The Queen v Bryan Joseph Law & Ors [2007] NTSC 26

PARTIES:	THE QUEEN v BRYAN JOSEPH LAW DONNA MAREE MULHEARN ADELE MARGARET GOLDIE JAMES JOSEPH DOWLING
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	20529991 20529995 20529975 20529976
DELIVERED:	18 April 2007
HEARING DATES:	21 March 2007
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Crown:	H Dembo
Defendants:	R Merkel QC and R Orr
Secretary, Department of Defence and The Commissioner, Australian Federal Police:	M Maurice QC

Solicitors:

Crown:	Commonwealth Director of Public Prosecutions
Defendants:	Northern Territory Legal Aid Commission
Secretary, Department of Defence and The Commissioner, Australian Federal Police:	Australian Government Solicitor

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Bryan Joseph Law & Ors [2007] NTSC 26
No. 20229991, 20529995, 20529975, 20529976

BETWEEN:

THE QUEEN

AND:

BRYAN JOSEPH LAW
DONNA MAREE MULHEARN
ADELE MARGARET GOLDIE
JAMES JOSEPH DOWLING

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 18 April 2007)

[1] This is an application by the defendants for discovery pursuant to Rule 81A.28(1) of the Supreme Court Rules. The defendants' seek the following orders from the Court:

> "1. The Secretary of the Department of Defence make discovery of the following documents:
>
> (a) all documents that evidence or record the decision made by the Minister of State for Defence on or about 2 November 1967, to declare pursuant to s 8 of the *Defence (Special Undertakings) Act 1952* (Cth) (the **Act**), an area of land described in the Schedule to that declaration to be a prohibited area for the purposes of the Act, as recorded in the Commonwealth of Australia Government Gazette No. 96 published on 9 November 1967 ('the **s 8 decision**');

(b) the documents prepared for consideration or considered by the Minister of State for Defence for the purposes of the s 8 decision;

(c) the files and other documents of the Department of Defence prepared for the purposes of the s 8 decision;

(d) the documents that evidence or record the decision made by the Minister of State for Defence on or about 2 November 1967, to declare pursuant to s 6 of the Act, the work or undertaking described in the declaration to be a special defence undertaking, as recorded in the Commonwealth of Australia Government Gazette No. 96 published on 9 November 1967 ('the **s 6 decision**);

(e) the documents prepared for consideration by or considered by the Minister of State for Defence for the purposes of the s 6 decision;

(f) the files and other documents of the Department of Defence prepared for the purposes of the s 6 decision;

(g) the documents that evidence or record the decision made by the Minister of State for Defence on or about 13 July 1992, to revoke the s 6 decision and to declare, pursuant to s 6 of the Act, the work or undertaking described in the declaration to be a special defence undertaking, as recorded in the Commonwealth of Australia Government Gazette No. 29 published on 22 July 1992 ('the **further s 6 decision**');

(h) the documents prepared for consideration or considered by the Minister of State for Defence for the purposes of the further s 6 decision;

(i) the files and other documents of the Department of Defence prepared for the purposes of the further s 6 decision:

(j) the agreements or arrangements that evidence or record the defence or other purposes for which the area on which the offences are alleged to have been was being used or were intended to be used:

(i) as at November 1967;

(ii) as at July 1992;

(iii) at the time of the alleged offences;

2. the Commonwealth Director of Public Prosecutions make discovery of the following documents:

   (a) the documents referred to in paragraphs [43] to [46] of the Statement of Facts provided by the Crown on 15 September 2006 and referred to in para [16] of the Outline of Crown Argument dated 10 October 2006;

   (b) the documents that evidence or record the matters set out in paragraphs [43] to [46] of the Statement of Facts provided by the Crown on 15 September 2006 and referred to in para [16] of the Outline of Crown Argument dated 10 October 2006;

   (c) the agreements or arrangements that evidence or record the defence or other purposes for which the area on which the offences are alleged to have been committed was being used or intended to be used:

      (i) as at November 1967;

      (ii) as at July 1992; and

      (iii) as at the time of the alleged offence.

