

## **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.