IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M5 OF 2013**

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Informant

KELLI ANNE KEATING
Defendant

INFORMANT'S ANNOTATED SUBMISSIONS

PART I INTERNET PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II STATEMENT OF ISSUES

2. The first issue is whether s 66A of the *Social Security (Administration) Act 1999* (Cth) (Administration Act) operates with retrospective effect to impose a duty on the Defendant to inform the Department (Centrelink)[1] of any change in circumstances that could affect her eligibility to receive a social security payment. At the time of enactment of s 66A, the Defendant had already been charged with offences against s 135.2 of the *Criminal Code* 1995 (Cth) (the Code).

3. If yes, the second issue is whether the retrospective imposition of a duty by s 66A is constitutionally invalid.

4. The third issue is whether, in the alternative to s 66A, the necessary duty to inform Centrelink of a change in circumstances was created by the issuing of notices to the Defendant under ss 67 and 68 of the Administration Act.

5. The Informant (the DPP) submits that:

   (1) s 66A is effective, as a matter of statutory construction, to impose this duty;

   (2) s 66A does not infringe the constitutional separation of judicial and legislative powers; and

   (3) the notices issued to the Defendant were capable of imposing a duty on her to inform Centrelink of a change in her circumstances.

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1 Before the *Human Services Legislation Amendment Act 2011* (Cth), Centrelink was an agency established by the *Commonwealth Services Delivery Agency Act 1997* (Cth). The role of Centrelink under the Administration Act is explained in *Re Coffey and Centrelink* [2003] AATA 633 at [32]-[33] (Forgie DP).

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PART III SECTION 78B OF THE *JUDICIARY ACT 1903*

6. The Defendant has given notice in accordance with s 78B of the *Judiciary Act 1903* (Cth)[2]. The DPP considers that no further notice is necessary.

PART IV FACTUAL BACKGROUND

7. The facts are set out in the Case Stated. The following facts should be emphasised.

8. The Defendant applied for Parenting Payment Single (PPS) on 6 October 2005.[3] PPS is means-tested.[4]

9. **Information provided by Defendant:** On 14 October 2005, the Defendant provided information showing that her income was $760.15 per fortnight.[5] She did not provide any other information about her income during the period that she received PPS (from October 2005 until September 2010).[6]

10. **Centrelink letters:** On 14 October 2005, Centrelink sent the Defendant a letter under s 67 of the Administration Act confirming the grant of payment (the Grant Letter). That letter stated (relevantly):[7]

> INFORMATION USED FOR CALCULATING YOUR REGULAR PAYMENT ...
> Regular Fortnightly Earnings ... $760.15
>
> ...
>
> WHAT YOU MUST TELL US
> You must tell us within 14 days (28 days if residing outside Australia) if any of these things happen, or may happen. ... This is an information notice given under the social security law.
>
> You must tell us if any of these things happen or are likely to happen:
>
> ...
>
> CHANGES TO INCOME AND ASSETS
>
> ...
>
> your income, not including financial investments or maintenance, increases ...

11. On the same date, Centrelink sent the Defendant a letter headed "How work affects your payments". That letter stated (relevantly):[8]

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2 Case stated book [CSB 82 - 85]

3 Case Stated, [3] [CSB 2].

4 Case Stated, [4] [CSB 3]. See *Social Security Act 1991* (Cth), Part 2.10 (especially s 503) and Pt 3.6A (especially s 1068A, module E).

5 Case Stated, [5] [CSB 3].

6 Case Stated, [6], [7] [CSB 3].

7 CSB 14–15.

8 CSB 17.

> Reporting your earnings
> You must tell us about any changes to your earnings within 14 days. If you get a 'Reporting and Income Statement', it will tell you how to report your earnings. You must tell us the gross amount you earned (the amount before tax is deducted). If you do not tell us the right information, and are overpaid, you may have to pay money back. A payment penalty can also apply.

12. The Defendant was sent 12 other letters between 18 December 2006 and 18 August 2009.

    (1) Each letter stated that the Defendant's fortnightly income was $760.15.[9]

    (2) In each letter the Defendant was requested to inform Centrelink of specified events within 14 days (or within 28 days if outside Australia). The specified events included "your income, not including financial investments or maintenance, increases"[10] or "you ... have any change to your income from employment (the amount you earn goes up or down)".[11]

    (3) Each letter stated that it was "an information notice given under the social security law" (or "under social security law").[12]

13. **Alleged overpayments:** The amended charges relate to three periods between May 2007 and September 2009. During those periods, the Defendant's fortnightly pay exceeded $760.15 (the income declared) in 29 out of 34 fortnights. Further, in those periods, the Defendant's fortnightly income was more than double the amount of her declared income in 10 out of 34 fortnights. Overall, her gross income for the charge periods was close to double the amount that she would have earned on her declared income ($44,438.82 compared with $25,084.95).[13]

14. The periods relating to each amended charge, together with the amount in each period that the DPP alleges was overpaid, are as follows:[14]

    Charge 4: 17 May 2007 to 4 October 2007 – amount overpaid: $1,624.39

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9 See CSB 19.17 (letter dated 18 Dec 2006); 22.22 (19 Sept 2007); 26.20 (22 Oct 2007); 32.25 (26 Nov 2007); 37.44 (18 Apr 2008); 42.41 (24 Jul 2008); 47.41 (30 Oct 2008); 50.19 (6 Nov 2008); 56.28 (5 Feb 2009); 59.17 (29 Apr 2009); 65.27 (14 May 2009); 70.27 (18 Aug 2009).

10 See CSB 20.25 (letter dated 18 Dec 2006); 23.29 (19 Sept 2007); 27.26 (22 Oct 2007); 51.28 (6 Nov 2008); 60.25 (29 Apr 2009).

11 CSB 33.20 (letter dated 26 Nov 2007); 38.39 (18 Apr 2008); 43.38 (24 Jul 2008); 48.38 (30 Oct 2008); 57.25 (5 Feb 2009); 66.25 (14 May 2009); 71.22 (18 Aug 2009).

