FEDERAL COURT OF AUSTRALIA

Kitchen v Director of Professional Services Review under s 83 of the Health Insurance Act 1973 (Cth) (No 3) [2020] FCA 634

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| File number: | QUD 699 of 2019 |
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| Judge: | **COLLIER J** |
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| Date of judgment: | 20 May 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – subpoena – non-party resisting production of documents in certain categories – computer programs – means or methodology of sampling under s 106K *Health Insurance Act 1973* (Cth) – whether documents in subpoena identified with reasonable particularity – reading subpoena sensibly and with reference to circumstances known – whether specific articulation of types of documents sought required – whether documents adjectivally relevant to issues in substantive proceeding – whether fishing exercise – where precise description of documents only within knowledge of subpoena recipient – whether documents sought in correspondence between applicant and subpoena recipient broader than subpoena – whether subpoena oppressive –effect of COVID-19 pandemic on reasonable time for response by subpoena recipient  |
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| Legislation: | *Evidence Act 1995* (Cth) Sch Pt 1, Sch Pt 2 cl 8*Federal Court of Australia Act 1976* (Cth) s 43(2)*Federal Court Rules 2011* (Cth) r 24.15, Sch 1*Health Insurance (Professional Services Review – Sampling Methodology) Determination 2017* Pt 2 s 8(1) *Health Insurance Act 1973* (Cth) ss 83, 88A, 106K  |
|  |  |
| Cases cited: |  *Adelaide Steamship Company v Spalvins* (1997) 24 ACSR 536 *Bailey v Beagle Management Pty Ltd* (2001) 105 FCR 136; [2001] FCA 60*Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28*Hamilton v Oades* (1986) 166 CLR 486; [1989] HCA 21*Kitchen v Director of Professional Services Review under s 83 of the Health Insurance Act 1973 (Cth) (No 2)* [2019] FCA 2022*Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555*McIlwain v Ramsey Food Packaging Pty Ltd* (2005) 221 ALR 785; [2005] FCA 1233*Oceanic Special Shipping Co Inc v Fay* (1988) 165 CLR 197; [1988] HCA 32*R v Robertson; Ex parte McAuley* (1983) 71 FLR 429*American Express Warehousing Ltd v Doe* [1967] 1 Lloyd’s Rep 222 *Re Westinghouse Electric Corporation* [1977] 3 WLR 430*Re Westinghouse Electric Corporation* [1978] 2 WLR 81*Seven Network Ltd v News Ltd (No 5)* (2005) 216 ALR 147; [2005] FCA 510*Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475; [1976] HCA 53*Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921 *Tamawood Ltd v Habitare Developments Pty Ltd* [2009] FCA 364*The Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 *Walker v Newmont Australia Ltd* [2010] FCA 298*Wong v Sklavos* (2014) 319 ALR 378; [2014] FCAFC 120  |
|  |  |
| Date of hearing: | 30 April 2020 |
|  |  |
| Registry: | Queensland |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords  |
|  |  |
| Number of paragraphs: | 96 |
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| **The interlocutory applications** |  |

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| Counsel for the Applicant: | Mr B Wacker |
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| Solicitor for the Applicant: | Russells  |
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| Counsel for the Respondent: | Ms A Nicholas |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | QUD699 of 2019 |
|   |
| BETWEEN: | DAVID NORMAN KITCHENApplicant |
| AND: | **DIRECTOR OF PROFESSIONAL SERVICES REVIEW UNDER S 83 OF THE HEALTH INSURANCE ACT 1973 (CTH)**First Respondent**THE MEMBERS OF PROFESSIONAL SERVICES REVIEW COMMITTEE NO. 1157**Second Respondent  |

|  |  |
| --- | --- |
| JUDGE: | COLLIER J |
| DATE OF ORDER: | 20 May 2020 |

THE COURT ORDERS THAT:

1. The interlocutory application filed by the Chief Executive, Medicare on 29 April 2020 be dismissed
2. By 4.00 pm on 1 July 2020, the Chief Executive, Medicare either:
	1. produce to the Court the documents the subject of paragraphs 2, 4 and 5 of the Schedule of documents to the Subpoena issued to the Chief Executive, Medicare in these proceedings; or
	2. file and serve on David Norman Kitchen (**the applicant**) an affidavit by a person with direct knowledge of the facts:
		1. explaining why he or she claims to be unable to do so; and
		2. identifying, to the best of the knowledge of the deponent, the person or persons (including any governmental agency or body) who has possession or custody of each document,

namely documents recording or disclosing:

* 1. the means or methodology by which each of the 50 services in each of the 11 Lists was selected for inclusion therein;
	2. the computer program used to select each of the services for inclusion in each of the said Lists; and
	3. the person or persons who selected each of the services for inclusion in each of the Lists.
1. The Chief Executive, Medicare pay the applicant’s costs of and incidental to the interlocutory applications filed on 25 March 2020 and 29 April 2020, to be taxed if not otherwise agreed.

# and the court further orders that:

1. The substantive proceeding be listed for further case management at 9.30 am on 7 July 2020.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1. Before the Court are two interlocutory applications. The first interlocutory application was filed by the applicant (**Dr Kitchen**) on 25 March 2020. The Chief Executive, Medicare (**Chief Executive**) is the respondent to that application. In his interlocutory application, Dr Kitchen seeks production by the Chief Executive of documents referable to the manner by which Medicare generated eleven lists of fifty services each (**Lists**), to which the Members of the Professional Service Review (**PSR**) Committee No. 1157 (**Members**) had regard in their inquiry into Dr Kitchen under the *Health Insurance Act 1973* (Cth) (**HI Act**). Dr Kitchen’s interlocutory application for production of documents relates directly to a subpoena filed and served by him on 28 November 2019 (**Subpoena**) on the Chief Executive.
2. The second interlocutory application before the Court was filed by the Chief Executive on 29 April 2020. Dr Kitchen is the respondent to that application. In summary, the Chief Executive resisted Dr Kitchen’s interlocutory application on the basis that, to the extent that Dr Kitchen seeks production of documents under the Subpoena, the Subpoena is drafted unclearly, is impermissibly broad, and is oppressive. The Chief Executive also claimed that the documents actually sought by Dr Kitchen in communications between the parties were broader than the terms of his Subpoena.
3. Despite the late filing of the Chief Executive’s interlocutory application, there was no objection to the two interlocutory applications being heard together.
4. The Chief Executive is not a respondent to the substantive proceeding. The first and second respondents to the substantive proceeding are, respectively, the Director of PSR under s 83 of the HI Act (**Director**) and the Members. The Director and the Members made no submissions in respect of either interlocutory application currently before the Court.

# background

1. The general background to the substantive proceeding is summarised in my decision of 29 November 2019 in *Kitchen v Director of Professional Services Review under s 83 of the Health Insurance Act 1973 (Cth) (No 2)* [2019] FCA 2022 at [5]-[44]. The current interlocutory applications before the Court arose following non-production of documents by the Chief Executive in respect of certain categories of the Subpoena.
2. In the Schedule of documents to the Subpoena, Dr Kitchen sought production of documents from the Chief Executive as follows:

In this Subpoena to produce documents, “Lists” means the 11 Lists of services annexed hereto.

1. A complete list of all services rendered by the Applicant, Dr David Norman Kitchen in the period 1 February 2016 to 31 January 2017 (“the relevant period”) for the following MBS Item numbers:-

|  |  |
| --- | --- |
| **MBS Item No**  | **Description**  |
| 00104  | Initial Specialist Attendance  |
| 00105  | Subsequent Specialist Attendance  |
| 11218  | Retinal Photography  |
| 11221  | Full Quantitative Computerised Perimetry  |
| 11241  | Orbital Contents, Ultrasonic Echography  |
| 42641  | Autoconjunctival Transplant  |
| 42673  | Additional Corneal Incisions  |
| 42702  | Lens Extraction and Insertion of Intraocular Lens  |
| 42738  | Paracentesis of Anterior Chamber or Vitreous Cavity or Both for the injection  |
| 42782  | Laser trabeculoplasty, for the treatment of glaucoma  |
| 42788  | Laser Capsulotomy  |

2. All and any file notes, memoranda, emails or other documents recording or evidencing the means or methodology by which each of the 50 services in each of the 11 Lists was selected for inclusion therein.

