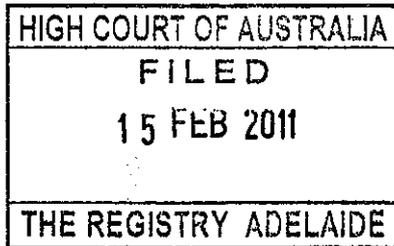


BETWEEN:

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS**  
Appellant



and

**GOSIA PONIATOWSKA**  
Respondent

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**RESPONDENT'S SUBMISSIONS**

**PART I – CERTIFICATION OF SUITABILITY FOR PUBLICATION**

1. This submission is suitable for publication.

**PART II – STATEMENT OF ISSUES PRESENTED BY THE APPLICATION**

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2. Whether s 135.2 of the *Criminal Code Act 1995* (Cth) (**The Code**) is an offence in which the physical element can be constituted by an omission to perform an act that a person is not otherwise required by a law of the Commonwealth to perform.
3. Whether, in a case where the statement of the offence under s 135.2 in a complaint fails to identify a particular act that it is alleged the defendant omitted to perform, the complaint is a nullity.
4. In respect of the first of the applicant's proposed questions, the respondent submits that special leave should not be granted because the question does not arise for consideration. The Full Court accepted that an omission may constitute a physical element of the offence created by s 135.2 of the Code, notwithstanding that the majority (Doyle CJ and Duggan J) held that this would only be so in the case of an omission to perform an act which there was a legal obligation or duty to perform.<sup>1</sup>
5. In respect of the second proposed question of the applicant, the respondent submits that special leave should not be granted because:

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<sup>1</sup> FC AB431 [12], AB433 [16]; AB435 [26] – [27]

- 5.1. the conclusion of the majority that the omission had to be in respect of an act which there was a legal obligation or duty to perform was clearly correct, or at least not attended by sufficient doubt to warrant a grant of special leave; and
- 5.2. in any event, this case is not a suitable vehicle for consideration of the issue raised, given the defective nature of the complaint, particularly when the complaint failed to identify clearly, or at all, the act that was the subject matter of the charge.

**PART III – JUDICIARY ACT 1903(Cth) CERTIFICATION**

6. The issues raised by this application do not require notice to be given to the Attorneys General pursuant to s 78B of the *Judiciary Act 1903* (Cth).

10 **PART IV – RESPONDENT’S STATEMENT IN RESPONSE TO APPLICANT’S STATEMENT OF FACTS**

7. The applicant refers in its submissions (AS) AS [6] to the respondent pleading guilty to 17 counts of *obtaining a financial advantage* contrary to s 135.2 of the Code. While this reflects the heading of the section, the physical elements of s 135.2(1) included not only *obtains a financial advantage*, but also *engages in conduct*. Section 135.2(1) may therefore be contrasted with, for example, the offence of *obtaining a benefit which is not payable* under s 215 of the *Social Security (Administration) Act 1999* (Cth) (**the Administration Act**) which does not contain this additional physical element. Insofar as the applicant contends that the statement of facts presented by the applicant to the Leaned Special Magistrate was ‘*unchallenged*’, the prosecution provided what was called a *Summary of Facts*. The facts were not agreed in the sense of admitted but were subject to and varied by the submissions of defence counsel.<sup>2</sup> The learned Magistrate incorrectly found that the respondent made false declarations and lied in written statements about her income from employment on the dates alleged in the complaint.<sup>3</sup> The respondent was sentenced to a suspended sentence of 21 months imprisonment.
8. The respondent does not challenge the applicant’s summary of the relevant facts, as set out in its submissions,<sup>4</sup> and incorporating the Full Court’s summary.<sup>5</sup>
9. The respondent notes, however, as the Full Court did,<sup>6</sup> that the applicant did not rely upon any provision of the *Administration Act* as establishing a duty of disclosure in the present case. It follows that the references in the Summary of Facts to the respondent being

<sup>2</sup> AB99 Affidavit of Ms Davison, sworn 8 December 2009

<sup>3</sup> AB9 [2] – [4]

<sup>4</sup> AS [7]

<sup>5</sup> FC AB428-429 [1]-[3]

<sup>6</sup> FC AB433 [21]

advised of a *requirement* to advise Centrelink<sup>7</sup> are not relevant to the issues the subject of this application.

10. [The financial advantage relied upon by the applicant here was a Parenting Payment Single (PPS), as defined under the *Social Security Act 1991* (Cth) (**the Social Security Act**) and determined according to the means test calculator at s 1068A of that Act. Questions of disentitlement and consequential obligations arising from a request for information or the service of a *notice* are determined by the provisions of the *Administration Act*. The applicant did not rely upon or seek to establish any obligation or duty arising under the *Administration Act*. Indeed, it was conceded by the applicant in the Full Court<sup>8</sup> that there were no duties imposed upon the recipient of a PPS under the *Social Security Act* or the *Administration Act*, except those that arose in respect of a notice issued in conformity with s 67 or s 68 under the *Administration Act*.]
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11. The respondent also notes that the dates between August 2005 and May 2007 in the complaint for the various counts alleged against the respondent are the dates (or approximate dates) that the net commission payments were paid into the respondent's bank account by her employer, and not the dates (or approximate dates) that the benefit payments were paid by Centrelink and received by the respondent.<sup>9</sup> This is relevant to the adequacy of the complaint and the difficulty in identifying any or the precise act(s) that the respondent allegedly omitted to perform relied upon by the applicant, a matter developed later in this outline of submissions.
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12. The respondent relies upon the following additional facts:
- 12.1. The respondent's relationship with her employer broke down in about 2005 as a result of workplace harassment. Her employment was terminated in February 2006. She suffered a major depressive disorder and was incapacitated for work from at least September 2006.<sup>10</sup>
- 12.2. The respondent submitted to the learned Magistrate that Centrelink was aware of her employment, that she was filing tax returns, that Centrelink had her tax file number, that it was able to ascertain her income at any time through an audit, and that she believed that somehow it would all work itself out.<sup>11</sup>

