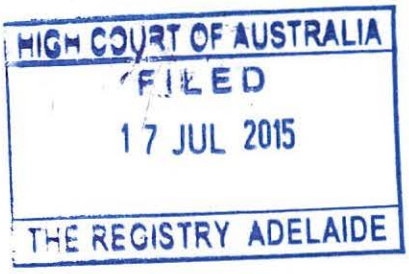
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S101 of 2015

BETWEEN:



TRAVERS WILLIAM DUNCAN
Appellant

and

INDEPENDENT COMMISSION AGAINST CORRUPTION
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

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

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the Appellant's statement of the applicable legislative provisions.

Part V: Submissions

5. In summary, South Australia submits:

   i. Properly construed, Pt 13 of Sch 4 to the *Independent Commission Against Corruption Act 1988 (NSW)* (**the Act**) effects an actual validation of the things done or purported to have been done by the Independent Commission Against Corruption (**the Commission**) which fall within the ambit of cl35(1). It does so by ascribing the legal status or attributes of "valid" acts, to those which fall within the class of acts captured by cl 35(1).

   ii. In so validating, the provision effects a retrospective expansion of the Commission's powers, the legislature having set fresh limits on the Commission's powers (as exercised prior to 15 April 2015). Where the Court is asked to adjudicate upon whether those limits have been exceeded and a jurisdictional error committed by the Commission, the Court is to apply the new limits as fixed by the provision. Thus, the Court's adjudicative task remains unrestricted, and its supervisory jurisdiction to review for jurisdictional error unimpaired.

   iii. Any court applying the provisions in Pt 13 of Sch 4 undertakes a genuine adjudicative function (determining whether legislative criteria have been met and applying the relevant legislatively prescribed consequences) in accordance with the ordinary judicial process. Properly construed, the impugned provisions do not direct the manner or outcome of the exercise of judicial power so as to render the provisions repugnant to or incompatible with the requirement that the Court retain its character as an impartial and independent tribunal.

   iv. The present proceeding, involving as it does a matter arising under the Constitution or involving its interpretation, is wholly conducted in federal jurisdiction. Limitations upon those laws which may be "picked up" for application in the proceedings are thus governed by s79(1) of the *Judiciary Act 1903* (Cth). The impugned provision not itself offending the Constitution for either of the reasons advanced by the appellant, the relevant limitations imposed by s79(1) are unproblematic, and the provision can be validly "picked up" and applied in the Court's exercise of federal jurisdiction.

The Construction and Operation of Part 13 of Schedule 4

6. The constitutional questions raised by the appellant can only be answered after the impugned provision has been properly construed and the work that it performs carefully identified.

7. The proper construction of Pt 13 of Sch 4 of the Act is derived from an analysis of its text, context and purpose.[1] In the present case, it is most convenient to begin with consideration of the context surrounding the provision and its enactment.

Context:

8. This Court's recent decision in *Independent Commission Against Corruption v Cunneen*[2] (**Cunneen**) provides the critical context for a proper understanding of Pt 13 of Sch 4; both as to its manner of operation and the precipitation for its enactment. That decision articulated the proper construction of the expression "adversely affects, or that could adversely affect ... the exercise of official functions by any public official" in the definition of "corrupt conduct" in s8(2) of the Act.

9. In *Cunneen* a distinction was drawn between conduct which adversely affects or that could adversely affect the *probity* of the exercise of an official function by a public official, and conduct which only adversely affects or could adversely affect the *efficacy* of the exercise of an official function by a public official.[3] The majority of this Court rejected the Commission's contention in that case that the scope of "corrupt conduct" for the purposes of the Act extended to include the latter of these two possible options, and held that only the former was within the scope of the relevant expression in s8(2).[4]

10. This distinction, and this language, have now been adopted by the New South Wales legislature and receive direct expression in the cl34(1) definition of "relevant conduct" in Sch 4.

11. That is, the definition of "relevant conduct" in cl34(1) picks up the conduct found by this Court in *Cunneen* to be outside the scope of "corrupt conduct" as prescribed in s8(2), but which nevertheless adversely affects, or could adversely affect, the *efficacy* of the exercise of official functions. In doing so, cl34(1) implicitly recognises the effect of this Court's decision in *Cunneen*; that such conduct falls outside the scope of the s8(2) expression, "conduct ... that adversely affects, or that could adversely affect ... the exercise of official functions". Conduct of this nature having been identified and labelled, becomes mobilised in the primary operative clause of Pt 13 Sch 4; cl35(1).

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1 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381-2 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings* [2012] HCA 55; (2012) 250 CLR 503 at 519 [39] (the Court); *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 388-389 [23]-[24] (French CJ and Hayne J), 411-412 [88]-[89] (Kiefel J).

2 [2015] HCA 14; (2015) 89 ALJR 475.

3 *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 at 477 [2] (French CJ, Hayne, Kiefel, Nettle JJ), 409 [74] (Gageler J).

4 *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 at 478 [3] (French CJ, Hayne, Kiefel, Nettle JJ).

12. The Premier's Second Reading Speech introducing the amendments which enacted Pt 13 of Sch 4[5] confirms that the meaning of the provision is the ordinary meaning conveyed by the text of the provision,[6] discussed below. The Premier said:

> The bill does not reverse the High Court's decision; it validates actions and findings of the ICAC before 15 April 2015 where they were based on the previous understanding of the ICAC's jurisdiction. The bill also validates actions taken by other persons or bodies, and legal proceedings, where they rely on the validity of ICAC's past actions. This will mean, for example, that the past prosecution, conviction and sentencing of a person, where it arose following an ICAC investigation, will stand.
>
> The bill will also validate the obtaining of evidence and information by the ICAC in the past, and will ensure that the ICAC can continue to refer that evidence or information on to other relevant bodies for appropriate action. This will mean that the information gathered by the ICAC can still be used validly by other investigatory or regulatory bodies such as the NSW Police Force, and used validly in subsequent proceedings, whether disciplinary, civil or criminal.[7]

Text

13. Part 13 of Sch 4 of the Act, particularly cl35(1), does not (nor purport to) amend and broaden the scope of s8(2) or the concept of "corrupt conduct". So much is apparent from the ordinary meaning of the words used in the provision, and is also reflected by the location of the provision in Sch 4 of the Act, being the "Savings, transitional and other provisions" schedule of the Act.

