IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M5 OF 2013

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Informant

KELLI ANNE KEATING
Defendant

DEFENDANT'S ANNOTATED SUBMISSIONS

Victoria Legal Aid
350 Queen Street
Melbourne VIC 3000

Telephone: (03) 9269 0599
Fax: (03) 9269 0210
Ref: Michael Freedman

PART I PUBLICATION OF SUBMISSIONS

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

PART II ISSUES

2. In certain periods between May 2007 and September 2009, the Defendant received social security benefits greater than those to which she was entitled.[1] It is alleged that the overpayments, totalling $6292.79, occurred because the Defendant omitted to inform Centrelink[2] of changes to her income, which fluctuated from fortnight to fortnight.[3] She is charged with obtaining a financial advantage in breach of s 135.2(1) of the Commonwealth Criminal Code (the **Code**).[4]

3. Leaving aside momentarily the effect of certain letters sent to the Defendant (addressed separately below), it is the case that, when the Defendant omitted to inform Centrelink of changes in her income, that conduct was innocent because, at the time, the Defendant was under no legal duty to provide Centrelink with the relevant information: *Director of Public Prosecutions (Cth) v Poniatowska.*[5]

4. The first issue in this case is whether the introduction in 2011 of s 66A of the *Social Security (Administration) Act 1999* (Cth) (the **Administration Act**), after the offences were alleged to have been committed and after the Defendant was charged,[6] "fix[es] criminality"[7] to the Defendant's omissions by retroactively imposing the duty which this Court found wanting in *Poniatsowska.* The Defendant's submission is that s 66A does not have this effect, either as a matter of statutory construction or by reason of Chapter III of the Constitution.

5. Assuming that s 66A does not operate retroactively to criminalise the Defendant's conduct, the second issue is whether the Defendant may nevertheless be held criminally responsible for her omissions by reason of certain letters sent to her by Centrelink under s 68(2) of the Administration Act. The Defendant contends that the sending of those letters did not generate a duty "imposed by law" within the meaning of s 4.3(b) of the Code.

---

1 Stated Case, [21], [26]. (CSB, 10)

2 "Centrelink" is the trading name of Commonwealth Services Delivery Agency.

3 Stated Case, [20]-[22]. (CSB, 10)

4 Stated Case, [24]-[25]. (CSB, 11)

5 (2011) 244 CLR 408.

6 The "charge periods" are set out in paragraph 26 of the Stated Case. The Defendant was charged on 7 October 2010: Stated Case, [24] (CSB 11).

7 See W Wade, *A Treatise on the Operation and Construction of Retroactive Laws as Affected by Constitutional and Judicial Interpretations* (1880), [271].

PART III SECTION 78B NOTICES

6. Notices under s 78B of the *Judiciary Act 1903* (Cth) were given by the Defendant on 21 December 2012.[8]

PART IV JUDGMENT BELOW

7. This cause was removed before any judgment was given.

PART V RELEVANT FACTS

8. The relevant facts are set out in the case stated by Hayne J under s 18 of the *Judiciary Act 1903* (Cth) dated 14 December 2012.

PART VI DEFENDANT'S ARGUMENT

10 **FIRST QUESTION RESERVED: STATUTORY CONSTRUCTION**

Relevant provisions of the Code

9. The Defendant is charged with obtaining a financial advantage under s 135.2 of the Code.

10. Section 135.2(1) has three physical elements, as set out in sub-paragraphs 135.2(1)(a), (aa) and (b). Relevantly for this case, it is a physical element that in 135.2(1)(a): that the person "engages in conduct". That phrase is to be read in light of the definition of that phrase in s 4.1(2) and in light of the terms of s 4.3. That physical element has, as its fault element, intention.[9]

11. In *Poniatowska* the majority decided that the Code incorporates the "general law
20 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", and that the Code adopted an even more restrictive approach to liability for omissions than the general law[10] by providing, in s 4.3, that an omission could *only* be a physical element if:

> (a) the law creating the offence makes it so; or
> (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.

12. This Court held that the law creating the offence in *Poniatowska* (namely, s 135.2(1)(a) of the Code) did not itself make the omission of an act a physical

---

8 CSB, 82.

9 By reason of the operation at ss 3.2(b) and 5.6(1) of the Code; s 135.2(1)(a) does not specify a fault element for the phyiscal element "engages in conduct" and thus the default element of intention applies.

10 *Poniatowska* (2011) 244 CLR 408, [29], [32]-[33] (French CJ, Gummow, Kiefel and Bell JJ).

element of the offence, and no Commonwealth law imposed a relevant duty on the respondent.[11]

Section 66A of the Administration Act

13. In response to *Poniatowska* (but before the High Court's decision was handed down) the Commonwealth Parliament passed amendments to the Administration Act. The *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth) (the **Amending Act**) inserted s 66A into the Administration Act. The relevant provision in this case is s 66A(2).

14. Section 2(1) of the Amending Act provides that s 66A is taken to have commenced on 20 March 2000. It appears that the Director of Public Prosecutions considers that s 2(1) operates to impose the duty under s 66A retroactively[12] so as to render a failure to comply with that duty "engaging in conduct" under s 135.2.

15. The Defendant contends that, by reason of its failure to amend s 4.3 of the Code, the Amending Act does not impose criminal liability for a failure to perform an act that the person was under no duty to perform at the relevant time.

16. A construction of the Amending Act and the Administration Act that imposes criminal liability for omissions retroactively ought not be adopted, given the language of s 4.1 of the Code, read with s 4.3 of the Code.

17. Section 4.3 of the Code has two limbs, such that an omission to perform an act can *only* be a physical element if one of them is satisfied:

    (a) the law creating the offence makes it so; or

    (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.