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<sup>7</sup> AS [7(2)]; AS [10]

<sup>8</sup> FC AB433 [20], [21], [38]; AB400 T45.16

<sup>9</sup> The Summary of Facts identified the amount and the approximate date of the applicant's receipt of commissions from her employer. Apart from identifying the total amount of the overpayment of PPS, it did not identify any particulars relating to the respondent's receipt of the PPS. AB97 - 98

<sup>10</sup> AB237 *Poniatowska v Hickinbotham* [2009] FCA 680 per Mansfield J at [349], [350]; referred to in the affidavit of Geraldine Davison, sworn 8 December 2009, AB at 104 [15]; and exhibit 1 to affidavit of respondent, sworn 16 April 2010 AB at 130; See also AB103 [12] - [14]; AB104 [16]

<sup>11</sup> Affidavit of Geraldine Davison, sworn 8 December 2009 AB102 [8]

- 12.3. The respondent was embroiled in a dispute with her employer. The respondent received commissions in relation to successful sales of property. Net commissions were paid into her bank account irregularly. She had no way of knowing what she would receive from one month to the next.<sup>12</sup> Bank statements were received quarterly. She received no information as to the gross amounts.<sup>13</sup>
- 12.4. The respondent did not receive the letters/notices referred to in AS [7(2)].<sup>14</sup> She changed her address and did not receive communications from Centrelink.<sup>15</sup> Indeed, the first complaint was issued on 22 April 2008 to a former address, with the relevant complaint issued on 19 February 2009. In relation to AS [7(2) and (4)], the applicant does not identify the source of the *requirement* to report any change of circumstance. The *Administration Act* does not provide such a stand-alone obligation. The obligation to provide certain information to Centrelink may arise pursuant to provisions of the *Administration Act*, if a notice under s 67 or s 68 of that Act is served. The applicant disavows any reliance upon the administrative and policing provisions of the *Administration Act* because they were not complied with in the present case.<sup>16</sup>
- 12.5. In relation to AS [7(5)], although \$71,000 was the gross amount that the employer reported to the ATO that the respondent was paid over the relevant period, the total overpayment of benefits to her was \$20,000.
- 12.6. In relation to AS [7(7)] the question of her entitlement or partial entitlement at any particular point in time could only be calculated by application of the *means test calculator* in s 1068A of the *Social Security Act* which allowed for a threshold of income that could be earned in one year without partial reduction of the PPS (see AS [8]).
- 12.7. In relation to AS [9], the question of whether the benefit of the PPS ceases or is reduced is dependent upon complex multiple factors over a given year identified in s 1068A of the *Social Security Act* and whether the *assets value limit* has been

<sup>12</sup> Affidavit of Geraldine Davison, sworn 8 December 2009 AB101 [5]; AB103 [14];

<sup>13</sup> Affidavit of the Respondent, sworn 19 April 2010 AB76 [25]; AB78 [25(25.1) (1) (1.5)]. Also see Schedule AB337 - 340

<sup>14</sup> AB433 [19]

<sup>15</sup> Affidavit of the Respondent, sworn 19 April 2010 AB74 [20]; Affidavit of respondent sworn 8 June 10 AB330 [5]

<sup>16</sup> Policing provisions under the Administration Act include s 63 (the requirement to attend at the Department); s67 and s68 (requirement to give information about a change of circumstances); s72 (Power to issue Notice); s74 (offence of failure to comply with notice); s75 (Secretary's power to request tax file numbers); s76 and s77 (effect of failure to satisfy request for failure to provide own or related person's tax file number); s 78 (rate increase determination); s79 (Rate reduction determination); s81 (Cancellation or misrepresentation for non compliance with certain notices). Part 6 offences eg s212 (False Statement in connection with Claim); s215 (obtaining payment that is not payable) Div 3 – penalties in connection with Div 2; Div 4 Procedural provisions; s218 (repayment of social security payments); s220 (joinder); s221 (Particulars of each offence); s224 (Enforcement of judgment).

exceeded. This is not a determination that the respondent was capable of making at any time.

- 10 12.8. In relation to AS [10], the applicant states that it relied upon the *notices* (or *letters* as they were referred to before the Learned Special Magistrate<sup>17</sup>) as evidence of the fault element. That is, the applicant acknowledges that there were no communications with the respondent that were relevant to proof of the first physical element of the offence, namely proof of the element that the respondent *engaged in conduct*. It was never alleged that the notices were issued to the respondent in compliance with s 68 of the *Administration Act*. The Full Court noted that it was not clear whether formal notices under the *Administration Act* were issued.<sup>18</sup> If indeed notices rather than letters had been sent, and non compliance was alleged, the *Administration Act* governed the requirements in relation to a valid notice, the manner in which compliance might occur and the circumstances in which the failure might be excused.
13. In relation to AS [11], the respondent submits that at its highest, the plea of guilty was an acknowledgement that the respondent had *engaged in conduct* that was unspecified as to the act or the omission to perform an act that was the subject of the charges.<sup>19</sup> In that context, any acknowledgement of the remaining elements of the offence did not ‘cure’ a defective charge. Upon the facts admitted by her plea, the respondent could not in law have been guilty of the offence.<sup>20</sup> In any event, the submission has no force because it is clear that she pleaded on legal advice which failed to appreciate the defective nature of the charge.<sup>21</sup>
- 20 14. In relation to AS [13], the affidavits were filed and received by the Full Court without objection by the applicant.
15. In relation to AS [14], the respondent refers to paragraph 7 above and to her submission in relation to the defective complaint developed later in these submissions. The respondent submits that the Full Court correctly identified the issues at the appeal.<sup>22</sup>
16. In relation to AS [15] and the applicant’s summary of the majority’s approach and reasoning, the majority held that the offence could be constituted by an omission,<sup>23</sup> but that the omission had to be one to perform an act which the respondent had an obligation or
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<sup>17</sup> AB10 [9]; AB12 [24]; AB97.35

<sup>18</sup> AB433 [19]

<sup>19</sup> Insofar as the applicant alleges the respondent made statements in her affidavit contrary to *agreed facts* put before the Magistrates Court, the respondent disputes that these were necessarily all *agreed facts* [see para 7 above. The Full Court noted that the respondent denied that she received the correspondence AB433 [19]].

