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

B E T W E E N:

TRAVERS WILLIAM DUNCAN
Applicant

AND

INDEPENDENT COMMISSION AGAINST CORRUPTION
Respondent

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ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

20 **PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED**

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Applicant's submissions.

PART V: SUBMISSIONS

5. The issues in this proceeding are stated in the six propositions at [15] of the Applicant's submissions. The Attorney General submits as follows. *First*, if the ICAC finding, at the core of the Applicant's complaint, does not have legal effect or consequence, and can be neither valid nor invalid, the finding is not invalid and the
30 impugned provisions do not validate it. As such, the validity of the impugned provisions does not arise. *Second*, as the New South Wales Parliament can empower ICAC to make a finding that does not have a legal consequence, the Parliament has power to confer upon such a finding the status of being 'invalid', even if of no legal consequence, for the specific and sole purpose of legislatively

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validating it. *Third*, in the alternative to the first contention, the impugned provisions do not direct the Supreme Court in the exercise of judicial power or preclude the Court from exercising judicial power. Nothing in Part 13 of the *ICAC Act* precludes the Supreme Court from granting appropriate declaratory relief to the Applicant.

The Applicant's core contention of principle

6. Central to this appeal is the Applicant's contention that, because the finding by ICAC that the Applicant engaged in corrupt conduct "produces no legal consequence"[1], there is no "legal consequence of validity capable of attaching"[2] to it. The Applicant contends from this that a thing that cannot be valid or invalid cannot be validated[3]. This argument is advanced, principally, to seek to differentiate the validating provisions impugned here from validating legislation considered in *Nelungaloo*[4], *R v Humby*[5] and *AEU*[6]. The Applicant's argument carries with it a contention that, because the impugned legislation cannot validate the finding, it is to be, and can only be, characterised 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 of corrupt conduct"[7] and is thereby invalid.

7. The impugned provisions do not purport only to validate findings. "Anything done or purporting to have been done by the Commission" for the purpose of cl.35(1) of Part 13 of the *ICAC Act* is broadly defined in cl.34(2). So, even if cl.35(1) does not operate in respect of findings, it has other work to do.

8. As will be discussed, the Applicant's contention that the ICAC finding "produces no legal consequence" is orthodox, and not disputed in these submissions.

9. Critical, however, to this appeal is the consequence of this contention to the legal operation of the impugned provisions. This is best considered having regard to the findings made and the relief sought by the Applicant.

The relevant ICAC findings

10. The gravamen of the appeal is the ICAC finding stated at CRB 152[8]. The finding is expressed to be in terms of s.8(2) of the *ICAC Act*[9]. Any finding in terms of s.13(3)(a) of the *ICAC Act*, that particular conduct constitutes corrupt conduct, requires a finding or determination for the purpose of s.9(1). This is addressed in the ICAC report at CRB 151 and 152 in terms of s.192E(1)(b) of the *Crimes Act 1900* (NSW).

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[1] Applicant's submissions at [15(c)].
[2] Applicant's submissions at [29].
[3] This is expressed by the Applicant principally at [15(c)], [23] and [29] of his submissions.
[4] *Nelungaloo Pty Ltd v Commonwealth* [1947] HCA 58; (1947) 75 CLR 495.
[5] *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231.
[6] *Australian Education Union v Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117.
[7] Applicant's submissions at [15(c)-(e)].
[8] CRB 152, l/h, line 40 to end.
[9] CRB 151 l/h column.

11. Obviously enough, the finding of corrupt conduct in respect of the Applicant must be understood in its totality. ICAC found that the conduct expressed at (a)-(d) at CRB 151 and 152 occurred, and that this conduct was intended to deceive relevant NSW government officers[10]. It also found, for the purpose of s.9(1) of the *ICAC Act* and in terms of s.192E(1)(b) of the *Crimes Act 1900*, that if the facts were proved it could be found that the Applicant committed the offence of obtaining a financial advantage by deception.

