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 IN REPLY

Dated: 24 July 2015
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Part I: Internet

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

Part II: Reply

ICAC's emphasis on form over substance

2. ICAC's argument proceeds largely upon the elevation of form over substance. So much is apparent in its twin assertions that Part 13 of Schedule 4 to the ICAC Act "does not refer to any particular court proceedings or to court proceedings generally" (RS [13]) and that it "confirms the validity of [ICAC's] pre-15 April 2015 conduct in all contexts – not just in legal proceedings" (RS [16]). However, as was emphasised in the Applicant's submissions in chief, these proceedings are concerned only with the operation of Part 13 in relation to findings of corrupt conduct. If, as ICAC appears not to contest, such findings do not create or alter any legal rights or obligations, then the only context in which Part 13 has any work to do with respect to such findings is in proceedings involving a claim for declaratory relief.

3. This preoccupation with form is manifest also in ICAC's denial that Part 13 is "targeted at particular individuals, particular conduct of the respondent or particular legal proceedings" (RS [52]). That proposition is sufficiently answered in paragraphs 38 to 42 of the Applicant's submissions in chief, to which, tellingly, ICAC offers little by way of rejoinder.

No retrospective amendment to s 8(2) of the ICAC Act

4. Given its reliance upon such cases as *Nelungaloo* and *Humby* (RS [18]-[32]), it appears to be one of ICAC's central contentions that Part 13 should be regarded merely as declaring the rights and obligations of all persons, in relation to things done by ICAC before 15 April 2015, to be, and always to have been, the same as if s 8(2) of the ICAC Act were construed in the manner rejected in *Cunneen*. That, however, is at odds with the proposition, also advanced by ICAC, that Part 13 "is properly to be characterised as effectively altering the lawful scope of subsec 8(2) insofar as things done by the respondent prior to 15 April 2015 are concerned" (RS [15]). It is, after all, one thing retrospectively to amend s 8(2) of the ICAC Act; it is another to leave that provision untouched while defining the rights and obligations of various persons by reference to a fiction as to its proper construction.

5. This distinction is important precisely because a finding of corrupt conduct by ICAC does not create or alter any legal rights or obligations. If Part 13 merely declares the rights and obligations of all persons to be same as if the construction of s 8(2) rejected in *Cunneen* had prevailed, then one must ask how that Part is to operate in relation to "things done" by ICAC that produce no effect upon any rights or obligations. In contrast, no such question would arise if Part 13 had simply effected a retrospective amendment to s 8(2) so as to extend its reach to conduct that could have adversely affected the efficacy, as distinct from the probity, of an exercise of official functions.

6. ICAC's submission is that because Part 13 "has substantially the same effect as if it retrospectively amended subsec 8(2) but then applied that retrospective amendment only to conduct of a certain kind occurring before 15 April 2015" (RS [39]), it should be characterised as doing just that. Three points may be made in relation to this. First, ICAC's argument finds no support in the text of Part 13, and specifically the definition of "relevant conduct", which makes clear that the construction of s 8(2) "articulated" for the purposes of that Part is no more than a statutory fiction. The matter may be tested by asking whether, in light of Part 13, and having regard to the facts found by ICAC, the Applicant can be said to have engaged in corrupt conduct

within the meaning of s 8(2) of the ICAC Act. That question can only be answered in the negative, as it would have been prior to the enactment of Part 13. The Attorney-General of Victoria is thus incorrect in his submission that "[a]s a matter of substance, cll 34 and 35 extend the meaning of 'corrupt conduct'" (VS [12(b)]). And it does little to improve that proposition to invoke the remarks of Brennan CJ and McHugh J in *Kartinyeri v The Commonwealth*[1] concerning the "implied repeal" of prior legislation. That is a process quite distinct from what was sought to be effected by the insertion of Part 13 into Schedule 4 of the ICAC Act.

7. Secondly, adopting ICAC's reasoning, the legislation considered in *Re Macks; Ex parte Saint* had substantially the same effect as, and therefore should have been characterised as being, a provision that "by legislative fiat [converted] the orders of the Federal Court to orders made by the Supreme Court" of South Australia.[2] However, that characterisation was rejected by Gummow J, who, with respect, correctly said of the operation of the impugned legislation that "rights and liabilities are created as if orders had been made by a judge of the Supreme Court".[3]

8. And thirdly, it would follow from acceptance of ICAC's submission that French CJ, Crennan and Kiefel JJ went to some unnecessary effort in *AEU* in describing s 26A of the FW(RO) Act as attaching the consequences of validity to an otherwise invalid registration. Their Honours could simply have characterised s 26A as a retrospective amendment to the substantive law prescribing the criteria for the registration of organisations under the FW(RO) Act. However, that characterisation was expressly rejected by Gummow, Hayne and Bell JJ, who said of s 26A that "[i]t does not purport to declare what the law *was* at the time of the decision of the Full Court in the *Lawler* matter".[4]

9. Consequently, Part 13 does not effect a retrospective amendment to s 8(2) of the ICAC Act or an expansion of ICAC's powers. The law, in so far as it relates to ICAC's jurisdiction, remains unchanged. To that extent, then, the submission of the Attorney-General of Victoria that Part 13 has provided "a lawful basis for the report" (VS [16]) should be rejected. All that has changed is the ability of the Supreme Court of New South Wales to grant the relief that would ordinarily follow from the application of that law. On any view, that would suffice to engage the principles expressed in *Kirk*.

