IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S101 of 2015

BETWEEN **TRAVERS WILLIAM DUNCAN**
Applicant

and **INDEPENDENT COMMISSION AGAINST CORRUPTION**
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Is Part 13 of Sched 4 to the *Independent Commission Against Corruption Act 1988* (NSW) ("***ICAC Act***") properly characterised as a "direction" to the judicature?

3 Even assuming Part 13 is properly characterised as a "direction" to the judicature (which the respondent does not accept), is Part 13 invalid on the basis that it:

(a) ousts the power of the Supreme Court of New South Wales to grant relief for jurisdictional error in a manner prohibited by the principles identified in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ("***Kirk***")?

(b) directs or commands State courts in the exercise of their jurisdiction in a manner prohibited by the principles identified in *Kable v DPP (NSW)* (1996) 189 CLR 51 ("***Kable***")?

(c) offends Ch III of the *Constitution*, given that the Court of Appeal is engaged in the exercise of federal jurisdiction?

4 If Part 13 is invalid on one or more of those bases, should it be read down such as to preserve its application to conduct other than the respondent's findings of corrupt conduct?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

5 The applicant has given sufficient notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth).

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Part IV: Facts

6 The respondent does not dispute the applicant's narrative of the material facts (except for the extent to which they effectively rehearse the applicant's submissions: see AS [6], [7]). However, many of them are not necessary for the resolution of these proceedings. The key facts are these.

7 In its report of July 2013, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, the respondent found that the applicant had engaged in corrupt conduct within the meaning of sec 7 of the *ICAC Act* (CRB 150-152) (the "**respondent's finding**").

10 **8** That finding proceeded upon the assumption that it was sufficient for the purposes of subsec 8(2) of the *ICAC Act* that the applicant's conduct could have adversely affected, directly or indirectly, what the majority in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 ("***Cunneen***") described as the "efficacy" as opposed to the "probity" of the exercise of official functions (the "**pre-*Cunneen* assumption**"). The decision in *Cunneen* showed that the pre-*Cunneen* assumption was wrong. It follows that, in the light of *Cunneen* and in the absence of any legislative amendment of the kind achieved by Part 13 of Sched 4, the respondent's finding was infected by error.

9 Prior to the decision in *Cunneen*, the applicant had unsuccessfully sought judicial review of the respondent's finding in the Supreme Court of New South Wales: *Duncan v*
20 *Independent Commission Against Corruption* (2014) 311 ALR 750. The applicant sought leave to appeal from that decision. After the decision in *Cunneen* was published, the applicant sought final relief in the appeal on the basis that the respondent's finding was invalid in light of that decision.

10 The *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) ("***Validation Act***"), which inserted Part 13 into Sched 4 to the *ICAC Act* ("**Part 13**"), commenced before the Court of Appeal issued any final relief. There is no real dispute between the parties as to the proper construction of Part 13 and its significance for the legal challenge to the validity of the respondent's finding. Both parties accept that subcl 35(1) of Sched 4 applies to the respondent's finding, such that the finding is a thing done by the
30 respondent that is "taken to have been, and always to have been, validly done".

Part V: Legislation

11 The respondent accepts the applicant's statement of applicable constitutional provisions, statutes and regulations.

Part VI: Argument

Characterisation of Part 13

12 The essential premise of the applicant's argument is that Part 13 operates, and only operates, as a "direction to the judicature that it is neither to pronounce upon nor to grant relief on the basis of the invalidity of findings" which proceeded upon the pre-*Cunneen* assumption: AS [15(d)]. That premise is erroneous for several reasons.

13 First, Part 13 is not in form or substance concerned with the functions or jurisdiction of courts, whether in reviewing the validity of the conduct covered by subcl 35(1) or in any other sense. It does not refer to any particular court proceedings or to court proceedings generally. The only reference in Part 13 to court proceedings is in subcl 35(5). That subclause does not "direct" the exercise of jurisdiction; it simply provides that the authorisation achieved by subcl 35(4) applies even if the relevant corrupt conduct finding is declared a nullity or otherwise set aside by a court.

14 Secondly, Part 13 cannot be characterised as a direction about the giving of relief in circumstances where it does not validate the respondent's findings in all respects. Part 13 is concerned with only one aspect of validity, namely that related to the construction of subsec 8(2) adopted by this Court in *Cunneen.* That is made clear by the definition of "relevant conduct" in subcl 34(1), which adopts the "efficacy"/"probity" dichotomy preferred in *Cunneen.* Part 13 operates by: (a) articulating a particular construction of subsec 8(2) (as including conduct that adversely affects, or could adversely affect, the "efficacy" of the exercise of official functions); (b) targeting those "things done" by the respondent prior to 15 April 2015 that would be valid according to that construction; and (c) deeming those "things done" to have been, and always to have been, validly done.

