

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

INFORMANT

AND

KELLI ANNE KEATING

DEFENDANT

Director of Public Prosecutions (Cth) v Keating
[2013] HCA 20
8 May 2013
M5/2013

ORDER

1. *The questions in the stated case dated 19 December 2012 be answered as follows:*

Question 1

Does section 66A of the Administration Act create a duty, from 20 March 2000, for the purposes of section 4.3(b) of the Commonwealth Criminal Code, such that a failure to inform the Department of the occurrence of an event or a change of circumstances as required by section 66A of the Administration Act amounts to "engaging in conduct" for the purposes of section 135.2(1)(a) of the Commonwealth Criminal Code?

Answer

No.

Question 2

If yes to Question 1, is section 66A of the Administration Act invalid, insofar as it has retrospective effect, because it

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infringes the separation of judicial and legislative powers mandated by the Constitution?

Answer

Does not arise.

Question 3

Did the notices issued to the defendant, as identified in paragraphs 13 and 15 of the stated case, or any of them, create a duty for the purposes of section 4.3(b) of the Commonwealth Criminal Code, such that a failure to perform the act or acts required by the notice or notices amounts to "engaging in conduct" for the purposes of section 135.2(1)(a) of the Commonwealth Criminal Code?

Answer

The notices issued to the defendant, as identified in paragraphs 13 and 15 of the stated case, were, in each case, capable of creating a duty for the purposes of s 4.3(b) of the Code such that a failure to perform the act or acts required by the notice or notices amounts to "engaging in conduct" for the purposes of s 135.2(1)(a) of the Code.

Question 4

What order for costs, if any, should be made?

Answer

Each party should bear its own costs of the stated case.

2. *Remit the whole of the cause in Action No A13050181 in which Kelli Anne Keating is the defendant and the Director of Public Prosecutions (Cth) appears for the informant to the Magistrates' Court of Victoria.*

Representation

W J Abraham QC with G A Hill for the informant (instructed by Director of Public Prosecutions (Cth))

D S Mortimer SC with K L Walker and F I Gordon for the defendant
(instructed by Victoria Legal Aid)

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with
R C A Higgins and D M Forrester for the Attorney-General of the
Commonwealth, intervening (instructed by Australian Government
Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with
C Jacobi for the Attorney-General for the State of South Australia,
intervening (instructed by Crown Solicitor (SA))

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

CATCHWORDS

Director of Public Prosecutions (Cth) v Keating

Criminal law – Physical element of offence – Omission – Defendant charged on multiple counts of obtaining financial advantage from Commonwealth entity contrary to s 135.2(1) of *Criminal Code* (Cth) ("Code") – Defendant failed to advise Department of changes in income – Section 4.3(b) of Code provided that omission to perform act could not be physical element of Commonwealth offence unless offence committed by omission to perform act that by law there is duty to perform – Whether s 66A of *Social Security (Administration) Act* 1999 (Cth) ("Administration Act") created duty for purposes of s 4.3(b) of Code prior to date on which Act inserting s 66A received Royal Assent.

Criminal law – Physical element of offence – Omission – Centrelink sent notices to defendant under ss 67(2) and 68(2) of Administration Act requiring defendant to perform certain actions – Section 74 of Administration Act made it offence to refuse or fail to comply with notices in certain circumstances – Defendant did not respond to notices – Whether notices issued under ss 67(2) and 68(2) of Administration Act capable of creating duty for purposes of s 4.3(b) of Code.

Words and phrases – "engages in conduct", "obtains a financial advantage", "omission", "omission to perform an act that by law there is a duty to perform", "presumption against retrospectivity".

Criminal Code (Cth), ss 4.3(b), 135.2(1).

Social Security (Administration) Act 1999 (Cth), ss 66A, 67(2), 68(2), 74.

Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011 (Cth), s 2(1), Sched 1.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. On 14 December 2012, the whole of the cause pending in the Magistrates' Court of Victoria in which Kelli Anne Keating is the defendant and the Commonwealth Director of Public Prosecutions ("the Director") appears for the informant was removed into this Court by order of Hayne, Heydon and Bell JJ¹.

