

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
GUMMOW, HEYDON, KIEFEL AND BELL JJ

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COMMONWEALTH DIRECTOR OF PUBLIC  
PROSECUTIONS

APPLICANT

AND

MALGORZATA BARBARA PONIATOWSKA

RESPONDENT

*Commonwealth Director of Public Prosecutions v Poniatowska*  
[2011] HCA 43  
26 October 2011  
A20/2010

## ORDER

1. *Special leave to appeal granted.*
2. *Appeal dismissed with costs.*

On appeal from the Supreme Court of South Australia

### Representation

W J Abraham QC with L J Chapman SC for the applicant (instructed by Commonwealth Director of Public Prosecutions)

M L Abbott QC with M E Shaw QC for the respondent (instructed by Town & Country Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Commonwealth Director of Public Prosecutions v Poniatowska**

Criminal law – Physical element of offence – Omission – Respondent convicted of multiple charges of obtaining financial advantage from Commonwealth entity contrary to s 135.2(1) of *Criminal Code* (Cth) ("Code") – Respondent failed to advise Centrelink of receipt of payments of commission from employer – Whether omission to perform act that person not under legal obligation to perform can be physical element of offence created by s 135.2(1) of Code – Whether s 4.3 of Code gave expression to common law principle that criminal liability does not attach to omission unless it is omission to perform act that person is under legal obligation to perform.

Words and phrases – "engages in conduct", "makes it so", "obtains a financial advantage", "omission".

*Criminal Code* (Cth), ss 4.1(2), 4.3, 135.2(1).

*Social Security Act* 1991 (Cth), Pt 2.10, s 1068A.

*Social Security (Administration) Act* 1999 (Cth), s 74.



Introduction

- 1        This appeal concerns the elements of the offence of "obtaining financial advantage" that is created by s 135.2(1) of the *Criminal Code* (Cth) ("the Code"). It is an offence under that provision for a person to engage in conduct and, as a result of that conduct, to obtain a financial advantage from another person (being a Commonwealth entity) knowing or believing that he or she is not eligible to receive that financial advantage. The expression "engage in conduct" is defined as doing an act or omitting to perform an act<sup>1</sup>. At issue is whether the omission to perform an act that a person is not under a legal obligation to perform may be a physical element of the offence created by s 135.2(1).

Procedural history

- 2        The respondent pleaded guilty before the Magistrates Court of South Australia (Baldino SM) to 17 counts of obtaining a financial advantage contrary to s 135.2(1). Each charge related to her receipt of part-payments of the Parenting Payment Single ("the PPS") from the Commonwealth Services Delivery Agency, a Commonwealth entity known as "Centrelink". The allegation in each case was that the respondent was not entitled to part-payment of the PPS because she had failed to advise Centrelink of her receipt of payments of commission from her employer. It is not alleged that the respondent was under a duty imposed by a law of the Commonwealth to advise Centrelink of the receipt of those payments.
- 3        The respondent was convicted of each of the charges. She was sentenced to 21 months' imprisonment subject to the direction that she be released immediately upon entering a bond to be of good behaviour for two years<sup>2</sup>.
- 4        The respondent unsuccessfully appealed against the severity of the sentence to the Supreme Court of South Australia (David J). She appealed from David J's order to the Full Court of the Supreme Court of South Australia (Doyle CJ, Duggan and Sulan JJ). Initially, the appeal was confined to the severity of the sentence. Subsequently, the respondent filed a notice of appeal

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1    Code, s 4.1(2).

2    *Crimes Act* 1914 (Cth), ss 4K(4), 20(1)(b).

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against conviction. She challenged her convictions on two grounds<sup>3</sup>. The first ground contended that the counts do not charge offences that are known to the law. The second ground contended that the counts are deficient in their failure to identify the transaction, act or omission on which liability is said to depend.

5 The Full Court allowed the appeal and set aside the respondent's convictions. The majority (Doyle CJ and Duggan J) held that the omission to perform an act will only found liability under s 135.2(1) of the Code if it is the omission of an act that the person was under a duty to perform<sup>4</sup>. In light of this conclusion, it was not necessary for the majority to deal separately with the second ground.

6 The Commonwealth Director of Public Prosecutions' application for special leave to appeal was referred by French CJ and Gummow J to the Full Court, where it was heard as on appeal. The respondent filed a notice of contention seeking to uphold the orders below on grounds which variously articulate the second ground above. For the reasons that follow, special leave to appeal should be granted but the appeal should be dismissed. In the balance of these reasons the Commonwealth Director of Public Prosecutions will be referred to as the appellant.