15 In doing so, Part 13 effectively cures those "things done" of any error flowing from the respondent having adopted the pre-*Cunneen* assumption: contra AS [30]. Part 13 does not cure the respondent's findings of other errors of law or protect them from review. It does not, for example, cure the respondent's findings of or protect them from review for any denial of procedural fairness or some other misconstruction of subsec 8(2) or other relevant provision of the *ICAC Act.* This suggests that Part 13 is properly to be characterised as effectively altering the lawful scope of subsec 8(2) insofar as things done by the respondent prior to 15 April 2015 are concerned. To say that this means that courts are now precluded from granting relief about the invalidity of things done based on the erroneous pre-*Cunneen* assumption is not to expose a "direction" to the courts. Part 13 is no more a "direction" to the courts than any law which directly and retrospectively amended subsec 8(2) would have been. In order

for the applicant's characterisation of Part 13 to be a meaningful characterisation from a constitutional perspective, it must mean something more than just the enactment or variation of law which courts are required to enforce in determining issues that arise in proceedings.

16 Thirdly, Part 13 confirms the validity of the respondent's pre-15 April 2015 conduct in all contexts – not just in legal proceedings. Part 13 applies to a broad range of conduct, some of which is not necessarily susceptible to judicial review. Part 13 applies to any "finding...made by the Commissioner": subcl 34(2). While that encompasses findings of corrupt conduct made under para 13(3)(a) of the *ICAC Act* (which are generally susceptible to judicial review), it would also encompass any other finding made by the respondent including those "in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings...relate to corrupt conduct": para 13(3)(a). It cannot be said that all such findings would be subject to judicial review. Part 13 also applies to all the conduct listed in subcl 34(2), including "anything done...by an officer of the Commission" and "the obtaining or receipt of anything by the Commission or an officer of the Commission". This would encompass, for example, the issuing of subpoenas and the compulsory examination of witnesses. Part 13 also applies to the matters in subcl 35(2). Again, this range of conduct would include conduct that is not susceptible to judicial review. This counts against the applicant's submission that the "sole operative effect" of subcl 35(1) is to "direct" the judicature.

17 Fourthly, even where Part 13 encompasses conduct which *is* susceptible to judicial review, the validation of such conduct has no necessary intersection with the exercise of judicial power. It is at least arguable, following *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, that where a finding is affected by jurisdictional error it is not necessary for a court to issue a writ of certiorari or a declaration for that finding to be considered or treated as no finding at all. In that context, Part 13 operates to clarify that the respondent's pre-15 April 2015 conduct is not to be treated as invalid by members of the public simply because it proceeded upon the pre-*Cunneen* assumption.

Analogous cases

18 Part 13 is an unexceptional example of a technique that has been repeatedly adopted by federal and State legislatures to address the invalidity of judicial and administrative decisions. It is an important part of a legislature's armoury to ensure the continuity and effectiveness of judicial and administrative decision-making. The legislative validation of judicial and administrative decisions has taken place in a number of contexts – from professional standards (see, eg, *Professional Standards Act 1994* (NSW), Sched 4, cl 17) to

the lease of Crown lands (see, eg, *Crown Lands Act 1989* (NSW), Sched 8, subcl 59(3)). Relevantly equivalent schemes for legislative validation have withstood constitutional challenge on a number of occasions in this Court. The applicant's submissions are no more than recalibrations of arguments that were made and rejected on those occasions.

19 In *Nelungaloo v The Commonwealth* (1948) 75 CLR 495 (***"Nelungaloo"***), sec 11 of the *Wheat Industry Stabilization Act (No 2) 1946* (Cth) provided that an executive order, purportedly made on 16th November 1939 under a particular regulation, "shall be deemed to be, and at all times to have been, fully authorized by that regulation, and shall have, and be deemed to have had, full force and effect according to its tenor". The plaintiff in *Nelungaloo* contended that sec 11 amounted to a "usurpation" of judicial power on the basis that it did "not amend the law prospectively" but attempted "to prescribe the construction to be placed upon an existing law by the court and the determination of the meaning of a statute is of the essence of the judicial power" (at 503). At first instance, Williams J concluded that sec 11 was valid. His Honour observed in obiter that it may have been "preferable" to amend the relevant regulation to make it clear that the executive order was authorised "ab initio", but his Honour concluded that "this is in substance the effect of the first limb of the section, and in case this limb fails, the second limb gives the language of the order statutory force and effect and makes this force and effect retrospective to 16th November 1939" (at 504). On appeal to the Full Court, Latham CJ agreed with William J's reasons (at 531). Dixon J observed at 579 that sec 11 "is simply a retrospective validation of an administrative act and should be treated in the same way as if it said that the rights and duties of the growers and of the Commonwealth should be the same as they would be, if the order was valid."

20 Although the language adopted in sec 11 is slightly different to that adopted in subcl 35(1), the difference is not material. Subclause 35(1) provides that certain "things done" are "taken" to have been "validly done". Section 11 deemed the executive order to be "fully authorised by that regulation" and to have "full force and effect". The expression "validly done" in subcl 35(1) can mean nothing other than that the respondent's conduct is taken to have been "fully authorised" by the *ICAC Act* and to have full force and effect.

