IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S101 of 2015

BETWEEN

TRAVERS WILLIAM DUNCAN
Applicant

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AND

INDEPENDENT COMMISSION AGAINST CORRUPTION
Respondent

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APPLICANT'S SUBMISSIONS

Dated: 19 June 2015
Filed on behalf of the Applicant by:
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Part I: Publication of Submissions

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

Part II: Issues

2. The issues that arise in these proceedings are as follows:

   (a) Is Part 13 of Schedule 4 to the *Independent Commission Against Corruption Act 1988* (NSW) ("**the ICAC Act**") invalid on the basis that it purports, in effect, to oust the power of the Supreme Court of New South Wales to grant relief for a specific category of jurisdictional error on the part of the Respondent ("**ICAC**") – namely, acting on the assumption that the definition of "corrupt conduct" in s 8(2) of the ICAC Act extends to conduct that adversely affects, or that could adversely affect, the efficacy, as distinct from the probity, of an exercise of official functions?

   (b) Is Part 13 of Schedule 4 to the ICAC Act otherwise invalid as an impermissible command or direction by the Parliament of New South Wales to:

      (i) the courts of that State; and

      (ii) any court to which decisions of such courts may be appealed against, including this Court,

   prohibiting them from making orders reflecting the legal reality that ICAC did not have the power to make findings of corrupt conduct, where such conduct could only have adversely affected the efficacy, as distinct from the probity, of an exercise of official functions?

   (c) Does the Constitution "otherwise provide" within the meaning of s 79(1) of the *Judiciary Act 1903* (Cth) so as to preclude the application of cl 35 of Schedule 4 to the ICAC Act in proceedings in federal jurisdiction?

   (d) If the answer to any of (a) to (c) above is "yes", did ICAC have jurisdiction to find, as recorded in its report entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others" ("**the Report**"), that the Applicant had engaged in corrupt conduct within the meaning of s 8(2) of the ICAC Act?

Part III: Notices under section 78B of the *Judiciary Act 1903* (Cth)

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) have been served.

Part IV: Material facts

4. On 12 November 2012, ICAC commenced a public inquiry in respect of an investigation styled "Operation Jasper" (Cause Removed Book ("**CRB**"), p 18). That inquiry concerned, amongst other things, the circumstances in which a mining exploration licence in respect of the area known as Mount Penny had been granted, in mid-2009, in favour of Cascade Coal Pty Ltd ("**Cascade Coal**"), of which, at the time

of that grant, the Applicant was a director and in which he remains a substantial shareholder.

5. In July 2013, following the conclusion of that public inquiry, ICAC provided copies of the Report, which recorded its findings in relation to that investigation, to the Presiding Officers of the Legislative Assembly and the Legislative Council (CRB, p 5). The Report contained findings by ICAC that various directors and shareholders of Cascade Coal, including the Applicant, had engaged in corrupt conduct within the meaning of the ICAC Act (CRB, pp 150-152). Those findings did not involve any assertion that the Applicant had participated in, or even had knowledge of, what was found to be a corrupt agreement between the former Minister for Mineral Resources, Mr Ian Macdonald, and members of the Obeid family concerning the creation of the Mount Penny tenement. Nor was the Applicant found to have acted corruptly in relation to the conduct and re-opening of the expressions of interest process by which the Mount Penny exploration licence was awarded.

6. The Applicant commenced proceedings in the Supreme Court of New South Wales, seeking principally a declaration that the finding that he had engaged in corrupt conduct was made without or in excess of jurisdiction, and was therefore a nullity. The terms of that declaration, which are set out in prayer 4.1 in the Applicant's Further Amended Draft Notice of Appeal (CRB p 280), have their provenance in the form of orders proposed by Gleeson CJ, and ultimately made by the New South Wales Court of Appeal, in *Greiner v Independent Commission Against Corruption.*[1] Nonetheless, it is worth observing that the word "nullity" may be mere surplusage in this context, given that:

   (a) as will be developed below, a finding of corrupt conduct by ICAC, even if valid, does not produce any legal consequence, in the sense of creating or otherwise affecting legal rights or obligations; and

   (b) as Dixon J remarked in *Posner v Collector for Inter-state Destitute Persons (Vic)*,[2] the term "nullity" is often used to describe that which is "entirely and absolutely devoid of legal effect."

7. There is no dispute that ICAC's finding against the Applicant proceeded upon the premise that his alleged conduct adversely affected, or could have adversely affected, what was described in the majority reasons in *Independent Commission Against Corruption v Cunneen*[3] (***"Cunneen"***) as the "efficacy", rather than the "probity", of the exercise of official functions by a public official or public authority – in this case, the official or authority charged with determining whether a mining lease should be granted in respect of Mount Penny. That finding was thus invalid, and as will emerge later in these submissions, the historical fact of that invalidity was neither altered nor erased by the legislation impugned in these proceedings. Nonetheless, in a judgment published on 29 July 2014, well before the litigation in *Cunneen* had been commenced, let alone decided, the primary judge held ICAC's finding against the Applicant to be valid and dismissed his claim for relief (CRB, p 260).

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[1] (1992) 28 NSWLR 125 at 148-149.
[2] (1947) 74 CLR 461 at 483.
[3] [2015] HCA 14 at [2].

