

BETWEEN

**COMMONWEALTH DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

And

MALGORZATA BARBARA PONLATOWSKA

Respondent

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APPLICANT'S SUBMISSIONS

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PART I – CERTIFICATION OF SUITABILITY FOR PUBLICATION

1. This submission is suitable for publication on the internet.

PART II – STATEMENT OF ISSUES PRESENTED BY THE APPLICATION

2. Is omitting to perform an act a physical element of the offence contrary to s 135.2 of the *Criminal Code 1995 (Cth)* (the “Code”)?
3. Is the application of s 4.3(a) of the *Code* dependent on the existence of a legal duty or obligation imposed by the offence provision or other Commonwealth statute to perform the act in question?

PART III – JUDICIARY ACT 1903 CERTIFICATION

4. The issues raised by this application do not require notice to be given to the Attorneys General pursuant to s 78B of the Judiciary Act 1903.

PART IV – CITATION OF THE REASONS FOR JUDGMENT

5. [2010] SASCFC 19; (2010) 107 SASR 578

PART V – STATEMENT OF FACTS

6. The Respondent pleaded guilty to seventeen counts of obtaining a financial advantage from the Commonwealth knowing she had no entitlement to it, contrary to s 135.2 of the *Code*. The facts are accurately summarised in the judgment of the Full Court (AB at 428 - 429 [1] – [3]). That summary reflects the unchallenged statement of facts tendered in the Magistrates Court, which was the factual basis on which this matter proceeded (AB at 428 [2]).¹

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7. The relevant facts are as follows:

- (1) The Respondent had been in receipt of fortnightly payments of Parenting Payment Single (PPS) intermittently since 1995;
- (2) The Respondent was regularly sent notices reminding her of the requirement that she inform Centrelink of any change to her circumstances, including financial circumstances (see [10] below);
- (3) The Respondent was employed from January 2005 to February 2006 and was paid commission;
- (4) In April 2005 the Respondent was placed on a requirement to report fortnightly any income she received. In September 2005 that requirement was dispensed with because in the preceding months she had reported that she received no income. When the requirement was removed she was advised of her continuing obligation to report any change of circumstances, including income;
- (5) Between August 2005 and May 2007, the Respondent received 17 payments of commission totalling approximately \$71,000;
- (6) The Respondent did not notify Centrelink of receipt of any of that income;

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¹ *Poniatowska v DPP (Cth)* [2010] SASC 1, AB at 55 [3] – [5] It was accepted during the appeal (AB at 413) that the reference to by the learned magistrate (AB at 9 [2]) to a positive act was an error. It is inconsistent with his later recitation of the facts (AB at 9 [7] – [9])

(7) As a consequence, during the relevant period the Respondent continued to receive the PPS to which she was not entitled (or was only partly entitled);

(8) The total amount the Respondent obtained to which she was not entitled was \$20,000.17.

8. A person is only entitled to a PPS benefit if certain criteria are satisfied. The criteria, which also determine the amount of benefit to which the person is entitled, is set out in the *Social Security Act 1991*². It includes a person being a parent, responsibility for a child, the child's age, whether the person is a member of a couple or single, Australian residency and, if applicable, participation requirements set out in a Parenting Payment Employment Plan or otherwise approved by the Commonwealth. The PPS is means tested and is not payable to a person if that person's assets, including income, exceed the legislatively determined "assets value limit."³ The rate of the benefit is calculated according to legislative criteria.⁴ Provisions relevant to the administration of the benefit are contained in the *Social Security (Administration) Act 1991*.

9. If after being granted the PPS benefit a person's circumstances change such that the criteria are no longer satisfied, entitlement to the benefit ceases. For example, as the PPS is means tested, if a recipient's assets increase (by receiving income or an increase in income) entitlement to that benefit may cease or cease at that level.

10. If a person has made a claim for a PPS⁵ or is being paid PPS⁶, they may be sent a written notice/s⁷ requiring them to provide Centrelink with certain information, including when a change of circumstances occurs or any other matter which might affect the benefit. It is an offence to fail to comply with such a notice.⁸ The Respondent was sent many notices during the time she was receiving PPS which notified her of the requirement to inform Centrelink of any income she received.⁹ This was relied upon

² Chapter 2, Part 2.10, Div 1 – 3A

³ *Social Security Act 1991*, s 500Q. It may also not be payable because the person is entitled to other Commonwealth payments (*SSA*, s 500S, s 500V, s 500VA, s 500W), or the person is engaged in seasonal work (*SSA*, s 500Z) or if the person failed to comply with various requirements in the *Social Security Administration Act*: s 500J (those requirements including failing to comply with a notice: s 67, s 68 and failure to give information: s192)

⁴ *Social Security Act 1991*, Part 2.10, Div 4 and Chapter 3, Part 3.6A, s 1068A, s 1068B

⁵ *Social Security (Administration) Act 1991*, s 67. This section (and s 68) authorises the Secretary to issue such notices.