2 The defendant is charged with three offences under s 135.2(1) of the *Criminal Code* (Cth) ("the Code"). That sub-section makes it an offence for a person to "engage[] in conduct" and thereby to obtain a financial advantage from a Commonwealth entity, knowing or believing that the person is not eligible to receive that financial advantage². The prosecution arises from the defendant's failure to inform the Department³ of increases in her income during the period in which she was in receipt of a social security payment known as the Parenting Payment Single ("the PPS"). It is one of a number of pending prosecutions for "social security fraud" offences charged under s 135.2(1) that are said to engage s 66A(2) of the *Social Security (Administration) Act* 1999 (Cth) ("the Administration Act").

1 *Judiciary Act* 1903 (Cth), s 40(1).

2 Section 135.2 relevantly provides:

"(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

(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.

Penalty: Imprisonment for 12 months.

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

3 The Department is not defined for the purposes of the social security law.

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3 Section 66A was inserted into the Administration Act by the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth) ("the Amendment Act") following the decision of the Full Court of the Supreme Court of South Australia in *Poniatowska v Director of Public Prosecutions (Cth)*⁴, which held that the use of the expression "engages in conduct" in s 135.2(1)(a) did not overcome the requirement that the conduct charged must be the omission of an act that a person is under a legal duty to perform⁵. The decision was affirmed by this Court in *Director of Public Prosecutions (Cth) v Poniatowska ("Poniatowska")*⁶. The decision in *Poniatowska* was reserved at the time the Amendment Act was enacted.

4 Section 66A(2) of the Administration Act relevantly provides:

"If:

(a) ...

(i) a social security payment ... is being paid to a person; [and]

...

(b) an event or change of circumstances occurs that might affect the payment of that social security payment ...;

the person must, within 14 days after the day on which the event or change occurs, inform the Department of the occurrence of the event or change."

5 The Amendment Act, Sched 1 of which inserted s 66A into the Administration Act, received the Royal Assent on 4 August 2011. Schedule 1 is taken to have commenced on 20 March 2000⁷. Schedule 1 provides that s 66A

4 (2010) 107 SASR 578.

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

6 (2011) 244 CLR 408; [2011] HCA 43.

7 Amendment Act, s 2(1).

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"applies in relation to an event or change of circumstances that occurs on or after 20 March 2000"⁸.

6

The defendant was charged on 7 October 2010 with offences that are alleged to have been committed between May 2007 and September 2009. Following the delivery of judgment in *Poniatowska*, the Director substituted three charges formulated in terms more closely following the terms of s 135.2(1). Relevantly, each charges the defendant with "engag[ing] in conduct", particularised as the intentional failure to advise the Department of a change in her circumstances "as required by law". Again, the charges cover periods between May 2007 and September 2009. At issue is proof of the first element of the offence: "the person engages in conduct". "Engages in conduct" means to do an act or to omit to perform an act⁹. It is a physical element of conduct¹⁰ to which the fault element of intention applies¹¹: the person must mean to do the act or mean not to perform the act. The averment that the relevant conduct was the failure to advise the Department of a matter as "required by law" recognises 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"¹². The principle and its exceptions are found in s 4.3 of the Code¹³:

8 Amendment Act, Sched 1, item 3.

9 Code, s 4.1(2).

10 Code, s 4.1(1).

11 Code, s 5.6(1).

12 *Poniatowska* (2011) 244 CLR 408 at 421 [29] per French CJ, Gummow, Kiefel and Bell JJ.

13 By Sched 1 to the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth), s 4.3(b) was amended in a manner that does not bear on the determination of the questions reserved in the stated case. From 8 March 2013, s 4.3 provides that:

"An omission to perform an act can only be a physical element if:

...

(Footnote continues on next page)

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"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."

7 *Poniatowska* held that the omission to perform an act is not made a physical element of the offence created by s 135.2(1) within the exception provided by par (a)¹⁴. This proceeding is concerned with the exception provided by par (b). *Poniatowska* allowed that the expression "engages in conduct" in s 135.2(1)(a) implies that the offence is committed by an omission to perform an act that by law there is a duty to perform¹⁵. It was not contended in *Poniatowska* that the respondent had been subject to a legal duty to act¹⁶. In this proceeding the Director submits that a duty engaging s 4.3(b) is imposed by s 66A(2) of the Administration Act.

8 The defendant challenges the application of s 66A to the prosecution of the charges against her. She submits that liability for the offence created by s 135.2(1) requires that the person is subject to the duty *at the time of the omission*. In the event that her construction argument fails, the defendant challenges the validity of s 66A, contending that its "retroactive" operation amounts to a usurpation of or interference with the judicial power of the Commonwealth contrary to the separation of powers for which the Constitution provides.