#### Social security payments – the statutory scheme

7 Entitlement to receipt of social security payments is governed by the *Social Security Act* 1991 (Cth) ("the Social Security Act")<sup>5</sup>. The qualifications for receipt of the parenting payment are dealt with in Pt 2.10 of the Social Security Act. They include, in the case of a person who is not a member of a couple, that the person has a dependent child<sup>6</sup>. The parenting payment may not be payable to a person who is otherwise qualified to receive it because, inter alia, the person's parenting payment rate, as determined by reference to a

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3 A third ground was subsumed by the first.

4 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 586-587 [30].

5 References to the Social Security Act in these reasons are to the Act as it stood throughout the period of the alleged offending, noting any amendments to the relevant provisions.

6 Social Security Act, ss 500, 500D.

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statutory calculation<sup>7</sup> would be nil<sup>8</sup>. This result may occur by virtue of a statutory "reduction for ordinary income", determined by reference to the extent to which a person's ordinary income exceeds that person's "ordinary income free area"<sup>9</sup>. This calculation may also result in a benefit being payable at a reduced rate.

8 The administration of social security payments is dealt with by the *Social Security (Administration) Act* 1999 (Cth) ("the Administration Act")<sup>10</sup>. Under the Administration Act, the Secretary of the Department may by written notice require a person who is a recipient of a social security payment to do certain things within a specified time. The Secretary may require the person to contact the Department and to give information to him or her<sup>11</sup>. Failure to comply with the reasonable requirements of such a notice has the consequence that the social security payment is no longer payable<sup>12</sup>. The Secretary may give a social security payment recipient a notice requiring that the person inform the Department if a specified event or change of circumstances occurs (or if the person becomes aware that such an event or change of circumstances is likely to occur). The person may be required by the notice to give the Department a statement about a matter that might affect the payment of the social security

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7 Social Security Act, s 1068A.

8 Social Security Act, s 500I(1).

9 Social Security Act, s 1068A, Module E.

10 References to the Administration Act in these reasons are to the Act as it stood throughout the period of the alleged offending, noting any amendments to the relevant provisions. The *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act* 2011 (Cth) (assented to on 4 August 2011) inserted s 66A into the Administration Act. Section 66A requires a person who has made a claim for or is receiving or has received a social security payment to inform the Department of an event or change of circumstances that might affect the payment within 14 days after the day on which the event or change occurs.

11 Administration Act, s 63.

12 In the period 30 August 2005 to 30 June 2006, the applicable provision was s 63(4) of the Administration Act. In the period 1 July 2006 to 30 May 2007, the applicable provisions were ss 63(4) and 63(5) of the Administration Act and ss 500ZA and 500ZB of the Social Security Act.

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payment<sup>13</sup>. The Administration Act makes detailed provision with respect to the giving and content of statutory notices, including the period within which the recipient is to respond to the notice<sup>14</sup>.

9           It is an offence under s 74 of the Administration Act for a person to fail to comply with a notice requiring that he or she inform the Department of a specified event or change of circumstances. The Administration Act creates a number of offences relating to the making of claims for, and the receipt of, social security payments<sup>15</sup>. Each is a summary offence that is punishable by a maximum penalty of imprisonment for 12 months<sup>16</sup>.

10          The Administration Act provides other mechanisms to assist in the detection and prevention of overpayments of social security payments. These include that the Secretary may request, but not compel, a recipient of a social security payment to give a written statement of his or her tax file number<sup>17</sup>. If the Secretary makes such a request and the recipient does not comply with it within a specified period, the social security payment is generally not payable<sup>18</sup>.

#### The factual background

11          The offences are alleged to have been committed between 30 August 2005 and 30 May 2007. Throughout this period the respondent received fortnightly payments of the PPS at the maximum payment rate for a single person with two dependent children. She had been in receipt of fortnightly payments of the PPS intermittently since 1995. On 30 January 2005, the respondent commenced employment with Employment Services Australia Pty Ltd, a subsidiary of the Hickinbotham Group. She was employed as a sales consultant to sell building contracts. She was paid a retainer of \$2,000 per month for the first three months of her employment. After this time her remuneration was solely by commission. The respondent ceased employment with Employment Services Australia Pty Ltd

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13 Administration Act, s 68.