The significance of legal consequences

10. Contrary to VS [8], the Applicant does not assert, blandly, that cl 35(1) of Schedule 4 to the ICAC Act produces no legal consequences. It is thus beside the point to say that because Part 13 would deprive the Applicant of a declaration that he might otherwise have been entitled to, it has a legal consequence (RS [37]; VS [15]-[18]). Rather, it is the consequences that flow from a finding of corrupt conduct, made within power, to which regard must be had. The Applicant's proposition is that there is no analogy between Part 13, in its purported application to such a finding, and the provisions considered in the cases relied on by ICAC, namely, *Nelungaloo*, *Humby*, *Macks* and *AEU*. This is because there is an incongruity involved in attempting to apply a provision that declares the rights and obligations of all persons to be the same as if a certain class of administrative act were valid, in circumstances where the relevant act, such as a finding of corrupt conduct by ICAC, neither creates nor alters legal rights or obligations.

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[1] (1998) 195 CLR 337 at 354 [9].
[2] (2000) 204 CLR 158 at 232 [208].
[3] *Ibid.*
[4] *AEU* (2012) 246 CLR 117 at 156 [96].

11. ICAC seeks to avoid this incongruity by pointing to the reputational harm that an individual might suffer as a consequence of a finding of corrupt conduct, which harm would render such a finding amenable to declaratory relief (RS [36]). However, a majority of this Court in *Ainsworth v Criminal Justice Commission*[5] described the reputational damage that might flow from a report published by an investigative tribunal as a mere "practical effect" or "practical consequence", albeit one which might confer a sufficient interest to dispel any suggestion of a hypothetical question on a claim for declaratory relief.[6] In this respect, reputational harm is no different from any other "real interest" that, whilst falling short of constituting an affected legal right, nonetheless confers standing to seek a declaration as to the lawfulness of an administrative act.

12. It should also be borne in mind that their Honours described the report in *Ainsworth* as having "no legal effect and [carrying] no legal consequences, *whether direct or indirect*" (emphasis added).[7] The circumstance that this latter remark was said in the course of considering the availability of certiorari does not make it any less valid. This is because, as their Honours observed, the function of certiorari is "to quash the legal effect or the legal consequences of the decision or order under review", as opposed to quashing some narrower subset of legal effects which is to be distinguished from what ICAC describes as "legal consequences in a more general sense" (RS [36]). There is accordingly no basis for qualifying the proposition, implicit in *Ainsworth*, that reputational harm does not constitute a *direct or indirect* legal consequence.

13. In any event, it is difficult to see what content might be given to the notion of "legal consequences in a more general sense". This is particularly so, having regard to the retreat into metaphor by the Attorney-General for South Australia, who suggests at [38] of his submissions that the phrases "legal consequences" and "legal effects" might have a broader meaning, "in the sense of affecting the status or effect of something in the overall legal landscape". But how anything within the "legal landscape" can have a "status" or "effect" separate from its effect upon legal rights or obligations is a matter shrouded in obscurity. Indeed, underpinning the submissions of ICAC and several of the interveners is an assumption that because the unlawfulness of a finding made without power might entitle a person the subject of that finding to seek declaratory relief, a finding of corrupt conduct made within power must produce legal consequences. However, that is plainly a *non sequitur*.

14. Moreover, the invocation by ICAC and the Attorney-General of Victoria of the concept of reputational harm serves only to highlight the egregiousness of the fiction adopted by Part 13. If this Court were to accept that that Part does not effect any amendment to, or alteration of, the definition of "corrupt conduct", then it must also accept that Part 13 does not in any way alter the fact that ICAC acted unlawfully in besmirching the Applicant's reputation. On that hypothesis, the only effect of Part 13 is to deny the only means available to the Applicant to remedy that harm. When regard is also had to the fact that Part 13 applies only to findings made before 15 April 2015, and therefore a closed class of affected persons, it becomes readily apparent that cl 35(1) is an acutely pernicious *ad hominem* law.

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[5] (1992) 175 CLR 564 at 582.

[6] This aspect of the reasoning in *Ainsworth* affords an answer to the submission at VS [21] that unless legal consequences of some sort were ascribed to ICAC's findings of corrupt conduct, a claim for declaratory relief in respect of an ICAC report would not involve "the quelling of a justiciable controversy".

[7] (1992) 175 CLR 564 at 580.

15. This also exposes the error in the submission by the Attorney-General for Western Australia that if the New South Wales Parliament can empower ICAC to make a finding that does not have a legal consequence, it must in turn have the power to confer the status of validity upon such a finding (WAS [45]). As is submitted in paragraph 1 above, the only context in which Part 13 has any work to do in relation to findings of corrupt conduct is in proceedings involving a claim for declaratory relief. Consequently, that which may appear, as a matter of form, to confer some new legal status upon a finding of corrupt conduct would, in truth, be directed exclusively to preventing the grant of a curial remedy for what is otherwise a jurisdictional error. There is accordingly no avoiding the collision between Part 13 and the limits upon State legislative power described in *Kirk*.

