IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No. A20 of 2010

BETWEEN

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

MALGORZATA BARBARA PONIATOWSKA

Respondent

10

APPLICANT'S REPLY

PART II – STATEMENT OF ISSUES

1. The Applicant's first question arises for consideration as the Court's decision (at [12][26][27]) and the Respondent's submission (RS [4]) that omitting to perform an act *can be* an element of the offence is conditional on identifying the existence of a legal duty or obligation imposed by the offence provision or some other Commonwealth statute.

2. Contrary to the contention (RS [5]) the decision below is incorrect. The issue is of general importance; its ramifications make it an appropriate matter for this Court's consideration.
20 Nothing in the notice of contention detracts from that. If the Applicant is correct and leave is not granted the error will infect a significant number of past and future trials/pleas/convictions. It is in the interests of the administration of justice that the error be corrected.

3. The resolution of the issue raised by the Applicant is not affected in any way by the claims in the notice of contention (RS [5.2][73]). None of the claims would render the complaint invalid or the proceedings a nullity (cf RS [3] see [18] – [24] below).

PART V – STATEMENT OF FACTS

4. Contrary to the contention (RS [7]) the summary of facts was not "*subject to and varied by the submissions of defence counsel*".[1] The Full Court correctly stated that the facts in the

[1] The reference in the accompanying footnote (2) does not support that proposition. The affidavit does not take issue with the accuracy of the statement of facts or its status. Nor did the Respondent's counsel on the appeal before Lavid J

Date of Document: 22 February 2011
Filed on behalf of the Applicant by
Commonwealth Director of Public Prosecutions
Telephone: 08 8238 2600
Fax: 08 8231 8257
Ref: Alicia Devitt

summary "*were not disputed*" (at [2]). Further, while the magistrate's initial description of the offence was an error, his later recitation was accurate (cf RS [7]). In any event David J, in dismissing the appeal against the sentence, accurately described the offending: it is this decision that was the subject of the appeal to the Full Court.[2]

5. The contentions in relation to the complaint (RS [11][13]) are addressed below in relation to the notice of contention.

6. Contrary to the contention (RS [14]) the Court below did not address (or make orders) as to the admissibility of the affidavit material.[3] The Applicant filed an affidavit which clearly challenged the Respondent's assertions (see AS [13]).[4] The affidavit material was irrelevant to the conclusion below and is totally irrelevant to the resolution of the legal question before this Court (including the notice of contention). Similarly the additional facts (RS [12][13]) (some of which rely upon the affidavit) are irrelevant to any issue before this Court.

7. Contrary to the contention (RS [17][18])[5] the Applicant's argument in this Court is consistent with that put below: that s 4.3 (a) applies and s 135.2, the law creating the offence makes omitting to perform an act a physical element of that offence.

8. Contrary to the contention (RS [19]) Sulan J did not overlook the elements of the offence or erroneously identify the first physical element. Indeed, unlike the majority, he correctly identified and addressed each of the elements (at [58] – [62]) and the issue of the causative link (at [59]).

PART VI – ARGUMENT

9. Contrary to the contention (RS [24]) the *Code* exhaustively states each of the elements of the offence (AS [18][37]). While there are occasions where it is appropriate to refer to the common law (AS [37]) the Respondent has not identified any basis which gives rise to doing so here.

10. The Respondent's submission as to the first element of the s 135.2 offence is based on two assertions which are unsupported by reference to authority, the *Code* or any valid reasoning process. The argument thereafter proceeds on a flawed foundation.

(who was different counsel to that at first instance). Rather his submissions expressly acknowledged that there was no issue with Respondent's intention, her knowledge that she failed to advise of the income – and that she knew she was failing to advise: AB at 28 – 29

[2] AB at 55

[3] No order admitting the evidence was made –mere filing of documents in advance of the hearing does not equate to admission into evidence.

[4] AB at 283

[5] The Respondent's references are out of context – it is clear that the position was that no duty is required: AB at 405 L7-9, AB 402 L26 -31

11. First, that as a matter of jurisdiction it is a precondition to criminal liability under the *Code* that the omission to perform the act in question must relate to one which by law the Respondent had a duty or requirement to perform (RS [23] - [30][34]). There need not be an identifiable duty under a Commonwealth statute to create jurisdiction for this offence. The Commonwealth clearly has jurisdiction: the offence relates to obtaining an advantage from a Commonwealth entity (s 135.2(1)(b)).

