SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2006

No.	Name of Matter	Page No
Tuesday, 7 November 2006		
1.	Bennett & Ors v. Commonwealth of Australia	1
Wednesday, 8 November 2006		
2.	Commonwealth of Australia v. Cornwell	2
Thursday, 9 November 2006		
3.	State of New South Wales v. Fahy	3
Tuesday, 14 November 2006		
4.	Forsyth v. Deputy Commissioner of Taxation	5
Wednesday, 15 November 2006		
5.	Z v. N	6
Thursday, 16 November 2006		
6.	The Queen v. Hillier	8

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BENNETT & ORS v COMMONWEALTH OF AUSTRALIA (S111/2006)

Writ of Summons: filed 12 April 2006

Special Case: filed 4 September 2006

This Special Case involves the extent of the Commonwealth's powers in respect of the external territory of Norfolk Island and arises from recent amendments to the Island's electoral laws inserting a requirement of Australian Citizenship to be included on the electoral roll and to stand as a candidate for the Local Assembly.

The plaintiffs filed a Writ of Summons in the Court alleging that Norfolk Island is a "*territory placed by the Queen under the authority of and accepted by the Commonwealth*" within the meaning of s.122 of the Constitution but is not relevantly part of the Commonwealth, and that the amendments are not "*laws for the Government of*" Norfolk Island within the meaning of s.122.

The plaintiffs claim that historically Norfolk Island never became part of the Commonwealth in any relevant sense and was placed under the authority of the Commonwealth on the footing that it was a "distinct and separate settlement". This, it is said, places limits on the power contained in s.122 in that the "government" of Norfolk Island, as vested in the Commonwealth, is the government of the Island as a distinct and separate settlement, and does not extend to the alteration of that status or character. It is conceded that this result would be inconsistent with *Berwick Ltd v Gray* (1976) 133 CLR 603.

The Special Case reserves the following questions for consideration by the Full Court:

- Is s.3 of the *Norfolk Island Amendment Act* 2004 (CTH) insofar as it gives effect to:

  a) Items 1, 3 and 4 in Part 1 of Schedule 1 to that Act; and
  b) Item 5 in Part 1 of Schedule 1 to that Act to the extent that that item inserts into the Principal Act the following new provisions:

     (i) paragraph 39A(1)(b)
     (ii) paragraph 39A(2)(a)
     (iii) s.39C and
     (iv) the definition of Returning Officer in s.39D

  valid ?

- Who should pay the costs in respect of the Special Case?

  Notice of a Constitutional Matter has been given as required by s.78B of the *Judiciary Act.*

COMMONWEALTH OF AUSTRALIA v CORNWELL (C10/2006)

Court appealed from: Court of Appeal of the Supreme Court of the Australian Capital Territory

Date of judgment: 8 May 2006

Date of grant of special leave: 1 September 2006

The respondent, John Griffith Cornwell, was employed by the Commonwealth in the 1960s as an apprentice spray painter. His employment status was as a "temporary" or "industrial" employee and as such he was not entitled as of right to join and contribute to the Commonwealth Superannuation Fund ("the Fund"), although he could apply to become a member. In July 1965, the respondent met with Mr Simpson, who was the manager of the Transport Section of the Department of the Interior and the respondent's senior manager, to seek advice about becoming a member of the Fund. Mr Simpson told him that he was not entitled to join the fund "but I will see what I can do". In fact, Mr Simpson did make some enquiries and the respondent's personnel file contained some correspondence which could have led to the respondent being accepted into the Fund, but Mr Simpson never informed the respondent of this. It was not until 1987, when his position was reclassified as a permanent employee, that the respondent joined the Fund and began to make contributions. The respondent retired in 1994, but his retirement benefit was significantly less than it would have been if he had joined the Fund in 1965 or 1966. The respondent brought an action for damages for negligent misstatement in November 1999.