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- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that there is a duty to perform by a law of the Commonwealth, a State or a Territory, or at common law."

14 (2011) 244 CLR 408 at 422-423 [33]-[37] per French CJ, Gummow, Kiefel and Bell JJ.

15 (2011) 244 CLR 408 at 423 [39] per French CJ, Gummow, Kiefel and Bell JJ.

16 (2011) 244 CLR 408 at 422 [34] per French CJ, Gummow, Kiefel and Bell JJ.

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9 An alternative way in which the prosecution puts its case respecting the duty to inform the Department of an event or change of circumstances depends upon proof of the service of notices under the social security law¹⁷ ("information notices") on the defendant. The failure to comply with an information notice is made an offence by s 74(1) of the Administration Act. The defendant disputes that s 74 imposes a duty to advise the Department of a change in the recipient's circumstances for the purpose of liability for the Code offence.

The reserved questions

10 On 19 December 2012, Hayne J stated a case and reserved the following questions for the consideration of the Full Court:

- "(1) Does section 66A of the Administration Act create a duty, from 20 March 2000, for the purposes of section 4.3(b) of the Commonwealth Criminal Code, such that a failure to inform the Department of the occurrence of an event or a change of circumstances as required by section 66A of the Administration Act amounts to 'engaging in conduct' for the purposes of section 135.2(1)(a) of the Commonwealth Criminal Code?
- (2) If yes to Question 1, is section 66A of the Administration Act invalid, insofar as it has retrospective effect, because it infringes the separation of judicial and legislative powers mandated by the Constitution?
- (3) Did the notices issued to the [defendant] ... create a duty for the purposes of section 4.3(b) of the Commonwealth Criminal Code, such that a failure to perform the act or acts required by the notice or notices amounts to 'engaging in conduct' for the purposes of section 135.2(1)(a) of the Commonwealth Criminal Code?
- (4) What order for costs, if any, should be made?"

17 "Social security law" means the *Social Security Act* 1991 (Cth), the Administration Act, and any other Act expressed to form part of the social security law: see *Social Security Act* 1991 (Cth), s 23(17); Administration Act, ss 3(3) and 4; *Social Security (International Agreements) Act* 1999 (Cth), ss 3(2) and 4.

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11 The Attorneys-General for the Commonwealth and South Australia intervened to support the validity of s 66A. For the reasons to be given, the second question does not arise.

12 It is convenient to first deal with the third reserved question, which concerns the effect of the issue of information notices.

The effect of the information notices

13 Section 67(2) of the Administration Act provides that the Secretary may give a notice in writing to a claimant for a social security payment requiring the person to inform the Department if a specified event or change of circumstances occurs, or if the claimant becomes aware that a specified event or change of circumstances is likely to occur. Section 68(2) of the Administration Act provides that the Secretary may give a notice in writing to a person in receipt of a social security payment requiring the person to inform the Department if a specified event or change of circumstances occurs, or if the recipient becomes aware that a specified event or change of circumstances is likely to occur.

14 Section 72 of the Administration Act makes detailed provision respecting the content of information notices. Certain notices under s 68(2) must specify the date by which the person is to give statements to the Department¹⁸, and in all other cases notices must specify the period within which the person is to give the information or statement to the Department¹⁹. A notice must specify that it is an information notice given under the social security law²⁰.

15 The Administration Act provides that the Secretary may arrange for the use of computer programs under his or her control for any purposes for which the Secretary may make decisions under the social security law²¹. A decision made

18 Administration Act, s 72(1)(d)(i).

19 Administration Act, s 72(1)(d)(ii).

20 Administration Act, s 72(1)(e).

21 Administration Act, s 6A(1).

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by the operation of a computer program under such an arrangement is taken to be a decision made by the Secretary²².

16 When a claim for a social security payment is granted, a s 67(2) notice is automatically generated by Centrelink's computer system and issued to the claimant. Thereafter, certain events automatically generate the creation of s 68(2) notices that are issued to the recipients of social security payments.

17 On 7 October 2005, the defendant lodged a claim form for the PPS with Centrelink²³. In the claim form she stated that she was employed on a part-time basis. She did not disclose her income in the claim form. On the same date, a Centrelink customer service adviser informed the defendant that further documentation was required in support of her claim. On 14 October 2005, the defendant supplied Centrelink with a payslip which showed her fortnightly income as \$760.15. Her claim for the PPS was granted and backdated to 6 October 2005. The defendant was in continuous receipt of the PPS until 1 September 2010.

