IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M5 OF 2013

Removed from the Magistrates' Court of Victoria

BETWEEN:	DIRECTOR OF PUBLIC PROSECUTIONS (CTH) Informant
AND:	KELLI ANNE KEATING Defendant

AMENDED ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II INTERVENTION

2. The Attorney-General of the Commonwealth (**Attorney-General**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) to support the validity of s 66A of the *Social Security (Administration) Act 1999* (Cth) (**Administration Act**) in its retrospective effect.

PART III LEGISLATIVE PROVISIONS

3. The Attorney-General agrees that the relevant legislative provisions are those identified by the Defendant.

PART VI STATEMENT OF THE ARGUMENT

SUMMARY

4. Section 66A of the Administration Act imposes a duty with both prospective and retrospective effect. It is a duty owed by a recipient of social security payments to inform the Department of the occurrence of an event or change of circumstances that might affect his or her payments. The duty applies in relation to a relevant event or change of circumstances that occurs on or after 20 March 2000.

5. In relation to the first Question Reserved, concerning the construction and effect of s 66A, the Attorney-General adopts the submissions of the Commonwealth Director of Public Prosecutions (**CDPP**).

6. In its retrospective operation, s 66A is a valid law of the Commonwealth. This is so for the following reasons:

   6.1. The grants of legislative power conferred by s 51 extend to the enactment of laws having retrospective operation. There is no constitutional prohibition – express or implied – on the Commonwealth Parliament enacting a law that creates rights and obligations merely because it has retrospective effect, and even if there are criminal consequences: see [22]-[28] below.

   6.2. To the extent that the Parliament is constrained in enacting retrospective laws, this is by reason of the separation of judicial and legislative powers mandated by the Constitution: see [29]-[36] below.

6.3. Application of the doctrine of the separation of powers does not entail that retrospective criminal laws are fundamentally repugnant to the judicial power, as contended by the Defendant at [26] of her submissions: see [37]-[42] below. Nor does its application in the present case invalidate s 66A of the Administration Act: see [44]-[54].

6.4. Arguments from the history of the common law at the time of Federation do not dictate any different outcome: see [58]-[62] below.

6.5. Considerations arising from the rule of law similarly do not dictate any different outcome: see [64]-[73] below.

10 Accordingly, the second Question Reserved, concerning invalidity, should be answered "no".

7. The Attorney-General adopts the submissions of the CDPP in relation to the third Question Reserved.

8. As to the fourth Question Reserved, the Attorney-General as intervener does not seek costs and submits that no order for costs should be made against him.

BACKGROUND TO THE QUESTION OF VALIDITY

The legislative scheme and alleged overpayments

9. Entitlement to the receipt of social security payments arises under the *Social*
20 *Security Act 1991* (Cth). The Administration Act provides for the administration of the social security law and related purposes.

10. From 20 October 2005 to 1 September 2010 (**the benefit period**), the Defendant received Parenting Payment Single (**PPS**) payments, the amounts of which were in part calculated by reference to income. In applying for the PPS, the Defendant declared to the Department a fortnightly income of $760.15. She did not make any other declarations of income during the benefit period.[1]

11. During the benefit period, the Department sent the Defendant a grant letter under s 67 containing the admonition referred to at [53] below, and 13
30 notices under s 68, of the Administration Act. Sections 67 and 68 confer separate, but related, discretions on the Secretary, including to give a written notice to a person to inform the Department of a specified change of circumstances where social security payments have been granted, or are being paid, respectively. The notices sent to the Defendant stated that she was required to inform the Department within 14 days of the occurrence of

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1 Stated Case [6]-[7]: Case Stated Book at 3.

any of a number of specified events, including a change in her income. At all material times, under s 74 of the Administration Act it was an offence of strict liability (s 74(4)) to fail to comply with certain notices, including notices issued under ss 67 and 68.[2] Section 2A of the Administration Act applies Chapter 2 of the *Criminal Code* (Cth) (**the Code**) to all offences under the Administration Act. The Defendant does not admit to receiving the grant letter or the notices.[3]

12. On 7 October 2010, the Defendant was charged in the Victorian Magistrates' Court with 3 counts of obtaining financial advantage from the Commonwealth contrary to s 135.2(1) of the Code in respect of 3 periods in 2007 to 2009. The CDPP alleges that the Defendant received overpayments as a consequence of omitting to inform the Department of changes to her income during these periods.

Elements of the offence

13. Section 135.2(1) of the Code provides that a person is guilty of the offence of obtaining financial advantage if he or she: (i) engages in "conduct"; (ii) as a result, obtains a financial advantage from another person; (iii) does so knowing or believing that he or she is not eligible to receive that advantage; and (iv) obtains that advantage from the Commonwealth.

14. "Conduct" includes an omission: s 4.1(2) of the Code. An omission may only constitute a physical element for the purpose of the Code if the law creating the offence makes it so (s 4.3(a)), or if 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: s 4.3(b).[4] The limited circumstances in which an omission can supply the physical element of a Commonwealth offence reflect the principle that the criminal law should be certain and embody the general law principle "that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform".[5]

15. When read with the default fault element in s 5.6(1) of the Code, establishing an offence against s 135.2(1)(a) requires, amongst other things, proof that the person intentionally does an act or intentionally omits to perform an act.[6]

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2 By ss 74(2) and (3), the offence provision applies only to the extent that a person is capable of complying with the notice, and does not apply if the person has a reasonable excuse.

3 Stated Case [13]-[18]: Case Stated Book at 4-9.

4 The Dictionary to the Code defines "law" to mean a law of the Commonwealth and to include the Code itself. The "law creating the offence" is s 135.2(1) of the Code.

5 *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 at 421 [29] and 424 [44] (French CJ, Gummow, Kiefel and Bell JJ).