14. The subject of cl35(1) is "things done" by the Commission that were done, or purported to have been done, prior to 15 April 2015,[8] "that would have been validly done if corrupt conduct for the purposes of [the] Act included relevant conduct". Clause 34(2) provides that things done or purporting to have been done include findings[9] and other exercises of powers in the Act. Orders, directions, summons, notices or requirements made or issued by the Commission are included[10] as are referrals made to other bodies.[11]

15. Clause 35(1) implicitly acknowledges that the things done or purportedly done by the Commission prior to 15 April 2015, which relied for their "validity" upon the concept of "corrupt conduct" extending to conduct that only adversely affects, or could adversely affect, the efficacy (and not the probity) of the exercise of official functions, were not "validly done".[12] In using the language of "validity", the NSW Legislature adopts the language of the courts. "Validity" supplies a clear and shorthand means of distinguishing between those things done by the Commission which are within the powers conferred upon it by statute,

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5 New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 175 (the Premier).

6 *Interpretation Act 1987* (NSW), s34(1)(a).

7 New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2015, 176 (the Premier).

8 The date upon which this Court's decision in *Independent Commission Against Corruption* v *Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 was delivered.

9 Clause 34(2)(b).

10 Clause 34(2)(c); see *Independent Commission Against Corruption Act 1988* (NSW) ss21, 22 and 23 regarding notices and entry of premises for the purposes of an investigation; ss35, 36 regarding compelling witnesses to attend a public inquiry; s40 regarding search warrants.

11 Clause 34(2)(b); see *Independent Commission Against Corruption Act 1988* (NSW) s53.

12 See cl34(1) definition of "relevant conduct" and cl 35(1).

and those which lie outside the limits imposed, expressly and impliedly, by the Act. It recognises the existence of statutorily defined limits on the scope of the Commission's powers.

16. In the manner of its identification of the scope of "relevant conduct" in cl34(1) then, the Legislature directly acknowledges, embraces and builds upon, the effect of this Court's decision in *Cunneen.*

17. The effect of cl35(1) is only triggered once several criteria[13] are satisfied.

    a. First, there must be a "thing done or purporting to have been done" by the Commission within the meaning of the provision. Implicitly, any such thing will have been performed or purported to have been performed pursuant to a statutorily conferred power. Clause 34(2) provides some guidance in identifying when an act will constitute such a "thing", providing that such things include the particular matters listed in cl34(2)(a)-(d).

    b. Second, the "thing done or purporting to have been done" by the Commission, must have been done (or purported to have been done) before 15 April 2015.

    c. Third, applying the meaning of "corrupt conduct", as provided for in s8(2) of the Act and as construed by this Court in *Cunneen*, to the applicable statutory power exercised (or purported to have been exercised) by the Commission in its doing of the "thing done or purporting to have been done", the thing done or purporting to have been done, must be one beyond the limits of the power purporting to have been exercised.[14]

    d. Fourth, the thing done or purported to have been done by the Commission must be one that would "have been validly done if corrupt conduct for the purposes of [the] Act included relevant conduct" as defined in cl34(1).

18. If each and every one of the above criteria are satisfied, then the operative effect of cl35(1) is triggered and the things done or purported to have been done are "taken to have been, and always to have been, validly done." That is, once all criteria are met, one has a "thing done" by the Commission which falls into a class of things done that, by the operation cl35(1), attracts a particular consequence or a particular set of attributes. Here the legislatively prescribed consequence or set of attributes is that the thing done is "taken to have been, and always to have been, validly done".[15]

19. Clause 35(1) operates by attaching to those things done, retrospectively, the same consequences or attributes as would have attached to them had they otherwise been within power.[16] At first blush then, the things done by the Commission might be said to retain the

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13 Much like the provisions in *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117, see at 161 [115] (Heydon J).

14 Disregarding any effect of cl35(1).

15 Clause 35(1). Again "validly done" having the meaning of being within the limits of the powers statutorily conferred on the Commission.

16 *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 161 [117] (Heydon J). See also at 137 [36] (French CJ, Crennan and Kiefel JJ); *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243 (Stephen J); *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 579 (Dixon J).

character of having been done "invalidly",[17] "so far as their inherent quality is concerned",[18] but cl35(1) prescribes that those things done "invalidly" are to have attached to them all the consequences and attributes which would attach to things done validly.[19] That is, the force and effect given by cl35(1) to those things done by the Commission which fall into the stipulated class, is that of things "validly done" by the Commission.

20. The nature of the legal consequences, attributes, or force and effect, declared by the provision to apply – that of things "validly done" – has the result that no difference in substance remains between things validly done by the Commission, and those captured by cl35(1) which are "taken to have been, and always to have been, validly done". Once all the legal consequences and attributes of a valid thing done by the Commission are afforded to an otherwise invalid thing done captured by cl35(1), the distinction between *in fact* validating the thing done, and simply giving it the legal consequences or attributes of a valid thing done, dissolves entirely. As a matter of substance, then, cl35(1) does in actual fact validate. The provision instructs the world at large, not just the courts, that the subject things are "taken to have been … validly done".

21. In effecting such actual validation, the provision effects a retrospective expansion of the Commission's powers.[20] That is, it retrospectively amends the limits on the exercise of the Commission's powers, for the period and in the manner specified by Pt 13 of Sch 4.

22. Clause 35(2) provides that the validation under cl35(1) extends to the validation of two further classes of thing: namely; "things done or purporting to have been done by any person or body";[21] and "legal proceedings and matters arising in or as a result of those proceedings",[22] where their validity relies on the validity of a thing done or purporting to have been done by the Commission. Read as a whole, and, critically, having regard to the phrase "if their validity relies on the validity of a thing done or purporting to have been done by the Commission" and its link to "[t]he validation under subclause (1)",[23] it is apparent that as a matter of construction it is only once cl35(1) has applied so as to validate a thing done by the Commission, that cl35(2) can be engaged.

23. Thus, for cl35(2) to have application, each of the criteria in [17] above must first be satisfied in relation to the thing done by the Commission. If those four criteria are met, then one turns to consider whether one of the further criteria, as required by cl35(2), has been met. That is, is there either a thing done or purporting to have been done by a person or body, *or* are there legal proceedings or matters arising in or as a result of legal proceedings, the validity of which relies on the validity of a thing done or purporting to have been done by the Commission? If

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17 That is, in excess of the Commission's power.

18 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243 (Stephen J).

19 Assuming there is no other feature of the act which would nevertheless still render it invalid.

20 The expansion of which does not extend to the Commission's powers exercised after 15 April 2015. *Cf* Appellant's submissions at [30] where the appellant asserts it is "common ground" that the provision does not retrospectively expand the scope of the Commission's powers. In this regard, South Australia notes the Commission's apparent position to the contrary in its summary of argument on the application for removal at [28] (Cause Removed Book at 312).

21 Clause 35(2)(a).

22 Clause 35(2)(b).

23 Clause 35(2).

so, then cl35(2) will operate so as to also require the relevant thing done, legal proceeding or matter arising, to be "taken to have been, and always to have been, validly done".

24. Subclauses 35(2), (3), (4) and (6) each expressly recognise "the validation under subclause (1)". Such language is consonant with the substantive validation in fact effected by cl35(1), as well as itself lending further textual support to the view that, properly construed, this is in fact the substantive operation and effect of cl35(1).