18 The PPS is paid fortnightly for periods known as "entitlement periods". Entitlement periods do not necessarily correspond to the pay periods for a given PPS recipient. The defendant's income from her part-time employment varied from one fortnight to the next. Sometimes it was less than \$760.15 and at other times it was more than that sum. She did not inform Centrelink of any of the changes in her income. Centrelink did not at any time notify the defendant that she was required to report her income at any specified interval, such as fortnightly.

19 The first charge pleads that:

"Between the 17th day of May 2007 and the 4th day of October 2007 at Epping in Victoria, whilst in receipt of Parenting Payment Single you engaged in conduct, namely you intentionally failed to advise the

22 Administration Act, s 6A(2).

23 At the time, s 8(1)(a) of the *Commonwealth Services Delivery Agency Act 1997* (Cth) stated that a function of the Chief Executive Officer of Centrelink is to provide Commonwealth services, which under s 3 include pensions, allowances, concessions or payments provided to members of the public by the Commonwealth.

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Department of a change in your circumstances as required by law, in that you failed to advise that your income increased and as a result of that conduct you obtained a financial advantage from the Commonwealth, namely payments of Parenting Payment Single to which you were not eligible knowing or believing that you were not eligible, contrary to section 135.2(1) of the *Criminal Code*."

20 The charge covers ten fortnightly pay periods. In two periods, the defendant's income was less than \$760.15 and in the remaining periods it exceeded that sum. The prosecution alleges that in total the defendant obtained the amount of \$1,624.39 for which she was not eligible.

21 The second count charges the defendant in the same terms as the first and relates to the receipt of the PPS between 3 April 2008 and 2 October 2008. This charge covers thirteen fortnightly pay periods. In each period, the defendant's income exceeded \$760.15. The prosecution alleges that in total the defendant obtained \$2,870.66 for which she was not eligible.

22 The third count charges the defendant in the same terms as the other counts and relates to the receipt of the PPS between 16 April 2009 and 3 September 2009. This charge covers ten fortnightly pay periods. In two periods, the defendant earned less than \$760.15. In the remaining pay periods her income exceeded that amount. The prosecution alleges that in total the defendant obtained \$1,797.74 for which she was not eligible.

23 The stated case sets out particulars of information notices issued to the defendant. A notice under s 67(2) was issued on 14 October 2005 and addressed to the defendant at premises in Mill Park, Victoria ("the grant notice"). The grant notice included a statement that:

"You must tell us about any changes to our [sic] earnings within 14 days (28 days if residing outside Australia) if any of these things happen, or may happen. ...

...

CHANGES TO INCOME AND ASSETS

...

your income, not including financial investments or maintenance, increases".

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24 A notice under s 68(2) also dated 14 October 2005 was sent to the defendant at the Mill Park address as the result of an event described as "[c]ustomer advice of earnings at grant". The notice contained a statement that "[y]ou must tell us within 14 days ... if any of these things happen, or may happen. ... your income ... increases".

25 A notice under s 68(2) dated 18 December 2006 was sent to the defendant at the Mill Park address as the result of an event described as "[a]dvice of rejection of Special Employment Advance" ("a particular event notice"). It contained a statement "[y]ou must tell us within 14 days ... if any of the things listed below happen. If you get a fortnightly Reporting and Income Statement, report your earnings or changes in circumstances on your reporting day". Whether an event involving an increase in income was subject to the 14 day requirement may be a matter for debate. The notice included a statement "YOU ALSO NEED TO TELL US ... [i]f ... your income ... increases".

26 Particular event notices pursuant to s 68(2) were sent to the defendant at an address in Epping, Victoria on 19 September 2007 and 22 October 2007 as the result of events described as "[a]dvice of advance payment" and "[b]enefit restoration" respectively. Each contained statements in substantially the same terms as the particular event notice dated 18 December 2006.

27 On 26 November 2007, 18 April 2008 and 24 July 2008, quarterly account statements under s 68(2) were sent to the defendant at the Epping address. Each contained a statement "[y]ou must tell Centrelink within 14 days ... if any of the things listed below happen or are likely to happen to you ... any change to your income from employment (the amount you earn goes up or down)".