18. Section 4.3(a) is not relevant to charges under s 135.2(1) because s 135.2(1) does not "make it so" within the meaning of s 4.3(a) — that is, s 135(1) does not make it a physical element of the offence to omit to perform an act (as was observed in *Poniatowksa*[13]). The Crown must rely upon s 4.3(b), read with the Amending Act.

19. The language of s 4.3(b) is in the present tense ("an offence *is* committed" and "an act that by law there *is* a duty to perform"), indicating that what is required in order for an

---

11 *Poniatowska* (2011) 244 CLR 408, [34]-[37] (French CJ, Gummow, Kiefel and Bell JJ).

12 The expression "retroactive" is used in these submissions to refer to law that "provides that as at a past date the law shall be taken to have been that which it was not", which Isaacs J described as a "retroactive law, that is, a retrospective law in the true sense" in *R v Kidman* (1915) 20 CLR 425, 443. Isaacs J was, in turn, citing Buckley LJ in *West v Gwynne* [1911] 2 Ch 1, 12. However, it should be noted that the terms "retrospective" and "retroactive" are often used interchangeably in the authorities and commentaries (B Juratowitch, *Retroactivity and the Common Law* (2008), 12).

13 (2011) 244 CLR 408, [37].

omission to constitute the physical element is that there be a duty on the person to perform the act *at the time of the omission*. This reading of the text is supported by the following additional considerations:

19.1. A statute is presumed not be to intended to have retrospective operation;[14] and "it is hardly credible that ... Parliament would pass retrospective criminal legislation".[15]

19.2. The majority judgment in *Poniatowska* was influenced by the lack of predictability and certainty that would exist if *any* omission, unconnected to a specific obligation, could count as conduct under s 135.2. Section 4.3 was said to reflect the ideas that the "criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it".[16]

19.3. Neither concern is met — indeed each idea is positively undermined — by a duty retroactively imposed, because a person is necessarily unable to ascertain the reach of an obligation that does not exist at the relevant time. Being non-existent, the obligation is also uncertain.

19.4. The construction would conform to the requirements of the Constitution,[17] about which the Defendant makes submissions in paragraphs 22 to 53 below.

20. Furthermore, this construction accords with the fault element for "engages in conduct", namely intention. "Proof of intention to commit an offence requires proof of the accused's knowledge of, or belief in, the facts that make the proposed conduct an offence".[18] The physical element is that a person has left undone that which she ought to have done. The facts that make the omission an offence include the existence of a duty to do the act omitted. Such an omission cannot be intentional unless the person knew what she ought to have done. That is, a person cannot intend to omit to perform an act which under law she has a duty to perform (understood as a composite concept) unless she knows she has a duty to perform it.

---

14 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194 (Fullagar J). See also: Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011), Chapter 10 and [9.18]; *Maxwell on the Interpretation of Statutes* (9th ed, 1946), 221-222; FAR Bennion, *Statutory Interpretation: A Code* (2nd ed, 1992), Sections 97 and 267.

15 *Waddington v Miah* [1974] 1 WLR 683, 694.E (Lord Reid).

16 *Poniatowska* (2011) 244 CLR 408, [43]-[44] (French CJ, Gummow, Kiefel and Bell JJ). See also A Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 *Modern Law Review* 1, 13.

17 See the authorities collected in footnote 103 in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

18 *Ansari v The Queen* (2010) 241 CLR 299, [59] (Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ).

21. The Amending Act did not purport to amend s 4.1, nor s 4.3(b). Section 4.1 read with s 4.3(b) is not satisfied by the imposition *retroactively* of a duty to inform Centrelink of relevant matters. The Amending Act ought not be interpreted as impliedly amending s 4.1 or s 4.3(b) so that criminal liability is imposed for an omission to perform an act which, at the time of the omission, there was no duty to perform.

SECOND QUESTION RESERVED: CONSTITUTIONAL VALIDITY

22. Assuming, contrary to the Defendant's submissions on construction, that s 4.3(b) read with s 66A is given retroactive operation so as to give rise to retroactive criminal guilt, the second question addresses whether such operation is constitutionally permissible.

23. Chapter III of the Constitution requires that courts exercising federal judicial power do so in accordance with the judicial process.[19] The essential features of that process include the determination of legal rights, obligations or consequences by the ascertainment of the facts as they are, the identification of the applicable law, and the application of that law to those facts.[20]

24. In *Polyukhovich* Gaudron J said:

> ... [I]t would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that act were a law invented to fit the facts after they had become known. In that situation, the proceedings would not be directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts), but to ascertaining whether the Parliament had perfected its intention of declaring the act in question an act against the criminal law. That is what is involved if a criminal law is allowed to take effect from some time prior to its enactment. Of course, the position is different if the law re-enacts an earlier law which applied when the acts were committed. At least that is so to the extent that that earlier law has not been brought to bear on conduct falling or alleged to fall within it. ... And the position is different again in the case of a law which acts retrospectively upon civil rights, obligations or liabilities. [A] retrospective civil law is very much like a statutory fiction ... it is a convenient way of formulating laws which, by their application to the facts in issue, determine the nature and extent of those present rights, obligations or liabilities.

---

19 See, eg, *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 703-704 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, [13] (Brennan CJ), [53] (Toohey J), [146] (Gummow J); *Thomas v Mowbray* (2007) 233 CLR 307, [111] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, [140] (Gummow J), [227] (Hayne J).

20 See, eg, *Harris v Caladine* (1991) 172 CLR 84, 150-152 (Gaudron J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Nicholas v The Queen* (1998) 193 CLR 173, [19] (Brennan CJ), [74] (Gaudron J).

25. The Defendant contends that Gaudron J's reasoning in *Polyukhovich* ought to be followed by this Court.[21] It is a distortion of judicial power to pretend that the criminal law at a particular time was something other than it was, where that fiction exposes a person to criminal liability where none was imposed at the relevant time. That is because of the nature of punishment as the end point of the application of the criminal law.