14 Administration Act, s 72.

15 Administration Act, ss 212, 215, 216.

16 Administration Act, s 217.

17 Administration Act, s 75.

18 Administration Act, s 76.



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on 21 February 2006; however, payments of commission continued to be deposited into her bank account by the Hickinbotham Group over the following 15 months.

The charges

- 12 The respondent's assets value limit throughout the period of the charges did not render her ineligible to receive the PPS<sup>19</sup>. The allegation in each count is of non-eligibility for receipt of part-payment of the PPS. Each count is framed in materially similar terms. It is sufficient to refer to the first:

"On or about the 30th day of August 2005 at Adelaide or elsewhere in the said State [the respondent] engaged in conduct and, as a result of that conduct, obtained a financial advantage for herself from a Commonwealth entity, namely the Commonwealth Services Delivery Agency trading as 'Centrelink', knowing or believing that she was not eligible to receive that financial advantage; contrary to section 135.2(1) of the Criminal Code (Cth).

Particulars:

The [respondent] was not entitled to the said financial advantage, namely part payment of Parenting Payment Single, because the [respondent] failed to advise Centrelink of payments of commission received by her from Employment Services Australia Pty Ltd (a subsidiary company of Hickinbotham Group) while she was in receipt of Parenting Payment Single."

- 13 The remaining counts charge the respondent with engaging in conduct contrary to s 135.2(1) on 29 September 2005, 28 October 2005, 29 November 2005, 21 December 2005, 30 January 2006, 27 February 2006, 30 March 2006, 27 April 2006, 29 June 2006, 28 July 2006, 30 August 2006, 28 September 2006, 30 October 2006, 29 November 2006, 27 February 2007 and 30 May 2007. The dates correspond with those on which payments of commission were deposited by the Hickinbotham Group into the respondent's bank account. No payments of commission were received by the respondent in May 2006, December 2006, January 2007, March 2007 or April 2007 and she is not said to have engaged in conduct contrary to s 135.2(1) in those months.

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19 See Social Security Act, s 500Q.

14 The appellant acknowledges that the particulars of each count bear no logical relation to the charge: the respondent's non-eligibility to receive part-payment of the PPS did not arise from her failure to advise Centrelink of the receipt of payments of commission. Non-eligibility for the receipt of a part-payment in any period is because the respondent's income during that period, by virtue of the calculation provided for in s 1068A, resulted in a nil parenting payment or a reduced parenting payment.

15 In the period 30 August 2005 to 30 May 2007, the respondent received a total of \$71,502 in payments of commission. The amount of the payments varied from month to month and, as noted, in some months no commission was received. The total amount of overpayment of the PPS was \$20,162.58.

The respondent's dealings with Centrelink

16 After officers of Centrelink became aware that the respondent was employed by Employment Services Australia Pty Ltd, she was notified that she was required to report her income to Centrelink fortnightly. The respondent complied with this requirement. She reported income in April and May 2005. Thereafter, her fortnightly returns recorded that she had not received income. None of these returns are said to have been false. The fact that the respondent did not receive income in the months following the disclosure of the May 2005 income appears to have led to the decision to relieve her of the fortnightly reporting obligation. This decision coincided with the commencement of receipt by the respondent of relatively substantial payments of commission.

17 The statement of facts in evidence at the respondent's sentence hearing recorded that the respondent had been "reminded on numerous occasions of her ongoing obligation to advise Centrelink of any income she received". On her appeal below, the respondent sought to put in issue her receipt of correspondence from Centrelink<sup>20</sup>. It was not necessary for this issue to be resolved, since the appellant did not assert that any advice given to the respondent as to the asserted obligation was by notice under the Administration Act<sup>21</sup>.

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20 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 584 [19]. The appeal to the Full Court was by way of rehearing: Supreme Court Civil Rules 2006 (SA), r 286. Affidavit evidence was filed by each of the parties.

21 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 584-585 [19]-[21].