12 See CSB 19.26 (letter dated 18 Dec 2006); 22.30 (19 Sept 2007); 26.29 (22 Oct 2007); 31.27, 33.11 (26 Nov 2007); 36.25, 38.30 (18 Apr 2008); 41.29, 43.29 (24 Jul 2008); 46.28, 48.29 (30 Oct 2008); 50.28 (6 Nov 2008); 57.15 (5 Feb 2009); 59.26 (29 Apr 2009); 66.15 (14 May 2009); 71.14 (18 Aug 2009).

13 See Case Stated, [22]-[23] [CSB 10-11].

14 Case Stated, [26] [CSB 11-12]; Attachment 4 [CSB 80].

Charge 5: 3 April 2008 to 2 October 2008 – amount overpaid: $2,870.66

Charge 6: 16 April 2009 to 3 September 2009 – amount overpaid: 1,797.74

This is a total overpayment of $6,292.79.

15. **Charges:** On 7 October 2010, the Defendant was charged with three counts of obtaining financial advantage, contrary to s 135.2(1) of the Code.[15] On 7 February 2012, those charges were amended and the charges set out above were substituted.[16]

PART V APPLICABLE LEGISLATIVE AND CONSTITUTIONAL PROVISIONS

16. The DPP relies on the provisions set out in the Defendant's submissions. The DPP will provide the Court with an agreed bundle of legislation for the hearing.

PART VI INFORMANT'S ARGUMENT

Q(1) Administration Act, s 66A is effective to create a duty from 20 March 2000

17. The first question is whether s 66A of the Administration Act is effective, as a matter of statutory construction, to create a duty for the purposes of s 4.3(b) of the Code.

1.1 Background to the insertion of s 66A

18. The Defendant is charged with offences against s 135.2(1) of the Code. The physical and fault elements of this offence are as follows:[17]

    (a) the person intentionally engages in conduct;

    (aa) as a result of the conduct, the person obtains a financial advantage for himself or herself from another person, being aware of the substantial risk that this will occur and, having regard to the circumstances that are known to him or her, it being unjustifiable to take the risk that this will occur;

    (ab) the person knows or believes that he or she is not eligible to receive the financial advantage; and

    (b) the other person is a Commonwealth entity (strict liability).

19. The expression "engages in conduct" means to do an act or to omit to perform an act (the Code, s 4.1(2)). However, under s 4.3, 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.

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15 Case Stated, [24] [CSB 11]; Attachment 2 [CSB 74-75].

16 Case Stated, [25] [CSB 11]; Attachment 3 [CSB 77-78].

17 See *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 (*Poniatowska*) at 417 [21] (French CJ, Gummow, Kiefel and Bell JJ).

20. In *Director of Public Prosecutions (Cth) v Poniatowska*,[18] this Court held (with Heydon J dissenting) that, although s 135.2(1) allowed that the offence may be committed by omission, it did not make an omission of an act a physical element of the offence within the meaning of s 4.3(a) of the Code.[19] The DPP in *Poniatowska* disavowed reliance on any statutory duty on the respondent to inform Centrelink of a change in circumstances (cf Code, s 4.3(b)).[20]

21. On 4 August 2011, the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth) (the 2011 Amendment Act) received Royal Assent.[21] Schedule 1, item 1 of that Act inserted a new s 66A into the Administration Act. Section 66A(1) provides:

> (1) If:
>
> (a) a person has made a claim for:
>
> (i) a social security payment; or
>
> (ii) a concession card; and
>
> (b) the claim has been granted or has not been determined; and
>
> (c) an event or change of circumstances occurs that might affect the payment of that social security payment or the person's qualification for the concession card;
>
> the person must, within 14 days after the day on which the event or change occurs, inform the Department of the occurrence of the event or change.
>
> ...

22. Section 2 of the 2011 Amendment Act provided that Schedule 1 (which added s 66A) commences on 20 March 2000. Schedule 1 item 3 provides:

> **3 Application provision**
>
> Section 66A of the [Administration Act], as inserted by this Schedule, applies in relation to an event or change of circumstances that occurs on or after 20 March 2000.

1.2 Clear language of 2011 Amendment Act excludes presumption against retrospectivity

23. It is submitted that the clear language of the 2011 Amendment Act excludes the presumption against retrospectivity.

24. It must be accepted that the presumption against retrospectivity applies with special force when legislation affects criminal liability in pending judicial proceedings.[22] Here,

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18 (2011) 244 CLR 408.

19 *Poniatowska* (2011) 244 CLR 408 at 423 [37].

20 *Poniatowska* (2011) 244 CLR 408 at 422 [34].

21 The 2011 Amendment Act was therefore enacted after argument in *Poniatowska* (3 March 2011), but before the decision was handed down (26 October 2011).

22 See eg *Lodhi v The Queen* (2006) 199 FLR 303 (*Lodhi*) at 310 [23], 312 [39] (Spigelman CJ, with McClellan CJ at CL agreeing on this point, and Sully J agreeing). See also, in relation to civil

the Defendant was charged in October 2010 (before the 2011 Amendment Act was enacted) and therefore proceedings were "pending" in that sense.

25. At the same time, it is possible to exclude the presumption against retrospectivity by sufficiently clear language[23] (putting aside the constitutional point discussed below). It is not necessary for Parliament to expressly address the question of pending actions.[24] Instead, the intention of Parliament is determined by the words of the statute, construed in their full context and in accordance with the scope and purpose of the legislation.[25] Although general notions of "justice" and "fairness" underpin these principles, the task of construction cannot be approached simply by asking whether a construction is "unfair" or "unjust" – rather, the issue is what constructional choices are open according to the established rules of interpretation.[26] Similarly, general arguments about "uncertainty" do not advance the proper construction of the 2011 Amendment Act.[27]

26. Here, it is obvious from s 2 and Sch 1, item 3 of the 2011 Amendment Act that s 66A has at least some retrospective operation. Moreover, for the following reasons, this retrospective operation extends to applying s 66A to pending proceedings.[28]

    (1) The application provision in Sch 1, item 3 is in completely unqualified terms – the new s 66A "applies in relation to an event or change of circumstances that occurs on or after 20 March 2000".[29]

    (2) The date of retrospective operation – 20 March 2000 – is more than 10 years before the enactment of s 66A. This could not sensibly be interpreted as applying only to an event or change of circumstances in respect of which judicial proceedings had not commenced.

