ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S302 of 2014

INDEPENDENT COMMISSION AGAINST CORRUPTION
Applicant

MARGARET CUNNEEN
First Respondent

STEPHEN WYLLIE
Second Respondent

SOPHIA TILLEY
Third Respondent

RESPONDENTS' SUBMISSIONS

Part I. Publication

1. This document is in a form suitable for publication on the internet.

Part II. Issues

2. There are two issues:

   (a) whether special leave to appeal from the decision of the New South Wales Court of Appeal in *Cunneen v. Independent Commission Against Corruption* [2014] NSWCA 421 should be granted;

   (b) if special leave be granted, whether s 8(2) of *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) confers power on the Independent Commission Against Corruption (**ICAC**) to investigate the "Allegations" referred to in paragraph 5 of the Applicant's Submissions ("AS").

3. The respondents contend that the answer to each question should be "No".

Part III. *Judiciary Act 1903*, s 78B

4. The respondents are of the view that s 78B notices are not required.

Filed on behalf of the Respondent by:
Dated: 30 January 2015
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IV

Part ~~IV~~. Decisions Below

5. The reasons for judgment below are not yet reported. The decision at first instance (Hoeben CJ at CL), is *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571. The decision of the Court of Appeal is *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421.

~~Part V.~~ Facts

6. ICAC has purported to commence an investigation into an allegation involving the respondents. The Allegation was first set out in a notice given to the first respondent, along with a summons requiring her to attend a compulsory examination pursuant to s 30 of the *ICAC Act* scheduled for 1 August 2014. By a second summons dated 27 October 2014, the first respondent was required to attend a compulsory examination. As Basten JA noted at CA [31] "the notice also referred to a 'public inquiry' but it was common ground that ICAC intended to conduct a public inquiry").

7. The time for the commencement of the inquiry identified in the notice was 10 November 2014 (CA [30]-[32]).

8. On 10 November 2014, Hoeben C.J. at C.L. in the Supreme Court of NSW dismissed a summons filed by the respondents seeking, *inter alia*, a declaration that ICAC had no jurisdiction to investigate the Allegations because the Allegations did not disclose "corrupt conduct" within the meaning of s 8(2)(g) of the *ICAC Act*.

9. On 18 November 2014 the NSW Court of Appeal heard, and on 5 December 2014 allowed, an appeal from the decision of Hoeben CJ at CL. The Court of Appeal, inter alia, set aside the orders made in the Supreme Court dismissing the summons and, relevantly, declared that "the Commission has no jurisdiction to investigate the allegation involving the applicants identified in the summons" issued on 27 October 2014, because (Basten JA and Ward JA; Bathurst CJ dissenting) the Allegations did not disclose "corrupt conduct" within the proper meaning of s 8(2).

10. On 9 December 2014 ICAC applied for special leave to appeal. It filed a summons for expedition of the special leave application and on 12 December, French CJ ordered, subject to undertakings in relation to costs by the applicant that the application for special leave be referred to a Full Court to be heard as on appeal ([2014] HCA Trans 296).

Part V~~I~~ Applicable legislative provisions

(a) *ICAC Act*, ss 2A, 3, 7, 8, 9, 12A, 13, 30, 31, 86, 87.

(b) *Interpretation Act 1987* (NSW), ss. 5, 7, 33, 34.

Part VI Argument

11. These submissions deal first with the issue sought to be raised in the appeal, and secondly with whether special leave should be granted.

Issue sought to be raised on appeal

12. The majority in the Court of Appeal ultimately determined the issue against the applicant:

    (a) on the basis that the reference in s. 8(2) of the *ICAC Act* to conduct which could adversely affect the exercise of an official function "should be understood to refer to conduct which has the capacity to compromise the integrity of public administration", or where the conduct of an individual is unlawful within one of the paragraphs of s. 8(2), but that conduct does not (and does not have the capacity) to lead a public official into dishonest, partial or otherwise corrupt conduct, s. 8(2) will not catch the conduct: Basten JA at CA[71], [75].

    (b) the focus of the *ICAC Act* was on corruption in the public sector and conduct which did not have the potential to cause any "corruption" in the exercise by a public official of his or her functions, or which could have no adverse outcome when viewed from a public corruption perspective did not fall within s. 8(2) because it could not adversely affect the proper exercise of official functions in a relevant sense: Ward JA at CA[171], [187]-[189].