⁶ *Social Security (Administration) Act 1991*, s 68

⁷ The notice provision is s 72, *Social Security (Administration) Act 1991*

⁸ *Social Security (Administration) Act 1991*, s 74

⁹ AB at 10[9]; *Poniatowska v Director of Public Prosecutions* [2010] SASC 1, AB at 55 [4] "It is also undisputed that, during the period of her offending, she was often reminded of her ongoing obligation to inform

by the Applicant in proof of the third element of the offence (see [20] below), that she knew or believed she was not entitled to the financial advantage she received (AB at 433 [18], 437 [38]).

11. By her plea of guilty the Respondent acknowledged that on each of the 17 occasions she intentionally failed to notify Centrelink of the commission payments she received, that she was reckless as to the fact that she would receive a benefit as a result of those omissions, that as a result of each omission she received a financial benefit to which she was not entitled and that she knew or believed that she was not entitled to that financial benefit.

10 12. Although the Respondent had pleaded guilty to these offences and appealed to a single judge of the Supreme Court¹⁰ against her sentence only,¹¹ she appealed to the Full Court¹² against her convictions.¹³ She was originally granted leave to appeal to the Full Court against her sentence.¹⁴ The affidavit with exhibits (AB at 66 – 243) was filed for the purpose of an application for an extension of time in which to lodge that appeal.¹⁵ She later sought leave to appeal against her convictions and an extension of time in which to lodge that appeal with an accompanying affidavit was filed (AB at 341 – 354). When delivering judgment, the Full Court granted the extension of time within which to appeal against conviction (AB at 438 [43]).

20 13. Three affidavits were filed by the Respondent in the Supreme Court (AB 244 – 249; AB 327 – 332; AB333 – 335) and one affidavit was filed by the Applicant (AB 282 –

Centrelink of any income she received" per David J. It is to be noted that the majority in the Full Court (AB at 433 [19]) refers to Ms Poniatowska denying receipt of correspondence. This appears to be based on an affidavit she sought to rely on in the Full Court (AB at 74 [20]) This was the first occasion she made that assertion, which is clearly contrary to the agreed facts put before the Court at first instance and not challenged before David J (referred to above). The Respondent filed an affidavit in response (AB at 285 [8]). However, the judgment does not address whether that affidavit were admitted on the hearing of the appeal. The transcript of the argument before the Full Court does not assist (for example: AB at 419). The contents of the affidavits were not relevant to the issues to be decided on the leave to appeal against conviction.

¹⁰ An appeal from the Magistrates Court is made pursuant to s 42 of the *Magistrates Court Act 1991* (SA). Where the appellant relies upon facts put before the Magistrate which are not dealt with in the published reasons, the appellant should put them before the court by way of an affidavit and not in submissions from the bar table: *Godfrey v South Australian Police* [2003] SASC 294 at [12]

¹¹ [2010] SASC 1, AB at 54

¹² An appeal to the Full Court from a judgment of a single judge on appeal from a judgment of the Magistrates Court lies only with the permission of the Supreme Court: s 50(4)(ii) *Supreme Court Act 1935* (SA).

¹³ The grounds are set out in the judgment: AB at 430 [5]

¹⁴ This occurred on 7 May 2010 after the Full Court (Doyle CJ, Gray and White JJ) considered the application on the papers.

