IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M5 of 2013

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Informant

and

KELLY ANNE KEATING
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF SOUTH AUSTRALIA (INTERVENING)

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes as of right under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: Constitutional and Legislative provisions

4. It is not necessary to add to the statement of applicable statutory provisions set out in Annexure A to the Defendant's Annotated Submissions.

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Part V: Argument

5. South Australia confines its submissions to the first and second of the questions reserved and even then only makes submissions on the first question to the extent necessary to address the second question.

6. As to the issues arising from the first and second question; Ms Keating is charged with three counts of obtaining a financial advantage contrary to s135.2(1) of the *Criminal Code* (Cth) (***"Code"***) in that during three separate periods she received the Parenting Payment Single Benefit in an amount greater than that to which she was entitled, because of changes in her income, Ms Keating having omitted to advise Centrelink of those changes. Section 135.2(1) of the *Code* does not make an omission an element of the offence it creates but implicitly provides that the offence it creates may be committed by an omission to perform an act that by law there is a duty to perform. In the circumstances:

   6.1 does s66A of the *Social Security (Administration) Act 1999* (Cth) (***"Administration Act"***) impose a duty upon Ms Keating such that she was obliged to inform Centrelink of the change in her circumstances when they occurred?

   6.2 If the answer to the first question is in the affirmative, that duty being retrospectively imposed, does the modification made by s66A of the *Administration Act* to the elements of the offence created by s135.2(1) of the *Code* impermissibly usurp or interfere with the exercise of judicial power?

7. In summary, South Australia submits that:

   7.1 Properly construed, the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011 (Cth)* ("***the Amending Act***") retrospectively operates to impose a duty, where there was no duty before, such that an omission to so act, is an offence, assuming proof of that and other elements, contrary to s135.2 of the *Code*. The first question should be answered, "Yes".

   7.2 Ch I of the *Constitution* contains no express or implied limitations upon the powers of the Commonwealth Parliament to enact a retrospective law, including a retrospective criminal law. Though the rule of law is an assumption underpinning the framework of the *Constitution*, it is not a free-standing limitation on legislative power of uncertain

content. The common law, which must conform to the *Constitution*, cannot, and does not, provide such a limit.

7.3 The vesting of the judicial power of the Commonwealth in courts by Ch III operates as a limit upon the legislative power of the Commonwealth and State Parliaments. The relevant aspect of that limit in this case (the *Administration Act* not altering the structure of the court or the process by which the trial is to occur) gives rise to the question whether the impugned law impermissibly limits the content of what the trial court may decide such that it represents the usurpation of the function vested in the court. Properly construed the retrospective law does not have that effect. The second question should be answered, "No".

The Code and the Amending Act

8. The second reserved question invites an analysis of the limits of the legislative power of the Commonwealth Parliament arising by reason of the vesting of judicial power in federal courts under Ch III of the *Constitution*. That analysis requires the identification of the precise operation and effect of the amendments made, with retrospective effect, by the *Amending Act* inserting s66A into the *Administration Act*.

9. In this case, the task of statutory construction coincides with the identification of the elements of the offence created by s135.2 of the *Code* when read together with s66A of the *Administration Act*.

10. The offence in s135.2 of the *Code*, considered without regard to the *Administration Act*, requires proof that Ms Keating (a) engaged in conduct (aa) as a result of which she obtained a financial advantage for herself (b) from a Commonwealth entity (ab) knowing or believing that she was not eligible to receive it.[1]

11. The physical element of "engage[ing] in conduct" under the *Code* may be satisfied by an omission to perform an act.[2] That will occur where the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there was

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1 Section 135.2 *Criminal Code* (Cth); *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408, 417 [21] (French CJ, Gummow, Kiefel and Bell JJ).

2 Section 4.1(2) *Criminal Code* (Cth), *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408, 417 [22] (French CJ, Gummow, Kiefel and Bell JJ).

a duty to perform.[3] Intention is the relevant fault element for that physical element.[4] In essence, proof that Ms Keating meant to omit to perform an act that by law she was required to undertake is necessary.[5] Whether Ms Keating had the relevant intention is a matter of evidence to be established at her trial. In that respect, the letters from the Department will, no doubt, be critical to the prosecution case. South Australia makes no submission on whether, as a matter of fact, the prosecution can establish the existence of the relevant fault element attaching to a physical element comprised of a retrospectively imposed duty.[6]

12. In this case, the act that there was a duty to perform is, assuming its validity, imported by s66A of the *Administration Act*. The duty applies to claimants for a social security payment or a concession card[7], recipients of social security or holders of a concession card[8] and persons who have previously been paid social security or held a concession card.[9] The duty requires that when an event or change of circumstances which might affect the payment of a social security payment or a person's qualification for the concession card occurs, the person is to "within 14 days after the day on which the event or change occurs, inform the Department of the occurrence of the event or change".[10]

13. It is at this step in the identification of the elements that the first question in the case stated falls for resolution. It is argued by the Defendant that s135.2 of the *Code*, read with ss4.3(b) of the *Code*, does not operate to 'pick up' s66A of the *Administration Act*.[11] That is so because, it is said, s4.3(b) of the *Code* requires the relevant duty to have existed at the time of the offence (and not to have been retrospectively imposed). The argument is that s4.3(b) of the *Code*, by using the present indicative, *is,* limits the class of relevant omission to those that existed on that day.