The appellant pleaded a defence under section 11 of the *Limitation Act* 1985 (ACT) that the action was commenced more than the permitted six years from the date on which the cause of action first accrued. The Supreme Court (Higgins CJ) held that the respondent's cause of action first accrued at the time when the respondent retired, in December 1994, which was the time at which the respondent suffered damage resulting from the negligent misstatement.

The Court of Appeal (Crispin P, Connolly and North JJ) dismissed the appellant's appeal, and held that where loss is contingent on the happening of a future event (here, retirement by reason of age or disability), the cause of action does not arise until the happening of that event, relying on the decision of *Wardley Australia Limited v The State of Western Australia* (1992) 175 CLR 514. The Court rejected the appellant's argument that, with changes to the Fund which affected the calculation of the respondent's retirement benefit, the loss became measurable at each of those points in time and that the cause of action arose at that time.

The grounds of appeal include:

- Whether the Court of Appeal erred in concluding that the respondent's cause of action did not accrue until the happening of the contingency, being his retirement in December 1994.

STATE OF NEW SOUTH WALES v FAHY (S341/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 4 April 2006

Date of grant of special leave: 1 September 2006

Ms Fahy is a police officer with Post-Traumatic Stress Disorder ("PTSD"). She developed that condition after attending the aftermath of an armed robbery where she treated a person with serious injuries. Ms Fahy subsequently brought a modified claim for common law damages pursuant to the *Workers Compensation Act* 1987 (NSW).

On 28 February 2005 Judge Graham held that Senior Constable Evans, who arrived at the scene with Ms Fahy, was negligent in failing to assist her as she attended the victim. His Honour further held that an Inspector who arrived shortly afterwards was also negligent. This was due to the insensitive way in which he dealt with Ms Fahy. In addition, Judge Graham held that the State of New South Wales ("the State") was negligent in failing to provide her with appropriate counselling and support. His Honour held that those acts and omissions materially contributed to the onset of Ms Fahy's PTSD.

On 4 April 2004 the Court of Appeal (Spigelman CJ, Basten JA & Campbell AJA) unanimously held, in relation to the duty of care, that an employment relationship is one that gives rise to a duty of affirmative action. Their Honours further held that the law also recognises a duty of affirmative action from one employee towards another in police officers. The Court found that Senior Constable Evans' failure to provide Ms Fahey with appropriate support involved a breach of such a duty. Justice Campbell however held that the Inspector had not breached any duty of care to avoid the risk of psychiatric injury.

With respect to causation, Chief Justice Spigelman and Justice Campbell held that the primary cause of Ms Fahy's PTSD was her exposure to the victim in the doctor's surgery. Her attendance at the scene of the armed robbery was however a contributing factor. The onus therefore shifted to the State to establish that Ms Fahey's injury would have occurred regardless. Justice Basten however held that Ms Fahy's experience of tending to the severely wounded victim would have probably caused a psychological condition anyway. It was also likely that her condition would have been less severe without the State's failure to provide reasonably safe conditions of employment.

With respect to damages, Chief Justice Spigelman and Justice Campbell held that the State was liable for the whole of the injury for which its conduct had materially contributed. Justice Basten however held that Judge Graham should have sought to identify that proportion of the harm suffered by Ms Fahy which was properly attributable to the State's breach of its duty of care. If that exercise was not available, the trial judge should have reduced the damages to take account of the possibility that some level of disability would have occurred without the State's negligent conduct.

All Justices however held that Ms Fahy's failure to take her prescription anti-depressant medication meant she did not take all reasonable steps to mitigate her loss. The loss attributable to her employer therefore needed to be appropriately reduced.

The grounds of appeal are:

- The Court of Appeal was wrong when it found that the duty of care of the Appellant as employer included a duty of one employee to take affirmative action to take reasonable care to prevent injury to another employee.

- The Court of Appeal failed to identify the content of the Appellant's duty of care to the Respondent.

- The Court of Appeal was wrong to hold that the injury suffered by the Respondent was reasonably foreseeable.