¹⁵ The court may extend the time for appeal pursuant to r 117(2)(b) *Supreme Court Civil Rules 2006* (SA)

326) prior to the Full Court hearing on 16 June 2010. No order was made by the Full Court in relation to the admissibility of those affidavits for the purpose of the appeal.¹⁶

14. The issue on appeal was whether omitting to perform an act was a physical element of the offence in s 135.2 of the *Code*. The Respondent's argument was that the admitted conduct could not establish the offence because omitting to perform an act was not a physical element of the offence. It did not detract from the admission of the factual matters referred to above (at [11]).
15. The Court concluded by majority (Doyle CJ and Duggan J) that this offence could not be committed by omission and allowed the appeal on the basis that the Respondent could not in law have been convicted of the offences (AB at 437 [39]). The Court concluded, relying on the common law, that the determination of whether omitting to perform an act was a physical element of this offence depended on there being a legal duty imposed (by Commonwealth statute) on the offender to perform the act omitted.
16. Sulan J in dissent applied Chapter 2 of the *Code* (in particular s 4.1 and s 4.3) to the offence provision and concluded that s 135.2 provides that an omission can constitute a physical element of the offence (AB at 441 [58]). Therefore the Court was not required to look at the existence of a duty of disclosure in either statute or common law, in addition to what is provided in s 135.2 (AB at 442 [59][62]), to determine that issue.

20 **PART VI – APPLICANT'S ARGUMENT**

17. It is submitted that Doyle CJ and Duggan J erred in:
- (1) Failing to determine the elements of the offence in s 135.2 by the application of Chapter 2 of the Code (and in particular s 4.3(a)) to the offence provision; and
 - (2) Concluding that whether "*omitting to perform an act*" is an element of an offence is always dependent on identifying a legal duty or obligation on the offender (expressed in the offence provision or otherwise imposed by a Commonwealth statute) to perform the act.

¹⁶ The appeal to the Full Court is by way of rehearing; the court may in its discretion hear further evidence on a question of fact: *Supreme Court Civil Rules* 2006, r 286(3). The rules as to fresh evidence apply: *Police v Dorizzi* [2002] SASC 356; *Twigden v Centrelink* [2010] SASC 154; *Channel Seven Pty Ltd v Manock* [2010] SASCFC 356; *Fox v Percy* (2003) 214 CLR 118

The reasoning and conclusion of the majority is inconsistent with the proper application of Chapter 2 to an offence provision. As a consequence, the Court has identified criteria for determining the elements of an offence other than (and additional to) those required by law.

18. Chapter 2 of the *Code* sets out the general principles of criminal responsibility that apply to all offences against the *Code* and other laws of the Commonwealth.¹⁷ The *Code* exhaustively states each of the elements of an offence making it apparent on the face of the offence provision, applying Chapter 2, precisely what the physical and fault elements are.¹⁸

10 19. Section 135.2 of the *Code* is in the following terms:

“Obtaining financial advantage

(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.”

20 20. It follows that the elements of s 135.2 of the *Code* are:¹⁹

(1) the defendant engages in conduct (physical element – conduct; fault element – intention);

(2) that as a result of that conduct the defendant obtained a financial advantage (physical element – result; fault element – recklessness);

¹⁷ s 2.2(1) of the *Code*

¹⁸ *R v JS* (2007) 175 A Crim R 108 at [129] and see [145] “Fundamental aspects of the law have been altered by the Criminal Code in substantial and critical matters, by the replacement of a body of nuanced case law, which never purported to be comprehensive with the comparative rigidity of a set of interconnecting verbal formulae which do purport to be comprehensive and which involve the application of a series of cascading provisions, including definitional provisions, expressed in language capable of only one meaning, which meaning does not necessarily reflect ordinary usage.”

¹⁹ *DPP (Cth) v Neamati* [2007] NSWSC 746 at [11]; *DPP v Acevedo* [2009] NSWSC 653 at [15]

- (3) the defendant knows or believes that she is not eligible to receive that financial advantage (physical element – circumstance; fault element – knowledge or belief);
- (4) that the other person is a Commonwealth entity (absolute liability).

The issue is whether the first physical element can be established by a person omitting to perform an act.

21. In s 4.1 of the Code, “engage in conduct” is defined to mean “(a) do an act; or (b) omit to perform an act.”
22. The Code was amended to include that definition of “engage in conduct”²⁰ to make it clear that whenever the phrase “engage in conduct” was used in an offence provision, it encompassed both doing an act and omitting to act. As the Explanatory Memorandum states:²¹

“The proposed definition of ‘engaging in conduct’ is designed to make clear that ‘engagement’ does not 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.” (emphasis added)

23. Section 135.2(1)²² was amended to its current terms by the *Crimes Legislation Amendment (Telecommunications Offences and other Measures) Act (No 2)* which came into force on 28 September 2004. At that time, amongst other amendments to the section, the phrase “engage in conduct” was included in the section.
24. The phrase “engage in conduct” is used in s 135.2 to denote its first physical element. By interpreting s 135.2 with reference to s 4.1 of the Code the offence provision reads:

- (1) A person is guilty of an offence if;
 - (a) The person acts or omits to perform an act; and

²⁰ The definition of “engage in conduct” was inserted by the *Criminal Code Amendment (Theft, Bribery and Related Offences) Act 2000* (no. 137 of 2000). This section took effect on 24 November 2000.