26. The Defendant's submission in this respect is that retroactive criminal laws are fundamentally repugnant to the judicial power for two related reasons:

26.1. First, a retroactive criminal law usurps or interferes with the exercise of judicial power of the Commonwealth by in effect removing from the court the fundamental task of determining an element of the offence (and relatedly, applies to an identifiable group of persons).

26.2. Second, a retroactive criminal law interferes with the exercise of judicial power of the Commonwealth by requiring a court to adjudge guilt and impose punishment for conduct that was in fact innocent — that is, to punish on the basis of a fiction.

Context: Retrospective legislation is exceptional

27. Judicial power "is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist".[22] The process to be followed "must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined".[23]

28. Part of the inquiry concerning "the law as it is and the facts as they are" is a determination of the relevant time at which to ascertain the law; put in practical terms, which reprint of the statute should I use? The relevant time is, ordinarily, the time at which the events in question occurred. That this must ordinarily be the case is an inherent part of the rule of law.

28.1. The rule of law is an assumption of the Constitution.[24]

---

21 This does not, the Defendant contends, require that *Polyukhovich* be overruled because, as explained at paragraph 57 below, it is not the ratio of *Polyukhovich* that the Parliament may enact retroactive criminal laws without limitation.

22 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 281 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), quoting *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 463 (Isaacs and Rich JJ).

23 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

24 See, eg, *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, [5] and [31] (Gleeson CJ), [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [120]

28.2. While there may be an aspirational or contentious aspect of the rule of law,[25] this case does not concern that aspect. The requirement that, in general, laws be prospective in a legal system that conforms to the rule of law is uncontroversial.[26]

28.3. Law cannot "rule" — or guide — conduct if it comes into existence after the conduct.[27]

28.4. Retroactive laws undermine the rule of law (understood in contrast to arbitrary rule[28]) because they lend themselves to abuse, being laws that are "invented to fit the facts after they have become known".[29]

10 29. While some retrospective laws may be justified consistently with the rule of law,[30] our system is one in which laws are almost universally prospective[31] and the separation of powers assumes as much.

30. In directing a court to apply a law other than the law that applied at the time of the occurrence of relevant events, the legislature is altering the usual judicial process, required by the Constitution and the rule of law. That alteration goes to the heart of judicial power, converting the judicial task from "an inquiry concerning the law as it is and the facts as they are" to an inquiry in which, "as at past date the law shall be taken to have been that which it was not".[32]

31. The function of adjudging and *punishing* criminal guilt is an exclusively judicial
20 function.[33] In that context, the alteration of the judicial process effected by a

---

(Gummow and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, [61] (French CJ) [423] (Crennan and Bell JJ). See also M Gleeson, "Courts and the Rule of Law" in C Saunders and K Le Roy (ed), *The Rule of Law* (2003) (**Courts and the Rule of Law**), 180-181 and the authorities cited therein.

25 See M Gleeson, "Courts and the Rule of Law". When Gleeson refers to the "formal" content of the rule of law, in contrast to its aspirational content, he appears to have in mind the distinction drawn by Paul Craig. According to Craig, prospectivity is part of the formal (and uncontroversial) aspect of the rule of law: P Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467, 469.

26 See, eg, L Fuller, *The Morality of Law* (rev edn, 1969) 46-91; J Raz, *The Authority of Law* (2nd edn, 2009) 214-19; J Finnis, *Natural Law and Natural Rights* (1980) 270-1.

27 J Raz, *The Authority of Law* (2nd edn, 2009) 214; AD Woozley, "What is Wrong with Retrospective Law?" (1968) 18 *Philosophical Quarterly* 40, 43.

28 See, eg, AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 188.

29 *Polyhukhovich* (1991) 172 CLR 501, 705.1 (Gaudron J). Madison, The Federalist No 44 in Ian Shapiro (ed) *The Federalist Papers* (2009), 228-9; L Tribe, *American Constitutional Law* (2nd ed, 1988) 629-632;

30 See, eg, *Polyhukhovich* (1991) 172 CLR 501, 642-643 (Dawson J).

31 L Fuller, *The Morality of Law* (rev edn, 1969) 53.

32 This is the definition given by Isaacs J of "retrospective law in the true sense" in *R v Kidman* (1915) 20 CLR 425, 443. See footnote 12 above.

33 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). The difficulties associated with the phrase "criminal guilt" do not arise in this case: *cf Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [79] (Gummow J).

retroactive criminal law is a usurpation of or interference with judicial power, for the reasons given below.

Legislative interference with the determination of an element of the offence

32. Legislative direction to a court in relation to the determination of an element of an offence reduces the role of the court to a mere formality[34] in relation to that element. A retroactive law takes away from a court a task that would otherwise arise at trial — that of conclusively determining an element of the offence.[35] In this case the focus is on a physical element; but on the Commonwealth's argument, the Parliament could equally remove from the Court the function of determining whether the accused knew or believed she had no right to the benefit, change the mental element by, for example, making s 135.2(1) an offence of strict liability, retroactively.

33. The Amending Act was enacted in circumstances in which it was known that persons had as a matter of fact omitted to inform Centrelink of certain matters, where such omissions were not at the time criminal in nature. The courts are now directed by ss 4.3(b), 135.2(1) and s 66A to treat such omissions as criminal. The only matter that has changed is that s 66A has supplied the duty. Although the courts are to determine whether those persons in fact omitted to perform the duty, that inquiry is a mere formality in the circumstances. There has been an "anterior determination" by the legislature of what was "an essential element in the curial decision".[36] Thus, the retroactive aspect of the Amendment Act, in the words of Deane J in *Polyukhovich*: [37]

> ... constitutes a usurpation of judicial power in that, once it is established that the accused has committed the past act, the question whether that act constituted a criminal contravention of the law is made simply irrelevant.