### The calculation of the overpayments

18       The way in which the amount of the overpayments was determined is explained in the statement of Michelle Justice, a Centrelink Customer Service Officer. It appears that Centrelink officers were alerted to the likelihood that the respondent had been overpaid payments of the PPS as the result of information supplied to Centrelink by the Australian Taxation Office. The amount of the overpayment was calculated for each fortnightly period with the assistance of the Centrelink payment calculator. It involved a complex computation. First, the respondent's maximum basic rate of benefit was determined by reference to a statutory table. The maximum basic rate is adjusted at six monthly intervals in line with the Consumer Price Index. In the period of the alleged offending, the maximum basic rate was increased on four occasions. Next, the maximum basic rate was reduced by applying a statutory "income test". Under this test, the payments of commission were apportioned over a period of 52 weeks. The respondent was taken to have received one 52nd of the amount of the commission payment as ordinary income during each week in the 12 months commencing on the day on which she became entitled to receipt of the sum. After making this adjustment, Ms Justice determined whether the respondent's ordinary income in a given fortnight exceeded her ordinary "income free area". The latter is the maximum amount of income that a recipient of a social security payment may earn without affecting his or her benefit rate. In those fortnightly periods in which the respondent's ordinary income exceeded her income free area she was assessed as having an "ordinary income excess". Percentage values specified in the Social Security Act were then applied to work out the respondent's ordinary income reduction. The income reduction was subtracted from the maximum payment rate to arrive at the respondent's correct rate of payment. The amount of the overpayment for a given period was the amount by which the payment made to the respondent exceeded her correct rate of payment.

### The offence

19       The offence created by s 135.2 of the Code is a summary offence punishable by a maximum penalty of imprisonment for 12 months. Relevantly, the offence is provided as follows:

"(1) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (aa) as a result of that conduct, the person obtains a financial advantage for himself or herself from another person; and

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- (ab) the person knows or believes that he or she is not eligible to receive that financial advantage; and
- (b) the other person is a Commonwealth entity.

...

- (1A) Absolute liability applies to the paragraph (1)(b) element of the offence."

20 Offences against a law of the Commonwealth consist of physical and fault elements<sup>22</sup>. Physical elements of an offence may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs<sup>23</sup>. The fault elements of intention and recklessness apply to the physical elements stated in pars (a) and (aa) respectively. Paragraph (ab) specifies the fault element of knowledge or belief with respect to the physical element of circumstance of non-eligibility for receipt of the financial advantage.

21 Applying the provisions of Pt 2.2 of the Code, the offence created by s 135.2(1) may be described as having the following physical and fault elements:

- (a) the person intentionally engages in conduct;
- (aa) as a result of the conduct, the person obtains a financial advantage for himself or herself from another person, being aware of the substantial risk that this will occur and, having regard to the circumstances that are known to him or her, it being unjustifiable to take the risk that this result will occur;
- (ab) the person knows or believes that he or she is not eligible to receive the financial advantage; and
- (b) the other person is a Commonwealth entity (absolute liability).

22 The first physical element of the offence is an element of conduct. "Conduct" and the expression "engage in conduct" are each defined in s 4.1(2) of the Code:

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22 Code, s 3.1(1).

23 Code, s 4.1(1).

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"In this Code:

**conduct** means an act, an omission to perform an act or a state of affairs.

**engage in conduct** means:

- (a) do an act; or
- (b) omit to perform an act."

23 Section 135.2(1)(a), when read as incorporating the default fault element, requires proof that the person intentionally does an act or intentionally omits to perform an act. At issue are the circumstances in which the intentional omission to perform an act may ground liability for the offence. This directs attention to s 4.3, which states the principles of criminal responsibility for the omission to act under the laws of the Commonwealth:

#### "Omissions

An omission to perform an act can 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."

#### Proceedings in the Full Court of the Supreme Court of South Australia

24 The respondent's principal ground below was the contention that the offence created by s 135.2(1) does not make the omission of an act a physical element of the offence, nor does it impliedly provide that the offence can be committed by the omission of an act that by law there is a duty to perform<sup>24</sup>. It was her contention that the offence could not be committed in any circumstances by an omission to act<sup>25</sup>. The majority rejected the latter proposition, holding that

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24 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 582 [11].

25 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 582 [11].

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the use of the expression "engages in conduct" signified the contrary<sup>26</sup>. Their Honours went on to state the general law principle, that there can be no criminal liability for an omission unless it is the omission to perform a legal obligation, and to conclude that the Code incorporates this principle<sup>27</sup>. They referred to the Report of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General ("the CLOC")<sup>28</sup>, on which the general principles of criminal responsibility found in the Code are based<sup>29</sup>:

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

25 Their Honours held that the use of the expression "engages in conduct" in s 135.2(1)(a) "does not overcome the requirement that the conduct charged must be an omission to carry out an obligation imposed by law"<sup>30</sup>. This is because the

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26 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 582 [12].