21 The applicant attempts to distinguish *Nelungaloo* on the basis that the executive order affected by sec 11 "would have had legal consequences, in the sense of creating or otherwise affecting legal rights or obligations": AS [24]. Whether the respondent's finding has "legal consequences", and whether that distinction has any constitutional significance, is addressed from [33] below. It is sufficient to note at this stage that the "legal consequences" of the executive order were not treated by the Court as an essential aspect of the validity of sec 11.

Although the applicant relies on Dixon J's reasoning at 579 (AS [25]), his Honour was merely comparing sec 11 to a law that declared the rights and duties of growers and of the Commonwealth to be the same as if the order was valid. His Honour was not suggesting that, absent the "legal consequences" described by the applicant, sec 11 would have been invalid.

22 In *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 ("***Humby***"), this Court considered sec 5 of the *Matrimonial Causes Act 1971* (Cth) which sought to address the invalidity of certain decrees issued by non-judicial officers of the Supreme Court of South Australia. Subsection 5(3) provided that "[t]he rights, liabilities, obligations and status of all persons are...declared to be, and always to have been, the same as if...the purported decree had been made by the Supreme Court of that State constituted by a single Judge". A similar provision was the subject of *Re Macks; Ex parte Saint* (2000) 204 CLR 158 ("***Macks***"). As just noted, in *Nelungaloo* Dixon J considered that there was no constitutional distinction between sec 11 (which "deemed" the executive order to be "fully authorised") and legislation in this form. Likewise, there is no relevant constitutional distinction between subcl 35(1) and legislation in this form. Subclause 35(1) has, in effect, declared the rights and liabilities of all to be, and always to have been, the same as if the respondent's purported findings had been made on the basis that subsec 8(2) had the expanded operation given to it by virtue of the definition of "relevant conduct" in subcl 34(1).

23 The applicant relies on Stephen J's observation in *Humby* at 243 that subsec 5(3) did not "deem" the relevant decrees "to have been made by a judge" nor did it "confer validity upon them"; rather, "it leaves them, so far as their inherent quality is concerned, as they were before the passing of this Act...the sub-section operates by attaching to them, as acts in the law, consequences which it declares them to have always had". A similar distinction was drawn in *Macks* at [25], [74], [115], [208]. However, Stephen J's observations should be appreciated in the light of the particular submissions made by the plaintiff in that case. The plaintiff had contended, inter alia, that: a) it was beyond the Commonwealth's legislative power, as found in sec 51 of the *Constitution*, to convert the impugned decisions into decisions of State Supreme Courts; b) the validation of the impugned decisions amounted to an exercise of judicial power by the Commonwealth Parliament; and c) the legislation was invalid for vesting judicial power in non-judicial officers. That is what drove the Court to distinguish between legislation that "validates" decisions or affects their "inherent quality" and legislation that attaches "consequences" to decisions. Stephen J and the other members of the Court were not attempting to prescribe exhaustive criteria for the validity of legislation

purporting to validate any kind of invalid decision, including *administrative* decisions at the *State* level.

24 In *HA Bachrach v Queensland* (1998) 195 CLR 547 ("***Bachrach***"), the plaintiff sought to challenge the validity of the local council's re-zoning of certain land to permit the development of a shopping centre. The day after the plaintiff instituted an appeal in the Court of Appeal, the Queensland Parliament passed the *Local Government (Morayfield Shopping Centre Zoning) Act 1996* (Q) ("***Zoning Act***"). The subject land was described as the "rezoned Morayfield shopping centre land". The Act referred to a particular planning deed made by the proposed developer of the shopping centre and the local council. Section 3 provided that the land was included in the central commercial zone of the planning scheme and that the purposes for which the land could be used without the consent of the local council were "taken to include" certain purposes including the proposed shopping centre development. Section 5 provided that anything done on the land under the planning deed was lawful. The plaintiff challenged the validity of the *Zoning Act* on the ground that it constituted an interference with the exercise of judicial power, including by "directing" the manner and outcome of the exercise of the Court of Appeal's jurisdiction in the context of the plaintiff's litigation (at 550-551). The Court decided to assess the challenge by reference to the Commonwealth separation of powers, on the basis that if the *Zoning Act* did not breach the Commonwealth separation of powers it would not breach the *Kable* principle (at [14]).

25 Section 3 of the *Zoning Act* and subcl 35(1) are similar in that:

(a) both provisions are capable of being characterised, albeit only in a loose and constitutionally insignificant sense, as "directing" the courts. The *Zoning Act* "directed" courts to "take" the purposes for which the land could be used to include certain specified purposes and subcl 35(1) of Sched 4 "directs" courts to "take" certain conduct as "valid"; and

(b) both provisions had the effect of determining legal questions that arose in pending proceedings. The *Zoning Act* determined the legal question of whether the proposed shopping centre was permissible and subcl 35(1) of Sched 4 determines the particular legal question of whether the respondent erred in making findings by proceeding upon the pre-*Cunneen* assumption.