3. All and any file notes, memoranda, emails or other documents recording or evidencing the group of services from which each of the services included in the Lists was drawn.

4. All and any documents which record or evidence any computer program used to select each of the services for inclusion in each of the said Lists.

5. All and any documents which identify the person or persons who selected each of the services for inclusion in each of the Lists.

6. All and any emails, letters or any other communications passing between the Department of Human Services or Medicare on the one hand and any of the following persons in relation to the selection of services for inclusion in any of the Lists:-

A. Dr Amanda Favilla;

B. Professor Julie Quinlivan;

C. Ms Kylie Neville; and

D. Any other officer or employee of Professional Services Review Agency.

1. It is convenient to refer to each of those six paragraphs of the Schedule of documents to the Subpoena as a **category** of documents sought.
2. In his affidavit filed 24 April 2020, Mr Romi Soukieh – the Director of the Health Management Information Section within Services Australia (**Services Australia**)– deposed that on 11 December 2019, Services Australia provided a response to the Subpoena, as follows:

9.1 Category 1: On 11 December 2019, the Agency produced to the Federal Court of Australia, two thousand, one hundred and sixty six (2,166) pages of data in response to this category of the subpoena;

9.2 Category 2: Following searches, as deposed to below, no documents can be found which are answerable to the subpoena.

9.3 Category 3: Following searches, as deposed to below, no documents can be found which are answerable to the subpoena.

9.4 Category 4: Following searches, as deposed below, no documents can be found which are answerable to the subpoena. The Agency acknowledges that the scope of Category 4 is currently in dispute between the Agency and the Applicant;

9.5 Category 5: There is no person or persons who select specific services for inclusion in each of the 11 lists, as the selection process is handled automatically by computer program code; and

9.6 Category 6: On 11 December 2019, the Agency provided 3 pages to the Federal Court of Australia in response to this category of the subpoena.

1. I understand that Services Australia:
* receives and responds to subpoenas issued to the Chief Executive;
* was previously known as the Department of Human Services, however, changed its name in February 2020 and was established as a new executive agency of the Commonwealth Government within the Social Services Portfolio, effective 1 February 2020;
* is responsible for providing Medicare-related services to the Australian public, including the payment of Medicare benefits pursuant to the HI Act; and
* refers to itself as “the Agency” in its own material.
1. In his affidavit filed 24 April 2020, Mr Soukieh explained the reasons for non-production of documents in categories 2, 4 and 5 of the Subpoena on 11 December 2019 (and subsequently):

11.1. That the Agency's email system is based on Microsoft Exchange and Outlook. On 9 December 2019, 5 February 2020 and 22 April 2020, my staff and I searched the mail server both personal and group e-mail address inboxes and no documents could be found which are answerable to the subpoena;

11.2. That the Agency's electronic folders are contained within a Shared Drive. On 9 December 2019, 5 February 2020 and 22 April 2020, my staff and I searched the Shared Drive for any electronic files held by the Agency and no documents could be found which are answerable to the subpoena; and

11.3. That the Agency's corporate records management system is based on Hewlett Packard Enterprise Content Manager. On 10 February 2020 my section requested access to corporate records that relate to all communications and arrangements with PSR to ensure we had completed all possible searches of documents in relation to the subpoena. On 11 February 2020 my staff were granted access to corporate records that relate to PSR and conducted searches of these records until 24 February 2020. No documents could be found which are answerable to the subpoena.

1. On 30 January 2020, a report entitled “*Final Report: Review of the Division’s Random Sampling Method, the Output of Which, is Utilised by the Professional Services Review Agency*” was produced by Mr Trevor Sutton of Python Hill Advisers (**Python Hill Report**). I understand that this report was produced under the instructions of the PSR. Although the report is a “Final Report”, it is unclear whether there was an earlier report referable to this topic produced by Python Hill Advisers for PSR (or anyone).
2. In a letter dated 4 February 2020 to the solicitors for the applicant, Russells Law, the Members stated:

**Potential issue in report used to generate random sample**

2.1 The secretariat of the Committee has been informed by the Department of Health that there is a potential issue in the report which was used to generate the random sample in the present case. The potential issue is that adjustments to rebates paid to your client made for the operation of the multiple services rule may appear in the report as separate instances of a particular item (this is described as “over-reporting”). In other words, it is possible that the same service appears in the report more than once even though it was billed only once.

1. Also on 4 February 2020, and in light of telephone calls which had taken place between Russells Law and Services Australia in December 2019 and January 2020, Ms Henderson of Russells Law emailed Ms Alexandra Cornfield of Services Australia, materially as follows:

…

We are dismayed that your client asserts that within the whole of Medicare there is not one single document which says what computer program was used, if any, to select each of the services for inclusion in each of the said Lists…

…

With respect, the subpoena was not issued to the Department of Human Services. It was issued to the Chief Executive Medicare and the Chief Executive Medicare is obliged to produce documents pursuant to it.

…

The Chief Executive Medicare remains in serious default of the obligation to produce the documents required under paragraph numbers 2, 3, 4 and 5 of the schedule contained in the subpoena.

The annual reports of the PSR state that computer programs are used in selecting samples.

We simply do not accept that no such programs were used.

Indeed, the PSR Agency and the members of the Second Respondent Committee have insisted in writing many times that the samples were selected randomly. Given the size of the data sets, unless someone in Medicare is throwing darts at many papers pinned on a wall, there must be a computer program at work.

…

1. On 10 February 2020, Ms Sara Ryan of the Subpoena Team of Services Australia emailed Ms Henderson, and said materially:

…

The relevant section of our agency that dealt with the Professional Services Review (PSR) data requests do not hold documents relevant to the Provider Items Rendered Twelve-monthly (PIRT) reporting function. This section utilised SAS computer program code developed to process requests. There were 16 SAS computer programs that were developed for the purpose of responding to written requests made by the PSR for PIRT and Item summary reports. These programs were developed and tested under the then Medicare Australia, in consultation with the PSR, and have been in operation for a considerable period of time.

On 30 June 2019, this function was transferred to the Department of Health. Up until 30 June 2019, the main computer program 'maincode' was configured as per PSR requirements. In particular:

* the provider number, review period and MBS items requested are specified as variables
* each item that PSR have requested a random sample for in addition to the number of samples requested are specified as variables, and each item is given a sequential list number that corresponds to the ordering of items in PSR's request (e.g. first item listed by PSR gets list number 1)
* there is a distinction made between pathology, diagnostic imaging and other MBS items and this distinction is specified in variables according to how the items are classified/categorised in the MBS schedule
* dates of referral and request are specified as variables for generation of the letter that accompanies the dataset that is sent to PSR
* if a request is made to combine items then variables are specified in maincode and other programs prefixed with "comb" (see list below for these program names).

The main computer program is executed and this executes other programs and macros as required according to the variables that have been specified. A zip file is produced which contains PIRT outputs in MS Excel and PDF format as well as a MS Word letter template which is signed, scanned and placed back in the zip file before sending to PSR. The items summary program is run manually as a separate step if PSR make a request for an item summary on their letter and this is included in the response to PSR where relevant.

The programs relevant to the description above are listed in the screenshot below:

~ comb\_items\_summary

~ comb\_items\_summary\_all

~ comb\_psrcoml

~ comb\_psrpirt

~ comb\_psrprint

~ diextr

~ items\_summary

~ maincode

~ mbsextr

~ pathextr

~ psrdis

~ psrpaths

~ psrpirt

~ psrprint

~ psrrdmdp

~ psrrdml

1. I understand that the Provider Items Rendered Twelve-Monthly report provided to the PSR in January 2018 (**2018 PIRT Report**) is, in effect, the Lists (see transcript p 17 ll 8-16).
2. On 25 February 2020, Ms Henderson emailed Ms Ryan seeking further explanation concerning the Chief Executive’s non-production of documents. In particular, Ms Henderson sought confirmation that the Chief Executive did not have possession or control of documents in categories 2 to 5 of the Subpoena. Ms Henderson asked whether, alternatively, relevant documents were in the possession or control of the Department of Health, or another government department.
3. In an email dated 27 February 2020, Ms Ryan emailed Ms Henderson in the following terms:

I cannot substantially add to what we have confirmed in writing and the undertaking I gave you that material is not being withheld from your client by Services Australia.