27 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 582-584 [13]-[15], citing *R v Iannelli* (2003) 56 NSWLR 247 at 251-252 [20]-[21] and *Nicholson v Department of Social Welfare* [1999] 3 NZLR 50 at 56-57 [24]-[25]. See generally Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 3-5; *Halsbury's Laws of England*, 4th ed (1976), vol 11 at 15.

28 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 584 [15].

29 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 19.

30 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 584 [16].

provision does not create a legal obligation "to act and not [to] omit"<sup>31</sup>. Their Honours considered that the concept of an omission is to be read as referring to the omission of an act that by law there is a duty to perform. They instanced a law making it an offence to fail to produce a driver's licence on request or to fail to file a tax return<sup>32</sup>.

26 Sulan J, in dissent, identified the question as being "whether the physical element of the offence, as prescribed by s 4.3(a), is contained within s 135.2"<sup>33</sup>. If it were not, Sulan J said, agreeing with the majority in this respect, then s 4.3(b) would not avail since there was "no ... identifiable duty"<sup>34</sup>. His Honour concluded that "s 135.2 provides that an omission can constitute the physical element of the offence if, as a result of the failure of a defendant to advise of his or her change in financial circumstances, that defendant obtains a financial advantage"<sup>35</sup>. It was unnecessary, in his Honour's analysis, to look to the existence of a duty of disclosure under statute or common law<sup>36</sup>. This was because of the requirement of a causal relation between the omission (to inform of the change of circumstances) and the resultant financial advantage<sup>37</sup>.

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31 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 586 [27].

32 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 586-587 [30].

33 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 591 [56].

34 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 591 [56].

35 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 591 [58].

36 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 591 [59].

37 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578 at 591 [59].

The appellant's submissions

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The appellant complains that the majority in the Full Court wrongly took the common law as the starting point for their analysis. The approach is said to have infected the whole of their Honours' reasoning. The elements of Commonwealth offences, it is pointed out, are to be ascertained by reference to Ch 2 of the Code and not by recourse to the common law. Where, as here, the law creating the offence provides that the offence may be committed by the omission to perform an act, it is said that no question of identifying a correlative obligation to do the act arises. The appellant submitted that the majority were misled by taking into account the commentary in the CLOC Report respecting liability for omissions. This is because, although the general principles of criminal liability in the Code are drawn from the CLOC draft Model Code, the expression "engage in conduct" did not form part of that draft. The appellant also observes that in a number of other respects the CLOC's recommendations concerning liability for omissions have not been adopted in the Code<sup>38</sup>.

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38 In its Final Report, the CLOC noted that the circumstances in which there is a legal duty to act would be set out in the relevant offence provisions. The discussion draft that preceded the Final Report had contained a statement of duties relevant to offences against the person. The CLOC proposed that these duties be contained in the chapter of the Code dealing with offences against the person: Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 19.

In the Discussion Paper published in June 1998, the Committee, by then styled the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General ("MCCOC"), proposed that an omission to perform an act could be a physical element of an offence against Pt 5.1 (Fatal and non-fatal offences) if it constituted an omission to perform certain specified duties. It said:

"In general terms, the law is that a person will not commit a criminal offence by failing to do something, or omitting to do something, unless a statute makes it an offence specifically – such as failing to file a tax return or failing to report a car accident – or unless the law imposes a duty to act in the situation at hand. The [MCCOC] considered the question of statutory duties to act when it was formulating the chapter on General Principles, but decided that the list of duties would need to be specific to each chapter of the Code – duties of honesty would be different to duties to prevent death – and that the codified duties which it had considered were peculiarly applicable to offences against the person."

(Footnote continues on next page)



28 The expression "engage in conduct" was introduced into the Code in 2000<sup>39</sup>. Since that time, a number of offences have been enacted which incorporate it. The appellant referred to a number of them in his written submissions<sup>40</sup>. The use of the expression is said to signify that the law creating the offence has made the omission to perform an act a physical element of the offence within s 4.3(a)<sup>41</sup>. Generally, the appellant submitted that there is no

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Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5: Fatal Offences Against the Person*, Discussion Paper, (June 1998) at 157.

39 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), Sched 1.