8. By a summons filed in the Court of Appeal on 14 August 2014, the Applicant sought leave to appeal against his Honour's decision (CRB, pp 266-267).[4] In response, ICAC has indicated its intention to rely upon a notice of contention filed 3 October 2014, challenging the primary judge's rejection of that part of its reasoning in the Report which involved an assertion that the Applicant had, by his alleged conduct, committed an offence against s 184(1) of the *Corporations Act 2001* (Cth) (CRB, pp 271-272).

9. The proceedings in the Court of Appeal were thus being conducted in federal jurisdiction.

10. On 15 April 2015, this Court delivered judgment in *Cunneen*.

11. The Applicant then sought to have the Court of Appeal pronounce final orders in respect of his appeal against the decision of the primary judge on the basis that the reasoning in *Cunneen* was fatal to ICAC's position. However, on 6 May 2015, before the Court of Appeal was able to make those orders, the New South Wales Parliament passed, and Royal Assent was given to, the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) ("**the Amending Act**"). That statute inserted into Schedule 4 to the ICAC Act a new Part 13, which provides, in cl 35(1), that "[a]nything done or purporting to have been done by [ICAC] before 15 April 2015 that would have been validly done if corrupt conduct for the purposes of this Act included relevant conduct is taken to have been, and always to have been, validly done." The expression "relevant conduct" is defined in cl 34(1) to mean "conduct that would be corrupt conduct for the purposes of this Act if the reference in section 8(2) to conduct that adversely affects, or could adversely affect, the exercise of official functions included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions." No less importantly, cl 34(2)(b) provides that a reference in Part 13 to anything done or purporting to have been done by ICAC includes a reference to "any investigation, examination, inquiry, hearing, *finding*, referral, recommendation or other *report* conducted or made by [ICAC] or an officer of [ICAC]" (emphasis added).

12. On 20 May 2015, the Applicant, with the consent of ICAC, provided to the Court of Appeal a further amended draft notice of appeal for inclusion in the White Folder that had previously been filed in that Court (CRB, p 321). This document foreshadowed a challenge to the validity of Part 13 of Schedule 4 to the ICAC Act on the grounds sought presently to be agitated.

13. Thereafter, on 25 May 2015, Gageler J ordered the removal into this Court, pursuant to s 40(1) of the *Judiciary Act 1903* (Cth), of so much of the proceedings in the Court of Appeal that concerned that challenge.

Part V: Reasons for judgment in the Court below

14. The reasons for judgment below are reported in *Duncan v Independent Commission Against Corruption* (2014) 311 ALR 750; [2014] NSWSC 1018.

[4] Given that the Applicant sought only declaratory relief in the proceedings at first instance, leave to appeal is required pursuant to s 101(2)(r) of the *Supreme Court Act 1970* (NSW).

Part VI: Applicant's Argument

15. Underpinning the Applicant's case are the following propositions, each of which will be developed in turn:

(a) having regard to what was decided in *Cunneen*, ICAC's finding that the Applicant had engaged in corrupt conduct within the meaning of s 8(2) of the ICAC Act was invalid. Given ICAC does not, for the most part, dispute the matters set out in the Applicant's summary of argument on the removal application at [4]-[14] (CRB, pp 291-293, 309), this would appear to be uncontroversial;

(b) Part 13 of Schedule 4 to the ICAC Act does not purport retrospectively to amend s 8(2) so as to confer validity upon ICAC's finding against the Applicant. On the contrary, the operation of Part 13 with respect to that finding assumes, and is predicated upon, its being invalid;

(c) a finding of corrupt conduct under the ICAC Act produces no legal consequences, as a result of which Part 13 of Schedule 4 cannot be understood as attaching the legal consequences of a valid finding to an invalid finding by ICAC. That is, unlike the legislation considered in cases such as *Nelungaloo Pty Ltd v The Commonwealth*[5] and *Australian Education Union v Fair Work Australia*,[6] Part 13 does not use an act or event, which lacked legal authorisation, as a reference point for declaring the rights or obligations of any person to be the same as if that act or event had been legally authorised;

(d) it follows that in so far as it purports to "validate" any such finding, Part 13 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 of corrupt conduct which were made before 15 April 2015 and proceeded upon the construction of s 8(2) of the ICAC Act that was rejected in *Cunneen*;

(e) in so directing the Supreme Court of New South Wales as to the manner and outcome of the exercise of its jurisdiction, Part 13:

(i) purports to deprive the Supreme Court of the power to grant relief or to make orders against ICAC on the basis of the jurisdictional error identified in *Cunneen*; and

(ii) further, or in the alternative, requires the Supreme Court to act otherwise than in accordance with the judicial process, and thus so substantially impairs its institutional integrity as to be incompatible with the Court's role as a repository of federal jurisdiction; and

(f) bearing in mind that the Applicant's appeal has engaged federal jurisdiction, to the extent that Part 13 is a valid law of New South Wales, it is incapable of being "picked up" and applied as surrogate federal law pursuant to s 79(1) of the *Judiciary Act*.

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[5] (1948) 75 CLR 495.
[6] (2012) 246 CLR 117.

16. It should be observed that quite apart from the power to make findings of corrupt conduct, the ICAC Act confers upon ICAC or its officers various powers, the exercise of which would be apt to produce legal consequences. These include the power to compel the production of documents (s 22), to summon witnesses to attend before a compulsory examination or public inquiry (s 35) and to issue search warrants (s 40). These proceedings do not raise for consideration whether Part 13 of Schedule 4 to the ICAC Act can be taken as attaching the legal consequences of validity to any purported exercise of those powers, to the extent that they might have been affected by the decision in *Cunneen*. Solely at issue is the operation of Part 13 in respect of findings, to which, as noted above, reference is explicitly made in cl 34(2)(b) of Schedule 4. There is accordingly no occasion in this litigation to pronounce upon the validity of Part 13 otherwise than in relation to findings of corrupt conduct.