6 *Poniatowska* at 417 [23] (French CJ, Gummow, Kiefel and Bell JJ).

Poniatowska and the insertion of s 66A

16. In *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 (***Poniatowska***), this Court considered the circumstances in which an intentional omission may ground liability for the commission of the offence provided by s 135.2(1) of the Code.

17. At the time of the relevant omission in *Poniatowska*, there was no stand alone legislative duty to inform the Department of a change in circumstances, including a change in income. In *Poniatowska*, unlike in this case, the CDPP had not separately relied on the issue of notices under ss 67 and 68 of the Administration Act to ground a duty for the purpose of engaging s 4(3)(b) of the Code.[7] Accordingly, only s 4.3(a) was enlivened. The question was whether s 135.2(1) itself made the "omission of an act" a physical element of the offence. By majority, this Court held that it did not.[8] In the circumstances of *Poniatowska*, the offence of obtaining financial advantage contrary to s 135.2(1) could not be committed by an omission to inform of a change in income.

18. Prior to this Court's decision, s 66A was inserted in the Administration Act by the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth) (**Amending Act**). That provision introduced a stand alone duty for a person who, relevantly, is receiving a social security payment, to inform the Department of the occurrence of an event or change of circumstances that might affect that person's social security payments within 14 days of the event or change.

19. By Sch 1, item 3 of the Amending Act, read with s 2(1), s 66A "applies in relation to an event or change of circumstances that occurs on or after 20 March 2000". The nominated date is the day upon which the Administration Act, as originally enacted, commenced.

20. Section 66A does not limit the Secretary's power to issue notices under ss 67 and 68: see s 66A(6). Compliance with notices issued under those provisions, if they deal with the same subject matter and are issued within a particular timeframe, will also be compliance for the purpose of s 66A: see s 66A(4) and (5).

Present proceedings

21. Although charged in 2010, the Defendant had not been tried when s 66A was enacted. The CDPP relies upon s 66A in its retrospective operation for the purposes of s 4.3(b) of the Code; that is, to contend that omitting to inform of an event or change of circumstances is a physical element of s 135.2(1). On this basis, an offence against s 135.2(1) could be committed by omission,

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7 *Poniatowska* at 422 [34] (French CJ, Gummow, Kiefel and Bell JJ).

8 *Poniatowska* at 423 [37] (French CJ, Gummow, Kiefel and Bell JJ).

even though *as a matter of fact*, there was no stand alone legislative duty to inform the Department during the benefit period.

CONSTITUTIONAL VALIDITY OF SECTION 66A

No prohibition on enacting retrospective laws per se

22. The Commonwealth Parliament has power to create criminal offences relating to subjects within the specific matters enumerated in s 51 of the Constitution.[9]

23. The grants of legislative power conferred by s 51 extend to the enactment of laws having retrospective operation: "What the Parliament can enact prospectively in the exercise of its legislative powers, it can also enact retrospectively."[10] Within the ambit of these grants, there is no difference as to the availability of legislative power with respect to retrospective civil and criminal laws.[11] Further, there is no constitutional prohibition – express or implied – on the Commonwealth Parliament enacting a law that creates rights and obligations merely because it has retrospective effect, and even if there are criminal consequences.[12] The retrospective application of a law does not, without more, indicate any excess of power under s 51, nor any infringement of Ch III.

24. So too, the Parliament may retrospectively alter the substantive law in issue in legal proceedings.[13]

25. In this respect, *R v Kidman* (1915) 20 CLR 425 (***Kidman***) and *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) should be followed by this Court, to find that s 66A of the Administration Act, read with s 135.2 of the Code, is valid in its retrospective operation.[14]

26. *Kidman* is authority for the propositions that there is no absolute constitutional bar to the enactment of retrospective criminal laws and that the

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9 *Attorney-General for the Commonwealth v Colonial Sugar Refining Co* (1914) AC 237; *R v Kidman* (1915) 20 CLR 425 at 433-434 (Griffith CJ), 439-440, (Isaacs J) and 453 (Higgins J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 644 (Dawson J); *Leeth v Commonwealth* (1992) 174 CLR 455 at 469 (Mason CJ, Dawson and McHugh JJ); *R v Hughes* (2000) 202 CLR 535 at 555 [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). Section 51(xxiiiA) supports the legislative change and the operation of s 135.2 of the Code in the circumstances of this case.

10 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 461 (Mason J).

11 *Kidman* at 442-443 (Isaacs J).

12 *Kidman* at 451 (Higgins J); *Polyukhovich* at 533-540 (Mason CJ), 643-651 (Dawson J), 689-690 (Toohey J) and 717-721 (McHugh J); *Nicholas v The Queen* (1998) 193 CLR 173 at 234 [149] (Gummow J).

13 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250 (Mason J); *Australian Building and Construction Employees' and Builders Labourers' Federation and Others v The Commonwealth* (1986) 161 CLR 88 at 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

14 Cf Defendant's Submissions [54]–[59].

Commonwealth Parliament has full power to give a retrospective operation to its laws, including criminal laws. It has been relied upon for these propositions in subsequent cases.[15] The fact that the law in *Kidman* criminalised conduct that was a common law offence was not considered relevant by 5 of the 6 Justices in that case. It is not relevant to the application of the only germane constitutional limitation in this case; namely, the separation of powers. And the fact that a Ch III argument was not expressly raised in *Kidman* does not deprive the case of its status as authority for the generality of the propositions expressed above.

10 27. In *Polyukhovich,* each of Mason CJ (at 533), Dawson J (at 647-649) and McHugh J (at 717-718) held that Parliament has power to enact retrospective criminal laws. However, each recognised that this power is subject to the limitation derived from the constitutional separation of powers and – as a particular operation of that doctrine – the prohibition on enacting a bill of attainder (a law that determines of itself the criminal guilt of an identified individual or group of individuals). These Justices did not consider to be relevant the question whether the conduct retrospectively criminalised would have been otherwise unlawful or wrongful at the time it occurred. This approach should be accepted as good law.