14. The Defendant's argument assumes that a retrospective law cannot change, for the purpose of s135.2 of the *Code*, what *is* so that it existed at an earlier point in time. From the perspective of a court hearing a charge and examining this element of the offence, the question to be

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3 Section 4.3(b) *Criminal Code* (Cth); *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408, 417 [23] and 422 [35] (French CJ, Gummow, Kiefel and Bell JJ).

4 Section 5.6(1) *Criminal Code* (Cth). *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408, 417 [20] (French CJ, Gummow, Kiefel and Bell JJ).

5 Section 5.2(1) *Criminal Code* (Cth).

6 See A. D. Woozley, "What is Wrong with Retrospective Law", *The Philosophical Quarterly* Vol. 18, No. 70 (Jan, 1968), 48.

7 Section 66A(1) *Social Security (Administration) Act 1999* (Cth).

8 Section 66A(2) *Social Security (Administration) Act 1999* (Cth).

9 Section 66A(3) *Social Security (Administration) Act 1999* (Cth).

10 Sections 66A(1), s66A(2) and s66A(3) *Social Security (Administration) Act 1999* (Cth).

11 Defendant's Annotated Submissions, [20].

answered can be framed as follows: was Ms Keating required to do something. A duty imposed retrospectively is nonetheless a duty operating as a matter of law. It does not assist the Defendant in that respect to have resort to the accepted principle of construction that legislation "ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events".[12] The *Code* simple looks to what "is" and what "is" has been retrospectively modified.

15. Proceeding accordingly, the offence created by s135.2 of the *Code*, read with s66A of the *Administration Act*, requires proof:

15.1 (a) That

15.1.1 Ms Keating had made a claim for a social security payment which had been granted;

15.1.2 an event or change had occurred in her circumstances that might affect the payment of that social security payment;

15.1.3 Ms Keating intentionally omitted to inform the Department of the occurrence of that event or change in circumstances within 14 days;

15.2 (aa) as a result of that omission, she obtained a financial advantage;

15.3 (ab) she knew or believed that she was not entitled to receive that financial advantage;

15.4 (b) the financial advantage was obtained from a Commonwealth entity, being the Department.

16. Furthermore, a means of compliance with the duty in s66A(4) creates a 'defence' relevant to the first element (a). It is a defence in the sense that it is an "exception" to the duty. As to proof of an exception the Defendant bears only an evidential burden.[13] Thus the Defendant has the burden of adducing evidence that suggests it is a reasonable possibility she complied

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12 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

13 Section 13.3(3) *Criminal Code* (Cth).

with the notice.[14] If that burden is satisfied, the prosecution must disprove beyond reasonable doubt that:

16.1 Ms Keating was given, or purportedly given, a notice in relation to the event or change of circumstance; and

16.2 She has complied with the notice in relation to the event or change of circumstance.

17. In summary, it can be seen that the effect of the *Amending Act* is:

17.1 to modify the physical element of the offence set out at paragraph [15.1.3] above by imposing a duty to act where none previously existed. Intent remains the relevant fault element for that omission, which in substance will be the intentional non-
10 disclosure to Centrelink of the changed circumstances; and

17.2 to introduce retrospectively a means of compliance with the retrospective duty, if a notice was issued and complied with.

18. The effect of section 2 of the *Amending Act* is to give the duty and the defence both retrospective and prospective operation.

19. It is to the provisions of the *Code* and the *Administration Act* so construed that the application of any limits upon the Commonwealth's legislative power is to be considered. In this regard it is useful as a starting point to observe that it cannot be disputed, and is not disputed, that the amendments' prospective operation is valid.

Chapter I of the Constitution - express or implied limits on retrospective laws

20 20. Putting to one side momentarily the implied limit arising from the vesting of judicial power, nothing in Ch I itself, nor the common law, nor the rule of law, establishes any limitation on the Commonwealth Parliament's power to legislate with retrospective effect. The powers contained in Chapter I are not limited to prospective laws.[15] So much is the ratio of the *Polyukhovich*.[16]

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14 Definition "evidential burden" at foot of s13.3 *Criminal Code* (Cth).

15 A. Inglis Clark, *Studies in Australian Constitutional Law* (1901), 39-40.

16 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 535-536 (Mason CJ); 644, 648 (Dawson J); 692 (Toohey J); 718 (McHugh J). See also *R v Kidman* (1915) 20 CLR 425, 442-3 (Isaacs J), 451 (Higgins J), *contra* 437 (Griffith CJ); *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 81 (Isaacs J); *Nicholas v The Queen* (1998) 193 CLR 173, 221-222 [114] McHugh J, 234 [156] (Gummow J).