The effect of cl 35(1) of Schedule 4 to the ICAC Act

17. Part 13 of Schedule 4 cannot be understood otherwise than in the context of the ICAC Act as a whole. Sections 8 and 9, which together give content to the concept of "corrupt conduct", were considered at length in *Cunneen*. As a result, it is unnecessary to expound upon those provisions beyond noting that Part 13 of Schedule 4 does not purport in any way to amend them. Indeed, the definition of "relevant conduct" in cl 34 of that Schedule proceeds upon the premise that conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of an exercise of official functions is simply not caught by the notion of adverse affectation, as it appears in s 8(2). Likewise, implicit in cl 35(1) is an acceptance that ICAC's actions, to the extent that they involved an assumption contrary to what was decided in *Cunneen* concerning the proper construction of s 8(2), were invalid. So much must follow from the use of the expression "[a]nything done or purporting to have been done ... that would have been valid".

18. Section 13 of the ICAC Act sets out the principal functions of ICAC. These include:

    (a) the investigation of any allegation or complaint that, or any circumstances which, in ICAC's opinion, imply that corrupt conduct may have occurred (s 13(1)(a)); and

    (b) the power to make findings and to form opinions, on the basis of the results of ICAC's investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct (s 13(3)(a)).

19. The scope of this last power is qualified by the circumstance that ICAC is prohibited, by the combination of ss 13(4) and 74B, from making a finding or expressing an opinion in its reports that a specified person is guilty of or has committed either a criminal offence or a disciplinary offence, as defined in s 9.

20. Reference should be made at this point to s 74, pursuant to which ICAC:

    (a) is authorised to prepare reports, to be furnished to the Presiding Officer of each House of the New South Wales Parliament, in relation to any matter that has been or is the subject of an investigation; and

(b) is obliged to prepare such reports in relation to matters referred to it by both Houses of Parliament and matters in respect of which it has conducted a public inquiry.

21. Section 74A then makes provision for the contents of such reports, particularly in so far as they relate to an "affected" person, defined relevantly in s 74A(3) to mean a person "against whom, in [ICAC's] opinion, substantial allegations have been made in the course of or in connection with the investigation concerned". Specifically, pursuant to s 74A(2), each report prepared by ICAC is required to include, in respect of any "affected" person, a statement as to whether or not in all the circumstances ICAC is of the opinion that consideration should be given to:

(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence;

(b) the taking of action against that person for a specified disciplinary offence; or

(c) the taking of action against the person as public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

22. Notwithstanding the use of the term "affected" in relation to such persons, there is nothing in the ICAC Act to indicate that the inclusion of any such statement in an ICAC report or the acceptance by ICAC of any so-called "substantial allegations" has the effect of either creating or altering legal rights or obligations. It is true that s 14(1)(a) of the ICAC Act empowers ICAC, during or after the discontinuance or completion of its investigations, "to gather and assemble ... evidence that may be admissible in the prosecution of a person for a criminal offence against a law of [New South Wales] in connection with corrupt conduct and to furnish such evidence to the Director of Public Prosecutions". To that extent, the work undertaken by ICAC may well result, in a given case, in the engagement, and perhaps even the more efficient functioning, of the criminal justice system. However, the exercise of the power conferred by s 14(1)(a) does not, of itself, affect the rights or liabilities, criminal or otherwise, of the putative accused. And more importantly, the availability of that power does not depend upon ICAC having validly made a finding of corrupt conduct. Thus, as Gleeson CJ observed in *Greiner v Independent Commission Against Corruption*,[7] "determinations of [ICAC], although they may be extremely damaging to the reputations of individuals, do not have legal consequences". The prospect of reputational damage might suffice to confer an entitlement to declaratory relief if such a determination were infected by jurisdictional error,[8] but that prospect alone does not suffice to constitute a legal consequence.

23. In relation to findings, then, cl 35(1) of Schedule 4 to the ICAC Act does not constitute an example of the technique considered in *R v Humby; Ex parte Rooney*,[9] and more recently deployed in response to the decision of this Court in *Re Wakim; Ex parte McNally*,[10] for "curing" what would otherwise be deficiencies fatal to the validity of administrative action, namely, by declaring the rights and obligations of

[7] (1992) 28 NSWLR 125 at 148.
[8] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
[9] (1973) 129 CLR 231.
[10] (1999) 198 CLR 511.

persons to be the same as if such action had been valid. As Stephen J observed in *Rooney*, to legislate in this manner is not to validate that which would otherwise be invalid;[11] it is instead to use the purported legal consequences of the invalid act as a reference point for the wholly anodyne legislative exercise of defining the rights and obligations of various persons.[12] Nonetheless, given that findings of corrupt conduct under the ICAC Act are entirely without legal consequence, the New South Wales Parliament has not so acted.

24. There is therefore no analogy to be drawn, despite their terminological similarities, between cl 35(1) of Schedule 4, as applied to findings of corrupt conduct, and provisions of the sort considered, and held to be valid, in cases such as *Nelungaloo Pty Ltd v The Commonwealth*.[13] At issue in *Nelungaloo* was the validity of an order purportedly made pursuant to reg 14 of the *National Security (Wheat Acquisition) Regulations 1945* (Cth), which relevantly provided that "the Minister may from time to time, by order published in the *Gazette*, make provision for the acquisition by the Commonwealth of any wheat described in the order ... and the rights and interests of every person in that wheat ... are hereby converted into claims for compensation." The language of reg 14 makes it readily apparent that unlike a finding of corrupt conduct by ICAC, an order validly made pursuant to that regulation would have had legal consequences, in the sense of creating or otherwise affecting legal rights or obligations.

