SHORT PARTICULARS OF CASES
APPEALS

MAY 2006

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STATE OF NEW SOUTH WALES v COMMONWEALTH OF AUSTRALIA (S592/2005);
STATE OF WESTERN AUSTRALIA v COMMONWEALTH OF AUSTRALIA (P66/2005);
STATE OF SOUTH AUSTRALIA v COMMONWEALTH OF AUSTRALIA (A3/2006);
STATE OF QUEENSLAND v COMMONWEALTH OF AUSTRALIA (B5/2006);
AUSTRALIAN WORKERS UNION & ANOR v COMMONWEALTH OF AUSTRALIA (B6/2006);
UNIONS NSW & ORS v COMMONWEALTH OF AUSTRALIA (S50/2006);
STATE OF VICTORIA v COMMONWEALTH OF AUSTRALIA (M21/2006)

Date of Writ of Summons: 21 December 2005 (S592/2005)

Date Demurrer Set Down: 9 March 2006

On 14 December 2005 the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) (the amending Act) received assent. The amending Act amends the *Workplace Relations Act* 1996 (Cth) (the Act). The majority of the amendments effected by the amending Act commenced on 27 March 2006, on which date the Regulations made under the Act were promulgated.

The first of the proceedings challenging the amending Act was brought by the State of New South Wales by writ of summons and statement of claim filed on 21 December 2005. The remaining proceedings were brought by writ and statement of claim at various dates thereafter. On 22 February 2006 the Commonwealth demurred to the New South Wales statement of claim, and to the various other proceedings subsequently. Notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) was filed by New South Wales on 8 March 2006 (and subsequently by each of the plaintiffs in the other proceedings). The Court (Gleeson CJ) made directions on 9 March 2006 that all the matters be heard together, and for the filing and service of written submissions. His Honour also set aside six days for the Full Court hearing for oral submissions by counsel for each of the plaintiffs, the Commonwealth and the interveners. The interveners in all matters are the Northern Territory, Australian Capital Territory and Tasmania; Victoria is an intervener in the first four matters.

The Act creates a scheme for the regulation of industrial relations between "employers" and "employees" as defined in the Act, and governs the content of the employment relationship between those employers and employees. The Act establishes the Australian Fair Pay Commission and provides for the making and registration of, and the terms and conditions in, employment agreements between employers and employees. The Act also imposes restrictions on the jurisdiction of State industrial relations tribunals and courts to set employment terms and conditions or to resolve industrial disputes between employers and employees covered by the Act.

The Act is expressed to apply to employers who are defined in the Act as "a constitutional corporation". (There are two other classes of "employers" defined in the Act, comprising employers, not necessarily corporations, of flight crew, maritime employees and waterside workers, and employers, not necessarily corporations, who or which carry on activities in a Territory). A "constitutional corporation" is defined in the Act as "a corporation to which paragraph 51(xx) of

the Constitution applies". An "employee" is defined in the Act as an individual employed by an employer, so defined.

The plaintiffs challenge the constitutional validity of the changes introduced into the Act by the amending Act as being beyond the Commonwealth's powers under the Constitution to make laws with respect to:

- "trade and commerce ... among the States" (section 51(i));
- "postal, telegraphic, telephonic, and other like services" (section 51(v));
- "banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money" (section 51(xiii));
- "insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned" (section 51(xiv));
- "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" (section 51(xx));
- "external affairs" (section 51(xxix));
- "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" (section 51(xxxv)); and
- "the government of any territory" (section 122).

The Commonwealth demurred to the whole of the statement of claim on the ground that none of the provisions of the Act, as amended by the amending Act, are invalid.

The matters raised by the statement of claim include:

- The scope of the Commonwealth Parliament's power to make laws with respect to each of the heads of power identified above;

- The capacity of the Commonwealth Parliament to make laws which authorise the Commonwealth Executive to issue an injunction to a State court or tribunal;

- The scope of the Commonwealth Parliament to make laws prohibiting certain conduct by industrial associations;

- The scope of the Commonwealth Parliament to make laws with respect to the internal structure, organisation and management of pre-existing constitutional corporations;

- The capacity of the Commonwealth Parliament to make laws in respect of corporations wholly owned or subject to the control of a State or a Minister of a State, and in respect of the employment relationships between the States and their employees which may interfere with the capacity of the State to function as a government;

- The extent to which and the manner in which constitutionally invalid provisions can be "read down" so as to give them a valid operation; and

- If only parts of the Act are invalid, whether those parts can be severed from the Act.