Services Australia was a process agency in relation to this matter. We are a separate and distinct entity from the Department of Health so cannot presume to provide information on what that Department may or may not hold. This was also raised with you in our discussion of 21 February.

These issues cannot be progressed further with us. As indicated in my previous communication, we are of the view we have complied with the subpoena. If you are still of the belief that Services Australia has information we have not supplied with you [sic], then you should be seeking to have the matter returned to Court so that any outstanding issues may be addressed in that forum

1. In a letter dated 20 March 2020 to Dr Kitchen from Ms Kylie Neville, the principal legal officer of the PSR, Ms Neville stated that a new random sample of services was provided to the Members because of an issue affecting the original sample. Six of the Lists were stated to have been affected by that issue, but the correspondence was silent as to the nature of the issue involved. The correspondence also attached a copy of the Python Hill Report in reply to Dr Kitchen’s request for information about the sampling methodology. The Python Hill Report relevantly stated:

The random sample of services is based on a **fixed seed** (i.e. starting position). What this means is that repeated use of the random sample SAS macro within the same input dataset of services will result in the same selection of services. This is only a problem if an independent random sample selection of services is required on the same dataset a second time. Our understanding is this is currently not required and as such the application of the relevant SAS code to the input dataset for the first time will result in a random sample of services as required by the PSR Determination 2017. The consideration of removing the fixed seed approach is discussed further in the recommendations.

1. On 14 April 2020, Russells Law wrote to Australian Government Solicitor (**AGS**), lawyers for the Chief Executive, materially as follows:

**…**

**Python Hill Advisors’ [sic] Report**

For the reasons set out below, the documents sought in our client’s interlocutory application, ought to be available to the Chief Executive, Medicare to produce pursuant to the Subpoena.

At page 138 of exhibit TJH-1 to the Affidavit of Teneale Jayne Henderson filed 23 March 2020 (a copy of which is attached) is a final report prepared by Mr Trevor Sutton of Python Hill Advisors [sic] (the “PHA report”) of a review of the random sampling method, the output of which, is utilised by the Professional Service Review Agency.

As you will see from the PHA report, Mr Sutton says that he reviewed “the methodology that is embedded in the SAS code to provide assurance that it is randomly sampling services…”. We understand, the relevant SAS code selects the random sample of services (see attachment 1 of the PHA Report).

Mr Sutton further appears to have reviewed SAS dataset, files in the folder “&maindir” and various excel sheets (see “Overview” on page 6 of the report).

Given the contents of the PHA report, our client is dismayed by the non-compliance of the subpoena by the Chief Executive, Medicare. Our client simply does not accept that the Chief Executive, Medicare does not hold the documents sought in paragraphs 2 to 5 of the subpoena for the following reasons:-

1. A document must exist that identifies, or contains, the relevant SAS code and the fixed seed. A copy of it was presumably provided to Mr Sutton for the purposes of the PHA report as he includes the source code (or part of it) in Appendices C and D to the report.

2. A manual presumably exists that identifies how the relevant SAS code selects a random sample of services. There must be a written instruction so that your client’s employees know how to run the computer “maincode” you outline in your letter to produce the PIRT report.

3. The Chief Executive, Medicare ought to be able to identify the staff responsible for running the code in the Division and producing the lists of services. There must be a record of who those people are. You say in your letter that “the information provided by the PSR is inputted into the maincode”. The PSR (which is not a natural person) could not do it. Who then inputted that information into the maincode to produce the Lists? Please disclose any document identifying that person or persons.

4. The PHA report provides an assessment of whether the SAS macro “psrrdmsv” is selecting a simple random sample without replacement. Surprisingly, the SAS macro “psrrdmsv” is not amongst the programs your client claims are relevant to the description of the programs that is run to select the random samples as set out in your email of 10 February 2020 (at page 70 of exhibit TJH-1).

5. Documents must exist in relation to the outputs listed under the heading “Overview” on page 6 of the PHA report.

6. Documents must exist that record the relevant fixed seed and the repeated use of the macros.

7. It seems that Mr Sutton who prepared the PHA report had no difficulty in assessing whether the SAS macro “psrrdmsv” was selecting a simple random sample without replacement. Mr Sutton obviously had access to the methodology utilised to select the random sample, including the computer programs used. These documents must be available to the Chief Executive, Medicare.

**Your letter of 9 April 2020**

In your letter you say that the Agency used (until 30 June 2019) a computer “maincode which was configured per PSR requirements”, which requirements you then list. What is not clear to your client is how the Agency (as defined in your letter) did that when, our client understands, it was not established until February 2020.

In any event, the reference to the “maincode” appears to be a reference to the SAS code referred to by Mr Sutton, but our client cannot be certain of that. Please have your client provide us with a copy of the computer “maincode”, the “PSR requirements” and all documents which record the configurations set out in paragraph 5(b) of your letter.

In light of the above, we do not accept that the Chief Executive, Medicare has no further documents to produce pursuant to the subpoena.

1. On 24 April 2020, AGS for the Chief Executive responded in writing, materially as follows:

…

Beyond the Scope

7. Your letter of 14 April 2020 seeks production of a number of documents which find no proper articulation in Category 4, or in any other Category of the Schedule. Your letter variously makes reference to, or apparently seeks to compel production of, “SAS Code”, an SAS dataset, a methodology embedded in SAS Code, a “fixed seed”, macros, “excel sheets”, files and folders, including those described as “psrrdmsv” and “&maindir” and states that our client should hold these.

8. Our client has conducted significant internal searches, and while our client does hold some of the documents referred to in your letter of 14 April 2020, our client’s instructions are that none of these documents are within the scope of Category 4 as they do not *evidence* or *record* a computer program.

9. It is wholly inadequate to demand the production of documents that were not within the scope of the original subpoena. Nor is it reasonable of your client to specify what he seeks in further correspondence, only after realising that what he seeks is not within the scope of his filed subpoena.

10. Category 4 is presently drafted with a lack of technical precision. If your client is seeking the production of specific technical documents, it is incumbent upon him to clearly define them in a subpoena.

Oppressive

11. Even if our client was to accept that the documents listed in your letter dated 14 April 2020 *were* within the scope of the original subpoena, which it does not, our client instructs us that this would potentially encompass a great volume of technical information and would take multiple days and multiple staff to compile.

12. The scope would therefore be oppressive in circumstances where it potentially seeks production of an impermissibly broad range of documents from our client over an undefined time period. Further, we note that it would be an inappropriate use of the public resources, including both its time and cost on what would effectively be a fishing expedition.

Python Hill Advisors [sic] Report

13. Finally, for complete clarity, we also your attention to a report prepared by Mr Trevor Sutton of Python Hill Advisors [sic], which is exhibited to the affidavit of Ms Henderson dated 23 March 2020 and referred to in your letter of 14 April 2020 (the “**PHA Report**”). Your client places reliance on the PHA Report as a basis for the documents requested in your letter dated 14 April 2020.

14. Such reliance is misconceived.

15. The PHA Report was not commissioned by our client, nor did our client provide any source code or other material to Mr Sutton for its preparation. It is our client’s understanding that the material provided to Mr Sutton was done so by the Department of Health and so our client cannot speak to the process or methodology they used in preparing that material.

16. Our client instructs us that the PHA Report refers to source code which clearly references the Provider Benefits Integrity Division in the Department of Health (see Appendix C of the PHA Report). Our client confirms that this source code is a small subset of all source code used to generate PIRT reports (see The Executive Summary, Areas-Out-Of-Scope of the PHA Report), and the source code is in no way specific to the Applicant or the PIRT Report that the Agency prepared in January 2018.

17. Our clients suggests, as they have done previously, that if you seek clarification regarding the PHA Report and the material provided for its production, you should contact the Department of Health.

…

# Interlocutory applications before the Court

1. By his interlocutory application filed 25 March 2020, Dr Kitchen seeks the following orders:

1. An order that, by 4.00 pm on 7 May 2020, the Chief Executive, Medicare either:-

(a) produce to the Court the documents the subject of paragraphs 2 to 5 of the Subpoena issued to Chief Executive, Medicare in these proceedings; or

(b) file and serve on the Applicant, an Affidavit by a person with direct knowledge of the facts:-

(i) explaining why he claims to be unable to do so; and

(ii) identifying, to the best of the knowledge of the deponent, the person or persons (including any governmental agency or body) who has possession or custody of each such document,

namely documents recording or disclosing:-

(c) the means or methodology by which each of the 50 services in each of the 11 Lists was selected for inclusion therein;

(d) the group of services from which each of the services included in the Lists was drawn;

(e) the computer program used to select each of the services for inclusion in each of the said Lists;

(f) the person or persons who selected each of the services for inclusion in each of the Lists.