<sup>20</sup> *Meissner v R* (1995) 184 CLR 132, 157; [1995] HCA 41 Dawson J at [19]. Also see submissions in this outline in relation to the Notice of Contention

<sup>21</sup> Affidavit of the Respondent, sworn 11 June 2010 AB335 [2]

<sup>22</sup> AB431 [11] – [12]

<sup>23</sup> FC AB431 [12], AB433 [16], AB435 [27]

duty at law to perform, and that no such omission had been alleged or proved against the respondent. The Court relied on the relevant sections of the Code which makes no provision for s 135.2 to punish omissions except in the limited circumstances of s 4.1 and s 4.3 of the Code.

17. The applicant's argument was accurately summarised by the majority<sup>24</sup> namely, that it relied upon the combination of s 4.3(a) of the Code (which provides that an omission may be a physical element if the law creating the offence makes it so) and s 135.2 of the Code (which makes an omission a physical element because it picks up the definition of *engage in conduct* in s 4.1(2) of the Code). The applicant contended before the Full Court that s 135.2 of the Code itself created a duty or obligation.<sup>25</sup>

18. In any event, to the extent that the applicant did contend that it was not necessary to identify any duty or obligation, this argument was rejected by the majority in that it held that the inclusion of *omission to perform an act* within the definition of *engage in conduct* did not overcome the requirement in s 4.3(b) of the Code, that the conduct must be an omission to perform an act in respect of which there was an obligation or duty imposed by law.<sup>26</sup>

19. In relation to AS [16], it is submitted that Sulan J (in dissent) appears to have overlooked the fact that s 135.2 of the Code is comprised of four separate physical elements with separate fault elements. The first physical element is not *obtaining a financial advantage* but *engaging in conduct*. The financial advantage must be causally linked to a failure to perform an act at a specific time. Unless the law imposes a duty to act at a particular time in particular circumstances, not only is a citizen unable to decide whether to comply with the obligations imposed (and thereby to attract criminal liability) but the content of that duty and therefore the content of any omission would never be ascertained.

20. The respondent also contended before the Full Court that the complaint was defective.<sup>27</sup>

#### **PART V – APPLICABLE STATUTORY PROVISIONS**

21. The applicant's statement of applicable statutes and regulations is accepted.

22. The respondent also relies upon the provisions of the *Administration Act*, Part 3, Div 6, 7, 8, 9; Part 4, Part 5, Part 6.

<sup>24</sup> FC AB435 [28]

<sup>25</sup> AB398 T43.15; AB399 T44.13, AB400 T45.9

<sup>26</sup> FC AB433 [16]

<sup>27</sup> *Kirk v Industrial Court of New South Wales* (2010) 293 CLR 531; *Poniatowska v DPP (Cth)* [2010] SASCFC 19 at [5] AB430, AB437 – 438 [37] – [41]

**PART VI – RESPONDENT’S STATEMENT IN RESPONSE TO APPLICANT’S ARGUMENT**

23. The jurisdiction of the Commonwealth under the Code is limited to punishing conduct referable to acts in respect of which the Commonwealth has jurisdiction.

24. Although a Code, it does not purport to be a complete Code and the Courts have looked to the common law and precedent in its interpretation.<sup>28</sup>

25. Section 135.2(1) of the Code has as its first physical element, the need to prove that the defendant engaged in conduct.

26. *Engage in conduct* is defined to mean (s 4.1(2))

10 (a) *do an act*; or

(b) *omit to perform an act*.

27. Although the circumstances in which an omission to perform an act may be a physical element of a federal offence is identified in s 4(3), *act* is not defined in the Code.

28. The issue of whether an omission to perform a particular *act* is within the jurisdiction of the Commonwealth will depend upon the statutory context and the common law.

29. For an omission to perform an act to attract liability under Commonwealth law, it must be an act in respect of which the laws of the Commonwealth have jurisdiction.

20 30. In other words, it is a precondition to criminal liability that the omission to perform the act in question must relate to an act which *by law* the respondent had a duty or requirement to perform. That is, there must be an identifiable duty under a statute or at law to act in a certain way.

31. This is consistent with the common law position:

*“omission to act in a particular way will give rise to a criminal liability only when a duty so to act arises at common law or is imposed by statute”*.<sup>29</sup>

32. Both at common law and under statute, the circumstances in which liability arises for conduct by omission are regarded as exceptional.<sup>30</sup>

<sup>28</sup> See for example, *When is a Code a Code* Andrew Hemming [2010] Deakin Law Rw 3; ‘*The Australian Criminal Code: Time for Some Changes*’ Ian Leader-Elliott (2009) 37 Fed Law Rev 205, 232-233

<sup>29</sup> *R v Ianelli* (2003) 56 NSWLR 247; 139 A Crim R 1, 5 [20] – [21]

<sup>30</sup> cf. *R v Lawford* (1993) 61 SASR 542; *R v Ianelli* (2003) 56 NSWLR 247; 139 A Crim R 1. See discussion - *Halsbury’s Laws of Australia – Criminal Law* [130-7] *Liability for Omissions*

## The Code

33. Section 135.2 of the Code creates an offence of commission. It does not on its face, create an offence of omission. However, s 4.1 of the Code, by reason of the definition of *engage in conduct*, may extend the liability for conduct to omissions to perform an act.

Section 4.1(2) provides that *engages in conduct* may be either to *do an act* or *omit to perform an act*. However, the latter is subject to the limited circumstances defined in s 4.3 of the Code.

10 34. Section 4.3 of the Code limits the liability under federal law, for a failure to perform particular acts to those omissions that fall within s 4.3(a) and (b) of the Code. As stated above, the existence of a duty is a precondition to the omission to perform a particular act, thereby attracting criminal liability.