BOUNDS v THE QUEEN (P54/2005)

Court appealed from: Court of Criminal Appeal,
Supreme Court of Western Australia

Date of judgment: 7 January 2005

Date of grant of special leave: 26 October 2005

On 28 May 2003, the appellant, Matthew David Bounds, was charged on indictment with two counts of breach of provisions of the *Censorship Act* 1996 (WA). Count one charged a breach of section 60(4) of the Act, in that on 28 July 2001, the appellant had in his possession child pornography in the form of computer data. Charge two charged a breach of section 59(5) of the Act, that on the same date the appellant had in his possession an indecent or obscene article in the form of computer data.

The appellant had been a student at Curtin University in Esperance, and he was entitled to make use of the University's computer room. In July 2001 the University's system administrator, Mr Philip Jones, discovered a large collection of images stored on the appellant's computer directory. This was subsequently found to comprise 105 images of child pornography which became the subject of count one of the indictment, and 11 other indecent or obscene images which became the subject of count two of the indictment. Mr Jones disabled the appellant's access to the computer room and told University management. The project manager of the Esperance campus of the University, Ms Kathline Michalanney, arranged an interview with the appellant. She asked Mr Jones to be present. The interview took place on 1 August 2001.

At trial, Ms Michalanney gave evidence that she told the appellant that objectionable material had been found in his files on the University's computer network. She said that he acknowledged by nodding his head and mumbling. She said that he said that he was not getting the material for himself and that he was "doing it to sell". Mr Jones gave similar evidence about the meeting. Mr Jones said he and Ms Michalanney stopped the appellant from saying any more after he said he had been doing it for money. Mr Jones and Ms Michalanney prepared notes in relation to what was said at the meeting, and these were tendered in evidence at the trial by consent of the appellant's counsel.

In his evidence, the appellant denied storing most of the objectionable material. He suggested that someone else had learned or guessed his password and had logged on in his name and saved the material. He also disputed that he had been in the computer room at one of the times at which objectionable material was downloaded. He acknowledged that he had saved and filed some of the objectionable material but said this had been sent to him by a computer chatroom acquaintance in Canada and that he had stored it without appreciating what it was.

As to the interview with Ms Michalanney and Mr Jones, the appellant said that he had gone into deep shock once he was told that the police were involved, and that he could not remember much more of the interview. He said that he did not remember apologising to them, or giving an explanation about selling the material. The appellant was convicted on both counts.

The appeal against both convictions proceeded on several grounds. In relation to the conviction on count one, the appellant submitted that the conviction was unsafe because the trial judge permitted evidence concerning count two to go to the jury for consideration in relation to count one. The appellant argued that because count two should not have been tried on indictment, not being an indictable offence under section 59(5) of the *Censorship Act* and for that reason liable to be set aside, evidence received in relation to count two should not have been available to the jury in considering count one.

On appeal, the Court upheld the appeal in relation to the conviction in relation to count two, and this conviction was quashed. McKechnie J, in the minority, also held that along with quashing the conviction on count two, the conviction on count one should be set aside, and a retrial conducted on that count.

The grounds of appeal include:

- As count two should never have been on the indictment, and as the evidence in support of count two was before the jury, the verdict on count one was flawed;

- The administration of justice in the State of Western Australia is seriously flawed if the verdict on count one is allowed to stand given:

  (a) the inclusion of count two on the indictment was a fundamental error;

  (b) evidence of prohibited obscene, indecent and bestiality images (not child pornography) was before the jury;

  (c) the jury's verdict on count two was a nullity as the offence was not triable on indictment;

  (d) the trial fundamentally miscarried;

  (e) the appellant lost a chance of acquittal which was fairly open to him because of the wrongful inclusion of count two;

  (f) there was no causal link between the obscene and indecent material in support of count two and the proof required concerning count one;

  (g) the appellant was denied the opportunity of advancing an argument that the indecent, obscene and bestiality evidence was inadmissible on count one as counts one and two were wrongly joined on the indictment; and

- Whether the appellant's trial fundamentally miscarried such that the verdict on count one was unsafe and unsatisfactory so that the matter should be remitted to the District Court of Western Australia for a trial to take place according to law.

CENTRAL BAYSIDE GENERAL PRACTICE ASSOCIATION LIMITED formerly known as CENTRAL BAYSIDE DIVISION OF GENERAL PRACTICE LTD v COMMISSIONER OF STATE REVENUE (M3/2006)

Court Appealed from: Court of Appeal, Supreme Court of Victoria

Date of Judgment: 1 July 2005

Date Special Leave Granted: 16 December 2005

The appellant (one of at least 123 such Divisions) was set up in 1993 with Commonwealth Department of Health funding (as part of the National Health Care Scheme), to encourage general practitioners to work together to promote the quality of local health care. It sought an exemption under sub section 10 (1) (bb) of the *Payroll Tax Act* 1971 (Vic) from payment of payroll tax as it was a charitable body engaged exclusively in the work of a charitable nature.