²¹ The Explanatory Memorandum for that Bill at p.15

²² The section was first inserted into the Code by the *Criminal Code Amendment (Theft, Bribery and Related Offences) Act* (no. 137 of 2000) in the following terms: “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 was not eligible to receive that financial advantage.” It commenced on 24 May 2001. It was then repealed and replaced by the *Crimes Legislation Amendment (People Smuggling, Firearms, Trafficking and Other Measures) Act* (no. 141 of 2002) as follows: “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. (1A) Absolute liability applies to paragraph (1)(b) element of the offence”. This commenced on 16 January 2003.

(aa)

25. Therefore, as a physical element in the offence in s 135.2 of the *Code* is expressed as “engage in conduct” that element can be established by omitting to perform an act.

26. Section 4.3 of the *Code* states:

“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.”

10 The word “law” is defined in the Dictionary to the *Code* as meaning a law of the Commonwealth including the *Code* itself.

27. The *Code* provides that an omission can only be a physical element in two alternative circumstances. The first applies in this case. Section 135.2, the law creating the offence, makes omission a physical element of the offence by specifying that the element is “engages in conduct”. It follows that, if the Respondent omitted to perform an act, provided the remaining elements are also satisfied, the offence is established.

28. It is submitted that Doyle CJ and Duggan J were in error in not so finding. The reasoning and conclusion of Sulan J in this regard is correct (AB at 442 [59][60]).

20 29. Significantly in reaching their conclusion, Doyle CJ and Duggan J did not address or apply Chapter 2 of the *Code*, the principles applicable to interpreting a Code or those relevant to determining the elements of a Commonwealth offence. Nor, apart from citing s 4.3 of the *Code* at the outset of the judgment (AB at 431 [9]) and referring to it when reciting the Applicant’s argument (AB at 435 [28]), is any reference made to that provision. In particular, the section (including the difference between (a) and (b)) is not analysed or applied.

30. The Court’s conclusion and the reasoning process underlying it are inconsistent with the proper application of Chapter 2 of the *Code* to the offence provision.

31. Rather the reasoning of Doyle CJ and Duggan J was as follows:

- (1) That at common law (AB at 431 [13]),²³ (and relying on comments in the MCCOC report), omissions will only attract liability if the offence expressly says so, and the omission is in breach of a legal duty to act (AB at 432 – 433 [15][16]);
- (2) Therefore the reference to “*omission*” in the *Code* must be read as “*referring to a law which identifies the omission in question in such a way as to create a duty to perform the omitted act*” (AB at 436 [30]);
- (3) Consequently, while an omission to perform an act can constitute a physical element of the offence in s 135.2, it can only do so if there is a relevant legal duty or obligation to perform the act omitted (AB at 431 [12], AB at 433 [16], AB at 435 [27]);
- (4) Therefore it is first necessary to identify the relevant duty or obligation, which can only arise under s 135.2 itself or some other Commonwealth statutory provision (AB at 433 [16][17]);
- (5) Section 135.2 does not define any duty or obligation relevant to an offence committed by way of omission (AB at 435 [27], AB at 437 [38]);
- (6) No other Act creates a separate “*stand alone*” obligation (AB at 437 [38]); and
- (7) Therefore omitting to perform an act is not a physical element of this offence (AB at 437 [38] – [39]).

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20 32. Doyle CJ and Duggan J determined the existence of a physical element of this offence by applying the principles of the common law only and ignoring entirely the application of Chapter 2 to the offence provision.

33. It is submitted that the Court’s resort to the common law in its reasoning has infected its entire analysis. This is clear from the statement at the outset (AB at 431 [13]) that “*it is well established that there can be no criminal liability for an omission unless the alleged conduct constitutes a failure to perform a legal obligation.*” Thereafter it simply concluded, without reference to any of the relevant *Code* provisions (in particular s 4.3), that “*it would seem the Code incorporates that principle*” (AB at 432 [15]). The only reference by the Court to support that conclusion was to the MCCOC Report²⁴ which does not have the significance contended for (see [45] below). The

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²³ The majority refer to *R v Iannelli* (2003) 56 NSWLR 247 in support of this proposition. It is to be noted that that decision concerned the now repealed s 29D of the *Crimes Act 1914* and related to offences committed in the period between 1993 – 1999, a time when Chapter 2 of the *Code* did not apply to offences outside the *Code*.