13. These views were a reflection of the objects of the *ICAC Act* set out in s 2A:

> "The principal objects of this Act are:
>
> (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
>
> (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials,
>
> (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
>
> (b) to confer on the Commission special powers to inquire into allegations of corruption."

14. The term "corruption", as used in ss 2A(a)(i), (a)(ii) and (b), is not itself defined by the *ICAC Act.* It is clear, however, that it involves some dishonesty or lack of integrity which involves or affects public authorities or public officials.

15. The AS make a number of submissions seeking to diminish the effect to be given to the presence of s. 2A. It is convenient to deal first with those arguments.

16. At AS[54], the applicant relies on one of the meanings given to "corrupt" in the *Macquarie Dictionary* (namely "4. infected; tainted") but the definitions of "corrupt" and "corruption" in the *Macquarie Dictionary* are:

> "**corrupt** 1. dishonest; without integrity; guilty or dishonesty, esp. involving bribery: a corrupt judge. 2. debased in character; depraved; perverted; wicked; evil. 3. putrid. 4. infected; tainted. 5. made bad by errors or alterations, as a text. – *v.t.* 6. to destroy the integrity of; cause to be dishonest, disloyal, etc., esp, by bribery. 7. to lower morally; pervert; deprave. 8. to infect; taint. 9. to make putrid or putrescent. 10. to alter (a language, text etc.) for the worse; debase. 11. *Archaic.* to mar; spoil. –*v.i.* 12. to become corrupt, [ME, from L *corruptus*, pp., broken in pieces, destroyed] – **corrupter,** *n.* – **corruptive**, *adj.* – ***corruptly***, adv."

> "**corruption** 1. the act of corrupting. 2. the state of being corrupt. 3. moral perversion; depravity. 4. perversion of integrity. 5. corrupt or dishonest proceedings. 6. bribery. 7. debasement, as of a language. 8. a debased form of a word. 9. putrefactive decay. 10. any corrupting influence or agency."

17. The definitions clearly suggest that the conduct which constitutes corruption goes beyond something which may simply cause an official to act differently from the way in which the official may have acted without that conduct.

18. The example given at AS[54] of "corruption of the electoral process" highlights the failure of the applicant to accept that conduct which comes within its jurisdiction must be conduct which could lead a public official or public authority to exercise their functions dishonestly, partially or otherwise improperly. The fact that the asserted example is not corrupt conduct within the meaning of the *ICAC Act*, does not mean that it is not a criminal offence. The conduct could be investigated by another body, such as the NSW Police Force, but not the applicant, which is not a general crime commission.

19. The applicant, at AS[55]-[56] also places reliance on the presence of the word "affecting" in s. 2A(a)(i), but the expression used is not "conduct affecting" but "corruption affecting".

20. The contentions at AS[57], with respect, misquote what was said in *Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47[47]. The passage quoted at AS[57] is used in contrast to the immediately preceding sentence "Historical considerations and extrinsic materials" (i.e. materials not part of the text) "cannot be relied on to displace the clear meaning of the text". In relation to matters in the text, however, (such as s. 2A) it was then said: "The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy".

21. The applicant's reliance, at AS[61]-[64], on the Court's observation in *Owners of the Ship "Shin Kobe Maru" v. Empire Shipping Co Inc* (1994) 181 CLR 404 at 419 is misplaced. It is true, of course, that if a definition is intended to be exhaustive, the proposition in *Shin Kobe Maru* will be applicable[1]. The proposition quoted from *Shin Kobe Maru*, however, needs to be read with the further qualification at 420 in that case. That qualification was referred to by Brennan CJ, Gaudron and McHugh JJ in *PMT Partners Pty Ltd (In liq) v. Australian National Parks and Wildlife Service* (1995) 184 C.L.R. 301 at 310:

> "It is also of fundamental importance that limitations and qualifications are not read into a statutory definition unless clearly required by its terms or its context, *as for example if it is necessary to give effect to the evident purpose of the Act"* (Emphasis added).