25. In attempting to defend the impugned order, the Commonwealth relied, in part, on s 11 of the *Wheat Industry Stabilization Act (No. 2) 1946* (Cth) (**"the Stabilization Act"**). That provision relevantly stated that the order "shall be deemed to be, and at all times to have been, fully authorized by [reg 14], and shall have, and be deemed to have had, full force and effect according to its tenor in respect of wheat harvested in any wheat season up to and including the 1946-47 season." The Commonwealth's invocation of s 11 prompted the appellant in *Nelungaloo* to submit that that provision amounted to a usurpation of judicial power, especially since it had been enacted during the pendency of those proceedings at first instance. However, that submission was rejected. In particular, Dixon J remarked that s 11 "should be treated in the same way as if it said that the rights and duties of [wheat] growers and of the Commonwealth should be same as they would be, if the order was valid".[14] That is, his Honour regarded s 11 as doing no more than attaching the legal consequences of validity, understood in terms of its effect upon legal rights or obligations, to what might otherwise have been an invalid administrative act.

26. It was by a similar process of reasoning that this Court, in *Australian Education Union v Fair Work Australia*[15] (***"AEU"***), upheld the validity of s 26A of the *Fair Work (Registered Organisations) Act 2009* (Cth) (**"the FW(RO) Act"**). That provision had been inserted into the FW(RO) Act following the determination by the

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[11] (1973) 129 CLR 231 at 243.

[12] (1999) 198 CLR 511. See, in particular, the legislation considered in *Re Macks; Ex parte Saint* (2000) 204 CLR 158, being s 6 of the *Federal Courts (State Jurisdiction) Act 1999* (SA), which relevantly provided that the "rights and obligations 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 ... the Federal Court of Australia ... or ... the Family Court of Australia had been a valid judgment of the Supreme Court" of a State.

[13] (1948) 75 CLR 495.

[14] (1948) 75 CLR 495 at 579.

[15] (2012) 246 CLR 117.

Full Court of the Federal Court in *Australian Education Union v Lawler*[16] that the purported registration of the Australian Principals Federation ("**the APF**") under the immediate predecessor to that statute had been invalid. This was on the basis that the governing rules of the APF did not contain a provision terminating the membership of persons who had ceased to be qualified for membership by reason of their employment. Given the rights and privileges conferred upon registered organisations by the FW(RO) Act, the purported registration of the APF would undoubtedly have produced legal consequences if valid. In any event, in order to overcome the difficulties created by *Lawler*, s 26A provided that if an association was purportedly registered under the FW(RO) Act before the commencement of that provision, and if that registration would otherwise have been invalid merely because the association's rules were afflicted by the same deficiency that had attended the rules of the APF, then "that registration is taken, for all purposes, to be valid and to have always been valid."

27. In impugning this provision, the Australian Education Union contended that to the extent that s 26A applied to validate the purported registration of the APF, its effect was to "dissolve or reverse" the orders of the Full Court in *Lawler*, and specifically, the issuing of a writ of certiorari for the purpose of quashing that registration.[17] In their reasons, French CJ, Crennan and Kiefel JJ stated that far from interfering with the judicial power of the Commonwealth, s 26A was merely an example of entirely unobjectionable "legislation which attaches new legal consequences to an act or event which [a] court had held, on the previous state of the law, not to attract such consequences".[18] Section 26A thus did nothing to alter the historical fact that "the invalid registration of the APF was from the outset a 'purported registration'".[19]

28. There is accordingly every reason to think that in a case where such relief had utility, s 26A would not have prevented a court from declaring the historical fact – if the existence of that fact was in issue – that Fair Work Australia had acted unlawfully in entering an association in the same position as the APF into the register of associations maintained for the purposes of the FW(RO) Act. In particular, such a declaration would not have been at odds with the admonition in s 26A that the rights and obligations of such an association were to be taken as always having been the same as if its purported registration were valid.

29. In this case, the Applicant seeks no more than a declaration that ICAC had no jurisdiction to find that he had engaged in corrupt conduct, as recorded in the Report. And notwithstanding that that finding involved, as both parties would agree, a failure to remain within the metes and bounds of the law as it was propounded in *Cunneen*, ICAC's position is that cl 35(1) of Schedule 4 precludes the grant of any such declaratory relief. This is in circumstances where the reasoning that established the validity of s 26A of the FW(RO) Act in *AEU* is simply not available in respect of cl 35(1), given that there are no legal consequences of validity capable of attaching to an invalid finding of corrupt conduct. In other words, because a finding of corrupt conduct under the ICAC Act does not create or affect legal rights or obligations, cl 35(1) of Schedule 4 to that statute, in its purported application to an invalid finding,

[16] (2008) 169 FCR 327.
[17] (2012) 246 CLR 117 at 120.
[18] (2012) 246 CLR 117 at 143 [53].
[19] (2012) 246 CLR 117 at 137 [38].

cannot be treated as if it merely provided that the rights or duties of persons shall be, and shall be taken always to have been, the same as if that finding was validly made. Consequently, any reliance by ICAC upon what was said in *Nelungaloo* or *AEU* would be misplaced. And if, as cl 35(1) requires, an invalid finding of corrupt conduct made by ICAC "is taken to have been, and always to have been, validly [made]", the sole operative effect of that provision is to seek to preclude a court from declaring that that finding was invalidly made.