35. Pursuant to s 4.3 of the Code, either the offence section expressly makes criminal the failure to carry out a particular act so that the duty is contained within the offence creating provision itself<sup>31</sup> or alternatively, the offence creating provision makes the omission to perform the act a criminal offence because it relates to an act that another law of the Commonwealth requires that the person perform.<sup>32</sup>

36. The respondent submits that liability for an omission to perform an act is imposed where:

36.1. a federal law *creates* an offence of omission under s 4.3(a),<sup>33</sup> or

20 36.2. where a federal law imposes a duty and another federal law *impliedly* provides that a breach of that duty can found an offence under s 4.3(b).<sup>34</sup>

37. Accordingly, applying s 4.3(a) of the Code, s 135.2 of the Code is not an offence which creates an offence of omission. It creates an offence of commission.

38. Applying s 4.3(b) of the Code, there is no duty imposed by a federal law or any law on which the applicant relies. It is not alleged that there is any law that imposes a duty on the respondent to notify Centrelink of income, or indeed of a change of circumstances. That is because neither the *Administration Act* nor the *Social Security Act* imposes a duty of the kind relied upon here namely, the requirement to inform Centrelink of income.

39. If (as the respondent submits) s 135.2 of the Code is an offence of commission, then proof of the first physical element of *conduct* by omission can only be pursuant to s 4.3(b) of the

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<sup>31</sup> The provisions of the ITAA (as in s 4.3(a)) for example failing to lodge a tax return by a certain date  
<sup>32</sup> See *The Commonwealth Criminal Code. A Guide to Practitioners March 2002*, Ian Leader-Elliott at p 45 where a number of examples are provided

<sup>33</sup> 4.3(a) *the law creating the offence makes it so*

<sup>34</sup> 4.3(b) *the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform*

Code and because there is no duty under any law of the Commonwealth applicable to the charge as laid, then the charge as laid is not an offence known to the law.<sup>35</sup>

40. The construction contended for by the respondent, and upheld by the majority, is not only sound as a matter of statutory construction, it is also consistent with the common law approach to omissions in the criminal law and in the construction of other offence creating legislation, as illustrated by decisions such as *R v Iannelli* (2003) 56 NSWLR 247 and *Nicholson v The Department of Social Welfare* [1999] 3 NZLR 50, referred to by the majority.<sup>36</sup>

10 41. To the same effect is the more recent decision of the New Zealand Court of Appeal (comprising Anderson P, Glazebrook, Chambers, O'Regan and Robertson JJ) in *The Queen v Chilton* [2006] 2 NZLR 341; [2005] NZCA 295. In quashing two convictions obtained under s 127 of the *Social Security Act 1964* (NZ) (being the same section as was under consideration in *Nicholson*), the Court held (at [55]) that *Nicholson* was correctly decided. The Court said the following of the suggestion that the actus reus of s 127 should be construed as including the omission to say or do anything that results in someone continuing to receive a benefit (at [58]-[59]):

20 *If that is the case, then the section must necessarily be seen as creating a positive duty to act where a failure to do or say something may result in someone continuing to receive a benefit. This would create a very wide duty of indeterminate effect on anyone who might (wittingly or unwittingly) hold some relevant information.*

*In our view, it is inconceivable that there was any intention to create such a wide duty in the context of social security legislation, where there is no corresponding duty to report even the most heinous of crimes. Such a duty would have to be created positively, not by implication, and certainly it would not have been created by the backdoor.*

42. The respondent submits that its interpretation is consistent with that adopted in Chapter 4 of the *Model Criminal Code (2001)* when addressing *Property Damage Resulting From Omission to Avoid Harm*.<sup>37</sup>

30 *Though damage resulting from omission is often a matter of blame, the Code does not impose criminal liability for omission in the absence of specific provision or necessary implication.*

<sup>35</sup> *R v Schildkamp* (1971) AC1; *R v Tait* (1996) 1 VR 662, 668

<sup>36</sup> FC AB431 – 432 [13]-[14]

<sup>37</sup> *Model Criminal Code – Report – Chapter 4 – Damage and Computer Offences and Amendments to Chapter 2 (Jurisdiction) – January 2001* at 15

43. It is also consistent with the analysis of the liability for omissions under Chapter 2 of the Code by Associate Professor Ian Leader-Elliott who states that:<sup>38</sup>

10           “...Chapter 2 does not leave the source of the duty at large. There are two circumstances in which liability for omission will be imposed. The first is the obvious case, in which “the law creating the offence makes it so”: s4.3(a). These are the offences which require fees to be paid, returns to be made and so on. Liability for omissions does not have to be explicit however. Liability can also be imposed by implicit provision. There is a limit to implication. Liability can only arise from an “omission to perform an act that by law there is a duty to perform”: s4.3(b). A reference to “law” in the Code is restricted in meaning to “a law of the Commonwealth”.

          It follows that the duty which provides the foundation for implied or express liability must be one imposed by Commonwealth legislation. The Code contains a number of offences of causing personal injury or death to United Nations officials and associated personnel and other offences of causing harm to Commonwealth Officials. These offences have no application when death, injury or other harm results from omission, for there is no statutory specification of the duties which are owed to the protected class of potential victims.