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proceedings, *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 (*Australian Education Union*) at 136 [33] (French CJ, Crennan and Kiefel JJ).

23 See eg *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at 481 [98] (Spigelman CJ, with Hidden and Latham JJ agreeing).

24 *Lodhi* (2006) 199 FLR 303 at 312-313 [40] (Spigelman CJ); see also *Continental Liqueurs Pty Ltd v GF Heublein* (1960) 103 CLR 422 at 427 (Kitto J).

25 *Jones v Commonwealth Services Delivery Agency* (2012) 265 FLR 158 (*Jones*) at 177 [41] (Gray J); see also *Attorney-General (NSW) v World Best Holdings Pty Ltd* (2005) 63 NSWLR 557 (*World Best Holdings*) at 571 [53] (Spigelman CJ).

26 *Australian Education Union* (2012) 246 CLR 117 at 134 [28]-[29], 135-136 [32] (French CJ, Crennan and Kiefel JJ).

27 Cf *Australian Education Union* (2012) 246 CLR 117 at 138 [39] (French CJ, Crennan and Kiefel JJ); contra Defendant's submissions, [19.2]-[19.3].

28 Even when an Act clearly has some retrospective operation, the courts will confine the extent of retrospective operation to what is clearly expressed: see eg *Australian Education Union* (2012) 246 CLR 117 at 135 [31] (French CJ, Crennan and Kiefel JJ).

29 See *Jones* (2012) 265 FLR 158 at 177 [42] (Gray J).

(3) The context of new s 66A was to fill the legal gap that had been identified by the Full Court of the South Australian Supreme Court in *Poniatowska v Director of Public Prosecutions (Cth)*[30] (subsequently confirmed by this Court). The date from which s 66A is added – 20 March 2000 – is the date on which the Administration Act commenced.[31] Given that s 66A clearly has some retrospective operation, the only conceivable interpretation is that Parliament intended to fill this gap in relation to all past conduct under the Administration Act, including past conduct that was the subject of pending and even completed judicial proceedings.[32]

27. This legislative intention is confirmed by the extrinsic materials.[33] The Explanatory Memorandum confirms that new s 66A was enacted in response to the decision in *Poniatowska* (with the appeal then pending in the High Court).[34] The purpose of applying new s 66A with retrospective effect was to ensure that any convictions in relation to social security fraud under provisions such as s 135.2 of the Code could not be overturned on the basis that the physical element of the offence, the omission, was not established.[35] It was considered that the usual criticism of retrospective criminal legislation (that people would be unaware that their conduct was an offence) did not apply here – the convicted persons would have all been aware that they should have informed the Department of the specified events and changes of circumstances listed in the notices given to them by Centrelink.[36]

1.3 Wording of s 4.3(b) and the need for intentional conduct do not assist the Defendant

28. The Defendant's other arguments for why s 66A should not be given a retrospective operation should be rejected.

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30 (2010) 107 SASR 578. Section 66A was enacted after argument in this Court in *Poniatowska*, but before this Court's decision had been handed down.

31 See Explanatory Memorandum to the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011 (Cth) (Explanatory Memorandum), p 6.

32 See, by analogy, *Australian Education Union* (2012) 246 CLR 117 at 137 [37], 138 [39]-[40] (French CJ, Crennan and Kiefel JJ): the language of the Commonwealth provision clearly validated the registration of all associations in the circumstances specified, and applied equally to an association whose registration had been declared invalid by a court as to any other association. See also *World Best Holdings* (2005) 63 NSWLR 557 at 574 [65]-[66] (Spigelman CJ): the intention of the NSW Parliament in that case was to validate the constitution of the Administrative Decisions Tribunal in all cases, therefore it was not possible to read down the general words that Parliament used.

33 Extrinsic materials cannot be used to displace the clear meaning of the text: *Alcan (NT) v Territory Revenue* (2009) 239 CLR 27 at 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ). However, it is permissible to use extrinsic materials to ascertain the mischief to which new s 66A was directed: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

34 Explanatory Memorandum, p 4. Since *Poniatowska*, the DPP had adjourned or discontinued a large number of matters of that kind before the courts: Explanatory Memorandum, pp 4-5.

35 Explanatory Memorandum, pp 6, 7.

36 Explanatory Memorandum, p 7.

29. **Section 4.3(b) does not require duty to exist at time of omission:** First, contrary to the Defendant's argument, there is no warrant for reading into s 4.3(b) a requirement that the duty must exist at the time of the omission.[37] Section 4.3(b) is a general provision, designed to apply to all Commonwealth criminal laws, which includes the possibility of retrospective legislation. Following the enactment of s 66A, there "is" a duty to inform Centrelink of certain events or changes in circumstances. For this reason, there was no need to amend ss 4.1 or 4.3 of the Code – the new s 66A engaged these provisions, by supplying a legal duty that comes within s 4.3(b).[38] Nor was there any need to amend s 135.2(1).[39]

10 30. **Intentional conduct does not require knowledge of duty:** Second, the need for the conduct referred to in s 135.2(1)(a) of the Code to be intentional does not require a person to be aware of the existence of the legal duty to perform an act.[40]

(1) As noted at [18] above, the first element of an offence contrary to s 135.2(1)(a) (when the physical and fault elements are combined) is that a person intentionally engage in conduct. As noted at [19] above, "engage in conduct" means to do an act or to omit to perform an act.[41] (The element is not, as the Defendant contends, that a "person has left undone that which she ought to have done").[42]

(2) Intention is defined in s 5 of the Code as follows: "[a] person has intention in respect of conduct if he or she means to engage in that conduct".

20 (3) The "conduct" is the failure to perform an act that by law there is a duty to perform (s 4.3(b)). For example, the conduct in this case is intentionally omitting to inform Centrelink of her change of circumstances (her change in income). This does not require that a person know that there is a duty, but rather requires: (i) as a matter of fact, a person intentionally did not perform an act; and (ii) as a matter of law, there is a duty to perform that act.[43] In other words, the element of the offence is <u>not</u> that an accused intended to breach the duty. Here, s 66A of the Administration Act imposed that duty with retrospective effect.