The directive nature of Part 13

16. ICAC's remaining contention is that even if Part 13 neither attaches new legal consequences to an invalid finding by ICAC nor retrospectively amends s 8(2) of the ICAC Act, it does not necessarily follow that Part 13 is directive in nature (RS [38]). However, having advanced this proposition, ICAC does not at any point articulate what else Part 13 can be said to do. For if it does not attach the legal consequences of validity to an invalid finding of corrupt conduct, and if it does not retrospectively amend s 8(2), then there is no scope for suggesting that cl 35(1) of Schedule 4 merely alters ICAC's "jurisdictional boundaries" (RS [43]) or that it alters "the legal rules to be applied in respect of particular things done by [ICAC]" (RS [48]). That being so, the Applicant's case does not involve the "novel proposition" that such an alteration may constitute a direction capable of engaging the *Kable* doctrine. If anything, it is sufficient, in order for the Applicant to succeed in his contention that Part 13 is directive in nature, for this Court merely to apply what was said in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[8]

17. At the time of the decision in that case, Division 4B of the *Migration Act 1958* (Cth), comprising ss 54J to 54U, made provision for the compulsory detention of "designated persons", being a subset of those non-citizens in Australia who had neither presented a visa nor been granted an entry permit. Section 54R provided that a court was "not to order the release from custody of a designated person". This was understood to apply even in circumstances where a designated person was unlawfully held in detention by persons purportedly acting in pursuance of Division 4B. In such a situation, the effect of s 54R was to deprive courts of the power to make orders reflecting the legal reality appertaining to that designated person, namely, that he or she was being unlawfully detained. It was on that basis that the plurality in *Lim* described s 54R as "a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction",[9] and concluded that it was invalid.

18. In these proceedings, if this Court were to accept that:

    (a) Part 13 does not retrospectively amend s 8(2) of the ICAC Act; and

    (b) in its purported application to findings of corrupt conduct, Part 13 has no work to do beyond shielding such findings from the grant of declaratory relief on the basis of what was determined in *Cunneen*, and does not operate in a manner analogous to the provisions considered in cases such as *Nelungaloo*, *Humby*, *Macks* and *AEU*,

[8] (1992) 176 CLR 1.
[9] (1992) 176 CLR 1 at 36.

then it would follow, in the Applicant's submission, that cl 35(1) of Schedule 4 to the ICAC Act, in its purported application to such findings, bears relevant similarities to s 54R. This is because, being directed to the judicature as a matter of substance, it prohibits the making of curial orders reflective of the unaltered legal reality that ICAC did not, and does not, have the power to find that the Applicant had engaged in corrupt conduct, given that his actions were not found to have adversely affected the probity of an exercise of official functions.

19. In relation to RS [63], it should be said that even a cursory reading of paragraphs 44 and 45 of the Applicant's submissions in chief discloses that those paragraphs were concerned with negativing the suggestion that if cl 35(1) is a legislative direction to the courts, it might be read down to apply only to the courts of New South Wales. Those paragraphs do not address the question of reading down more broadly. The opening sentence of RS [63] is thus entirely misconceived.

20. Furthermore, contrary to RS [65], acceptance of the Applicant's argument would not deprive the New South Wales Parliament of the power to validate administrative actions that are susceptible only to declaratory relief, as distinct from certiorari. It would still be open to Parliament retrospectively to amend the law pursuant to which such actions are taken – in this case, s 8(2) of the ICAC Act. However, for reasons known only to those responsible for drafting Part 13, that course was not pursued.

The submissions of the Attorney-General for Western Australia

21. For the most part, the parties and the interveners have crafted their submissions on the assumption that the term "valid" means no more than that something has been done – or in the case of a finding, made – within power. In contrast, the Attorney-General for Western Australia appears to understand that term as denoting the ability to produce legal consequences. It is on that basis that he submits that a finding of corrupt conduct is neither valid nor invalid, and that cl 35 has no application with respect to such findings.

22. There are difficulties with that submission, not least of which is that cl 34(2)(b) expressly includes findings by ICAC within the ambit of the expression "anything done or purporting to have been done by the Commission" (although this then gives rise the to awkwardness, in applying cl 35, of speaking of findings being "validly done", as distinct from "validly made"). Nonetheless, if the Court were to accept the submission, the logical conclusion of this would be that the Applicant is entitled to the declaration that he seeks in relation to the impugned finding.

23. As outlined in paragraph 51 of the Applicant's submissions in chief, that declaration states merely that ICAC had no jurisdiction to make that finding. And as appears to be recognised by the Attorney-General for Western Australia (WAS [33]-[34]), his arguments suggest that such a declaration may be made even in the face of Part 13 of Schedule 4 to the ICAC Act.

Date: **24 July 2015**

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