A law aimed at particular individuals

34. As Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed in *HA Bachrach Pty Ltd v Queensland*:[38]

> A statute affecting litigation with respect to the guilt of a particular individual or group of individuals charged with criminal offences will involve quite different considerations from one affecting litigation as to rights which the Parliament may choose to have determined either by a judicial or non-judicial body.

35. A statute need not correspond in every way to a bill of attainder (or a bill of pains and penalties) to usurp the judicial power of the Commonwealth.[39] However, one way of

---

34 *Nicholas v The Queen* (1998) 193 CLR 173, [24] (Brennan CJ).

35 *Cf Nicholas v The Queen* (1998) 193 CLR 173, [149] (Gummow J), [252] (Hayne J).

36 *Totani* (2010) 242 CLR 1, [140] (Gummow J).

37 *Polyukhovich* (1991) 172 CLR 501, 613.3 and 613.6 (Deane J).

38 (1998) 195 CLR 547, [18].

framing the relevant question is whether the Act "exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power".[40] In the Defendant's submission, the retroactivity and particularity of s 66A amount to an intrusion in this case – the possibility of an acquittal pursuant to a trial need not be foreclosed.[41]

36. Retroactive criminal legislation deals "only with events which have happened before the legislation comes into effect, it must always be possible, at least theoretically, to identify all cases to which the legislation may apply".[42] It is thus legislation directed to a particular cohort of persons. All that is left to the Court to determine, in relation to the physical element, is whether an accused is a member of the relevant cohort of persons.[43] The fact that the Court must also, in this case at least, determine whether the mental element is satisfied is no antidote to this usurpation of the judicial function. Partial usurpation of the judicial function is as offensive as usurpation of the whole of the judicial function.[44]

37. In the present case, the legislation was enacted for the purposes of dealing with a particular group of known individuals, being those who had been convicted or charged with an offence of the relevant kind.[45] The explanatory materials reveal that purpose:

    37.1. The Explanatory Memorandum states that giving s 66A retroactive effect was "to ensure that certain criminal convictions in relation to social security fraud already made under sections of Criminal Code ... cannot be overturned on the basis that the physical element of the offence, being an omission, was not established".[46]

    37.2. In the Second Reading Speech Ms Plibersek stated that "in this case there are exceptional circumstances justifying retrospectivity, namely that it would not be appropriate for a significant number of prosecutions conducted from 2000

---

39 See *Liyanage v The Queen* [1967] AC 259; *Nicholas v The Queen* (1998) 193 CLR 173.

40 *Polyukhovich* (1991) 172 CLR 501, 649-650 (Dawson J).

41 *Liyanage v The Queen* [1967] AC 259.

42 *Nicholas v The Queen* (1998) 193 CLR 173, 277 [249] (Hayne J).

43 As Gummow J put it in *Totani* (2010) 242 CLR 1, [139]: "The Court must be satisfied of the membership of the defendant, but ... the defendant need not have engaged ... in criminal activity".

44 As French CJ observed in *Totani* (2010) 242 CLR 1, [78]: "The fact that the impugned legislation provides for an adjudicative process does not determine the question whether it impairs the institutional integrity of the Magistrates Court by impairing the reality or appearance of judicial decisional independence. The laws held invalid in *Kable* and *International Finance Trust Co Ltd* both allowed for an adjudicative process by the court to which they applied."

45 *Liyanage v The Queen* [1967] AC 259, 290.E.

46 Explanatory Memorandum to the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011, p 6.

for social security fraud to be overturned on the basis of previously unidentified legal technicalities."[47]

38. Further, enactment of a retroactive law of this kind enables the Parliament and the executive, in combination, to seek to ensure a conviction, as is illustrated by this case: had the Defendant's trial occurred reasonably close to the time of the alleged offences by her (say 2010), that would have been a trial under the law as it then stood and she would have been legally entitled to an acquittal — or, at a practical level, to success on appeal, pursuant to *Poniatowska* (again, putting to one side the notices issue not ventilated in that case). The delays in the Defendant's trial,[48] coupled with the amendment of the law, mean that the Defendant is to be tried in 2013 under a different law and reformulated charges, with a possibly different outcome.

39. This was "a legislative plan ex post facto to secure the conviction ... of particular individuals"[49] and so exhibits the quality or character of a bill of attainder that constitutes an intrusion upon the exercise of judicial power.[50]

Requiring the court to adjudge and punish fictional criminal guilt

40. A retroactive criminal law interferes in the function of adjudging and punishing criminal guilt, or usurps part of that function, by severing the link, critical to the common law concept of criminal guilt and punishment,[51] between allegedly illegal conduct and the law: "Before the law, there is no transgression of the law".[52]

41. In the present case, in which innocence is sought to be converted into guilt by the retroactive imposition of a duty where there previously was none, there is a similar severance, of the requisite temporal link between the omission said to give rise to criminal liability and the legal duty to do the thing allegedly omitted.[53] Only a *pre-existing* duty to act provides a ground for punishing an omission.[54]

42. The retroactive aspect of the Amendment Act, again in the words of Deane J in *Polyukhovich*:[55]

---

47 Commonwealth, House of Representatives, *Parliamentary Debates,* Wednesday, 6 July 2011, 7830-7831 (Plibersek, Tanya, MP).

48 The Defendant does not allege that the Crown caused the delays in her trial or acted in bad faith in this regard. Nonetheless, it is the case that her trial has not yet occured.

49 See *Liyanage v The Queen* [1967] AC 259, 290.D (Lord Pearce for Lords MacDermott, Morris, Guest, Pearce and Pearson).

50 *Polyukhovich* (1991) 172 CLR 501, 649.9-650.1 (Dawson J).