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37 Contra Defendant's submissions, [19]. Section 4.3(b) refers to an omission being a physical element of an offence if "the law creating an offence impliedly provides that the offence <u>is</u> committed by omission to perform an act that by law there <u>is</u> a duty to perform" (emphasis added).

38 *Jones* (2012) 265 FLR 158 at 179 [50]-[51], 180 [54] (Gray J); contra Defendant's submissions, [21].

39 Section 135.2(1) allows that an offence may be committed by omission: *Poniatowska* (2011) 244 CLR 408 at 423 [37].

40 Contra Defendant's submissions, [20].

41 Section 4.1(2) of the Code.

42 Defendant's submissions, [20].

43 *Jovanovic v Director of Public Prosecutions (Cth)* [2012] SASC 194 at [38] (Gray J).

31. The Defendant's reliance on the statement from *Ansari v The Queen*[44] is misplaced. *Ansari* turns on the particular nature of the conspiracy offence in s 11.5(1) of the Code which requires (among other things) that a person and at least one other party to an agreement "have intended that an offence be committed pursuant to the agreement" (s 11.5(2)(b)).[45] In that context, the plurality stated that "[p]roof of an intention to commit an offence [required by s 11.5(2)(b)] requires proof of the accused's knowledge of, or belief in, the facts that make the proposed conduct an offence".[46]

32. This statement in *Ansari* does not stand for any broader proposition about the knowledge required – indeed, even under s 11.5 an accused must have knowledge only of the facts that make conduct an offence (as distinct from having knowledge of, or belief in, the legal characterisation of the conduct).[47] That statement does not impose on the Crown a requirement to prove that an accused had knowledge of the law – to the contrary, ignorance of the law is no excuse.[48]

33. As the plurality in *Ansari* also observed a person may be criminally responsible for an offence even if he or she is mistaken about, or ignorant of, the existence or content of an Act that directly or indirectly creates the offence (citing the Code, s 9.3(1)).[49] For example, an accused may commit a slavery offence against s 270.3(1) of the Code if a person is known by the accused to possess the qualities that, by virtue of s 270.1, go to make that person a slave. The accused's intention does not depend on him or her appreciating the legal significance of those qualities.[50]

Q(2) The retrospective creation of a duty by s 66A is constitutionally valid

34. If s 66A creates a duty from 20 March 2000 as a matter of statutory construction (as submitted by the DPP), the second question is whether this retrospective operation is constitutionally valid.

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44 (2010) 241 CLR 299 (*Ansari*) at 318 [59], quoted in Defendant's submissions, [20].

45 The argument in *Ansari* was that that a charge of conspiracy to commit an offence that had recklessness as a fault element was bad in law: see (2010) 241 CLR 299 at 311-312 [30], [32] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

46 *Ansari* (2010) 241 CLR 299 at 318 [59], citing *R v LK* (2010) 241 CLR 177 at 228 [117].

47 *R v LK* (2010) 241 CLR 177 at 228 [117] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). However, s 11.5(2)(b) does require that at least one party to the agreement must have intended that an offence be committed pursuant to the agreement: ibid.

48 *CTM v The Queen* (2008) 236 CLR 440 at 446 [7] (Gleeson CJ, Gummow, Crennan and Kiefel JJ) and see in relation to the Code: *DPP (Cth) Reference* (No 1 of 2008) (2008) 21 VR 111 at 115 [21] (the Court). Contra Defendant's submissions, [19].

49 *Ansari* (2010) 241 CLR 299 at 318 [60].

50 *R v Wei Tang* (2008) 237 CLR 1 at 25 [48] (Gleeson CJ, with Gummow, Heydon, Crennan and Kiefel JJ agreeing with his Honour and Hayne J), 55 [134] (Hayne J).

2.1 *Parliament may enact retrospective criminal laws, provided they do not usurp or interfere with the exercise of federal judicial power*

35. The DPP submits that correct position is that the Commonwealth Parliament can validly enact retrospective criminal laws, provided those laws do not usurp or interfere with the exercise of federal judicial power.

36. This position was taken by four members of this Court in *Polyukhovich v The Commonwealth*.[51]

(1) Mason CJ, Dawson and McHugh JJ held in separate judgments that the Commonwealth could enact retrospective criminal laws, provided those laws did not usurp the exercise of federal judicial power. A retrospective Commonwealth criminal law would not usurp the exercise of judicial power if it left the courts to determine whether the person has engaged in the conduct complained of, and whether that conduct infringes the prescribed rule.[52]

(2) Toohey J (the other member of the majority) held that the Commonwealth could enact some retrospective criminal laws, provided the law did not require a court to act contrary to accepted notions of judicial power.[53] Toohey J held the Commonwealth law in that case was not retroactive "in any offensive way", largely because the relevant offence (murder) was universally condemned in both international and domestic law.[54]

37. It is beside the point that *Polyukhovich* does not hold that the Commonwealth has an unfettered power to enact retrospective criminal laws[55] – the holding of these four justices is squarely inconsistent with the Defendant's argument in this case. The Defendant relies[56] on the dissenting judgments of Deane J and Gaudron J, who held that the Commonwealth Parliament cannot enact <u>any</u> retrospective criminal laws.[57]

38. It is also beside the point that the war crimes legislation considered in *Polyukhovich* was penalising conduct that was already criminal.[58] That aspect was decisive in the reasoning of Toohey J; however, that reasoning has been persuasively criticised as "little more than a declaration of a judicial obligation to prevent injustice from being enacted

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51 (1991) 172 CLR 501 (*Polyukhovich*).

52 (1991) 172 CLR 501 at 536 (Mason CJ); see also 647, 649 (Dawson J), 721 (McHugh J).

53 (1991) 172 CLR 501 at 689.

54 (1991) 172 CLR 501 at 690, 691.

55 Cf Defendant's submissions, [57].

56 See Defendant's submissions, [24]-[25], [33], [42], [62].

57 (1991) 172 CLR 501 at 613-614 (Deane J), 706-707 (Gaudron J). This reasoning is criticised in Leslie Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 171, 172.