25. In this context, the legislative choice to include the words "taken to have been" in cl35(1) can be seen not to be intended to effect something less than validation itself, but instead as words which recognise that, but for the operation of the provision, those things done by the Commission which fall within the ambit of cl35(1) were and continue to be invalid. The language, in effect, acknowledges the effect of this Court's decision in *Cunneen*. The contention that the language, "taken to have been done", does not substantively validate conduct otherwise beyond power, considers only the word, "taken", and does not consider the proper effect of the whole of the provision in its legislative context.

26. The phrase, "taken to have been", should not be considered separately from the composite phrase, "is taken to have been, and always to have been". "Taken to have been" is the legislative tool to validate things done for now and for all time into the future. The words, "always to have been", is the legislative language to cure that invalidity for all historical purposes. Such language (reflecting both the intention to cure the default for the past time period and for all future periods) is necessary, with words of "irresistible clearness",[24] to effect the legislative intention.

27. The terms of the provision are no different from those of the provisions in *Australian Education Union v General Manager of Fair Work Australia*[25] (***AEU***) which provided that certain purported registrations were "taken, for all purposes, to be valid and to have always been valid". French CJ and Crennan and Kiefel JJ at least[26] appear to have accepted that such language effected a substantive validation.[27]

Purpose

28. The purpose of a statute, in particular the general purpose and policy of a provision and the mischief it is seeking to remedy, informs its proper construction.[28] That purpose "resides in its text and structure".[29]

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24 Maxwell, *On the Interpretation of Statutes* (4th Ed, 1905) at 122, cited with approval in *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at 577 [19] (Gleeson CJ) and *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 at 217-8 [29] (French CJ) and at 264 [171] (Kiefel J).

25 [2012] HCA 19; (2012) 246 CLR 117.

26 Arguably, Gummow, Hayne and Bell JJ implicitly accepted that the provisions effected a validation: 148 [72], 154 [90], 156 [97]. At 161-162 [117], Heydon J retains the distinction insofar as he refers to the attaching of "the attributes of a valid registration", but his Honour's reasons are silent on whether a substantive distinction remains between the legislative language and a direct validation.

27 *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 138 [40] (French CJ, Crennan and Kiefel JJ).

28 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

29. The decision in *Cunneen*, together with the language of cll 34 and 35(1), disclose the obvious mischief or subject with which the provision is concerned – a class of "things done" by the Commission prior to that judicial decision that were beyond power. It is apparent that without cl35(1), a significant class of things done or purported to have been done by the Commission between the original enactment of the Act in 1989 and the delivery of the decision in *Cunneen* on 15 April 2015, were not "validly done". "Things done" included the making of findings, in addition to the exercise of various coercive powers to obtain information and evidence, and the subsequent referral of that information to relevant bodies.[30]

10 30. The mischief to which the provision is directed is also consistent with the underlying purpose of the statute. The purpose of the Act is to promote integrity and accountability of public administration by constituting the Commission to investigate, expose and prevent corruption and to educate public authorities and members of the public about the detrimental effects of corruption.[31] In exercising its functions, the Commission's paramount concerns are the protection of the public interest and the prevention of breaches of public trust.[32]

31. A construction of cl35(1) that effects actual validation, as is here contended for, adopts a harmonious approach to the construction of the Act.[33] The Court would be recognising the legislative intention to allow ICAC to focus on future detection and education.

The relevant role and nature of "legal consequences" or "legal effects"

20 32. The appellant's contentions that cl35(1) operates as an impermissible direction to the Court, and/or, purports to oust the supervisory jurisdiction of the Supreme Court, are both erected upon a foundational premise as to the role and nature of the "legal consequences" prescribed by the legislative technique which has been employed. The appellant contends that because a finding of corrupt conduct under the Act produces no consequences for rights or obligations, Pt 13 of Sch 4 cannot be understood as attaching the legal consequences of a valid finding to an invalid finding, and that therefore Pt 13 does not use an act or event, which lacked legal authorisation, as a reference point for declaring the rights or obligations to be the same as if that act or event had been legally authorised.[34]

33. With respect, that premise suffers from error at two stages; first, that "legal consequences" in
30 the narrow sense used by the appellant is a necessary element of a constitutionally valid invocation of the legislative technique employed, and second, that a finding of corrupt conduct under the Act produces no legal consequence in the relevant sense.

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29 *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 389-390 [25]-[26] (French CJ and Hayne J), 404-406 [68]-[70] (Crennan and Bell JJ), 411-412 [88]-[89] (Kiefel J).

30 See [14] above.

31 *Independent Commission Against Corruption Act 1988* (NSW) s2A.

32 *Independent Commission Against Corruption Act 1988* (NSW) s12.

33 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381-2 [70] (McHugh, Gummow, Kirby and Hayne JJ); applied in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 at 484 [35] (French CJ, Hayne, Kiefel and Nettle JJ).

34 Appellant's submissions at [15](c), [23]-[24].

34. As to the first, the appellant's assertion that "legal consequences" or "legal effects" – i.e. the creation or affectation of legal rights, obligations, liabilities and statuses, in the sense used in *Greiner v Independent Commission Against Corruption*[35] and in *Ainsworth v Criminal Justice Commission*[36] (**legal effects in the narrow sense**) – are a necessary component for a legislative technique of this sort to have been validly employed, is without proper foundation.

35. The appellant attempts to reason backwards from the manner of operation of similar provisions considered in cases such as *AEU*, *Nelungaloo Pty Ltd v Commonwealth*,[37] *R v Humby; Ex parte Rooney*[38] and *Re Macks; ex parte Saint*[39] and extrapolate from the particular way those provisions achieved their end a mandatory element or limitation on the way such a provision must operate so as to be valid (namely, by the legislative attachment of legal effects in the narrow sense).

36. Such an approach is apt to mislead and distract from the true analysis necessary for an assessment of a provision's constitutional validity. However, more than that, the appellant's reasoning is fallacious as a matter of logic.[40] It simply does not follow that because those valid provisions operated by attaching legal effects in the narrow sense,[41] a similar provision which does not attach legal effects in the narrow sense will necessarily be constitutionally offensive.

37. References in such cases to the legislative technique of attaching particular "legal consequences"[42] or "force and effect"[43] to particular acts cannot now be treated as requiring the positive attribution of legal rights, obligations, liabilities and statuses as a necessary element to the valid use of this legislative technique. The result is that those cases, which each dealt with provisions which did attach legal effects in the narrow sense, are of little utility in considering whether the effects attached by the presently impugned provision are done so validly. The analysis, then, necessarily returns to first principles and, specifically, that the State

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35 (1992) 28 NSWLR 125 at 148 (Gleeson CJ).

