CITATION: *Baird v Northern Territory of Australia* [2007] NTMC 023

PARTIES:	DAVID RALPH BAIRD
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20507109
DELIVERED ON:	3 May 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	13 November 2006
JUDGMENT OF:	Dr John Lowndes SM

CATCHWORDS:

WORK HEALTH – LEGAL PROFESSIONAL PRIVILEGE ATTACHING TO SURVEILLANCE VIDEOTAPES – POWER TO IMPOSE RESTRICTIONS ON FORENSIC USE OF PRIVILEGED MATERIAL

J- Corp Ltd v Australian Builders Labourer's Federated Union of Workers (1992) 38 FCR 452 considered
Nagan v Holloway [1991] 1 Qd R 607 considered
Alphapharm Pty Ltd v Eli Lily Australia Pty Ltd (1996) 69 FCR 149 not followed
State of Victoria v Davies (2003) 6 VR 245 followed
Mooney v James [1949] VLR 22 considered

REPRESENTATION:

Counsel:

Worker:	Mr Colin McDonald QC
Employer:	Mr Ian Morris

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 023
Number of paragraphs:	82

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20507109

BETWEEN:

DAVID RALPH BAIRD
Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA
Employer

REASONS FOR RULING

(Delivered 3 May 2007)

Dr JOHN LOWNDES SM:

THE NATURE OF THE INTERLOCUTORY APPLICATION

1. By way of an interlocutory application filed on 11 October 2006 the worker sought the following orders:

    1. That the employer within 7 days give continuing discovery of documents in its possession or control relevant to the proceedings since its List of Documents dated 17 October 2005.

    2. That with respect to the continuing discovery referred to in Order 1, that the employer by its proper officer swear an affidavit verifying that List of Documents.

    3. That at the trial of the proceedings the employer not be permitted, unless with the leave of the Court, to adduce any evidence as to the contents of any surveillance film or videotape or similar document in

respect of which the employer has maintained a claim for privilege from inspection by the worker, or to cross-examine the worker in respect thereof.

4. That the costs of and incidental to this application be costs in the cause, certified fit for counsel including senior counsel, to be taxed in default of agreement at 100% of the Supreme Court scale.

5. Such further or other order or orders as the Court deems meet.

2. The application was supported by the affidavits of John Michael Neill sworn 11 October 2006 and 25 October 2006 and the annexures thereto.

3. On 13 November 2006 I gave a ruling declining to make order 3 as sought in the application. I also gave a ruling on a threshold matter, namely, whether the surveillance film was subject to legal professional privilege. I ruled that it was. There was no need for me to rule in relation to the first two orders sought in the interlocutory application as those matters had resolved. In relation to the two rulings, it had been my intention to provide written reasons at the conclusion of the substantive matter. The proceedings have been settled and are in the process of being discontinued by the worker. However, the parties still wish to receive my written reasons in relation to the ruling. Having acceded to that request, my reasons are set out herein.

THE NATURE AND EFFECT OF THE ORDER SOUGHT

4. The order sought in paragraph 3 of the application is similar to the order made by Justice Moore in the Federal Court of Australia in *Alphapharm Pty Ltd v Eli Lily Australia Pty Ltd* (1996) 69 FCR 149, 163 E. There his Honour imposed limits on the use that could be made at trial of documents that were the subject of a claim of privilege. In the present case, the worker sought an order that would have the effect of preventing the employer from making any use, at trial, of the surveillance film or videotape in which a

claim of professional legal privilege had been claimed and maintained, unless it obtained the leave of the Court to make use of such material.

THE THRESHOLD ISSUE: IS THE CLAIM OF LEGAL PROFESSIONAL PRIVILEGE SUSTAINABLE IN RELATION TO THE SURVEILLANCE FILM OR VIDEOTAPE?

5. The worker's interlocutory application was brought on the premise that the subject surveillance film or videotape was subject to legal professional privilege.

6. In light of recent questioning of the existence, or the scope, of "litigation privilege" - a species of legal professional privilege which the subject film is said to attract – and particularly in light of the observations made by French J in *J-Corp Ltd v Australian Builders Federated Union of Workers* (1992) 38 FCR 452, which expressed scepticism for there being any basis for a litigation privilege, I invited the parties to make submissions as to whether the employer's claim of privilege over the subject surveillance film was sustainable. The point of the exercise was self-evident. If the subject film was not privileged, then there was no need to consider the third order sought by the worker. If the film was not privileged, then the film was not only required to be the subject of discovery, but was required to be made available for inspection by the workers and his solicitors prior to trial.

7. The facts in *J-Corp Ltd v Australian Builders Labourers Federated Union of Workers* (supra) were that the solicitor for the Union requested his client to videotape a picket line and connected events at J-Corp's Rivervale site in anticipation of, and for the purpose of legal proceedings to be issued by or against the Union in relation to events at the site.

8. J –Corp filed a notice of motion seeking access to copies of the videotapes. The respondent asserted that the tapes were subject to legal professional privilege, as they were made in anticipation of, and solely for the purpose of legal proceedings.

9. The claim for legal professional privilege was rejected by the presiding judge, French J:

> "The privilege attaching to statements taken form potential witnesses may not be supportable by public interest considerations of the same order as those enunciated in *Grant v Downs* (1976) 135 CLR 674 in relation to solicitor-client communications although it arises in the context of the solicitor-client relationship. The confidentiality which attends their taking is of a limited character. There is nothing to stop a prospective witness who has given a statement to a solicitor from announcing that fact and the content of his statement to the world at large. In the ordinary course, neither the solicitor nor his client could do anything to prevent such disclosure. It may be that the time has come to reconsider whether such privilege as attaches to witness statements ought to continue although it may be questionable whether it can be affected by judicial decision. But I can see no reason for its extension to the class of material under consideration in this case. The videotapes have, it may be accepted, been brought into existence for the sole purpose of possible litigation. They are in one sense analogous to witness statements. But they are more than that. They are real evidence of events which occurred in public. They were not taken in circumstances to which any confidentiality attached. To attach legal privilege to these materials would be to accord excessive respect to the adversarial aspects of litigation and insufficient weight to the objective of determining in litigation the facts in issue. To allow inspection of these materials, in my opinion, infringes no public interest and no established category of privilege."[1]

10. This decision is to be contrasted with the decision of Williams J in *Nagan v Holloway* [1996] 1 Qd R 607, which distinguished *J-Corp Ltd v Australian Builders Labourers Federated Union of Workers* (supra).