21. There is no reason to read into Chapter I such a restriction. The Commonwealth may make laws on all subject matters in exercise of its sovereignty.[17] So long as the proposed measure is one with respect to some subject matter or purpose entrusted to the Parliament, it is for the Parliament to decide the nature and extent of the measure, if any, to be enacted on that subject or for that purpose.[18]

22. The position is to be contrasted with that in the United States where the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed"[19]. The limitation in the American Constitution on the making of an *ex post facto* law has been held to be limited to lawmaking by legislation, and then only to criminal laws.[20] A further distinction is drawn between criminal laws on the basis of whether or not they are disadvantageous (contrast, the position of a pardon)[21], and even then may turn on whether they only affect procedure[22]. The absence of such a provision in the Australian *Constitution* formed an important part of the reasoning in *Polyukhovich v Commonwealth.*[23]

23. The word "laws" in the chapeau to s51 and s52 of the *Constitution* does not import any limitation requiring prospectivity. Three judges in *Polyukhovich v The Commonwealth*[24] came to that conclusion. In the result, on numerous occasions this Court has held valid laws of the Commonwealth that have a retrospective effect.[25]

24. The "rule of law" does not assume the role of being an independent criteria against which the validity of legislation is tested. It is an assumption upon which the *Constitution* depends for its

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17 *New South Wales v the Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337, 498 (Jacobs J), cited in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 529 (Mason CJ).

18 *Pearce v Florenca* (1976) 135 CLR 507, 515-516 (Gibbs J); *Union Steamship Co Ltd v King* (1988) 166 CLR 1, 12-13. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687 (Toohey J). The words "peace, order and good government" in s 51 do not impose any limit on the legislative power of the Commonwealth Parliament: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court). See also *Reg v Burah* (1878) 3 App Cas. 889; *Hodge v the Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co* (1885) 10 App Cas 282; *Riel v the Queen* (1885) 10 App Cas 675; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 635-636 (Dawson J).

19 Art I s 9 cl 3 and Art I s 10 cl 1 of the United States Constitution, referred to in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 535 (Mason CJ), 720 (McHugh J).

20 *Calder v Bull* (1798) 3 US 386; *Mahler v Eby* (1924) 264 US 32.

21 *Calder v Bull* (1798) 3 US 386.

22 *Thompson v Missouri* (1898) 171 US 380; *Williams v Florida* (1970) 399 US 78.

23 (1991) 172 CLR 501, 535 (Mason CJ) 647-649 (Dawson J), 720 (McHugh J) *contra* 617 (Deane J).

24 (1991) 172 CLR 501, 536 (Mason CJ); 644, 648 (Dawson J); 718 (McHugh J).

25 See for example *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231; *Haskins v Commonwealth* (2011) 245 CLR 22; *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117.

efficacy.[26] But it is only through the text and structure of the *Constitution* that it is possible to identify the rule of law as a constitutional assumption.[27] In this regard the "rule of law" is manifest in the text of the *Constitution* only in certain respects. The practical operation and effect of "the rule of law" is that the Executive is subject to the law as interpreted and declared by the courts,[28] that federal judicial power should be separate and distinct from legislative and executive power,[29] and that judges should be impartial and independent.[30] However, that aspect of the rule of law concerned with retrospectivity is not reflected in the text of the *Constitution* so as to place any inherent limit on Parliament's power to retrospectively legislate.

25. As to the common law, it "must conform with the *Constitution*."[31] Whilst the *Constitution* and its interpretation is informed by the common law,[32] it cannot, and does not, operate to constrain legislative power granted by the *Constitution*.

Chapter III of the Constitution - limits on legislative power of the Commonwealth Parliament

26. In 1901 Inglis Clark recognised that whilst the grant of legislative power to the Commonwealth Parliament carried with it no prohibition on the enactment of retroactive laws, such limitation may arise from the vesting of judicial power exclusively in the judiciary.[33]

27. The specific grants of legislative power in s51 and s52 are expressly subject to the *Constitution*, and, accordingly, are subject to the structure of the *Constitution* and the provisions of Ch III which identify the permissible repositories and control the manner of exercise of

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26 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ); *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322, 351 [30] (Gleeson CJ & Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow & Crennan JJ); *State of South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ), 63 [131] (Gummow J), [232]&[232] Hayne J, 155-156 [423] (Crennan & Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 216 [563] (Crennan & Kiefel JJ).

27 *State of South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ).

28 *Commissioner of Taxation (Cth) v Futuris Corporation Ltd* (2008) 237 CLR 146, 171 [85] (Kirby J). See for example, *Constitution* covering clause 5, section 75(v), section 75(iii); *Re Residential Tenancies Tribunal ex parte Defence Housing Authority* (1997) 190 CLR 410, 443-444 (Dawson, Toohey & Gaudron JJ); *Commonwealth v Mewett* (1997) 191 CLR 471, 546-548 (Gummow & Kirby JJ); *Re Patterson ex parte Taylor* (2001) 207 CLR 391, 415 [64] (Gaudron J).

29 *State of South Australia v Totani* (2010) 242 CLR 1, 21 [4] & 49 [73] (French CJ); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 634 [178] (Kirby J); *R v Moss; Ex parte Mancini* (1982) 29 SASR 385, 389 (King CJ).