20 28. The judgment of Toohey J in *Polyukhovich* should not be understood as departing from the other members of the majority. His Honour approached the issue that arose in these terms: "The validity of the Act may be tested against the requirements of Ch III of the Constitution, that is, the Act must not call for an exercise by a Court to which the Chapter applies, of what is not truly judicial power."[16] His Honour decided that issue on the basis that a law that operates retrospectively does not thereby offend Ch III.[17] It is only if a law purports to operate in such a way as to require a court "to act contrary to accepted notions of judicial power"[18] that a contravention of Ch III might be involved. It was conceivable that, in some circumstances, a law that
30 purported to criminalise conduct, which attracted no criminal sanction at the time it was done, might offend Ch III. But the Act, in its application to the information laid against the plaintiff, was not retrospective in any offensive way.[19] In his discussion, Toohey J identified general objections to retrospective criminal laws which, he observed, "have their source in a fundamental notion of justice and fairness" and, in particular, the capacity to choose to avoid conduct which will attract criminal sanction.[20] However, his

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15 *R v Snow* (1917) 23 CLR 256 at 265 (Barton ACJ); *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 at 86 (Isaacs J) and 124-125 (Higgins J); *Millner v Wraith* (1942) 66 CLR 1 at 9 (Williams J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 172 (Latham CJ); *Metwally* (1984) at 461 (Mason J) and 484 (Dawson J).

16 *Polyukhovich* at 692, item 8.

17 *Polyukhovich* at 689.

18 *Polyukhovich* at 687, 689.

19 *Polyukhovich* at 690.

20 *Polyukhovich* at 686-688.

Honour accepted that there could be circumstances in which a retrospective criminal law would be justified in balancing the public and private interests involved.[21] His Honour's discussion[22] suggests that he did not consider that, in context – including "the universality of the condemnation of murder in municipal laws"[23] – the retrospective operation of the law by itself required any further inquiry as to whether the law constituted an impermissible direction to the court as to the exercise of judicial power. By contrast, a retrospective criminal law the operation of which was not justified in balancing the public and private interests involved or which was retrospective in any offensive way, may invite closer scrutiny as to whether it operated as an impermissible direction to the court as to the exercise of judicial power.

Implications arising from the separation of judicial and legislative power

29. The second step in the argument is to make the necessary concession that the Commonwealth Parliament's power to make laws, including retrospective laws, is constrained by implications derived from the doctrine of the separation of powers. Sections 1, 61 and 71 of the Constitution give effect to this doctrine by separately vesting the legislative, executive and judicial powers of the Commonwealth.[24]

30. Two aspects of the constitutional separation of powers are capable of bearing upon the present case.

31. *First*, the Commonwealth Parliament cannot itself purport to exercise the judicial power of the Commonwealth. While "judicial power" defies "purely abstract conceptual analysis",[25] it describes the power of a sovereign authority "to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".[26] The nature of the judicial function involves the determination of a question of legal right or legal obligation by the application of law as ascertained to facts as found

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21 *Polyukhovich* at 689.

22 *Polyukhovich* at 690-692.

23 *Polyukhovich* at 690.

24 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10-11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Nicholas* at 200 [48] (Toohey J); *R v Kirby; Ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254. See also MJC Vile, *Constitutionalism and the Separation of Powers* (2nd ed, 1998) at 14.

25 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 (Windeyer J) and 374-375 (Kitto J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan, ~~Murphy~~ and Deane JJ).

26 *Huddart, Parker & Co. Pty. Ltd. v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *Russell v Russell* (1976) 134 CLR 495 at 505 (Barwick CJ), 520 (Gibbs J) and 532 (Stephen J); *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [27] (French CJ and Gageler J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, ~~Kirby~~, Hayne, Callinan JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [42] (Gaudron and Gummow JJ ~~Gleeson CJ~~).

"so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons".[27] The process by which the function is performed involves, subject to appropriate exceptions, an open and public inquiry,[28] in accordance with the rules of procedural fairness.[29]

32. The adjudgment and punishment of criminal guilt is exclusively judicial in character.[30] The separation of powers would be infringed if the legislature itself declares criminal guilt or inflicts punishment for a crime without judicial trial,[31] or prejudges an issue with respect to a particular individual and
10 requires a court to exercise its function accordingly.[32] Thus, bills of attainder offend the separation of judicial power.[33] Such bills characteristically include provisions which:

    32.1. designate a person or group of persons, often by name;

    32.2. recite their crimes, often treason;

    32.3. pronounce their guilt, or adjudge them guilty, or both; and/or

    32.4. impose punishment on them, including (for a bill of attainder) death.

33. So understood, a bill of attainder wholly supplants the court's function of determining criminal guilt. It does not involve any direction to the court as to the exercise of its jurisdiction, save by displacing it. While it may (but need

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27 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [27] (French CJ and Gageler J) citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J) and *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 [41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

28 *Russell v Russell* (1976) 134 CLR 495 at 505 (Barwick CJ), 520 (Gibbs J) and 532 (Stephen J).

29 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [27] (French CJ and Gageler J); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [156] (Hayne, Crennan, Kiefel and Bell JJ).

30 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 444 (Griffith CJ); *R v Davison* (1954) 90 CLR 353 at 368-369 (Dixon CJ and McTiernan J) and 383 (Kitto J); *Polyukhovich* at 608-609 (Deane J); *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Nicholas* at 187 [19] – [20] (Brennan CJ).

