IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S181 of 2015

BETWEEN:

TRAVERS WILLIAM DUNCAN
Applicant

and

INDEPENDENT COMMISSION AGAINST CORRUPTION
Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

PART II: Basis of intervention

2 The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3 Not applicable

PART IV: Statutory provisions

4 The relevant legislation is the *Independent Commission Against Corruption Act 1988* (NSW) (the "ICAC Act"), current as at 6 May 2015 and the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) (the "Amendment Act") as passed.

5 The Amendment Act inserted part 13 of schedule 4 to the ICAC Act. The applicant challenges the validity of part 13 ("the impugned legislation"). The relevant provisions are set out in the schedule to the applicant's submissions.

Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland (Intervening)
Form 27c
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Per Wendy Ussher
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PART V: Submissions

Summary

6 Queensland adopts the submissions of the respondent ("ICAC"). Queensland wishes to develop two particular points:

(a) Properly construed, part 13 does not purport, in effect, to oust the power of the Supreme Court of New South Wales to grant relief for jurisdictional error on the part of ICAC, and is therefore not invalid on that ground; and

(b) Properly construed, part 13 is not an impermissible command or direction by the Parliament of New South Wales to the courts, and is not invalid on that ground.

Background

7 So far as presently relevant, ICAC's functions and powers are defined by reference to corrupt conduct. "Corrupt conduct" is defined by ss 7-9 of the ICAC Act. Section 8(2) defines corrupt conduct to include conduct that "adversely affects, or ... could adversely affect ... the exercise of official functions".

8 In December 2013, ICAC reported findings of corrupt conduct against the applicant in relation to its Operations *Jasper* and *Acacia*.[1]

9 Subsequently, the meaning of s 8(2) of the ICAC Act was considered by this Court in *Independent Commission Against Corruption v Cunneen* ("*Cunneen*").[2] There, a majority of the Court held that in s 8(2) the words "adversely affects, or ... could adversely affect ... the exercise of official functions" mean "adversely affects, or ... could adversely affect ... *the probity* [as opposed to the *efficacy*] of the exercise of official functions".[3] The consequences include that a significant number of previous ICAC investigations and actions may be invalid due to jurisdictional error.[4]

10 On the basis of the High Court's findings in *Cunneen*, the findings of corrupt conduct made against the applicant by ICAC were, absent part 13, affected by jurisdictional error because the applicant's alleged conduct adversely affected, or could have adversely affected, the efficacy, rather than the probity of the exercise of public functions.[5] However, on 6 May 2015, the New South Wales Parliament enacted the Validation Act to retrospectively cure the effect of the decision in *Cunneen*.[6]

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1 Applicant's submissions at [5]; CRB, 150-152.
2 (2015) ALJR 475; [2015] HCA 14.
3 (2015) ALJR 475, 488-9 [62]; [2015] HCA 14, 25.
4 New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 175-180 (Mike Baird, Premier and Minister for Western Sydney) (Second Reading Speech of Independent Commission Against Corruption Amendment (Validation) Bill 2015 (NSW)).
5 Applicant's submissions at [7]; Respondent's submissions at [10].
6 Explanatory Note, Independent Commission Against Corruption Amendment (Validation) Bill 2015 (NSW).

11 For the reasons given in ICAC's submissions and below, the impugned legislation is within the legislative power of the Parliament. In particular, it does not oust the power of the Supreme Court of New South Wales to grant relief for jurisdictional error so as to infringe the *Kirk* principle,[7] or impermissibly direct the Court so as to infringe the *Kable* principle.[8]

The legislative power of the NSW Parliament

12 The Parliament of New South Wales has power, subject to the provisions of the Commonwealth Constitution, to make laws for the "peace, welfare, and good government" of New South Wales.[9] This power is plenary.[10] There is no separation of powers between the judiciary and the legislature at State level,[11] subject to the operation of the principles pronounced by the High Court in *Kable*[12] and *Kirk*.[13] Otherwise, the doctrine of parliamentary sovereignty ensures the right of the legislature to change the law. Any sanctions against such changes are political, not legal.[14]

13 Far from ousting the jurisdiction of the Supreme Court, part 13 merely alters the governing law that would be considered by the court in a relevant case. Justice Kirby, as the President of the New South Wales Court of Appeal said this:[15]

> Unless a valid inhibition is found which prevents the Parliament from enacting a law such as the 1986 Act, the power of the Parliament to do so is, by orthodox constitutional theory, regarded as plenary. The traditional view of the plenary power of Parliament can be stated in six words. The Queen in Parliament is supreme: cf comment on *Liyanage* [1967] 1 AC 259. Formulations of the omnipotence of Parliament are derived, in this State, from statements about the Parliament at Westminster which have profoundly affected our approach to the powers of the Parliaments of Australia, modelled as they are on the Westminster Parliament.

