

**TITLE: INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT
VALIDATION BILL 2022 – ROD ROBERTS – ONE NATION CROSSBENCH BILL.**

DATE: 14 November 2022

SHADOW MINISTER: DALEY – Shadow Attorney-General

RECOMMENDATION:

That NSW Labor not support the bill.

BACKGROUND:

On 15 April 2015, the High Court found in favour of Margaret Cuneen in the matter of *ICAC v Cuneen* [2015] HCA 14.

Ms Cuneen challenged ICAC on the basis that it had no powers to investigate her under its own Act – that it was, acting beyond its jurisdiction.

Ultimately the High Court agreed, with the majority finding that the ICAC had conducted itself in a manner that misinterpreted the definition of "corrupt conduct" in the *ICAC Act 1988*.

The High Court's decision cast into doubt the efficacy of earlier findings by the ICAC on the basis that that they too had proceeded upon the misconceptions identified by the High Court in *Cuneen*.

Prior to *Cuneen* ICAC had made corrupt findings against Travers Duncan, John Atkinson, John McGuigan and Richard Poole as part of Operation Jasper. These individuals were in the process of appealing their findings and on the basis of the *Cuneen* judgment, the ICAC had in fact agreed to draft orders, before the Court of Appeal, which agreed to set aside their corruption findings.

Documents given to the NSW Parliament show that this was done with the agreement of not only the contesting parties, but also the three judges of the NSW Court of Appeal who were to hear the matter, on 8 May 2015, at which time they were to make the required declarations.

However, on 6 May 2015, without notice, the Baird Government passed through all stages, in both the LA and the LC, *the Independent Commission Against Corruption Validation Act 2015*.

The effect of the *Validation Act* was to not reverse the decision of the High Court in *Cuneen* (which the NSW Parliament had no power to do), but to validate actions taken by the ICAC before 15 April 2015, (i.e. before the judgment in *Cuneen*) whether those actions were beyond power or otherwise at the time.

The *Validation Act* extinguished the legal rights not only of the above parties but of all others who had been subject to findings of corruption by the ICAC.

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It is understood that there are potentially 128 persons who may be affected by the *Validation Act*. However, only a handful of those persons proceeded to court to uphold their rights.

Whilst the NSW Opposition supported the passage of the Validation Act, it must be noted that the existence of the abovementioned Court of Appeal proceedings and its settlement by the ICAC was **not disclosed to Members of the NSW Parliament when they debated and voted** on the *Validation Act*. Had there been a relevant disclosure, this group of persons may well have been excluded from the operation of the *Validation Act* on the basis of the agreed settlement of their case against the ICAC.

These matters have been extensively canvassed by the Joint Standing Committee on the Independent Commission Against Corruption. In November 2021 this committee handed down its report on Reputational Impact on an Individual Adversely Named in the ICAC's Investigations.

Recommendation 7 of this report (unanimously) stated the following:

That the *Independent Commission Against Corruption Amendment (Validation) Act 2015* be amended to put the persons named in the correspondence from the Crown Solicitor dated 23 April 2015 in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had the *Validation Act* not applied to them.

This bill seeks to put that recommendation into effect.

Members of the Government have advised that the Government is committed to reconsidering this matter. To date the Government has not done so.

Effect of the Bill:

The Independent Commission Against Corruption Amendment (Validation) Act 2015 inserted a provision into the Independent Commission Against Corruption Act 1988 to validate certain previous actions of the Independent Commission Against Corruption following the decision of the High Court in *Independent Commission Against Corruption v Cuneen* [2015] HCA 14. The object of this Bill is to amend the Independent Commission Against Corruption Act 1988 to provide that the validation provision does not apply in relation to a person who had proceedings pending in the Supreme Court or the Court of Appeal on 8 May 2015 relating to a finding by the Commission of corrupt conduct.

Recommendation –

It is clear that these are serious matters involving the application of the very Rule of Law itself in NSW.

That is why it deserves to be dealt with by the Government after full consideration of the Cabinet acting upon publicly-available advice from the relevant authorities.

It is incumbent on the Government to introduce a bill to right these wrongs as they said they would. It is for the Government to provide advice and assurance to the Parliament that the bill gives effect to recommendation 7 of the Committee and that the state is protected from compensation.

This has not occurred. Instead, the Parliament has been presented with a bill by a member of the crossbench.

Members of the Parliament deserve, (particularly in light of the fact that hugely significant facts were hidden from them with the passage of the *Validation Act*), to be able to form a judgment on these issues with the full benefit of reliable facts and appropriate advice.

This is not the case.