3. the Commissioner of the Australian Federal Police make discovery of the following documents:

   (a) all notes, running sheets, memoranda, correspondence, reports and other documents relating to the response of the Commonwealth or its officers including police officers to the proposed inspection of the Pine Gap Joint Defence Facility by members of Christians Against All Terrorism on 9 December 2005;

   (b) the documents referred to in paragraphs [43] to [46] of the Statement of Facts provided by the Crown on 15 September 2006 and referred to in para [16] of the Outline of Crown Argument dated 10 October 2006;

   (c) the documents that evidence or record the matters set out in paragraphs [43] to [46] of the Statement of Facts provided by the Crown on 15 September 2006 and referred to in para [16] of the Outline of Crown Argument dated 10 October 2006;

4. In the event that the orders for discovery are not made, or if those orders are made and the documents ordered to be discovered are not produced for inspection, an order that each count in each indictment be permanently stayed;

5. Alternately a date be fixed for the return of the subpoenas relating to the above matters copies of which have been served on the parties.

[2] Rule 81A.28(1) of the Supreme Court Rules gives the Court discretion to order third party discovery in criminal proceedings. The Rule provides as follows:

> "(1) If it appears that a person (other than the accused) has or is likely to have, or had or is likely to have had, in his or her possession or power a document that relates to a question likely to be raised at the trial of the accused, the Director or the accused may apply to the Court for an order that the person make discovery to the applicant of the document.
>
> (2) Documents ordered to be discovered may be discovered –
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> (a) if the Court does not specify a method of discovery –
>
> (i) by delivering to the applicant a list of the documents prepared in accordance with rule 29.04; or
>
> (ii) by producing to the applicant the original documents for inspection; or
>
> (b) if the Court specifies a method of discovery – by that method.
>
> (3) If a document is produced to an applicant, the applicant may –
>
> (a) copy the document, including by taking a photocopy or photograph of it; or
>
> (b) request a photocopy of the document.
>
> (4) If an applicant requests a photocopy of a document, the person producing the document must, at his or her option, either –

(a) allow the applicant to photocopy the document at a place agreed by the parties; or

(b) supply the applicant with a photocopy of the document.

(5) The cost of photocopying a document is payable by the applicant.

(6) If a person provides a list of documents in accordance with subrule (2)(a)(i), the person to whom the list is provided may apply to the Court for an order that –

(a) the documents or some of them be produced to the applicant for inspection; and

(b) the applicant pay the costs of preparing and serving the list of documents and the costs of opposing the order incurred by the person who was required to produce the document.

(7) Unless otherwise ordered by the Court, an application under subrule (1) or (6) is to be supported by affidavit and the application and supporting affidavit are to be served on the person against whom discovery is sought.

(8) An order under subrule (1) or (6) may be made ex parte if the applicant establishes that it is necessary to do so in the interests of justice."

[3] The defence rely on the affidavit of Bryan Joseph Law sworn 14 August 2006 and the affidavit of Russell Goldflam sworn 20 March 2007.

[4] Mr Law deposes to the fact that at his trial he intends to present a "lawful excuse" defence under s 10.3 of the Commonwealth Criminal Code.

Section 10.3 provides as follows:

"(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies if and only if the person carrying out the conduct reasonably believes that:

(a) circumstances of sudden or extraordinary emergency exist; and

(b) committing the offence is the only reasonable way to deal with the emergency; and

(c) the conduct is a reasonable response to the emergency."

[5] Section 3BA of the Crimes Act 1914 (Cth) provides that Chapter 2 of the Commonwealth Criminal Code applies to all offences against the Crimes Act 1914 (Cth). Chapter 2 of the Commonwealth Criminal Code sets out the general principles of criminal responsibility.