2. Such further or other orders or directions as may be appropriate.

3. An order that the Chief Executive, Medicare pay the Applicant’s costs of and incidental to this Application.

1. The Chief Executive’s interlocutory application was, effectively, a defence to Dr Kitchen’s interlocutory application. By her application, filed 29 April 2020, the Chief Executive seeks the following orders:

1. So much of the *Federal Court Rules 2011* (Cth) (**the Rules**) as would prevent this application from being heard on 30 April 2020 be dispensed with.

2. Pursuant to Rule 24.15 of the Rules, Categories 2, 4 and 5 (the **Categories**) of the subpoena issued to the Chief Executive Medicare on 28 November 2019 Medicare [sic] be set aside, or that the Chief Executive Medicare otherwise be relieved from compliance with the Categories.

3. David Norman Kitchen pay the Chief Executive Medicare’s costs of and incidental to this application.

# submissions of the parties

1. In opposing Dr Kitchen’s interlocutory application for further production of material under the Subpoena, the Chief Executive submitted, in summary:
* Services Australia has already produced in excess of 2,000 pages of documents in response to the Subpoena. Services Australia has done “all that they are required to do in order to meet what the subpoena could reasonably compel”.
* As deposed by Mr Romi Soukieh in his affidavit filed 28 April 2020, almost all health provider compliance functions of the Chief Executive were transferred from Services Australia to the Department of Health in January 2016. The responsibility for the generation of PIRT reports fully transitioned to the Department of Health on 1 July 2019. The Chief Executive was uncertain whether the Department of Health took ownership of the source code for the PIRT reports at that time.
* Services Australia was unable to locate any documents relating to categories 2, 4 or 5 of the Subpoena.
* Services Australia explained the methodology used to produce the 2018 PIRT Report in correspondence with Dr Kitchen’s solicitors.
* Dr Kitchen’s submission – that the Python Hill Report suggests that the methodology used to create the Lists was embedded in relevant source code (namely SAS Code) – was an unsatisfactory exercise of inductive reasoning.
* In relation to category 5 of the Subpoena, Services Australia indicated that the selection process was handled automatically. Further, there was no apparent forensic purpose to this category in the substantive proceeding.
* Category 4 of the Subpoena is ambiguous. It does not indicate whether metadata or base data sets are also sought and such a request would be impermissibly broad. Much of the information held by Medicare is also of a confidential nature.
* If Dr Kitchen seeks source code of some kind, or SAS Code, it is incumbent on him to clearly define it in a subpoena.
* Dr Kitchen sought by correspondence the production of a number of documents that do not find expression in Category 4, namely SAS Code, an SAS dataset, a methodology embedded in an SAS Code, a “fixed seed”, macros, excel sheets and files and folders, including those described as “psrrdmsv” and “&maindir”.
* This extended scope of documents would potentially be oppressive or impose a considerable burden on public resources if Services Australia was required to comply.
* The extended scope of documents sought by Dr Kitchen are also of questionable probative value in the substantive litigation. The scope of the Subpoena suggested that Dr Kitchen was engaged in a “fishing” exercise, rather than limiting his request in a focused manner.
1. At the hearing of the interlocutory applications, Counsel for Dr Kitchen indicated that paragraph 1(d) of his interlocutory application, which related to category 3 of the Subpoena, was no longer pressed.
2. Dr Kitchen’s main contentions in relation to his application were, in summary, as follows:
* Overall, the documents sought by the Subpoena were relevant to the relief sought by Dr Kitchen in the substantive proceeding. Dr Kitchen claims in the substantive proceeding that the methodology for selecting the random sample of services in each of the Lists was not in accordance with s 106K(3) of the HI Act. The Subpoena sought documents relating to that methodology (including any computer programs).
* When the solicitors for Dr Kitchen sought production of specific types of documents (SAS Code, an SAS dataset, a methodology embedded in an SAS Code, a “fixed seed”, macros, “excel sheets” and files and folders, including those described as “psrrdmsv” and “&maindir”) in a letter to the Chief Executive dated 14 April 2020, the Chief Executive indicated that she did possess some of those documents, but asserted that those documents did not fall within the scope of category 4 of the Subpoena.
* The source code is plainly a document which records or evidences a computer program in light of the definitions of “document” in the *Federal Court Rules 2011* (Cth) and the *Evidence Act 1995* (Cth). The source code falls within both categories 2 and 4 of the Subpoena.
* It was not clear from the evidence filed on behalf of the Chief Executive (in particular the affidavit of Mr Stephen Rule filed on 23 April 2020) how the Lists were generated, including whether by SQL or SAS code or by way of a custom report in the SAS Portal. However, it was apparent from that material that there was some means or methodology by which the services were selected for inclusion in the Lists, and the Chief Executive has not produced this.
* The Chief Executive’s assertion that the documents sought fell outside the scope of the Subpoena was a belated argument developed only on 24 April 2020.
* It was disingenuous of the Chief Executive to claim the source code identified in the Python Hill Report referred to source code referencing the Department of Health rather than Medicare. The Lists the subject of the substantive proceeding were generated by Services Australia in January 2018. Any change to departmental structure transferring provider compliance functions occurred after the generation of the Lists. It is the source code in the possession or control of Services Australia which appeared to have generated the Lists. No witness on behalf of the Chief Executive deposed that the relevant source code was not in her power, possession or control.
* Whilst the Chief Executive now makes bald assertions that it would be oppressive to produce the source code, the available evidence suggests that the source code is not particularly lengthy. The Subpoena was also returnable on 13 December 2020.
* Whilst the Chief Executive asserted that she could produce no documents in category 5, as the process of creating the Lists was automated, Mr Stephen Rule, a Senior Director with Services Australia, deposed in his affidavit filed 23 April 2020 at [24] that ***a person*** would be required to input variables to produce the Lists. Further, a copy of the “MBS data request” from the Director for the purposes of the review under s 88A of the HI Act appeared to have been marked up by hand, identifying the types of services requested. The only part of the process that appeared automated was the selection of the fifty services for inclusion in the Lists.

# consideration

1. As was explained in *McIlwain v Ramsey Food Packaging Pty Ltd* (2005) 221 ALR 785; [2005] FCA 1233 and *Tamawood Ltd v Habitare Developments Pty Ltd* [2009] FCA 364 at [12]:
* a request for a subpoena cannot be used to disguise an application for discovery of documents, or as an alternative to an application for further and better discovery;
* documents for production must be identified with reasonable particularity;
* the material sought must have an adjectival relevance, that is, an apparent relevance to the issues in the principal proceedings; there must be a legitimate forensic purpose for the production of documents;
* a mere “fishing” exercise can never justify the issue of subpoenas;
* a wide-ranging subpoena seeking documents of doubtful relevance at great inconvenience to, or that risk compromising the commercial privacy of, a third party, may not readily attract the grant of leave; and
* the issue of the subpoena must not, in all the circumstances, be oppressive in terms of its impact on the recipient.
1. Clearly a large volume of material has been produced by the Chief Executive in response to the Subpoena. However, no material has been provided in respect of the categories of the Subpoena pressed by Dr Kitchen, namely categories 2, 4 and 5.
2. In the circumstances, the following issues require determination:
3. Has Dr Kitchen identified with reasonable particularity the documents he seeks produced in categories 2, 4 and 5 of the Subpoena?
4. Are the documents sought by Dr Kitchen in correspondence subsequent to the Subpoena outside the scope of categories 2, 4 and 5 of the Subpoena?
5. Are the documents sought by Dr Kitchen in categories 2, 4 and 5 of the Subpoena relevant to the matters in issue in the substantive litigation and do they have a legitimate forensic purpose?
6. Would it be oppressive to the Chief Executive to require her to produce the documents sought by Dr Kitchen in categories 2, 4 and 5 of the Subpoena because of impermissible breadth or lack of clarity of description of the documents in the Subpoena?