28 Quarterly account statements in the same terms as earlier account statements were issued to the defendant at an address in Coburg North, Victoria on 30 October 2008, 6 November 2008 and 5 February 2009.

29 A particular event notice under s 68(2) was sent to the defendant at the Coburg North address on 29 April 2009. It contained statements in the same terms as earlier particular event notices.

30 On 14 May 2009 and 18 August 2009, quarterly account statements were sent to the defendant at the Coburg North address. Each contained statements in the same terms as those in earlier account statements.

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31 Each of the information notices issued to the defendant under s 68(2) contained a statement that it was an information notice given under the social security law.

32 The receipt of any of the information notices by the defendant is an issue between the parties.

The duty imposed under s 74 of the Administration Act

33 Section 74 of the Administration Act provides:

"Offence—failure to comply with notice

- (1) A person must not refuse or fail to comply with a notice under section 67, 68, 69, 70 or 70A.

Penalty: Imprisonment for 6 months.

- (2) Subsection (1) applies only to the extent to which the person is capable of complying with the notice.
- (3) Subsection (1) does not apply if the person has a reasonable excuse.
- (4) Subsection (1) is an offence of strict liability."

34 The defendant offers three reasons in support of her contention that the act which an information notice requires the recipient to perform is not "an act that by law there is a duty to perform" within the exclusion provided by s 4.3(b) of the Code. First, she submits that a legal duty to act must be certain and it is unclear when the duty under an information notice arises and when it ceases. Secondly, the duty is "qualified" in that it does not apply to the extent that a person is incapable of complying with the notice, and does not apply to a person who has a reasonable excuse for non-compliance. Thirdly, the creation of the lesser offence under the Administration Act for a failure to comply with an information notice is inconsistent with the same conduct attracting criminal responsibility for the more serious offence under the Code. The defendant says that to interpret the offence under s 74 as providing a "general duty" for the purposes of s 4.3(b) would subvert the scheme of the Administration Act.

35 Section 74(1) of the Administration Act imposes a duty on a person to comply with an information notice. The limitations on the duty for which s 74 provides do not deny that there is a legal obligation on a person to comply with

an information notice to the extent that the person is capable of so doing, subject only to the person having a reasonable excuse for refusing or failing to comply with the notice.

36 A conviction for an offence under s 135.2(1) based on the intentional failure to comply with an information notice may bar a subsequent prosecution for an offence under s 74(1) of the Administration Act based on the same omission²⁴. This is not to say that the Code and the Administration Act are inconsistent merely because the conduct that constitutes the offence under the Administration Act also constitutes an element of the more serious offence under the Code. Imposing liability under s 135.2(1) does not "subvert" the scheme of the Administration Act because the offence under s 135.2(1) contains different elements.

37 The recipient of an information notice is under a legal duty to comply with the notice. What is required in order to discharge the duty will depend upon the terms of the notice. The intentional failure to comply with the notice, where the failure results in the recipient obtaining a financial advantage from a Commonwealth entity knowing or believing that he or she is not eligible to receive the financial advantage, is an offence contrary to s 135.2(1) of the Code.

38 The third question in the stated case asks whether the notices issued to the defendant, or any of them, create a duty for the purposes of s 4.3(b) such that a failure to perform the act or acts required by the notice or notices amounts to engaging in conduct within s 135.2(1)(a). The stated case does not raise consideration of the scope of the obligation created by the notices, which are in varying terms. Nor does it raise any issue respecting the form of the charges. Any issue in either of these respects is for determination by the Magistrates' Court on the remitter.

39 The stated case records that the defendant was sent the information notices. Information notices may be given to a recipient by post²⁵. Service is deemed to have been effected at the time at which the notice would have been delivered in the ordinary course of post²⁶. It remains that there is no agreement

24 *Pearce v The Queen* (1998) 194 CLR 610 at 616-620 [18]-[28] per McHugh, Hayne and Callinan JJ; [1998] HCA 57.

25 Administration Act, s 72(1)(b).

26 *Acts Interpretation Act* 1901 (Cth), s 29(1).