The ouster of the supervisory jurisdiction of the Supreme Court of New South Wales

30. There is no dispute that at the time when ICAC made its finding of corrupt conduct against the Applicant, that finding was infected by jurisdictional error. It is similarly common ground that whatever be the effect of Part 13 of Schedule 4 to the ICAC Act, it does not extend to amending s 8(2) or otherwise expanding the scope of ICAC's powers on a retrospective basis. Therefore, if this Court were to accept the Applicant's argument that, having regard to the legally inconsequential nature of a finding of corrupt conduct, cl 35(1) of Schedule 4 does not achieve the validation of such a finding by operating upon the rights or obligations of a person in his position, then it must follow that that provision does no more than to prevent any court from granting relief in respect of the form of jurisdictional error identified in *Cunneen*, without, as a matter of law, curing that error.

31. In the Applicant's submission, this necessarily engages the principle, given recognition in *Kirk v Industrial Court (NSW)*,[20] that "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power". That doctrine was said to proceed upon the basis that:

(a) the supervisory role of State Supreme Courts in determining and enforcing the limits on the exercise of State executive and judicial power by other persons or bodies was, and is, "a defining characteristic of those courts";[21] and

(b) given the requirement in Ch III of the *Constitution* that there be in each State a body answering the description of a "Supreme Court of a State", "it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet [that] constitutional description".[22]

32. Critically, in giving content to the "defining characteristic" referred to in sub-paragraph (a) above, the majority in *Kirk* spoke of the supervisory role of State Supreme Courts as being "exercised through the grant of prohibition, certiorari and mandamus", as well as the grant of habeas corpus.[23] This is not say, however, having regard to the omission of declarations from their Honours' account of the remedies capable of being granted in the supervisory jurisdiction of State Supreme Courts, that those Justices were content to leave some scope for State legislatures to prevent such Courts from making declarations concerning jurisdictional errors by public bodies or public officials.

[20] (2010) 239 CLR 531 at 581 [100].
[21] (2010) 239 CLR 531 at 580-581 [98].
[22] *Forge v ASIC* (2006) 228 CLR 45 at 76 [63]; *Kirk* (2010) 239 CLR 531 at 580 [96].
[23] (2010) 239 CLR 531 at 581 [98].

33. On the contrary, the reason why their Honours focused upon the so-called prerogative writs was not to provide an exhaustive list of those remedies, the grant of which is beyond the power of State Parliaments to preclude, but rather to explain why it was that in this field of discourse, the limits of State legislative power have been shaped by the concept of jurisdictional error. Once that is understood, it becomes apparent that in so far as jurisdictional errors are concerned, declarations should not be seen as constituting some lesser category of relief capable of being withheld at the direction of State Parliaments. This is significant because the sole form of relief available to any person challenging the validity of a purported finding to which cl 35(1) is expressed to apply is a declaration to the effect that in making such a finding, ICAC exceeded its jurisdiction.

34. If therefore the sole effect of cl 35(1), in its purported application to an invalid finding, is to prevent a court from declaring that finding to have invalidly been made, it is no answer to the Applicant's case to say, as ICAC has done (CRB, p 312 [28]), that a retrospective amendment to s 8(2) of that statute could similarly have precluded the Supreme Court of New South Wales from granting relief on the basis of the jurisdictional error identified in *Cunneen*. This assumes that there is no relevant difference between cl 35(1) and such a retrospective amendment. However, as has already been developed above, that assumption is incorrect.

35. There may arise in another case a question as to whether *Nelungaloo* and *AEU* should be reconsidered, given the concerns that underpinned what was decided in *Kirk*. In particular, one might ask whether the New South Wales Parliament could have sought, in response to the decision in *Kirk*, to produce the consequences that would have flown from the broadest possible construction of s 179 of the *Industrial Relations Act 1996* (NSW) simply by enacting a law declaring that any decision of the Industrial Court affected by the jurisdictional error found in *Kirk* "is taken to have been, and always to have been, validly made". Nonetheless, it is unnecessary to address that question for present purposes, particularly because this case offers a clear instance of a State legislature seeking to create precisely the sort of "islands of power immune from supervision and restraint"[24] that this Court sought to avoid in *Kirk*.

The invalidity of the direction constituted by cl 35 of Schedule 4 to the ICAC Act

36. As was recently noted in *Attorney-General (NT) v Emmerson*,[25] the doctrine that takes its name from the decision in *Kable v DPP (NSW)*[26] fastens upon the integrated court system established by the *Constitution* and the exercise of federal jurisdiction by State Supreme Courts as premises supportive of the proposition that "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". Admittedly, this case does not concern an attempt to confer some non-judicial function upon the Supreme Court of New South Wales. Nonetheless, it is significant that in the context of applying and considering the *Kable* principle, repugnancy has been found to lie, not merely in attempts to enlist a State Supreme Court in the implementation of that State's legislative or executive policies, but also in any

[24] (2010) 239 CLR 531 at 581 [99].
[25] [2014] HCA 13; (2014) 88 ALJR 522 at 533 [40].
[26] (1996) 189 CLR 51.

requirement that "the court ... depart, to a significant degree, from the processes which characterise the exercise of judicial power".[27]