12. There would appear to be no issue in this proceeding that ICAC had power to make the factual findings that the conduct expressed at (a)-(d) at CRB 151 and 152 occurred, and that this conduct was intended to deceive relevant NSW government officers. ICAC had this power, even if ICAC did not make a consequential finding or form a consequential opinion that such conduct constitutes "corrupt conduct". That ICAC has such power emerges, *inter alia*, from s.13(3)(a) of the *ICAC Act* which empowers the making of findings and forming of opinions whether or not related to corrupt conduct.

The effect of *Cunneen*

13. It is common ground between the parties[11] that the ICAC conclusion that the conduct of the Applicant found to have occurred constitutes "corrupt conduct" was premised upon a construction of the term "adversely affect" in s.8(2) of the *ICAC Act* that was held in *Independent Commission Against Corruption v Cunneen*[12] to be incorrect. In making the ultimate finding in respect of the Applicant ICAC erred in law or proceeded upon an erroneous construction of the *ICAC Act*.

14. In *Cunneen* the same error of law arose at a different stage of an ICAC process. In *Cunneen* the principal order of the Court of Appeal of the Supreme Court of New South Wales, from which the appeal to this Court was simply dismissed[13], was a declaration that; "... the Commission has no power to investigate the allegation involving the applicants identified in the summons issued to the applicants dated 27 October 2014"[14]. Following *Greiner v Independent Commission Against Corruption*[15] and *Ainsworth v Criminal Justice Commission*[16] it must be supposed that declaratory orders, as opposed to ordering prerogative relief, were made.

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[10] CRB 151 and 152.

[11] See Applicant's submissions at [7]; Respondent's submissions at [8].

[12] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475.

[13] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 at 490 [72] (French CJ, Hayne, Kiefel and Nettle JJ).

[14] *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [124] (Basten JA); [207] (Ward JA).

[15] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 130. Applied by McDougall J below; see CRB 198.

[16] *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ); 595 (Brennan J). Such reasoning has been adopted and applied by the Court of Appeal of the Supreme Court of Western Australia in *Cox v Corruption and Crime Commission* [2008] WASCA 199 at [85] (Martin CJ); [140] (Steytler P).

The character of the relevant ICAC findings here, following *Cunneen*

15. In this proceeding the Applicant does not seek relief in respect of the primary findings - that the conduct expressed at (a)-(d) at CRB 151 and 152 occurred, and that it was intended to deceive relevant NSW government officers. Indeed, the declaration sought in terms of 4.2 of the Orders Sought in the Notice of Appeal[17], can only be understood as accepting these primary findings.

16. For the reasons explained by Gleeson CJ in *Greiner*[18], in this matter, even though ICAC has proceeded upon an erroneous construction of the *ICAC Act*, prerogative relief does not lie to quash any finding. To apply the reasoning and terminology of this Court in *Ainsworth*; such findings have no legal effect and carry no legal consequences, direct or indirect[19]. The *ICAC Act* in this respect reflects the legislation considered in *Ainsworth*.

17. But, as *Ainsworth* decides; even if legislation that empowers the making of findings or forming of opinions that carry no legal consequence, and so cannot be quashed, Courts have power to make declarations in respect of, or arising from, such findings. In *Ainsworth* the declaration made was that; "... in reporting adversely to the Applicants in its Report on Gaming Machine Concerns and Regulations, the Commission failed to observe the requirements of procedural fairness"[20]. The Court did not declare such report, or any finding in it, to be "invalid". No doubt the declaration made in *Ainsworth* had utility because the Commission would have, in response to it, proceeded to accord the applicants procedural fairness. Similarly, the declaration made in *Balog v Independent Commission Against Corruption*[21] makes no reference to the validity of findings. As noted, the declaration made in *Cunneen* was that; "... the Commission has no power to investigate the allegation involving the applicants identified in the summons issued to the applicants dated 27 October 2014"[22]. In *Greiner* the declarations made were "... the determination by the defendant, in the report... that the plaintiff had engaged in corrupt conduct within the meaning of the *ICAC Act 1988* was made without or in excess of jurisdiction, and is a nullity"; and "... on the facts as found in the said report, the said determination was wrong in law"[23].