51 See below at paragraphs 43 to 53.

52 T Hobbes, *Leviathan* (1994), chapter 28, 186.

53 *Poniatowska* (2011) 244 CLR 408.

54 J Kleinig, "Criminal Liability for Failures to Act (1986) 49 *Law and Contemprary Problems* 161.

55 *Polyukhovich* (1991) 172 CLR 501, 613.3 and 613.6 (Deane J).

pre-empts and negates what would otherwise be an inevitable judicial determination that, since the act of the particular person did not constitute a criminal contravention of any Commonwealth law which was applicable at the time when it was done, that person committed no crime under our law.

Retroactive criminal statutes and the concept of criminal guilt and punishment

43. The Defendant's submissions are supported by "history, principle and authority",[56] including in particular the common law's history.[57] The Constitution was framed against an understanding of criminal guilt — and its punishment — depending upon the prior existence of the law creating the relevant offence.

10 44. In the Australian context, contemporaneous material from the period around federation demonstrates this proposition and supports the argument that requiring a court to give effect to a retroactive criminal law violates the separation of powers.

44.1. Sir Samuel Griffith's draft Code of Criminal Law of 1897, which attempted "to cover the whole ground of what may be called the Living Criminal Law",[58] provided that a "person cannot be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred".[59] That provision was enacted as s 11 of the *Criminal Code Act 1899* (Qld).

44.2. Professor Harrison Moore, in his Chapter on the judicial power of the
20 Commonwealth, appeared to take it as a given that "Parliament could not pass *ex post facto* laws which made criminal acts which were lawful when done".[60] He went on to say this:[61]

> However mischievous and dangerous may be *ex post facto* laws ... their very mischief lies in the fact that they are something other than judicial acts; and what should have been done in a judicial way and according to law has been done by the assumption of arbitrary power. The grant of judicial power to a special organ means that if the matter be one which from its nature is proper

---

56 See *Cheatle v The Queen* (1993) 177 CLR 541, 562 (the Court).

57 *Cheatle v The Queen* (1993) 177 CLR 541, 552 (the Court); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (the Court); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104,141-142 (Mason CJ, Toohey and Gaudron JJ).

58 Explanatory Letter, Griffith to Attorney-General of 29 October 1897, ii, in SW Griffith, *A Draft Code of Criminal Law, Prepared for the Government of Queensland* (1897) CA 89-1897.

59 SW Griffith, *A Draft Code of Criminal Law, Prepared for the Government of Queensland* (1897) CA 89-1897, s 13.

60 Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910, reprinted in 1997) 315. Moore referred to Griffith CJ in *Donohoe v Britz* (1904) 1 CLR 391, 402, who, in the context of a discussion of the rule that Parliament had the power to validate the collection of customs duties retrospectively, said "it does not follow that it had the power to make unlawful an act which was lawful at the time when it was done".

61 Ibid, 322.

> for judicial determination alone, the Legislature cannot deal with it otherwise, or authorise anyone, even a court properly constituted, to deal with it except in the way of adjudication.

45. The attitude of the common law to statutes that provide for the retroactive adjudication and punishment of criminal guilt, and that of many other current (and past) legal systems,[62] is one of abhorrence, as the following examples illustrate.

46. Blackstone, having dealt with the vice of not making laws publicly accessible, wrote:[63]

> There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment on the person who has committed it; here it is impossible that a party could foresee that an action, innocent when it was done, should be afterward converted into guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.

47. Glanville Williams wrote of the subject this way:[64]

> The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty. Punishment in all its forms is a loss of rights or advantages consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects.

48. Lord Bingham, writing extra-judicially in reference to the prohibition on *ex post facto* criminal laws in Article 7 of the *European Convention on Human Rights*,[65] put it thus:[66]

> This is a rule of simple fairness, a rule which any child would understand, and it has featured in most legal systems since Roman times. It has long featured in British law, although it has not been consistently observed... But that was a long time ago. Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.

49. In the American context, in *Calder v Bull* Chase J said that it would be "against all reason and justice" to entrust the legislature with the power to punish a citizen for an

---

62 *Universal Declaration of Human Rights*, UN Doc A/810, art 11(2); *International Covenant on Civil and Political Rights*, 999 UNTS 171, art 15; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221, art 7; *United States Constitution* art I § 9; *Constitution Act 1982* (Canada) art 11(g) (*Canadian Charter of Rights and Freedoms*).

63 Blackstone, *Commentaries on the Laws of England*, (1769), bk 1, Introduction, 46.

64 G Williams, *Criminal Law: The General Part* (2nd ed, 1961), 575.

65 Article 7 is described in Archbold as "correspond[ing] to the general prohibition on retroactivity in English criminal law", citing *Waddington v Miah* [1974] 1 WLR 683: *Archbold on Criminal Pleadings, Evidence and Practice* (2011), [16-98].

66 T Bingham, *The Rule of Law* (2010) 74.

"an *innocent* action, or in other words, for an act, which, when done, was in violation of no existing law" – the legislature "cannot change *innocence* into *guilt*" or "punish *innocence* as a *crime*".[67] More recently, Laurence Tribe has expressed the view that "the ban on bills of attainder, and to some degree the more limited ban on *ex post facto* laws serves ... 'as ... an implementation of the separation of powers...'".[68]

50. Thus, the conception of criminal guilt and punishment against which the Constitution was framed is connected to the question whether the relevant statute was in existence at the time of the alleged offence: a retroactive criminal statute involves a fiction that seeks to convert what is in truth innocence into guilt and distorts the notion of punishment for breach of the law. Put differently, a criterion of the common law concept of criminal guilt and punishment is the prior existence of the law creating the relevance offence.