- 20           44. The respondent’s construction is also consistent with the approach in the US Model Penal Code 1962. Associate Professor Ian Leader-Elliott noted: “Chapter 2 is a lineal descendant of the US Model Penal Code”.<sup>39</sup> Under the US Model Penal Code, criminal liability for an omission “is imposed in two distinct situations. Firstly, such liability is often imposed explicitly in offence definitions that punish a failure to perform certain conduct”.<sup>40</sup> Secondly, liability for an omission may be created where an offence is defined in commission terms and the failure to perform conduct is in respect of conduct “that one has a duty and the capacity to perform”.<sup>41</sup> In those circumstances, the omission may amount to “an adequate substitute for the conduct required by the offence definition”.<sup>42</sup>

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<sup>38</sup> See *The Commonwealth Criminal Code. A Guide to Practitioners March 2002*, Ian Leader-Elliott Consultant to the Commonwealth Attorney-Generals Department 1992 – 2002 at p 45 (footnotes omitted)

<sup>39</sup> “*The Australian Criminal Code: Time for Some Changes*” supra at 206

<sup>40</sup> “*Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*” Robinson (1984) *New York Law School Review* 101

<sup>41</sup> Referred to in America as the ‘*extraneous duty rule*’; see ‘*Criminal Omissions: A Legal Microcosm*’ Frankel (1965) 11 *Wayne Law Review* 367, 429

<sup>42</sup> Supra at 106

**Analysis**

Majority decision not attended by sufficient doubt to warrant a grant of leave

45. In relation to AS [17], the respondent submits that the Full Court correctly applied Chapter 2 of the Code in its determination of the circumstances in which an omission to perform an act might constitute the first physical element of s 135.2 of the Code.
46. The respondent does not accept the analysis of the applicant contained in paragraphs AS [27] to [54] and instead submits the following analysis.
- 10 47. By alleging offences of *engaging in conduct* under s 135.2 of the Code, in the complaint, the applicant took on the burden of establishing this physical element. In this respect, it is significant (for reasons elaborated upon later in this outline) that the applicant never identified the relevant conduct in the statement of offence. Rather, the identification of the conduct relied upon as the *transaction* that was the subject of each count only emerged from the Summary of Facts placed before the Learned Magistrate<sup>43</sup> (namely that the respondent *failed* to declare to Centrelink her income from employment).
48. As the majority of the Full Court accepted, s 4.1(2) of the Code makes it clear that an omission to perform an act may constitute the physical element of an offence under s 135.2(1)(a) of the Code.
49. Moreover, s 4.3 of the Code provides that an omission to perform an act can only be a physical element if:
- 20 49.1. the law creating the offence makes it so; or
- 49.2. the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.
50. Section 4.3(b) might operate, for example, to make an omission or failure to comply with an obligation provided for under the *Administration Act*, the first physical element in s 135.2(1)(a) of the Code, if s 135.2 is read as referring to duties imposed under the *Administration Act*.
51. However as the applicant has expressly disavowed reliance upon any obligation that may be imposed under the *Administration Act*, the applicant is therefore forced to rely only upon s 4.3(a) of the Code.<sup>44</sup> The applicant is then able to submit that in the case of s 135.2, any omission which the applicant selected, is the first physical element under s 135.2 because the first physical element in s135.2(1)(a) is *engages in conduct* which, because of
- 30 s 4.1(2) includes both acts and omissions to act.

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<sup>43</sup> AB97-98; FC AB428 [2]

<sup>44</sup> FC AB433 [20], [21], [38]; AB 400 T45.16; AS[10]

52. The respondent contends, as the majority of the Full Court held, that this analysis should be rejected on the basis that s 4.3(a) requires something more than merely the existence of an offence containing a physical element which is defined as potentially including any omission. The wording of s 4.3(a) *the law creating the offence makes it so*, requires an offence provision which expressly makes the particular omission to perform a particular act relied upon, a physical element of the offence. An example of such an offence provision is s 105.21 of the Code,<sup>45</sup> which makes it an offence for a person to *refuse or fail to comply with* a specified request of the person made by a police officer. The majority provide examples of an omission that might fall within the definition of s 4.3(a) of the Code at para [30].<sup>46</sup>
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53. Interpreted in this way, s 4.3(a) and 4.3(b) recognise or reflect an important distinction between acts and omissions to perform acts. The section reflects the fact that the concept of a culpable omission to act presupposes a duty or obligation to act. Absent a duty or obligation to act in a particular way, a failure to act in that way is essentially meaningless. There is no standard against which to assess or measure the defendant's conduct, or to warrant it being treated as culpable.
54. By construing s 4.3(a) in the manner contended for by the applicant, an almost infinite number and type of omissions might suffice to constitute the physical element required by s 135.2(1)(a) – many of which might be considered as involving a relatively low or trivial level of culpability and as undeserving of being treated as a serious criminal offence.
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55. The physical element might be satisfied by not only a failure to advise Centrelink of an overpayment, but also, for example,
- 55.1. a failure to advise Centrelink a second time if the first time did not produce a result;
- 55.2. a failure to close a bank account so as to prevent further overpayments being made.
- Indeed, if one assumes that any omission which results in the obtaining of the benefit may suffice, then this would be tantamount to requiring that any defendant must take all possible steps to divest himself/herself of the benefit so as to avoid liability under s 135.2.
56. It is highly unlikely that Parliament would have intended to overlay the detailed provisions of the *Administration Act* (and other social welfare legislation) with the general and all encompassing exposure to liability inherent in the applicant's construction of s 135.2. On the other hand, confining s 135.2 to omissions to perform acts required by other laws of the Commonwealth including the *Administration Act* (and other relevant legislation), produces
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<sup>45</sup> Identified by Odgers, *Principles of Federal Criminal Law*, (2007), at [4.1.240].

<sup>46</sup> AB436

a more workable and coherent relationship between the various Acts and hence is more likely to represent the intention of Parliament.