30 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 118 [181] (Kirby J).

31 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 566 (The Court).

32 *Condon v Pompano* [2013] HCA 7, [2] (French CJ); *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 564 (The Court).

33 A. Inglis Clark, *Studies in Australian Constitutional Law* (1901), 39-40.

Commonwealth judicial power.[34] The provisions of Ch III give effect to the separation of powers insofar as the vesting and exercise of judicial power are concerned.[35]

28. It follows that the Commonwealth Parliament may not in the exercise of legislative power usurp judicial power.[36] There is no exhaustive test to identify when legislation usurps or impermissibly interferes with judicial power.[37] However, as Mason J identified in *R v Humby; Ex parte Rooney*[38] for judicial power to be usurped there must be some infringement of the provisions of Ch III of the *Constitution*.[39] It follows that in any case where that is asserted, it is necessary to identify the relevant aspect of judicial power said to be infringed or usurped, and then analyse whether, and if so, the extent of such interference with that aspect.[40]

10 29. Though judicial power has "defied precise definition" various facets of the power can be identified.[41] As explained in *TCL Air Conditioning (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*:[42]

> The judicial power of the Commonwealth has defied precise definition. One dimension concerns the nature of the function conferred: involving the determination of a question of legal right or legal obligation by the application of law as ascertained to facts as found "so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons". Another dimension concerns the process by which the function is exercised: involving an open and public enquiry (unless the subject-matter necessitates an exception), and observance of the rules of procedural fairness.
> 20 Yet another dimension concerns the overriding necessity for the function always to be

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34 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane & Dawson JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 606 (Deane J).

35 *Wilson v Minister for Aboriginal and Islander Affairs* (1996) 189 CLR 1, 10-11 (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 364 [77] (McHugh J); *TCL Air Conditioning (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, [26] (French CJ & Gageler J).

36 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 364 [77] (McHugh J); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 369-370 [63]-[65] (Kirby J); *Nicholas v The Queen* (1998) 193 CLR 173, 200 [48] (Toohey J), 220-221 [111]-[113] (McHugh J).

37 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 149 [76] (Gummow, Hayne & Bell JJ).

38 (1973) 129 CLR 231.

39 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 250 (Mason J):

> *In the context of the Commonwealth Constitution [usurpation of judicial power] must signify some infringement of the provisions which Ch III makes respecting the exercise of the federal judicial power.*

Cited with approval in *Haskins v Commonwealth* (2011) 245 CLR 22, 36 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

40 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 26-29 (Brennan, Deane & Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 256-257 [201] (Kirby J).

41 *TCL Air Conditioning (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, [27] (French CJ & Gageler J); *State of South Australia v Totani* (2010) 242 CLR 1, 64 [134] (Gummow J), 86 [220] (Hayne J); *Thomas v Mowbray* (2007) 233 CLR 307, 415 [306]-[307] (Kirby J), 464 [464] (Hayne J).

42 [2013] HCA 5.

> compatible with the essential character of the court as an institution that is, and is seen to be, both impartial between the parties and independent of the parties and of other branches of government in the exercise of the decision-making functions conferred on it.[43]

30. In this case, the Defendant complains that the judicial process is interfered with in that judicial power is usurped by reason of the retrospective insertion of a duty comprising one part of one element of the offence created by s135.2 of the *Code*. The relevant kind of interference that falls for consideration is that broadly referred to as a directed outcome.

31. Neither the Commonwealth Parliament nor the Parliament of a State or Territory may direct their courts as to the manner and outcome of the exercise of their jurisdiction.[44] In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[45] Brennan, Deane and Dawson JJ stated:

> It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.[46]

32. One result of the application of the limit so explained is that, in the sphere of criminal law, the determination of guilt or innocence, an exclusive function of judicial power, cannot be the subject of legislative direction.[47] Accordingly, a Bill of Attainder is beyond the legislative competence of the Commonwealth Parliament.[48] That is so because a Bill of Attainder, properly understood, involves the legislature exercising judicial power by determining the guilt

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43 [2013] HCA 5, [27] (French CJ & Gageler J).

44 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36-7 (Brennan, Deane & Dawson JJ); *Nicholas v The Queen* (1998) 193 CLR 173, 185-186 [15] (Brennan CJ), 208 [73] (Gaudron J), 232 [146] (Gummow J); *International Finance Trust Company Ltd & Anor v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [50] (French CJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 669-670 [47]-[48] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ).

45 (1992) 176 CLR 1.

46 (1992) 176 CLR 1, 36-37, cited with approval in *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 150 [78] (Gummow, Hayne & Bell JJ).

47 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 37 (Brennan, Deane & Dawson JJ); see also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Victoria v Australian Building Construction Employee's and Builders Labourer's Federation* (1982) 152 CLR 25, 107 (Murphy J); *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 608-9 (Deane J); *State of South Australia v Totani* (2010) 242 CLR 1, 81 [202] (Hayne J).