The intrusion of the nomenclature of 'invalidity' and 'validity'

18. That an ICAC finding of corrupt conduct cannot be quashed requires an understanding of what the Applicant sought at trial and now seeks in this appeal. In the Orders Sought in the Notice of Appeal the Applicant does not seek a declaration

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[17] CRB 280.

[18] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 130. Applied by McDougall J below; see CRB 198.

[19] *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 580 (Mason CJ, Dawson, Toohey and Gaudron JJ).

[20] *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 597.

[21] *Balog v Independent Commission Against Corruption* [1990] HCA 28; (1990) 169 CLR 625 at 636 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

[22] *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [124] (Basten JA); [207] (Ward JA).

[23] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 148-149 (Gleeson CJ); 193 (Priestley JA concurring).

in terms of the invalidity of any finding. In his submissions the Applicant asserts that the relevant finding is "invalid"[24].

19. It is unclear what is meant by the notion of 'an invalid finding'. This is particularly so where s.13(3)(a) of the *ICAC Act* empowers ICAC to make findings, whether or not they relate to corrupt conduct. Similarly, it is not obvious how any finding could be void or avoided[25]. As observed by Gaudron and Gummow JJ and Hayne J in *Minister for Immigration and Multicultural Affairs v Bhardwaj*, the ascription of terms such as "invalid", "void", "voidable" and "nullity" as the consequence of error by executive bodies often obscures rather than clarifies[26].

10 20. It must be supposed that the terminology of 'validity' in the Applicant's submissions in this appeal and the focus upon notions of invalidity and validity derives from the technique in the impugned provisions; of 'validation' or 'deeming of validity'[27]. The nomenclature of 'validity' is likely also invited by the definition of that which is 'validated' by the impugned provisions of "anything done or purporting to have been done", which includes, "any finding"[28].

21. But, reference to the validity of findings, or conclusions derived from primary findings, is problematic. As the Applicant explains[29], the relief sought reflects that ordered in *Greiner*[30] and in *Greiner* nothing was declared to be 'invalid'.

22. Logic suggests that for a thing to be validated, it must have been invalid. This logic
20 has a consequence when the impugned cl.35(1) is construed, in particular having regard to the Applicant's primary contention of principle.

23. This principle can be accepted - because the finding by ICAC that the Applicant engaged in corrupt conduct produces no legal consequence, there is no legal

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[24] See Applicant's submissions at [7]; [15(a)].

[25] This much is accepted by the Applicant; see Applicant's submissions at [6]. For this reason, the words in the declarations sought by the Applicant in respect of "nullity" are best ignored.

[26] *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 at 612-613 [45]-[46] (Gaudron and Gummow JJ); 643 [144] (Hayne J). See also *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364 at 369-370 [10] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Swansson v R* [2007] NSWCCA 67; (2007) 69 NSWLR 406 at 415 [60]-[69] (Spigelman CJ); *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* [2010] HCA 2; (2010) 240 CLR 409 at 429 [61] (Hayne J). See generally, F C Hutley, 'The Cult of Nullification in English Law' (1978) 52 *Australian Law Journal* 8. This obscurity has also been recognised by the Court of Appeal in New Zealand, by making reference, as did Hayne J in *Bhardwaj*, to the work of Sir William Wade: see *Reid v Rowley* [1977] 2 NZLR 472 at 478; H W R Wade, 'Unlawful Administrative Action: Void or Voidable? Part I' (1967) 83 *Law Quarterly Review* 499 and 'Part II' (1968) 84 *Law Quarterly Review* 95. In festschrift (respectively) for Sir William Wade and Professor Enid Campbell (whose paper 'Unconstitutionality and its Consequences' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (The Federation Press, 1994) 90, is important in this respect) these themes were re-visited. In respect of Sir William Wade, see Christopher Forsyth, '"The Metaphysic of Nullity" – Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Public Law in Honour of Sir William Wade QC* (Clarendon Press, 1998) 141; in respect of Professor Enid Campbell, see Mark Aronson, 'Nullity' in Matthew Groves (ed), *Law and Government in Australia* (The Federation Press, 2005) 139.

[27] *ICAC Act* Part 13 cl.35(1).

[28] *ICAC Act* Part 13 cl.34(2)(b).

[29] See Applicant's submissions at [6].