40 See, for example, the following provisions of the Code: s 80.1AA (Treason – materially assisting enemies etc); s 104.22(3) (Treatment of photographs and impressions of fingerprints); s 105.45 (Offences of contravening safeguards); s 115.1 (Murder of an Australian citizen or a resident of Australia); s 115.2 (Manslaughter of an Australian citizen or a resident of Australia); s 115.3 (Intentionally causing serious harm to an Australian citizen or a resident of Australia); s 115.4 (Recklessly causing serious harm to an Australian citizen or a resident of Australia); s 147.1 (Causing harm to a Commonwealth public official etc); s 271.8 (Offence of debt bondage); s 272.8 (Sexual intercourse with child outside Australia); s 272.9 (Sexual activity (other than sexual intercourse) with child outside Australia); s 272.12 (Sexual intercourse with young person outside Australia – defendant in position of trust or authority); s 272.13 (Sexual activity (other than sexual intercourse) with young person outside Australia – defendant in position of trust or authority); s 272.14 (Procuring child to engage in sexual activity outside Australia); s 272.15 ("Grooming" child to engage in sexual activity outside Australia); s 272.18 (Benefiting from offence against [Div 272 – Child sex offences outside Australia]); s 272.19 (Encouraging offence against [Div 272]); s 310.2 (Danger from exposure to unlawful manufacturing); s 310.3 (Harm from exposure to unlawful manufacturing); and s 471.6 (Damaging or destroying mail-receptacles, articles or postal messages).

41 The Explanatory Memorandum to the Bill that introduced the expression "engage in conduct" states that:

"Subsection 4(2) of the *Criminal Code* contains the important definition of 'conduct' which means an act, an omission to perform an act or a state of affairs. Offences refer to 'engaging in conduct'. The proposed definition of 'engaging in conduct' is designed to make it clear that 'engagement' does not

(Footnote continues on next page)

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support in the Code for the conclusion that an omission to perform an act is a physical element of an offence only when a legal obligation to perform the act can be identified.

#### Liability for omissions under the Code

29 The majority in the Full Court were right to consider that the Code incorporates 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. The expression of that principle is found in s 4.3 of the Code. Section 4.3 is drawn directly from the CLOC draft Model Code<sup>42</sup>.

30 In a number of respects, the statement of the general principles of criminal responsibility proposed in the CLOC draft draws on the Model Penal Code promulgated by the American Law Institute in 1962<sup>43</sup>. Article 2 thereof is headed "General Principles of Liability" and §2.01(3) states:

"Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

- (a) the omission is expressly made sufficient by the law defining the offense; or
- (b) a duty to perform the omitted act is otherwise imposed by law."

31 The Explanatory Note which accompanies Art 2 illustrates the distinction between pars (a) and (b) as follows:

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only infer the relevant conduct must only be an act. The use of 'engaging in conduct' is meant to cover omissions as well. This will simplify the drafting of offences."

Australia, House of Representatives, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Explanatory Memorandum at 15.

42 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 10.

43 American Law Institute, *Model Penal Code*, (1962).

"There are some cases where an omission is expressly made sufficient by the law defining the offense, as in the failure to file an income tax return. An omission will also suffice in cases where a duty to perform the omitted act is otherwise imposed by law. Laws defining the obligation of parents toward infant children provide an illustration."

32 Under the law of the Commonwealth, the omission to perform an act cannot be a physical element of an offence unless the law creating the offence makes it so, expressly or impliedly, in the manner provided by s 4.3. The Code adopts a more restrictive approach to liability for the omission to act than does the common law. This is because "the law" to which s 4.3(b) refers is a law of the Commonwealth<sup>44</sup>. Section 4.3(b) does not include obligations imposed under the general law.

33 Section 4.3(a) of the Code allows the omission to perform an act to be a physical element of an offence if the law creating the offence "makes it so". Many Commonwealth statutes make it an offence for a person to fail to do a specified thing. Section 74 of the Administration Act is an example. The failure to comply with a notice requiring a bankrupt to give the official receiver a statement of affairs is another<sup>45</sup>. There are numerous examples of Commonwealth offences that are drafted along these lines and which come within the exception to the general principle that is provided by s 4.3(a)<sup>46</sup>. Commonly, they are of a regulatory kind. Liability arises from the fact of the omission and does not depend upon proof of resulting harm.

34 The rule that the omission to perform an act cannot be a physical element of an offence is subject to the further exception provided by s 4.3(b). The law creating an offence may impliedly provide that the omission to perform an act, which under the law there is a duty to perform, is a physical element of the offence. The appellant disavows reliance on any statutory duty upon the respondent to perform any act. It is common ground between the parties that s 4.3(b) is not engaged in this appeal.

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44 Code, Dictionary, definition of "law".

45 *Bankruptcy Act* 1966 (Cth), ss 77CA, 267B.