[6] In his affidavit sworn 14 August 2006 Mr Law deposes as to his belief that the extraordinary emergency confronting Australians is the illegal war in Iraq and its consequences. Mr Law further asserts that this emergency threatens imminent and dire consequences to the lives and property of all Iraqis, all Australians and others. He states that one key imminent dire consequence is the increased risk of "terrorist attack" within Australia. Mr Law referred to comments which he attributes to the Commissioner of the Australian Federal Police, Mick Keelty, Victorian Chief Police Commissioner Christine Nixon and New South Wales Police Commissioner Ken Moroney, to the effect that Australian participation in the war against Iraq had increased the risk of terrorist attack. He deposes to the fact that on 9 December 2005 he attempted a citizen inspection of Pine Gap. He was arrested and subsequently indicted with the charges presently before the Court. Mr Law does not actually state he had a belief that Pine Gap was

involved in the war against Iraq. However, for the purpose of this application I have assumed that this is what he is implying.

[7] The defendants rely on this affidavit as to the state of Mr Law's belief, and presumably the belief of all the defendants, as to how the Pine Gap premises were being put to use. It is asserted on behalf of the defendants that the documents sought to be discovered would go to support the reasonableness of that belief.

[8] The second affidavit being that of Mr Goldflam sworn 20 March 2007 is the basis of the application. Mr Goldflam deposes to forming a view based on advice received from counsel as to the serious issues concerning the validity of the s 8 declaration. This declaration states as follows:

> "Defence (Special Undertakings) Act 1952-1966
>
> DECLARATION OF A PROHIBITED AREA
>
> IN pursuance of the powers conferred on me by section eight of the Defence (Special Undertakings) Act 1952-1966, I, Allen Fairhall, Minister of State for Defence, being satisfied that it is necessary for the defence of the Commonwealth to do so, hereby declare the area of land described in the Schedule hereunder to be a prohibited area for the purposes of that Act."

There then follows a schedule in the Government Gazette No. 96 of 1967 which it is agreed describes the property known as Pine Gap.

[9] Mr Goldflam asserts in his affidavit that these issues primarily concern whether the s 8 declaration is invalid by reason of being ultra vires or infected by jurisdictional error because the Minister inter alia failed to

address the correct question, erred in law in the consideration of the pre-conditions for the exercise of the power conferred by s 8, failed to take into account relevant considerations or otherwise constructively failed to exercise the power conferred by s 8 in making the s 8 declaration.

[10] Mr Goldflam further deposes to the view that these issues cannot be properly investigated without discovery of the documents falling within the categories identified in the Amended Application for Discovery.

[11] Mr Goldflam further asserts in his affidavit that the discovery of the documents falling within the categories identified in the Amended Application for Discovery is essential to fault elements of intention and recklessness under s 5.6 of the Commonwealth Criminal Code and to "whether a mistaken belief or ignorance of facts about the use of the facility at Pine Gap may negate the requisite fault elements".

[12] For the principles relating to Discovery in criminal proceedings, Mr Merkel QC referred to the High Court decision in *The Commonwealth of Australia v Northern Land Council and Anor* (1993) 176 CLR 604.

[13] I accept the principle expressed at page 619 that in criminal cases there may be "exceptional circumstances which give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of

documents recording Cabinet deliberations that it will be necessary or appropriate to order production of the documents to the court."

[14] I do not think this is such a case.

[15] The submission for the defence is that the validity of the decision made under s 8 of the Defence (Special Undertakings) Act 1952 is under challenge and discovery of the documents relevant to that decision are essential to the defence. Mr Merkel QC on behalf of the defence, further submits that the Crown have a duty of disclosure concerning the decision itself and any material that would relate to it that would found, or be capable of founding, an argument for its validity or its invalidity.

[16] Thirdly, the submission on behalf of the defendants is that the defendants would be entitled to issue a subpoena for the Minister's decision and the material before the Minister in making such a decision. The corollary to that is that discovery must at least embrace documents that the defence could properly subpoena.

