

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No M5 OF 2013

BETWEEN:

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DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Informant

KELLI ANNE KEATING
Defendant

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DEFENDANT'S ANNOTATED REPLY

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ISSUE 1: CONSTRUCTION

1. The Informant's submissions concentrate on the retroactive effect of s 66A: Informant's submissions at [18]-[27]. However, the Defendant's construction argument is directed at s 4.3(b) of the Criminal Code, not s 66A of the Administration Act: Defendant's submissions at [15]-[20]. The Informant's submissions at [29] do not grapple with the problem that imposition of criminal liability in the absence of a duty to perform an act *existing at the time of the alleged omission* is contrary to the approach to criminal liability for omissions taken by both the Criminal Code and the common law (as discussed in *Poniatowska*¹).

10 ISSUE 2: CONSTITUTIONAL VALIDITY

2. Contrary to the assertions of the Government parties, the Defendant does not ask this Court to give direct normative force to the rule of law,² and does not submit that injustice is determinative of constitutional invalidity.³ The universal condemnation of retroactive criminal laws over time is relied upon, in particular, to give content to the concept of "criminal guilt", which lies at the core of the exclusive judicial power of the Commonwealth: Defendant's submissions at [40]-[41]; and to shed light on the understanding of retroactive criminal laws in the 1890s.
3. The real difference between the parties to this proceeding is whether the separation of legislative and judicial powers is infringed by the retroactive operation of s 66A.

20 3.1. The Government parties argue that s 66A is a law of general application, leaving the court with its usual tasks. In its prospective operation this is so. But in this case s 66A must be read with s 2(1) and item 3 of schedule 1 of the Amending Act.⁴ By reason of those provisions, s 66A is a retroactive law aimed at a finite group of individuals and it effectively removes from the Court the task of determining an element of the offence.⁵

30 3.2. The Government parties argue that there is no general incompatibility between a retroactive criminal law and the judicial function of adjudging and punishing criminal guilt. In contrast, the Defendant submits that there is a repugnancy when the Parliament directs the Court, in a case concerning criminal liability, to apply a law other than the law that existed at the time of the relevant events. In that circumstance the court is directed to act on a fiction and punish conduct that was innocent: Defendant's submissions, [40]-[42].

¹ [2011] 244 CLR 408.

² Her use of the rule of law is explained in her submissions at [27]-[30], [50]. Cf Informant's submissions at [58]; Commonwealth Attorney-General's submissions at [65]; South Australian Attorney-General's submissions at [24].

³ Cf Informant's submissions at [59].

⁴ Any invalidity attaches to these provisions, not to s 66A itself, and relief would be granted in those terms.

⁵ Defendant's Submissions at [32]-[39].

4. There are suggestions in the submissions of the Government parties that the notices render social security recipients in some sense culpable, so as to suggest that the “usual criticism of retrospective legislation does not apply”.⁶

4.1. As a general proposition, this is untenable. The legislature has recognised by the terms of ss 74(2) and (3) of the Administration Act that there are many reasons why a person who in fact receives a notice may have no duty to comply and may not merit punishment.

4.2. As a proposition applicable to this case, it is also incorrect: the Defendant does not admit receiving the notices.⁷ A person who is deemed to have received a Notice cannot, without more, be regarded as culpable.

5. The Government parties rely on *Nicholas v The Queen*.⁸ As Gummow J said,⁹ referring in turn to Isaacs J, “a law which, on its true construction, is merely evidentiary and operates only to regulate future curial procedure is not retrospective”. Changing the way in which an offence can be proved is fundamentally different from retroactively imposing criminal guilt.

ISSUE 3: THE NOTICES

6. The Informant appears to understand the Defendant’s argument to be that two provisions cannot create different offences arising from the same factual circumstances: Informant’s Submissions at [71]. This is not the argument. The Defendant’s contention is that the scheme of the Administration Act is subverted if the limits in s 74 are ignored and that section is used to supply a general duty for the purposes of s 4.3(b).¹⁰ The Informant fails to address the limited nature of the duty under s 74.

7. Finally, the Informant overlooks the distinction between actual and deemed receipt of notices, or conflates the two: Informant’s submissions at [27], [39], [73]. The distinction will be significant in determining whether the duty in s 74(1) applies in a given case.

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⁶ Informant’s submissions at [27], [39], [73]; see also Commonwealth Attorney-General’s submissions at [53]-[54].

⁷ Stated Case, [18]. (CSB, 9) See also Defendant’s submissions at [67] and footnote 96.

⁸ (1998) 193 CLR 173. Informant’s submissions at [42]; South Australian Attorney-General’s submissions at [35]

⁹ *Nicholas v The Queen* (1998) 193 CLR 173, [150]; see also [26], [29] (Brennan CJ), [53] (Toohey J) and [249] (Hayne J).

¹⁰ Defendant’s submissions at [74]-[75].