11. In that case the respondent had made arrangements with two persons to tape record any conversations they had with the applicant with a view to using the recordings in proceedings against him. Subsequently, the respondent commenced proceedings against him alleging that words used by him during conversations he had with the two persons defamed her. The applicant sought that he be allowed to inspect the recordings.

[1] *J-Corp Ltd v Australian Builders Labourers Federated Union* (1992) 110 ALR 510 at 515.

12. In holding that legal professional privilege attached to the recordings of the conversations, Williams J stated that the critical element in the reasoning adopted by French J in *J-Corp Ltd v Australian Builders Labourers Federated Union of Workers* (supra) was that the videotapes were real evidence of public events. According to Williams J, that was sufficient to distinguish that case from the case under consideration.

13. The decision of French J in *J –Corp Ltd v Australian Builders Labourers Federated Union of Workers* (supra) was considered in *Boyes v Colins* (2000) 23 WAR 123.

14. The first observation made by the Full Court of the Supreme Court of Western Australia was that French J was dealing with videotapes of events which were critical to the issues in question in that case and his Honour saw no reason to extend legal professional privilege to the tapes.

15. The Full Court then gave the reasons why it was not prepared to follow the line of reasoning of French J in *J-Corp Limited v Australian Builders Labourers Federated Union of Workers* (supra):

> "In my view, the description of 'real evidence' does not, with respect, assist in determining whether or not the video film is privileged. What, in truth, is meant by the term 'real evidence'? It seems to me that there can be only two possible arguments raised for distinguishing the video tape from ordinary witness statements.
>
> The first is that at the trial on production, identification and proof of the video film by the photographer, the film will stand as proof of the truth of its contents. But that fact cannot be a ground for destroying the privilege that might otherwise attach to the film. Take, for example, a statement signed by a witness and given by him to a party's solicitor for use in pending litigation. The mere fact that that statement might be admissible in evidence to prove the truth of its contents (under s 79C of the *Evidence Act* 1906) cannot in any way detract from the privilege that (subject to any waiver that may be effected) otherwise attaches to it.

> The second is that the video film is real evidence because it contains images of what in fact occurred. This is to be contrasted with the oral or written testimony by a witness who describes the event he or she has observed. Again, in my view, such a distinction is unhelpful. Take a case where the identity of a driver of a motor vehicle is in issue. Assume that the driver was seen by a skilled artist who did not know the man but made a drawing of him. If the artist made a statement to the solicitor of a party to the litigation and attached the drawing, that drawing would constitute a document prepared solely for use in contemplated litigation and communicated by the witness to the solicitor. The drawing, being the image of the driver, would undoubtedly be privileged. In my opinion, there is no difference in principle between the drawing and the video film. In the drawing, the image is portrayed by the hand of an artist. In the case of a video film, the image is captured on the film by the photographer. In each instance the probity of the material depends upon the skill and integrity of the witness seeking to prove the validity of the images in question and their accuracy. It is common knowledge, these days, that videotapes can be altered, or taken in such a way as to distort or alter reality.
>
> Accordingly, I would not follow the reasoning in *J –Corp Limited v Australian Builders Labourers Federated Union of Workers* . In my view, the ordinary rules of privilege attach to video film and there is no basis in law to distinguish it."

16. Ligertwood has commented on the apparent conflict between *J-Corp Limited v Australian Builders Labourers Federated Union of Workers* (1992) 38 FCR 452 and *Nagan v Holloway* [1996] 1 Qd R 607:

> " ...what of the situation where client or lawyer collects other information in preparation for litigation, as in *J-Corp Limited v Australian Builders Labourers Federated Union of Workers* (1992) 38 FCR 452, where the client videotaped a picket line in order to give to the lawyers for the purposes of pending industrial proceedings? Is the videotape privileged as created for the sole purpose of pursuing litigation? French J, sceptical of there being any justification for a litigation privilege, denied privilege in these circumstances on the ground that the videotape was real evidence of a public event which ought to be discovered. In *Nagan v Holloway* [1996] 1 Qd R 607, a client pursuing defamation proceedings arranged to secretly tape-record private conversations with the defendant to obtain further defamatory material to pass on to her lawyer. That tape was held privileged as created for the sole purpose of litigation and *J-Corp* was distinguished on the ground that in that

case the recording had been of a public event and thus lacked the requisite confidentiality to give rise to the privilege.

Yet it is not the confidentiality of the event observed that is crucial, it is the confidentiality and purpose of the record which justifies the privilege. If this is so, *J-Corp* and *Nagan v Holloway* are indistinguishable and inconsistent. Logically in each situation the recording, if taken for the sole purpose of advice or litigation, should be privileged. This would seem to be the position under ss 119-120 of the uniform Acts (as a confidential communication or document (any record of information) prepared for the dominant purpose of advice or use in a proceeding)."[2]

17. *Cross on Evidence (Australian Edition)* [25255] p 25,132 provides the following commentary and case analysis in relation to whether legal professional privilege attaches to the documentary or tape record of conversations between adversary litigants prepared solely for the purpose of contemplated litigation or of obtaining legal advice:

> "The argument against privilege starts from the proposition that the conversation is itself not confidential and is therefore entitled to no privilege. The mere fact that a party took the precaution of noting its substance or recording it for one of the relevant purposes does not render privileged a record of that which itself is not privileged. Where the record itself is the communication between the adversary litigants, the better view is that no privilege arises.[3] A tape recording of a conversation between the parties which was prepared for the dominant purpose of provision to a party's solicitors for use in the proceeding is not by reason only of that purpose the subject of legal professional privilege."[4]