## Issue 1: Has Dr Kitchen identified with reasonable particularity the documents he seeks produced in categories 2, 4 and 5 of the Subpoena?

1. As Jordan CJ explained in *The Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 573 in respect of third party subpoenas:

A writ of subpoena *duces tecum* may be addressed to a stranger to the cause or to a party. If it be addressed to a stranger, it must specify with reasonable particularity the documents which are required to be produced. A subpoena *duces tecum* ought not to be issued to such a person requiring him to search for and produce all such documents as he may have in his possession or power relating to a particular subject matter. It is not legitimate to use a subpoena for the purpose of endeavouring to obtain what would be in effect discovery of documents against a person who, being a stranger, is not liable to make discovery. A stranger to the cause ought not to be required to go to trouble and perhaps to expense in ransacking his records and endeavouring to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant...

1. Extensive correspondence has been exchanged between the parties concerning the nature of the documents in categories 2, 4 and 5. In the most recent correspondence from the legal representatives for the Chief Executive, particular objection was taken to documents sought by Dr Kitchen being referable to category 4, and to a lesser degree category 2.
2. In considering whether documents have been identified with reasonable particularity, it is useful to have regard to such matters as noted by O’Leary J in *R v Robertson; Ex parte McAuley* (1983) 71 FLR 429 at 434, where his Honour observed:

… it is necessary to look at all the circumstances concerning the demand for production, and to have regard to such matters as the issues in question in the proceedings in relation to which the [subpoena] has been issued, the relevance of the documents to those issues, the effort and expense involved in complying with the [subpoena] and particularly in forming an opinion as to which, if any, of the documents required to be produced are relevant to those issues: see *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555 at 573.

1. In *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555, Smithers J (Bowen CJ and Nimmo J agreeing) said at 569:

It is, however, of the essence of an obligation to make discovery that a duty rests upon the party subject thereto to decide for himself with respect to documents in his possession whether, in the relevant sense, they relate to the issues in the action. The subpoena does not in terms seek to impose this task on the respondents. It seeks production of documents the contents of which relate to specified subjects. The respondents do not have to direct their minds to the issues. But it is said that the specified subjects are numerous and are so comprehensive that the task of examining documents to test the relationship of their contents to those subjects does not, in the circumstances of this case, differ in nature from that involved in making discovery.

No doubt, if the terms of a subpoena are such that although purporting to be a subpoena it is in substance a notice for discovery, it should be set aside. But I am not satisfied that the subpoena before the court is of this kind. The task it imposes on the respondents is to identify documents as relating to particular subjects. This is quite a different task from that of ascertaining issues and identifying the relationship of documents thereto. And it is to the point in this case that the comprehensive nature of the specified subjects is a reflection of the evidence introduced into the litigation in the affidavit of the respondent Mr. Howlett. Except in minor respects, the subpoena is limited to documents relating to those particular subjects.

1. At 572-573 Smithers J continued:

In this contest of assertion and counter-assertion the circumstances are all important. In my view, in the light of the circumstances, the contention that the subpoena is so oppressive as to merit being set aside or that it is fishing, cannot be upheld.

In this connection reference should be made to the comments contained in the judgments of the members of the Court of Appeal in *Re Westinghouse Electric Corporation* [1977] 3 WLR 430. The issues in that case concerned, inter alia, the provisions relating to production of documents pursuant to letters rogatory issued out of a foreign court contained in the *Evidence (Proceedings in Other Jurisdictions) Act 1975* (c 34). But comments concerning the required specificity in respect of documents sought under subpoena were made in particular by Lord Denning MR (at 437–8).

His Lordship stated: “We have had some discussion as to whether the documents in those letters rogatory are sufficiently specified. They are in Schedule B with sub-headings from 1 to 81. It contains many documents which are specified as being or likely to be in the possession of RTZ Services. Most of them are particular documents which are specified sufficiently. For instance, those underlined in green and those underlined in pencil seem to me to be sufficiently specified. But some of the words in the sub-headings seem to me to be rather too wide. They have these words: ‘and any memoranda correspondence or other documents (in the files) relating to’ the foregoing. Those words were used in *Re Foreign Tribunals Evidence Act 1856*; *American Express Warehousing Ltd v Doe* [1967] 1 Lloyds Rep 222. They may have to be narrowed a bit. I think the words ‘relating thereto’ cast the net too widely. It would be better to limit them more specifically, such as ‘referred to therein’ or some such words. The point is that the documents should be specified with such distinctiveness as would be sufficient for a subpoena *duces tecum*. The description should be sufficiently specific to enable the person to put his hand on the documents or the file without himself having to make a random search, in short, to know specifically what to look for.”

These comments were approved inferentially by Lord Diplock on appeal in *Re Westinghouse Electric Corporation* [1978] 2 WLR 81 at 111. It is apparent, however, that the context which evoked these comments in respect of the words “relating thereto” in that case differs substantially from that in which they are used in the schedule to the subpoena in this case. As used in *Re Westinghouse Electric Corporation* they had no significance with respect to relevant evidence already submitted to the court, there being none such, and on their face travelled far beyond the issues.

In my view the comments referred to above must not be understood as indicating that the expression “relating to” is necessarily too wide in all circumstances. As was said by Lord Diplock (supra, at 111): “There is a good deal of authority cited by Lord Denning MR in his judgment as to how specific the reference to documents must be in subpoena *duces tecum*. Classes of documents provided the description of the class is sufficiently clear, may be required to be produced on subpoena *duces tecum*” (cf *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475; 13 ALR 481).

It would seem that what is “sufficiently clear” in relation to any class must be determined by reference to all the circumstances concerning the demand for production. In this case the relevant circumstances are those the subject of the foregoing discussion.

1. Subsequently, O’Loughlin J in *Adelaide Steamship Company v Spalvins* (1997) 24 ACSR 536 observed at 546:

What is more, I am satisfied that Mr Bampton, for example, would well know and understand the documents that are required; there is, additionally, of course, a responsibility on the person to whom a subpoena is directed to "read it sensibly and with reference to the circumstances as known to him": *Lucas Industries v Hewitt* (1978) 18 ALR 555 at 571.

In several of the subpoenas there are references to "documents containing a statement of or a reference to" nominated subjects. No periods of time have been identified but is clear that the ambit of time would be identifiable with ease, by a responsible officer of the ASC, as would the actual detail of the documents. In the circumstances of this case, I am not persuaded that the expression is necessarily to wide: cf *Lucas Industries Ltd v Hewitt*, supra, at 573, where it was held that the expression "relating to" was not necessarily to wide in all the circumstances: see also the discussion of Waddell J on this subject in *Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 921 at 929. A subpoena may become excessively burdensome, especially if it is directed to a non-party, by virtue of the large number of documents sought, because of questions of relevance, or because it requires the party served to make a judgment as to which documents should be produced. For example, in *Commissioner of Railways v Small*, *supra*, Jordan CJ said (at 574):

Where the sub-poena is addressed to a party it is still necessary that it should state with reasonable particularity the documents which are to be produced ... Even if the documents are specified, a sub-poena to a party will be set aside as abusive if great numbers of documents are called for and if it appears that they are not sufficiently relevant.

I have borne these warnings in mind in coming to my conclusions in this case.