57. Further, if the applicant's construction of s 135.2 (and s 4.1 and s 4.3) of the Code is correct, the consequences will not be confined to benefits received under social welfare legislation. Section 135.2 would operate in other fields of Commonwealth legislation where financial advantages might be obtained (including, for example, taxation legislation) and impose criminal penalties for omissions to perform acts for which there is not (otherwise) any obligation to perform, or where different and less onerous obligations are imposed by the relevant legislation. It is unlikely that Parliament would have intended to impose criminal liability in such a wide-ranging and open-ended way, over the top of, and despite the existence of, the detailed provisions (including offence provisions) of those in other Commonwealth legislation.
58. In addition, the effect of interpreting the Code in the manner contended for by the applicant would have a similarly open-ended impact upon other offence creating provisions which include *engage in conduct* as a physical element. Nine such offences are listed in the applicant's submissions.<sup>47</sup>
59. On the other hand, the respondent's submissions and the approach of the majority of the Full Court which confines relevant omissions to those which involve a failure to act in circumstances where there is a legal obligation to act, (or there is an offence which renders a particular failure an element of an offence), mean that these consequences and difficulties are avoided.
60. That s 4.3 was intended to reflect the peculiar nature of omissions can be seen from the following passage from the *Model Criminal Code Officers Committee Report on Chapter 2 of the Code*, extracted in the reasons of the majority:<sup>48</sup>

*Clearly, the physical element of an offence constituted by conduct can include conduct constituted wholly by an omission to act. However, the Committee accepted the common law and Griffith Code position that omissions attract liability only if the statute creating the offence explicitly says so, or the omission was in breach of a legal duty to act. It will be necessary for P to prove that the omission was accompanied by any relevant fault element. The circumstances in which there is a legal duty to act will be set out in the relevant offence provisions.*

61. Whilst the physical element of an offence constituted by conduct could include conduct constituted wholly by an omission to act, the Committee accepted the common law and

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<sup>47</sup> AS [27]

<sup>48</sup> FC AB432 [15]; Criminal Law Officers Committee, Parliament of Australia, *Model Criminal Code Chapter 2 – General Principles of Criminal Responsibility Report* (1992) at 19.

Griffith Code position that omissions attract liability only if the statute creating the offence explicitly says so, or the omission was in breach of a legal duty to act.

62. In the applicant's outline,<sup>49</sup> the applicant criticises the majority's reliance upon this passage on the basis that the report did not address the definition of *engage in conduct* as now appears in s 4.1 of the Code. However, as the issue in question is the proper interpretation of s 4.3 of the Code, the majority's reliance upon the passage was sound and appropriate.
63. Interpreting s 4.3 (and in particular s 4.3(a)) in the way contended for by the respondent avoids an element of circularity inherent in the applicant's construction. The starting point in the inquiry is the need to prove the physical element of *engages in conduct* under s 135.2; this then requires consideration of the definition of *engages in conduct* in s 4.1(2) of the Code and the fact that such definition includes omissions; but if s 4.3 of the Code is seen (as it must be) as a qualification to the general inclusion of omissions under s 4.1, there is then an element of circularity in holding that the s 4.1 definition is sufficient to render an omission (indeed all omissions) a physical element of the s 135.2 offence.
64. In relation to the applicant's submissions at AS [27], the respondent submits that s 135.2 is an offence of commission. It prohibits conduct. Whether it extends to omissions to perform particular acts is governed by the definition of *engages in conduct* in s 4.1 of the Code. *Conduct* is defined to include *omit to perform an act*. However, s 4.3 of the Code expressly limits the omissions that can constitute *conduct* that attracts criminal liability.
65. The applicant criticises the majority's reference to the common law as being inconsistent with Chapter 2 and the proper approach to interpreting the Code,<sup>50</sup> and in particular the proposition that the Code is to be read without any preconceptions that a particular provision has, or has not, altered the law.
- 65.1. First, it is not correct to assert, as the applicant does<sup>51</sup> that the majority did not address the application of Chapter 2. The majority made clear reference to ss 4.1 and 4.3 of the Code, being the only sections from Chapter 2 upon which the applicant relied. Indeed, the proper interpretation of these provisions was a central issue in the majority's reasons.
- 65.2. Secondly, the Full Court did not start with a preconception that the common law approach to omissions was applicable and/or approach the construction of the Code as though the issue was whether this common law approach had been abrogated.<sup>52</sup> Rather, the Full Court approached the issue as a matter of statutory

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<sup>49</sup> AS [45]

<sup>50</sup> AS [32], [33]

<sup>51</sup> AS [29] – [30], [32]

<sup>52</sup> As the applicant asserts at AS [32] – [33]

construction, observing (and drawing some comfort from the fact) that the conclusion reached was one consistent with the common law.

65.3. Thirdly, the proper interpretation of the Code does permit reference to common law principles and concepts in appropriate circumstances, including (as the applicant acknowledges<sup>53</sup>) where there is some ambiguity as to the meaning of a particular provision.<sup>54</sup>

10 66. In relation to AS [41], the respondent submits that whether or not any notification to Centrelink of the receipt of income (in respect of which no requirement existed under the *Administration Act*) impacted if at all, on the amount of the respondent's PPS, depended entirely upon the provisions of the *Social Security Act*. The applicant contends that certain consequences flow from the failure to notify Centrelink which the Full Court failed to consider. If the legislation under which the respondent received the benefit did not mandate such a notification, the consequences of the failure to do so cannot found a breach of the law in the circumstances of the present case. A consideration of the other elements of s 135.2 does not resolve or indeed, have any relevance to the need to prove the first physical element. That is, proof of an offence under s 135.2 requires proof of *conduct*, the first physical element of the offence. The prosecution must be able to identify conduct that is capable of satisfying the first physical element of the offence.<sup>55</sup> That conduct must be *to do an act or omit to perform an act*. The omission must fall within the definition in s 4.3 of  
20 the Code. The applicant cannot point to any legal requirement for the applicant to perform any such act at any time.

67. Contrary to the applicant's submission at AS [54], the respondent submits that the gravamen of an offence under s 135.2 of the Code is not omitting to do *something*. The gravamen of the offence in s 135.2 is proof of a number of physical elements and fault elements. The first physical element to which a specific fault element must fasten is proof of *engages in conduct*. If an omission is relied upon, the precondition to proving the gravamen of an omission to perform an act is identifying the particular act that at law the defendant was obliged to perform.

68. The applicant's argument does not answer the following critical questions.

30 68.1. Firstly, what is the particular act that the respondent failed to perform?

68.2. Secondly, if the respondent was required to inform Centrelink of income, what is the source under Federal law of that requirement or obligation for her to perform that act?