18. In *Telebooth Pty Ltd v Telstra* [1994] 1 VR 337 Hedigan J held that a tape recording of a non-confidential conversation between adversary parties at a time when proceedings were being contemplated, and a transcript of that recording, did not attract legal professional privilege, even though the

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[2] Ligertwood *Australian Evidence* (3rd ed Butterworths 1998), p 273 [5.23].
[3] The following authorities are referred to in footnote 12 of the text: *Feuerheerd v London General Omnibus Co Ltd* [1918] 2 KB 565 (in relation to a signed statement); *J-Corp Ltd v Australian Builders Labourers Federated Union of Workers* (1992) 38 FCR 452 at 457 (in relation to a videotape); *Telebooth Pty Ltd v Telstra Corp Ltd* [1994] 1 VR 337 (in relation to an audio tape).
[4] The following authority is referred to in footnote 13 of the text: *Telebooth Pty Ltd v Telstra Corp Ltd* [1994] 1 VR 337.

recording and transcript were made for the sole purpose of being delivered to one party's solicitors for use in the proceedings and for obtaining legal advice with respect to the contents.

19. In light of the conflicting authorities and the issues raised in relation to litigation privilege over surveillance film or videotape, is the film in the present case subject to legal professional privilege?

20. Despite views expressed to the contrary, litigation privilege – that is privilege in relation to material collected for litigation – is a recognised part of legal professional privilege and continues to exist in Australia.

21. The critical element of such privilege is that the record or recording – being the surveillance film in the present case – must have been made or taken confidentially for the purpose of advice or litigation.[5] In order for the film to acquire privileged status, it must have been taken in circumstances that either clearly evince an intention of confidentiality or permit an intention of confidentiality to be inferred.

22. In my opinion, the subject video film came into existence under such circumstances and should therefore be considered to be privileged. That conclusion accords with the preponderance of authority in this area of the law of evidence.

THE WORKER'S ARGUMENT WITH RESPECT TO ORDER 3 SOUGHT IN THE APPLICATION

23. The essential elements of the worker's argument can be distilled as follows:

- *The Work Health Act* when read in context, particularly since the amendments of 1993, promotes the expeditious determination of compensation claims and a "cards on the table" approach to the

[5] Ligertwood n 3, p 273 [5.23].

question of whether the contents of video film should be disclosed prior to the hearing of the present proceedings;[6]

- The "cards on the table" approach to the disclosure of evidence to be adduced at trial is clearly contemplated by the terms of the *Work Health Act* and when read in context;[7]

- Section110A, which was introduced into the Act in 1993, was designed to promote expediency and efficiency in the determination of workers compensation matters and to minimise tactical manoeuvring or the taking of evidentiary points at trial, thereby encouraging a "cards on the table" approach to litigation;[8]

- Section 110B, which was also introduced in 1993, clearly evinces an legislative intent to introduce an "cards on the table" approach to the determination of worker compensation matters;[9]

- The legislative intent that proceedings be "fair, effective, complete, prompt and economical" is further demonstrated by the provisions of Rule 3.04 of the *Work Health Rules*;[10]

- The increasing relevance of court management of matters in an efficient manner coupled with the importance of the "cards on the table" approach to litigation supports the making of the third order sought.[11]

24. The worker relied on s 62A of the Interpretation Act which, along with the common law, permits a purposive approach to statutory interpretation.[12]

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[6] See p 2 of the written submissions of Mr McDonald QC dated 27 October 2006.
[7] See p 2 of the written submissions of Mr McDonald QC dated 27 October 2006.
[8] See p 5 of the written submissions of Mr McDonald QC dated 27 October 2006.
[9] See p 5 of the written submissions of Mr McDonald QC dated 27 October 2006.
[10] See p 5 of the written submissions of Mr McDonald QC dated 27 October 2006.
[11] See pp 6-7 of the written submissions of Mr McDonald QC dated 27 October 2006.
[12] The worker also relied on *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381, which holds that the process of statutory construction in relation to a statutory provision must always begin with an examination of the context of that provision.

According to the worker, the purpose of the *Work Health Act*, when read in context, is to ensure "efficient, expedient case management and to minimise legalistic adversarial and costly hearings".[13]

25. The worker also relied on s 62B of the Interpretation Act which permits recourse to extrinsic material as an aid in interpreting a statutory provision. The worker relied on the Second Reading Speech relating to the amendments introduced by the *Work Health Amendment Act* (No 2) of 1993 as part of the context in which the amendments, and the Act as a whole, should be read in order to discern the purpose of the Act.

26. The worker also relied on a number of authorities which deal with the "cards on the table" approach in varying degrees:

- Mercer v Chief Constable of the Lancashire Constabulary (1991) 2 ALL ER 504, 508;
- Khan v Armaguard Ltd (1994) 3 ALL ER 545, 550, 550-553;
- Robbins v Harbord (1994) 62 SASR 229 at 237;
- Cases Nos NT 94/281-291 (1995) 30 ATR 1279, 1280;
- BHP Pty Ltd v Mason (1996) 67 SASR 456, 461-465;
- Alphapharm Pty Ltd v Eli Lily Australia Pty Ltd (1996) 69 FCR 149, 163;
- Commissioner of Australia Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501, 543, 550, 564, 581, 583;
- Brown v Metro Meat International Ltd [2000] WASCA 123 at pars 21 to 22, 24;
- Boyes v Collins (2000) 23 WAR 123, 139 to 148;

[13] See p 4 of the written submissions of Mr McDonald QC dated 27 October 2006.