Mr Whitington QC also submitted that the reference to the expression "all documents" without being more specific, was oppressive. In referring to one particular matter, he described it as a "scatter gun" approach. But his complaints fell short of suggesting that officers of the ASC did not understand what documents would be the subject of the subpoenas or that the number of documents would make compliance with the subpoenas an oppressive exercise. Nor was it suggested that compliance with the suhpoenas would involve unnecessary and unreasonable costs

1. Applying these principles to the present circumstances, I am satisfied that the documents identified in categories 2, 4 and 5 have been identified with reasonable particularity for the following reasons.
2. First, the Subpoena requested documents relating to nominated subject matters. The subject matters of categories 2, 4 and 5 of the Subpoena are expressed with particularity, namely:
* the means or methodology by which the services were selected for inclusion in the Lists;
* any computer program used to select the services for inclusion in the Lists; and
* the person or persons who selected the services for inclusion in the Lists.
1. The Chief Executive is only required to identify documents that relate to the particular subject matters in the way identified in the category, such as “recording or evidencing” or “identifying”. The Chief Executive is not required to ascertain the issues in the substantive proceeding or engage in a discovery exercise to determine whether documents in her possession are relevant to those issues.
2. It cannot be said that Dr Kitchen is “fishing”. The Subpoena has identified the documents sought by reference to particular aspects of the generation of the Lists.
3. Second, while the Chief Executive complained about the breadth of such terms as “documents”, “methodology” and “computer program”, I consider such terms appropriate where Dr Kitchen is unable for obvious reasons to specify with more precision the nature of the documents he seeks. Such knowledge is exclusively within the purview of the Chief Executive (or possibly Services Australia). To require Dr Kitchen to be more specific in these circumstances is, in my view, unreasonable.
4. Third, the Chief Executive contended that the Subpoena, as presently drafted, called for Services Australia to form judgments about the kinds of technical documents which were within the scope of category 2 and 4. As made clear in the authorities, in particular *Lucas Industries*, there is a responsibility on the part of the Chief Executive and Services Australia to read the Subpoena sensibly and with reference to the circumstances as known to them. It is difficult to accept that Services Australia, as the department that apparently generated the Lists in the 2018 PIRT Report, would have difficulty identifying the documents falling within categories 2 or 4 of the Subpoena.
5. I note the letter of Dr Kitchen’s solicitors of 14 April 2020, which attempted to articulate the specific types of documents sought by the Subpoena. Further, I note the email of 10 February 2020 from Services Australia to Russells Law, which specified “the methodology used to produce the impugned PIRT report”, referring to:
* the selection of variables;
* the execution of a computer programs;
* the execution of macros;
* the production of a zip file containing PIRT outputs in Microsoft Excel and PDF format; and
* the production of a Microsoft Word letter template that is signed and then placed back in the zip file.
1. The correspondence from Services Australia demonstrates that it understood the “methodology” for generating the Lists in the 2018 PIRT Report. Accordingly, it must understand what is being sought in respect of category 2 of the Subpoena.
2. Further, Mr Soukieh, in his affidavit filed 28 April 2020, was able to estimate a time frame for production of the source code of computer programs relevant to “the 2018 PIRT Report” and category 4 of the Subpoena. In this regard, Mr Soukieh deposed:

16. On 28 April 2020, three of my staff opened the SAS grid and opened the SAS programs and macros relevant to the 2018 PIRT Report that the Agency prepared and obtained information on the lines of code that are in each .SAS file.

17. There were 9,947 lines of code dispersed across 44 .SAS files. Using an estimate of 30 lines per page, which accounts for instances where a line in SAS may exceed a line on an A4 page, I estimate that a document covering PSR reporting would come to approximately 332 pages.

18. There may however, be a further need of information even if the source code was produced. On the basis of my training and experience I say that the source code would in general be difficult for even a SAS expert to read and understand without sample data and underlying metadata for this sample data being also provided.

1. The evidence of Mr Soukieh and the correspondence of 10 February 2020 suggests there is no inability on the part of the Chief Executive and Services Australia – reading the Subpoena sensibly and with reference to the circumstances as known to them – to understand the meaning of “methodology” or “computer program” in categories 2 and 4 of the Subpoena.
2. Fourth, the Chief Executive’s assertion concerning the lack of articulation about the format of production of the documents sought may be answered in a similar manner. Dr Kitchen can only guess at the format in which the documents exist. In the circumstances, he could not reasonably be expected to specify the format of relevant documents. That knowledge, again, is reposed in the Chief Executive or Services Australia.
3. Finally, category 5 requires production of all and any documents which identify the person or persons who selected each of the services for inclusion in each of the Lists. This, in my view, is reasonably particularised.

## Issue 2: Are the documents sought produced by Dr Kitchen in correspondence subsequent to the Subpoena outside the scope of categories 2, 4 and 5 of the Subpoena?

1. The Subpoena seeks “documents” referable to the selection of the fifty services for inclusion in the Lists. In particular, categories 2 and 4 seek documents relating to the methodology and computer programs involved in that selection. Accordingly, Dr Kitchen contends that the material sought on 14 April 2020, in particular the source code of the relevant computer programs, falls within the definition of “document” in the *Federal Court Rules 2011* (Cth) and the *Evidence Act 1995* (Cth).
2. Sch 1 to the *Federal Court Rules 2011* (Cth) defines “document” as including:

(a) any record of information mentioned in the definition of document in Part 1 of the Dictionary to the *Evidence Act 1995* ; and

(b) any other material, data or information stored or recorded by mechanical or electronic means.

1. Further, Pt 1 to the Schedule of the *Evidence Act 1995* (Cth) defines “document” as follows:

"document" means any record of information, and includes:

(a) anything on which there is writing; or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph.

Note: See also clause 8 of Part 2 of this Dictionary on the meaning of document.

1. Clause 8 of Pt 2 of the Schedule to the *Evidence Act 1995* (Cth) states:

**8 References to documents**

A reference in this Act to a document includes a reference to:

(a) any part of the document; or

(b) any copy, reproduction or duplicate of the document or of any part of the document; or

(c) any part of such a copy, reproduction or duplicate.

1. There is some overlap in the arguments concerning categories 2 and 4, whereas documents referable to category 5 have been argued on a different basis. It is appropriate to consider these arguments accordingly.
2. In relation to categories 2 and 4, it does not appear to be controversial in this case that the material sought by Russells Law on 14 April 2020, being SAS Code, a “fixed seed”, macros, excel sheets and files and folders, including those described as “psrrdmsv” and “&maindir”, are “documents”. However, the Chief Executive submitted that:
* such documents find no proper articulation in category 4 of the Subpoena;
* such documents are not evidence of, and do not record, a computer program as required to fall within category 4 of the Subpoena; and
* such documents require an expansive construction of category 2.
1. In my view, there is no question that the types of documents identified by Russells Law in their letter of 14 April 2020, in particular the source code of the relevant computer programs, fall within the definition of “document” for the purposes of the Subpoena. Further:
* it is clear that there are documents relating to source code relevant to the generation of the Lists in the possession or control of Services Australia, as deposed to by Mr Soukieh;
* while it may be that the description of documents by Russells Law in their correspondence to the Chief Executive is strictly inaccurate or irrelevant to the 2018 PIRT Report and the Lists, this merely serves to highlight that Russells Law are not in a position to be more specific about the documents in the possession and control of the Chief Executive than they have been the Subpoena; and
* no compelling arguments have been advanced by the Chief Executive as to why the documents described in the correspondence of 14 April 2020 referable to source code are not evidence of, or do not record, a computer program.
1. It may be that the some of the types of documents sought by Russells Law in their letter of 14 April 2020 do not all fall within category 4 of the Subpoena. However, it is possible that such types of documents would relate to the methodology and therefore fall within category 2 of the Subpoena. I note that in her submissions, the Chief Executive contended that Services Australia had gone to some lengths to explain the methodology used to produce the impugned 2018 PIRT Report, referring to Services Australia’s email of 10 February 2020. That email relevantly referred to:
* the selection of variables;
* the execution of a computer programs;
* the execution of macros;
* the production of a zip file containing PIRT outputs in Microsoft Excel and PDF format; and
* the production of a Microsoft Word letter template that is signed and then placed back in the zip file.
1. In my view, this correspondence conclusively referred to documents which fall within category 2. In circumstances where, by reliance on the email of 10 February 2020, the Chief Executive claims that the relevant methodology has been explained, and she refers in some detail to the types of documents involved, it is difficult to understand the position of the Chief Executive in denying that such documents fall within category 2.
2. Mr Soukieh also referred to other information relevant to understanding the source code in his affidavit of 28 April 2020. In particular, I note his reference to sample data and underlying metadata, and the creation of accompanying material including commentary and/or descriptions. As I have already observed, “document” in Sch 1 to the *Federal Court Rules 2011* (Cth) includes data or information stored or recorded by mechanical or electronic means, and accordingly would appear to include the data and metadata to which Mr Soukieh referred. In relation to the commentary and/or descriptions to which Mr Soukieh referred, it is unclear whether they currently exist. However, if they do, they would also fall within the definition of “document”. All documents to which Mr Soukieh referred in [16]-[19] may fall within the scope of category 2 of the Subpoena, and potentially category 4.
3. In relation to documents sought by Dr Kitchen in category 5 of the Subpoena, while I consider documents in this category are properly identified, in subsequent correspondence there was controversy between the parties as to whether the selection of services for inclusion in the Lists was automated or partly automated.
4. In particular, the evidence of Mr Soukieh was that the selection of services for inclusion in the Lists was handled automatically by a computer program. Counsel for the Chief Executive submitted that Mr Soukieh did not depose that there are no human users at play, however, if Dr Kitchen was seeking the “the person who pressed play on the computer, in effect, that should be specified with particularity” (transcript p 27 ll 45-48).
5. Counsel for Dr Kitchen contended that it now seemed uncontroversial that an individual at Medicare or Services Australia changed the written request for the Lists into variables that were then inputted into the source code, which then randomly selected the fifty services for inclusion in the Lists (transcript p 31 ll 8-10). Counsel pointed to the evidence of Mr Rule of Services Australia. Mr Rule deposed that a custom report could be generated in the SAS Portal by the user selecting various options, such as date ranges, items numbers and provider numbers. Dr Kitchen submitted that in circumstances where the Lists referred only to services provided by Dr Kitchen in relation to eleven item numbers over a specific period, an individual must have selected the services meeting that criteria for inclusion in the Lists.
6. Counsel for Dr Kitchen noted that the Services Australia had not undertaken any searches in respect of category 5 because it had concluded that there was no person who selected the services.
7. There appears to be a disjunction between, on the one hand, the “services for inclusion in each of the Lists”, and, on the other hand, the role of a person or persons in respect of selecting those services. On the evidence before me at this stage, it appears that:
* a person or persons inputted variables into the relevant computer program which narrowed the potential services to be included in the Lists; and
* on the basis of those variables, the relevant computer program selected each of the services for inclusion in each of the Lists.
1. Can it be said that in inputting those variables, a person or persons “selected” “services for inclusion in each of the Lists? It may well be that, strictly, the answer in terms of category 5, is that a computer program selected each of the services for inclusion in the Lists rather than a person. At present, and on the basis of the material before me, I am not prepared to say that the Chief Executive is unable to comply with category 5 or that the selection process in category 5 was wholly automated, such that no person or persons had a role in the selection of each of the services for inclusion in the Lists.
2. However, I consider that the process whereby variables were inputted into the relevant computer program by a person could form part of the means or methodology by which each of the fifty services in each of the eleven Lists in the 2018 PIRT Report were selected for inclusion. Documents identifying persons inputting such variables potentially fall within category 2 of the Subpoena.
3. On balance, I consider that Dr Kitchen is entitled to press his request for the types of documents he identified subsequent to the issue of the Subpoena in correspondence with the Chief Executive that are relevant to the Lists.