48 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 539 (Mason CJ); see also *United States v Brown* (1965) 368 US 437.

of a specific person or class of persons.[49] Section 135.2 of the *Code* read with s 66A of the *Administration Act* does not constitute a Bill of Attainder.

33. Whether a law impermissibly usurps or interferes with the exercise of judicial power will require an examination of the operational effect, and not merely the form, of the impugned law. For example, so substantial was the interference with the method and exercise of judicial power by the impugned legislation in *Liyanage v The Queen*[50] that it was held to usurp judicial power:

> The pith and substance of both Acts was a legislative plan ex post facto to secure a conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them....These alterations constituted a grave and deliberate incursion into the judicial sphere.[51]

34. Thus whether a law impermissibly interferes with the exercise of judicial power is a question of fact and degree requiring an evaluative judgment. As Kirby J explained:[52]

> Between a Bill of Attainder (which amounts to a parliamentary finding of guilt and is thus offensive to the separation of powers) and a law of general application (which in some particular respects permissibly affects pending cases) lie a myriad of instances which fall on one side of the line of constitutional validity or the other.

35. In *Nicholas v the Queen,*[53] the High Court held that the impugned provision did not usurp judicial power. Although the practical operation of s15X was to require the trial court when considering admissibility of evidence to disregard the otherwise relevant fact that a law enforcement officer had committed an offence in the course of a controlled operation, that

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49 *International Finance Trust Company Ltd & Anor v New South Wales Crime Commission* (2009) 240 CLR 319, 389 [167] (Heydon J) stated:

> The submission must be rejected. Like a bill of attainder, a bill of pains and penalties "is a legislative enactment which inflicts punishment without a judicial trial". The key question is thus whether s 22(2)(b) provides for a judicial trial. The finding referred to in s 22(2)(b) can only be made after notice of the application for an assets forfeiture order has been given to the person described in s 22(2)(b): see s 22(9). That person has a right to appear and adduce evidence: s 22(9). And the rules of evidence apply to that process of adducing evidence: s 5(2)(b). Thus s 22(2)(b) provides for a judicial trial. The standard of proof to be satisfied by the Commission ("more probable than not") is lower than the conventional criminal standard. This may be an unamiable provision, but it does not entail constitutional invalidity. The more extreme step of reversing the burden of proof itself has been held not to invalidate a federal statute. Section 22(2)(b) does not adjudge any specific person or specific persons guilty of an offence: it leaves it to the Supreme Court to do so on that standard of proof, but otherwise in conformity with the rules of evidence. If any s 22(2)(b) order is made, it is made in exercise of judicial power, not legislative power. (Footnotes omitted).

50 [1967] AC 259.

51 *Liyanage v The Queen* [1967] AC 259, 290 (Lord Pearce for the Privy Council).

52 *Nicholas v The Queen* (1998) 193 CLR 173, 256 [201] (Kirby J).

53 (1998) 193 CLR 173.

did not amount to the usurpation of judicial power.[54] Nor did the fact that the provision affected a small and known group of people.[55] Further, the Court concluded that the operation of the law did not diminish public confidence in courts.[56]

36. A further example is provided by the decision of the New South Wales Court of Criminal Appeal in *Cheikho and Ors v The Queen.*[57] The challenged provision[58] required a Court to receive in evidence in an exempt proceeding[59] without further proof, a document purporting to be a certificate issued by the Managing Director of a telecommunications carrier who had enabled a warrant for interception to be executed, as conclusive evidence of the matters stated in the document. The certificate could set out facts which the issuer "considered relevant with respect to acts or things done by, or in relation to, employees of the carrier in order to enable a warrant to be executed".[60] The Court of Appeal held that the provision was valid. Spigelman CJ considered that questions of fact and degree arise when identifying impermissible interference with the operation of the accusatory system of criminal trials. He stated:

> It cannot, however, be said that it is one of the predominant characteristics, or an essential characteristic of a criminal trial in an accusatory system, that every single fact which is relevant to the discharge by the prosecution of its onus to prove the case against an accused beyond reasonable doubt must be regarded as of equal significance. I repeat questions of fact and degree arise.[61]

His Honour concluded:

> It is, in my opinion, not an essential or predominant characteristic of an accusatorial system of criminal justice that there be no restriction on the proof of facts or the ability to challenge facts in the Crown case. No doubt most of the restrictions in the law of evidence operate in favour of the accused. This is a manifestation of the fundamental principle that every accused must

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54 *Nicholas v The Queen* (1998) 193 CLR 173, 191 [26] (Brennan CJ), 202 [53] (Toohey J), 210 [79]-[80] (Gaudron J), 236 [156], 239 [168] (Gummow J), 279 [255] Hayne J.

55 Those persons who had been subject of a controlled operation which obtained evidence unlawfully. *Nicholas v The Queen* (1998) 193 CLR 173, 191-193 [27]-[29] (Brennan CJ), 203 [57] (Toohey J), 211 [83] (Gaudron J), 238 [163] (Gummow J).