51. The principle that ignorance of the criminal law is no defence[69] supports this submission because it assumes, as a matter of logic and fairness, the existence of the relevant law at the time of the offence.[70] As Scott LJ said in *Blackpool Corp v Locker*,[71] "the very justification for [the maxim that ignorance of the law does not excuse] is that the whole of our law, written or unwritten, is accessible to the public – in the sense, of course, that, at any rate, its legal advisers have access to it, at any moment, as of right." A law that does not exist at the relevant time is necessarily inaccessible.

52. The attitude of the common law to retroactive criminal law is consistent with at least two other fundamental constitutional assumptions: the rule of law, and the principle that, in a system based on the common law, "everybody is free to do anything, subject only to the provisions of the law".[72] That common law freedom at any given time is fundamentally compromised if it is contingent on unknown future laws.

53. To assimilate the rule against retroactive criminal laws to the general principle of statutory construction against giving a statute retrospective operation and infer from

---

67 *Calder v Bull* (1798) 3 US 386, 388. These comments of Chase J did not depend on the express ban in the United States Constitution on *ex post facto* laws. Indeed, his Honour's point was that such an *express* ban was unnecessary and included "for greater caution" (389). See also W Wade, *A Treatise on the Operation and Construction of Retroactive Laws as Affected by Constitutional and Judicial Interpretations* (1880), [270].

68 L Tribe, *American Constitutional Law* (2nd ed, 1988) 657.

69 G Williams, *Criminal Law: The General Part* (2nd ed, 1961), 288.

70 See, eg, Blackstone's Commentaries, vol 1, 46; *Blackpool Corporation v Locker* [1948] 1 KB 349, 361 (Scott LJ); FAR Bennion, *Statutory Interpretation: A Code* (2nd ed, 1992) 558; AD Woozley, "What is Wrong with Retrospective Law?" (1968) 18 *Philosophical Quarterly* 40, 44-46.

71 [1948] 1 KB 349, 361.

72 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (the Court).

the fact that the latter is rebuttable that the former is equally subject to contrary legislative intent is to miss the following:

53.1. First, the principle against retroactive criminal laws stands apart from the general presumption, even if they both exist to implement the rule of law and avoid injustice.[73] As Lon Fuller puts it:[74]

> The principle *nulla poena sine lege* is one generally respected by civilized nations. The reason the retrospective criminal statute is so universally condemned does not arise merely because the stakes are high. It arises also – and chiefly – because of all branches of law, the criminal law is most obviously and directly concerned with shaping and controlling human conduct. It is the retroactive criminal statute that calls most directly to mind the brutal absurdity of commanding a man today to do something yesterday.

53.2. To the extent that the principle against retroactive criminal laws historically found its expression in England as a rule of statutory construction reflects "the peculiarly English combination of the doctrine of the rule of law with the doctrine of the legislative supremacy of Parliament".[75] This is not the position in Australia, where legislative power must be "exercised in accordance with the terms of the Constitution from which the power derives",[76] including the assumption of the rule of law.[77]

53.3. Furthermore, it is difficult to find an example of an English court giving a criminal statute retroactive effect or applying a retroactive criminal statute.[78] This may explain Lord Bingham's statement, quoted above, that "That was a long time ago". In 1861, in *Midland Railway Co v Pye,* Erle CJ said: "it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law".[79]

---

73 See *Maxwell on the Interpretation of Statutes* (9th ed, 1946) 221: "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation".

74 L Fuller, *The Morality of Law* (revised ed, 1969) 59.

75 The quote is taken from Sir W Holdsworth, *A History of English Law* (7th revised ed, 1966), vol 2, p 440, which addresses the combination in general; the specific point, in the context of retroactive legislation, is made in E Smead, "The Rule against Retroactive Legislation: A Basic Principle of Jurisprudence" (1936) 20 *Minnesota Law Review* 775, 797; see also Sir W Holdsworth, A *History of English Law* (7th revised ed, 1966) vol 10, pp 647-650.

76 See *Liyanage v The Queen* [1967] AC 259, 286 (Lord Pearce for the Court).

77 See paragraphs 28 to 29 above.

78 Cf *R v Griffiths* [1891] 2 QB 145; *Waddington v Miah* [1974] 1 WLR 683.

79 (1861) 10 CBNS 179, 191.

Kidman* and *Polyukhovich

54. The Defendant contends that *Kidman* and *Polyukhovich* are distinguishable.

55. In *Kidman* conspiring to defraud the Commonwealth, the act retroactively criminalized under the impugned Commonwealth statute, was, at the relevant time, an offence at common law.[80] Further, no separation of powers argument was put or considered. Thus *Kidman* was no bar to this Court's consideration of the separation of powers argument in *Polyukhovich*.[81]

56. In *Polyukhovich*, which concerned retroactive criminalization of acts acknowledged to be war crimes under other systems of law, the nature of the legislation was decisive in upholding the validity the legislation on the Chapter III ground.[82] In *Polyukhovich*, the defendants' argument was that the legislation in the case was not "true retroactive legislation".[83]

57. Although *Polyukhovich* is often cited as authority for an unfettered power in the Commonwealth Parliament to enact *ex post facto* criminal laws, this is not its *ratio*. In particular, there was no majority support for the proposition that the Commonwealth may, consistently with Ch III, retroactively criminalise acts or omissions that were not criminal at the time they were committed or omitted. Rather:

    57.1. Deane and Gaudron JJ held that Ch III precludes the enactment of retroactive criminal laws (except, perhaps, in relation to conduct already criminal, which was not the case in relation to the war crimes legislation).[84]

---

80 As explained in *Polyukhovich* (1991) 172 CLR 501, 717 (McHugh J).

81 See, eg, (1991) 172 CLR 501, 719.2 (McHugh J).

82 Toohey J's decision depended upon his Honour's view that the challenged legislation was not "retroactive in any offensive way": (172 CLR 501, 690.1). Dawson J discussed at some length the specific justification for the *ex post facto* creation of war crimes, though it is not clear that this materially affected his decision (see 172 CLR 501, 642-3). The facts of *Polyukhovich* arguably fall within a common proviso to the ban on *ex post facto* criminal laws in other legal systems. For example, Article 7 of the *European Convention on Human Rights*, which prohibits retroactive criminal laws contains the following proviso: "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