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between the parties about whether the defendant in fact received the notices. In the event that a notice was not received the defendant would not be subject to a duty to comply with it as the fact that she had not received it would provide a reasonable excuse for non-compliance. The third question assumes the existence of a fact that is in issue between the parties. This makes it inappropriate to answer the question "yes". It should be answered in this way: "The notices issued to the defendant, as identified in paragraphs 13 and 15 of the stated case, were, in each case, capable of creating a duty for the purposes of s 4.3(b) of the Code such that a failure to perform the act or acts required by the notice or notices amounts to 'engaging in conduct' for the purposes of s 135.2(1)(a) of the Code."

The duty imposed by s 66A

40 The Director submits that on and from 20 March 2000, s 66A(2) imposes a duty to inform the Department of an event or change of circumstances affecting eligibility for a social security payment. The duty engages s 4.3(b) of the Code. He submits that the clear terms of the Amendment Act rebut the presumption against retrospectivity²⁷. The mischief which the retrospective operation of the provision is designed to redress is identified as the successful challenge to convictions for "social security fraud" in cases in which the physical element of the offence was not established. In this respect the Director refers to extrinsic material²⁸.

41 The explanatory memorandum to the Amendment Act stated²⁹:

"The Commonwealth has appealed the *Poniatowska* decision to the High Court, which has reserved its decision. The current position is that a large number of past convictions are at risk of being overturned on appeal on the basis of the decision in *Poniatowska*. ...

27 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ; [1957] HCA 7; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 per Fullagar J; [1960] HCA 80.

28 *Acts Interpretation Act* 1901 (Cth), s 15AB.

29 Australia, Senate, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011, Explanatory Memorandum at 4-5.

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The CDPP did not, in past prosecutions, rely on the notices given to the person by Centrelink to establish the person was under a duty to inform Centrelink as it was understood that this was not required. It is not possible to defend past convictions appealed on the basis of the reasoning in *Poniatowska* by seeking to introduce such notices into evidence to establish the duty. In addition, it has become apparent that it may not be able to be proved beyond reasonable doubt that such notices have complied with the requirements of section 6A of the Administration Act during the relevant period of time."

42 The Director submits that:

"the usual criticism of retrospective criminal legislation (that people would be unaware that their conduct was an offence) did not apply here – the convicted persons would have all been aware that they should have informed the Department of the specified events and changes of circumstances listed in the notices given to them by Centrelink".

43 This submission assumes the person's awareness of the obligation to inform the Department of a specified event or change of circumstances without the necessity of proof of the fact. The Director characterises the duty imposed by s 66A(2) as "reinforcing" the duty imposed by information notices served on a recipient of social security payments. That characterisation is apt to mislead. On the Director's analysis, s 66A imposes the duty on and from 20 March 2000 regardless of whether the person received an information notice and regardless of the capacity to comply with the notice in the event it was received.

44 Section 4.3 governs the circumstances in which the omission to perform an act may constitute a physical element of an offence. The Director submits that s 4.3 is a general principle of criminal responsibility applying to all Commonwealth offences and should be construed so as to accommodate the possibility of legislation having a retroactive operation. A valid retroactive law operates with effect that "at a past date the law shall be taken to have been that which it was not"³⁰. Section 66A applies on and from 20 March 2000, such that the defendant's failure in the period 17 May 2007 to 3 September 2009 to inform

30 *R v Kidman* (1915) 20 CLR 425 at 443 per Isaacs J; [1915] HCA 58, citing *West v Gwynne* [1911] 2 Ch 1 at 12 per Buckley LJ.

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the Department that her income had increased was the omission of an act that by law she is taken to have been under a duty to perform.

45 The Director observes that ignorance of the content of a law affecting the scope or operation of an offence does not relieve a person of criminal responsibility³¹. He notes that proof of the element stated in s 135.2(1)(a) requires the prosecution to establish (i) as a matter of fact, a person intentionally does not perform an act, and (ii) as a matter of law, there is a duty to perform the act. His point is that the prosecution is not required to prove an intention to breach a legal duty. These considerations support his principal contention, which is that s 4.3(b) is silent as to the point in time at which the duty to act is imposed.

46 On the Director's construction, s 66A creates a statutory fiction³² with the effect of attaching criminal liability to the defendant for her failure to advise the Department of an event within 14 days of its occurrence. This is so notwithstanding that *at the time of the failure* she was not required by law to inform the Department of the event (putting to one side receipt of any information notice) and that the duty is incapable of discharge.