56 *Nicholas v The Queen* (1998) 193 CLR 173, 197-198 [37]-[39] (Brennan CJ), 202 [54] (Toohey J), 274 [239] (Hayne J).

57 (2008) 75 NSWLR 323.

58 *Telecommunications (Interception and Access) Act 1979* (Cth) s18(2).

59 Defined in s5B of the *Telecommunications (Interception and Access) Act 1979* (Cth) include prosecutions for prescribed offences among other defined types of proceedings.

60 *Telecommunications (Interception and Access) Act 1979* (Cth) s18(1).

61 (2008) 75 NSWLR 323, [153] (Spigelman CJ); note *contra*, Murphy J had considered that federal acts providing conclusive presumptions would often be invalid because they pose an impermissible interference with judicial power: *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 646.

> receive a fair trial. However, some forms of restriction on the admissibility of evidence will operate in favour of the prosecution. [62]

Retrospectivity of criminal laws and directed outcomes

37. Whether the retrospective operation of a criminal law has the result of interfering with the exercise of judicial power was addressed in *Polyukhovich.*[63] Mason CJ, Dawson and McHugh JJ all held that of itself the fact that a law was a retrospective criminal law did not usurp judicial power.[64] All considered that retrospective criminal legislation which allowed the court to determine a criminal charge allowed the court to exercise judicial power and hence did not offend Ch III.

10 38. Toohey J decided the case on a slightly different basis. His Honour considered that a criminal law which operated retroactively may offend Ch III of the *Constitution*, but:

> It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Ch III may be involved. It is conceivable that a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch III, especially if the law excludes the ordinary indicia of the judicial process. Such a law may strike at the heart of judicial power... But it is unnecessary to pursue this topic further because, as will appear, I do not consider that the Act, in its application to the information laid against the plaintiff, is retroactive in any offensive way.[65]

20 39. *Polyukhovich* stands as authority for the proposition that, at least, the court must inquire into the nature of the interference with judicial power before a retrospective criminal law will be invalid for usurping judicial power.[66] Absent the feature of there being a directed outcome or an outcome that is not the product of a genuine adjudicative function, the law will be valid.[67]

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62 (2008) 75 NSWLR 323, [160] (Spigelman CJ). To similar effect see *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, [7] and [13] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

63 The approach in *Polyukhovich* was consistent with the approach taken by the Privy Council in *Liyanage v The Queen* [1967] AC 259, 289-290 (Lord Pearce for the Council).

64 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534, 540 (Mason CJ), 643-4 (Dawson J) & 719,721 (McHugh J).

65 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 689 (Toohey J).

66 See also *Nicholas v The Queen* (1998) 193 CLR 173, 234 [149] (Gummow J):

> However, *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) decides that even a law, on its face imposing criminal liability in respect of past conduct which, at the time of its commission, did not contravene a law of the Commonwealth, does not, for that reason alone, usurp the exercise of the judicial power of the Commonwealth. The law will be valid if it leaves for determination by a court the issues which would arise at a trial under the law in question.

67 McHugh J summarised the ratio of *Polyukhovich* in *Nicholas v The Queen* (1998) 193 CLR 173, 221-2 [114] stating:

> Similarly, in *Polyukhovich v The Commonwealth (War Crimes Act Case),* members of this Court said that there would be a usurpation of judicial power if a law inflicted punishment on specified persons without a judicial trial. However, the majority of the Court held that s 9 of the War Crimes Act 1945 (Cth), which had been amended in 1988 to declare certain acts committed in Europe between 1939

That result will not necessarily follow just because the applicable law is retrospective in some respect. Two judges of this Court in *Nicholas* identified that as the *ratio* in *Polyukhovich*.[68]

40. The Defendant argues, in reliance on the dissenting judgments in *Polyukhovich,* that a retrospective criminal law usurps judicial power because it prevents the court from determining whether the conduct (once proved) contravened a law which is an essential component of the exercise of judicial power. Consideration of the dissenting judgments is critical to understanding that argument.

40.1 Deane J relied upon the Court of Exchequer Chamber decision in *Phillips v Eyre*[69] to find that the "central vice of a Bill of Attainder not as lying in its specific naming of an individual but as lying in its ex post facto operation as a legislative decree that an act which was not criminal when done was "voided and punished" as a crime."[70] He expressly noted that retrospective criminal legislation was not beyond the legislative power of the Imperial Parliament.[71] He found that the *War Crimes Act 1978* deprived the judiciary of its power to determine whether the past conduct constituted a criminal contravention of the law.[72] He stated:

> ...The position is less obvious where such a statutory provision does not nominate a particular person or group of persons but identifies the persons whom it makes punishable for past "crime" by reference only to their having committed some past act which was not criminal when done. In such a case, there will be a need for a trial to determine whether a particular accused falls within the class of those whose past conduct is retroactively made criminal. Nonetheless, such a statutory provision declaring past conduct to have been a criminal offence constitutes a usurpation of judicial power in that, once it is established that the accused has committed the past act, the question whether that act constituted a criminal contravention of the law is made simply irrelevant. To that extent, curial determination of criminal guilt is ousted by legislative decree. The point can be illustrated by dividing the legislation in such a case into its essential components. One component of such legislation is the requirement that there be a "trial" in the courts, in which the judicial process must be observed, to determine whether it is established beyond reasonable doubt that a particular person knowingly engaged in the designated conduct. The second component is that, if it be established that the particular person did in fact engage in that past conduct which was not criminal when done, he is guilty of a punishable crime. That second component of the legislation invades the heart of the exclusively

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and 1945 to be indictable offences against the Act, did not usurp the judicial power of the Commonwealth. Because s 9 of the War Crimes Act 1978 allowed the courts to determine whether a person engaged in conduct contrary to the Act, it was a valid law of the Commonwealth, despite the retrospectivity of its operation.