37. It was accepted in *North Australian Aboriginal Legal Aid Service Inc v Bradley*,[28] in the context of considering a submission that called in aid the doctrine in *Kable*, that "it is implicit in the terms of Ch III of the *Constitution*, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal." It would, in the Applicant's submission, be inconsistent with that duty of impartiality for a court to accept a direction from the legislature to exercise judicial power in a particular way or with a view to securing a particular outcome. So much was recognised by Brennan CJ in *Nicholas v The Queen*[29] and accepted by French CJ in *International Finance Trust Company Limited v New South Wales Crime Commission*.[30] This would no doubt explain the preparedness of the plurality in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*,[31] again in the context of an attempted invocation of the *Kable* principle, to accede to the proposition that "legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair of the character of the courts as independent and impartial tribunals." And if that proposition be right, then assuming the correctness of the Applicant's contentions concerning the effect of cl 35(1) of Schedule 4 to the ICAC Act, in its purported application to findings of corrupt conduct, that provision must be invalid.

38. It is insufficient, in resisting the conclusion that cl 35(1) is a legislative direction, merely to assert, as ICAC appears to do (CRB p 311 [26]), that that provision is not expressed as an *ad hominem* law, in the sense that it does not expressly identify the Applicant or the proceedings brought by him as the object of its operation, or that the validation it purports to effect is limited as to both purpose and scope. The first of these assertions assumes, erroneously, that a legislative direction as to the exercise of judicial power cannot, by definition, answer the description of a law of general application. However, if that were so, Isaacs J would have been mistaken in ascribing invalidity, in *Williamson v Ah On*,[32] to a hypothetical law pursuant to which "a man found in possession of stolen goods shall be conclusively deemed to have stolen them", and Brennan CJ similarly in error in embracing that observation in *Nicholas v The Queen*.[33] After all, notwithstanding that such a law purports to direct the curial function of finding the relevant facts in a given case, it is not addressed to any one man (or woman) in particular.

39. Similarly, French CJ would have been incorrect in concluding, in *International Finance*,[34] that s 10 of the *Criminal Assets Recovery Act 1990* (NSW) ("**the CAR Act**") operated as a direction to the Supreme Court of New South Wales "as to the manner in which it exercises its jurisdiction". It will be recalled that s 10 made

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[27] *Kuczborski v Queensland* [2014] HCA 46; (2014) 89 ALJR 59 at 88 [140] per Crennan, Kiefel, Gageler and Keane JJ.
[28] (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Hayne JJ.
[29] (1998) 193 CLR 173 at 188 [20].
[30] (2009) 240 CLR 319 at 352 [50].
[31] (2008) 234 CLR 532 at 560 [39] per Gummow, Hayne, Heydon and Kiefel JJ.
[32] (1926) 39 CLR 95 at 108.
[33] (1998) 193 CLR 173 at 189-190.
[34] (2009) 240 CLR 319 at 354-355 [55].

provision for the making of restraining orders in respect of dealings with specific interests in property on the satisfaction of certain conditions, and required that the Court hear any application for such an order on an ex parte basis. It was thus plainly a law of general application, one whose ambit was not confined to any specific person or class of persons or a specific piece of litigation. Nonetheless, the circumstance that s 10 required the Supreme Court "not only to receive an ex parte application, but also to hear and determine it ex parte, if the Executive so desires" was sufficient, in the Chief Justice's mind, to confer upon it the character of a legislative direction to the Court.

40. In any event, cl 35(1) purports to validate a closed and finite class of actions by ICAC, namely, things done or purporting to have been done before 15 April 2015 that would have been invalid on the basis that they proceeded upon what was held in *Cunneen* to be an incorrect construction of s 8(2) of the ICAC Act. Thus, even if a direction by Parliament as to the outcome of an exercise of jurisdiction by a court were required to be narrowly targeted, Part 13 of Schedule 4 to the ICAC Act amply fulfills that requirement.

41. As for the second of the assertions posited above, much is sought to be made of the circumstance that cl 35(1) is intended, not to validate, for all purposes, all things purportedly done by ICAC, but rather to validate only a confined class of ICAC's previous actions, and even then, only to the extent that they might otherwise be infected by an error of the sort identified in *Cunneen*. However, let it be assumed that the Applicant is correct in his submission that cl 35(1) does not, because it cannot, attach the legal consequences of validity to otherwise invalid findings of corrupt conduct. Its only effect then is to deny, without altering his or her legal rights or obligations, a person aggrieved by such an invalid finding any possibility of a curial remedy on the basis of what ICAC, in its summary of argument on the removal application in these proceedings, termed "the *Cunneen* ground". In those circumstances, it cannot seriously be said that cl 35(1) is somehow less of a legislative direction as to the exercise by a court of its jurisdiction merely because, in a given case, a plaintiff might have some other surviving basis for attacking the validity of a finding by ICAC.

42. To advance that proposition is to proceed upon an assumption that a law cannot constitute a legislative direction concerning the exercise of a court's jurisdiction unless it instructs that court as to the ultimate outcome of the proceedings before it, as distinct from the decision it is to make on a specific issue in those proceedings. Again, that assumption runs contrary to the reasoning of French CJ in *International Finance*. While s 10 of the CAR Act obliged the Supreme Court to make a restraining order upon the satisfaction of certain conditions, the Court itself was free to decide, in a given case, whether those conditions had been satisfied. This was particularly because one of those conditions was that the Court considered that there were reasonable grounds for suspecting:

(a) that the person against whom the order was sought had engaged in one or more serious crime related activities; and

(b) that the relevant interest to which the order would attach was "serious crime derived property because of a serious crime related activity or serious crime related activities of a person".