[30] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 148-149.

consequence of validity capable of attaching to it. As noted, the Applicant contends from this that a thing that cannot be valid or invalid cannot be validated[31], and so (the Applicant contends) the impugned provisions can only be characterised as a direction to the Supreme Court as to the manner of the exercise of its judicial power[32].

24. But, the contention that a thing that has no legal consequence can be neither valid nor invalid and so cannot be validated invites a prior question of construction; whether cl.35(1) has any operation in respect of findings at all.

25. This is perhaps better expressed as the proposition – if a thing is not (because it cannot be) invalid, it cannot be validated. In terms of cl.35(1) of Part 13 of the *ICAC Act*, the finding that the Applicant engaged in corrupt conduct would not have been "validly done" if the Commission had not proceeded upon an erroneous construction of the term "adversely affect" in s.8(2) of the *ICAC Act*. This is because any finding could be neither validly nor invalidly done.

The consequence of this to construction or operation of the impugned provisions

26. If a thing (X) is not and cannot be invalid and thereby cannot be validated; and if cl.35(1) can only validate, cl.35(1) cannot validate X. On this construction or understanding of cl.35(1), the finding in respect of the Applicant is unaffected by cl.35(1).

27. On this understanding, no issue as to the validity of the impugned provisions actually arises.

The confounding factor of the relief that the Applicant seeks

28. The declaration sought in terms of 4.1 of the Orders Sought in the Notice of Appeal, and similarly, the declaration in terms of Order 4(a) at [51] of the Applicant's submissions, responds to the characterisation of the conduct expressed at (a)-(d) at CRB 151 and 152 as "corrupt conduct". A declaration in terms of 4.1 or Order 4(a) would not affect the findings made by ICAC that the conduct expressed at (a)-(d) at CRB 151 and 152 occurred and that this conduct was intended to deceive relevant NSW government officers.

29. The declaration sought in terms of 4.3 of the Orders Sought in the Notice of Appeal relates to the finding or determination for the purpose of s.9(1) of the *ICAC Act* in respect of s.192E(1)(b) of the *Crimes Act 1900*. The form of this declaration pre-supposes that the Applicant does not contest or seek relief in respect of the primary findings that the conduct expressed at (a)-(d) at CRB 151 and 152 occurred, and that this conduct was intended to deceive relevant NSW government officers.

30. As noted, the declaration sought in terms of 4.2 of the Orders Sought in the Notice of Appeal[33], can only be understood as accepting these primary findings.

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[31] This is expressed by the Applicant principally at [15(c)], [23] and [29] of his submissions.
[32] Applicant's submissions at [15(c)-(e)].
[33] CRB 280.

31. But none of the declarations sought are premised upon the 'invalidity' of any finding.

32. There is any number of declarations that could be made in the circumstances of this matter, that would be unaffected by the impugned provisions. A separate question is, of course, whether a Court would grant declaratory relief in exercise of the Court's discretion, having regard in particular to the unchallenged primary findings[34].

33. But, a declaration (for instance) that '*the finding by the Commission [in the relevant report], at the time that it was made, that the Applicant had engaged in corrupt conduct proceeded on an error of law*' would be correct. Such a declaration would not be affected by cl.35(1). Similarly, a declaration (mirroring that sought in 4.1 of the Orders Sought in the Notice of Appeal) that '*the finding by the Commission [in the relevant report], that the Applicant had engaged in corrupt conduct was made in excess of jurisdiction*', would also be correct, and unaffected by cl.35(1). Similarly, a declaration in the terms of Order 4(a) at [51] of the Applicant's submissions would be correct and unaffected by cl.35(1). This is because, in terms of cl.35(1), even though the finding was made in excess of jurisdiction it was not invalidly done and would not have been validly done even if not made in excess of jurisdiction.

34. Where, as here, a person does not seek a declaration that a finding was invalid, the impugned provision is not engaged. This is so even though the definition of "anything done or purporting to have been done" in cl.34(2)(b) includes "any finding".