58 Cf Defendant's submissions, [56]-[57].

by the Parliament".[59] That factor played no place in the reasoning of the other members of the majority in *Polyukhovich*,[60] nor for that matter in reasoning of this Court (apart from Griffith CJ) in *R v Kidman*.[61]

39. In any event, s 66A comes within the narrower principle articulated by Toohey J. Section 66A does not itself create any criminal liability,[62] but imposes a "stand alone" duty to inform the Department of a change in circumstances. This duty is imposed in the context where recipients of a social security benefit would have received a notice issued under s 67 of the Administration Act advising them to inform the Department of any changes in circumstance (including a change in income).[63] As discussed in answering Q(3) below, notices issued under ss 67 and 68 of the Administration Act are capable of creating a duty within s 4.3(b) of the Code. Thus, in the DPP's submission, the s 66A duty merely reinforces a legal duty that already existed.[64]

40. In *Nicholas v The Queen*,[65] four members of this Court understood *Polyukhovich* as holding that the Commonwealth can enact retrospective criminal laws, provided those laws do not usurp the exercise of federal judicial power. Retrospectivity, in itself, it not a usurpation.[66] In addition, this Court has accepted that the Commonwealth had power to enact retrospective criminal laws in *R v Kidman*[67] and *Millner v Raith*.[68]

41. The Defendant has not demonstrated any need to overrule these earlier decisions.

42. The requirements of Ch III of the Constitution, as with all constitutional limitations, are determined as a matter of substance and not mere form.[69] However, the

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59 Leslie Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 172. Cf *Minister for Home Affairs v Zentai* (2012) 289 ALR 644: the offence of "war crimes" did not exist in Hungarian law until 1945, even though the conduct was also criminal as murder.

60 The discussion of the nature of war crimes by Dawson J at 172 CLR at 643 is in the context of the presumption against retrospectivity, not Ch III validity.

61 (1915) 20 CLR 425 at 443 (Isaacs J), 456-457 (Gavan Duffy and Rich JJ), 462 (Powers J); see also 448, 451 (Higgins J); contra 436-437 (Griffith CJ).

62 *Jones* (2012) 265 FLR 158 at 179 [45] (fn 41) (Gray J): s 66A is not a penal provision.

63 When a payment is granted, all grant recipients are sent a pro forma letter issued under s 67 of the Administration Act: Case Stated, [8] [CSB 3]. See also *Jones* (2012) 265 FLR 158 at 179 [46] (Gray J).

64 There is one difference – s 66A(1) imposes a duty to report a change of circumstances etc within 14 days. The notices sent to the Defendant required her to report a change in circumstances etc within 14 days, or within 28 days if she was outside Australia: see [10], [12(2)] above. There is no evidence of her being outside Australia at any of the relevant times.

65 (1998) 193 CLR 173 (*Nicholas*).

66 (1998) 193 CLR 173 at 221-222 [114] (McHugh J, dissenting in the result), 234 [149] (Gummow J), 259 [201] (point 6) (Kirby J, dissenting in the result), 277 [249] (Hayne J).

67 (1915) 20 CLR 425.

68 (1942) 66 CLR 1 at 6 (Starke J), 6 (McTiernan J), 9 (Williams J).

69 See *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

Defendant's argument – which would introduce an absolute bar on imposing retrospective criminal laws – would seem to move away from matters of substance.

(1) The Defendant's argument is said to be confined to retrospective "criminal" laws.[70] However, this Court has observed many times that there is no sharp distinction between "civil" and "criminal" laws.[71] Either the Defendant's argument will require drawing unsatisfactory distinctions, or it will extend into fields that are often considered as "civil" law. Although United States law prohibits retrospective criminal laws, that distinction is drawn for the purposes of confining an express constitutional provision that otherwise appears to ban all retrospective laws.[72]

(2) Similarly, the Defendant's argument would seem to draw a distinction between retrospective laws that deal with the elements of an offence, and retrospective laws that deal with matters of evidence (given that the Defendant does not seek to overrule *Nicholas*). However, the facts of *Nicholas* demonstrate that a retrospective alteration to the rules of evidence can have a significant impact on whether a person will be found guilty – after the enactment of the relevant Commonwealth law in that case, evidence that heroin had been imported unlawfully could be admissible. Without that evidence, the prosecution was bound to fail.

43. This is no mere definitional debate, but highlights a conceptual incoherence in the Defendant's argument. Her arguments as to why retrospective criminal laws necessarily interfere with the exercise of federal judicial power, if correct, would seem to apply equally to all retrospective laws.[73] But the Defendant does not challenge the Commonwealth's power to enact retrospective civil laws, or retrospective alterations to the laws of evidence. By contrast, the existing doctrine – which considers whether a law interferes with or usurps judicial power – does not require drawing any of these unsatisfactory distinctions.

2.2 *Giving s 66A a retrospective operation does not interfere with or usurp the exercise of federal judicial power*

44. Contrary to the Defendant's submissions, giving new s 66A of the Administration Act a retrospective operation does not interfere with or usurp federal judicial power.

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70 See eg Defendant's submissions, [53.1].

71 See eg *Dalton v NSW Crime Commission* (2006) 227 CLR 490 at 502 [27] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ), and the authorities cited.

72 See *Polyukhovich* (1991) 172 CLR 501 at 645 (Dawson J).

73 Leslie Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 171-172.

45. **Court not reduced to "mere formality":** First, giving s 66A retrospective operation does not reduce the role of a court to a "mere formality",[74] even in relation to the first element in s 135.2(1)(a) of the Code.[75]

46. As noted, the first physical element in the s 135.2(1) offence is that a person "engaged in conduct" (s 135.2(1)(a)).

(1) This physical element, as explained by s 4.1 and s 4.3(b), has two requirements: (i) as a matter of fact, the Defendant did not perform an act and (ii) as a matter of law, there was a duty to perform that act (see [30(3)] above). The need for a fault element means that there is a further requirement – the Defendant intentionally did not perform an act.

(2) Thus, in relation to this element, the court will need to determine whether the prosecution has established that: (1) there was a relevant change of the Defendant's circumstances; (2) the Defendant failed to inform Centrelink of that change in circumstances and (3) that the failure to inform was intentional. The court determines whether the person charged engaged in the conduct alleged and whether that is an offence. If any of these inquiries are a mere formality,[76] it is only because the Defendant does not have a defence on the facts, not because the court has been directed to reach any particular conclusion.