²⁴ *Model Criminal Code Officers Committee Report*, Chapter 2, 1992

majority by applying the common law (for example: AB at 433 [16] [17], AB at 435 [27], AB at 436 [30]) then considered whether terms in the *Code* (“engage in conduct”) overcame those requirements (AB at 433 [16], AB at 436 [29]). The approach involved no analysis of the meaning, purpose and use of the term “engage in conduct” or the meaning of s 4.3.

34. There is no support in the *Code* for the approach taken or the conclusion reached. In particular, there is no support for the conclusion that determining whether omitting to perform an act is a physical element of this offence (or any offence) is always dependent on identifying a legal duty or obligation imposed by Commonwealth statute, to perform the act in question.

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35. Determining whether omitting to perform an act is a physical element of the offence in s 135.2 (or any Commonwealth offence to which Chapter 2 of the *Code* applies) is dependent upon applying s 4.3. Either an omission to perform an act is a physical element of the offence in s 135.2 by reference to s 4.3, or it is not.

36. Doyle CJ and Duggan J nominated three reasons for taking the approach they did “to the definition of omission” (AB at 436 [31]). However, the issue before the Court was what the elements of an offence were; not the definition of omission. It is submitted that the reasons proffered further demonstrate that the majority took an erroneous approach to the resolution of the issue before it. Such reasons cannot override the proper application of Chapter 2. Further, other aspects of the judgment also reveal a flawed reasoning process.

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37. The first reason given (AB at 436 [32]), that the conclusion is consistent with the generally accepted approach at common law, is inconsistent with the proper approach to interpreting the *Code*. The *Code* is to be read without any preconceptions that a particular provision has, or has not altered the law.²⁵ While there may be occasions where it is appropriate to refer to the common law (for example if a term employed has a technical legal meaning, where the interpretation of a word is well established or there is some ambiguity as to the meaning)²⁶ that does not arise here. The elements of a Code offence are determined by the application of Chapter 2 to the offence provision.

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The phrase in issue “omits to perform an act” does not have a technical legal meaning.

²⁵ *Vallance v The Queen* (1961) 108 CLR 56 at 75; *R v LK* (2008) 73 NSWLR 80 at [44]; *R v JS* (2007) 175 A Crim R 108 at [124] – [158]

²⁶ *R v JS* (supra) at [149]; *The Queen v LK* (2010) 241 CLR 177 at [96] – [98], [102] – [107]

In any event, the issue here is not the meaning of a word or phrase but rather what are the physical elements of the offence in s 135.2. The language in s 4.1 and s 4.3 (and s 135.2) is clear. The *Code* contains some offence provisions which use the terminology “*engages in conduct*” to describe the physical element of the offence.²⁷ By the very use of that terminology, omitting to perform an act is a physical element of that offence. It is the *Code* that determines whether “*omits to perform an act*” is a physical element of an offence, not the common law.

- 10 38. The second reason given (AB at 436 [33]) appears simply to be that the consequence of the Applicant’s argument is that whenever the phrase “*engages in conduct*” appears in the offence provision, that offence can be committed by omitting to act. However, the majority does not explain why this consequence supports its conclusion. It could only be based on a view that it is considered to be an undesirable result for a number of offences to have a physical element of omitting to act.²⁸ That is neither a principle of statutory interpretation nor is it a valid basis on which to interpret the *Code*. It is not the proper basis to determine the elements of an offence.
- 20 39. It is to be noted there are relatively few offences in the *Code* which contain the phrase “*engage in conduct*.”²⁹ Those that do contain that terminology were enacted (or amended) after “*engage in conduct*” in its current terms, was introduced in to the *Code* (see [22] above). This is clearly to designate that “*omits to perform an act*” is a physical element of those offences.
40. Such reasoning of the majority fails to take into account that it is not omitting to perform an act *per se* that establishes this offence (and other offences which include “*engage in conduct*” terminology); all elements of the offence must be proved. In relation to s 135.2 the majority ignores that the (intentional) omission must have a specified result (the receipt of a financial advantage) which the person knew or believed he/she was not entitled to.
41. Similarly, the third reason given (AB at 436 [34]) does not support the conclusion. It appears to erroneously suggest that the construction contended for by the Applicant

