

## The powers of the ICAC to investigate

Marcel Fernandes reports on *Independent Commission Against Corruption v Cunneen* [2015] HCA 14

The issue in these judicial review proceedings was the extent of the powers of the Independent Commission Against Corruption (ICAC) to investigate individuals under the *Independent Commission Against Corruption Act 1988* (Act). That depended upon the statutory definition of ‘corrupt conduct’ in s 8 of the Act.

### Background

The first respondent, Ms Margaret Cunneen SC (Respondent) was a deputy senior Crown prosecutor. ICAC served her with a summons to appear to give evidence at an enquiry in relation to an allegation that she counselled a person to act in such a way so as to prevent police officers from obtaining evidence, with the intention to pervert the course of justice (alleged misconduct). The respondent instituted proceedings seeking a declaration that the alleged misconduct was not ‘corrupt conduct’ under the Act and that ICAC’s issuance of the summons was beyond power.

The case turned on the construction of ‘corrupt conduct’ in s 8 of the Act and in particular the construction of s 8(2) and its relationship to s 8(1). ICAC argued that the alleged misconduct, not done as a public official but as an ordinary citizen, was corrupt conduct under s 8(2) because it could adversely affect the exercise of official functions of a police officer and was conduct that involved an attempt to pervert the course of justice.

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By majority (French CJ, Hayne, Kiefel and Nettle JJ), the High Court held that ICAC’s jurisdiction did not extend to the alleged misconduct as that conduct did not fall under s 8(2). This was because the alleged misconduct only went to the efficacy of the police officer’s exercise of his or her functions, whereas, on its proper construction, s 8(2) defined ‘corrupt conduct’ as conduct with the capacity to adversely affect the probity of a public official’s exercise of his or her functions, due to the effect of s 8(1) on s 8(2).

In contrast, Gageler J (and Bathurst CJ in the New South Wales Court of Appeal) in dissent held that ‘adversely affects’ in s 8(2) was properly construed as only requiring that the efficacy of the public official’s exercise of his or her functions be adversely affected.

### The Act

Section 8(1) of the Act sets out four instances of misconduct which are defined as ‘corrupt conduct’. Subsections 8(1)(b), (c) and (d) refer to certain conduct done actively by a public official: dishonest or partial exercise of official functions; breach of public trust; or misuse of material acquired in the course of official functions, whether or not for anyone’s benefit.

In contrast, section 8(1)(a) defines ‘corrupt conduct’ in a more general way, namely, as conduct of any person (not only of 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’.

Section 8(2) provides, relevantly, as follows:

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 of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters ...

Section 8(2), thus, has two limbs.<sup>1</sup> The first limb (the ‘that could adversely affect’ limb), is in identical terms to s 8(1)(a) except that it adds the word ‘also’ and removes the adjectives ‘honest or impartial’. The second limb (the ‘and which involves’ limb) provides a list of 25 instances of misconduct, including perverting the course of justice in subsection 8(2)(g) and any attempt to do so in subsection 8(2)(y).

Section 8(6) provides that ‘[t]he 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 limited s 8 by providing that even if conduct fell within s 8, it would ‘not amount to corrupt conduct unless it could constitute or involve’ a criminal or similar offence. Section 12A also limited ICAC’s investigative powers by requiring it to direct its attention ‘to serious and systemic corrupt conduct’ and ‘to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct’. The Act’s objects clause, s 2A, provided that the Act’s ‘principal objects’ were ‘to promote the integrity and accountability of public administration by constituting [ICAC]

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... to investigate, expose and prevent corruption involving or affecting public authorities and public officials’.

## Litigation history

At first instance, Hoeben CJ at CL held that the alleged misconduct fell within s 8(2). His Honour rejected the Respondent’s reliance on the principle of legality as s 8(2) was composed of ‘ordinary English words and there is no ambiguity about them’.<sup>2</sup>

The Court of Appeal overturned that decision (Basten and Ward JJA; Bathurst CJ dissenting). In separate judgments, Basten and Ward JJA held that having regard to s 2A, the alleged misconduct did not fall within s 8(2) because ‘adversely affects’ meant conduct that ‘has the capacity to compromise the integrity of public administration’<sup>3</sup> or that has ‘the potential to cause ... ‘corruption’ in the exercise by the public official of his or her functions’ or could ‘have [an] adverse outcome when viewed from a public corruption perspective’.<sup>4</sup>

In dissent, Bathurst CJ held that the alleged misconduct fell under s 8(2) because, due to s 8(6), s 8(2) was not limited by any of the provisions in s 8(1)<sup>5</sup> and ‘adversely affects’ in s 8(2) simply meant ‘limits or prevents the proper performance of the public official’s functions’.<sup>6</sup>

## High Court majority

French CJ, Hayne, Kiefel and Nettle JJ held that ‘adversely affect’, in the first limb of s 8(2), meant to adversely affect the probity of the exercise of an official function by a public official. This was because ‘adversely affects’ in s 8(2) was to be read as being qualified by s 8(1)(b) to (d) of the Act. ‘Adversely affect’ could go to probity or efficacy,<sup>7</sup> but the former was the preferable construction as this ‘accord[ed] with the ordinary understanding of corruption in public administration and consequently with the principal objects of the [Act] as set out in s 2A’.<sup>8</sup> The ‘efficacy’ construction would mean the Act’s definition of ‘corrupt conduct’, and thus ICAC’s jurisdiction, would extend to criminal offences beyond corruption in public administration.<sup>9</sup>

The majority said that Bathurst CJ’s approach, for which ICAC contended in the High Court, ‘assume[d] that the plain and ordinary meaning of ‘adversely affect’ is its broadest possible meaning and does not attempt any kind of reconciliation of the meaning of that expression with the statutory context in which it appears’.<sup>10</sup>

