

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v KEATING (M5/2013)

Court from which removal was sought: Magistrates' Court of Victoria

Date cause removed: 14 December 2012

Date Case Stated referred to Full Court: 19 December 2012

On 7 October 2010 the defendant was charged with three counts of obtaining financial advantage contrary to s 135.2(1) of the *Commonwealth Criminal Code*. It is alleged that between May 2007 and September 2009 the defendant failed to inform Centrelink of increases in her income, as a consequence of which she knowingly received a social security benefit greater than that to which she was entitled.

On 4 August 2011, assent was given to the *Social Security and Other Legislation (Miscellaneous Measures) Act 2011*(Cth) ("the amending Act"), which introduced s66A into the *Social Security (Administration) Act 1999* (Cth). That section provides:

(2) If:

(a) either:

(i) a social security paymentis being paid to a person; or

(b) an event or change of circumstances occurs that might affect the payment of that social security payment

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.

Section 2(1) of the amending Act provided that s 66A was taken to have commenced on 20 March 2000.

On 26 October 2011 this Court handed down its judgment in *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 262 ALR 200, which had been reserved at the time the amending Act received assent. If *Poniatowska* applied to the prosecution of the defendant, the prosecution could not succeed because there was, at the time of the defendant's conduct, no duty to inform Centrelink of increases in income.

The criminal proceedings in the Melbourne Magistrates Court have been adjourned on a number of occasions due to the uncertainty surrounding the operation of s 66A of the amending Act and the defendant has not yet entered a plea. In July 2012 the defendant applied to this Court remove the proceeding from the Magistrates' Court, pursuant to s 40(1) of *the Judiciary Act 1903* (Cth). On 14 December 2012 this Court ordered that the cause be removed; the parties agreed that the matter proceed by way of Case Stated and on 19 December 2012 Hayne J referred the Case Stated for the consideration of the Full Court.

The defendant has filed a Notice of Constitutional Matter and the Attorney-General of the Commonwealth of Australia and the Attorney-General for South Australia have intervened.

The questions reserved for the consideration of the Full Court include:

- Does s 66A of the *Social Security (Administration) Act* 1999 (Cth) create a duty, from 20 March 2000, for the purposes of s 4.3(b) of the *Commonwealth Criminal Code*, such that a failure to inform the Department of the occurrence of an event or change of circumstances as required by s 66A of the Administration Act amounts to “engaging in conduct” for the purpose of s 135.2(1)(a) of the *Commonwealth Criminal Code*?
- If yes to Question 1 is s 66A invalid in so far as it has retrospective effect, because it infringes the separation of judicial and legislative powers mandated by the Constitution?
- Did the notices issued to the defendant [as identified in the Case Stated], or any of them, create a duty for the purposes of s 4.3(b) of the *Commonwealth Criminal Code*, such that a failure to perform the act or acts required by the notice or notices amounts to “engaging in conduct” for the purpose of s 135.2(1)(a) of the *Commonwealth Criminal Code*?