## Issue 3: Are the documents sought by Dr Kitchen in categories 2, 4 and 5 of the Subpoena relevant to the matters in issue in the substantive litigation and do they have a legitimate forensic purpose?

1. The second ground of Dr Kitchen’s amended originating application for judicial review, filed on 28 November 2019 in the substantive proceeding, is as follows:

A procedure required by law to be observed in respect of the Second Respondent’s Conduct is not being observed (section 6(1)(b) of the ADJR Act).

**Particulars**

1. The Second Respondent’s Conduct includes the Second Respondent taking into account a “sample” (**the sample**) of services (**the sample conduct**).

2. Section 106K of the HI Act requires, as a precondition to the sample conduct, that the methodology for selecting a sample of services either accord with:

(a) the determination by the Minister under s. 106K(3) of the HI Act (the determination), which requires that the sample be “random”; or

(b) advice by a statistician accredited by the Statistical Society of Australia Inc.

3. The Second Respondent is engaging in the sample conduct in circumstances where:

(a) The methodology purportedly used to select the sample was the methodology prescribed by the determination;

(b) The Applicant has provided detailed submissions and evidence, including expert evidence, calling into question whether the sample is in fact random and thereby not selected in accordance with the determination;

(c) As a result, the Second Respondent has requested the original data on which the sample was derived and other information to enable an assessment of whether the sample is in fact “random” (**the original data**);

(d) The original data has not yet been supplied to either the Second Respondent or the Applicant;

(e) The Second Respondent is continuing to have regard to the sample without first satisfying itself with reference to the original data that the methodology complies with the requirement in the determination that the sample be “random”.

1. It is clear from that ground of review that a matter in issue in the substantive proceeding is whether the procedure utilised to produce the samples, namely the Lists in the 2018 PIRT Report, was in accordance with s 106K of the HI Act. That section provides:

**Committee may have regard to samples of services**

(1) The Committee may, in investigating the provision of services included in a particular class of the referred services, have regard only to a sample of the services included in the class.

(2) If the Committee finds that a person has engaged in inappropriate practice in providing all, or a proportion, of the services included in the sample, then, the person under review is taken, for the purposes of this Part, to have engaged in inappropriate practice in the provision of all, or that proportion, as the case may be, of the services included in the class from which the sample is chosen.

(3) The Minister may, by legislative instrument, make determinations specifying the content and form of sampling methodologies that may be used by Committees for the purposes of subsection (1).

(4) The Committee may use a sampling methodology that is not specified in such a determination if, and only if, the Committee has been advised by a statistician accredited by the Statistical Society of Australia Inc that the sampling methodology is statistically valid.

1. I note that the Minister made a determination pursuant to s 106K(3) of the HI Act on 15 March 2017 in *Health Insurance (Professional Services Review – Sampling Methodology) Determination 2017*. The Chief Executive asserted that the methodology applied was set out in this Determination. Pt 2 s 8(1) of that Determination provides:

Under this methodology, the Committee must have regard to a sample of no fewer than 25 provided services randomly drawn from a class of referred services being investigated.

1. The Determination does not provide the methodology by which services are to be randomly selected from the class of services being investigated.
2. Earlier in this judgment I noted that, in correspondence to Russells Law on 4 February 2020, the Members had informed Russells Law that there was a “potential issue” in the report used to generate the Lists, namely it was possible that the same service appeared in the 2018 PIRT Report more than once notwithstanding that it was only billed once.
3. In correspondence to Russells Law on 20 March 2020, Ms Neville (the principal legal officer of PSR) wrote that a new random sample of services was provided to the Members because six of the Lists were affected by an issue in the original sample. Ms Neville attached a copy of the Python Hill Report to that correspondence, noting:

In reply to your request for information about the sampling methodology, please find attached a review of the sampling methodology (**Attachment C**).

1. The Chief Executive contended:
* Dr Kitchen sought to compel, by correspondence dated 14 April 2020, production of an “SAS Code, an SAS dataset, a methodology embedded in an SAS Code, a ‘fixed seed’, macros, ‘excel sheets’ and files and folders, including those described as ‘psrrdmsv’ and ‘&maindir’" on the basis that those documents or information appeared to have been reviewed by, or provided to, Python Hill Advisers.
* However, the Python Hill Report was not commissioned by Services Australia, nor did Services Australia provide any source code or material to Python Hill Advisers for its preparation.
* The source code referred to in the Python Hill Report was “in no way specific to the 2018 PIRT Report”.
1. The onus is on Dr Kitchen to demonstrate the relevance of the documents in the proceedings: *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28 at [130], *Wong v Sklavos* (2014) 319 ALR 378; [2014] FCAFC 120 at [12]. I am satisfied that documents in categories 2, 4 and 5 of the Subpoena are not sought in the course of a “fishing exercise”, but are adjectivally relevant to the substantive proceeding and have a legitimate forensic purpose in relation to issues in the proceedings (in particular the second ground of review).
2. First, it appears there was a methodology involving computer programs used to generate the Lists in the 2018 PIRT Report to which the Members had regard in their inquiry into Dr Kitchen’s practice. That this is so is evident from the correspondence and Mr Soukieh’s affidavit.
3. Second, whether the Lists comply with s 106K of the HI Act is a matter in issue in the substantive proceeding. The fact that an issue in relation to the generation of Lists was identified, and an expert engaged to review the sampling methodology and opine as to whether the methodology was random, emphasises the importance of Dr Kitchen being in a position to obtain and properly review material relevant to the methodology generating the Lists.
4. Third, the documents sought in the categories of the Subpoena attempt to capture documents relevant to the means or methodology by which the Lists were generated, including any computer programs or persons involved.
5. Fourth, although the Chief Executive submits that the forensic purpose of documents sought in category 5 is unclear, where the applicant alleges a miscarriage of an administrative procedure referable to the generation of the Lists, I accept that it would be important to his case that he prove how, why and by whom the process miscarried. In this regard, Counsel for Dr Kitchen submitted that it may be relevant to cross-examine witnesses who had a role in inputting variables for the generation of the Lists. In my view this is a reasonable contention.