12. Second, that s 135.2 of the *Code* creates an offence of "*commission*" (RS [33][37][39] [64]). The assertion ignores and is inconsistent with the terms of the offence provision; the very use of the phrase "*engage in conduct*" makes omitting to perform an act an element of the offence.

13. Further, contrary to the contention (RS [33][34][64]) s 4.3 does not "*limit*" s 4.1(2); nor is it a "*qualification*" on the general inclusion of omissions in s 4.1 (RS [63]). The Respondent advances no argument in support of those assertions. Section 4.1 defines "*engages in conduct*" to include omitting to perform an act. An offence provision which uses that term makes omitting to perform an act a physical element of that offence. That reasoning is not circular (cf RS [63]). Such an offence comes within s 4.3(a). Section 4.3 addresses all the circumstances where omitting to perform an act is a physical element; it does not confine the definition in s 4.1.

14. The Respondent wrongly asserts (RS [35]) that s 4.3(a) "*makes criminal the failure to carry out a particular act so that the duty is contained within the offence creating provision itself.*" Rather, s 4.3(a) makes an omission to perform an act a physical element of an offence if "*the law creating the offence makes it so.*" There is no reference in s 4.3(a) to a duty, or an offence provision containing a duty or to any preconditions before that section can apply. If the law creating the offence makes omitting to perform an act an element of the offence (for example by using the phrase "*engages in conduct*"), nothing more is required (see AS [27][46][48][49][50]).

15. Contrary to the contention (RS [40]) its interpretation (and that of the majority of the Court below) is not a matter of "*sound statutory construction*". Further the Respondent's assertions as to the reasoning of the majority (RS [16][40][45][52][65][70][71]) (that it interpreted the *Code* including s 4.3 and did not apply the common law) are not supported on a proper reading of the judgment. Nor does the Respondent support them by any reference to the judgment.[6]

16. Similarly, the Respondent's approach to determining the first physical element of this offence has no foundation in the *Code*. It is simply asserted (eg RS [52][30][34]) that

[6] Sulan J was clearly of the view that the conclusion of the majority relied on applying the common law: AB 438 at [45]

something more than what the *Code* says (that is a duty) is required. The reliance on the common law (RS [24][40]); *Nicholson v The Department of Social Welfare*[7] and *The Queen v Chilton*[8] (RS [40][41] see AS [52][53]); a particular MCCOC Report (RS [42]) and the commentary by Leader-Elliott[9] (RS [43][44]) is misplaced as it ignores, amongst other things, the role of the *Code* in determining the elements of offences.

17. The suggestion (RS [53] – [55]) that to decide otherwise would give rise to an "*almost infinite number and type of omissions*" amounting to an offence ignores that proof of an offence requires proof of all elements of the offence (AS [24]). The examples given (RS [55]) and the questions posed (RS [68]) reflect a lack of understanding of the elements of the offence. In any event, that is not a valid basis to interpret the *Code*. Similarly, speculation (RS [56][57][70]) of what was "*likely*" to represent Parliament's intention, is not a basis to determine the elements of an offence.[10] The Court's task is to interpret the words used by Parliament, not to divine its intent.[11]

Notice of Contention

18. The Notice of Contention only arises if the finding of the majority was incorrect.

19. Accordingly, the Respondent's reliance upon the majority criticisms of the wording of the complaint (RS [72][75][76]), which were dependent on the existence of a duty, is misplaced. Similarly is the reliance on *Kirk v The Industrial Court*[12] as the legislation in that case involved a breach of statutory imposed duties[13]. The submission also ignores the gravamen of a s 135.2 offence (AS [54]), the requirements of a complaint in this case,[14] and the fact of the plea of guilty (and undisputed factual basis).

20. The contention (RS [72][74][78][81]) identified as the third complaint (RS [81]) is dependent on the need to identify a duty. If the Applicant is correct regarding the elements of the offence those complaints have no foundation.