The approaches of Basten and Ward JJA, for which the

Respondent contended, were ‘susceptible to circularity’<sup>11</sup> because they ‘assum[ed] the purpose of the Act and then reason[ed], as if syllogistically, that, because a meaning of ‘adversely affect’ limited to an adverse effect on [the integrity of public administration or a public corruption perspective was] more consonant with the assumed purpose of the Act, that meaning should be preferred’.<sup>12</sup> The majority said it was ‘not logically open to apply that kind of syllogistic reasoning’ here because it was impossible to identify the Act’s purpose ‘without reference to the scope of operation of the Act as defined by ss 8 and 9’.<sup>13</sup>

The majority stated that the issue of circularity meant that it was not open to express a conclusion as to the meaning of ‘adversely affect’ in s 8(2) in terms of absolute validity.<sup>14</sup> The majority referred to principles of statutory construction set out in *Project Blue Sky*<sup>15</sup> and held that:

The best that can be done is to reason in terms of relative consistency – internal logical consistency and overall consistency in accordance with the principles of statutory interpretation adumbrated in *Project Blue Sky* – to determine which of the two competing constructions of ‘adversely affect’ is more harmonious overall.<sup>16</sup>

The majority did not articulate how s 8(6) fitted in with the above reasoning by relative consistency. Their Honours did not deal with s 8(6) in any detail but commented that s 8(6) ‘makes clear that the categories so described in s 8(1) and s 8(2) are not to be read as limiting each other’.<sup>17</sup>

The majority defined the question to be whether ‘adversely affects’ in s 8(2) was limited to ‘corruption in public administration’ or what it described as ‘something more’.<sup>18</sup> Their Honours accepted that it would not be right to read s 8(2) in a way that gave it no work to do beyond that already done by s 8(1)(a)<sup>19</sup> although their Honours did not refer to s 8(6). The majority said that viewed in the context of ss 8(1)(b) to (d) and the interrelationship between ss 8(1)(b) to (d) and 8(2), ‘it will be seen that what was intended is an adverse effect upon the exercise of an official function by a public official such that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b) to (d)’.<sup>20</sup>

The majority held further that s 8(1)(b) to (d) limit a public official’s conduct that may be ‘corrupt conduct’ and so ‘define the nature of improbity of public officials’.<sup>21</sup> In turn, s 8(1)(b) to (d) limited ‘adversely affects’ in s 8(2) to conduct that ‘constitutes or involves conduct ... identified in s 8(1)(b) to (d)’.<sup>22</sup> Thus, it would be ‘inherently improbable’ for s 8(2) to be

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read as directed at any broader range of improbity than that, as it was ‘more logical and textually symmetrical to read ‘adversely affect’ in s 8(2) as confined to having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined in s 8(1)(b) to (d)’.<sup>23</sup> Their Honours stated that the narrower construction of s 8(2) was ‘also more consonant with the language of ss 2A and 9 in that it embraces offences which could affect the integrity of public administration and excludes those which could not’.<sup>24</sup>

Given the breadth of conduct outlined in the second limb of s 8(2), the majority noted that the broader construction of the first limb would extend to many different kinds of misconduct, such as telling lies to a police officer.<sup>25</sup> In that context, the majority applied the principle of legality to prefer the narrower construction.<sup>26</sup>

#### Gageler J’s dissent

His Honour stated that his reasons accorded substantially with those of Bathurst CJ.<sup>27</sup> His Honour accepted the majority’s identification of a choice between the ‘efficacy’ and the ‘probity’ construction of ‘adversely affects’, but considered it sufficient for the alleged criminal conduct to have the potential to impair the efficacy of a public official’s official functions for it to be ‘corrupt conduct’ such that ICAC had the power to investigate.

His Honour considered that the ordinary grammatical meaning of ‘could adversely affect’ connoted ‘nothing more than impediment or impairment’ and ‘import[ed] no unexpressed qualitative element into the nature of that impediment or impairment’, particularly one ‘not expressed in the text of s 8(2), but which is expressed, at least in part, in the text of s 8(1)(a) (doing so would appear to be contrary to s 8(6))’.<sup>28</sup> The ‘efficacy’ construction gave s 8(2) a ‘relatively precise operation which depends entirely on the language of that sub-section’, which ‘in turn gives the defined term ‘corrupt conduct’ a relatively precise operation which does not depend on drawing some negative implication from the undefined and indefinite concept of corruption’.<sup>29</sup>

In relation to the principle of legality, Gageler J said that it was not clear why the principle had any work to do in construing provisions defining the scope of ICAC’s jurisdiction, as opposed to particular coercive powers that might derogate from a particular common law right. No particular right or principle had been identified that could be said to be jeopardised by the ‘efficacy’ construction.<sup>30</sup>

#### Conclusion

Accordingly, by majority, the High Court granted special leave but dismissed the appeal.

#### Endnotes

1. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [7].
2. *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571 at [63].
3. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [71].
4. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [189].
5. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [15].
6. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [22].
7. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [2].
8. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [3].
9. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [3].
10. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [32].
11. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [33].
12. *Ibid.*
13. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [35].
14. *Ibid.*
15. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] and [70] per McHugh, Gummow, Kirby and Hayne JJ.
16. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [35].
17. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [78].
18. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [36].
19. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [38].
20. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [46].
21. *Ibid.*
22. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [45].
23. *Ibid.*
24. *Ibid.*
25. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [52].
26. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [54].
27. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [75].
28. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [82].
29. *Ibid.*
30. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [86].