The alternative to this – if cl.35(1) has an operation

35. No issue is raised in these proceedings as to the capacity of a State Parliament to enact validating legislation *per se*. Of course, validating legislation has a long history, recognised in some of the core Australian constitutional instruments[35] and in s.105A(2) of the *Constitution*. The usual issue of controversy with such legislation, its retrospectivity (or retroactivity)[36], is not raised here.

36. Central to this appeal is the contention that this impugned legislation differs in its effect and operation from legislation, the operation and effect of which was considered in *Nelungaloo*, *R v Humby* and *AEU*[37]. The basis of differentiation[38] derives from Applicant's core contention; that, unlike validating legislation considered in these other cases, the finding here of corrupt conduct produces no legal consequence and so cannot be validated. From this it is reasoned that the

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[34] That is; the conduct expressed at (a)-(d) at CRB 151 and 152 occurred, and that this conduct was intended to deceive relevant NSW government officers.

[35] The *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict c 63 and the *Australian States Constitution Act 1907* (Imp) 7 Edw 7, c 7, s.2.

[36] For broad discussions of such controversies, see Andrew Palmer and Charles Samford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22 *Federal Law Review* 217; Ben Juratowich, *Retroactivity and the Common Law* (Hart Publishing, 2008) at 81-86.

[37] See Applicant's submissions at [23]; [24]; [29].

[38] The basis of differentiation is stated by the Applicant principally at [15(c)], [23] and [29] of his submissions.

impugned legislation is not properly characterised as validating, but is a "direction to the judicature that it is neither to pronounce upon nor to grant relief on the basis of the invalidity of findings of corrupt conduct"[39], and thereby invalid[40]. Invalidity is posited on the bases of impermissible Parliamentary direction to a Court and on the *Kirk* ground; that the impugned provisions "deprive the Supreme Court of the power to grant relief ... on the basis of jurisdictional error"[41].

37. Although the Applicant's argument is not put as one of legislative power, it is instructive to briefly consider it. If a Parliament has power to enact Act A empowering a body to decide X or do X, it has power to validate X (and the consequences of X) where Act A does not in fact empower deciding or doing X. Just as a power to legislate for X logically includes a power to repeal enactment of X[42], a power to legislate for X includes a power to validate X, and its consequences. To the truism expressed by Brennan CJ and McHugh J in *Kartinyeri v Commonwealth* that, "the power to make laws includes the power to unmake them"[43] can be added a further truism, that the power to make laws includes the power to validate them, and the (otherwise invalid) consequences .

38. If the New South Wales Parliament can validly enact legislation which empowers ICAC to make findings, form opinions[44] and formulate recommendations[45] that "produce no legal consequence"[46], as a matter of logic it is difficult to conceive of a deficit of power or constitutional restriction to validate such finding, opinion or recommendation (and their consequences), whether of legal consequence or not[47].

39. This much the Applicant may accept. But, as stated, the Applicant's assertion as to the invalidity of cl.35(1) is not put as a deficit of legislative power, but rather that cl.35(1) infringes Chapter III.

40. The Applicant's Chapter III contentions proceed on an erroneous characterisation of cl.35(1).

The Applicant's two errors of characterisation of the impugned provisions

41. The Applicant reasons that a thing that cannot be valid or invalid cannot be validated and so here, because the impugned provisions cannot validate the finding, they are to be, and can only be, characterised as a "direction to the judicature that it

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[39] Applicant's submissions at [15(d)].
[40] Applicant's submissions at [15(e)].
[41] Applicant's submissions at [15(e)(i)].
[42] As to which see *Kartinyeri v Commonwealth* [1998] HCA 22; (1998) 195 CLR 337 at 354-356 (Brennan CJ and McHugh J); 368-369 [47] (Gaudron J).
[43] *Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337 at 355 [13].
[44] In terms of s.13(3)(a) of the *ICAC Act*.
[45] In terms of s.13(3)(b) of the *ICAC Act*.
[46] Applicant's submissions at [15(c)].
[47] In *R v Humby* none of their Honours were troubled with the contention that the Parliament lacked power under s.51(xxii) of the *Constitution* to enact the legislation; see *R v Humby; Ex parte Rooney* [1973] HCA 63; (1973) 129 CLR 231 at 238-239 (McTiernan J); 240 (Gibbs J); 243-244 (Stephen J); 248 (Mason J).

is neither to pronounce upon nor to grant relief on the basis of the invalidity of findings of corrupt conduct"[48] and are thereby invalid.