The Victorian Civil and Administrative Tribunal upheld the respondents' determination that the appellant was not exempt from pay roll tax (on wages) as it was too close to being an arm of government to be an organisation whose objects come within the concept of charity. The appellant's appeal to the Supreme Court of Victoria (Nettle J) was dismissed.

The Court of Appeal by majority (Chernov, JA and Osborn AJA, Byrne AJA dissenting) dismissed the appellant's appeal. They found the core activities of the appellant were performed pursuant to the dictates of government such as to deny it the status of a charity and that it was a creature or agent of government. Byrne AJA found such an entity could be classified as charitable so long as it stood sufficiently distant from government so as not to be seen as a mere creature or agent.

The Commonwealth is seeking leave to appear as amicus curiae.

The grounds of appeal are:

- The Court of Appeal of the Victorian Supreme Court erred in holding that the appellant is not a "charitable body" for the purpose of the exemption from payroll tax contained in paragraph 10(1)(bb) of the *Payroll Tax Act* 1971 (Vic) on the basis that it performs the work of government.

- The Court of Appeal should have held that the appellant is a charitable body for that purpose notwithstanding its role in relation to the Federal Government's health policy.

McKINNON v SECRETARY, DEPARTMENT OF TREASURY (S52/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of Judgment: 2 August 2005

Date of Grant of Special Leave to Appeal: 3 February 2006

The proceedings concern two applications made by the appellant, Michael McKinnon, the Freedom of Information ("FOI") Editor of the Australian newspaper, for release of documents under the *Freedom of Information Act* 1982 (Cth) ("the FOI Act") concerning subjects of public interest.

The appellant applied on 17 December 2002 to the FOI officer of the Australian Taxation Office for the disclosure of documents relating to "bracket creep". In particular, he sought reports, reviews or evaluations completed in the last two years detailing the extent of bracket creep and its impact on revenue collection, in particular the higher burdens faced by taxpayers resulting from increases due to bracket creep. This class of documents is referred to as "the Bracket Creep documents".

The appellant applied on 3 December 2002 to the FOI officer of the Federal Treasury for disclosure of a second category of documents. These were documents relating to reviews, reports or evaluations completed in the last two years on the First Home Buyers Scheme. He sought, in particular, documents summarising the level of fraud associated with that scheme including its use by high wealth individuals and its impact on the performance of the housing sector. This class of documents is referred to as "the First Home Buyers documents".

For both requests there were numerous documents which the respondent claimed were exempt under s 36 of the FOI Act. Section 36 Act provides that a document is exempt from disclosure if it is an internal working document (as defined in s 36(1)(a)) and disclosure would be contrary to the public interest. If the Treasurer is satisfied, in relation to an internal working document, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect. Such a certificate is called a "conclusive certificate".

Shortly before the hearing dates listed for the applications, the Treasurer issued a conclusive certificate under s 36(3) of the FOI Act for the Bracket Creep documents on 1 December 2003. He issued a conclusive certificate for the First Home Buyers documents on 13 January 2004. The Treasurer said that disclosing the documents would be contrary to the public interest because they could confuse or mislead the public and would impede frank communication between a minister and staff.

The appellant was unsuccessful in the Administrative Appeals Tribunal ("the Tribunal"). The Tribunal decided, pursuant to s 58(5) of the FOI Act that there existed reasonable grounds for the claim made in certificates, signed by the Treasurer under s 36(3), that the disclosure of certain documents would be contrary to the public interest. The appellant appealed to the Federal Court. The appeal was rejected by a majority of the Full Court of the Federal Court (Tamberlin and Jacobson JJ, Conti J dissenting). The Court found that there had been no error of law by the Tribunal in approaching the matter on the basis

that it was not necessary "when considering s 58(5) ..... to carry out the process of balancing or weighing all aspects of the public interest or indeed to decide whether or not that ground will ultimately prevail".

The Australian Press Council seeks to leave to intervene as amicus curiae in these proceedings.

The grounds of appeal include:-

The majority of the Full Court erred in finding that the Tribunal had not:

- misconstrued or misapplied sub-section 58(5) of the FOI Act;
- failed properly to exercise its jurisdiction;
- failed to take account of relevant considerations with respect to whether there existed reasonable grounds for claims made in certificates signed by the Treasurer under sub-section 36(3) of the FOI Act that the disclosure of certain documents would be contrary to the public interest, in particular by:
    - misconstruing the nature of the public interest as provided for in subsection 58(5);
    - applying a two stage approach to the question, namely, asking as a threshold matter whether the claims in the certificates were rational or logical, then examining the documents in question to see if they could be linked to one or more of the 7 claims; and
    - failing to take any or sufficient account of all of the evidence on public interest before the Tribunal.