[17] Mr Merkel QC then addressed the principle of parliamentary immunity in respect of the documents relating to the decision. Reliance is placed on the decision of *The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* (1882) 11 QBD 55 in support of the principle that on discovery Brett J at 63:

> " … that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* - not which *must* - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. …"

[18] In *Parkin v O'Sullivan* [2006] FCA 1413 a decision of the Federal Court of Australia delivered 3 November 2006, Sundberg J made an order for discovery in favour of a party who had been the subject of an adverse security report by ASIO and who had subsequently been refused a visa on the basis of the security report. He stated at paragraphs 45-47:

> **"[45]** The Director-General submits that there is no live issue between the parties and that discovery therefore should not be ordered. In order to make out their respective claims, the applicants will need to demonstrate jurisdictional error on the part of the Director-General. They will need to show that there was no evidence on which ASIO could have formed the opinion that the applicants were security threats. Given the extreme difficulty of this task, the Court should not be satisfied that the applicants have a good case proof of which may be aided by discovery.
>
> **[46]** I am not persuaded by this argument. The applicants' claim is that they have done nothing to justify their security assessments. Therefore ASIO must be wrong to conclude that they are security threats. In order to demonstrate this to a court they need to understand why and on what basis ASIO has formed the view that it has. It stands to reason that they do not yet have the evidence to demonstrate this; that is why they have sought discovery. The Director-General's argument is circular. It is, in effect, that because the applicants do not have the evidence they need, they therefore have no case and so do not need that evidence. In the circumstances of these applicants, it is not possible to say whether they do or do not have any chance of making out a good case. It would be premature at this stage to say that there is no live issue between the parties.
>
> **Exercise of discretion**
>
> **[47]** Taking into account the above considerations, it is appropriate that I exercise my discretion to allow discovery. The applicants say

> that they have good reason for bringing their claims. They are entitled to call on the aid of the Court to assist them in determining if they are right and, if so, the detail of those claims. They should not be shut out just because their claim involves the denial of a state of affairs they cannot explain, as opposed to a positive averment. No sufficient reason has been advanced why discovery should not be ordered."

[19] The Crown represented by Mr Dembo are in agreement with the principle that there is no impediment to a collateral attack, in the course of a criminal proceeding, on the validity of a decision on which a prosecution depends: See *Re Lawrence; Ex parte Goldbar Holdings Pty Ltd* (1994) 84 LGERA 113 at 122 Malcolm CJ:

> "The starting point is that, as a general rule, the court will allow the issue of validity to be raised in any proceedings where it is relevant. Thus, in a prosecution for carnal knowledge of a detained mental defective, the accused was able to plead that the detention order under which the defective was held had not been validly made and was a nullity: *Director of Public Prosecutions v Head* [1959] AC 83; cf *Dillon v The Queen* [1982] AC 484."

[20] In *Alister & Ors v The Queen* (1983-84) 154 CLR 404 Gibbs CJ at 414:

> "Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v. Whitlam*, (1978) 142 CLR, at pp 42, 62), so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance,

since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done."

[21] and Murphy J at 431:

"There is a public interest in certain official information remaining secret; but there is also public interest in the proper administration of criminal justice. The processes of criminal justice should not be distorted to prevent an accused from defending himself or herself properly. If the public interest demands that material capable of assisting an accused be withheld, then the proper course may be to abandon the prosecution or for the court to stay proceedings."

[22] In *Hudson & Anor v Branir Pty Ltd & Anor* (2005) 148 NTR 1 Martin CJ par [38]:

"Although there is a legitimate forensic purpose which the respondents seeks [*sic* - seek] to achieve through the issue of the subpoena, namely, the production of documents relevant to the application for a stay of the principal action, it is also necessary to consider whether the subpoena is merely a fishing exercise in the hope of obtaining documents relevant to that purpose. In the context of the criminal law, reference is often made to the decision of the High Court in *Alister v R* (1984) 154 CLR 404; 51 ALR 480 and to the observation of Gibbs CJ that in contrast to the impermissible fishing expedition, it might be sufficient if it appears to be "on the cards" that the documents sought will be relevant to an issue raised by the accused."

[23] Mr Merkel QC submits on behalf of the defendants that it is more than "on the cards" that production of the decision referred to in s 8 will be relevant. He says it is a fortiori relevant, as is the grounds on which the decision was made.

[24] Mr Merkel QC then referred to a number of authorities outlining the approach of the Courts to the issue of ultra vires and jurisdictional error.