36 [1992] HCA 10; (1992) 175 CLR 564 at 581 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan J).

37 (1948) 75 CLR 495.

38 (1973) 129 CLR 231.

39 [2000] HCA 62; (2000) 204 CLR 158.

40 The logical fallacy committed by the appellant takes a familiar form of syllogistic fallacy. That is: "Validating provisions previously found to be valid ascribed legal effects in the narrow sense. This provision does not ascribe legal effects in the narrow sense. Therefore this provision must not be valid."

41 In *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117, s26A of the *Fair Work (Registered Organisations) Act 2009 (Cth)* provided that the purported registration of an association under that Act was "taken, for all purposes, to be valid and to always have been valid" which necessarily attached legal consequences in the narrow sense. In *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, s11 of the *Wheat Industry Stabilization Act (No 2) 1946* provided that an acquisition order made under reg 14 of the *National Security (Wheat Acquisition) Regulations* "shall be deemed to be and at all times to have been, fully authorized by that regulation and shall have had, full force and effect according to its tenor…". In *R v Humby; ex parte Rooney* (1973) 129 CLR 231, the "rights, liabilities, obligations and status of all persons" subject to a purported decree under the *Matrimonial Causes Act 1971* were by s5 of that Act "declared to be, and always to have been, the same as if" a purported decree was made by a judge of the Supreme Court. In *Re Macks; Ex parte Saint* [2000] HCA 62; (2000) 204 CLR 158, s6 of the *Federal Courts (State Jurisdiction) Act 1999* (enacted by the Parliaments of Queensland and South Australia) provided that the "rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if…each ineffective judgment of…Federal Court of Australia…or…the Family Court of Australia had been a valid judgment of the Supreme Court" of that State.

42 Eg *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 137 [36] (French CJ, Crennan and Kiefel JJ).

43 Eg *R v Humby; ex parte Rooney* (1973) 129 CLR 231 at 243 (Stephen J).

legislatures have plenary legislative power, subject only to the express or implied limitations imposed by the Constitution.[44] That plenary power includes the power to make retrospective amendments to legislation.[45]

38. The second and related difficulty with the appellant's contention relates to the scope or nature of the "legal consequences" or "legal effects" referred to. These phrases have at least two different meanings. They can refer to legal effects in the narrow sense,[46] or they can have a broader meaning, in the sense of affecting the status or effect of something in the overall legal landscape (**legal effects in the broader sense**).

39. The content of the latter meaning is perhaps best illustrated by example. Whilst a finding of corrupt conduct by the Commission perhaps carries no legal effects in the narrow sense,[47] the general law attaches a broader legal effect to it. At the very least, a finding which is made beyond the Commission's power (or an "invalid" finding) attracts a legal effect by giving rise to an entitlement in the person about whom the finding was made, to seek declaratory relief that that finding was made beyond the Commission's power.[48] Where a party has an entitlement to bring a cause of action and to seek relief from a court,[49] there is readily identifiable, in the broader sense, a legal effect. An "invalid" act by the Commission thus possesses a different status in the legal landscape than does a valid act. There being an identifiably different status in the legal landscape between these two classes of act, there is no difficulty with the legislature ascribing the attributes of one class (that of a valid act) to another particular class of acts[50] which meet stipulated legislative criteria.[51]

40. A "valid" finding is itself a factum, and it bears a different legal quality from an "invalid" finding (also a factum). Thus, attaching the attributes of a thing done validly by the Commission to an otherwise invalid finding of the Commission, has the effect of altering the

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44 *Australia Act 1986* (Cth), s2; *Durham Holdings Pty Ltd v New South Wales* [2001] HCA 7; (2001) 205 CLR 399 at 408-9 [9]-[10] (Gaudron, McHugh, Gummow and Hayne JJ); *Re Wakim; ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 at 607 [203] (Kirby J); *Gould v Brown* [1998] HCA 6; (1998) 193 CLR 346 at 480 (Kirby J); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10 (the Court). As to recent affirmation of the plenary powers of the NSW legislature, see *Duncan v New South Wales; NuCoal Resources Ltd v New South Wales; Cascade Coal Pty Ltd v New South Wales* [2015] HCA 13; (2015) 89 ALJR 462 at 470-471 [36]-[37] (the Court). See also the Court's comment that the word "laws" in s 5 of the *Constitution Act* (NSW) "implies no relevant limitation as to the content of an enactment of the New South Wales Parliament"; at 386 [39] (the Court).

45 The Commonwealth also has such power, as a retrospective law of itself will not for that reason alone usurp the exercise of judicial power; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 534, 540 (Mason CJ), 643-4 (Deane J), 719, 721 (McHugh J); see also *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 234 [149] (Gummow J), 221-2 [114] (McHugh J).

46 It is a legal effect of this type only which is able to be quashed by an order of certiorari; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581.

47 *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 148 (Gleeson CJ).

48 Whether that relief is granted will be a matter of discretion for the court competent to hear the application and grant the declaratory relief.

49 The occasions on which a court will be empowered to grant declaratory relief are confined by the considerations which mark out the boundaries of judicial power. Thus, the exercise of the power must be directed to the resolution of a legal controversy, it is not to answer abstract or hypothetical questions, the person seeking relief must have a real interest, and the Court's declaration must be seen to produce foreseeable consequences for the parties; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

50 Here, that things done by the Commission before 15 April 2014 which were not validly done, but would have been validly done if corrupt conduct for the purposes of the Act included relevant conduct.

51 Subject to the provision otherwise being inconsistent with limitations imposed by the Constitution. In this regard, the appellant's *Kirk* and *Kable* arguments are dealt with respectively below.

status of that finding in the general legal landscape. True it is, by re-setting the limits on the Commission's power it alters the ability of a person with standing to challenge successfully that finding and seek a declaration of invalidity from a court, in that the content of the applicable law is altered. But the status of a particular finding by the Commission, as valid or invalid, is not just so classed for the benefit of a court. The status of that finding is a quality it possesses for the world at large. Thus, for example, a decision by a Minister about whether a person was a "fit and proper person" for a particular purpose could be expected to treat a valid finding of corrupt conduct differently from an invalid finding of that nature.

41. Section 70 of the *Government Sector Employment Act 2013* (NSW), whilst not applicable to the appellant, is illustrative of the point. Under that provision, if the Commission "has made a corrupt conduct finding" against an employee of a government sector agency of a particular kind, the head of the relevant agency "may suspend the employee from duty ... until any subsequent action has been taken by the head of the agency",[52] and, also, "may direct that any remuneration payable to an employee while the employee is suspended from duty under [the] section is to be withheld".[53] It would be difficult to read s 70 as empowering the head of an agency to so act, on the basis of an *invalid* finding of the Commission.