14 Here, the New South Wales Parliament made the law in s 8(2) of the ICAC Act which set the boundaries of ICAC's jurisdiction. Those boundaries were tested in the High Court in *Cunneen* and held to be narrower than had been applied. The New South Wales Parliament then set new boundaries via the impugned legislation, which are to

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7 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
8 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1.
9 *Constitution Act 1902* (NSW) s 5.
10 *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1.
11 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1, 65 (Brennan CJ), 77 (Dawson J), 92 (Toohey J), 103 (Gaudron J), 109 (McHugh J) and 132 (Gummow J); *Clyne v East* (1967) 68 SR (NSW) 385; *Moffatt v R* [1998] 2 VR 229, 249 (Hayne JA); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598-9 [37] (McHugh J); *Queensland v Together Queensland* [2014] 1 Qd R 257, 276 [59].
12 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1.
13 *Kirk* v *Industrial Relations Court (NSW)* (2010) 239 CLR 531.
14 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405.
15 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372, 396D.

be applied retrospectively in relation to prescribed circumstances. It is submitted that this is an unremarkable exercise of the Parliament's plenary legislative power.

15 The starting point in a challenge to the validity of legislation like the present is to construe the legislation. The following submissions first consider the meaning and effect of the individual provisions, then consider the application of the *Kable* and *Kirk* principles to the provisions.

The impugned legislation construed

16 Part 13 is headed 'Validation relating to decision on 15 April 2015 in Independent Commission Against Corruption v Cunneen [2015] HCA 14' and consists of only two clauses, cl 34 (Interpretation) and cl 35 (Validation).

17 The substantive work of part 13 is done by cl 35.

18 Subclause 35(1) validates *anything done* or purporting to have done by ICAC before 15 April 2015 that would have been validly done if corrupt conduct included *relevant conduct*.

19 'Anything done by' ICAC includes:

- anything done by an officer of ICAC (cl 34(2)(a));
- any investigation, examination, inquiry, hearing, finding, referral, recommendation or report conducted or made by ICAC or an officer of ICAC (cl 34(2)(b));
- any order, direction, summons, notice or other requirement made or issued by ICAC or an officer of ICAC (cl 34(2)(c)); and
- the obtaining or receipt of anything by ICAC or an officer of ICAC (cl 34(2)(d)).

20 'Relevant conduct' means conduct that would be corrupt conduct for the purposes of the Act if the reference in s 8(2) to conduct that adversely affects, or could adversely affect, the exercise of official functions included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions (cl 34(1)).

21 Thus, subcl 35(1) in neither terms nor effect involves any abolition or limitation of the Supreme Court's supervisory jurisdiction over inferior courts and tribunals for jurisdictional error, or any interference with judicial process, independence or integrity.

22 Properly construed, subcl 35(1) does two things, both of which are entirely orthodox and unremarkable exercises of State legislative power. First, it alters the statutory boundaries of ICAC's statutory powers and functions by effectively amending s 8(2). Second, it provides that the amendment so made applies retrospectively, and indeed applies *only* retrospectively. Plainly, the policy of the provision is to validate things done under the then-accepted but ultimately mistaken understanding about the

meaning of s 8(2). In general, this Court's interpretation of s 8(2) will apply to things done by ICAC after 15 April 2015, unaffected by subcl 35(1).

23 Paragraph 35(2)(a) extends the validation under cl 35(1) to things done by any person or body if their validity relies on the validity of a thing done or purportedly done by ICAC.

24 Similarly, para 35(2)(b) extends the validation under subcl 35(1) to legal proceedings and matters arising in or as a result of those proceedings if their validity relies on the validity of a thing done or purporting to have been done by ICAC.

25 So understood, subcl 35(2) is ancillary to subcl 35(1) and like that provision, is an orthodox and unremarkable exercise of legislative power. Again, it has no effect on the Supreme Court's supervisory jurisdiction or institutional integrity.

26 Subclause 35(3) provides that the validation under subcl (1) extends to the validation of things on and from the date they were done or purported to have been done. The retrospective effect of subcl 35(1) is clear from the terms of that provision alone, and subcl 35(3) makes unmistakeable the intention that the validation should apply not just before 15 April 2015, but from the date on which the relevant thing was done. There is nothing about subcl 35(3) to cast any doubt on its validity.