- State of Victoria v Davies (2002) 6 VR 245, 259-262;
- Alcoa of Australia Ltd v McKenna (2002) 8 VR 452, 462-464

27. In relation to the argument based on case management the worker drew the Court's attention to two cases: *Sali v SPC Ltd & Anor* (1993) 67 ALJR 841, 849; *State of Queensland v JL Holdings Pty Ltd* (1996-1997) 189 CLR 146, 153-154, 165-172.

28. In his further written submissions Mr McDonald said that the basis for the *Alphapharm* order was set out at page 163 of Justice Moore's judgment:

> "In my opinion, basic fairness suggests that if a party claims privilege and thereby precludes the other party from seeing the documents the subject of the claim, limits may be placed on the use that can be made of those documents at the trial itself. Notwithstanding the width of order 4 it is, in the circumstances, an appropriate one."[14]

29. Mr McDonald went on to make the following final submission in relation to the comments made by Justice Moore:

> "These comments reflect the Court's concern to avoid ambush or unfairness at trial. The types of unfairness that can ensue if such orders are not made or other procedural steps taken to avoid unfairness are reflected in the judgment of Justice of Appeal Ipp in *Boyes v Collins* (2000) 23 WAR 123 at pages 139-148."[15]

THE EMPLOYER'S POSITION WITH RESPECT TO ORDER 3

30. On behalf of the employer, Mr Morris submitted that the Work Health Court could not make the order sought because the Work Health Court was not a "cards on the table" jurisdiction". Furthermore, if the Court were to make the order sought it would have the effect of abrogating the right of legal professional privilege by compelling the employer to abandon the privilege at a time other than its choosing. It was the employer's contention that

[14] See pp 1-2 of Mr McDonald's further written submissions.
[15] See p 2 of Mr McDonald's further written submissions.

neither the Act nor its rules had expressly or by implication abrogated the privilege. The employer submitted that the authorities relied upon by the worker did not support the order being sought, and indeed at least one case – *State of Victoria v Davies* (supra) - supported the employer's argument.

31. In the employer's written submissions dated 9 November 2006, Mr Morris submitted that the order that was made in the Alphapharm case does not appear to have been based upon "any rule of court, practice direction or the like".[16]

32. Mr Morris further submitted that in the Alphapharm case Justice Moore did not provide "any justification or reasoning as to why such limits can be placed on privileged documentation that is or may be used in the course of the hearing and there has been no similar judicial statement by any of the Courts who have considered this question."[17] Consequently, Mr Morris submitted that Justice Moore did not rely upon any authority in making the order he made.

33. The following submission was made by Mr Morris:

> "The orders made by Justice Moore stand in contradistinction to the manner in which the Court of Appeal of Victoria in *Alcoa of Australia Ltd v McKenna* [2003] 8 VR 452 dealt with the issue of film in that case. In that event, the film was sought to be used by the employer of a worker injured in the course of his employment, but the employer refused to provide to the worker the opportunity to put the film in context by refusing to provide the worker with the dates during which the video was taken or by providing the maker of the film for cross examination. There, Chernov JA thought that it was open for the trial judge 'to conclude that it would be unfair to the respondent if the film was shown to him in cross examination in circumstances where the appellant effectively denied his counsel the opportunity of putting its content in context." That is not the case in the matter at hand, details having been already provided of the dates of surveillance and the availability of the maker of the film to give evidence open to the worker's counsel.

[16] See p 6 of Mr Morris' written submissions dated 9 November 2006.
[17] See p 7 of Mr Morris' written submissions dated 9 November 2006.

> There has been one other case where orders of the sort granted by Justice Moore have been raised and that is the case of *Fitzgerald v Munroe* (1998 VSC 30) and there Justice Beach referred to the *Alphapharm* decision and stated that 'in my opinion it is undesirable that I impose any such restriction on the plaintiff. To do so may well inhibit the trial judge". Although his Honour did not say so, the inference from his decision is that his view was adverse to the view taken by Justice Moore in *Alphapharm*. "[18]

CONSIDERATION OF THE COMPETING ARGUMENTS

34. The starting point is the submission made by Mr McDonald QC:

> "This application is not about any abrogation of the important principle of legal professional privilege; rather, it is about the Court's exercise of its proper control over its own practice and procedure."[19]

35. Mr Morris' retort is to the effect that this application concerns that very issue, namely, the abrogation of the privilege.

36. The primary task is to identify the real issue arising out of the worker's application.

The effect of the proposed order

37. The proposed order clearly places limits on the use that the employer may make at trial of any surveillance film or videotape or similar document in respect of which it has maintained a claim for privilege from inspection by the worker. The proposed order places limits on the ability of the employer to adduce evidence as to the contents of such material and its ability to cross-examine the worker in respect thereof. The imposition of those limits flow from the worker's failure, prior to trial, to abandon or waive its privilege over the material and to show its contents to the worker.[20]

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[18] See pp 8-9 of Mr Morris' written submissions dated 9 November 2006.
[19] See p 1 of the written submissions of Mr McDonald QC, dated 27 October 2006.
[20] See *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] 723 FCA 1, 14 August 19 per Moore J:
"…if a party claims privilege and thereby precludes the other party from seeing the documents the subject of the claim, limits might be placed on the use that can be made of the those documents at the trial."

38. The proposed order puts the employer between "a rock and a hard place". If the employer were to abandon or waive the privilege it would be compelled to permit the worker to inspect the visual material. On the other hand, the order, if made, exposes the employer to the risk that it may not be able to make forensic use of the evidence at trial if it maintains the privilege claimed.

39. As noted by Hunter, Cameron and Henning, it is not uncommon for films or videotapes surreptitiously made with a view to challenging the credibility of a claimant for compensation – in personal injury cases or worker's compensation cases – to be allowed to be "sprung" on a claimant during cross-examination.[21] Absent an order of the type sought here, a party is afforded a reasonable opportunity of presenting its case and being able to effectively cross-examine a witness whose credibility is in issue.[22] Cross-examination is most effective "when the evidence of a witness is able to be confronted by documents".[23] However, before that can happen it is necessary "to have the witness commit himself or herself to a precise version of relevant facts…".[24]

40. The limits sought to be imposed are considerable and potentially far – reaching and oppressive, as was recognised by the Court in *Alphapharm*, when making a comparable order in a similar context.[25] The proposed order requires the worker to obtain the Court's *permission to adduce, at trial, evidence of the contents of the privileged material or to cross-examine the worker in respect thereof.* That is the effect of the leave provisions of the proposed order.