42. Embedded within this contention are two errors of characterisation. The first error is really a logical leap from the premise that because the impugned provisions are not validating they can only be characterised as directing a Court to do something or precluding it from doing anything. The second error is characterisation of the impugned provisions as directing a Court to do something or precluding it from doing anything.

43. The first error of characterisation emerges from an aspect of how the Applicant gets to any issue of Chapter III.

The first error of characterisation

44. The Applicant reasons from his premise that because the finding of corrupt conduct produces no legal consequence; (first) there can be no validation of a legal consequence; (second) so the impugned provisions are not properly characterised as validating; (third) because the impugned provisions cannot be so characterised their proper characterisation is 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 of corrupt conduct"[49].

45. An alternative to this is as follows. Even if a finding of corrupt conduct produces no legal consequence, cl.35(1) can be understood to validate the finding – even though it had, and after validation, has no legal consequence. This is to be understood as follows. If, as is undoubted, the New South Wales Parliament can empower ICAC to make a finding that does not have a legal consequence, the Parliament has power to confer upon such a finding the status of being 'valid', even if of no legal consequence. If, as a general proposition, this is too broad and might be thought to engage judicial power, there is a narrower proposition.

46. If, as is undoubted, the New South Wales Parliament can empower ICAC to make a finding that does not have a legal consequence, the Parliament has power to confer upon such a finding the status of being 'invalid', even if of no legal consequence, for the specific and sole purpose of legislatively validating such a finding.

47. It must be supposed that such an understanding of the effect and operation of cl.35(1) is in accordance with its obvious legislative purpose.

48. If these alternatives are open, it is not inevitable that the impugned provisions can only be characterised as a direction to the Court.

The second error – whether cl.35(1) directs anything or denies any power of the Court

49. As noted, the Applicant reasons from his premise that the impugned provisions cannot properly be characterised as validating to a characterisation that they are a

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[48] Applicant's submissions at [15(c)-(e)].
[49] Applicant's submissions at [15(d)].

"direction to the judicature that it is neither to pronounce upon nor to grant relief on the basis of the invalidity of findings of corrupt conduct"[50].

50. Whether cl .35(1) is properly characterised, or to be understood as operating, as an impermissible legislative direction to the Court or denies it power, is best tested against an understanding of what cl.35(1) precludes and permits.

51. Nothing in Part 13 of the *ICAC Act* precludes the Supreme Court from granting declaratory relief to the Applicant. The principle derived from *Kirk*[51] is not engaged. There is any number of declarations that the Court could make in respect of the findings made in respect of the Applicant.

52. To those noted above[52], is the following, which could be made even if a finding could be invalid; '*the finding by the Commission [in the relevant report] that the Applicant had engaged in corrupt conduct proceeded on an error of law, was made in excess of jurisdiction of the Commission, was invalid when made but has been validated by [Part 13]*'.

53. In respect of the Applicant's *Kirk* contention, it might be supposed that, by reason of Part 13, a Court could not make the following declaration; '*the finding by the Commission [in the relevant report] that [the Applicant] had engaged in corrupt conduct is invalid*'.

54. There are a number of things to say about this. *First*, the Applicant does not seek such a declaration. *Second*, had he done so, this does not, in terms of *Kirk*, "deprive the Supreme Court of the power to grant relief ... on the basis of jurisdictional error". As illustrated in the preceding paragraphs, there is nothing to preclude the Court from granting relief by way of, suitable, declaration. *Third*, such a declaration is not only not sought by the Applicant, but is not one that the Applicant would seek because it is contrary to the Applicant's core contention that the finding is incapable of validation. If it is not capable of validation it is impossible to conceive of how it was once invalid.

55. The Intervener makes no submission as to whether, in accordance with the applicable law in relation to the making of declarations[53], any declaration should be made. That said, in this matter, it is difficult to conceive of a Court, in exercise of the discretion that it has, making a declaration that '*the finding that the Applicant had engaged in corrupt conduct is invalid*' where the Applicant does not challenge the prior ICAC findings that the conduct expressed at (a)-(d) at CRB 151 and 152 occurred, and that it was intended to deceive relevant NSW government officers.