31 *BLF* at 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); *Bachrach v Queensland* (1998) 195 CLR 547 at 562-563 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Nicholas*; *United States v Lovett* (1946) 328 US 303 at 322-323 (Frankfurter J). McHugh J in *Lim*, at 69-70, summarises the history of bills of attainder. Cf L Tribe, *American Constitutional Law* (2nd edn) (Foundation Press: 1988) at 643, which describes a bill of attainder as an instrument that "proscribes legislative punishment of specified persons – not of whichever persons might be judicially determined to fit within properly general proscriptions duly enacted in advance."

32 *Waterside Workers' Federation of Australia v J W Alexander* (1918) 25 CLR 434 at 444 (Griffith CJ); *Polyukhovich* at 536 (Mason CJ) and 649 (Dawson J); *Lim* at 27 (Brennan, Deane and Dawson JJ); *Nicholas* at 220 [112] (McHugh J) and 231 [142] (Gummow J).

33 *Leeth* at 469-470 (Mason CJ, Dawson and McHugh JJ); *Polyukhovich*; *Haskins v Commonwealth* (2011) 244 CLR 22 at 37 [25] and following (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

not) effect a retrospective alteration to the law, it is not this aspect that creates the offence against Ch III. As Mason CJ observed in *Polyukhovich*:

> The distinctive characteristic of a bill of attainder, marking it out from other ex post facto laws, is that it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence. Other ex post facto laws speak generally, leaving it to the courts to try and punish specific individuals.[34]

34. *Secondly*, Parliament cannot interfere with the exercise of federal judicial power by a court. It cannot enact a law that directs courts exercising federal jurisdiction "as to the manner and outcome of the exercise of their jurisdiction",[35] or which requires that the judicial power be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power.[36]

35. It is not, however, a necessary condition of an exercise of the judicial power that it must in all circumstances involve the application to facts of a legal principle or standard which in every sense has been formulated in advance of the events to which it is applied. It can properly involve the application to the facts of a retrospective law that operates on past conduct, so as to create rights and liabilities. And so, in *Polyukhovich* Mason CJ said:

> The need for an inquiry into what the law is presupposes that there may be uncertainty as to the nature, scope or content of the principle or standard to be applied. Indeed, it is widely recognized that courts, in exercising their judicial power, make and alter law in the sense of formulating new or altered principles.[37]

36. Accordingly, while the separation of legislative and judicial power may lead to two specific implications which could bear on the validity of a retrospective law in certain particular circumstances, it would be wrong to deduce a general implication that retrospective criminal laws are fundamentally repugnant to the judicial power.[38]

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34 *Polyukhovich* at 535. See also *Polyukhovich* at 647 (Dawson); *Leeth* at 469-470 (Mason CJ, Dawson and McHugh JJ).

35 *Lim* at 36-37 (Brennan, Deane and Dawson JJ) and 53 (Gaudron J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ) and 594 [174] (Crennan J); *Australian Education Union v General Manager of Fair Work Australia* (2012) 86 ALJR 595 at 609, [48] (French CJ, Crennan and Kiefel JJ) and 615 [78] (Gummow, Hayne and Bell JJ).

36 *Lim* at 27 (Brennan, Deane and Dawson JJ); *Nicholas* at 185 [13] (Brennan CJ) and 208 [73]-[74] (Gaudron J).

37 *Polyukhovich* at 532-533.

38 Cf Defendant's Submissions [26]; where intended to encompass all retroactive criminal laws.

Specific response to the Defendant's core contentions at DS [26]

37. The third step in the argument is to offer a specific response to the Defendant's core contentions.

38. The proposition advanced at [26.1] of the Defendant's Submissions could be accepted if expressed as follows: a retrospective criminal law usurps or interferes with the exercise of the judicial power of the Commonwealth *if it in effect* removes from the court the fundamental task of determining an element of the offence (where this latter notion is understood as meaning the identification of the law and the application of that law to the facts as found). The Defendant's use of the causal term – *by in effect* – erroneously moves from one formal characteristic of a law to conclusions about the substantive content, and mode of application, of that law. Not every rule of the criminal law constitutes or relates to an element of an offence. Not every retrospective criminal rule that affects an element of an offence must – by reason of that character alone – remove from the court the task of determining that or any other element of the offence. Nor does every retroactive criminal law apply to "an identifiable group of persons": cf Defendant's Submissions [26.1] and [34] – [39]. And so, in *Nicholas* at 1923 [28], Brennan CJ observed that the principle to be derived from *Liyanage v R* [1967] 1 AC 259 "applies only to legislation that can properly be seen to be directed ad hominem." Toohey J made this related observation at 203 [57] (footnotes omitted):

> Even though the existence of controlled operations may be ascertainable, identifying the persons affected by a controlled operation is another matter. There is nothing in the relevant provisions which singles out an individual, as in *Kable v Director of Public Prosecutions (NSW)*, or which singles out a particular category of persons. It is simply the fact that by applying to controlled operations commenced before Pt 1AB, s 15X necessarily operates only by reference to accused persons to whom those operations related. In the same way, it might be said that the *War Crimes Act 1945* (Cth) necessarily applied only to the conduct of a limited number of persons. But that did not lead to any declaration of invalidity. The legislation held invalid in *Liyanage v The Queen* ~~R~~ went a great deal further by purporting to legislate ex post facto the detention of particular persons charged with particular offences on a particular occasion.

39. So too, in *Leeth* at 470 ~~69~~, Mason CJ, Dawson and McHugh JJ said this:

> [A] law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers does not trespass upon the judicial function.