Reference was made to *Craig v The State of South Australia* (1994-95) 184 CLR 163 and the more recent decision of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* (1996) 185 CLR 259 which establishes the principle that a decision based on the state of satisfaction is as vulnerable to review on the grounds outlined in *Craig v The State of South Australia* (supra) as any other decision.

[25] Mr Merkel QC also made reference to *The Australian Communist Party and Ors v The Commonwealth and Ors* (1950-51) 83 CLR 1. The issue in this case concerned the power of the Governor-General to declare an organisation such as the Communist Party illegal - see Williams J at 223:

> "It follows from what I have said that, in order that s. 4 of the *Communist Party Dissolution Act* could be authorized by the defence power, it must be proved that facts existed on 20th October 1950 which made it reasonably necessary in order to prepare for the defence of Australia that as a preventive measure the Australian Communist Party should be dissolved and its property forfeited to the Commonwealth. …"

[26] It is the submission on behalf of the defence that firstly the validity of an executive decision (such as a s 8 declaration) made for defence purposes is a matter to be determined by a court on the basis of the evidence adduced by the parties and secondly it is not open to the Commonwealth to make such decision unreviewable.

[27] Mr Merkel QC argues that there is a real issue to be investigated as to how a decision made in 1967 concerning a particular facility still comes to be operative in the changed circumstances that exist in 2005 when the alleged

offences are said to have been committed. A comparison was drawn between the provisions of s 6 and s 8. It is the submission on behalf of the defence that there is inherent in s 8 a temporal aspect. On this basis the defendants argue that if the Minister's decision was of indefinite duration, and not made for so long as it was necessary for the defence of Australia, for the purpose of declaring a prohibited area, the Minister would have addressed the wrong question. It is Mr Merkel's submission that in those circumstances the Minister would have made an error in law as to the power the Minister had and it would therefore be an invalid decision. Mr Merkel QC referred to s 6 and s 8 declarations having been made at the same time. They were both published in the same Gazette which was on 9 November 1967. It is Mr Merkel's submission after reading the s 6 and s 8 declaration that the Minister may have misconceived his power under s 8 by treating it the same as his power under s 6. The submission is that this issue can only be investigated by looking at the documents the Minister signed, recording his decision and the grounds upon which that decision was made and the facts to which the Minister had regard.

[28] It is further submitted on behalf of the defence that in 1992 the Defence Minister revoked the section 6 decision and made a new section 6 decision: "For the establishment, maintenance and operation of the Joint Defence Facility - Pine Gap, being a work or undertaking to which paragraph 6(a) of that Act applies, to be a special defence undertaking". It is no longer referred to as a "Joint Defence Space Research Facility". It is the

submission on behalf of the defence that the section 6 decision being revoked for a changed purpose would also require reconsideration of the validity in this changed situation of a section 8 decision or that section 8 had exhausted its purpose. These are matters the defence wish to investigate as to whether it is still a valid decision, as it is now some 38 years after the declaration was made.

[29] Mr Merkel QC then read from the statement of facts prepared by the Crown in particular paragraphs 43 to 46 that refer to documents. He submitted that the purpose of the facility may have changed considerably since 1967 and may have become a facility less relevant to the defence of Australia. If that has occurred then it is argued for the defendants that this is very relevant to their defence as the documents may show that the facility at Pine Gap is no longer necessary or relevant to the defence of Australia.

[30] Mr Merkel QC then went through the amended application for discovery and why the particular requests for discovery are relevant to the defendants' defence.

[31] Mr Merkel QC submitted that it is fundamental to the position of the defendants, and the movement of which they are part - the Christians Against All Terrorism, that this is a political protest which embraces Pine Gap being used for aggression rather than for defence. In this context aggression means the war in Iraq and other possible purposes, the war in Iraq being predominant as at that day.