27 Subclause 35(4) authorises ICAC to exercise functions under the Act *after* 15 April 2015 to refer matters for investigation or action to other persons, or to communicate evidence given to ICAC to other persons, even if the matter arose or the evidence was given to ICAC *before* 15 April 2015. Again, the plain policy intention is that a reference by ICAC to another body whose functions do not depend on s 8(2) should not be affected by the circumstance that the exercise of ICAC's functions may have depended on subcl 35(1). If the exercise of ICAC's functions did *not* depend on subcl 35(1) (whether because the matter involved probity not efficacy, or because the matter involved alleged corrupt conduct other than by virtue of s 8(2)), subcl 35(4) is not engaged. Again, there is nothing about subcl 35(4) that casts any doubt on its validity.

28 Subclause 35(5) which provides that subcl (4) applies even if any finding of corrupt conduct that relates to the matter or evidence is declared a nullity or otherwise set aside by a court. The applicant fastens upon the provision as an impermissible ouster of the Supreme Court's supervisory jurisdiction. But that is to misconstrue the provision. First, subcl 35(5) operates only in relation to subcl 35(4). That is, its effect is only that, even if a court declares null a corrupt conduct relating to *the matter or evidence* (meaning the matter or evidence referred to in subcl (4)), ICAC may exercise its functions, not at large but only to refer matters or evidence for investigation or action by other bodies. Importantly, subcl (5) says nothing about the Supreme Court's power to supervise ICAC or anyone else for jurisdictional error. Indeed, it presupposes the ongoing existence and exercise of the Court's power.

29 Subclause 35(6) provides that a person is not (and was not) required to comply, from 15 April 2015, with any order, direction, summons, notice or requirement made by

ICAC or an officer of ICAC before 15 April 2015 if its validity relies on subcl 35(1). Thus, in an investigation that relied on s 8(2), a person issued with a summons by ICAC is not required to comply with it after 15 April 2015 unless s 8(2) was engaged because of an adverse effect on the probity, not the efficacy, of the relevant public function. The applicant makes no attack on subcl 36. It is clearly valid.

30 It is submitted that clause 35 considered in its component parts and as a whole provides limited validation to things done or purported to be done by ICAC and officers of ICAC where 'relevant conduct' was concerned, and generally only up to the date of the decision in *Cunneen*. The validation does not seek to disturb *Cunneen* or any other relevant litigation; further, it, in effect, bars enforcement proceedings against a person in relation to a person's non-compliance with things done by ICAC or an officer of ICAC in the exercise of its retrospectively broadened jurisdiction.

31 It is submitted that clause 35 and part 13 as a whole do not affect the Supreme Court's power to supervise for jurisdiction error in any way, nor purport to direct a court as to the manner or outcome of the exercise of its jurisdiction.[16]

Does the impugned legislation oust the power of the Supreme Court?

32 Chapter III of the Commonwealth *Constitution* requires that there be a body fitting the description of "the Supreme Court of a State".[17] The *Supreme Court Act 1970* (NSW) confers jurisdiction on the Supreme Court. It provides that the New South Wales Supreme Court has "all jurisdiction which may be necessary for the administration of justice in New South Wales" and the Court of Appeal, "may, in proceedings before it, exercise every power, jurisdiction or authority of the Court, whether at law or in equity or under any Act, Imperial Act or Commonwealth Act."[18]

33 This Court held in *Kirk*[19] that a State Parliament may not abolish the supervisory jurisdiction of a State Supreme Court to grant relief for jurisdictional error.[20] Part 13 does not do that either in terms or in effect.

34 ICAC is a creature of the New South Wales Parliament. Its powers and functions are determined and established by the ICAC Act. The impugned legislation merely altered the statutory boundaries of its powers and functions. There is no constitutional principle that prevents the New South Wales Parliament from doing so, nor from doing so with retrospective effect.

35 Contrary to the applicant's submission, the impugned legislation does not engage *Kirk*.[21] In *Kirk*, s 179 of the *Industrial Relations Act 1996* (NSW), in terms provided that a decision of the Industrial Court was final and might not be appealed against,

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16 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 140 [48] (French CJ, Crennan and Kiefel JJ).

17 *Constitution* s 73; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 580 [96].

18 *Supreme Court Act 1970* (NSW) ss 23 and 44.

19 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

20 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [100].

21 Applicant's submissions at [30].

reviewed, quashed or called into question by any court or tribunal, and extended to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction, declaration or otherwise.