26 Nevertheless, the Court held that the *Zoning Act* did not constitute an impermissible interference with judicial power. The Court observed that "it is the operation and effect of the law which defines its constitutional character" (at 561 [12]) and the circumstance that the *Zoning Act* affected "rights in issue in pending litigation" did not "necessarily involve an

invasion of judicial power" (at 563 [17]). The Court noted that the "plaintiff's legal proceedings are not mentioned in the Act" and that the "manifest purpose and effect of the Act is to establish a legal regime affecting the Morayfield shopping centre land, binding the developer, the Council, and all other persons including the plaintiff" (at 564 [22]).

27 The Court dismissed the plaintiff's challenge despite the fact that the *Zoning Act* was, unlike Part 13, clearly targeted at particular proceedings. The *Zoning Act* applied only to the land that was the subject of those proceedings. To the extent it is relevant, the *Zoning Act* was also passed in circumstances where the relevant Minister, at the time of introducing the Bill, expressed concern that the plaintiff's litigation might frustrate or delay the proposed shopping centre development (at 561 [10]). Here, there is no mention of the applicant's litigation in the Premier's second reading speech or in the explanatory note to the Independent Commission Against Corruption Amendment (Validation) Bill 2015. The *Validation Act* also has a broader operation which extends well beyond the validity of the particular finding at issue in the applicant's proceedings in the Court of Appeal.

28 In *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 ("***AEU***"), this Court considered the validity of sec 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth). In 2006, the Australian Industrial Relations Commission granted an application by the Australian Principals Federation ("**APF**") for registration as an organisation under the *Workplace Relations Act 1996* (Cth). APF's details were entered on the register. In 2008, the Full Court of the Federal Court held in *Australian Education Union v Lawler* (2008) 169 FCR 327 ("***Lawler***") that the registration was invalid because the APF's rules did not have the effect of terminating the membership of persons no longer eligible for membership. An order was issued quashing the Commission's decision and the APF's registration. In 2009, sec 26A was introduced and provided as follows:

> **Validation of registration**
>
> If:
>
> (a) an association was purportedly registered as an organisation under this Act before the commencement of this section; and
>
> (b) the association's purported registration would, but for this section, have been invalid merely because, at any time, the association's rules did not have the effect of terminating the membership of, or precluding from membership, persons who were persons of a particular kind or kinds;
>
> that registration is taken, for all purposes, to be valid and to have always been valid.

29 The parallels with subcl 35(1) are obvious. Section 26A is relevantly similar in that it: (a) targeted "purported registrations" that took place before a particular point in time; (b)

identified those purported registrations that, but for sec 26A, would have been invalid on a particular ground (ie the ground identified in *Lawler*); and (c) deemed those registrations "for all purposes, to be valid and to have always been valid".

30 All members of the Court rejected the submission that sec 26A constituted an impermissible interference with judicial power. A majority of the Court considered that sec 26A operated, in effect, by attaching to the "purported registration" (which existed as an historical fact, but absent any legal effect) the legal consequences of a valid registration: at [36], [48], [53] per French CJ, Crennan and Kiefel JJ; at [117] per Heydon J. Justices Gummow, Hayne and Bell expressed its effect slightly differently, observing that sec 26A "altered the law by providing, in effect, that the organisations with which it dealt were to be treated as having had the status of registered organisation from the time when the organisation in question was first purportedly entered on the register" (at [90]). French CJ, Crennan and Kiefel JJ observed:

> [48] As a general rule, the Parliament of the Commonwealth, which is empowered to define the jurisdiction of federal courts and to invest the courts of the States with federal jurisdiction, cannot "direct [those] courts as to the manner and outcome of the exercise of their jurisdiction". It cannot interfere with or intrude into the exercise of the judicial power. *Section 26A, however, does not purport to direct courts exercising federal jurisdiction as to the manner or outcome of its exercise. It states a rule attaching legal consequences to an entry in the Register kept under the FW(RO) Act*...
>
> [50]...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. Section 26A was such a law.* [emphasis added]

31 Their Honours cited the submissions of the then Commonwealth Solicitor-General with approval:

> [53] As the Solicitor-General submitted, it would be an impermissible interference with the judicial power of the Commonwealth if the Parliament were to purport to set aside the decision of a court exercising federal jurisdiction. *There is no such interference, however, if Parliament enacts legislation which attaches new legal consequences to an act or event which the court had held, on the previous state of the law, not to attract such consequences. That was the substantive operation of s 26A. It changed the rule of law embodied in the statute as construed by the Full Federal Court in* Lawler. We agree with Gummow, Hayne and Bell JJ that s 26A assumes that *Lawler* was correctly decided. *To change that rule generally and for the particular case was within the legislative competence of the Commonwealth.* The challenge to the constitutional validity of s 26A fails. [emphasis added]