²⁷ For example: s 80.1 (Treason); s 104.22 (Treatment of Photographs); s 105.45 (Contravening Safeguards); ss 115.1, 115.2, 115.3, 115.4 (Harming Australians); s 147.1 (Causing Harm to a Public Official); s 271.3 (Debt Bondage); ss 272.8(2), 272.9(2), 272.12(2), 272.13(2), 272.14(1), 272.15(1), 272.18(1), 272.19 (Sexual Offences against Children outside Australia); s 310 (Harm and Danger to Children under 14 from Serious Drug Offences); s 471.6 (Damaging or Destroying Mail Receptacles).

²⁸ see: *The Queen v Tang* (2008) 237 CLR 1 at [44]

²⁹ Some examples of such offences are noted in the footnote above.

would give rise to a difficulty in identifying the omission and then linking the omission with the financial advantage. Whether a link can be established depends on the facts. It is not a relevant basis to determine the elements of an offence. As noted above (at [40]) to establish the offence requires proof of all elements of the offence (see [20] above). The facts in this case provide a clear illustration. The Respondent omitted to inform Centrelink of her income. She did so intentionally. As a result she received a financial advantage. If she had informed Centrelink of her income she would either have received no benefit, or a reduced benefit. The Respondent knew or believed she was not entitled to the financial advantage she received. Omitting to perform an act must be accompanied by proof of the other elements. The majority does not refer to the elements of s135.2 in this context. It failed to address, amongst other things, that to prove this offence the financial advantage gained was one to which the person was not entitled and to which they knew or believed they were not entitled.

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42. Further, the criticism of the drafting of the charge in this context (AB at 437 [35][36][37]) is misconceived. It presupposes that a duty to act was a necessary element of the offence. The charges were not drafted on the basis that s135.2 required a “duty” to be established; rather the charges were drafted on the basis that the elements of the offence as set out in s 135.2, applying s 4.1 to the phrase “*engage in conduct*” and s 4.3(a), had to be established. The soundness of those comments by the majority is dependent on its conclusion that proof of the offence is dependent on indentifying a breach of a duty.

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43. The terms of a complaint do not determine what, in law, are the elements of an offence.³⁰ The terms of a complaint do not create a duty. They cannot be relied upon to support the conclusion reached. There was no issue in this case either at first instance or in the Supreme Court that the Respondent did not know the allegation against her.³¹ No further particulars were ever sought. In any event the terms of the complaint do not and could not support the conclusion of the majority.

44. In addition to those issues which relate to the three reasons proffered by Doyle CJ and Duggan J, other aspects of the judgment which underlie its reasoning are flawed.

³⁰ The statement of the offence does not need to state all the essential elements of the offence; the particulars shall be set out in ordinary language, in which the use of technical terms is not required: s 22A *Summary Procedure Act 1921* (SA). A complaint is not invalid because of a defect of substance or form; it can be amended unless the defendant has been substantially prejudiced: s 181 *Summary Procedure Act 1921* (SA).

³¹ This is apparent from the appeal against sentence before David J [2010] SASC 1; AB at 54

45. For example, reliance is placed (AB at 432 [15]) on comments in the 1992 MCCOC Report on Chapter 2 of the *Code*. It is to be noted that neither this or later Reports addressed (or recommended) the definition of “*engage in conduct*” as now appears in s 4.1.³² Indeed the approach referred to in the Report in this regard (and relied on by the majority) was not adopted in the *Code*.³³ It is submitted that a proper reading of the Report (AB at 432 [15]) does not have the significance contended for by the majority. The passage cited includes the following, “*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.*” The Report is referring to two different or alternative scenarios. The reasoning of the majority does not recognise that distinction; rather it conflates the two concepts.
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46. So much is apparent from the reasoning that followed which addressed the issue by focusing solely on the need to identify a duty imposed by a Commonwealth statute, rather than by the application of s 4.3 of the *Code*. No analysis is undertaken of the meaning of s 4.3(a) and s 4.3(b). For example, Doyle CJ and Duggan J stated that “*the definition of ‘engage in conduct’ does not overcome the requirement that the conduct charged must be an omission to carry out an obligation imposed by law*” (at [16]). However, the definition of “*engage in conduct*” (together with s 4.3(a)) identifies when omitting to perform an act is an element of the offence. Applying s 4.3(a), there is no additional requirement to be met.
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47. This erroneous focus is also demonstrated when the majority “*tested*” the Applicant’s argument (AB at 436 [29]). To do so Doyle CJ and Duggan J inserted words into s 135.2(1)(a) and (aa) of the *Code* which were said to reflect the argument. It is to be noted that they have done so incorrectly (see [24] above for the correct insertion).
48. Regardless of that error, the majority concluded from this test that s 135.2 had not made omitting to perform an act a physical element. It is unclear how the “*test*” demonstrates that. It appears to be based on the proposition that when the words “*omits to perform an act*” are inserted into the offence provision (by applying s 4.1) it does not create a legal duty to perform an act and therefore omitting to perform an act is not a physical element (despite the fact that the phrase appears in the law creating