47. Moreover, the s 135.2(1) offence has a number of other elements, which are entirely unaffected by the new s 66A.[77]

48. **Section 66A not aimed at particular individuals:** Second, s 66A cannot properly be described as a law aimed at securing the conviction of a group of known individuals.

49. The new s 66A operates both with retrospective and prospective effect. In its prospective operation, it applies to all persons who fail to notify Centrelink of a change in their circumstances. In its retrospective operation, it applies equally to persons who

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74 Contra Defendant's submissions, [32].

75 A Commonwealth law may provide for conclusive certificates to be issued in relation to at least some elements of an offence. For example, it is valid to provide that a conclusive certificate is issued about the steps taken by employees of a telecommunications carrier that enabled an accused's conversations to be monitored: *Cheikho v The Queen* (2008) 75 NSWLR 323, discussing *Telecommunications (Interception and Access) Act 1979* (Cth).

76 Cf Defendant's submissions, [33].

77 It will also be necessary for the Prosecution to prove: (i) as a result of the conduct, the Defendant obtained a financial advantage for himself or herself from another person; (ii) the Defendant was aware of the substantial risk that this would occur; (iii) having regard to the circumstances that were known to her, it was unjustifiable to take the risk that this result will occur; (iv) the Defendant knew or believed that she was not eligible to receive the financial advantage; and (v) the other person was a Commonwealth entity: see the analysis of s 135.2 in *Poniatowska* (2011) 244 CLR 408 at 417 [21].

were convicted, persons (like the Defendant) who had been charged by August 2011, and persons who had engaged in conduct but had not yet been charged.

50. Certainly one reason for the retrospective operation of s 66A was to uphold convictions for social security fraud that had already occurred (see [27] above). However, in doing so, the new s 66A did not result in a different or unexpected liability being imposed.[78] There is no comparison with *Liyanage v The Queen*.[79]

51. **Guilt is not fictional:** Third, a person who is convicted of an offence against s 135.2 of the Code, following the enactment of the new s 66A of the Administration Act, is not being punished on any "fictional" basis.[80]

10 52. As noted, the s 135.2 offence contains various elements, including: a person intentionally engaged in conduct (here, not informing Centrelink of a change in circumstances); a person has obtained a financial advantage as a result and was reckless as to that fact; and the person knew or believed that he or she was not eligible to receive that advantage (s 135.2(1)(a), (aa) and (ab)). The prosecution must prove all of these elements under the usual rules of evidence to the criminal standard of proof. New s 66A does not direct a court even as to the first of these elements: (see [46] above); moreover, the s 66A duty merely reinforces the duty created by the notices issued under ss 67 and 68 of the Administration Act (see [39] above). There is no fiction involved.[81]

20 53. **Historical material:** Fourth, the so-called history of the common law does not assist the Defendant.[82]

54. There is no dispute that common law principles were strongly against the imposition of retrospective criminal liability. But that does not mean that Parliament lacked power to impose retrospective criminal laws, in the absence of an express constitutional prohibition as exists in the United States.[83] In *Polyukhovich*,[84] McHugh J stated that

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78 See *Haskins v The Commonwealth* (2011) 244 CLR 22 at 38 [30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ): the Commonwealth Act in that case sought to "confirm irregular acts", not to void and punish "what had been lawful when done".

79 [1967] AC 259, cited in Defendant's submissions, [39]. The passage in *Nicholas* (1998) 173 CLR 193 at 277 [249] (Hayne J) is saying that the mere fact that, by definition, it must be possible to identify all the persons to whom a retrospective law applies does not, in itself, mean that the law is aimed at those individuals: contra Defendant's submission, [36].

80 Contra Defendant's submissions, [40].

81 See *Polyukhovich* (1991) 172 CLR 501 at 536 (Mason CJ), 647, 649 (Dawson J), 721 (McHugh J); *Nicholas* (1998) 193 CLR 173 at 191 [26] (Brennan CJ), 202 [53] (Toohey J), 210-211 [80] (Gaudron J), 236 [156], 238 [162] (Gummow J), 278 [251] (Hayne J).

82 Cf Defendant's submissions, [43]-[45].

83 See *Polyukhovich* (1991) 172 CLR 501 at 535 (Mason CJ), 642, 645-647 (Dawson J), 718 (McHugh J).

The United States position turns on an express prohibition and is therefore distinguishable. In addition, there are fundamental differences between the Australian and United States conception of separation of powers: cf Defendant's submissions, [49]. For example, in the United States federal

there was nothing in the historical materials "which would indicate that the framers of the Commonwealth Constitution believed or assumed that giving a criminal statute a retrospective operation was an exercise of, or an interference with the exercise of, judicial power."

55. The Defendant attempts to distinguish the British position by saying that the Commonwealth Parliament is subject to the Constitution.[85] But this is circular – to say that the Commonwealth Parliament's powers are constrained by the Constitution is not a reason for saying that the Constitution contains the constraint contended for (here, a prohibition on all retrospective criminal laws). Instead, as noted, the relevant constitutional limit is narrower – a Commonwealth law cannot interfere with or usurp the exercise of federal judicial power.

56. **Rule of law:** In particular, there is nothing inconsistent between the Commonwealth's power to enact some retrospective criminal laws and the constitutional assumption of the rule of law.[86]

57. Statements that the Constitution is framed against an assumption of the rule of law use the "rule of law" to mean only that the courts must be able to review the legality of government action (both legislative and executive).[87] That meaning of "rule of law" is anchored in Ch III of the Constitution.

58. The rule of law is a notoriously imprecise concept, used to describe a number of different, and sometimes conflicting, values.[88] It would be going much further to give other values reflected in the rule of law – such a strong preference for rules to operate prospectively – "immediate normative operation" in applying the Constitution.[89]

59. The Defendant relies on various statements about the traditional abhorrence of retrospective criminal laws.[90] However, injustice, by itself, cannot be the yardstick of validity.[91] In any event, the extent of injustice may vary according to the subject-matter of the law.[92] For example, there is a strong argument for retrospectivity where "the

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judicial power may be conferred on bodies other than the courts referred to in Art III of the United States Constitution: see eg James E Pfander, "Article I Tribunals, Article III Courts, and the Judicial Power of the United States" (2004) 118 *Harvard Law Review* 643.