32 There is no relevant distinction between sec 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) and subcl 35(1) of Part 13 of the *ICAC Act*. Both provisions, in effect, attach new legal consequences and a new legal status to things done which, based on the law as it stood immediately before the provisions commenced, did not have such consequences or status. Again, the applicant has endeavoured to distinguish sec 26A from subcl 35(1) on the basis that the respondent's finding had no "legal consequences". That submission is addressed from [33] below. It should be noted at this stage, however, that the applicant's submission at [28] regarding *AEU* is flawed and irrelevant. There the applicant contends that, where such relief had utility, sec 26A would not have prevented a court from declaring the historical fact "that Fair Work Australia had acted unlawfully in entering an association in the same position as APF into the register". It is unclear why there would ever be utility in making such a declaration about such a historical fact. In any event, the proposition is constitutionally irrelevant. If there is some historical fact regarding the legal status of past action and the legality of that past action has not been altered by an amending Act, then there could theoretically remain some possibility of relief regarding that past action. But that says nothing about the constitutional validity of a law that alters the legal rule about the validity of a thing that has previously been done. The relevant point for present purposes is that, as recognised in *AEU*, an enactment may validly state a rule of law which alters the legal status and consequences of a past act.

Significance of "legal consequences"

33 The applicant attempts to distinguish *Nelungaloo, Humby, Macks* and *AEU* on the basis that, in those cases, the legislation was treated as attaching "legal consequences" to the purported administrative or judicial decision. The applicant contends that the respondent's finding has no "legal consequences" (citing *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 ("***Greiner***")) and that that somehow invalidates Part 13.

34 The applicant has not articulated why, in circumstances where legislation purports to validate administrative conduct, the absence of "legal consequences" arising from that conduct (in the sense referred to in *Greiner*) has constitutional significance. No authority has been cited in support of this proposition.

35 Even if it is accepted that the notion of "legal consequences" has some constitutional significance in the present case, it is important to appreciate the particular context in which the observations in *Greiner* were made. There the Court was concerned with the question whether the respondent's findings were susceptible to the writ of certiorari. Gleeson CJ observed at 148 that an order of certiorari is designed "to quash the legal effect or the legal

consequences of the decision or order under review" (citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580), and that such an order was not available because "technically, determinations of the Commission, although they may be extremely damaging to the reputations of individuals, do not have legal consequences. A determination of the Commission does not create or affect legal rights or obligations". Gleeson CJ's observations do not suggest that the respondent's findings themselves have no legal status nor "legal consequences" *in any sense*. Nor is there any reason to think that this Court's references to "legal consequences" or impacts upon "legal rights or duties" in *Nelungaloo, Humby, Macks* and *AEU* were limited to those of a kind that are susceptible to certiorari.

10 **36** While the respondent's finding against the applicant in the present case is not susceptible to certiorari, it is an act having legal significance and legal consequences in a more general sense. The finding is the act of an official entity in the purported exercise of a specific statutory power (para 13(3)(a) of the *ICAC Act*). Such a finding has acute reputational consequences, of the kind that make it amenable to declaratory relief: *Ainsworth* at 597. If an administrative action does not affect the rights of the person seeking the declaration, the court will not grant a declaration in respect of it: see *Johnco Nominees v Albury-Wodonga (NSW) Corp* [1977] 1 NSWLR 43 at 59 per Moffitt P. The applicant recognises this by the very fact that he is challenging the respondent's finding and seeking a declaration in respect of it.

20 **37** Part 13 has altered the legal effect or status of the respondent's finding, and consequently the applicant's rights vis-à-vis that finding. Following the introduction of Part 13, the applicant no longer has a legal basis to seek declaratory relief on the ground that the respondent's finding proceeded upon the pre-*Cunneen* assumption. The applicant's rights are now taken to be the same as they would have been if, at the time the finding was made, subsec 8(2) encompassed adverse effects on the "efficacy" of the exercise of official functions. That Part 13 alters the legal status of, and attaches new legal consequences to, the respondent's finding is exposed by the applicant's complaint that subcl 35(1) denies him a curial remedy which he otherwise would have had in respect of the finding: AS [41].

Retrospective amendment to subsec 8(2)

30 **38** The applicant's argument is founded upon a false dichotomy. He seems to contend that because Part 13 *neither* attaches new legal consequences to the respondent's conduct *nor* retrospectively amends subsec 8(2), it necessarily follows that Part 13 is "directive" in nature: AS [17]. The constitutional validity of Part 13 does not depend upon it fitting into one or both sides of this dichotomy. However, for the reasons just given, Part 13 *does* attach new

"legal consequences" to the respondent's finding. It also, in effect, retrospectively alters the scope of subsec 8(2) insofar as the respondent's pre-15 April 2015 conduct is concerned.

39 As submitted at [14] above, Part 13 articulates a particular construction of subsec 8(2) (in subcl 34(1)); identifies the respondent's pre-15 April 2015 conduct that would be valid according to that construction; and deems that conduct to be valid. Part 13 therefore has substantially the same effect as if it retrospectively amended subsec 8(2) but then applied that retrospective amendment only to conduct of a certain kind occurring before 15 April 2015. As noted above, in *Nelungaloo* Williams J suggested at 504 (Latham CJ agreeing at 531) that there was no constitutional difference between sec 11 and legislation that retrospectively amended the enabling regulation. The Parliament of New South Wales clearly has the power retrospectively to amend subsec 8(2) in a more direct way. The fact that it has chosen to achieve the same effect by validating certain things done by reference to a particular construction of subsec 8(2) does not mean that Part 13 falls outside Parliament's legislative competence.

