

## Corrupt conduct: the ICAC's Cunneen inquiry

By the Hon Peter Heerey AM QC\*

The New South Wales Independent Commission Against Corruption commenced an inquiry into alleged corrupt conduct by Margaret Cunneen SC, the state's deputy senior crown prosecutor.

The alleged corrupt conduct was that Ms Cunneen 'with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, ... to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol at the scene of a motor vehicle accident.'

Ms Tilley was the girlfriend of Ms Cunneen's son. In fact a blood alcohol test was conducted at a hospital and showed zero alcohol.

The ICAC's inquiry, on its face, was not concerned with any conduct by Ms Cunneen in her official capacity as deputy senior crown prosecutor. In theory, the same conduct would have provoked inquiry by ICAC had it been engaged in by Bruce from Bondi or Cheryl from Chatswood. However, as Gageler J in the High Court delicately put it, the question before the courts was 'not about the propriety or prudence of the ICAC choosing to undertake the particular investigation in this case.'<sup>1</sup>

Ms Cunneen challenged the legality of the inquiry in the Supreme Court of New South Wales. She failed at first instance before Hoeben CJ at CL<sup>2</sup> but succeeded in the Court of Appeal (Basten and Ward JJA, Bathurst CJ dissenting).<sup>3</sup> The ICAC sought special leave to appeal to the High Court of Australia. Special leave was granted but the appeal was dismissed (French CJ, Hayne, Kiefel and Nettle JJ, Gageler J dissenting).<sup>4</sup>

The central point of the majority judgment in the High Court was that the expression in the definition of 'corrupt conduct' in s 8(2) of the *Independent Commission Against Corruption Act* 1988 (NSW), viz conduct which 'adversely affects, or could adversely affect ... the exercise of official functions by any public official,' was confined to conduct which affected the *probity* of the official, as distinct from the *efficacy* of the exercise of an official function. In other words, conduct causing an official to act in a way which was without fault or lack of probity on the part of that official was not within the Act. Since in the instant case any police officer whom Ms Tilley deceived would be acting innocently, her conduct, and that of Ms Cunneen in counselling her to engage in it, was outside ICAC's jurisdiction.

### Defining corrupt conduct

At common law 'corruption' is not a term of art, so drafters of the Act had to define the term with care since it would be the gateway to the exercise of what the High Court majority referred to as ICAC's 'extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges)'.<sup>5</sup>

Section 8 commences with sub-s (1) which provides:

- (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.

This seems to accord with the general understanding of corruption, that is to say conduct involving dishonest or improper conduct by a public official.

Sub-section (2) however goes on to provide:

- (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 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:
- (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;

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- (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.

These offences will be referred to as 'the s 8(2) offences'.

It will be observed at the outset that not all of the s 8(2) offences necessarily involve dishonesty or wrongdoing on behalf of the public official. Indeed with some of them, e.g. tax and revenue evasion, it is of the essence that the public official is innocent.

Tax evasion usually involves conduct such as concealing income which should be reported in tax returns, constructing false documents and the like, essentially for the purpose of deceiving innocent tax authorities, with a consequent loss to public revenue.

Another example is homicide or violence, which in this context would primarily bring to mind the murder or assault of a public official.

Other s 8(2) offences, such as perverting the course of justice, might or might not involve wrongdoing on the part of a public official. For example, essential exhibits in a court case might be destroyed with, or without, the connivance of a public official.

The only other part of s 8 which need be mentioned for present purposes is sub-s (6) which provides:

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(1) provides an overall limitation on s 8:

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.

There is obviously some overlapping between sub-sections (1) and (2). Both extend to 'any person (whether or not a public official)'. It is not difficult to hypothesise conduct which could fall within both. Nevertheless, provisions of a statute are not necessarily to be treated as separate, watertight compartments, as s 8(6) explicitly reminds the reader.

In s 8 there appears to be a logic in the relationship between the two sub-sections (1) and (2) and a different emphasis in each. Sub-section (1) is primarily directed at the conduct of public officials themselves. Impropriety of such persons is at the forefront, both in paragraph (a)'s 'honest or impartial exercise of official functions' and paragraphs (b), (c) and (d), all of which specify different kinds of wrongful or improper conduct by an official.