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<sup>53</sup> AS [37]

<sup>54</sup> See, for example, *R v Barlow* (1997) 188 CLR 1 at 31-33.

<sup>55</sup> cf *R v Tang* (2008) 237 CLR 1, 24; [2008] HCA 39 at [46]

- 68.3. Thirdly, at what point in time did the respondent fail to perform that particular act?
- 68.4. Fourthly, at what point in time was she required to perform that act (when was the respondent required to inform Centrelink of her income and failed to do so).
- 68.5. Fifthly, what act was she required to perform to avoid the commission of the offence? Would that act have removed all liability? For example, if she informed Centrelink that her circumstances changed and they continued to pay her, is she required to divest herself of the money bearing in mind that she would be unable to apply the means test calculator to determine what Centrelink may recalculate as her changed entitlement.<sup>56</sup>

10 69. The respondent submits that unless a citizen knows of such requirement in law and compliance that must occur, one cannot make a choice as to whether to comply or break the rule. A voluntary omission to act can only ever amount to *conduct* where it involves a choice either to comply or to break the rule.<sup>57</sup>

70. Properly understood, the majority's reasoning was not merely an application of the common law. Rather it was an exercise in construing the Code, and in particular s 4.3(a), having regard to the conceptual and practical difficulties associated with the applicant's contended construction and the consequential unlikelihood that such an approach reflected Parliament's intention. To the extent that the Court drew comfort from the common law approach to omissions (as illustrated by *Iannelli* and *Nicholson*), this was no more than a reflection that the considerations that underpin the common law approach are also relevant to the attempt to construe Parliament's intention in enacting the relevant provisions of the Code.

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71. In summary, the majority's decision is clearly correct. The issues identified in this submission serve primarily to reinforce the correctness of the majority's approach in confining the physical element of an offence allegedly committed by omission, to omissions constituted by a failure to perform an act expressly or implicitly required by the offence creating provision or by some legal obligation or duty under Federal law. However, even if sufficient doubt exists about the correctness of the majority's conclusion, so as to otherwise attract a grant of leave, then the inadequate identification in the complaint of the particular act that the respondent failed to perform, renders this case an unsuitable vehicle for consideration by this Court of the special leave issues said to arise. Indeed, the continuing inability of the applicant to identify the particular act that the respondent was required to perform, how she was required to perform it, when and why

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<sup>56</sup> cf *In Chilton* [2007] 2 NZLR 341 where the recipient of the benefit had notified the provider of a benefit but it was contended that she may have discharged a specific obligation but remained under a general obligation

<sup>57</sup> cf *R v Tang* (2008) 237 CLR 1, 24, 61

she was required to perform it, confirms that the applicant's interpretation of the Code is unworkable and must be erroneous.

**PART VII – RESPONDENT'S NOTICE OF CONTENTION**

72. The respondent submits that the complaint is a nullity and does not disclose an offence known to law. The respondent relies upon the majority's criticism of the wording of the charges and the complaint.<sup>58</sup>
73. The respondent contends that even if, contrary to her submissions and the decision of the majority, any omission may constitute the physical element of a s 135.2 offence, then the defective nature of the complaint here (in failing to identify precisely, or at all, the particular act that the respondent failed to perform) renders this case an unsuitable vehicle for consideration of the issues said to arise.
- 10 74. As this Court recently affirmed in *Kirk v Industrial Court* (2010) 239 CLR 531 at 553, 557, the law requires that a defendant be told, through the statement of offence, not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge. The information or complaint must specify the time, place and manner of the act that the defendant failed to perform.<sup>59</sup> In the case of a failure to perform a particular act, this will ordinarily require an identification of the measure that should have been taken but was not.
75. As the majority observed, while the statement of offence in respect of each of the 17 counts alleged that the respondent *engaged in conduct*, there is no reference to the act that the defendant failed to perform. The uncertainty as to the subject matter of the complaint is evident from the reasons of the Learned Special Magistrate. The Learned Special Magistrate found that the conduct that was the subject of the offences was the completion by the respondent of false declarations.<sup>60</sup> This was not the conduct relied upon by the prosecution nor the conduct that was the subject of defence counsel's submissions.
- 20 76. The applicant now relies on the reference in the particulars to the respondent having *failed to advise* Centrelink of the commission payments she received. On one view,<sup>61</sup> this was no more than an (incorrect) statement of the reason why there was no entitlement to payment, rather than a particular of the offence charged.<sup>62</sup> The applicant also characterised the offence as a breach of an obligation *not to get a benefit to which you are not entitled*<sup>63</sup> but
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<sup>58</sup> FC AB437 – 438 [35]-[37], [41]; Complaint AB1 – 6

<sup>59</sup> See *Kirk* (supra) at p557 Citing *Johnson v Miller* (1937) 59 CLR 467 at 486.

<sup>60</sup> AB9 [2] – [4]; AB12 [24]; respondent's affidavit 19 April 2010 AB73 [17]

<sup>61</sup> FC AB437 [36]

<sup>62</sup> See transcript of Full Court hearing, AB410 – 411 T55-T56, as to the uncertainty surrounding what conduct or act resulted in the financial advantage.

<sup>63</sup> AB400 T45.11

agreed that the respondent was not charged with this conduct as constituting the offence.<sup>64</sup> The applicant conceded that the conduct in respect of which the Learned Special Magistrate had sentenced the respondent was not the conduct that the applicant alleged against her.<sup>65</sup> The applicant acknowledged that the only offence with which the respondent could be charged under the Social Security legislation that involved a breach of an obligation to perform an act in relation to the receipt of her PPS benefit, related to failure to comply with a notice under the *Administration Act*.<sup>66</sup>

10 77. But even if the majority were wrong about this, and a *failure to advise* is the failure to perform an act (*the omission*) relied upon as constituting the physical element (*engage in conduct*) required by s 135.2(a) of the Code, the complaint is still defective. The respondent is entitled to know what is the particular act that she failed to perform when she failed to perform it, and how such failure or omission occurred. Moreover, when one considers the dates identified in the complaint, they are the dates of receipt of the net commission payments, not the dates of receipt of the PPS benefits.<sup>67</sup> Presumably the prosecution alleged that there was a failure to act at the very moment that the net income was received into the respondent's bank account. This is difficult to reconcile with:

77.1. the fact that the receipt of particular amounts of income, through the multi-factorial means test applied under the *Social Security Act*, may or may not ultimately have an impact on the level of benefit properly payable; and

20 77.2. the fact that the obligations of the recipient of the benefit are dependent upon compliance by Centrelink with the notice provisions of the *Administration Act*. It follows that (contrary to the apparent assumption in AS [41]), no meaningful failure can have occurred at or about the time of receipt of the commission payments. But if the failure did not occur at the moment of receipt of income, then when did it occur? When asked this question by the Full Court, counsel for the applicant said

*when you have failed to report your income to Centrelink.*<sup>68</sup>

This answer is at least uninformative, if not entirely meaningless and circular.

30 78. Absent an obligation to notify someone at a particular time or upon the happening of a particular event (for example, under the provisions of *the Administration Act*), it is impossible to identify when the relevant failure to act or the physical element occurred.

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<sup>64</sup> AB400 T45.16

<sup>65</sup> This error was not appreciated by or acknowledged before David J in the Supreme Court AB53-60

<sup>66</sup> AB399-400 T44.33 – T45.19

<sup>67</sup> The Summary of Facts before the Learned Special Magistrate did not identify the dates of receipt of the PPS payments but provided a single overpayment figure (AB98)

<sup>68</sup> AB401 T46.25

79. The difficulty is compounded when one turns to the issue of identifying the requisite fault element of intention (which the applicant acknowledges is the relevant fault element<sup>69</sup>) in respect of the first physical element of s 135.1 of the Code. If the precise nature and timing of the particular act that the respondent failed to perform (the physical element) is not easily determined, then there will be a consequential difficulty in identifying the fault element associated with that failure, given that the fault element (intention) must exist at the time of the conduct that is said to constitute the first physical element of each count.<sup>70</sup> The other physical elements of s 135.2 require proof of different fault elements.<sup>71</sup>
- 10 80. In relation to AS [42] and [43], the respondent submits that the need for a complaint to identify the particular act that is the subject of the charge is not limited to the defendant's ability to know the nature of the allegations. Nor is it necessary to do so because proof of an omission to act that is culpable at law requires that the duty to perform the act in question is expressed or implicit in the offence creating provision or imposed by another statute. Identification of the particular act in question is necessary to ensure it is a valid complaint and that there is no duplicity or uncertainty relevant to questions of *autrefois acquit* and *autrefois convict*.<sup>72</sup> That is, it is necessary to identify the act that the respondent allegedly failed to perform in order to crystallise and prove an essential element of the offence, not merely to protect the defendant from surprise.<sup>73</sup> As French CJ observed at the application for special leave, a guilty plea cannot cure a defective complaint. The respondent submits that his Honour's observation is supported by authority.<sup>74</sup> In any event  
20 in the present case, it was plain that the form of the charge misled the Learned Special Magistrate who purported to sentence the respondent for doing an act, not for an omission to act.
- 30 81. To summarise: the complaint is defective because firstly, it alleges the respondent *engaged in conduct* on the date that net commissions were paid into her bank account, whereas the applicant concedes that the subject matter of the count did not relate to any conduct by the respondent on that date. Secondly, the Leaned Special Magistrate sentenced the respondent upon the basis that she engaged in conduct on the 17 occasions alleged in the complaint by swearing false declarations, whereas the applicant concedes that this was not the transaction that was the subject of each count. Thirdly, the applicant concedes that there is no particular act that the applicant was required to perform pursuant to any law of the Commonwealth in relation to her receipt of a PPS pursuant to the *Social Security Act*

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<sup>69</sup> AS [10(1)]

<sup>70</sup> *Campbell v R* (2008) 73 NSWLR 272 at [44], [129] (Spigelman CJ), [139], [144] (Weinberg AJA).

<sup>71</sup> Identified at AS [20]

<sup>72</sup> *Walsh v Tattersall* (1996) 188 CLR 77, 90; [1996] HCA 26

<sup>73</sup> cf *R v Ayles* (2008) 232 CLR 410, 414; [2008] HCA 6 at [7]

<sup>74</sup> *R v Parsons* (1997) 97 A Crim R 267; *R v Whitehouse* (1977) QB 868; 65; Cr App R 33; *R v Angel* (1968) 52 Cr App R 280; *R v Pickford* (1995) 1 Cr App R 420

and the *Administration Act*. The respondent submits that accordingly, there is no conduct by the respondent that is capable of constituting the first physical element of the offence under s 135.2. The reliance upon a non-specific failure to inform Centrelink of income is not capable of constituting *conduct* under the Code. Therefore, on the facts and circumstances of the instant case, the alleged omission to perform the act relied upon in the Full Court, (and intended to be relied upon before the Leaned Special Magistrate), was not an offence known to law.

10 82. Accordingly, because the complaint did not identify the particular act that the respondent failed to perform, and indeed it remains impossible for the applicant to identify that act, when the respondent was supposed to perform it and why, the complaint is a nullity. In any event, if the applicant was alleging a continuing general failure to perform an act that at law a defendant was obliged to perform over a lengthy period relating to separate receipts of PPS payments, the complaint would be duplicitous.<sup>75</sup> However, it remains impossible for the applicant to identify the particular act that the respondent was required to perform because there is no such requirement at law imposed upon the respondent. Therefore, the complaint was defective and incurably so.

20 83. Upon the admitted facts, there was no identifiable conduct capable of satisfying the first physical element of the offence charged. Therefore, the offence charged was not capable of constituting an offence known to law.<sup>76</sup>

Dated



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<sup>75</sup> *Walsh v Tattersall* supra at 105 – 107; 110 – 111

<sup>76</sup> *Meissner v R* supra; *Liberti* (1991) 55 A Crim R 120 at 121-122