40 Even if Part 13 is not properly characterised as either attaching new "legal consequences" to the respondent's pre-15 April 2015 conduct or retrospectively amending subsec 8(2), that does not mean that Part 13 constitutes an impermissible "direction" to the Courts or falls foul of the principles in *Kirk* or *Kable*. It is to those authorities that the respondent now turns.

Kirk: precluding relief for jurisdictional error

41 In *Kirk*, the Court was concerned with sec 179 of the *Industrial Relations Act 1996* (NSW). That is a very different provision to subcl 35(1). Section 179 provided that a decision of the Industrial Court was final and might not be appealed against, reviewed, quashed or called into question by any court or tribunal. It extended to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari, mandamus, by injunction, declaration or otherwise.

42 The defining characteristic of State Supreme Courts which was found in *Kirk* to be constitutionally entrenched was the supervisory jurisdiction by which such Courts determine and enforce the limits on the exercise of State executive and judicial power by persons and bodies other than those Courts: at 580 [98]. The critical point in *Kirk* is therefore that limits on power that apply to bodies exercising executive and judicial power must be determined and enforced by courts exercising supervisory jurisdiction. The reasoning in *Kirk* does not prohibit State legislatures from passing legislation that re-defines where those limits lie.

43 For the reasons given above, the effect of Part 13 is not to preclude the Supreme Court from enforcing the limits on the respondent's power, but rather to set new limits on that power. Just like the provision under consideration in *AEU,* subcl 35(1) has "changed the law" to be applied by the courts in the sense that what would have been a jurisdictional error (by reason of the respondent having made a finding that relied upon the pre-*Cunneen* assumption) is *now* no longer (and effectively taken never to have been) a jurisdictional error. This is achieved by altering the jurisdictional boundaries of the administrative decision-maker, not by restricting the jurisdiction of the Court to enforce those boundaries. If the proper characterisation of Part 13 is that it makes valid that which would otherwise have been affected by jurisdictional error then in no sense does it remove the power of courts to grant relief on account of jurisdictional error. The respondent's findings are still subject to review by the courts by reference to the jurisdictional limits imposed by the *ICAC Act*, including subsec 8(2), which must for these purposes be read in the light of Part 13.

Kable: directing the exercise of judicial power

44 The *Kable* principle was recently summarised in *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522 at [40] where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ observed:

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid. [footnotes omitted]

45 In *Kuczborski v Queensland* (2014) 89 ALJR 59, Crennan, Kiefel, Gageler and Keane JJ, having cited the above passage, observed at [140]:

> Decisions of this Court establish that the institutional integrity of a court is taken to be impaired by legislation which enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory, or which requires the court to depart, to a significant degree, from the processes which characterise the exercise of judicial power. [footnotes omitted]

46 The applicant appears to rely on the second limb of this observation. He contends that Part 13 requires the Court to depart from essential aspects of the judicial process: namely, independence and impartiality: AS [36]-[37]. The applicant, appropriately, does not rely on the mere fact that Part 13 has impacted rights the subject of pending legal proceedings. This circumstance is insufficient to constitute an impermissible interference with judicial power: *Humby* at 250 per Mason J; *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96.

47 The authorities that have applied the second limb above generally concern legislation that has conferred a particular function on a State court which function has required the court to exercise its power in a manner that departs from the essential incidents of judicial procedure. For example, the legislation in *International Finance Trust Company v NSW Crime Commission* (2009) 240 CLR 319 ("***International Finance***") empowered the Supreme Court to make a restraining order but required it to hear and determine the proceedings ex parte. For the Chief Justice, that was the factor that resulted in a breach of the *Kable* principle: at [55]-[56]. For Gummow and Bell JJ, it was the ex parte nature of the proceedings plus the fact that the order applied "for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications" with release from the order being "conditioned upon proof of a negative proposition of considerable legal and factual complexity": at [97]. For Heydon J, it was the fact that the legislation provided no facility for the Court to dissolve an ex parte order after the defendant received notice, at least without much difficultly and delay: at [159], [161].

48 The legislation in *International Finance* bears no analogy to Part 13 and the applicant's reliance on it is misplaced: see AS [39], [42]. Part 13 does not affect the procedures to be applied by the Supreme Court. It does not confer a function on the Supreme Court at all. The applicant must make good the novel proposition that, by altering the legal rules to be applied in respect of particular things done by the respondent, Part 13 constitutes a "direction" of a kind that interferes with the institutional integrity of the Supreme Court such that it somehow affects that Court's status as a repository of federal jurisdiction.