40. The proposition advanced at [26.2] of the Defendant's Submissions cannot be accepted for the related reason that use of the causal notion "by" – as

opposed to the conditional notion "if" – fails to recognise that the conclusion of invalidity flows from an impermissible effect of the application of a law upon the exercise of the judicial power, and not from the mere fact that a law is retrospective. As Toohey J observed in *Polyukhovich:* "It is not the case that a law (even a criminal law) that operates retroactively *thereby* offends Chapter III of the Constitution."[39] A retrospective law does not "punish on the basis of a fiction". The court exercises judicial power to impose punishment for conduct found by the court to have occurred, by reference to the law determined by the court as applying at the time of trial.

No relevant distinction between criminal and civil laws

41. The fourth step in the argument is to address specifically the Defendant's isolation of retrospective criminal laws as having a particular offensive nature. It is uncontroversial that the mere fact that a civil law is to be applied retrospectively is not inimical to the exercise of judicial power. There is no reason in principle why any distinction should be drawn in this respect between civil and criminal laws.[40]

42. The implications derived from Ch III, including the doctrine of the separation of powers, operate alike – at the level of *principle* – in respect of both civil and criminal laws that have retrospective operation.[41] In each case, the criteria of invalidity are those identified above: whether the Commonwealth Parliament has purported to exercise judicial power itself and supplant the judicial function, or has otherwise interfered with the exercise of judicial power by a court.

43. While these criteria remain constant, their *application* may differ as between civil and criminal laws. The determination of criminal guilt or innocence is an exclusively judicial function. In the context of the civil law, Parliament's powers with respect to the abrogation, creation and alteration of civil rights, obligations or liabilities may more readily incline to the result that laws with respect to such matters do not infringe the separation of powers doctrine by virtue only of pertaining to those matters. However, neither in respect of the civil nor the criminal law, can Parliament direct the outcome of a court's exercise of its jurisdiction. The function of a court in both civil and criminal proceedings is to apply the law as it is at the time of the trial, to the facts as it has determined them to be, subject to any constraints and implications drawn from Ch III of the Constitution. The relevant enquiry is not when the law to be applied by the court was enacted but whether, in enacting that law,

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39 *Polyukhovich* at 689 (emphasis added).

40 *Polyukhovich* at 718 (McHugh J, citing Isaacs J in *Kidman*). A categorical prohibition on the enactment of retrospective criminal laws would raise difficult issues about the classification of laws. A less than bright line divides the terms "civil" and "criminal", including in the context of the application of retrospective laws: *Dalton v NSW Crime Commission* (2006) 227 CLR 490 at 502 [27] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

41 *Kidman* at 442-443 (Isaacs J); *Polyukhovich* at 718 (McHugh J).

Parliament has itself purported to exercise judicial power, or has otherwise interfered with the exercise of judicial power.

Section 66A does not offend the separation of powers

44. The fifth step in the argument is to apply the principles stated at [22]-[42] above to the provisions here in question.

45. Section 66A of the Administration Act, in its retrospective operation, read with s 135.2(1) of the Code, does not constitute an exercise of judicial power by substituting a legislative enactment of criminal guilt for a trial by a Ch III court. Nor does it constitute an interference with the nature of judicial power or the judicial process: cf Defendant's Submissions [32]-[33]. Three matters merit attention.

46. *First*, the legislation "speaks generally".[42] This is so, both as to: (i) its substantive field of application (it specifies no particular persons); and (ii) its temporal application (it is backdated to the date of commencement of the statute itself). It purports to encompass all possible historical and future applications. It does not on its face target any particular pending proceeding. It is, rather, a "law of general application which seeks in some respect to govern the exercise of a jurisdiction which it confers".[43]

47. *Secondly*, s 66A is given retrospective effect by reason of s 2(1) and Sch 1, item 3 of the Amending Act, by which it is said to *apply in relation to* certain matters. The language of "application" suggests that the Parliament has achieved the amendment of the previous law, not by direction to the courts, but through reliance on legislative power.[44] It operates by its own force to achieve its stated purposes. Its character is, accordingly, substantively legislative. It does not deal with matters that are uniquely susceptible to judicial determination or insusceptible to legislative determination.[45] There is nothing judicial in character in the creation of a general legislative stand alone duty with both prospective and retrospective effect.

48. *Thirdly*, exposition of the full task reposed in a court under s 135.2(1) reveals that no impermissible interference occurs and that it is left "to the courts to try and punish specific individuals".[46] By operation of s 66A(2), read with s 2(1) and Sch 1, item 3 of the Amending Act, a court cannot relevantly convict a person of an offence against s 135.2(1) of the Code unless it determines that:

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42 *Polyukhovich* at 535 (Mason CJ).

43 *Leeth* at 469-470 (Mason CJ, Dawson and McHugh JJ).

44 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 and cf *BLF*. See further P Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Oxford and Portland; Hart Publishing, 2009) Chapter 2.

45 *BLF* at 95 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

46 *Polyukhovich* at 535 (Mason CJ).

48.1. a social security payment (other than a utilities allowance or senior supplement) was being paid to a person: s 66A(2)(a)(i);

48.2. an event or change of circumstances occurred that might affect the payment of that social security payment: s 66A(2)(b);

48.3. the person engaged in conduct, being a failure to inform the Department of the occurrence of the event or change. Having regard to ss 4.1 and 4.3 of the Code, this will require the court to determine and conclude that:

(i) as a matter of fact, the person failed to inform the Department of the occurrence of the event or change of circumstances: s 135.2(1)(a) read with s 4.1(2)(b);

which,

(ii) as a matter of law, there is a duty to perform: s 4.3(b);

Having regard to s 5.6(1) of the Code, the court must also determine that:

(iii) this failure to inform the Department was intentional: s 5.6(1);

48.4. as a result of that conduct, the person obtained a financial advantage for himself or herself from another person, being aware of the substantial risk that this would occur and, having regard to the circumstances that were known to him or her, it was unjustifiable to take the risk that this result would occur: s 135.2(1)(aa) read with s 5.6(2) and 5.4(2);

48.5. the person knew or believed that he or she was not eligible to receive the financial advantage: s 135.2(1)(ab); and

48.6. the other person is a Commonwealth entity: s 135.2(1)(b).