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[21] Hunter J, Cameron C and Henning T *Litigation Civil Procedure* (7th edition, Lexis Nexus, Butterworths, Australia 2005) par 8.38, pp 302-303. In that regard, the authors cite the following authorities: *Australian Postal Commission v Hayes* (1989) 18 ALD 135 and *Re Lindsey and Australian Postal Commission* (1989) 18 ALD 340.
[22] See *Australian Postal Commission v Hayes* (1989) 18 ALD 135 at 6.
[23] See *Australian Postal Commission v Hayes* (1989) 18 ALD 135 at 6.
[24] See *Australian Postal Commission v Hayes* (1989) 18 ALD 135 at 6.
[25] See *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* [1996] 723 FCA 1 at 14.

41. In my opinion, the proposed order impinges upon the usual reasonable opportunity given to a party to present its case, not only in terms of adducing its own evidence, but also in terms of "springing" a film or video on a claimant, and thereby testing his evidence.[26]

42. The granting of leave is a discretionary matter, and the discretion must be exercised judicially. It is implicit in the nature of the discretion that a request for leave may be accepted or denied. Therefore, if the proposed order were to be made then the employer would be exposed to the risk that it would not be able to make use of the privileged material at trial.

43. As indicated by Moore J in *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (supra) the Court may permit use of the privileged material "if it appears appropriate".[27]

44. Although his Honour did not indicate the circumstances under which it may be considered appropriate to permit use of privileged material at trial, guidance can be obtained from a number of authorities that were provided to the Court for its consideration.

45. In *Khan v Armaguard Ltd* [1994] 3 ALL ER 545 the Court heard an appeal from a decision of a district judge dismissing the defendant's application for leave under RSC Ord 38, r 5 to produce video film as evidence at the trial without prior disclosure to the plaintiff or his solicitors. The application was refused on the ground that non-disclosure was not in the interests of a fair trial.

46. The relevant rule provided:

> "Unless, at or before the trial, the Court for special reasons otherwise orders, no plan, photograph or model shall be receivable in evidence at the trial of an action unless at least 10 days before the commencement of the trial the parties, other than the party producing

[26] See *Australian Postal Commission v Hayes* (1989) 18 ALD 135 at 6.
[27] (1996) 69 FCR 149, 163

it, have been given an opportunity to inspect it and to agree to the admission thereof without further proof."

47. In my opinion, this rule has a similar effect to that of the order sought by the worker in the present case. Both require the leave of the Court before use can be made at trial of any material that has not been previously disclosed on account of a claim of privilege over that material.[28]

48. In *Khan v Armaguard Ltd* (supra) the Court dismissed the defendants' appeal. The Court held that the "cards on the table" approach to litigation meant that in personal injury cases disclosure of video films of the type under consideration should almost always be made, and an order under the relevant rule of court preventing pre-trial disclosure of video film should only be made in the rarest of circumstances. The Court relied upon a number of factors that favoured pre-trial disclosure. It was in the interests of the parties, the legal aid fund and the efficient management and dispatch of the case load of courts that cases should be disposed of at an early stage in the proceedings. Early disclosure served those interests and the ultimate objective. The Court rejected the defendants' contention that non-disclosure of the film would enable them to confront at trial the plaintiff, who was shown to be a malingerer, with the film and expose his fraudulent claim. The Court also rejected the defendants' argument that pre-trial disclosure would give the plaintiff an opportunity to trim his evidence. To the contrary, it held that in cases where there was clear film evidence to support a fraudulent claim, the possibility of the claimant trimming his evidence was most remote.

49. The decision in *Khan v Armaguard* (supra) leaves very little room for thediscretion being exercised in favour of non-disclosure. Although the Court gave no indication as to the circumstances under which leave would

[28] Although it is accepted that Order 38 r 5 also covers situations where non –compliance with the rule is due to other circumstances.

be granted under Order 38 r 5, Counsel for the plaintiff made submissions as to the rationale behind the discretion.[29]

50. Although *Robbins v Harbord* (1994) 62 SASR 229 was not concerned with a rule of court nor a judicial order imposing restrictions on the use of privileged material, it was concerned with the stage at which film evidence in the possession of one party should be produced to the other party in a proceeding, in the exercise of a judicial discretion.

51. The Court was concerned with the effect of s 96(1a) of the *Workers Rehabilitation and Compensation Act:*

> "A party to proceedings before a Review Officer must disclose to the Review Officer and all other parties to the proceedings the existence of all material in the party's possession or power that may be relevant to the proceedings and must, if the Review Officer so requests, produce all or any of that material to the Review Officer."

52. In proceedings before a Review Officer, the Officer made an order that the defendant disclose the existence of all relevant material, but excluded from the ambit of that order video film taken of the plaintiff and any other material subject to a claim of legal professional privilege. A declaration was sought that the defendant be obliged to produce to the Review Officer and to the plaintiff any video film, whether or not the material attracted a claim for legal professional privilege.

53. Apart from concluding that it was implicit in s 96(1a) that legal professional privilege did not apply to material relevant to the proceedings and that the privilege did not apply to the video film and must be produced to the Review Officer, if requested, the Court held that the subsection only obliged production of material to the Review Officer, it then being for that Officer

[29] At page 552 of the decision the Court noted the submissions made by counsel. Counsel submitted that Order 38 r 5 created a discretion because of the "rule – making body's reticence in laying down an absolute rule". Counsel also submitted that the rule was not confined to personal injury cases. He accepted, at the suggestion of the Court, that "there may be situations in which a video film is either in the hands of a third party or some reason does not come to light until less than ten days before trial, which would be within the ambit of Ord 38, r 5".