49 Nothing constituting a "direction" of this nature has ever been held to breach the *Kable* principle. There are two cases in which a "direction" has been held to impermissibly interfere with judicial power: *Liyanage v The Queen* [1967] 1 AC 259 ("***Liyanage***") and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 ("***Chu Kheng Lim***"). Those cases obviously did not concern the *Kable* principle and are in any event distinguishable for the reasons given below.

50 In *Liyanage*, the Parliament of Ceylon purported to amend the Criminal Procedure Code in its application to some 60 persons accused of offences against the State for their part in an abortive coup in 1962. Although the persons and their trial was not expressly mentioned, the legislation was expressed to operate retrospectively to cover the period starting just prior to the coup and ending after all relevant legal proceedings had been concluded; was limited in its application to any offence against the State committed at around the relevant time; legalised the detention of any persons suspected of having committed an

offence against the State; allowed arrest without warrant for "waging war against the Queen"; widened the categories of offences for which trial without jury could be ordered including those with which the accused were charged; added a new offence to meet the circumstances of the coup; made admissible certain evidence which was otherwise inadmissible; and altered the punishment which could be imposed for the relevant offences.

51 The Privy Council accepted that the legislation constituted an impermissible interference with the judicial process. While accepting that the notion of unconstitutional interference was incapable of exhaustive definition, the Board observed at 290 that relevant considerations included: "the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings." The Board focused on the ad hominem nature of the legislation (in the way that it targeted particular persons and also particular legal proceedings) and the way in which the legislation sought to interfere with matters traditionally reserved for judicial discretion, such as trial by jury, arrest without warrant, the admissibility of evidence and the sentence to be imposed. The Board adopted at 290 counsel's submission that "the pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals".

52 By contrast, Part 13 of Sched 4 to the *ICAC Act* is neither expressly nor implicitly targeted at particular individuals, particular conduct of the respondent or particular legal proceedings. Although the applicant submits that Part 13 is "narrowly targeted" (AS [40]), that submission cannot be sustained in the light of the broad range of conduct covered by Part 13. It applies not only to the respondent's findings of corrupt conduct under para 13(3)(a) of the *ICAC Act*, but also to all the conduct specified in subcl 34(2) and subcl 35(2). The "sub-set" of conduct picked up by Part 13 is essentially defined by the effects of *Cunneen*. That is, Part 13 targets conduct that occurred prior to *Cunneen* and that proceeded upon the pre-*Cunneen* assumption. In no sense does that make Part 13 "ad hominem" in nature. Nor does Part 13 obviate the need for, or completely determine the outcome of, the pending proceedings. As submitted above, Part 13 simply means that the applicant can no longer contend that the respondent's finding is invalid for the particular reason of the respondent having based its finding upon the pre-*Cunneen* assumption. The applicant may still contend that the respondent's finding is affected by other errors of law.

53 In *Chu Kheng Lim*, the Court considered the validity of sec 54R of the *Migration Act 1958* (Cth), which provided that a court was "not to order the release from custody of a

designated person". A majority of the High Court concluded that sec 54R applied even in circumstances where the detention of the designated person was unlawful. Justices Brennan, Deane and Dawson observed at 36 (Gaudron J agreeing generally at 53):

> In terms, s. 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch. III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch.III vests exclusively in the courts which it designates.

54 Again, the distinction between sec 54R and subcl 35(1) is obvious. Section 54R was expressly directed to the courts and expressly precluded them from ordering the release of designated persons. Further, the courts were precluded from doing so regardless of any unlawfulness affecting the detention. As already noted, subcl 35(1) does not validate the respondent's conduct in all respects or make it immune from review.

55 In *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 (***"Cth BLF"***), an industrial commission had declared that the Federation had engaged in conduct that constituted a contravention of certain undertakings and agreements. The Minister was empowered as a result of that declaration to order the deregistration of the Federation under the *Building Industry Act 1985* (Cth). The organisation applied to the High Court to quash the commission's declaration. Before the hearing of that application, Parliament passed the *Builders Labourers' Federation (Cancellation of Registration) Act 1986* (Cth). That Act provided that "The registration of [the Federation] under the *Conciliation and Arbitration Act 1904* is, by force of this section, cancelled". The plaintiffs submitted that the Act was an exercise of judicial power or alternatively an impermissible interference with it.

56 The Court concluded that the legislation was neither an exercise of nor interference with judicial power, noting that there was nothing "in the nature of deregistration which makes it unsusceptible to legislative determination" (at 95). The Court observed at 96, with reference to *Nelungaloo* and *Humby*, that it is "well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution." The Court noted at 96: "It is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings". The Court referred to *Liyanage* and said at 96-97:

> Here the situation is very different. The Cancellation of Registration Act does not deal with any aspect of the judicial process. It simply deregisters the Federation, thereby making redundant the legal proceedings which it commenced in this Court. It matters not that the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings.

57 Although the legislation in *Cth BLF* is in different terms to Part 13, the same observations may be made here: namely, Part 13 does not deal with any aspect of the judicial process. It simply validates the respondent's finding to the limited extent outlined above, thereby "making redundant" one aspect of the applicant's challenge to that finding.

