

## BAR NEWS AUTUMN 2012

### RECENT DEVELOPMENTS

#### **COMMONWEALTH DPP v PONIATOWSKA (2011) 282 ALR 200**

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*“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.”*

- Heydon J (dissenting) in *Commonwealth Director of Public Prosecutions v Poniatowska*

The enactment of section 66A of the *Social Security (Administration) Act* (Cth) has rendered the majority decision of the High Court in *Poniatowska* of academic interest only. Notwithstanding that, the case is an important addition to the body of law concerning statutory interpretation, particularly in the context of offences under the *Criminal Code Act 1995* (Cth).

#### **Issue**

The High Court’s decision examined the elements of the offence of ‘obtaining financial advantage’, pursuant to section 135.2(1) of the Code.

Section 135.2(1) relevantly provides as follows:

*A person is guilty of an offence if:*

*the person engages in conduct; and*

*as a result of that conduct, the person obtains a financial advantage for himself or herself; 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.*

Given that section 4.1 of the Code defines 'engage in conduct' as both doing an act or omitting to perform an act, the issue in the High Court was 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 in section 135.2(1).

A majority of the High Court (French CJ, Gummow, Kiefel and Bell JJ) answered that question in the negative, holding 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.

### **Background**

The CDPP alleged that between 30 August 2005 and 30 May 2007, Ms Poniatowska failed to report employment income to Centrelink. Specifically, Poniatowska did not declare 17 payments received in connection with her previous employment, totalling \$71,502. She subsequently received payments of the Parenting Payment Single from Centrelink to which she was either not entitled or only partially entitled, totalling \$20,162.58.

Poniatowska pleaded guilty before the Magistrate's Court of South Australia to 17 counts of obtaining financial advantage contrary to section 135.2(1) of the Code. She was convicted and on each charge sentenced to a 21 month suspended sentence.

She unsuccessfully appealed against the severity of the sentence to a single Judge of the Supreme Court of South Australia. She appealed the order of the single Judge to the full court of the Supreme Court of South Australia and filed a notice of appeal against conviction.

The full court allowed the appeal and set aside Poniatowska's convictions. Drawing on general law principles, the majority held that the omission to perform an act will only found liability under section 135.2(1) of the Code if it is the omission of an act that the person was under a duty to perform. The majority rejected the CDPP's argument that the obligation not to obtain a benefit was created by section 135.2(1) itself, finding that the omission is not identified in such a way that creates a duty to perform an act.

## Proceedings in the High Court

On appeal to the High Court, the CDPP complained that the majority of the full court erroneously took the common law as the starting point for their analysis and repeated the argument made below that where, as in the case of section 135.2(1), the law creating the offence provides that the offence may be committed by the omission to perform an act, no question of identifying a correlative obligation to do the act arises. The CDPP contended that there was no 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.

The majority of the High Court endorsed the findings of the full court and held that criminal liability does not attach to an omission unless there is a legal obligation to perform an act. That common law principle, it was said, found expression in section 4.3 of the Code which essentially states that 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.

At paragraph [35] the majority opined:

*"If the law creating the offence does not criminalise the failure to do a thing and if that failure is not the breach of a duty imposed by the law, it is difficult to characterise the fact that a person does not do the thing as the omission of an act."*

The CDPP maintained that the gravamen of the offence created by section 135.2(1) was the intentional failure to do something, which caused someone to receive the financial advantage.

However, the majority found that such analysis conflated the elements of conduct and the result of conduct, without identifying a *specific* omission to act. When pressed, the CDPP was unable to specify the act omitted said to have occurred and could not go beyond a nebulous assertion that Poniatowska failed to advise

Centrelink of a payment of a commission received by her while she was in receipt of a PPS. Hence, on the CDPP's analysis, the intentional omission of *any* act that resulted in a financial advantage being conferred on a person could be a physical element of section 135.2(1) of the Code. But such an inexact proposition meant that section 135.2(1) did not make the omission of *an act* a physical element of the offence within the meaning of section 4.3(a) of the Code. Put another way, section 135.2(1) did not proscribe the omission of any *specified* act. On that basis, the CDPP's argument could not be sustained and the majority disposed of the appeal.

In a dissenting judgment, Heydon J endorsed the finding of the minority judge in the full court of the Supreme Court of South Australia. There Sulan J concluded that the intention of the legislature in enacting section 135.2(1) of the Code was to address the very issue identified by the majority. Accordingly His Honour held that section 135.2(1) did not require the court to look to a duty of disclosure beyond that provided in the section.

### **Conclusion**

But for the actions of the legislature, the majority's findings would have had far reaching consequences, potentially calling into question a significant number of social security fraud cases.

The enactment of section 66A of the *Social Security (Administration) Act* on 23 June 2011 creates a stand-alone obligation for a person to inform Centrelink of events or changes in circumstances that might affect the person's social security payments and, crucially for the Government, commenced retrospectively on 20 March 2000.

**Samuel Pararajasingham**

**Forbes Chambers**