"to decide whether the material should be produced to the plaintiff and if so the stage of the proceedings at which such production should be made".[30] What then fell from the Court is of relevance to the present case:

> "If the material is relevant it will presumably be used on the Review and must as a matter of procedural fairness be produced to the plaintiff. The stage at which this should be done may be more difficult to determine. A direction for premature production to the plaintiff might have the effect of depriving the defendant of natural justice: *Australian Postal Service v Hayes* (1989) 23 FCR 320. I should think that there would be every justification in a case such as the present for withholding a film of the plaintiff's activities from the plaintiff until he has been cross-examined about his physical capacity and activities."

54. In this case the review officer was compelled, as a matter of procedural fairness, to the produce the film to the plaintiff; though he had a discretion as to the time at which the film should be so produced. However, that judicial discretion had, in turn, to be exercised in accordance with the requirements of procedural justice. The Court (constituted by King CJ, Mohr and Nyland JJ) stated that it would seem appropriate, in the circumstances of the case, for the Review Officer, in the exercise of his discretion, to withhold the film from the plaintiff until cross-examination of the plaintiff. The natural inference is that the Court considered that it would be inappropriate to produce the film to the plaintiff before trial or at least before cross examination.

55. In *BHP Pty Co Limited v Mason and Anor* (1996) 67 SASR 456 a review officer, dealing with a claim for worker's compensation, had ordered the employer to produce a film of the worker to the worker or his solicitor prior to the commencement of the hearing. The order was made by the Review Officer in the exercise of a judicial discretion, following upon the operation of section 96(1)(a) of the *Workers Rehabilitation and Compensation Act* –

[30] *Robbins v Harbord* (1994) 62 SASR 229 at 237.

the same legislative provision considered in *Robbins v Harbord* (supra). The employer applied for judicial review.

56. On appeal the Court (constituted by Debelle J) quashed the order of the Review Officer that the film be produced before cross–examination of the worker:

> "The review officer has taken the view that only in unusual cases should the discretion be exercised to deny the inspection of a film. That view is inconsistent with the decision in *Robbins v Harbord,* a decision of the Full Court which is binding on me. Further, in my respectful view, the views expressed in *Robbins v Harbord* and *Hayes* are to be preferred to the views of the two decisions of the Administrative Appeals Tribunal. The direction that the film be produced for inspection had the effect of infringing the right of the plaintiff to present its case and so constituted a breach of the requirements of procedural fairness. Finally, the review officer has failed to weigh the relevant factors and consider whether in all the circumstances procedural fairness required that the film not be produced for inspection."[31]

57. In this case the Court held that it was not appropriate, in the exercise of the discretion conferred upon the review officer, for him to order the employer to produce the film for inspection prior to the commencement of the hearing.

58. In *Cases Nos NT 94/281 -291* (1995) 30 ATR 1279, 1280 Mathews J dealt with section 35 (2) (c) of the *Administrative Appeals Tribunal Act* which provides :

> "Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order –
>
> (a)…
>
> (b)…
>
> (c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the

[31] *BHP Co Limited v Mason* (1996) 67 SASR 456 at 465.

> Tribunal, or the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding."

59. Mathews J made an order allowing the applicants access to a number of documents prior to the commencement of the hearing. The factors in favour of early disclosure were:

- Recent increased openness in the litigation process, coupled "with a move away from the traditionally adversarial 'ambush' method of conducting trials;[32]

- Openness and co-operation can often facilitate settlement of actions;

- The "cards on the table" approach "has recently led the English courts to conclude that, in all but very rare personal injury cases, video films should be disclosed to plaintiffs: *Khan v Armaguard Limited* [1994] 3 ALL ER 545"

- Procedural fairness:

> "The overriding consideration ….is that of procedural fairness. Would a party be so impeded in the presentation of its own case and the challenging of its opponent's case that fairness dictates that relevant material be withheld from the opponent? The situations in which this question were to receive an affirmative answer would, in my view, be rare indeed. It would certainly not be sufficient for a party merely to show that the material was capable of contradicting another party's version, even accepting that the credibility of that party was critical to the case."[33]

- The nature of the jurisdiction:

> "The Tribunal is bound, under s 33 of the AAT Act, to conduct its proceedings with as little formality and technicality as the circumstances permit. It is of course bound to apply the rules of procedural fairness. But unless these rules or a legislative enactment require that relevant material be withheld from a party, then the fundamental principles under which the AAT operates – as enshrined

[32] *Cases Nos NT 94/281-291,* p 5.
[33] *Cases Nos NT 94/281-291,* p 5.

in subsections 35(3) and 36(4) of the AAT Act – dictate that there be openness in its proceedings, and that each party be made aware of all relevant material in the possession of the other."

60. In *Brown v Metro Meat International Ltd* [2000] WASC 123 the Full Court of the Supreme Court of Western Australia discussed the circumstances under which video surveillance material, being the subject of a claim to legal professional privilege, ought to be disclosed.

61. A review officer had ordered the employer in a workers compensation matter to provide the worker and her general medical practitioner with an opportunity to view video surveillance film of the worker taken by private investigators. It is not clear from the decision of the Full Court under what authority the review officer was exercising his discretion. Presumably, the review officer was exercising his discretion pursuant to Order 36 r 4 of the Supreme Court Rules.[34] The decision of the review officer went on appeal to a Compensation Magistrate who reversed the order for disclosure. The decision of the Compensation magistrate was appealed. On appeal, Wheeler J set aside the magistrate's order and dismissed the appeal to the Compensation Magistrates' Court.