58 Finally, in *Nicholas v R* (1998) 193 CLR 173, the Court considered the validity of sec 15X of the *Customs Act 1901* (Cth). It provided that in determining, for the purpose of a prosecution for a particular offence, whether evidence that the narcotics were imported into Australia in contravention of the *Customs Act* should be admitted, "the fact that a law enforcement officer committed an offence in importing the narcotic goods....is to be disregarded" if certain conditions were met. Section 15X was inserted into the *Customs Act* following the High Court's decision in *Ridgeway v The Queen* (1995) 184 CLR 19, in which it was held that evidence of the importation of narcotics (in circumstances where that importation was conducted by law enforcement officers in breach of the law) should be excluded on public policy grounds. The proceedings against the plaintiff had been permanently stayed on the basis of *Ridgeway*. The prosecution applied to vacate the stay on the basis of the legislative amendment. The plaintiff challenged the validity of sec 15X as an attempt by the Parliament to usurp or impermissibly interfere with the judicial power of the Commonwealth.

59 A majority of the Court concluded that sec 15X was valid. Chief Justice Brennan accepted at [15] that Parliament "cannot direct the court as to the judgment or order which it might make in the exercise of a jurisdiction conferred upon it". The Chief Justice also identified, as an essential characteristic of a court, its "duty to act and to be seen to be acting impartially" (at [20]). The Chief Justice then observed at [20]: "We are not concerned with these characteristics in the present case, except in so far as the duty to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way. A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid."

60 The applicant relies on this passage in support of his argument that Part 13 impermissibly "directs" courts as to the exercise of their jurisdiction. However, the Chief

Justice was part of the majority which found sec 15X to be valid. That is despite the fact that the provision was in terms targeted at courts and directed them to "disregard" a particular matter in the exercise of their jurisdiction. At no stage did the Chief Justice, or any other member of the Court, suggest that provisions of the kind found in Part 13 would breach the Commonwealth separation of powers, let alone the *Kable* principle.

61 While it is not possible exhaustively to prescribe the circumstances in which a "direction" of the kind alleged here will breach the *Kable* principle, the authorities suggest that the impugned legislation must do something more than change the law to be applied by the courts. Relevant factors include whether the legislation is expressly or implicitly directed to courts; whether it is ad hominem in nature (in targeting particular individuals, particular conduct, and/or particular proceedings); and the extent to which it determines the outcome or key findings in those proceedings. Even accepting, as the applicant suggests at AS [38], that legislation need not meet every single one of these criteria in order to breach the *Kable* principle, in circumstances where Part 13 is not directed solely to courts, is not ad hominem in any sense and does not completely or necessarily determine the outcome of any legal proceedings, it can safely be concluded that it does not require courts to depart from the essential incidents of the judicial process in a manner that would breach the *Kable* principle.

62 For the same reasons, Part 13 does not control the exercise by this Court of its appellate jurisdiction under subsec 73(ii) of the *Constitution*: contra AS [43].

Reading down

63 To the extent that AS [44] and [45] suggest that Part 13 cannot be read down, that submission should be rejected. The applicant elsewhere accepts that his challenge is, and must be, limited to the effect of Part 13 on the respondent's findings of corrupt conduct under para 13(3)(a) of the *ICAC Act*, such that there is "no occasion in this litigation to pronounce upon the validity of Part 13 otherwise than in relation to findings of corrupt conduct": AS [16]. Should the Court conclude that Part 13 is invalid insofar as it purports to validate such findings, the declaration should be limited accordingly and the balance of Part 13 (ie insofar as it applies to other conduct) should be preserved.

Section 79 of Judiciary Act

64 It may be accepted that, because the applicant's proceedings in the Court of Appeal involve a question arising under subsec 184(1) of the *Corporations Act 2001* (Cth), the proceedings engage federal jurisdiction and Part 13 must apply via the medium of subsec 79(1) of the *Judiciary Act 1903* (Cth): AS [46]. However, that does not affect the outcome of the applicant's challenge to Part 13. The applicant's characterisation of Part 13 as

"directive" in nature still fails. Even if it were accepted, the authorities arising in the Commonwealth context discussed above indicate that Part 13, even if enacted as a law of the Commonwealth, would not offend Ch III of the *Constitution.*

Conclusion

65 The constitutional questions presented by the applicant simply do not arise. Part 13 should not be characterised as "directive" in nature; rather, it simply changes the law to be applied by the courts. In any event, Part 13 does not offend the *Kirk* principle, the *Kable* principle or any other principle arising from Ch III of the *Constitution*. The consequence of the applicant's argument, if accepted, would be that the Parliament of New South Wales could not legislate to validate administrative actions of the kind which are susceptible to declaratory relief but not to the writ of certiorari. That is a large proposition and one unsupported by authority or constitutional principle.

Part VII: Time estimate

66 The respondent would seek no more than 2 hours for the presentation of its oral argument.

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