The Applicant's invocation of s.79 of the *Judiciary Act 1903*

56. It need not be determined whether this matter is in federal jurisdiction by reason only of the reference in the ICAC report to s.184(1) of the *Corporations Act 2001*

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[50] Applicant's submissions at [15(d)].
[51] *Kirk v Industrial Court of New South Wales* [2010] HCA 1, (2010) 239 CLR 531.
[52] See [33].
[53] With respect, as comprehensive a general statement as any is that of Lockhart J in *Aussie Airlines Australia v Australian Airlines* (1996) 68 FCR 406 at 413-414.

(Cth). For the reasons stated by the Respondent[54], it matters not whether the matter is one in federal or non-federal jurisdiction.

Whether *Nelungaloo*, *R v Humby* and *AEU* can be distinguished

57. As noted, the Applicant seeks to differentiate the impugned provisions of the *ICAC Act* from forms of validating legislation considered by this Court in *Nelungaloo*, *R v Humby* and *AEU*. The basis of differentiation is contended as being that, in those cases, the invalidly done thing had legal consequences to which validity could attach[55]. Such a difference between the provisions impugned here and those in considered in *Nelungaloo*, *R v Humby* and *AEU* can be accepted. The real issue, however, is whether *Nelungaloo*, *R v Humby* and *AEU*, or indeed any other authority, decides that only validating legislation that creates or alters legal rights and duties is valid.

58. None of *Nelungaloo*, *R v Humby* or *AEU* is authority for the proposition that creation of a 'legal consequence' is a prerequisite of the validity of validating legislation. Validating legislation can work in several ways. One was applied in *R v Humby*, *Nelungaloo*, *Re Macks; Ex parte Saint*[56], *Residual Assoc Corp v Spalvins*[57], and in the judgment of French CJ, Crennan and Kiefel JJ in *AEU*[58]. The historical fact of an invalidly done thing is preserved. So the thing done was and remains invalid, but the legal consequences flowing from it are validated, in the sense that they are declared to be and always to have been valid[59].

59. Another means of statutory validation is that often times referred to as an 'Indemnity Act'[60]. What was once an unlawful act (say a thing done pursuant to invalid legislation) is declared to be valid and lawful. The validating legislation might be thought to validate the first legislation and validate the consequences of it, including things done[61].

60. A third means is amendment of the principal law upon which the invalid act was purportedly made, where the amendment is expressed to apply retrospectively.

61. Interesting questions might arise as to the differences between particular means of legislative validation[62]. If so, none arise here.

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[54] Respondent's submissions at [64].
[55] Applicant's submissions at [29].
[56] [2000] HCA 62; (2000) 204 CLR 158.
[57] [2000] HCA 33; (2000) 202 CLR 629.
[58] [2012] HCA 19; (2012) 246 CLR 117 at 137 [36].
[59] A description of this is 'non-retrospective interpretation': see Will Bateman, 'Legislating against constitutional invalidity: constitutional deeming legislation' (2012) 34 *Sydney Law Review* 721 at 726.
[60] See Will Bateman, 'Legislating against constitutional invalidity: constitutional deeming legislation' (2012) 34 *Sydney Law Review* 721 at 738-740.
[61] *Haskins v The Commonwealth of Australia* [2011] HCA 28; (2011) 244 CLR 22 at 38-40. That method may also have been recognised by Gummow, Hayne and Bell JJ in *AEU* [2012] HCA 19; (2012) 246 CLR 117 at 154 [90] in treating the validating legislation as conferring the status of valid registration from the time the organisation was first purportedly entered on the register.
[62] *Haskins v Commonwealth* [2011] HCA 28; (2011) 244 CLR 22 at 53 [85] (Heydon J). Similar issues may arise with the *de facto* officers doctrine.

PART VI: LENGTH OF ORAL ARGUMENT

62. It is estimated that the oral argument for the Attorney General for Western Australia will take 30 minutes.

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