62. In setting aside the Magistrate's order, his Honour relied upon the following considerations:

- The element of unfairness:

  Unfairness occasioned to the employer in allowing a worker, who is not truthful and malingerer, to see surveillance film in advance is but one aspect of unfairness. A worker who is not untruthful and not a malingerer may in some cases suffer significant disadvantage through lack of access to surveillance film;

[34] That rule provides:
"Unless before or at trial the Court otherwise orders, no plan, photograph or model shall be receivable in evidence at the trial of an action unless at least 10 days before the trial the parties, other than the party that intends to produce it, are given the opportunity to inspect it and to agree to its admission without further proof."

- The opportunity to call explanatory evidence:

  "Depending upon the nature of the disability which the worker alleges and the nature of the activities shown on the videotape, the worker may be able to give or call evidence which explains the activities carried out on the video; perhaps they were undertaken at a time after certain treatment had been undertaken, or perhaps they were followed by severe renewed symptoms…"[35]

- The proper and effective cross–examination of expert witnesses called by the employer/insurer:

  "It may be on occasion that medical advisers of the worker, particularly if assisted by comments or explanation from the worker, will form a view of the videotaped material different from that of the experts to whom the film has been shown by the employer or insurer. The worker will be disadvantaged if that material is not able to be put to the employer/insurer's witnesses during cross-examination. Such disadvantage is particularly likely during the course of litigation involving personal injury, where medical witnesses are generally called in a sequence which is convenient to them. Making the videotape available to the appellant only at a hearing would be likely, therefore, not only to require an adjournment, but also to require the respondent's medical practitioners to revisit the appellant's condition a considerable time after they had last seen [the worker], and to review videotapes which they may …be unwilling to view again"[36];

- Disclosure facilitates settlement:

  "… disclosure of the videotaped material allows the worker and his or her advisers to consider the possibility of settlement without the spectre of some action which is forgotten or able to be innocently explained being produced at trial in a manner which has a disproportionate impact."[37]

- Prior commitment of a worker to some facts:

  "… a worker will generally have committed to at least some facts both in documentation associated with a claim and in discussions

[35] *Brown v Metro Meat International Ltd* [2000] WASC 123 at 8.
[36] *Brown v Metro Meat International Ltd* [2000] WASC 123 at 8.
[37] *Brown v Metro Meat International Ltd* [2000] WASC 123 at 8.

with medical experts, and the degree to which this is so will perhaps be a relevant factor."[38]

63. The upshot of *Brown v Metro Meat International Ltd* [supra] is that in analogous cases, where a discretion is being exercised, it is always necessary to weigh the competing considerations. An order restricting access to videotaped material prior to the commencement of a trial may be appropriately made, "depending on the circumstances of the individual case".[39] However, as recognised in *Brown v Metro Meat International Ltd* [supra at 9] "there are, equally, many cases in which such an order would not be appropriate".

64. The case of *Boyes v Colins* (2000) WAR 123 provides further guidance as to the circumstances under which it is appropriate to order pre-trial disclosure of privileged material.

65. The issue in that case was whether the respondent should be entitled to an order pursuant to Order 36 r 4 of the Supreme Court Rules,[40] permitting the use of surveillance film at trial without first giving the appellant an opportunity of inspecting it. In deciding that issue the Court discussed the various factors, including policy considerations, relevant to the proper exercise of the discretion. Ipp J expressed the view that "in determining an application under O 36 r4, the court should be biased towards disclosure, subject to there being persuasive grounds by reason of the particular circumstances of the individual case to make an order in terms of the rule".[41]

66. The intrinsic value of the cases discussed above is that they demonstrate the real likelihood that if the order as sought by the worker in the present case is made the discretion will be exercised in favour of the worker and the

[38] *Brown v Metro Meat International Ltd* [2000] WASC 123 at 9.
[39] *Brown v Metro Meat International Ltd* [2000] WASC 123 at 9.
[40] For the content of this rule see n 34.
[41] (2000) 23 WAR 123 at 141 [59].

employer will be precluded from making forensic use of the privileged material.

67. Accordingly, the Court needs to be very circumspect about making the order, and should only make the order where there is a firm basis for making the order.

Does the Work Health Court have the power to make the order?

68. Although the decision of Justice Moore in the *Alphapharm* case is not binding on this court, it represents a persuasive or advisory precedent. However, in determining the weight to be accorded to the decision it is relevant to take into account the absence of any other authority that would support the making of the type of order that was made in *Alphapharm*, in circumstances where such an order does not appear to have been sanctioned by any rule of court, practice direction or comparable procedural mechanism. It is also relevant to take into account any other persuasive authorities that take a contrary position. Finally, the basis upon which the order was made in *Alpahapharm* needs to considered in determining the persuasiveness of the precedent.

69. In *State of Victoria v Davies* (2003) 6 VR 245 the Court of Appeal allowed an appeal against the ruling of a trial judge in relation to the use that could made of surveillance videotape. That decision is in stark contradistinction to the ruling made by Justice Moore in *Alphapharm.*

70. In *State of Victoria v Davies* (supra) the defendant had included in the amended court book index a collection of surveillance videos of the plaintiff brought into existence after the commencement , and for the dominant purpose, of the litigation. Having expressed the opinion that generally there should be pre-trial disclosure of video surveillance in the interests of securing a fair trial the trial judge ordered, inter alia, that the defendant make the subject video material available for inspection by the

plaintiff. The defendant declined to make the material available for inspection. At the trial, and during cross-examination of the plaintiff, the defendant's counsel informed the trial judge that he proposed to put the surveillance video to the plaintiff. The trial judge refused leave to use the surveillance video during cross-examination. The trial judge held that the plaintiff had impliedly waived its privilege in the material by the listing of it in the amended court book index. The defendant appealed the trial judge's ruling in relation to the use of the surveillance videotapes.