³² For example: the 1995 Report “*Chapter 3 Theft Fraud Bribery and Related Offences*”; the 1998 Report “*Chapter 5 Non Fatal Offences Against the Person*”

³³ For example: the 1992 MCCOC Report recommended an approach where the *Code* set out specific duties. This was akin to the Griffith Code approach, and was not adopted. It was for the legislature to determine what approach it would take as to criminal responsibility. As recognised in *JS* (supra) at [145] “*Fundamental aspects of the law have been altered by the Criminal Code in substantial and indeed critical matters...*”

the offence). In other words, the majority concluded that omitting to perform an act is not a physical element of an offence even where the offence provision states it is so. That conclusion ignores entirely the application of s 4.3 of the Code. The approach is erroneous. After the Court had substituted the words it should have applied s 4.3(a); the law creating the offence makes it an element. Nothing more is required.

49. Further, without referring to s 4.3 the majority concluded that the concept of “*omission*” must be read as referring to a law which identifies the omission in question in such a way as to create a duty to perform the omitted act (AB at 436 [30]). The majority relied on two general examples of offences to illustrate that conclusion, without referring to any specific offence provision. Without that its reasoning process is not susceptible to analysis. However, by requiring the omission to be one which the person “*is obliged to perform, having regard to the terms of the offence creating provision*” is to add an additional criteria not required by the Code.

50. There is no basis to construe “*omission*” in the Code as “*referring to a law which identifies the omission in question in such a way as to create a duty to perform the omitted act*” (AB at 436 [30]). There is nothing in s 4.3 which so confines it. Rather, the section makes omission to perform an act a physical element of the offence if “*the law creating the offence makes it so*”. There are a number of ways that that could be achieved. One such way is for the offence provision to explicitly use “*omit*” or “*omit(s) to perform an act.*” Another, as here where the Code explicitly states that the use of term “*engages in conduct*” includes both performing and omitting to perform an act. As noted above (at [22] – [27]) use of that phrase in the offence provision is the same as stating that “*a person does an act or omits to perform an act.*” The very use of the term makes omitting to perform an act an element of the offence. Nothing more is required.

51. This is to be contrasted to s 4.3(b) which addresses the situation where “*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.*” This covers offence provisions where the terminology used to describe the physical element is apt to being satisfied by an omission when there is a corresponding duty to perform the act omitted. An example of such an offence is s 135.1(5) of the Code. The physical element of that is in the following terms: a person is guilty of an offence if the person dishonestly causes a loss, or dishonestly causes a risk of loss to another. Acting dishonestly can be

committed by performing an act or omitting to perform one in circumstances where there is a duty to so act.³⁴

10 52. Further, the repeated reference to and reliance upon the New Zealand decision of *Nicholson v The Department of Social Welfare*³⁵ is misplaced (AB at 432 [14], AB at 434 [22] – [26]). It is based on entirely different legislation. The Court in *Nicholson* applied the common law in finding that the relevant “omission” in the offence provision must consist of a failure to comply with some legal obligation.³⁶ However, the NZ legislation was not a Code, nor was there any section similar to s 4.3. Indeed, the majority’s reliance upon *Nicholson* further demonstrates how they have failed to have proper regard to Chapter 2 in interpreting s 135.2 and in particular, the terms and meaning of s 4.3. That decision is of no assistance in determining the elements of a Commonwealth offence to which the Chapter 2 applies.