68 See footnotes 66 and 67 above.

69 (1870) LR 6 QB 1, 25.

70 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 611 (Deane J).

71 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 611 (Deane J).

72 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 613 (Deane J).

> judicial function of determining criminal guilt, that is to say, of determining whether past conduct constituted a criminal contravention of the law. It pre-empts and negates what would otherwise be an inevitable judicial determination that, since the act of the particular person did not constitute a criminal contravention of any Commonwealth law which was applicable at the time when it was done, that person committed no crime under our law. In the place of that inevitable judicial determination, it imposes a legislative enactment of past guilt which it requires the courts, in violation of the basic tenet of our criminal jurisprudence and the doctrine of separation of judicial from legislative and executive powers, to apply and enforce. It is simply not to the point that the first component of the legislation camouflages the usurpation of judicial power involved in the second by requiring a display of the full panoply of judicial process for the purpose of determining whether it is established beyond reasonable doubt that the accused person knowingly did a specified act which was not criminal when done.[73]

40.2 Gaudron J's essential reasoning was similar. Her Honour stated:

> The usurpation of judicial power by a law which declares a person guilty of an offence produces the consequence that the application of that law by a court would involve it in an exercise repugnant to the judicial process. It is repugnant to the judicial process because the determination of guilt or innocence is foreclosed by the law. The only issue is whether the person concerned was a person declared guilty by the law. And all that involves is the determination, as a matter of fact, whether some person is the person, or answers the description (whatever form it takes) of the persons, declared guilty by the Act. It does not involve, and indeed negates, that which is the essence of judicial power in a criminal proceeding, namely, the determination of guilt or innocence by the application of the law to the facts as found.[74]

41. With respect, the conduct of a criminal trial is not amenable to division into two stages. In a criminal trial, the trier of fact is not asked two questions: first, have the elements of the offence been proven beyond reasonable doubt; and second, if so, has the accused committed the offence with which they are charged, as is suggested. The question is but one - has the prosecution proved beyond reasonable doubt that the accused committed the offence with which they are charged. The answer to that question is dictated by satisfaction that each and every element is proved beyond reasonable doubt. The answer is the necessary sum of the parts.

42. The determination of guilt is not in this case fractured. This can be tested by comparing the exercise of judicial power in Ms Keating's anticipated trial with the trial of an offence committed in the same circumstances as alleged against Ms Keating but where the omission takes place post the *Amending Act* coming into operation. In each trial the exercise of judicial power will be no different. There is no directed outcome, no denial of a genuine adjudicative function.

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73 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 612-613 (Deane J).

74 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 706 (Gaudron J).

43. It is true that in its retrospective operation the impugned law in this case operates upon an ascertainable class of people (at least in theory), namely, those who have been in receipt of benefits. To that extent there is a legislative judgment that the members of that class shall be subject of the duty imposed. However, in its prospective operation it will operate on a class identically determined. The modification of the elements of the offence do not have the effect that the Parliament has undertaken an empirical investigation of the acts, characteristics and propensities of a specified class of people such as to invade the task committed to the judicial power to an impermissible degree.[75] The modified offence remains a law of general application.

10 44. In *Polyukhovich* Gaudron J explains that a re-enactment of a law which applied to acts at the time of the commission and which had not been "brought to bear" on the facts in question, would not be invalid as contrary to Ch III.[76] In so concluding, Her Honour did not explain how the exercise of judicial power was any different for those valid retrospective laws compared with the other type of retrospective laws which she had considered usurped judicial power. It seems most likely the only distinction is an individual's capacity to organise their affairs and to avoid criminal liability. That, with respect, is not an instance of legislative interference with the exercise of judicial power. It is a policy consideration properly within the legislature's sphere of power.