47 A clear statement of legislative intention is required before the courts will find that liability for a serious Commonwealth offence is imposed by means of a statutory fiction³³. The ascertainment of such an intention proceeds by the application of well-understood principles³⁴. In issue is proof of an offence under

31 Code, s 9.3(1).

32 See *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65-66 per Windeyer J; [1970] HCA 63.

33 *CTM v The Queen* (2008) 236 CLR 440 at 446-447 [7] per Gleeson CJ, Gummow, Crennan and Kiefel JJ; [2008] HCA 25, citing *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ; [2003] HCA 2; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ; [2004] HCA 37; and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 562-563 [43] per McHugh J, 576 [88] per Kirby J, 592-593 [134] per Callinan J; [2002] HCA 49.

34 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

the Code. This directs attention to the law creating the offence and to the general principles of criminal responsibility under the Code. To observe that s 66A of the Administration Act operates with retrospective effect is not to conclude that the deemed duty it imposes engages with s 135.2(1)(a) and s 4.3 of the Code so as to render the latter nugatory in the case of an omission to inform the Department of an event or change in circumstances on and from 20 March 2000 to 4 August 2011, the date on which the Amendment Act received the Royal Assent.

48 It is not to the point to observe that ignorance of the law affords no excuse or that the prosecution is not required to prove an intention to breach a legal duty. The submission ignores that the failure to do a thing is not an offence in the absence of a legal duty to do the thing³⁵. As explained in *Poniatowska*, s 4.3 of the Code is a reflection of an idea that is fundamental to criminal responsibility: that the criminal law should be certain and its reach ascertainable by those who are subject to it³⁶. This idea underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability. Mr Bennion explains the principle in this way³⁷:

"A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly."

49 Section 4.3 provides that the omission to perform an act cannot be a physical element of a Commonwealth offence unless, relevantly, the offence is committed by an omission to perform an act that by law there *is* a duty to perform. The submission that s 4.3 is silent as to the time at which the obligation is imposed should be rejected. The use of the present tense in s 4.3(b) is important. The exception to the general principle for which it provides applies to

35 Code, s 4.3(b).

36 (2011) 244 CLR 408 at 424 [44] per French CJ, Gummow, Kiefel and Bell JJ; and see Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 579-580; Ashworth, "Public Duties and Criminal Omissions: Some Unresolved Questions", [2011] *Journal of Commonwealth Criminal Law* 1.

37 *Bennion on Statutory Interpretation*, 5th ed (2008) at 807 (footnotes omitted).

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the failure to act where there is a presently existing legal duty to act. Criminal responsibility under s 4.3 is confined to the failure to do a thing that *at the time of the failure* the law requires the person to do. The obligation is coincident with the failure to discharge it.

50 The first reserved question should be answered "no".

51 This conclusion makes it inappropriate to answer the second reserved question.

Orders

52 The following orders should be made.

1. The questions in the stated case dated 19 December 2012 be answered as follows:

Question 1

Does section 66A of the Administration Act create a duty, from 20 March 2000, for the purposes of section 4.3(b) of the Commonwealth Criminal Code, such that a failure to inform the Department of the occurrence of an event or a change of circumstances as required by section 66A of the Administration Act amounts to "engaging in conduct" for the purposes of section 135.2(1)(a) of the Commonwealth Criminal Code?

Answer

No.

Question 2

If yes to Question 1, is section 66A of the Administration Act invalid, insofar as it has retrospective effect, because it infringes the separation of judicial and legislative powers mandated by the Constitution?

Answer

Does not arise.

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Question 3

Did the notices issued to the defendant, as identified in paragraphs 13 and 15 of the stated case, or any of them, create a duty for the purposes of section 4.3(b) of the Commonwealth Criminal Code, such that a failure to perform the act or acts required by the notice or notices amounts to "engaging in conduct" for the purposes of section 135.2(1)(a) of the Commonwealth Criminal Code?

Answer

The notices issued to the defendant, as identified in paragraphs 13 and 15 of the stated case, were, in each case, capable of creating a duty for the purposes of s 4.3(b) of the Code such that a failure to perform the act or acts required by the notice or notices amounts to "engaging in conduct" for the purposes of s 135.2(1)(a) of the Code.

Question 4

What order for costs, if any, should be made?

Answer

Each party should bear its own costs of the stated case.

2. Remit the whole of the cause in Action No A13050181 in which Kelli Anne Keating is the defendant and the Director of Public Prosecutions (Cth) appears for the informant to the Magistrates' Court of Victoria.