42. Part 13 of Sch 4 simply operates to legislatively ascribe the legal consequences or attributes which attach to valid findings, to a particular class of thing done by the Commission – that is, the class of things which meet all four of the criteria identified above at [17].[54] Thus, even if the provision does not always operate by attaching legal effects in the narrow sense, it need not.[55] It certainly operates by attaching legal effects in the broader sense, and there is nothing inherently constitutionally offensive about it so operating.

43. The question then is whether the way in which this particular provision operates offends the limitations imposed, expressly or impliedly, by the Constitution on the legislative power of the State.

Adjustment of Limits: No infringement on the supervisory jurisdiction

44. The references in s73 of the Constitution to the Supreme Courts of each State have the effect that Ch III mandates that there be for each State a body fitting that description.[56] From this Court's decision in *Kirk v Industrial Court (NSW)*[57] (***Kirk***) it fell that in Ch III mandating that there be such a body, there must also necessarily be mandated some content as to what it means to be such a body; that is, some minimum defining characteristics, without which the

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52 Section 70(3), *Government Sector Employment Act 2013* (NSW).

53 Section 70(4), *Government Sector Employment Act 2013* (NSW).

54 That is, it is (1) a "thing done or purporting to have been done" by the Commission, (2) before 15 April 2015, (3) that was beyond the limits of the powers conferred on the Commission, and (4) which would have been within the Commission's powers if corrupt conduct for the purposes of the Act included "relevant conduct".

55 Whilst it might be an interesting question whether a legislature could validly enact a provision which purported to "validate" an act which no one had standing to challenge and did not even carry legal effects in the broader sense, the question is merely hypothetical and one which need not be considered.

56 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); cited with approval in *Public Service Association of South Australia v Industrial Relations Commission (SA)* [2012] HCA 25; (2012) 249 CLR 398 at 426 [73] (Heydon J).

57 [2010] HCA 1; (2010) 239 CLR 531.

body would cease to meet the description of a "Supreme Court of a State", as referred to in s73.

45. The supervisory jurisdiction of the Supreme Courts of the States, exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus), is the mechanism for the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than that Court.[58] This role of the Supreme Courts is "a defining characteristic" of those courts,[59] and thus attracts the protection afforded by the principle above at [44].

46. Thus, the plurality of this Court in *Kirk*, considering the construction and operation of a privative clause, stated:

> Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.[60]

47. It is this principle which the appellant asserts is offended by the provision presently impugned.[61] However, it is one thing to take from a State Supreme Court power to grant relief on account of jurisdictional error, and quite another to retrospectively alter the limits on a power which are to be applied by a court when it is assessing whether an act was infected by jurisdictional error.

48. It is the province of the legislature to prescribe the limits which attach to statutorily conferred powers.[62] What the legislature is not to do, is dictate or determine when those statutorily conferred limits have been exceeded,[63] or, on the basis of the decision in *Kirk*, prohibit the Supreme Court of a State from adjudicating on whether those limits have been exceeded by the commission of a jurisdictional error.[64]

49. As to the allegation that cl35(1) offends the principle enunciated in *Kirk*, the focus of the enquiry is whether the operation of the provision permits the Supreme Court of New South Wales to retain its defining characteristic of being able to adjudicate upon and enforce the limits on the exercise of State executive and judicial power by persons and bodies other than

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58 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at 581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon JJ concurring).

59 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at 581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon JJ concurring).

60 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon J concurring).

61 Appellant's submissions at [31]-[34].

62 A. Inglis Clark, *Studies in Australian Constitution Law* (Charles F. Maxwell (G. Partridge & Co), 1901) 30.

63 As to the allegation that cl35(1) constitutes such impermissible direction, the disposition of that contention appears below at [59]-[73].

64 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon J concurring). "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. … The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall C.J. in *Marbury v. Madison:* 'It is, emphatically, the province and duty of the judicial department to say what the law is.' The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power" (citation omitted); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J), cited with approval in *Minister for Immigration & Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at 347 [73] (McHugh, Gummow and Hayne JJ).

the Supreme Court, in circumstances where jurisdictional error has been committed.[65] As is developed below, the provision does so permit.

50. Each of the powers conferred by the Act on the Commission, pursuant to which the Commission has done things or purported to have done things, is, as with any statutorily conferred power, subject to various limits. These limits are imposed either expressly or impliedly by the Act.

51. As explained earlier, cl35(1) effects an actual validation of particular things done by the Commission, and in so doing, effects a retrospective expansion of the Commission's powers.[66] It is a valid exercise of legislative power for a State legislature to expand statutorily conferred powers retrospectively.[67]

52. Obviously enough, the effect of this expansion of power, or retrospective change to the limits on power, affects (only) the particular class of actions captured by cl35(1). Its effect is that actions which fall within that class of actions fall within the limits of the Commission's powers, rather exceed them.

53. However, this result does not mean that the Court's supervisory jurisdiction, and specifically its capacity to review for jurisdictional error on the part of the Commission, has somehow been removed or even in any way confined. The character of the things done by the Commission which fall within that class has been changed, from being beyond the limits of power (as they were stipulated by the Act prior to the enactment of Pt 13 of Sch 4), to being within the limits of power (as a result of the expansion effected by cl35(1)). Their character has changed in this regard in the legal landscape at large, for all purposes.[68] The task of the Court was, and remains, one of policing the limits.

54. Thus, under the impugned provision, the Court's capacity to review the actions of the Commission for jurisdictional error remains untouched and unconstrained.

55. One of the effects of this change of limits is that when the Court is asked to adjudicate on whether a jurisdictional error has been committed by the Commission in a particular case, if the act of the Commission constitutes a "thing done or purported to have been done" within the meaning of the Act, and that thing done was done before 15 April 2015, then in performing its supervisory function, the Court will need to apply the fresh set of limits as fixed by cl35(1), rather than those which it would have applied prior to that provision's enactment. Put another way, one effect of making a legislative change to the limits to the power, is that when asked to adjudicate on whether those limits have been exceeded and cl35(1) is found by the Supreme Court to apply to the particular conduct, the Supreme Court must obviously apply the new legal standard stipulated by the Act to determine whether those limits have been exceeded. So much is uncontroversial and will be true of any legislative

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65 *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 at 581 [98]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon J concurring).

66 *Cf* Appellant's submissions at [30]. South Australia notes the Commission's apparent position at [28] (Cause Removed Book at 312).

67 See footnote 45 above. See also, by implication, *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 at 113 [26] (French CJ, Crennan and Kiefel JJ).

68 Except those carved out by cl35(6) of Sch 4.

adjustment to the limits on a statutorily conferred power, be those adjustments retrospective or prospective.