20 53. Reliance on *Nicholson* and the reasoning contained therein also resulted in the majority erroneously focussing on what it perceived were practical problems in identifying in what circumstance an omission could be linked to a s 135.2 offence in the absence of a duty (AB at 437 [437]). However, as noted above (at [38] – [41]) such reasoning is not a basis to determine the elements of an offence under the *Code*. The circumstances in which omitting to perform is a sufficient basis to found a charge is dependent on the facts and requires proof of each element of the offence. Again, as noted above (at [40]) for this offence those circumstances require that the offender intentionally omitted to perform an act, that at the time they were reckless that that would result in a financial advantage to them, it resulted in a financial advantage which they knew or believed they were not entitled. This was correctly recognised by Sulan J (AB at 441 [58] – [62]) in dissent.

54. The gravamen of this offence is doing or omitting to do something which results in obtaining a financial advantage to which the person knows or believes they are not entitled; it is not about breach of any obligation.

³⁴ For example: *R v Phan* (2010) 106 SASR 116. Phan was convicted of such an offence contrary to s 135.1(5) of the Code. The allegation was based on an omission to act. The duty in question was to lodge GST returns: *Goods and Services Tax Act*, s 31 – 35, which places an obligation on certain persons to lodge a GST return if carrying on an enterprise and its GST turnover met the registration threshold (*R v Phan* (supra) at [39]). For a similar example see: *R v Phan and Ton* [2010] SASFC 53

³⁵ [1999] 3 NZLR 50

³⁶ *R v Nicholson* (supra) at [24]

55. The reasoning of the majority gains no support from the relevant Explanatory Memorandum for s 4.1 (“*engages in conduct*”) (at [22] above) for this offence (AB at 439 [50] – [52]) or other offence provisions³⁷ which contains that terminology. In those offence provisions, as here, there is no legal duty to act specified, nor, given the nature of the offences, would there be any “*stand alone*” (AB at 437 [38]) duty imposed by any other statute. Indeed, the Explanatory Memoranda which do address the issue of omission supports the interpretation contended for by the Applicant.
56. Unless “*engages in conduct*” and s 4.3 are applied as contended for by the Applicant that definition, in particular the phrase “*omits to perform an act*” has no work to do in the *Code*. Inclusion of that phrase in offence provisions is of no consequence.
57. It is submitted that Sulan J correctly concluded, by applying s 4.3(a), that s 135.2 provides that omitting to perform an act is a physical element of that offence (AB at 441 [56] – [62]). The provision does not require the existence of a duty (AB at 442 [62]) and the common law has no application in determining the elements of this offence (AB at 438 [45]).

PART VII – APPLICABLE STATUTORY PROVISIONS

58. *Criminal Code 1995* (Cth) Chapter 2 (ss 2, 3, 4), s 135.2
59. *Social Security Act 1991* (Cth) Chapter 2, Part 2.10, Div 1- 4 (ss 500)
60. *Social Security (Administration) Act 1991* (Cth) ss 67, 68, 72, 74

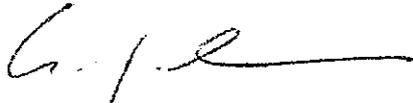
PART VIII – ORDERS SOUGHT BY THE APPLICANT

61. That special leave to appeal be granted and the appeal be allowed;

³⁷ Some of the relevant Explanatory Memoranda are silent on the topic apart from noting that the offence provision includes omitting to perform an act. None of them refer to identifying a duty or obligation imposed by Commonwealth law before omitting to act is an element of the offence. Some do provide some explanation. These clearly support the interpretation of the *Code* contended for by the Applicant. For example in relation to s 274.2(1)(a) (Torture) the EM states that the section “*will use the phrase “engage in conduct” with the definition in subsection 4.1(2)...means “do an act” or omit to perform an act*”. Although torture is defined in the Convention as “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted...*” relevant conduct could include deliberate omissions which could inflict severe pain or suffering such as denial of nutrition, clothing or medical care”: *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010*. And see: s 305.2 (Danger from Exposure to unlawful Manufacturing – Children under 14) “*Expose retains its ordinary meaning and in this context includes to be subjected to or to allow the individual to be subjected to, the manufacture of a controlled drug...through a physical act or omission*”: *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*.

62. The orders of the Full Court of the Supreme Court of South Australia be set aside and in lieu thereof it be ordered that the appeal against conviction be dismissed; and
63. The matter remitted to the Full Court of the Supreme Court of South Australia for its further consideration of the application for appeal against sentence.

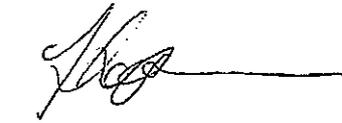
Dated 1 February 2011



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