46 See, for example, *Crimes Act* 1914 (Cth), ss 3LA, 3UC, 3ZQM, 15KM, 89; *Corporations Act* 2001 (Cth), ss 283BI, 283CE; *Competition and Consumer Act* 2010 (Cth), s 135C and Sched 2, s 202.

35 If the law creating the offence does not criminalise the failure to do a thing (the exception to the general principle stated in s 4.3(a)) and if that failure is not the breach of a duty imposed by the law (the exception to the general principle stated in s 4.3(b)) it is difficult to characterise the fact that a person does not do the thing as the omission of an act. The appellant's answer to this difficulty is to say that the elements of the offence are not to be analysed in isolation: the gravamen of the offence created by s 135.2(1) is the intentional failure to do something, which causes the person to receive the financial advantage, in circumstances in which he or she has the requisite additional mental state. This analysis conflates the elements of conduct and the result of conduct. In the result, the need to identify a specific omission to act is overlooked.

36 The pleading of the charges illustrates the difficulty. The appellant acknowledges that the averment of the date in each charge cannot be sustained. The appellant does not maintain that on the date of receipt of income the respondent's failure to inform Centrelink of that receipt was the omission of an act attracting criminal liability under s 135.2(1)(a). In the appellant's submission, nothing turns on this error since the date is not material to the validity of the charge. So much may be allowed. However, it remains that senior counsel for the appellant was unable in written submissions or in the course of oral argument to identify the act that was omitted, other than to say that the respondent "failed to advise Centrelink of a payment of a commission received by her while she was in receipt of a Parenting Payment Single". When pressed to identify when it was alleged the omission occurred in respect of a given charge, counsel responded by saying "between receiving the commission and the receipt of the advantage". The difficulty lies in moving from the generalised assertion, that the respondent knew she should advise Centrelink, to the identification in each count of the omission to perform an act.

37 On the appellant's analysis, the intentional omission of *any* act that results in the person receiving a financial advantage can be a physical element of the offence. Section 135.2(1)(a) allows that the offence is one that may be committed by the omission to perform an act but the provision does not proscribe the omission of any specified act. The law creating the offence does not make the *omission of an act* a physical element of the offence within the meaning of s 4.3(a).

38 This conclusion is sufficient to dispose of the appeal. However, something should be said about the appellant's submissions, which invited attention to the legislative history.

The legislative history

39 The appellant submitted that the introduction of the expression "engage[s] in conduct" in s 4.1(2) will have no work to do if the construction for which he contends is not accepted. It is not evident that this is so. The introduction of the expression into the Code may be thought to serve the purpose that was given for it in the Explanatory Memorandum to the Bill circulated by the Minister<sup>47</sup>. The expression simplifies the drafting of offences by requiring the use of fewer words to convey that the offence is one that may be committed by doing an act or by omitting to perform an act. The use of the expression serves to resolve any question of whether a particular offence impliedly provides that it may be committed by the omission to perform an act that by law there is a duty to perform.

40 Nothing in the legislative history or in the extrinsic material to which the Court was taken supports the appellant's submission that the introduction of the expression "engages in conduct" operates to bring the offence created by s 135.2(1) within s 4.3(a). The offence of obtaining a financial advantage was introduced into the Code as part of Ch 7 by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth). As enacted, s 135.2(1) provided:

"A person is guilty of an offence if the person obtains a financial advantage for himself or herself from a Commonwealth entity knowing or believing that he or she is not eligible to receive that financial advantage."

41 The offence was repealed and a new offence substituted by the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth), in these terms:

"(1) A person is guilty of an offence if:

- (a) the person obtains a financial advantage for himself or herself from another person, knowing or believing that he or she is not eligible to receive that financial advantage; and
- (b) the other person is a Commonwealth entity.

...

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47 See above at footnote 41.

(1A) Absolute liability applies to the paragraph (1)(b) element of the offence."

42 Section 135.2 in its present form was introduced into the Code by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth). The reason given for the substitution of the new offence in the Explanatory Memorandum to the Bill was to "make it clear that there is a conduct and a result element in the offence"<sup>48</sup>. It was also said that "the substance and effect of the offence is not changed by this amendment"<sup>49</sup>.

### Conclusion

43 In his second reading speech for the Bill for the *Criminal Code Act 1995* (Cth), Mr Kerr, then the Minister for Justice, explained that codification of the criminal law had its root in the work of Jeremy Bentham. He referred to Bentham's frequently quoted criticism of the common law<sup>50</sup>:

"Do you know how they make it? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait till he does it, and then you beat him for it."