45. To the extent that the Defendant argues that retrospective laws of themselves are invalid, it is
20 contrary to the decisions in *Polyukhovich*[77] and *Kidman,*[78] and would require this Court to overrule those decisions and others.[79] There is no well-defined rule regarding when this Court will overrule one of its prior decisions.[80] In order to support the interests of continuity and consistency in the law, this Court takes a cautious and strongly conservative approach.[81] It is not necessary for the Court to identify a manifest error in the prior decision.[82] All of the factors which may weigh for and against overruling are to be evaluated,[83] including the extent to which the prior decision is incorporated into a stream of authority; whether the prior decision is confined to its own precise question; whether the prior decision involves a question of such

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75 *United States v Brown* (1965) 381 US 437.
76 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 707 (Gaudron J).
77 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
78 *R v Kidman* (1915) 20 CLR 425.
79 See footnote 25 above.
80 *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, 352-353 [70] (French CJ).
81 *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, 352-353 [70] (French CJ).
82 *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, 353 [71] (French CJ).
83 *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, 352-353 [70] (French CJ).

vital constitutional importance that its consequences were likely to be far reaching; whether there was a difference in the reasons of the majority in the prior decision; whether the earlier decision has achieved a useful result or caused considerable inconvenience; and whether the earlier decision had been acted upon in a way which militated against reconsideration.[84]

46. The Defendant argues that s66A of the *Administration Act* is invalid with reference to academic and judicial writings that warn of the unfairness and the dangers of retrospective laws.[85] It is beyond doubt that retrospective laws may so operate. However, general considerations of fairness are matters for the Parliament to balance in enacting legislation. Fairness, for example, may give way to utility in order to achieve a greater public good. In any event, it has been observed that whether retrospective legislation operates unfairly depends to a great extent on the "merits and demerits of the projected legislation" and that "it is easier to believe the general proposition that a retrospective Act diminishes public confidence in the law, if we do not think of particular cases."[86] An example demonstrates the proposition:

> What about the case of smart operators who indulge in activities which are highly undesirable but which, because of some deficiency or loophole in the law, are not illegal, eg, unscrupulous property owners who use the defect in the law to exploit their tenants?[87]

Fairness to the individual, save to the extent that Ch III might protect it, forms no part of this the assessment of validity.[88] Not the least because there is legitimate room for disagreement about the fairness and utility of such laws, as the laws in question in *Polyukhovich* demonstrate.

The validity of the Amending Act

47. The *Amending Act* read with the *Administration Act* and the *Code* is not a Bill of Attainder. It does not specifically identify a class of persons to whom criminal liability is attached. It is a law of general application. It does not determine guilt. It modifies an element of the offence.

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84 *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, 351-352 [68] &[69] (French CJ) stating the relevant factors as set out by Aickin J in *Queensland v the Commonwealth* (1977) 139 CLR 585 and the Court in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

85 Defendant's Annotated Written Submissions [44] to [49].

86 A. D. Woozley, "What is Wrong with Retrospective Law", *The Philosophical Quarterly* Vol. 18, No. 70 (Jan, 1968), 48-9.

87 A. D. Woozley, "What is Wrong with Retrospective Law", *The Philosophical Quarterly* Vol. 18, No. 70 (Jan, 1968), 48.

88 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 134 [29], 135-136 [32] (French CJ, Crennan &Kiefel JJ).

48. It remains for a court hearing a trial of a charge under s135.2 of the *Code* to hear the evidence, to ascertain the law, to make findings of fact and to apply the law as ascertained to the facts as found in determining guilt beyond reasonable doubt. But one aspect of one element of the offence has been modified by the operation of s66A of the *Administration Act*: the existence of the duty with which the recipient of benefits was obliged by law to comply. It remains in relation to that element to establish that Ms Keating was possessed of the requisite fault element. It may be that in the factual circumstances of this case those aspects of the inquiry are easily determined or proved. That of itself does not constitute the usurpation of judicial power. The offence created by s135.2 of the *Code* read with s66A of the *Administration Act* is not established merely by proving that Ms Keating is a person answering a legislatively prescribed description, the consequence of which is guilt of the offence. To conclude otherwise is to conclude that the law in its prospective effect similarly impermissibly interferes with the exercise of judicial power.

49. The *Administration Act* operates in the way described in *Polyukhovich* by Mason CJ:

> But if the law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power.[89]

and by McHugh J:

> Under such a law, it is still the jury, and not the legislature, which determines what the facts of the case are and which applies the law, as determined by the judge, to those facts for the purpose of determining whether the accused is guilty or innocent of the charge against him or her. Such a law is not an exercise of, or an interference with the exercise of, judicial power.[90]

50. For the reasons advanced above South Australia contends that the first and second questions reserved should be answered as follows:

50.1 Question 1 should be answered "Yes".

50.2 Question 2 should be answered "No".

South Australia makes no submission as to the third question reserved for the determination of this Court.

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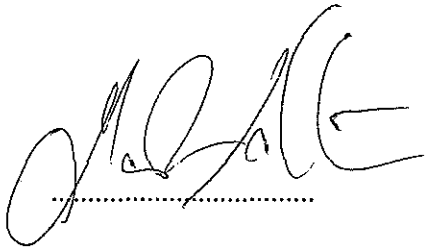
89 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 536 (Mason CJ).

90 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 (McHugh J).

Part VI: Estimate of time for oral argument

51. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated 21 March 2013



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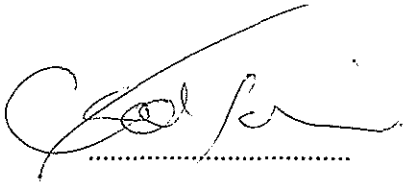

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