By contrast, sub-s (2) aims at the conduct of someone *other than* the public official the exercise of whose official functions is adversely affected, even though that other person may be a public official. But whether that other person happens to be a public official is not relevant. What is relevant is that such 'other person'

- has engaged in conduct which involves any of the s 8(2) offences, and
- that conduct adversely affects, or could adversely affect, the exercise of official functions by a public official.

The drafters' strategy seems to be to provide for some element of illegality or impropriety in each limb of the definition of 'corrupt conduct'; cf 9. In sub-s (1) it is in the conduct of the person whose conduct adversely affects the honest and impartial exercise of official functions or who, as a public official, engages in the wrongful or improper conduct in (b)–(d). In sub-s (2) it is the commission of a s 8(2) offence which adversely affects the exercise of official functions by someone else, who is a public official.

The majority of the High Court held that the expression 'adversely affect' in s 8(2) meant 'to adversely affect the exercise of an official function by a public official in such a way that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)–(d).'<sup>6</sup>

There are problems with this reading.

First, the plain meaning of the expression 'the exercise of official functions' in s 8(2) is not limited by any qualification as to the legality or propriety of such exercise, whether good, bad or indifferent.

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Secondly, the majority read into s 8(2) words that are not there. One is reminded of the oft-cited<sup>7</sup> passage in the speech of Lord Mersey in *Thompson v Goult & Co*<sup>8</sup>

It is a strong thing to read into an Act of parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

See also *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service*.<sup>9</sup> In the present case s 8(2) conveys a rational meaning without any such insertion.

Thirdly, the immediately preceding sub-s (1) speaks of ‘the honest or impartial exercise of official functions.’ (Emphasis added.) There must have been some reason for the drafters omitting those qualifications in sub-s (2). Presumably it was some reason other than absent-mindedness. The most likely explanation is that the drafters intended the expression ‘exercise of official functions’ in sub-s (2) not to be concerned with the honesty or impartiality of such exercise.

Fourthly, it does violence to the syntax of the sub-sections to drag pars (b)–(d) of sub-s (1) across to do, as it were, double duty in sub-s (2) – especially when that sub-section already has the s 8(2) offences.

Fifthly, if the true intention was to restrict the definition of ‘corrupt conduct’ to official conduct that was not honest and impartial, there would be no need for s 8(2) at all. Sub-section (1) could simply be written differently. The target would be conduct which adversely affects the honest or impartial exercise of official functions by a public official. The (rewritten) sub-section would cover:

- such conduct by the public official himself or herself;
- the type of conduct presently described in pars (c) and (d);
- conduct involving what are now the s 8(2) offences.

### ‘Corrupt conduct’; a taker as well as a giver?

At an early stage of the argument before the High Court, Hayne J put to ICAC’s counsel the proposition:

Well, corruption has a giver and a taker and this Act is directed against both conduct which would be the giving of and the taking of, is it not?<sup>10</sup>

Once it is assumed that parliament had the same assumption, that corrupt conduct must involve a taker as well as a giver, the reading of the majority would follow. But is this assumption correct? Bear in mind that the critical words are not so much ‘corrupt conduct’ but ‘the exercise of official functions’ and the suggested qualifying insertion of ‘honest or impartial’. It is a

question whether those qualifications are ‘clearly required by [the provision’s] terms or its context.’<sup>11</sup>

### Competing absurdities

A familiar forensic technique is to argue that an opponent’s case, say on the construction of a statute, would logically lead to absurd results. *Ergo*, it is argued, such a construction could not have been intended by the legislature.

The majority judgment contains no less than ten examples of what are said to be absurd results if ICAC’s construction is correct.<sup>12</sup> My favourite is number two: the contention that the theft of a garbage truck would qualify as corrupt conduct since the garbage collecting authority could be rendered less able to discharge its official function of collecting garbage.

However, Gageler J in dissent counters with some equally surprising counter-absurdities.<sup>13</sup> His Honour points out:

At the other extreme is that to which the narrower *probity* reading of s 8(2) leads: ICAC having no power to investigate, expose, prevent or educate about state-wide endemic collusion among tenderers in tendering for government contracts; as well as ICAC having no power to investigate, expose, prevent or educate about serious and systemic fraud in the making of applications for licences, permits or clearances issued under New South Wales statutes designed to protect health or safety (such as the *Child Protection (Working with Children) Act 2012* (NSW) or the *Work Health and Safety Act 2011* (NSW)) or under New South Wales statutes designed to facilitate the management and commercial exploitation of valuable State-owned natural resources (such as the *Mining Act 1992* (NSW), the *Fisheries Management Act 1994* (NSW) or the *Forestry Act 2012* (NSW)).