49. Section 66A is relevant to the court's determination at the juncture identified in paragraph 483.3(ii) above. Having regard to the scheme of findings of fact and law that a court must make before any legal consequence follows, however, it is apparent that the Parliament has not purported to deal directly with the ultimate issues of criminal guilt or innocence, insofar as s 66A operates retrospectively.[47]

50. Nor has the Parliament deemed to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the

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[47] *Nicholas* at 210 [79] (Gaudron J) and 278 [251] (Hayne J).

offences with which the accused is charged.[48] That this is so is revealed by the fact that the relevant element of the offence under s 135.2(1) of the Code is not that an accused intended to breach the stand alone duty imposed by s 66A. Rather, what must be established, consistent with [48] above, is that: (i) as a matter of fact, a person intentionally did not perform an act; and (ii) as a matter of law, there is a duty to perform that act.[49] So understood, it is apparent that, by s 66A, Parliament has prescribed an additional rule that is applied by the court at a discrete juncture of its decision-making process.

51. The court must apply that rule as much in a case where it has prospective application as where it has retrospective operation.

52. In performing its task under s 135.2(1), the Court will find facts, apply the law, and exercise any available discretion in making the judgment or order which is the purpose of judicial power.[50] It will thereby, in accordance with the usual judicial process, exercise the judicial power of the Commonwealth in determining guilt or innocence.[51]

53. Furthermore, applying the language of Toohey J in *Polyukhovich*, s 66A does not require a court to act contrary to accepted notions of judicial power. The retrospective operation of s 66A is an exercise of Parliament's legitimate role in the balancing of the public and private interests involved and is not an impermissible direction to the court as to the exercise of judicial power. The full range of matters that must be proved before a Court can determine guilt in respect of the relevant offence – as identified at [~~32~~48] above – will, if established, indicate that the accused understood, or ought to have understood, *at the time of the conduct charged*, that his or her acts and omissions were wrongful. This ameliorates any *ex facie* unfairness in the creation and application of a retrospective criminal rule.[52] Similarly, the grant letter stated: "You must tell us about any changes to your earnings within 14 days (28 days if happening outside Australia) if any of these things happen or may happen ... your income, not including financial investments or maintenance, increases".[53] The non-statutory admonition articulated in the grant letter now finds legislative reflection in s 66A of the Administration Act. Accordingly, the statutory and administrative matrix entails that the "wrongful nature of the conduct ought to have been apparent to those who engaged in it".[54]

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48 *Nicholas* at 236 [156] (Gummow J).

49 *Jovanovic v Director of Public Prosecutions (Cth)* [2012] SASC 194 at [38] (Gray J).

50 *Nicholas* at 190 [24] (Brennan CJ); *Williamson v Ah On* (1926) 39 CLR 95 at 108 (Isaacs J).

51 *Nicholas* at 188-191 (Brennan CJ); *Kariapper v Wijesinha* [1968] AC 717 (PC).

52 Cf W Blackstone, *Commentaries* (17th ed) (1830), vol 1, pp 45-46, cited by Mason CJ in *Polyukhovich* at 534.

53 Stated Case [15], Table, item 1: Case Stated Book at 5,6.

54 *Polyukhovich* at 643 (Dawson J).

54. The judgment made by Parliament is one available within the exercise of legislative power, leaving the courts to exercise the judicial power in the resulting matter. The legislative judgment might be expressed thus: the interest in protecting the integrity of the social security system justifies placing all persons who claim benefits to which they are not entitled under the same duty of disclosure backed by the criminal law, whether they are persons who do so after the change in law or before (but before a time when, by reason of the terms of the grant letter to them or otherwise, they knew or ought to have known that claiming benefits from the public purse carried with it a duty, legal or otherwise, not to allow the public purse to continue to be expended when the basis for the payment had disappeared, or changed).

Conclusion on the separation of powers

55. It is a permissible legislative choice for Parliament to enact laws – including criminal laws – with retrospective effect. The defeasible character of the presumption that legislation is not intended to have retrospective effect reflects this proposition.[55] The enactment of such a law involves a question of legislative policy as opposed to legislative power.

56. The Commonwealth Parliament has frequently exercised this available legislative choice. Generally, and unsurprisingly, this has been in the context of the civil law.[56] However, at times, the Commonwealth Parliament has considered it appropriate to enact retrospective criminal laws.[57] Where validly so done, as Brennan CJ observed in *Nicholas*:[58]

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55 Described by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267 as a defeasible "general rule of the common law"; in a passage which Lord Rodger of Earlsferry considered "conveniently stated" the common law rule: *Wilson v First County Trust (No 2)* [2004] 1 AC 816 at 876 [187]. See further, *Re Athlumney* [1898] 2 QB 547 at 551-552 (Wright J); *Phillips v Eyre* (1870) LR 6 QB 1 at 23 (Exch) (Willes J); *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 (Fullagar J); *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] (Gleeson CJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625 at [32] (French CJ, Crennan and Kiefel JJ).

56 See, for example, the *Parliamentary Service Amendment Act 2013* (Cth), which retrospectively changed the circumstances in which a parliamentary service employee would be in breach of the Parliamentary Services Code of Conduct. Tax and revenue measures are frequently enacted with retrospective effect, and justified by reference to principles of certainty and public benefit. A further category of retrospective legislation gives legal effect to court decisions made without jurisdiction: see, for example, the *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) and the *Family Law Amendment (Validation of Certain Orders and Other Measures) Act 2012* (Cth). Another category validates administrative decisions that were subject to technical irregularity: see the *Classification (Publications, Films and Computer Games) Amendment Act (No 2) 2004* (Cth).