36 Part 13 contains no such provision either in terms of in effect. As explained above, neither subcl 35(5) nor anything else in part 13 expressly or impliedly purports to remove power from the Supreme Court to grant relief for jurisdictional error. Subclause 35(1) merely alters the boundaries of ICAC's functions and powers to accord with ICAC's pre-*Cunneen* understanding of those boundaries, and then only in relation to certain categories of case.[22] There can still be jurisdictional error by ICAC in a particular case (whether because of its statutory boundaries or otherwise). Part 13 does not affect the Court's supervisory jurisdiction in relation to such error which is protected by *Kirk*.[23] It simply varies the legal effect of administrative acts of a particular class.[24]

37 The applicant argues that the impugned legislation impermissibly ousts the power of the Supreme Court to grant relief. The relief that the applicant seeks is declaratory relief, an equitable remedy based on equity's interest in due administration and the inadequacy of common law remedies.[25] The equitable jurisdiction of a court is distinct from and the supervisory common law jurisdiction protected by *Kirk*. The latter is a defining characteristic of the Supreme Court of a State[26] and is conferred on the High Court pursuant to s 76(i) of the Constitution by ss 30(a) and 32 of the *Judiciary Act 1903* (Cth).

38 In *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport (NSW)*,[27] the Court considered the *State Transport Co-ordination (Barring of Claims and Remedies) Act 1954* (NSW). Section 3 purported to extinguish causes of action for the recovery of money collected under the *State Transport (Co-ordination) Act 1931-1952* (NSW) in relation to the operation of a vehicle for inter-state trade, and s 4 purported to bar any action, suit, claim or demand in respect of those matters. The Court held that ss 3 and 4 infringed s 92 of the Constitution.

39 Fullagar J referred to the recognised distinction between rights (dealt with by s 3) and remedies (s 4), although the distinction was not significant for that case:[28]

> If the Constitution preserves a common law right, it must be taken to preserve the appropriate common law remedy. If it protects a common law right against State invasion, the State cannot make that protection ineffective by denying all remedy for State invasion.

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22 Gareth Griffith, *ICAC v Cunneen: The power to investigate corrupt conduct* (e-brief 3/2015) NSW Parliamentary Research Service, 10.

23 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

24 Respondent's submissions, [15]-[16], [30]-[31].

25 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 257 [25].

26 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 566.

27 (1955) 93 CLR 83.

28 (1955) 93 CLR 83, 103.

> So far as the State itself is concerned, it might be said that the State is sovereign within its own territory, and that no remedy can be pursued against it in the courts without its consent. As a general rule this is, of course, true, but, within the limited class of case to which s 58 of the *Judiciary Act 1903-1950* applies, the position is governed by that section, which is an exercise of the power given by s 78 of the Constitution ... It seems to me that the general power of a State to say whether a remedy may be pursued against it in the courts or not is limited by s 58, and, so far as [claims for repayment of moneys alleged to have been exacted in contravention of s 92 of the Constitution] is taken away ...
>
> If the Act did no more than limit the remedy, while leaving practically effective redress open to the plaintiff I am disposed to think that it would not be inconsistent with the Constitution.

40 Albeit that the last remark was made in *obiter dicta*, if his Honour left open the possibility that a remedy to vindicate the constitutional right in that case might be limited as opposed to denied, it seems improbable that the Parliament in this case could have limited a non-constitutional right. But that problem does not arise, because nothing in part 13 affects any administrative law (or other) right or any remedy in vindication of any such right. Indeed, as already noted, cl 35(5) expressly contemplates that certain remedies are available.

Is the impugned legislation an impermissible command to the Supreme Court?

41 The applicant's argument effectively seems to be that part 13 directs courts to find that ICAC has jurisdiction in a way that contravenes the *Kable* principle.

42 In *Australian Education Union v Fair Work Australia* ('*AEU*'),[29] the Court dismissed a challenge to Commonwealth legislation which purported to retrospectively cure an industrial organisation's eligibility for registration. The legislation was a response to a Federal Court decision that the registration was invalid.[30] All members of the court rejected the Australian Education Union's submission that the legislation interfered with the judicial power of the Commonwealth because it dissolved or reversed the Federal Court's orders. Rather, the Court held, the legislation assumed that the Federal Court case had been correctly decided.[31]

43 Chief Justice French, Crennan and Kiefel JJ referred[32] to what was said in *Mabo v Queensland (No 1)*[33] about declaratory Acts being frequently passed to overcome the effect of a judicial decision as follows:[34]

> The effect of such a statute is to change the law and the courts are thereafter bound to take the law as the statute declares it to be. If the statute declares what

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29 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117.