- The Court of Appeal was wrong to find that the Appellant had breached its duty of care to the Respondent.

On 13 October 2006 the Appellant filed a summons, seeking leave to add the following as a ground of appeal:

- That the Court of Appeal erred in following the decision in *Wyong Shire Council v Shirt* (1979-80) 146 CLR which is wrong and should no longer be followed.

FORSYTH v DEPUTY COMMISSIONER OF TAXATION (S543/2005)

Court appealed from: New South Wales Court of Appeal

Date of Judgment: 20 December 2004

Date of grant of special leave to appeal: 7 October 2005

The appellant was the director of a company which failed to remit group tax deductions at various times over a two year period. The appellant became personally liable to pay a penalty equal to the unpaid amount of the company's liability under s 222AOC of the *Income Tax Assessment Act* 1936. The Commissioner issued three notices under s 222AOE of his intention to commence proceedings to enforce the penalty. Each notice was in respect of a discrete period. The appellant failed to comply with the notices and the Commissioner commenced recovery proceedings against the appellant in the District Court of New South Wales. Judgment was entered in favour of the respondent in the sum of $414,326.45.

The appellant appealed, claiming that the District Court had no jurisdiction to determine the proceedings or alternatively, that the notices were invalid. The appellant submitted that the District Court was deprived of jurisdiction by reason of an amendment made to the *Supreme Court Rules* on 30 June 2000, assigning to the Equity Division of the Court proceedings in relation to any provision in a Commonwealth Act by which a tax, fee, duty or other impost was levied, collected or administered by or on behalf of the Commonwealth.

The Court of Appeal dismissed the appeal, holding per Spigelman CJ (Giles JA and Gzell J agreeing) that the jurisdiction of the District Court under s 44(1)(a) of the *District Court Act* 1973 (NSW) was fixed at the date the *District Court Amendment Act* 1997 came into effect and accordingly the District Court had jurisdiction to entertain the proceedings. The Court commented "It is most unlikely that Parliament intended that the jurisdiction of the District Court was able to be modified by the Supreme Court Rule Committee."

The appellant has issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). Only the State of New South Wales has indicated an intention to intervene.

The respondent has filed an amended notice of contention asserting that the decision of the Court below should be affirmed, but on the ground that the Court below erroneously decided or failed to decide some matter of fact or law.

The grounds of appeal include:-

- The Court of Appeal erred in holding that the District Court of New South Wales had jurisdiction to hear and dispose of the actions raised in the Proceeding.
- The Court of Appeal should have held that:
  - s 44(1) of the *District Court Act* 1973 (NSW) conferred jurisdiction on the District Court of New South Wales to hear and dispose of any action of a kind which if brought in the Supreme Court of New South Wales, at the time the action was instituted, heard and disposed of by the District Court of New South Wales would be assigned to the Common Law Division of the Supreme Court of New South Wales.

<u>Z v N</u> (S229/2006)

<u>Court appealed from</u>: New South Wales Court of Appeal

<u>Date of judgment</u>: 19 November 2004

<u>Date of grant of special leave</u>: 16 June 2006

This matter involves the interpretation of sections 18(2) and 18B(4) of the *New South Wales Crime Commission Act* 1985 ("the Act"). It specifically concerns whether legal professional privilege, public interest immunity or a fear of reprisals can be relied upon for refusing to answer questions.

The Appellant is a solicitor who was retained by X in respect of passing information to the police about M (without X's identity being disclosed). As a result, the police acted against M on several occasions. In November 2002 M was shot, but survived. A detective told the Appellant that he suspected that police were involved in that shooting and he requested X's name and address. The Appellant declined on the basis of both legal professional privilege and his fear of reprisals to himself and his family.

In September 2003 the Appellant attended the New South Wales Crime Commission ("the Commission") and declined to answer questions about X's identity and address. He relied, inter alia, upon section 18B(4) of the Act which provides in part "....the legal practitioner or other person is entitled to refuse to comply unless the privilege is waived....However, the legal pratitioner must, if so required....furnish to the Commissioner the name and address of the person to whom or by whom the communication was made."