[32] The Court was advised that the defence to be raised at trial is that if the defendants had an honest and reasonable belief that the facility at Pine Gap was not used for the defence of Australia, and the fact is it was not used for the defence of Australia a fortiori it must be a reasonable belief. Therefore Pine Gap was not capable of being the subject of protection under the defence power but was in fact being used for the purpose of aggression not defence. That gives the defendants an entitlement to raise the honest and reasonable belief defence. It is submitted that the best evidence is the evidence as to the use Pine Gap was put, on the relevant date.

[33] Mr Maurice QC appearing for the Secretary of the Department of Defence, opposes the making of the orders sought by the defendants and also the alternative order for the issue of a subpoena which he submits would have the same effect.

[34] It is conceded by Mr Maurice QC that in the prosecution proceedings the validity of the declaration can be contested if there is a proper basis for doing so. The essence of the opposition to the orders sought is that no proper foundation has been disclosed to base an order for discovery. Mr Maurice QC confirmed that his client is quite prepared to disclose the declaration which is replicated in the Gazette No. 96 dated 2 November 1967.

[35] Mr Maurice QC challenges the construction of section 8 put forward on behalf of the defendants which was that it was not intended that s 8 have

effect in respect of any period when the declaration is not necessary for the defence of Australia. It is the position on behalf of the Secretary of the Department of Defence that there is nothing in section 8 to indicate that a declaration lapses or ceases to have any cause or effect when the area in relation to which the declaration was made ceases to be needed or required or used for a defence purpose.

[36] I agree with this interpretation of s 8. I also agree on reading the section that the only time at which the Minister needs to be satisfied that it is necessary for the purposes of the defence of Australia to declare an area to be a prohibited area is the time at which he makes the declaration. I also agree that a purpose of the legislation is to keep the activities at Pine Gap beyond the surveillance of persons who are not authorised to have access to that area. Section 9 of the Defence (Special Undertakings) Act 1952 creates an offence of unlawful entry into a prohibited area.

[37] There appears to be no reported cases specifically on discovery in criminal matters under order 81A.28 of the Supreme Court Rules. I have sought guidance in the exercise of the discretion invested in the Court by reviewing the principles in the various authorities on the issue of discovery and production of documents under subpoena in civil cases. I have also borne in mind the principle that in criminal cases the public interest in the administration of justice and enabling the defendants to have a fair trial may outweigh the public interest in the confidentiality of documents relevant to

the declaration - see *Alister & Ors v The Queen* (supra). If this were the case then I would make the orders as sought on behalf of the defendants.

[38] However, I have come to the conclusion that it does not appear to be "on the cards" that the documents will materially assist the defence. There is nothing in the affidavit material provided to the Court on behalf of the defendants to support a finding that there is any evidence that the declarations made pursuant to sections 6 and 8 of the Defence (Special Undertakings) Act 1952 in 1967 and 1992 are invalid and/or inoperative.

[39] I agree with Mr Maurice QC that the prosecution commences with the presumption of regularity with respect to the declarations. The rule was stated by McHugh JA in *Minister for Natural Resources v NSW Aboriginal Land Council & Anor* (1987) 9 NSWLR 154 at 164:

> "… Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled. Thus a person who acts in a public office is presumed to have been validly appointed to that office: *M'Gahey v Alston* (1836) 2 M & W 206 at 211; 150 ER 731 at 733; *R v Brewer* (1942) 66 CLR 535 at 548; *Hardess v Beaumont* [1953] VLR 315 at 318-319. And a council which must form an opinion as to whether there will be any detriment upon the granting of a planning permit is presumed to have formed the opinion before granting the permit: *Pearce v City of Coburg* [1973] VR 583."

See also *Industrial Equity Ltd & Anor v Deputy Commissioner of Taxation & Ors* (1990) 170 CLR 649 Gaudron J at 671-672 and *Warringah Shire Council Ors v Pittwater Provisional Council* (1992) 26 NSWLR 491 Kirby J at 508.

[40] In this matter the affidavit of Russell Goldflam sworn 20 March 2007 contains an assertion that in Mr Goldflam's opinion s 8 of the Defence (Special Undertakings) Act 1952-56 (the s 8 declaration is invalid). There is no evidence put forward to support this assertion.

