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

BETWEEN **TRAVERS WILLIAM DUNCAN**
Applicant

INDEPENDENT COMMISSION AGAINST CORRUPTION
Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Certification

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

Part II: Basis of intervention

2. The Attorney General for New South Wales intervenes under s 78A of the Judiciary Act 1903 (Cth) in support of the respondent (**ICAC**).

Part IV: Constitutional and legislative provisions

3. The Attorney General accepts the applicant's statement of applicable provisions.

Part V: Argument

4. The Attorney General adopts the submissions of ICAC.

5. The applicant's challenge to the validity of Part 13 of Schedule 4 to the Independent Commission Against Corruption Act 1987 (NSW) ("ICAC Act") depends on the correctness of each of the propositions in paragraph [15] of his written submissions.

Date of Document: 17 July 2015
Filed by:
I V Knight, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Tel: (02) 9224 5247
Fax: (02) 9224 5255
Ref: T05 P Buchberger

The primary difficulty with those propositions lies in sub-paragraph (c), from which the subsequent propositions are said to follow (see sub-paragraph (d)).

6. In sub-paragraph (c), the applicant seeks to distinguish the significant authorities which otherwise stand in his path on the basis that they involved the selection of "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". Properly construed, there is no relevant distinction between Part 13 and the legislation considered in the decisions of this Court from which the applicant necessarily seeks to distance himself (AWS [24]ff):

10 a. The operation of cl 35 is triggered on the existence of one of a number of acts or events by which ICAC sought to determine and/or determined the question of the engagement of a person in corrupt conduct as defined in the ICAC Act, on the basis that "the reference in section 8(2) to conduct that adversely affects, or could adversely affect, the exercise of official functions included conduct that adversely affected, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions": cl 34(1).

b. Some of the matters included in cl 34(2) of Part 13, in particular the findings of ICAC, are without a legal consequence that would render them amenable to relief in the nature of certiorari: Greiner v Independent Commission Against
20 Corruption (1997) 28 NSWLR 125 ("Greiner") at 148 per Gleeson CJ. Nonetheless ICAC's findings are made as an exercise of statutory power (s 13(3)) on which the legislature has imposed certain limits (s 13(3A) and s 74B), and were open to, and were, challenged on the basis that they affected interests which were capable of attracting judicial intervention: Greiner at 147, 148 per Gleeson CJ.

c. In declaring, subsequent to Independent Commission Against Corruption v Cunneen (2015) 89 ALJR 475, that "anything done or purporting to have been done" that would have been validly done if corrupt conduct included "relevant conduct", Part 13 declares the position of ICAC and persons affected by
30 conduct which falls within "anything done or purporting to have been done" to be the same as if that conduct was legally authorised.

7. As Stephen J observed in R v Humby; Ex parte Rooney (1973) 129 CLR 231, of the decrees purported to have been made by Masters, which were the subject of validation in s 5(3) of the Matrimonial Causes Act 1971 (Cth), cl 35 does not alter the character of findings caught by the provision; rather, it "operates by attaching to them, as acts in the law, consequences which it declares them to have always had": at 243; see also Australian Education Union v Fair Work Australia (2012) 246 CLR 117 ("AEU") at [53] per French CJ, Crennan and Kiefel JJ. That the applicant might only be able to, and was only ever able to, obtain a declaration as to their lawfulness does not deprive the provision of that character (cf AWS [28]-[29]).

8. Even if the applicant were correct in the assertion that the conduct which is the subject of validation in cl 35 of Part 13 had no legal consequence (cf ICAC's Submissions at [36]-[37]), that does not impugn its selection as the criterion of operation for cl 35. A legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence: Baker v The Queen (2004) 223 CLR 513 at [41] per McHugh, Gummow, Hayne and Heydon JJ, citing Re Macks at [25], [59]-[60], [208], [347]; see also Baker at [8]-[10] per Gleeson CJ.

9. If the operation of Part 13 impacts upon the outcome of pending proceedings, or proceedings which might be brought in the future with respect to things done or purportedly done by ICAC or its officers before 15 April 2015, any such impact does not interfere with the exercise of federal judicial power in a way that is inconsistent with the Constitution. Clause 35 does no more than state a rule attaching particular consequences to the conduct which is the subject of cl 34(2): AEU at [48] per French CJ, Crennan and Kiefel JJ. As ICAC has submitted, those consequences are not confined to legal proceedings (ICAC Submissions at [13]-[17]).

10. Even if the consequences were so confined, application of the clause in legal proceedings does not engage the court in a process that involves a departure from the processes which characterise the exercise of judicial power, let alone a departure to a significant degree: cf Kuczborski v Queensland [2014] HCA 46; (2014) 89 ALJR 59 at 88 and AWS [37]-[38]. The role of the Court remains the supervision of ICAC in the exercise of its statutory powers, including the power to make findings. That cl 35 operates, in effect, to modify the limits of those powers in particular cases does not have any impact on the judicial process. There is a stark difference in this respect

between the operation of cl 35 and the operation of s 10 of the Criminal Assets Recovery Act 1990 (NSW) which was considered in International Finance Trust Company Limited v New South Wales Crime Commission (2009) 240 CLR 319: see [55]-[57] per French CJ, [93]-[98] per Gummow and Bell JJ, [159]-[160] per Heydon J.

11. That the outcome of pending proceedings would have been otherwise but for the application of cl 35 is not sufficient to convert cl 35 into an impermissible direction that infringes the Kable principle. Previous decisions of this Court have upheld the capacity of State and Federal Parliaments to amend legislation where it affects pending proceedings or even renders them nugatory: see eg Nelungaloo Pty Ltd v The Commonwealth (1948) 75 LR 495 at 503 per Williams J; R v Humby (1973) 129 CLR 231 at 250 per Mason J; HA Bachrach Pty Ltd v Queensland (1998) 195 CLR 547 at [17] per the Court. For the reasons outlined above, the adoption in those cases of statutory mechanisms which are formulated differently to the mechanism adopted in the present case does not constitute a relevant distinction.

12. The applicant's contention that Part 13 interferes with or otherwise impermissibly limits the role of the Supreme Court in a manner contrary to the reasons of this Court in Kirk v Industrial Court (NSW) (2010) 239 CLR 531 similarly rests on a mischaracterisation of the Part's operation and effect (AWS [30], [34]). As stated above, the role of the Court remains one of policing the proper exercise by ICAC of its statutory powers, consistently with the role that was envisaged by the Court in Kirk: see at [98]-[99], [113].

13. It might be noted that in Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372 Street CJ considered that the relevant provision was "directive rather than substantive" (at 378). This provision (set out at 377) stated that the registration of the union in question under NSW legislation "shall, for all purposes, be taken to have been cancelled" as at a particular date. The Commonwealth legislation challenged in Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth of Australia (1986) 161 CLR 88 provided that the registration of the union under federal legislation was "by force of this section, cancelled". It is not easy to see a distinction between the two provisions and the High Court did not appear to

regard the Commonwealth provision as a direction to the courts, noting that it "does not deal with any aspect of the judicial process" (at 96). The other members of the NSW Court of Appeal did not find it necessary to consider this question.

Part VI: Time Estimate

14. The Attorney General estimates that 15 minutes will be required to present the arguments.

Dated: 17 July 2015

10

M G Sexton SC SG
Ph: (02) 9231-9440
Fax: (02) 9231-9444
Michael_Sexton@agd.nsw.gov.au

20 A M Mitchelmore
Ph: (02) 9223-7654
Fax: (02) 9221-5604
amitchelmore@sixthfloor.com.au