44 The principles of criminal responsibility stated in the Code proceed from the view 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. Section 4.3 is a reflection of those ideas. The exceptions to the general principle that it states do not extend to criminalising the omission of *any* act which is able to be causally related to a result of conduct. The conclusion of the majority in the Full Court was correct. For these reasons, special leave to appeal should be granted, but the appeal should be dismissed with costs.

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48 Australia, House of Representatives, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004, Explanatory Memorandum at 73.

49 Australia, House of Representatives, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004, Explanatory Memorandum at 73.

50 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1995 at 1331.

45 HEYDON J. It is common for the decisions of courts to be reversed by the legislature after they have been delivered. It is less common for this to take place even before they have been delivered. Yet the legislature has got its retaliation in first in relation to this appeal<sup>51</sup>. In those circumstances it is desirable that this dissenting judgment be as brief as possible.

### The appeal

46 Sulan J, dissenting in the Full Court of the Supreme Court of South Australia, was, with respect, correct to hold that par (a) of s 4.3 of the *Criminal Code* (Cth) ("the Code") is satisfied by s 135.2(1)(a), read with par (b) of the definition of "engage in conduct" in s 4.1(2), for the reasons which he gave<sup>52</sup>.

47 No support for a construction contrary to that of Sulan J can be found in the proposition advanced by the responsible Minister, when the Code was introduced into the House of Representatives in 1995, that it would reflect Benthamite ideals of certainty in the criminal law<sup>53</sup>. One does not often encounter a more striking illustration of the vanity of human wishes. That is because very many parts of the Code, including the parts debated in this appeal, are inconsistent with those ideals. They represent a significant regression from the condition of Commonwealth, State and Territory criminal law as it was before 1995. That criminal litigation under the Code is conducted with any semblance of ordered justice is a tribute to the Australian legal profession, not to the Commonwealth legislature.

48 Nor can any support for a construction contrary to that of Sulan J be found in the statement in the relevant Explanatory Memorandum<sup>54</sup> that the substance and effect of the relevant offence was not changed by the amendment in 2004, which introduced the present form of s 135.2. This statement begs the question of what its substance and effect were in 2000 and 2002. It is far from clear that the interpretation given by Sulan J to the legislation in its present form differed from the interpretation to be given to its predecessors.

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51 See n 10 above.

52 *Poniatowska v Director of Public Prosecutions* (Cth) (2010) 107 SASR 578 at 590-592 [53]-[62].

53 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 1 March 1995 at 1331.

54 Australia, House of Representatives, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004, Explanatory Memorandum at 73.

The Notice of Contention

49           It is therefore necessary to turn to the Notice of Contention. In substance the contention advanced has two aspects. One aspect is that "the complaint is a nullity and does not disclose an offence known to law." The other aspect of the contention is that it would not be possible for the appellant adequately to particularise the charges. It is necessary to bear in mind that the central question is whether the Full Court should have granted leave to the respondent to change her plea from guilty to not guilty. It is also necessary to bear in mind that the assumption on which consideration of the Notice of Contention rests is that the respondent's construction of the legislation is not sound. On that assumption, it cannot be said that the charges are nullities. It is true that the particulars of the charges were inadequate. But if the respondent had pleaded not guilty and complained about the inadequacy of the particulars, that question could have been investigated, and any difficulty met by amendment. The respondent submits that it would not have been possible for the appellant to have particularised the charges in a manner indicating to the respondent the particular act she failed to perform and when she failed to perform it. That submission must be rejected. The respondent knew the details of her own affairs much better than Centrelink did. Her silence about the state of those affairs resulted in the gaining by her of excessive benefits. Assuming that an omission satisfying s 135.2 must take place before receipt of each excessive benefit – and the appellant did not contend otherwise – the appellant might face difficulties in proof, depending on what was particularised, but particularisation would be possible. For example, particulars could have been given, as the appellant submitted, that after the moment of receipt of each commission payment, the respondent omitted to inform Centrelink of it before receipt of her next benefit payment.

Orders

50           Special leave to appeal should be granted. The appeal should be allowed. The orders of the Full Court of the Supreme Court of South Australia should be set aside. In lieu of them there should be an order that the appeal against conviction be dismissed. The matter should be remitted to the Full Court of the Supreme Court of South Australia for its further consideration of the respondent's complaints about the sentence.