[41] The affidavit of Bryan Joseph Law sworn 14 August 2006 is similarly devoid of any evidence as to the invalidity of the declaration but rather is confined to speculation as to the validity or otherwise of the s 8 declaration.

[42] In *W.A. Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, Brennan J at 181-182:

> "Though the power to require discovery be acknowledged, how should it be exercised? It depends upon the nature of the case and the stage of the proceedings at which the discovery is sought. In the present case, discovery is sought before there is a tittle of evidence to suggest that the Chairman did not have the requisite cause to believe which par. 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v Blakes Motors* [1951] 2 All ER 689, but in cases of that kind there is either an anterior relationship between the parties which entitles one to obtain information from the other, or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery. This is not such a case. This is a case where a bare allegation is made by par. 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing. As Smithers J. said in *Melbourne Home of Ford Pty. Ltd. v Trade Practices Commission and Bannerman*: "In the absence of such evidence the proceeding is essentially speculative in nature. In such circumstances for the court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the court on established principles should refrain (1979) 36 FLR at p 460". His Honour's refusal of discovery was right and it ought not to be disturbed."

[43] The problem identified in that authority is a problem in this matter. The affidavits of Mr Goldflam and Mr Law do not disclose any fact or piece of evidence for the opinions or beliefs that they hold. They make assertions without disclosing the process of reasoning.

[44] In *R v Robertson & Anor; Ex parte McAulay* (1983) 21 NTR 11 at p 18 O'Leary CJ:

> "What is in question here is not the right of the accused to call on the Commissioner, by subpoena or otherwise, to produce a particular document or documents which may be in his possession and which may help the accused to make full answer to the charge against him: cf *Maddison v Goldrick* [1976] 1 NSWLR 651; *Waind v Hill* [1978] 1 NSWLR 372 at 382. What is in question is whether a summons to witness framed in the terms of that in the present case and directed towards finding out whether there is any material in the possession of the Commissioner that may support the accused's defence, is of a "fishing" nature. In my opinion it is. "Fishing", whether used as a descriptive of discovery or of a subpoena, has been variously described. In *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250, Owen J said (at 254) that it meant "that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not". In *Maddison v Goldrick,* supra, Samuels JA (at 657) spoke of a fishing expedition as one "designed to catch at large what material the statements of witnesses might yield". That seems to me to be essentially what the accused here is endeavouring to achieve by means of the summons to witness. Having asserted that he was elsewhere at the time of the commission of the offence, he now wishes to ransack the Commissioner's documents relating to the investigation of the crime in the hope of finding there something that would support his defence. In my opinion, that is "fishing", and is not a proper use of a summons to witness. In some respects it bears a resemblance to the kind of "fishing" that was dealt with in *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, see per Brennan J (at 181–2) and per Lockhart J at 190."

[45] In *Carmody v Mackellar & Ors* (1996) 68 FCR 265 Merkel J at 280 summarised the principles upon which discovery is ordered in judicial review applications:

> "The following principles may now be taken to be well established by the decisions of the Court in *Melbourne Home of Ford v Trade Practices Commission* (1979) 36 FLR 450, *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 and *Australian Securities Commission v Somerville* (1994) 51 FCR 38:
>
> - the Court has a discretionary power to order discovery in proceedings for the review of an administrative decision;
> - the proper exercise of the power depends upon the nature of the case and the stage of the proceedings at which discovery is sought;
> - if a proceeding or claims in it are essentially speculative in nature the Court will not order discovery in order to assist the applicant in a fishing exercise;
> - the evidence or material which will be required to establish that the proceeding or particular claims in it are not essentially speculative will vary with the nature and circumstances of the particular case;
> - if there is not the slightest evidence or there is no other material to support the bare allegations made in the proceeding, then as a general rule, an order for discovery ought not to be made."

These principles were approved and followed in *Jilani v Wilhelm & Others* (2005) 148 FCR 255 at 273.

[46] On behalf of the Secretary of the Department of Defence, Mr Maurice QC submits that the only temporal connection between the defence purpose and the making of the declaration is the connection that is required to exist at

the time the s 8 declaration was made. I agree. I further agree that the s 8 declaration continues in effect until such time as the government sees fit to revoke it, or it is found to be invalid. I also agree that there is no evidence that the base at Pine Gap has ceased to be used for the defence of Australia.