83 According to the reports, Griffith QC argued that the Act "is not retroactive. At international law, a State may use its courts of ordinary criminal justice for the trial of war crimes and crimes against humanity" (172 CLR 501, 506.6). Weinberg QC argued: "The Act is retrospective in a procedural sense, but not retroactive. Every crime alleged against the plaintiff was a crime under international law, the law of the place where it was done, Australian law, and the law of every civilized country. What is involved is no more than the retrospective procedural application of Australian jurisdiction where jurisdiction would not previously have been available. ... True retroactive legislation renders criminal something which was not criminal when done. The Act does not do that..." (172 CLR 501, 507.9-508.6).

84 (1991) 172 CLR 501, 613-614 (Deane J), 706-707 (Gaudron J).

57.2. Toohey J held that the law in question was not invalidated by Ch III because it criminalised actions that were criminal at the time they were committed.[85]

57.3. Brennan J did not need to consider the Ch III point, but viewed retrospectivity as a problematic feature of the legislation in question[86] and left open the correctness of *Kidman* (as to availability of a head of power).[87]

57.4. Only three judges — Mason CJ, Dawson and McHugh JJ — held that the Commonwealth could enact retroactive criminal laws in relation to conduct not already criminal (and each judge endorsed a proviso to the effect that such laws could not usurp the judicial power of the Commonwealth, without exhaustively defining the scope of this proviso).[88]

58. The suggestions that appear in some judgments in *Polyukhovich* that "no one doubts the power of the Parliament ... to enact retrospective criminal laws"[89] or that "[t]here is ample authority for the proposition that the Commonwealth Parliament may in the exercise of its legislative powers create ... criminal laws with an *ex post facto* operation"[90] ought, in the Defendant's submission, be approached with caution. As Deane J observed, the "only case in this Court in which reasoned consideration has been given to the question of the legislative competence of the Parliament of the Commonwealth to enact an *ex post facto* criminal law is *R. v. Kidman*".[91]

59. However, if this Court were of the view that either *Kidman* or *Polyukhovich* cannot be distinguished then the Defendant would seek leave to reopen those decisions.

Conclusion on constitutional validity

60. In *Ha v New South Wales* this Court rejected an invitation to overrule the franchise cases prospectively. Brennan CJ, McHugh, Gummow and Kirby JJ said:[92]

> If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law. This would be especially so where, as here, non-compliance with a properly impugned statute exposes a person to criminal prosecution.

---

85 (1991) 172 CLR 501, 689-690.

86 (1991) 172 CLR 501, 593.

87 (1991) 172 CLR 501, 554.

88 (1991) 172 CLR 501, 536 (Mason CJ), 647, 649 (Dawson J), 721 (McHugh J).

89 718.5 (McHugh J). McHugh J was here referring to the Parliament of the United Kingdom, but it is apparent that his Honour regarded this as applicable to the Commonwealth Parliament.

90 643.9-644.1 (Dawson J).

91 *Polyukhovich* (1991) 172 CLR 501, 619-620.

92 (1997) 189 CLR 465, 504.2.

61. This case raises the obverse problem — a perversion of judicial power by the application to a person that which is acknowledged not to have been the law at the time of her omissions.

62. To return to the words of Gaudron J in *Polyukhovich*,[93] proceedings under the retroactive aspect of the Amendment Act will not be "directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts)", but to ascertaining whether, in enacting s 66A, "the Parliament had perfected its intention" of declaring the omissions in question omissions giving rise to criminal liability.

10 THIRD QUESTION RESERVED: EFFECT OF NOTICES

63. If he cannot rely on s 66A of the Administration Act, it appears the Informant will seek to rely on letters sent to the Defendant pursuant to s 68(2) of the Administration Act.[94] However, the Informant has not said that he will rely on those letters, or how he might do so. The following submissions assume that the Informant will say that:

63.1. the letters sent to the Defendant, stating that she was required to give certain information to Centrelink, gave rise to a duty by law to perform certain acts for the purpose of s 4.3(b) of the Code; and

63.2. not performing those obligations constituted "engaging in conduct" for the purpose of s 135.2(1)(a) of the Code.

20 64. The Defendant contends that a demand made in a letter sent to a person under s 68 of the Administration Act does not of itself give rise to a duty imposed by law within the meaning of s 4.3(b).

65. The submissions on this point are in two parts: first, the construction of the notices scheme in the Administration Act; second, the requirements of s 4.3(b) of the Code.

The notices scheme[95]

66. Sections 67 to 70A, in Subdivision B of Division 6 of Part 3 of the Administration Act, empower the Secretary to give notices to certain categories of person requiring the person to inform the Department of a specified event or change of circumstances ("**information notices**").

---

93 *Polyukhovich* (1991) 172 CLR 501, 705.2 (Gaudron J).

94 The letters are summarised at paragraph 15 of the Stated Case (SCB 5-9) and set out in full at SCB 13-71 (Attachment 1 to the Stated Case).

95 The notices scheme is described in *Poniatowska* (2011) 244 CLR 408, [8]-[9] (French CJ, Gummow, Kiefel and Bell JJ).

67. Between October 2005 and August 2009, the Defendant was sent 13 information notices issued under s 68, which contained the following statement, or something similar:[96]

> You must tell us within 14 days (28 days if residing outside Australia) if any of the things listed below happen, or may happen.... This is an information notice given under social security law.

68. The notices went on to list a series of things, such as "if your income increases", "if you start work or go back to work", "if you start any form of profession".