84 (1991) 172 CLR 501 at 720.

85 See Defendant's submissions, [53.2].

86 Cf Defendant's submissions, [28]-[30], [52].

87 See particularly *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [102]-[103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

88 See eg, Jeffrey Goldsworthy, "Legislative Sovereignty and the Rule of Law" in Tom Campbell, Keith Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (2001) 61 at 64-65.

89 *Re Minister for Immigration; Ex parte Lam* (2003) 214 CLR 1 at [72] (McHugh and Gummow JJ).

90 Defendant's submissions, [45]-[49].

91 Cf *University of Wollongong v Metwally* (1984) 158 CLR 447 at 472 (Wilson J, dissenting in the result).

92 *Polyukhovich* (1991) 172 CLR 501 at 642 (Dawson J).

moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression".[93]

Q(3) Section 67 and s 68 notices are capable of creating a duty for the purposes of s 4.3(b) of the Code

60. The third question is whether the notices issued to the Defendant are capable of creating a duty for the purposes of s 4.3(b) of the Code.

3.1 Letters to Defendant were issued under Administration Act, ss 67 or 68

61. As noted, the Defendant was sent a Grant Letter on 15 October 2005, together with another letter on that date, and was sent 12 further letters between 18 December 2006 and 18 August 2009 (see [10]–[12] above).

62. **Grant letter (s 67):** The DPP submits that the Grant Letter[94] was issued under s 67 of the Administration Act.

(1) Section 67(2) applies to a person who has made a claim for a social security payment and whose claim has been granted (s 67(1)). The Secretary may give a person a notice in writing that requires the person (relevantly) to inform the Department if a specified event or change of circumstances occurs (s 67(2)(a)(i)).

(2) An event or change in circumstances is not to be specified unless (relevantly) the occurrence or change of circumstances might affect the payment of the social security payment (s 67(5)(a)).[95]

(3) The Grant Letter stated (relevantly) "[y]ou must tell us within 14 days (28 days if residing outside Australia) if any of these things happen, or may happen … your income, not including financial investments or maintenance, increases."[96] An increase in income affects the payment of PPS, which is means-tested: (see [8]) above.

63. **Other letters (s 68):** The DPP submits that the remaining letters were issued under s 68 of the Administration Act.

(1) Section 68(2) applies to a person receiving a social security payment (other than utilities allowance or seniors concession allowance) (s 68(1)). The Secretary[97] may

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93 *Polyukhovich* (1991) 172 CLR 501 at 689 (Toohey J).

94 CSB 14-16.

95 An event or change of circumstances may also be specified if it would affect the operation, or prospective operation, of Pt 3B of the Administration Act in relation to the person. Part 3B provides for an income management regime.

96 CSB 14, 15.

97 These computer-generated letters are taken to be sent by the Secretary: see 2011 Amendment Act, Sch 3, item 1; Administration Act, s 6A.

give a person a notice that requires the person (relevantly) to inform the Department if a specified event or change of circumstances occurs, or the person becomes aware that a specified event or change of circumstances is likely to occur (s 68(2)(a)).

(2) An event or change in circumstances is not to be specified unless the occurrence of the event or change of circumstances might affect the payment of the social security payment (s 68(5)).

(3) The letter dated 15 October 2005 stated (relevantly) "[y]ou must tell us about any changes to your earnings within 14 days".[98] The other letters requested the Defendant to inform Centrelink of specified events within 14 days (or within 28 days if outside Australia), including: "your income, not including financial investments or maintenance, increases" or "you ... have any change to your income from employment (the amount you earn goes up or down)" (see [12(2)] above). Again, an increase in income affects the payment of PPS, which is means-tested.

64. **Requirements of ss 67 and 68 notices (s 72):** Notices issued under ss 67 and 68 of the Administration Act must satisfy the requirements in s 72.

(1) These requirements include that the notice must specify: how the person is to give the information to the Department (s 72(1)(c)); the period within which the person is to give the information to the Department (s 72(1)(d)(ii)); and that the notice is an information notice given under the social security law (s 72(1)(e)). However, a notice is not invalid merely because it fails to comply with s 72(1)(c) or (e) (s 72(2)).

(2) The period specified for the purposes of s 72(1)(d)(ii) must be (relevantly) the period of 14 days after the day on which the event or change in circumstances occurs, or the day on which the person becomes aware that the event or change in circumstances is likely to occur, as the case may be (s 72(3)(b)).[99]

65. **Non-compliance offence (s 74):** It is an offence to refuse or fail to comply with a notice under ss 67 or 68 of the Administration Act (s 74(1)). This is an offence of strict liability (s 74(4)). However, this offence does not apply to the extent that a person is incapable of complying with the notice (s 74(2)), or if the person has a reasonable excuse (s 74(3)).

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98 CSB 17.

99 In special circumstances, the period specified can be up to 28 days after the event or change in circumstances: Administration Act, s 72(4).

3.2 *Section 74 offence creates a duty to comply with ss 67 or 68 notices*

66. Section 4.3(b) of the Code provides that an omission to perform an act can be a physical element if "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".

67. Here, s 74(1) of the Administration Act provides that it is an offence to refuse or fail to comply with a ss 67 or 68 notice (subject to the defences in s 74(2) and (3)). The DPP submits that the s 74(1) is the clearest possible indication that there is a duty to comply with a notice under s 67 or s 68.

68. Section 4.3(b) of the Code must be read consistently with s 4.3(a) (where an omission is a physical element because the offence provision "makes it so"). In the s 4.3(a) context, the offence provision creates a duty to perform the act, by penalising a failure to perform that act. As Doyle CJ and Duggan J stated in *Poniatowska* in the South Australian Supreme Court:[100]

> The concept of an "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. An example of such a law is a law which makes it an offence for a person to refuse or fail to produce a driver's licence on request by a police officer. The refusal or failure to produce the driver's licence is an identified or specific omission and it is an omission to perform an act which the person in question is obliged to perform, having regard to the terms of the offence creating provision.

