

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS v  
PONIATOWSKA (A20/2010)**

Court appealed from: Full Court of the Supreme Court of South Australia

Date of judgment: 2 August 2010

Date of referral to Full Court: 12 November 2010

The respondent pleaded guilty to 17 counts of obtaining a financial advantage from the Commonwealth knowing she had no entitlement to it, contrary to s 135.2 of *Criminal Code* 1995 (Cth) (the Code). The respondent had received fortnightly Single Parenting Payments intermittently since 1995. As that benefit is means tested, a recipient is required to advise Centrelink of any change in circumstances including financial circumstances. Between February 2005 and February 2006 the respondent was employed and was paid commission. Between August 2005 and May 2007 the respondent received 17 payments of commission totalling over \$71,000. She did not notify Centrelink of receipt of any of that income. Accordingly during that period the respondent continued to receive benefits to which she was not entitled, or only partly entitled.

Convictions were recorded on each count in the Magistrates Court and the respondent was sentenced to one penalty of imprisonment for 21 months. She was unsuccessful in her appeal to a single judge of the Supreme Court against her sentence. She then appealed to the Full Court against not only sentence, but also her convictions. It was submitted for the respondent that the complaint was defective because it alleged conduct which did not amount to an offence. She argued that s 135.2 of the Code does not create an offence which can be committed by omission so that she could not be convicted under that section for omitting to advise the relevant department of changes in her financial circumstances. The Full Court, by majority (Doyle CJ & Duggan J, Sulan J dissenting) upheld her appeal. The Court concluded, relying on the common law, that the determination of whether omitting to perform an act was a physical element of the offence in question depended on there being a legal duty imposed, by Commonwealth statute, in the offender to perform the act omitted. The Court held that in the present case the offence could not be committed by omission and that she could not in law have been convicted of the offences. Sulan J applied Chapter 2 of the Code to the offence provisions and concluded that s 135.2 provides that an omission can constitute a physical element of the offence. He held that the Court was not required to look at the existence of a duty of disclosure either in statute or at common law, in addition to what is provided in s 135.2 to determine that issue.

At the hearing of the special leave application on 12 November 2010 the Court (French CJ & Gummow J) ordered that the application be referred for argument as if on appeal.

The questions of law said to justify the grant of special leave are:

- Whether omitting to perform an act a physical element of the offence contrary to s 135.2 of the *Criminal Code* 1995 (Cth); and
- Whether the determination of that issue is dependent on the existence of a legal duty or obligation imposed by the offence provision or other Commonwealth statute to perform the act in question.