57 See, for example, the insertion of s 471.10 ("Hoaxes – explosives and dangerous substances") in the Code by the enactment of the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* (Cth). The provision commenced at 2.00pm on 16 October 2001, being "the time and date at which the Prime Minister publicly announced the proposed new offence for sending hoax material": Explanatory Memorandum, *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002* at p 2. The *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth) inserted new provisions into the Code making it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian, where that conduct occurs outside Australia. The relevant provisions commenced on 1 October 2002, prior to the date the Act received Royal Assent: 14 November 2002. The *Commonwealth (Places) Application of Laws) Act 1970* (Cth) retrospectively applied the law of a

> It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice.

57. The two final steps in the argument are to deal with history, and the rule of law generally.

Arguments from history do not dictate a different outcome

58. History, principle and authority do not alter this understanding of the separation of powers doctrine and its application in this case: cf Defendant's Submissions [43] – [53]. That is, history does not support the proposition that the Constitution was drafted on an understanding that Parliament's powers with respect to the enactment of retrospective laws, including those with criminal consequences, would be categorically curtailed by the separation of powers (or otherwise).

59. While the enactment of *ex post facto* criminal laws is expressly prohibited in the United States Constitution,[59] that prohibition has no counterpart in the Constitution.[60]

60. The absence of such a corresponding constitutional prohibition should be characterised as a deliberate omission. Having observed that the "framers of our Constitution were much influenced by the model of the US Constitution", in *Polyukhovich* at 720, McHugh J observed:[61]

> [O]ur Constitution does not prohibit Bills of Attainder or ex post facto laws. The omission must have been deliberate. It is a powerful indication that the Parliament was intended to have the power to enact ex post facto laws. Furthermore, I have not seen anything in the historical materials which would indicate that the framers of the Commonwealth Constitution believed or assumed that giving a criminal statute a retrospective operation was an exercise of, or an interference with the exercise of, judicial power.

State in a "Commonwealth place" in that State following this Court's decision in *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89.

58 *Nicholas* at 197 [37] (Brennan CJ).

59 Art 1 § 9 and § 10 of the United States Constitution.

60 *Polyukhovich* at 534 (Mason CJ); see also *Kidman* at 442 (Isaacs J), 453-454 (Higgins J), 458 and 463 (Powers J).

61 See also H Moore, *The Constitution of the Commonwealth of Australia* (1902), pp 85-91, in particular, p 89 for a discussion of the different considerations governing the development of the United States Constitution and the Australian Constitution, in the context of the separation of powers and express constitutional prohibitions.

61. His Honour further noted that Inglis Clark, writing in 1901, accepted that "[t]he Constitution does not prohibit the Parliament of the Commonwealth from making retroactive laws".[62]

62. Mason CJ separately observed in *Polyukhovich*, at 535, that the express prohibition in the United States Constitution in no way reflected the common law, and in all likelihood was a response to the particular power of the Parliament of Great Britain to enact bills of attainder.[63]

63. In summary, Ch III ought not be relied upon to resurrect, by implication, a general prohibition that the framers chose to reject.

10 **Considerations arising from the rule of law do not dictate a different outcome**

64. So too, considerations grounded in the rule of law cannot dictate any different conclusion as to validity in this case:[64] cf Defendant's Submissions [28]-[31]. True it is that the Constitution is framed upon the general assumption of the rule of law.[65] The essence of that notion is that all authority is subject to, and constrained by, law.[66] It "reflects values concerned in general terms with abuse of power by the executive and legislative branches of government".[67]

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62 *Polyukhovich* at 720-721, citing I Clark, *Studies in Australian Constitutional Law* (1901) 39-40; cf Deane J at 619. While H Moore in *The Constitution of the Commonwealth of Australia* (1910) at p 315 suggests that Parliament could not pass ex post facto laws, this is arguably a reference to laws that amount to a bill of attainder having regard to the reference to the judgment of Willes J in *Phillips v Eyre* (1870) LR 6 QB 1, which at p 25 discusses *ex post facto* laws that are bills of attainder. This is supported by Moore's qualification that "it does not follow that Parliament is prohibited from enacting any law which has a retrospective operation".

63 *Polyukhovich* at 535, citing *Calder v Bull* (1798) 3 US 386 at 389. In *Calder v Bull*, in acknowledging the power of the Parliament of Great Britain to enact ex post facto laws, particular reference was made, not more generally to retrospective laws, but to "bills of attainder, or bills of pains and penalties", which were said to be legislative judgments" made for the purpose of "the safety of the kingdom [where that] depended on the death, or other punishment, of the offender", citing *The case of the Earl of Strafford* in 1641, *The case of Sir John Fenwick* in 1696 and *The banishment of Lard Clarendon* in 1669. Cf Defendant's Submissions at [46] and Deane J in *Polyukhovich* at 617-619, where his Honour adopted the view that the prohibition in the United States Constitution merely reflected an aspect of the doctrine of the separation of powers with respect to *ex post facto* criminal laws.

64 J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), Chapter 11; J Gardner *Law as a Leap of Faith* (Oxford and New York: Oxford University Press, 2012) Chapter 2, especially at §3.2; Lon L. Fuller *The Morality of Law* (Revised ed) (New Haven, Conn.: Yale University Press, 1969) pp 38-44.

65 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31] (Gleeson CJ).

66 The Honorable M Gleeson AC, "Courts and the Rule of Law" The Rule of Law Series, Melbourne University, 7 November 2001; *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 at 591 (Lord Styne).