69. Section 4.3(b) deals with the situation where the duty to perform the omitted act is created by a provision, other than the offence provision. By parity of reasoning with s 4.3(a), this duty can be created by an offence provision – indeed, this is the most obvious way by which a duty will be imposed on a citizen.

3.3 *Answer to Defendant's arguments*

70. The Defendant's arguments for resisting the conclusion there is a duty, within s 4.3(b), to comply with ss 67 or 68 notices should not be accepted.

71. **Single failure can be an offence under s 74 and also an element in the s 135.2(1) offence:** First, it is no "subversion of the legislative scheme"[101] that a failure to comply with a s 67 or s 68 notice can be an offence under s 74 of the Administration Act, but also can go to the physical element in s 135.2(1)(a) of the Code.

    (1) By way of comparison, failures to remit GST payments to the Tax Office and to withhold income tax instalments as required by tax legislation may constitute an offence of dishonestly causing a loss, contrary to s 135.1(5) of the Code.[102] In other words, there is no suggestion that the specific offences in the taxation

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100 (2010) 107 SASR 578 at 586-587 [30].

101 Contra Defendant's submissions, [75].

102 See eg R *v Phan and Tan* (2010) 108 SASR 260; R *v Phan* (2010) 106 SASR 116.

legislation for failing to do these acts are the only punishment available. In this case the fraud offence involves proof of different elements and is directed towards a different harm.[103]

(2) More generally, it is not uncommon for different offences to have overlapping elements, and for a single course of conduct to raise potentially different offences.[104] Double jeopardy principles ensure that a person is not punished twice to the extent of the overlap.[105]

72. **Duty is imposed "by law":** Second, there is no basis for saying that the notices in this case were too uncertain to impose a duty "by law". The notices here were issued under and in compliance with ss 67, 68 and 72 of the Administration Act: (see [62]-[64] above). That satisfies the requirement that the duty be imposed "by law" (meaning by a Commonwealth law[106]).

73. Notices issued under ss 67 or 68 of the Administration Act do not have the uncertainties suggested in [71] of the Defendant's submissions. A notice imposes a duty when the notice is received by a person (although once a notice is sent, there is a presumption of receipt[107]). In principle, the obligations set out in a notice remain current for as long as a person is receiving benefits; at the same time, a person may be sent more than one notice (s 72(9)). In this case, the Defendant received regular reminders of her obligation to inform Centrelink, including one notice during the first charge period, two notices during the second charge period, and three notices during the third charge period.[108]

74. The Defendant does not dispute that non-compliance with a notice issued in accordance with ss 67, 68, 72 of the Administration Act is capable of giving rise to an offence against s 74 of that Act.[109] If that is correct, then it must follow that the issue

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103 See *Poniatowska* (2011) 244 CLR 408 at 422 [33] (French CJ, Gummow, Kiefel and Bell JJ).

104 *Island Maritime Limited v Filipowski* (2006) 226 CLR 328 at 344 [43] (Gummow and Hayne JJ); *R v Wei Tang* (2008) 237 CLR 1 at 9 [4] (Gleeson CJ, with Gummow, Heydon, Crennan and Kiefel JJ agreeing with his Honour and Hayne J); *R v Einfeld* (2008) 71 NSWLR 31 at 41-42 [44]-[46] (the Court).

105 See generally *Pearce v The Queen* (1998) 194 CLR 610; see also *Island Maritime Limited v Filipowski* (2006) 226 CLR 328 at 338-340 [25]-[30] (Gleeson CJ, Heydon and Crennan JJ), 345-346 [49]-[50], 350-351 [63]-[65] (Gummow and Hayne JJ).

106 See *Poniatowska* (2011) 244 CLR 408 at 421 [32] (French CJ, Gummow, Kiefel and Bell JJ).

107 See *Evidence Act 1995* (Cth), ss 160 and 163, which apply to all Australian courts (see s 182(4A) and s 5, respectively). See also *Acts Interpretation Act 1901* (Cth), s 29.

108 See, respectively, letters dated 19 September 2007 [CSB 22-25] (first charge period), dated 18 April 2008 [CSB 35-39] and 24 July 2008 [CSB 40-44] (second charge period), and dated 29 April 2009 [CSB 59-61], 14 May 2009 [CSB 63-67] and 18 August 2009 [CSB 68-72] (third charge period). The charge periods are set out in Case Stated, [26] [CSB 12].

109 There is no principle of Australian law of legislation being invalid for uncertainty or vagueness: cf *R v Hughes* (2000) 202 CLR 535 at 575-576 [95]-[98] (Kirby J).

of a notice under those provisions is capable of creating a duty to comply with the notice, for the purposes of s 4.3(b) of the Code.

75. **No assistance from construing s 74 "strictly":** Finally, it does not assist the Defendant to say that s 74 of the Administration Act should be construed "strictly".[110] That rule is a useful rule of last resort in cases of ambiguity,[111] but does not authorise the courts to read in limitations that are not present in the statutory language used.

76. The DPP notes that this Court would ordinarily not decide constitutional questions unless it was necessary for the decision of the case.[112] If it is decided that notices issued under ss 67 and 68 of the Administration Act create a sufficient duty for the purposes of s 4.3(b) of the Code, then it may be strictly unnecessary to consider whether a duty was also imposed by s 66A. However, the validity of s 66A is significant in other matters where notices are not relied on, and for past convictions.

Answers to questions reserved

77. The questions reserved for this Court[113] should be answered as follows: (1) Yes; (2) No; (3) Yes; (4) No order for costs should be made.

PART VIII ESTIMATE OF TIME OF ARGUMENT

78. The DPP estimates that it will require approximately 1.5-2 hours for the presentation of oral submissions in this matter.

Date: 21 March 2013

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[110] Contra Defendant's submissions, [76].

[111] *Beckwith v The Queen* (1976) 135 CLR 569 at 576 (Gibbs J).

[112] See eg *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28] (McHugh, Gummow, Hayne and Heydon JJ).

[113] CSB 12.