There was thus nothing in s 10 that mandated a particular outcome in respect of the Court's application of that provision. To the extent that it was a direction, it was only in respect of the more limited question of whether or not the Court would hear and determine an application for a restraining order ex parte. And yet, for French CJ, that was sufficient to make it a direction that "[distorted] the institutional integrity of the [Supreme Court] and [affected] its capacity as a repository of federal jurisdiction".[35] Accordingly, ICAC's contention that Part 13 of Schedule 4 does not deem its conduct to be valid in all respects is entirely beside the point.

43. Finally, whether or not Part 13 of Schedule 4 to the ICAC Act is valid, having regard to its effect upon the exercise of its jurisdiction by the Supreme Court of New South Wales, it should be observed that if, as the Applicant submits, cl 35(1) is a legislative direction, this Court is plainly one of its intended recipients. To conclude that it is valid would thus be at odds with the principle that "a State law cannot control the exercise by this Court of its appellate jurisdiction when hearing appeals from State Supreme Courts under s 73(ii) of the *Constitution*".[36]

44. Moreover, there is no basis for thinking that some valid operation for cl 35 may be preserved by a process of reading down pursuant to s 31 of the *Interpretation Act 1987* (NSW), the effect of which would be to confine its directive effect to the courts of New South Wales. In order for a law to be capable of being read down, it is necessary that:

(a) some standard, criterion or test for reading down be discernible in the law itself, either expressly or by implication, or in the nature of the subject matter with which the law deals;

(b) there be no alteration in the policy or operation of the law with respect to those cases which, after its being read down, would still remain within its terms; and

(c) in circumstances where the law "can be reduced to validity by adopting one or more of a number of possible limitations", there be some reason "based upon the law itself" for favouring one limitation over another.[37]

45. In the Applicant's submission, even the most cursory review of cl 35 would make clear that the first two of these conditions are incapable of being satisfied. That being so, cl 35 and the balance of Part 13 of Schedule 4 to the ICAC Act are invalid, at least in so far as they purport to validate findings of corrupt conduct affected by this Court's decision in *Cunneen*.

Section 79(1) of the Judiciary Act

46. As noted above, the proceedings in the Court of Appeal involve a question arising under s 184(1) of the *Corporations Act*, with the result that federal jurisdiction has been engaged. That being so, cl 35 of Schedule 4 to the ICAC Act cannot apply of its

[35] (2009) 240 CLR 319 at 355 [56].
[36] *Gould v Brown* (1998) 193 CLR 346 at 424 [124].
[37] *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485-486; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339, 347-348, 372; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416at 502.

own force in those proceedings; instead, if it is to apply at all, it must be via the medium of s 79(1) of the *Judiciary Act*. That provision relevantly states that "[t]he laws of each State or Territory ... shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

47. In the Applicant's submission, even if cl 35(1) of Schedule 4 to the ICAC Act were otherwise a valid enactment of the New South Wales Parliament, s 79 would not "pick up" and apply as surrogate federal law any provision that imposes functions upon a court which are "insusceptible of exercise as part of the judicial power of the Commonwealth".[38] Whether this is because the Constitution "otherwise provides" within the meaning of s 79 or because s 79 could not validly operate in such a way as to detract from the strict separation of judicial power effected by Ch III does not fall for present determination.

48. What is presently relevant is that if, for the reasons already given, cl 35(1) would, if it had been enacted by the Commonwealth Parliament, offend Ch III of the *Constitution*, then it simply cannot apply as surrogate federal law in the determination of the Applicant's appeal against the decision of the primary judge.

The validity of ICAC's finding against the Applicant

49. At the risk of repetition, it is uncontroversial that but for Part 13 of Schedule 4 to the ICAC Act, ICAC's finding of corrupt conduct against the Applicant would be invalid, given the reasoning of the majority in *Cunneen*. If therefore this Court were to accept the submissions above, the result would be to vindicate complete the Applicant's position as against ICAC.

Part VII: Applicable constitution provisions, statutes and regulations

50. Part 13 of Schedule 4 to the ICAC Act is reproduced in full in the Schedule to these submissions, as are ss 8, 9 and 13 of that statute and s 79 of the *Judiciary Act*.

Part VIII: Orders sought

51. Orders should be made in the following terms:

1. Declare that in its purported application to the finding, recorded in the report of the Respondent entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others" and dated July 2013, that the Applicant had engaged in corrupt conduct, Part 13 of Schedule 4 to the *Independent Commission Against Corruption Act 1988* (Cth) ("**the ICAC Act**") is invalid.

2. Alternatively, declare that s 79(1) of the *Judiciary Act 1903* (Cth) does not validly apply Part 13 of Schedule 4 to the ICAC Act as surrogate federal law in proceeding no. 2014/239426 in the Court of Appeal of the Supreme Court of New South Wales and in this proceeding.

[38] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593 [73]; *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 135 [24].

3. The Applicant's appeal against the decision of the Supreme Court of New South Wales in proceeding no. 2013/249678 be allowed.

4. Set aside the orders of the Supreme Court of New South Wales in proceeding no. 2013/249678, and in place thereof, make the following orders:

   (a) declare that Defendant had no jurisdiction to determine, as recorded in the report entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others" and dated July 2013, that the Plaintiff had engaged in corrupt conduct within the meaning of s 8(2) of the *Independent Commission Against Corruption Act 1988* (Cth); and

   (b) the Defendant pay the Plaintiff's costs.