69. It is a strict liability offence, punishable by imprisonment for 6 months, to refuse to or fail to comply with an information notice: s 74(1). Section 74(1) only applies to the extent to which the person is capable of complying with the notice (s 74(2)) and "does not apply" if the person has a reasonable excuse (s 74(3)).

Submissions regarding scheme

70. An act demanded to be performed in a computer-generated[97] information notice is not "an act that by law there is a duty to perform" for the purposes of s 4.3(b) of the Code.

71. Section 4.3 reflects the ideas, fundamental to the Code, that "that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it".[98] The expression "by law" in s 4.3(b) is to be understood in light of those ideas. The proposition that a demand in an information notice gives rise to a duty "by law" is inconsistent with those ideas because a duty arising from a demand expressed in an information notice is fundamentally uncertain, in the following respects:

    71.1. When does the duty arise? Does it arise when the notice is sent? When it is received? When it is read? If it is never received or read, does it arise at all?

    71.2. When does it end? Assuming that the time period specified in the notices corresponds to the legislative requirement,[99] for how long after the date of the notice does the obligation subsist? If a change of circumstances occurred many months or years after the issue of the notice, would there still be a duty to inform Centrelink of the change of circumstances arising from the notice? What effect does the issuing of a fresh information notice have on an obligation imposed by an earlier notice?

---

96 Stated Case, [15] (CSB, 5). Receipt of the notices is not conceded: Stated Case, [18]. (CSB, 9)

97 Stated Case, [8]-[12] (CSB, 3-4).

98 *Poniatowska* (2011) 244 CLR 408, [44] (French CJ, Gummow, Kiefel and Bell JJ).

99 Sees 72(3)(b) of the Administration Act requires that the period specified in a notice begin on the day of the change of circumstances or the day on which the benefit recipient becomes aware of a likely change of circumstances.

72. Thus, it is necessary for the Crown to source the asserted duty in a section of the Administration Act. There are only two possible sources of a duty by law to comply with the notices sent to the Defendant: s 68 or s 74 of the Administration Act.

73. Section 68 should be swiftly discarded. It is an empowering provision — it authorises the Secretary to send certain notices. But it does not, expressly or impliedly, impose a legal duty on a person to comply with the terms of a notice.

74. Section 74 equally ought to be discarded as the source of a legal duty capable of operating to satisfy the requirements of s 4.3(b).

74.1. Section 74 expressly imposes criminal responsibility for refusing or failing to comply with an information notice (and is the only provision that does so).

74.2. Section 74 carries a penalty of 6 months imprisonment and must be prosecuted within one year after the alleged failure to comply.[100] In contrast, s 135.2, although summary in nature, carries a penalty of one year's imprisonment and can be prosecuted at any time.[101]

74.3. The provisions of s 74 evince an acknowledgement by the legislature that there will be circumstances in which a person is not criminally responsible for a failure to comply with a notice: s 74(1) "applies only to the extent to which the person is capable of complying with the notice" (s 74(2)) and "does not apply" if the person has a reasonable excuse (s 74(3)).

74.4. Thus the scope of any obligation arising from a demand expressed in an information notice is limited by the provisions of s 74. Whether a person is under a duty to comply with a notice will turn on whether he or she is capable of complying and whether he or she has a reasonable excuse for not complying. These are matters that would be ventilated in a trial for breach of s 74.

75. To take an obligation expressed in an information notice and give it independent force, divorced from the terms and constraints of s 74, is fundamentally to subvert the legislative scheme.

76. The Defendant's submissions draw further support from the rule that penal provisions are to be strictly construed and the explanatory materials concerning the notices scheme.

---

100 See *Crimes Act 1914* (Cth), s 15B(1)(b).

101 See *Crimes Act 1914* (Cth), s 15B(1)(a).

76.1. As to the former, the "Court should be specially careful... to ascertain and enforce the actual commands of the legislature"[102] and not to extend any penal category where there is uncertainty.[103]

76.2. As to the latter, the relevant Explanatory Memorandum makes clear that the requirement to comply with information notices was both created and constrained by s 74 (then cl 73):[104]

> Clause 73 requires that a person comply with a notice under clause 66, 67, 68 or 69 to the extent that the person is capable of complying. A penalty of 6 months imprisonment for refusal or failure may be imposed.

PART VII APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

77. Identifying the relevant legislative provisions, *as at the relevant date*, goes to the very heart of the issue in this proceeding. For this reason, Part 1 of Annexure A contains the provisions as they stood at the time of the alleged offences; Part 2 contains the relevant provisions of the Amending Act.

PART VIII ORDERS

78. The Defendant submits that the answers to the questions reserved for the consideration of the Full Court on 14 December 2012 are as follows:

1. No.
2. Yes.
3. No.
4. Each party to bear his or her own costs.

PART IX TIME ESTIMATE

79. The Defendant considers that 2 hours will be required for her oral argument, having regard to the allocation of a total of one day for the hearing in this matter.

Date of filing: 28 February 2013

Debbie Mortimer	Kristen Walker	Frances Gordon
Telephone: (03) 9225 7170	Telephone: (03) 9640 3281	Telephone: (03) 9225 6809
Facsimile: (03) 9640 3108	Facsimile: (03) 9225 8480	Facsimile: (03) 9225 7293
debbie.mortimer@mc8.com.au	kristen.walker@mc8.com.au	francesgordon@vicbar.com.au

---

102 *Scott v Cawsey* (1907) 5 CLR 132, 154-155 (Isaacs J).

103 *R v Adams* (1935) 53 CLR 563, 567-568 (Rich, Dixon, Evatt and McTiernan JJ); *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).

104 Explanatory memorandum to the Social Security (Administration) Bill 1999, Social Security (International Agreements) Bill 1999, the Social Security (Administration and International Agreements) (Consequential Amendments) Bill 1999, p 20.