It may be conceded that either construction of s 8(2) could produce some surprising hypothetical applications. So the suggested absurdities rather cancel each other out. The expression ‘exercise of official functions’ must mean *something*.

It might be accepted that a general understanding of the concept of corrupt conduct involves some dishonesty or lack of probity by a public official. However, parliament was entitled to take the view that the integrity and accountability of public administration could also be affected by unlawful or improper conduct which affected the exercise of official functions even though the public officials themselves were innocent of any unlawfulness or impropriety. The numerous ways in which this could occur are powerfully demonstrated in the passage from the judgment of Gageler J cited above.

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### ‘Serious and systemic conduct’

Section 12A introduces the concept of ‘serious and systemic corrupt conduct’ as follows:

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

Encouraging a family member to invent an excuse to a police officer to avoid a breath test is conduct to be deprecated, but would stand rather towards the bottom end of the scale of human wickedness. When it turns out there was no alcohol anyway, the possibility of societal harm is minimised. And there is no suggestion that Ms Cunneen was part of some organisation which regularly used or promoted such tactics.

The ‘responsibility and role of other public authorities and public officials’ brings to mind the normal functions of the NSW Police Force, who would seem to be the logical authority to pursue such a complaint, bearing in mind that the conduct alleged would involve the deception of its members.

It does not seem to have been argued that any failure of the alleged conduct to satisfy s 12A went to the jurisdiction of ICAC to launch the inquiry against Ms Cunneen. Such considerations go rather to the ‘propriety or prudence’ of the Commission’s conduct. It might also be noted in this context s 20(3) of the Act provides:

The Commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission’s opinion):

- (a) the subject-matter of the investigation is trivial; or
- (b) the conduct concerned occurred at too remote a time to justify investigation; or
- (c) if the investigation was initiated as a result of a complaint – the complaint was frivolous, vexatious or not in good faith.

Parliament must be taken to have been fully aware that the Act would confer extraordinary coercive powers with consequent abrogation of fundamental rights and privileges. Also, that its reach might extend to conduct perhaps not falling within the popular understanding of the meaning of the term ‘corrupt conduct’.

Perhaps there was discussion along these lines in the parliamentary Drafting Office:

Drafter 1: This draft of the Act is going pretty far. Taken literally it would apply to somebody stealing a garbage truck.

Drafter 2: True, but if we limit it to ‘adversely affecting the honest or impartial exercise of official functions’ it wouldn’t catch, for example, widespread collusion amongst tenderers for government contracts, or fraud in applications for mining licences.

Drafter 1: I suppose that’s right. But what if we put something in the Act making it clear ICAC should only investigate corruption, as we define it, that is serious? After all, it will be an eminent body, staffed with experienced people, so the public can rely on them to act sensibly.

Drafter 2: Good idea. We could also say something to the effect that ICAC should confine itself to serious conduct that was somehow extensive and extending beyond an individual – what’s the word?

Drafter 1: Systemic?

Drafter 2: That’s it. And we could say ICAC should leave something better investigated by another body.

Drafter 2: Great. I think it’s time for morning tea.

ICAC appear to have ignored the statutory advice in s 12A and 20(3). In the absence of any explanation perhaps the charitable conclusion is that there is such a high level of purity in the public administration of New South Wales that ICAC has nothing better to do than investigate *l’affaire Cunneen*.

### Endnotes

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1. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [73].
2. *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571.
3. *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421.
4. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.
5. [2015] HCA at [3], [8].
6. [2015] HCA 14 at [45].
7. Pearce and Geddes, *Statutory Interpretation in Australia*, 8<sup>th</sup> ed, 2014, at 69.
8. [1910] AC 409 at 420.
9. (1995) 184 CLR 301 at 310 per Brennan CJ, Gaudron and McHugh JJ.
10. [2015] HCA Trans 47.
11. PMT Partners, *ibid*.
12. [2015] HCA 14 at [52].
13. [2015] HCA 14 at [92].