71. Apart from holding that there had been no implied waiver of privilege over the surveillance videos, the Court of Appeal (constituted by Callaway, Batt and Chernov JJA) allowed the appeal against the trial judge's ruling with respect to the videotapes for the following reasons:

> … the question arises whether his Honour was entitled to refuse to allow the appellant to use the videotapes in cross-examining the respondent. Now, legal professional privilege is a substantive general principle of the common law of great importance, which is not to be sacrificed even to promote the search for justice or truth in an individual case or to be abolished or cut down otherwise than by clear statutory provision or to be narrowly construed: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 -491 per Deane J. This was re-emphasised by the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561. It is clear as a matter of principle, and from the statements in the two High Court cases just mentioned, that a court cannot, without the authority of statute or of valid rules of court, by order, in effect compel a party entitled to legal professional privilege in a document to abandon or waive that privilege by, for instance, producing it before trial to an opposing party against the will of the first-mentioned party, or prevent the party from tendering or using the document in a hearing where the party has not already disclosed it to the opposing party or, alternatively, where the party does not thereafter first do so."[42]

72. In addition, the Court of Appeal held that the rules of court did not authorise the making of an order refusing to allow the defendant to use the videotapes in cross-examination or, if it became appropriate, to tender them in evidence, whether the refusal be absolute or conditional upon the

[42] (2003) 6 VR 257.

defendant's not having already disclosed them to the plaintiff or upon the defendant's not doing so thereafter.[43]

73. The approach taken by the Court of Appeal in *State of Victoria v Davies* (supra) is in direct conflict with the approach taken by Justice Moore in the *Alphapharm* case. In the latter case the Court was prepared to place restrictions on the use that could be made of privileged material, in the absence of any rules of court that had the clear effect of abolishing, cutting down or otherwise interfering with the fundamental principle of legal professional privilege.

74. The decision in *State of Victoria v Davies* (supra) is persuasive authority, which must be considered along with the decision of Justice Moore in the *Alphapharm* case. I prefer to follow the approach taken by the Court of Appeal in *State of Victoria v Davies* (supra) for the reasons that follow.

75. The Work Health Court does not adopt a "cards on the table" approach to the disclosure of evidence to be adduced at trial. There is no explicit provision in the *Work Health Act* evincing an intention to introduce a "cards on the table" approach to the determination of worker compensation matters. Nor is there any rule of court or practice direction that directly points in that direction. It is implicit in the decision of *State of Victoria v Davies* (supra) that there has to be a clear legislative intention to create a "cards on the table" approach to litigation, if a court is to cut across such a fundamental principle as legal professional privilege. It is also clear from the various authorities provided in support of the worker's case that where the court has imposed restrictions on the use that could be made of privileged material at trial the relevant legislation has established a "cards on the table" approach to litigation by requiring prior disclosure of the evidence.

76. In his written submissions, Mr McDonald referred to a number of provisions

[43] (2003) 6 VR 258

in the Act – ss 110A and 110B and rule 3.04 – as being indicia of a legislative intent to create a "cards on the table" jurisdiction. Mr McDonald also sought to rely upon a purposive approach to the construction of the Act, which he submitted sanctioned a "cards on the table" approach to the determination of worker's compensation matters.

77. I am not persuaded by those submissions. Although the Act clearly places an emphasis on the "fair, effective, complete, prompt and economical" determination of cases coming before the Work Health Court, its does not require a "cards on the table" approach to the disclosure of evidence that is properly the subject of legal professional privilege.

78. Although this argument was not relied upon by the worker, any court has "the discretionary power to regulate the manner in which evidence is given so as to ensure that the issues before the court are investigated not only fully, but fairly": *Alcoa of Australia v McKenna* (2003) 8 VR 452 at 463; *Mooney v James* [1949] VLR 22 at 28-29. However, my opinion, it would be wrong to invoke that discretionary power to make the order sought in the worker's application.

79. The starting point is the judgment of Barry J in *Mooney v James* (supra). The principal issue before the court was whether it had the power to refuse counsel the right to put leading questions in cross-examination to a witness who was partisan to the cross-examining party. His Honour reached the conclusion that the court had the discretionary power to regulate the manner in which evidence was elicited in order to ensure fairness and, on that ground, to prevent counsel form putting questions of a leading nature to a witness:

> …It is the duty of the Judge to regulate and control the proceeding so that the issues for adjudication may be investigated fully and fairly…The existence of this duty clothes the Judge with all the discretionary powers

> necessary for the discharge of the duty, and he may therefore control and regulate the manner in which the evidence is presented or elicited.[44]

80. It is important to put those observations in context. *Mooney v James* (supra) was specifically concerned with the court's inherent power to control the questioning of witnesses. While the observations are of a general nature, one needs to be circumspect about extending them to situations, like the present, which involve the regulation and control of the use of privileged material at trial. In my opinion, there is a very substantial difference between controlling the cross-examination of a witness in the interests of fairness and controlling the forensic use to which undisclosed privileged material may be put at trial, ostensibly as a matter of fairness. In the latter case, the control or regulation of evidence impinges upon a fundamental right, namely that of legal professional privilege.

81. It should be noted that in *Alcoa of Australia v McKenna* (supra) the issue was as follows. During cross-examination of the worker, counsel for the employer attempted to show the worker a surveillance film, which was said to depict him at work. The worker's counsel objected to the film being shown to the worker, unless the employer furnished the dates on which the worker had been put under surveillance, or made the surveillance officer available for cross-examination. When the employer refused to do either of those things the trial judge ruled that the film could not be shown to the worker because it would deprive his counsel of the opportunity to put the content of the film in proper context. However, this is quite different to controlling evidence in a way that impinges upon the exercise of legal professional privilege.

82. In my opinion, the discretionary power of a court to regulate the manner in which evidence is given so as to ensure that the issues before the court are investigated fully and fairly should not be invoked in situations like the present or, if invoked, should not be exercised in a way that affects or

[44] *Mooney v James* [1949] VLR 22 at 21.

interferes with legal professional privilege. Either of those approaches are consistent with, and supported, by the reasoning of the Court of Appeal in *State of Victoria v Davies* (supra).

Dated this 3rd day of May 2007.

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Dr John Lowndes
STIPENDIARY MAGISTRATE