56. As noted above at [15], in using the language of "validity" in cl35(1), the legislature has adopted the language of the courts. But an election to use such language should not mislead one to understand the provision as in some way encroaching on the Supreme Court's task of adjudicating on whether the applicable statutory limits have been exceeded. This language is convenient because the provision is remedial and backward-looking, but it does not alter the substance of the provision's operation. It remains that all that the Legislature has done, is altered the limits that apply to the scope of the Commission's powers prior to 15 April 2015.

10 57. Unlike the provisions considered in both *Kirk* and *Public Service Association of South Australia v Industrial Relations Commission (SA)*,[69] cl35(1) is not directed to the jurisdiction of the Supreme Court. It does not confine or constrain the jurisdiction of the Supreme Court of New South Wales to determine whether a thing done by the Commission was within or beyond its power. It does not exclude or even reduce the Court's supervisory jurisdiction. That Court retains its ability to review for all jurisdictional errors committed by the Commission in the exercise of its statutorily conferred powers.

58. It follows that the impugned provision does not take away from the Supreme Court of New South Wales any power to grant relief on account of jurisdictional error, and, therefore, does not alter the constitution or character of that Court such that it ceases to fit the description of
20 a Supreme Court of a State, within the meaning of s 73 of the Constitution.

Impairment of the Court's Institutional Integrity

59. An alternative asserted basis for the invalidity of cl34(1) is that it allegedly constitutes a direction from the legislature to the courts "to exercise judicial power in a particular way or with a view to securing a particular outcome" which is said to be repugnant to and inconsistent with the court's duty of impartiality.[70] In this manner, the provision is claimed to confer a function on the Supreme Court of New South Wales which is repugnant to or incompatible with the capacity of that Court to exercise the judicial power of the Commonwealth, a feature which would render the provision invalid by virtue of the doctrine articulated by this Court in *Kable v Director Public Prosecutions (NSW)*[71] (***Kable***). "[T]he essential
30 notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutional mandated position in the Australian legal system."[72]

60. What is meant by repugnancy and incompatibility is "not susceptible of further definition in terms which necessarily dictate the outcome of future cases".[73] It is necessary to "grapple with that 'essential notion' of repugnancy to or incompatibility with the institutional integrity

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69 [2012] HCA 25; (2012) 249 CLR 398.

70 Appellant's submissions at [37].

71 (1996) 189 CLR 51.

72 *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 614 [86] (Gummow J), cited with approval in *Pollentine v Bleijie* [2014] HCA 30; (2014) 88 ALJR 796 at 804 [42] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

73 *Kuczborski v Queensland* [2014] HCA 46; 89 ALJR 59 at 82 [103] (Hayne J).

of the State courts and to do that recognising that there cannot be any single, let alone comprehensive, statement of the content to be given to that essential notion."[74] Attention is necessarily directed to the "maintenance of the defining characteristics of a court"[75] because "if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies".[76]

61. As a functional doctrine, the inquiry must look at the practical operation of the law to consider repugnancy or incompatibility.[77]

62. As the *Kable* doctrine focuses upon the capacity of the courts to exercise the judicial power of the Commonwealth, if a law could be validly enacted as a law of the Commonwealth without impermissibly interfering with the requirements of Ch III, it will not offend the *Kable* principle. In *H A Bachrach Pty Ltd v Queensland*[78] this Court stated:

> If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.[79]

The presently impugned provision is such a law.

63. In the context of this case, and against that background, it is helpful to understand the essential elements of the exercise of judicial power. The key judicial task is to apply the law to facts as found by the Court in order to quell controversies between the parties.[80] Although there is no precise definition of what constitutes Commonwealth judicial power, key aspects were identified in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*[81] to be:

    i. the nature of the function conferred, being the determination of legal rights or obligations[82] by the application of law to the facts found;

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74 *Kuczborski v Queensland* [2014] HCA 46; 89 ALJR 59 at 83 [106] (Hayne J), with whom French CJ concurred at 73 [38].

75 *Forge v Australian Securities and Investment Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

76 *Forge v Australian Securities and Investment Commission* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

77 *Kuczborski v Queensland* [2014] HCA 46; 89 ALJR 59 at 99 [231] (Crennan, Kiefel, Gageler and Keane JJ); *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at 229 [106] (Gummow, Hayne, Crennan and Bell JJ); *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 50 [74] (French CJ), 84 [213] (Hayne J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; (2004) 218 CLR 146 at 158 [14] (Gleeson CJ). Further, constitutional limitations or prohibitions are tested by reference to the practical operation of a law, not their form; *Cole v Whitfield* (1988) 165 CLR 360 at 401 (the Court).

78 [1998] HCA 54; (1998) 195 CLR 547.

79 *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547 at 561-562 [14] (the Court); applied in *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at 526 [22]-[23] and [51] (McHugh, Gummow, Hayne and Heydon JJ).

80 *Kuczborski v Queensland* [2014] HCA 46; (2014) 89 ALJR 59 at [226] (Crennan, Kiefel, Gageler and Keane JJ). "The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion"; *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ), cited with approval in *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173 at 187 [19] (Brennan CJ).

81 [2013] HCA 5; (2013) 251 CLR 533.

82 Having regard to the ability of courts to grant declaratory relief, even where no other form of relief might otherwise be available, and the fact that the grant of such relief constitutes a valid exercise of judicial power

ii. the process for the exercise of the function, being an open and public inquiry observing the rules of natural justice; and

iii. the function's compatibility with the court's institution as an impartial and independent decision maker.[83]

64. As identified above, the appellant contends that the *Kable* doctrine is here offended on the basis that the impugned provision is said to impair the third aspect identified; that the character of the Supreme Court of New South Wales as an impartial and independent tribunal is impermissibly impaired because the provision directs the Court as to the manner and outcome of the exercise of its jurisdiction.[84]

10 65. A true direction as to the manner and outcome of the exercise of jurisdiction does have the capacity to impair the character of courts as independent and impartial tribunals.[85] In this connection, the plurality in *Attorney-General (NT) v Emmerson*[86] stated:

> A legislature which imposes a judicial function or an adjudicative process on a court, whereby it is essentially *directed or required to implement a political decision or a government policy without following ordinary judicial processes*, deprives that court of its defining independence and institutional integrity.[87] (Emphasis added)

66. That statement of principle was made with reference to the decision in *International Finance Trust Co Ltd v NSW Crime Commission*[88] where the repugnant aspect of the legislation was the requirement that the court hear and determine an *ex parte* application for a restraining order
20 over property. There, the repugnancy arose from two aspects of the amendments to the judicial process. First, the Court was required to hold an *ex parte* hearing at the discretion of the Executive and obliged to make an order if there was a suspicion of wrongdoing[89] and, second, there was absent any mechanism to dissolve an *ex parte* restraining order so made.[90]

67. The impugned provisions stand in stark contrast to the invalid provisions of the *Criminal Assets Recovery Act 1990* (NSW). Any court applying cl35(1) is required to exercise judicial power in an impartial and independent manner according to the ordinary rules regarding judicial process. The Act makes no provision regarding any particular process to be adopted by a court in applying it, and hence it is assumed that a court applying cl35(1) will do so in the

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(*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2), this must necessarily be a reference to legal rights or obligations in the broader sense.