21. The Respondent advances two other bases (RS [81]), neither of which alone or in combination would render the complaint invalid. First, while it is accepted that the dates on the complaint should more accurately have been between dates; that the omission

---

[7] (1999) 3 NZLR 50
[8] (2006) 2 NZLR 341
[9] His commentary in relation to some other sections in Chapter 2 of the *Code* has not been accepted by Courts and the interpretation of some sections is inconsistent with his analysis: for example - *R v Ansari* (2007) 70 NSWLR 89 at [65]; *Onuorah v The Queen* (2009) 76 NSWLR 1 at [34] ff.; *R v JS* (2007) 175 A Crim R 108 at [126][127].
[10] The Respondent does not refer to any material to support its submission: see AS at [55]
[11] *R v JS* (2007) A Crim R 108 at [142]
[12] (2010) 239 CLR 531
[13] In *Kirk* this Court was considering legislation which set out duties and obligations of the employer. The statement of offence had to identify the act or omission said to constitute the contravention of the obligations or duties. The acts or omissions had to be identified if Mr Kirk and his company were able to rely on a defence (s 53) under the relevant statute: *Kirk v Industrial Court* (supra) at [24][27][38]
[14] Section 22A *Summary Procedure Act 1921* (SA) see footnote 19 below and AS at footnote 30

occurred between receipt of the commission and receipt of the benefit (see AS [41]), that does not render the complaint invalid: the date is not a material particular (cf RS [11][77][78][81]).[15] Second, the error by the magistrate in his sentencing remarks cannot render a complaint invalid (RS [75]).

22. Not every defect in an indictment/complaint renders it invalid[16] (or the proceedings a nullity)[17]: some are curable.[18] A complaint is not invalid because of a defect of substance or form.[19] It was clear that the terms of the complaint did not mislead the Respondent.[20] When read with the particulars[21] (and the undisputed facts) it was abundantly clear what was alleged. There was no objection to the complaint at first instance or in the Supreme Court, no request for further particulars or submission about its adequacy at the hearings. There was simply no issue that the Respondent knew the allegation against her on each count (see AS [43]).

23. In that context the plea of guilty[22] clearly affected the conduct of the proceedings. If an objection had been raised, an amendment could have (and if necessary would have) been made at any stage of the proceeding (cf RS [82]).[23] An appellate court would also have available the application of the proviso.[24]

24. Contrary to the contention (RS [72][77][82]) the Respondent has not identified any defect that would render the complaint invalid or the proceedings a nullity. Unless this is an offence unknown to law on the basis that it cannot be committed by omitting to perform an act, in this case there is no basis to appeal the conviction.[25] The adequacy of the complaint is not a basis.

Wendy Abraham QC
Counsel for the Applicant

Liesl Chapman SC

---

[15] *WGC v The Queen* (2007) 233 CLR 66 at [43],[126]-[133][137][156][165]

[16] See s 181 (1) *Summary Procedure Act* 1921 (SA); *R v Phan* (2010) 160 SASR 116; *R v Wong* (1990) 54 SASR 297; *Boujaoude v The Queen* (2008) 72 NSWLR 85; *R v MAJW* (2007) 171 A Crim R 407; *R v Ayres* [1984] AC 447; *Kahatapitiye v The Queen* (2004) 146 A Crim R 542; *Doja v R* (2009) 198 A Crim R 349

[17] *Ayles v The Queen* (2008) 232 CLR 410 at [85]; and see *Swansson and Henry* (2007) 69 NSWLR 406; *R v Janceski* (2005) 64 NSWLR 10

[18] *R v Phan* (supra) at [25] and see footnote 16 above

[19] *Summary Procedure Act* (SA) 1921 – section 181(1) "An *information or compliant is not invalid because of a defect of substance or form*". An amendment can be made to cure a defect of substance or form unless the defendant has been substantially prejudiced by the defect: s 181(2)(a). As to what is required: "*shall be sufficient if it contains a statement of the specific offence ... charged, together with such particulars as are necessary for giving reasonable information as to the nature of the charge*" s 22A(1) and "*the statement of the offence shall describe the offence shortly in ordinarily language, ... and without necessarily stating all the essential elements...*": s22A(2)

[20] e.g: *WGC v The Queen* (supra) at [132][133][137][166]; *Ayles v The Queen* (supra) at [50(e)][75][76][79][82]

[21] *Tourni v R* [2010] NSWCCA 317 at [64] and see: *John Holland Pty Ltd v Industrial Court of NSW* [2010] NSWCA 338 at [56]

[22] A verdict of guilty has been held to cure a defect in an indictment: *R v Doja* (supra) at [39][107][181]

[23] *Ayles v The Queen* (supra) at [85]

[24] *R v Wong* (supra); *R v Phan* (supra) at [26]; *R v Doja* (supra) at [51][60][160]; *R v Ayres* (supra)

[25] *Elmir v R* (2009) 193 A Crim R 87