The Appellant sought a review of the presiding member's direction in the Supreme Court. Justice Grove dismissed that application, holding that the communication by X to the Appellant of his identity was not a privileged communication. His Honour also held that even if it was, the proviso in section 18B(4) of the Act overrode it.

The Court of Appeal (Mason P, Giles JA and Wood CJ at CL) also refused the Appellant leave to appeal. Their Honours held, by majority, that section 18B(4) of the Act gave the presiding member a discretion to require an answer even where a person's name and address themselves were privileged. They further found that that discretion had not miscarried.

The grounds of appeal are:

- The Court of Appeal should have held that protection from disclosure of privileged communications given by sub-section 18B(4) of the Act extends to protection from disclosure of the name and address of a client.

- The Court of Appeal erred in as much as the majority (Mason P and Wood CJ at CL, but not Giles JA) found that the protection given to privileged communications by sub-section 18B(4) of the Act excludes from its operation the name and address of a client.

- The Court of Appeal should have held that the communication of the name and address of the Appellant's former client, X, is subject to legal professional privilege.

- The Court of Appeal should have held that the Appellant has a "reasonable excuse" under subsection 18B(4) of the Act for refusing to answer questions seeking the name and address of his former client.

THE QUEEN v HILLIER (C1/2006)

Court appealed from: Court of Appeal, Supreme Court of the Australian Capital Territory

Date of judgment: 15 December 2005

Date referred to Full Court: 4 August 2006

The respondent, Steven Wayne Hillier, was charged with the murder of his former de facto partner, Anna Louise Hardwick, to which he pleaded not guilty. On 26 November 2004, following a jury trial, he was found guilty and sentenced to 18 years' imprisonment with a non-parole period of 13 years. The respondent appealed to the Court of Appeal which, on 15 December 2005, by majority allowed his appeal and set aside his conviction and sentence. The Crown seeks leave to appeal to the High Court from that decision, to set aside the orders of the Court of Appeal or in the alternative for an order that the respondent be retried. The matter was referred to the Full Court for hearing as if on appeal.

A few days before Ms Hardwick's death, the Family Court made final orders awarding custody of the two children of the relationship to her. There was evidence of considerable animosity by the respondent towards the deceased. The deceased was discovered by her parents, lying on the floor of her bedroom. There was no sign of forced entry to the house. A post-mortem examination determined that the deceased had died from neck compression, and not from the effects of a small fire in the bedroom, which appeared to have been deliberately lit to conceal the cause of death. DNA material was found on the lapel of the deceased's pyjamas, purchased some time after her separation from the respondent, which could have been that of the respondent, who was alone on the night the deceased was murdered. The respondent denied any involvement in Ms Hardwick's death.

In the Court of Appeal, the respondent, although represented by counsel, sought and obtained leave to address the Court, and also handed up a substantial volume of written material, much of which had not been tendered during the trial. By majority (Higgins CJ and Crispin J, Spender J dissenting), the Court of Appeal upheld the appeal and set aside the conviction on the ground that the verdict of the jury was unreasonable. The majority held that a number of factual issues, which had not been advanced during the trial or appeal and several of which were only advanced in the material handed up by the respondent during his submissions to the Court of Appeal, led to a "substantial possibility" that a person other than the respondent was responsible for the death of the deceased. Spender J, in dissent, held that the hypothesis of the majority was "utterly speculative" and that the factual issues on which it was based did not reflect the evidence which was before the jury.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in substituting its views of the evidence for the verdict of the jury, and in taking account of evidence not tendered at the trial;

- Whether the majority of the Court of Appeal erred in concluding that it was impossible to conclude that it was open to the jury to find that the guilt of the respondent had been proven beyond reasonable doubt;

- Whether the majority of the Court of Appeal erred in setting aside the respondent's conviction rather than ordering a retrial.