67 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ); *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 152-154 [43]-[44] (Gleeson CJ, ~~Kirby~~, Gummow, Kirby and Hayne JJ). Writing extra-judicially, Lord Bingham of Cornhill understood the notion as entailing that, "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the Courts": T Bingham, *The Rule of Law*, (London: Allan Lane, 2010) Chapter 3,

65. However, any substantive principle or implication said to flow from the rule of law must conform to the text and structure of the Constitution. The values that comprise the rule of law ought not be given "an immediate normative operation in applying the Constitution".[68] To the extent relevant to this case, the rule of law is manifested in Ch III of the Constitution. A law that does not offend the constitutional separation of powers cannot be invalidated on the basis of some freestanding implication derived from the rule of law.

66. If consideration is given to the normative precepts of the rule of law it must be emphasised that there is considerable scope for the exercise of judgment in the exercise of legislative power as to precisely what weight is to be given to prospectivity amongst other values, which may sit in tension.

67. Prospectivity is a characteristic of laws that promotes various ends related to the rule of law.[69] This centrally involves the capacity of law to guide human conduct. Typically, law can be a reason for action, capable of guiding conduct and being the object of obedience, only if it is published and known in advance. In this respect, rules of the criminal law are paradigmatically normative. They are enacted to guide conduct, such that "a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."[70] Prospectivity also ensures that, to the extent possible, law's subjects are treated in a manner that is fair and non-arbitrary.[71]

68. Understood in this way, prospectivity is one formal characteristic of laws apt to facilitate the enactment of substantively meritorious legal rules. But it is, in this respect, one among many means capable of promoting one among many ends. These ends need not always be frustrated – and may on occasion be facilitated – by retrospectivity.[72]

69. Retrospective legislation can be of varying kinds. The kind of legislation is likely to affect the grounds upon which retrospectivity can be both attacked and justified as to the merits of the exercise of legislative power. A taxonomy

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p 37. Hayek's celebrated notion predicated "rules fixed and announced beforehand": F Hayek, *The Road to Serfdom* (London, 1944) p 54. J Locke, *Two Treatises of Government* (1690) II, xi, [136], cited in TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford and New York: Oxford University Press, 2001), p 31: "the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges." See also, Montesquieu *The Spirit of the Laws* (New York, Hafner Press, 1949), Book xi, §3, p 150.

68 *Lam* at 23 [72] (McHugh and Gummow JJ).

69 The precepts of a procedural, or formal, notion of the rule of law include non-exhaustively that: laws should be prospective, open, clear and relatively stable; the independence of the judiciary should be guaranteed; the principles of natural justice should be observed; the courts should have review powers over the implementation of other principles; the courts should be readily accessible, and the discretion of crime-preventing agencies should not be allowed to pervert the law. See further, Raz, *op cit*.

70 *Black-Clawson International v Papeirwerke Waldhof-Aschaffenberg* [1975] AC 591 (HL) at 6383 (Lord Diplock); *R v Rimmington* [2006] 1 AC 459 at 480, [33] (Lord Bingham); J Raz *op cit*, p 228.

71 *Polyukhovich* at 688 (Toohey J).

72 *Polyukhovich* at 642-643 (Dawson J) and 608-609 (Deane J).

of such laws might be as diverse as follows: curative legislation (which can be further broken down into sub-categories of routine revision and restorative legislation); validating legislation, and the overturning of judicial decisions; beneficial legislation (which includes statutes explicitly conferring retrospective regulatory powers, as well as retrospective subordinate legislation); subordinate legislation; procedural statutes; retrospective criminal law; retrospective taxation law; and laws retrospective to the date of announcement.[73]

70. A retrospective law may cure an unforeseen legal defect, or serve systemic goals of coherence and fairness. Curative retrospective legislation is, for this reason, in principle more amenable to merit justification than other kinds of retrospective law. As Fuller put it: "a retrospective 'curative' statute can perform a useful function in dealing with mishaps that may occur within a system of rules that are generally prospective."[74]

71. In particular, a retrospective law is capable of guiding conduct at a systemic level by indicating that, where appropriate, unintended gaps in the law will not allow a person to escape the legal consequence of past actions:[75] cf Defendant's Submissions [28.3]. In this vein, in *Kidman* at 443, Isaacs J observed that the Parliament's powers are not confined to "creating fear of punishment by threatening as to future acts, but extend to dealing with the conduct, which in its opinion deserves it, and so conveying the same warning and fear as a plenary Legislature within the ambit assigned to it."

72. For the reasons given at [54] above, s 66A might be understood as in fact falling into the category of a meritorious choice by Parliament of a limited, curative use of retrospectivity. Whether that be so, this remains a matter within the range of legitimate legislative choice, not something which offends any implication from Ch III.

73. The second Question Reserved should accordingly be answered "no".

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73 C Sampford, *Retrospectivity and the Rule of Law* (Oxford and New York: Oxford University Press, 2006) Chapter 4, "Retrospective Legislation".

74 LL Fuller, *op cit* at p 74. At p 53, Fuller makes a related point: "Like every other human undertaking, the effort to meet the...demands of the internal morality of law may suffer ~~from~~ various kinds of shipwreck. It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces."

75 L Kaplow, "An Economic Analysis of Legal Transitions" (1985-86) 99 *Harvard Law Review* 509 at 600 and C Sampford, *op cit* at p 238. See also: E A Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 *Canadian Bar Review* 268; MJ Graetz, "Retroactivity Revisited" (1984-85) 98 *Harvard Law Review* 1820; S Munzer, "A Theory of Retroactive Legislation" (1982-83) 61 *Texas Law Review* 425 ~~and~~ (1982-83) 61(3) *Texas Law Review* 463.

PART VII ESTIMATED HOURS

74. It is estimated that one hour will be required for the presentation of the Attorney-General's oral argument.

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