## Issue 4: Would it be oppressive to the Chief Executive to require her to produce the documents sought by Dr Kitchen in categories 2, 4 and 5 of the Subpoena because of impermissible breadth or lack of clarity of description of the documents in the Subpoena?

1. The Chief Executive asserted that Dr Kitchen’s application was oppressive because the range of documents sought was impermissibly broad and over an undefined time period.
2. A subpoena will be found to be oppressive if its impact on the recipient is seriously and unfairly burdensome, prejudicial, damaging or productive of serious and unjustified trouble and harassment: *Hamilton v Oades* (1986) 166 CLR 486 at 502; [1989] HCA 21 at [8], *Oceanic Special Shipping Co Inc v Fay* (1988) 165 CLR 197; [1988] HCA 32 and *Seven Network Ltd v News Ltd (No 5)* (2005) 216 ALR 147; [2005] FCA 510 at [12].
3. In particular, the Chief Executive submitted:
* Dr Kitchen has sought “SAS Code”. However, large areas of the SAS Code were not related to selecting the services for inclusion in the Lists.
* There was a genuine confusion about what may be captured by the Subpoena, and different time estimates were given by Mr Soukieh for compliance depending on what was to be produced (transcript p 27 ll 9-12).
* Mr Soukieh deposed that production of the source code would ordinarily take three business days, but due to the COVID-19 pandemic, it would now take up to four weeks.
* The letter of 14 April 2020 from Russells Law sought datasets. Medicare holds a great volume of data and much of that information is confidential.
1. In relation to these contentions, I find as follows.
2. First, to the extent that areas of the SAS Code were not related to selecting the services for inclusion in the Lists, they would not be caught by the Subpoena. Only documents concerning the selection of services for inclusion in the Lists are sought by Dr Kitchen.
3. Second, although no time period is expressed in the Subpoena, the subject matter of the categories is clearly defined by reference to the generation of the Lists. Reading the Subpoena sensibly and reasonably, I am satisfied that the reference to the Lists means that the ambit of time for potentially relevant documents could be identified with relative ease (cf *Adelaide Steamship Company v Spalvins* (1997) 24 ACSR 536 at 546). Accordingly, I do not accept the submission by the Chief Executive that the Subpoena was oppressive because the range of documents sought was over an undefined time period.
4. Third, Mr Soukieh referred to the prospect of producing the relevant source code in a “document covering PSR reporting [which] would come to approximately 332 pages”. Production of a document of this length does not appear to me to be oppressive.
5. Fourth, insofar as I understand Mr Soukieh’s evidence, he did not give different time estimates for compliance because of a “genuine confusion” about what was required to satisfy the Subpoena or because there were different things that might be required in compliance. Rather, in his affidavit filed 28 April 2020, Mr Soukieh gave different time estimates for compiling the source code ***because of the current COVID-19 pandemic***. In particular, Mr Soukieh deposed:

16. On 28 April 2020, three of my staff opened the SAS grid and opened the SAS programs and macros relevant to the 2018 PIRT Report that the Agency prepared and obtained information on the lines of code that are in each .SAS file.

17. There were 9,947 lines of code dispersed across 44 .SAS files. Using an estimate of 30 lines per page, which accounts for instances where a line in SAS may exceed a line on a A4 page, I estimate that a document covering PSR reporting would come to approximately 332 pages.

18. There may however, be a further need of information even if the source code was produced. On the basis of my training and experience I say that the source code would in general be difficult for even a SAS expert to read and understand without sample data and the underlying metadata for this sample being also provided.

19. In ordinary circumstances, I estimate that it would take 3 business days to compile the source code into a document that could be printed, but this estimate excludes the creation of any accompanying material including commentary and/or descriptions. There are currently only two employees in my section who have the requisite training and experience with previous PSR reporting arrangements.

20. The estimate of time does not include printing and compiling the material to be posted to Court, which I understand would be completed by the Subpoena Team.

21. Due to the COVID-19 pandemic, my section is focused on the delivery of two daily reports for internal use and seven ad-hoc data requests for external release (with more requests coming through weekly), all of which are priority pieces of work that can assist the Agency and broader health sector in planning and responding to current and future waves of the pandemic. I have two staff that have been re-deployed to assist the Agency with working through service delivery processing backlogs (one of whom has background and experience in PSR reporting). Under current circumstances, the creation of a document consisting of complete source code and possibly other information will be resource intensive and I believe may take up to four weeks of elapsed time from the point at which work commences due to increased pressures on my section.

1. It is not controversial that inordinate time and effort on the part of a subpoena recipient to respond to a subpoena can result in the subpoena being found to be oppressive. I note comments to this effect by Smithers J in *Lucas Industries* at 571. I also accept that Commonwealth Government agencies could be under significant stress because of the current COVID-19 pandemic. However, I also consider that it is not the response to the Subpoena which is oppressive – rather, it is functioning in the current public health environment which is creating workplace difficulties and time delays for various government departments.
2. I consider that to require the Chief Executive to produce the documents sought by Dr Kitchen within a short period of time would be oppressive. However, I consider that the burdens on the Chief Executive in respect of responding to the Subpoena can properly be addressed by giving her extra time to respond.
3. Fifth, I consider that the time and effort required of the Chief Executive in responding to the Subpoena is not unjustified, in light of the very serious consequences to which Dr Kitchen may be subjected by the inquiry into his practice, and the relative importance of the documents to the substantive application. A subpoena will be an abuse of process where a great number of documents are called for which are not sufficiently relevant: *Bailey v Beagle Management Pty Ltd* (2001) 105 FCR 136 at 144; [2001] FCA 60 at [31] and *The Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 575. This is not the case before me.
4. Finally, although the Chief Executive identified concerns relating to confidential and sensitive information, it is entirely unclear to me in the present circumstances:
* whether the Chief Executive is making a legal claim of confidentiality sufficient to resist compliance with the Subpoena;
* to which documents (if any) in the categories of the Subpoena she makes that claim of confidentiality; and
* the legal basis for any such claim.
1. A general reference by the Chief Executive to holding (or potentially, other government departments holding) confidential documents is not a proper basis to dismiss Dr Kitchen’s interlocutory application before the Court and permit non-compliance by the Chief Executive with the Subpoena.
2. In conclusion, I do not accept that the Subpoena is oppressive.

# Conclusion

1. The interlocutory application of the Chief Executive is dismissed.
2. Dr Kitchen is entitled to the interlocutory orders he seeks, subject to the provision of more time available to the Chief Executive to comply with the Subpoena. I understand from submissions of his Counsel at the hearing that no prejudice to Dr Kitchen will be occasioned if such extra time is provided – indeed Counsel for Dr Kitchen indicated he would not oppose four weeks to produce the source code.
3. In the circumstances of this case, and in the present public health environment with associated workplace strains on the Chief Executive, I consider that a period of six weeks for the Chief Executive to produce all documents in its possession or control that fall within categories 2, 4 and 5 of the Subpoena (including, but not limited to, relevant source code and documents identified in correspondence from Services Australia as being referable to the methodology, as discussed in the course of this judgment) is reasonable. Accordingly, I will extend the time to 1 July 2020 for production by the Chief Executive of such documents.
4. Finally, both Dr Kitchen and the Chief Executive sought costs depending on the outcome of both interlocutory applications. Dr Kitchen has been successful in respect of his interlocutory application; the Chief Executive has not.
5. Section 43(2) of the *Federal Court of Australia Act 1976* (Cth) provides that the award of costs is in the discretion of the Court or Judge. I note that in similar circumstances, in *Walker v Newmont Australia Ltd* [2010] FCA 298, Gordon J ordered costs following the event against a non-party subpoena recipient.
6. In my view, costs should similarly follow the event in this case. I will also list the matter to return for further case management after expiration of the further time granted by Order 1 of these Orders for production of documents by the Chief Executive referable to categories 2, 4 and 5 of the Subpoena.

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| I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier. |

Associate:

Dated: 20 May 2020