5. ICAC pay the Applicant's costs of the cause removed.

6. The matter be remitted to the Court of Appeal of the Supreme Court of New South Wales for the determination of the costs of the proceedings in that Court.

Part XI: Estimate of time for oral argument

52. The Applicant estimates that he will require two hours for the presentation of his oral argument.

Date: 19 June 2015

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SCHEDULE TO THE APPLICANT'S SUBMISSIONS

Schedule 4 Part 13 *Independent Commission Against Corruption Act 1988* (NSW)

Part 13 Validation relating to decision on 15 April 2015 in Independent Commission Against Corruption v Cunneen [2015] HCA 14

34 Interpretation

(1) In this Part:

relevant conduct means conduct that would be corrupt conduct for the purposes of this Act if the reference in section 8 (2) to conduct that adversely affects, or could adversely affect, the exercise of official functions included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions.

(2) A reference in this Part to anything done or purporting to have been done by the Commission includes a reference to:

(a) anything done or purporting to have been done by an officer of the Commission, and

(b) any investigation, examination, inquiry, hearing, finding, referral, recommendation or report conducted or made by the Commission or an officer of the Commission, and

(c) any order, direction, summons, notice or other requirement made or issued by the Commission or an officer of the Commission, and

(d) the obtaining or receipt of anything by the Commission or an officer of the Commission.

(3) A reference in this Part to evidence given to the Commission includes a reference to:

(a) a statement of information, or a document or other thing, produced in response to a notice by the Commission or an officer of the Commission, and

(b) an answer made, or a document or other thing produced, by a person summoned to attend or appearing before the Commission or an officer of the Commission at a compulsory examination or public inquiry, and

(c) any information, document or other thing otherwise obtained or received by the Commission or an officer of the Commission.

35 Validation

(1) Anything done or purporting to have been done by the Commission before 15 April 2015 that would have been validly done if corrupt conduct for the purposes of this Act included relevant conduct is taken to have been, and always to have been, validly done.

(2) The validation under subclause (1) extends to the validation of:

(a) things done or purporting to have been done by any person or body, and

(b) legal proceedings and matters arising in or as a result of those proceedings, if their validity relies on the validity of a thing done or purporting to have been done by the Commission.

(3) The validation under subclause (1) extends to the validation of things on and from the date they were done or purported to have been done.

(4) The Commission is authorised (and is taken always to have been authorised) to exercise functions under this Act on or after 15 April 2015 to refer matters for investigation or other action to other persons or bodies, or to communicate or provide evidence given to the Commission to other persons or bodies, even if the matter arose or the evidence was given to the Commission before 15 April 2015 and its validity relies on the validation under subclause (1).

(5) Subclause (4) applies even if any finding of corrupt conduct that relates to the matter or evidence is declared a nullity or otherwise set aside by a court.

(6) However, a person is not (and was not) required to comply, on and after 15 April 2015, with any order, direction, summons, notice or other requirement made or issued by the Commission or an officer of the Commission before 15 April 2015 if the validity of the order, direction, summons, notice or other requirement relies on the validation under subclause (1).

Section 8 *Independent Commission Against Corruption Act 1988* (NSW)

(1) Corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),

(b) bribery,

(c) blackmail,

(d) obtaining or offering secret commissions,

(e) fraud,

(f) theft,

(g) perverting the course of justice,

(h) embezzlement,

(i) election bribery,

(j) election funding offences,

(k) election fraud,

(l) treating,

(m) tax evasion,

(n) revenue evasion,

(o) currency violations,

(p) illegal drug dealings,

(q) illegal gambling,

(r) obtaining financial benefit by vice engaged in by others,

(s) bankruptcy and company violations,

(t) harbouring criminals,

(u) forgery,

(v) treason or other offences against the Sovereign,

(w) homicide or violence,

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

(a) matters arising in the State or matters arising under the law of the State, or

(b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

Section 9 *Independent Commission Against Corruption Act 1988* (NSW)

(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purposes of this section:

applicable code of conduct means, in relation to:

(a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

(6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

Section 13 *Independent Commission Against Corruption Act 1988* (NSW)

(1) The principal functions of the Commission are as follows:

(a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

(i) corrupt conduct, or

(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

(iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,

(b) to investigate any matter referred to the Commission by both Houses of Parliament,

(c) to communicate to appropriate authorities the results of its investigations,

(d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,

(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,

(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,

(g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,

(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,

(i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,

(j) to enlist and foster public support in combating corrupt conduct,

(k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

(1A) Subsection (1) (d) and (f)–(h) do not extend to the conduct of police officers, Crime Commission officers or administrative officers within the meaning of the *Police Integrity Commission Act 1996*.

(2) The Commission is to conduct its investigations with a view to determining:

(a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and

(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

(2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.

(3) The principal functions of the Commission also include:

(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and

(b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

(3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

(a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,

(b) opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether consideration should or should not be given to the taking of other action against particular persons,

(c) findings of fact.

Section 79 *Judiciary Act 1903* (Cth)

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

(2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.

(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:

(a) limiting the period for bringing the suit to recover the amount;

(b) requiring prior notice to be given to the person against whom the suit is brought;

(c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.

(4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:

(a) an amount paid as the tax;

(b) an amount of penalty for failure to pay the tax on time; (c) an amount of penalty for failure to pay enough of the tax;

(c) an amount of penalty for failure to pay enough of the tax;

(d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.