83 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533 at 553 [27] (French CJ and Gageler J)

84 Appellant's submissions at [37].

85 *Gypsy Jokers Motorcycle Club v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ).

86 [2014] HCA 13; (2014) 88 ALJR 522.

87 *Attorney-General Northern Territory v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522 at 534 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

88 See *Attorney-General Northern Territory v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522 at 534 [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49; (2009) 240 CLR 319.

89 *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at 354-5 [55] (French CJ); 366-7 [97] (Gummow and Bell JJ).

90 *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at 366-7 [97] (Gummow and Bell JJ) and 386 [159] (Heydon J).

course of conducting the ordinary judicial process.[91] There is no suggestion that a court applying cl35(1) would act other than by an open and public inquiry observing the rules of natural justice.

68. The majority in *South Australia v Totani*[92] concluded that the Magistrate's Court of South Australia was "enlisted" by s14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) to implement decisions of the executive in a manner incompatible with the institutional integrity of that Court.[93] Members of the majority emphasised the following factors as critical aspects of the interference:

    i. the Magistrate's Court was obliged to make a control order (including specified conditions) against a defendant if satisfied they were a member of a declared organisation;[94]

    ii. the control order necessarily placed limits on a defendant's personal liberty;[95]

    iii. the only adjudicative task for the Magistrate's Court was to determine whether the defendant was a member of a declared organisation;[96]

    iv. the key foundation for the Magistrate's Court role was the declaration of an organisation, by the Attorney-General, on evidence not available to the Magistrate's Court.[97]

69. In that case, it was the combination of all of these factors which led to the conclusion that the legislation conferred a function on the court which controlled both the manner and the outcome of the Court's exercise of judicial power.[98]

70. It was explained in *Totani* that a duty to exercise a power where certain conditions were met was, alone, not an invalidating direction to the outcome of the exercise of judicial jurisdiction.[99] That principle was applied in *Attorney-General Northern Territory v Emmerson.*[100] There, the impugned legislation empowered the court to make specified orders upon application by the Director of Public Prosecutions. The application by the executive was one of a number of cumulative legislative criteria that needed to be satisfied, according to

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91 *Attorney-General Northern Territory v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522 at 537 [58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

92 [2010] HCA 39; (2010) 242 CLR 1.

93 *State of South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 52 [82] (French CJ), 67 [149] (Gummow J), 92 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 172 [480] (Kiefel J).

94 *State of South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 50 [75] (French CJ), 66 [142] (Gummow J), 85 [218] (Hayne J), 165 [453], 168 [464] (Kiefel J).

95 *State of South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 50 [76], 52 [82] (French CJ), 62 [131] (Gummow J), 86 [222] (Hayne J), 172 [480] (Kiefel J).

96 *State of South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 52 [82] (French CJ), 151 [405] (Crennan and Bell JJ), 163 [445] (Kiefel J).

97 *State of South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 66 [142] (Gummow J), 160 [435] (Crennan and Bell JJ).

98 *Kuczborski v Queensland* [2014] HCA 46; 89 ALJR 59 at [224] (Crennan, Kiefel, Gageler and Keane JJ).

99 *State of South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 63 [133] (Gummow J) "It is true that such a law .... which confers upon a court a power with a duty to exercise it if the court decides that the conditions attached to the power are met, *on that ground alone* is not to be classified as a legislative attempt to direct the outcome of the exercise of jurisdiction". (Emphasis added). See also 49 [71] (French CJ); 141 [369] (Heydon J); 154 [420] (Crennan and Bell JJ); *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at 532 [43].

100 *Attorney General Northern Territory v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522.

ordinary judicial processes, for the Court to give effect to the statutory scheme.[101] The alleged "direction" (to impose a penalty on persons which the Director of Public Prosecutions applied to have declared to be "drug traffickers") did not "trespass on the judicial function" because of the cumulative legislative criteria to be satisfied.[102]

71. Similarly, a legislative instruction that the courts are to take account of government policy is not an impermissible direction regarding the exercise of judicial power. All legislation reflects government policy[103] and a legislative instruction to apply a regulation incorporating government policy is not an impermissible interference.[104]

72. A legislature may change the limits on powers or the applicable law, retrospectively or prospectively, without interfering with the judicial process.[105] The "Parliament may select whatever factum that it wishes to trigger a consequence it determines".[106] Further, the Parliament can so legislate even where the change will affect or alter rights in issue in pending litigation.[107]

73. Part 13 of Sch 4 of the Act does not itself confer any function on the courts. The impugned provision is to be applied by courts exercising jurisdiction otherwise conferred upon them. For example, a person seeking judicial review regarding a finding of the Commission invokes the common law jurisdiction. The Court's function on such an application is to apply the law, including the Act, to consider whether the Commission has exceeded the limits of its jurisdiction. Equally, a criminal court considering charges against a defendant who had been the subject of a Commission investigation may be called upon to apply cl35(1) in considering whether particular evidence was unlawfully or improperly obtained and ought to be admitted against the defendant. As already noted, cl35(1) is a law of general application. It is directed to the world at large, not only to the courts. Thus, cl35(1) may also fall to be applied by, for example, an employer considering exercising the powers available to him or her under s70 of the *Government Sector Employment Act 2013* (NSW), referred to above at [41].

74. Having regard to the proper statutory construction of the Act, a court applying Pt 13 of Sch 4 undertakes a "genuine adjudicative process"[108] in accordance with ordinary judicial process. There is no direction of the kind capable of interfering with the process or the outcome of the judicial exercise which renders the legislation repugnant to or incompatible with the

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101 *Attorney General Northern Territory v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522 at 537 [58].

102 *Attorney General Northern Territory v Emmerson* [2014] HCA 13; (2014) 88 ALJR 522 at 536 [52].

103 *Public Service Association (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 250 CLR 343 at 365 [44] (French CJ), 372 [69] (Heydon J).

104 *Public Service Association (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 250 CLR 343 at 365 [45] (French CJ), 367 [55] (Hayne, Crennan, Kiefel and Bell JJ), 373 [70] (Heydon J).

105 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534, 540 (Mason CJ), 643-4 (Dawson J), 719,721 (McHugh J); *Nicholas v The Queen* [1998] HCA 9; (1998) 193 CLR 173, 221-2 [114] (McHugh J), 234 [149].