[47] Mr Maurice QC then addressed the alternative application that an order be made for the return date of the subpoenas relating to the matters listed in the discovery application, copies of which have been served.

[48] In *Kizon v Palmer* (1997) 75 FCR 261 Beaumont J at 271:

> "If it be accepted, as it must, that the Full Court has decided at least that discovery is prohibited, it must follow, in my view, that any indirect attempt to obtain discovery by another route, namely, through the issue of a subpoena, should not be permitted in this Court. It is a principle of general application that it is not permissible to do indirectly what is prohibited directly, (see for example *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523). The legitimate pursuit of that information in an (exempt) criminal proceeding is another question.
>
> In the present procedural area, there is much to be said for the view that symmetry and consistency should be achieved in the control by the Court of *all* aspects of its procedures; so that, even if the prohibition (in this case, on discovery) does not extend originally, or directly, to the other process (that is, the subpoena), the prohibition should be viewed, nonetheless, as intended to apply derivatively to the subpoena process as well (see *Trade Practices Commission v Port Adelaide Wool Company* (1996) 60 FCR 366 and *Telstra Corporation v Australis Media Holdings (No 1)* (1997) 41 NSWLR 277."

See also *Hudson v Branir Pty Ltd* (supra), Martin (BR) CJ at paragraph [39].

[49] I do not consider the applicants have established grounds for an order for discovery against the Secretary of the Department of Defence. In those

circumstances it would not be appropriate to order production of those documents on subpoena.

[50] With respect to the application for discovery from the Commissioner of the Australian Federal Police, I essentially make the same finding that the applicants have not established the necessary basis for an order for discovery or the production of those documents on subpoena.

[51] The documents sought in 3(a) of the amended application are not directed to the notes, running sheets, memoranda, correspondence, reports and other documents relating to the actual alleged offences. I am informed such documents have in fact been provided. This application refers to the proposed inspection of Pine Gap by themselves of Christians Against All Terrorism and the response of the Commonwealth or its officers including police officers to the proposed inspection. It has not been established that this is relevant to the actual allegations of offending.

See *Ali Tastan* (1994) 75 A Crim R 498, Barr J at 504 and 506 and *Attorney General for New South Wales v Stuart* (1994) 34 NSWLR 667.

[52] I note that the Crown has expressly stated that it does not rely on the documents enumerated in paragraphs 3(b) and 3(c). In addition to this, Joint Standing Committee Report and the National Interest Analysis are proceedings in Parliament for the purpose of s 16(2) of the Parliamentary Privileges Act 1987 (Cth). Section 16(3) of that Act provides as follows:

> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament. "

[53] Mr Dembo, on behalf of the Commonwealth Director of Public Prosecutions, submitted that his client adopts the submissions made by Mr Maurice QC.

[54] Mr Dembo confirmed that the Commonwealth Director of Public Prosecutions will not be relying on paragraphs 43 to 45 of the Statement of Facts provided by the Crown. He further confirmed that paragraphs 40-42, visual and physical evidence, will be relied upon by the Crown.

[55] Mr Dembo referred to the written submissions filed on behalf of the defendants and identified the following matter with which the Commonwealth Crown are in agreement.

> "(1) On the proper construction of the Act, s 6 and 8 have different preconditions for their operation and fulfil different functions."

[56] Mr Dembo added that he confirmed the Crown was not relying on s 6 of the Act. He agreed with the submission made by Mr Maurice QC that there was no indication that Parliament intended s 8 to operate for a limited time.

[57] Mr Dembo further endorsed the submission that there was no evidence put before the Court by the applicants as to what the Minister did wrong in making the declaration under s 8 where his discretion miscarried, where he failed to address the correct question, erred in law or took into account irrelevant considerations and/or failed to take account of relevant considerations.

[58] I agree with these submissions.

[59] The defendants' amended application for discovery and alternate orders is refused.

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