30 *Australian Education Union v Lawler* (2008) 169 FCR 327.

31 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 143 [53] (French CJ, Crennan and Kiefel JJ), 110 [96] (Gummow, Hayne and Bell JJ).

32 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 137 [35] (French CJ, Crennan and Kiefel JJ).

33 (1988) 166 CLR 186.

34 (1988) 166 CLR 186, 211-12 (Brennan, Toohey and Gaudron JJ).

> the law has been, the courts are commanded to decide future cases in conformity with the declaration through the circumstances to which the declaration applies occurred prior to the enactment of the statute ... The statute does not, however, affect final judgments already given pursuant to the earlier law ... The operation of a declaratory statute, like the operation of any other statute, depends upon the intention of the Parliament ascertained by construction of its terms.

44 Their Honours went on to hold that:[35]

> If a court exercising federal jurisdiction makes a decision which involves the formulation of a common law principle or the construction of a statute, the parliament of the Commonwealth can, if the subject matter be within its constitutional competence, pass an enactment which changes the law as declared by the court. Moreover, such an enactment may be expressed so as to make a change in the law with deemed operation from a date prior to the date of its enactment.

45 It is submitted that the impugned legislation in *AEU* is not relevantly distinguishable from part 13. It is true that the former was Commonwealth legislation and the latter is State legislation. If the legislation in *AEU* was valid, part 13 must be also.

46 The same point was made in the *State BLF case*[36] concerning State legislation which was held to be valid even though it was considered to be an exercise of judicial power by the parliament, by comparison with the *Commonwealth BLF case*,[37] which was challenged on similar grounds and held to be valid. Justice Kirby observed that:[38]

> ... the Federal legislation ... was challenged in the High Court of Australia *inter alia* on grounds similar to those raised in this Court, in a context apparently more fertile, yet without success.

47 Whether the *State BLF case* would have been decided differently after *Kable* does not matter. Part 13 does not command or direct the court to do anything. To alter the statutory boundaries of ICAC's powers and functions is not to contravene *Kable*.

48 The impugned legislation is similar to the legislation considered in *Attorney-General (NT) v Emmerson*,[39] which conferred jurisdiction on a *court* to determine a controversy. That legislation was considered "an unremarkable example" of conferring such jurisdiction.[40] It is submitted that part 13 is equally unremarkable. Indeed it is even more unremarkable in the sense that it neither confers nor denies jurisdiction on the courts: it merely alters the statutory boundaries of ICAC's functions and powers, and no doubt in recognition of its retrospective effect, does so in a limited

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35 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 141-2 [50].

36 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372. See also, *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561-2.

37 *Australian Building Construction Employees' and Builders Labourers' Federation v the Commonwealth* (1986) 161 CLR 88.

38 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 388G.

39 (2014) 88 ALJR 522.

40 (2014) 88 ALJR 522, [58], [60].

way (in terms of the period of time and narrow scope). It says nothing and means nothing for the functions and powers of courts that are repositories of federal jurisdiction.

49 On no sensible construction is part 13 a direction or command to a court. It is not directed at a particular individual or litigation;[41] it does not deprive the court of its power to find, or not find, jurisdictional error in a given case;[42] it does not direct the court as to how a legal issue under consideration is to be resolved;[43] or the manner and outcome of the exercise of their jurisdiction;[44] and ordinary judicial processes apply as to whether conduct by ICAC was infected with jurisdictional error in any particular case.[45] It does not purport to set aside or revise the final decision of the High Court in *Cunneen*.[46] Nothing in part 13 requires the Supreme Court to act at the behest of the executive or to give effect to government policy without following ordinary judicial processes.[47]

PART VI: Time estimate

50 The presentation of Queensland's oral argument will require no more than 20 minutes.

Dated 17 July 2015.

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41 *Liyanage v* R [1967] AC 259; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1.
42 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1.
43 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522, [69]; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; Gypsy Jokers *Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [39].
44 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36-7 (Brennan, Deane, Dawson JJ); Nicholas v the Queen (1998) 193 CLR 173, 185-6 (Brennan CJ); *Australian Building Construction Employees' and Builders Labourers' Federation v the Commonwealth* (1986) 161 CLR 88, 96.
45 cf *South Australia v Totani* (2010) 242 CLR 1.
46 cf *Chu KhengLim* (1992) 176 CLR 1; *Liyanage* [1967] 1 AC 259.
47 *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522, [5], [56], [69], [89], [141].