106 *Kuczborski v Queensland* [2014] HCA 46; 89 ALJR 59 at 111 [303] (Bell J). The use of a prior judicial recommendation as to sentencing can constitute a permissible legislative criterion; *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at 534 [49] (McHugh, Gummow, Hayne and Heydon JJ). Somewhat of a parallel is capable of being drawn between such a criterion and the way Part 13 of Sch 4 builds upon this Court's judgment in *Cunneen*, to create one of the conditions for the application and operation of cl35(1).

107 *Australian Building Construction Employees and Builders Labourers Federation v Commonwealth* (1986) 161 CLR 88 at 96 (the Court); *R v Humby; ex parte Rooney* (1973) 129 CLR 231at 250 (Mason J).

108 *Fardon v Attorney-General (Qld)* [2004] HCA 6; (2004) 223 CLR 575 at 654 [214] (Callinan and Heydon JJ). See also 602 [44] (McHugh J).

requirement that the Court retain its character as an impartial and independent tribunal. The provision would not impermissibly interfere with the requirements of Ch III were it enacted by the Commonwealth Legislature, and as such it cannot operate to offend the *Kable* doctrine.[109]

Section 79(1) of the *Judiciary Act 1903*

75. The present proceeding, involving as it does a matter arising under the Constitution or involving its interpretation, is thus conducted in federal jurisdiction, with the Supreme Court of New South Wales exercising that jurisdiction by virtue of s 39(2).[110] This is so regardless of the fact that the respondent's Notice of Contention involves a question arising under s184(1) of the *Corporations Act 2001* (Cth). Federal jurisdiction having been so attracted in relation to the matter, that jurisdiction extends to the resolution of the whole matter, with the remainder of the jurisdiction to resolve the matter "accrued" as federal jurisdiction.[111] As such, the whole of the proceeding is being conducted in federal jurisdiction.

76. The Supreme Court of New South Wales conducting this proceeding in the exercise of federal jurisdiction, s79(1) of the *Judiciary Act 1903* (Cth) instructs that Court as to the laws which are to be applied in its exercise of that federal jurisdiction.

77. Section 79(1) does not effect a conferral of jurisdiction,[112] and a number of limitations can be seen to arise from its text:

> First, the section operates only where there is already a court "exercising federal jurisdiction", "exercising" being used in the present continuous tense. Secondly, s 79 is addressed to those courts; the laws in question "shall . . . be binding" upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws. Thirdly, the compulsive effect of the laws in question is limited to those "cases to which they are applicable". To that it may be added, fourthly, the binding operation of the State laws is "except as otherwise provided by the Constitution".[113]

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109 *H A Bachrach Pty Ltd v Queensland* [1998] HCA 54; (1998) 195 CLR 547 at 561-562 [14] (the Court); applied in *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at 526 [22]-[23] and [51] (McHugh, Gummow, Hayne and Heydon JJ).

110 Section 30 of the *Judiciary Act 1903* (Cth) provides that the High Court shall have original jurisdiction "in all matters arising under the Constitution or involving its interpretation." Section 39(1) of the *Judiciary Act 1903* (Cth) renders this jurisdiction exclusive of the jurisdiction of the State Courts. Section 39(2) then provides that the State Courts shall be invested with federal jurisdiction "in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred on it, except as provided in section 38 ..."; The original jurisdiction conferred by s30 of the *Judiciary Act 1903* (Cth), pursuant to the power in s76(i) of the Constitution, is thus federal jurisdiction with which the State Courts are invested by virtue of s39(2).

111 *Phillip Morris Inc v Adam P. Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 473-474, 479-480 (Barwick CJ); *Fencott v Muller* (1983) 152 CLR 570 at 607-610 (Mason, Murphy, Brennan and Deane JJ). See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559 at 585 [52] (Gleeson CJ, Gaudron and Gummow JJ).

112 This having already been relevantly effected by s30 of the *Judiciary Act 1903* (Cth) on the High Court, and then by s 39(2) of that Act on the State Court (the Supreme Court of New South Wales).

113 *Solomons v District Court of New South Wales* [2002] HCA 22; (2002) 211 CLR 119 at [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

78. Section 79, with s80, "facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law".[114] When s79(1) applies to proceedings, it "picks up" all relevant State laws,[115] and applies them as "surrogate" laws of the Commonwealth.[116]

79. As to the first limitation identified in the quotation above, for the reasons already identified, the Supreme Court of New South Wales is, in these proceedings, "exercising federal jurisdiction". Section 79(1) thus addresses itself to that Court, and provides that the laws of New South Wales shall be binding on it in its exercise of that jurisdiction. This includes, subject to the third and fourth limitations, the relevant provisions of the Act. It is the third and fourth limitations which the appellant here seeks to invoke.[117]

10 80. As to the third limitation, the relevant provisions of the Act will only be so binding by virtue of s79(1) if this is a case "to which they are applicable". Of this limitation, three members of this Court stated:

> ... As to State law, this may be taken to reflect what otherwise would be the operation of Ch III. In *Kruger v The Commonwealth*, Gaudron J said: 'There may be statutory provisions couched in terms which make it impossible for them to be "picked up" by s 79 of the *Judiciary Act*. Similarly, there may be provisions which impose functions which are beyond the reach of s 79. ...
>
> An example in the second category of provisions imposing functions beyond the reach of s 79 would be those insusceptible of exercise as part of the judicial power of the
20 Commonwealth. ...[118] (Citation omitted)

81. Thus, were either of the appellant's first two contentions as to invalidity – that the impugned provision so alters the character of the Supreme Court of New South Wales that it is beyond the legislative power to the State to enact, or that the impugned provision directs the Supreme Court as to the manner and exercise of its jurisdiction such that it confers a function repugnant to or incompatible with the capacity of that Court to exercise the judicial power of the Commonwealth – to succeed, then it would seem s79(1) would not "pick up" the impugned provision, because the present proceedings would not be a case to which it is "applicable".

82. Equally, it would only be if one of those two contentions for invalidity were to succeed that
30 the fourth limitation of s79(1) might become engaged. That is, if the impugned provision offended either the principle in *Kirk* or the principle in *Kable*, then the Constitution would "otherwise provide" within the meaning of s79(1) of the *Judiciary Act 1903* (Cth), and s79(1) would not "pick up" the impugned provision.

83. Thus, the effect of the matter being in federal jurisdiction, and the consequential contention as to the ability of s79(1) to "pick up" the impugned provision, necessarily stands or falls with the success or failure of the appellant's other two claimed bases for invalidity.

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114 *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553 at 588 [80] (Gleeson CJ and Gummow J).
115 *Austral Pacific Group Ltd v Airservices Australia* [2000] HCA 39; (2000) 203 CLR 136 at 154 [52] (McHugh J).
116 *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553 at 588 [80] (Gleeson CJ and Gummow J).
117 Appellant's submissions at [47].
118 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559 at 593 [72]-[73] (Gleeson CJ, Gaudron and Gummow JJ).

Part VI: Estimate of time for oral argument

84. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

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