22. The applicant at AS[61] also refers to the remarks of Gibbs J. in *Wacal Development Pty Ltd v. Realty Developments Pty Ltd* (1978) 140 CLR 503. The passage from *Shin Kobe Maru* 419 cited at AS[61] does not refer specifically to Gibbs J. and it is not clear that the other members of the Court in *Wacal Developments* would have gone quite so far as Gibbs J. (See Stephen J. at 512-3, Mason J. at 518-9, Murphy J. at 522, Aickin J. at 528-9. The statements in *Shin Kobe Maru* at 420 certainly do not go so far.

23. The Full Court of the Federal Court in *Esso Resources Pty Ltd v. Commissioner of Taxation* (2011) 199 FCR 226 at 256-258 ([100]-[107]) doubted whether *Wacal Developments* went so far: see at [102]. So too did the Court of Appeal in *Tovik Investments Pty Ltd v. Waverley Council* (2014) NSWCA 379. There is in reality no difference for present purposes between those cases.

24. In relation to AS[64] and the passing amusement of the opening words of its second sentence, the position which obtains in the present case is:

(a) The *Shin Kobe Maru* principle *does* allow the legislatively stated purpose of an enactment to be taken into account when considering the ambit of a definition.

(b) Within the terms of s. 8(2) of the *ICAC Act* are provisions which themselves require interpretation – "adversely affects", "could adversely affect", "the exercise of official functions". It is entirely orthodox to interpret, as did the majority in the Court of Appeal, those terms by reference to the statutorily stated purpose of the Act.

25. Further, regard to the purpose of underlying the *ICAC Act* is *required* by s. 33 of the *Interpretation Act 1987* (NSW):

> "In the interpretation of a provision of an Act..., a construction that would promote the purpose or object underlying the Act ... is expressly stated in the

[1] AS[64] recognizes that the definition needs to be an exhaustive definition for that principle to apply.

Act ...) shall be preferred to a construction that would not promote that purpose or object."

26. The reliance at AS[60] on s. 7 of the *Interpretation Act* and the common law presumption that cognate words in legislation have common meanings should not be accepted as relevantly applicable. Section 7 has to be read with the precept in s. 33, which should prevail. See too s. 5(2) of the *Interpretation Act*. Further, as noted earlier, the terms of the definition of "corrupt conduct" themselves require interpretation. Section 33 requires that s. 2A of the *ICAC Act* be taken into account in so doing.

27. In short the approach taken by the applicant to the interpretation of the relevant provisions of the *ICAC Act* does not conform with the general law, or with the requirements of the *Interpretation Act*.

28. Turning then to the applicant's attack on the reasoning of each of the majority in the Court of Appeal, the bases of the attack should not be accepted.

29. Thus Basten JA at CA[49] referred to the fact that s. 7(1) of the *ICAC Act* recognized that conduct might fall within both s. 8(1) and 8(2) and was correct in taking the view that to understand s. 8(2) one needs to consider s. 8(1) as well. To similar effect was Ward JA at CA[174]-[175].[2]

30. Basten JA, correctly it is submitted, went on to say, at CA[51], that while taking into account s. 8(6) it was yet necessary to read s. 8 as a whole and "in the context of the objects of the Act (s. 2A)". This was an entirely orthodoxview, in the light of the approach to interpretation referred to above. The view, expressed by Bathurst CJ at CA[20] and [21] that one should "focus on the words of" s. 8(2) is true as far as it goes, but it does not apply the full test. It was to focus on the words in isolation, without sufficient regard for the remainder of the Act.

31. The further discussion by Basten JA at CA[53]-[55] of the role of ss. 8(1) and 8(2) is a very clear and accurate description of the interrelationship between the two provisions. So too is his discussion at CA[56]-[57]. The example given in the last sentence of CA[56] is relevant. It demonstrates that if the applicant is correct, every "tax evasion" or "revenue evasion" in terms of ss. 8(2)(m) and (n) of the *ICAC Act* will amount to "corrupt conduct": see too at CA[61]. This gives an extremely wide operation to the Act, far wider than any ordinary reading of the purposes in s. 2A would allow. So too does the example referred to in CA[57]. Again the discussion of the role of ss. 8(1) and 8(2) by Ward JA at CA[168]-[169] and CA[171]-[177] is, it is submitted, clear and accurate.

[2] As Isaacs and Rich JJ observed in *Metropolitan Gas Co v. Federated Gas Employees' Industrial Union* (1924) 35 CLR 449 at 455, "every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument".

32. Basten JA then, at CA[58], rejected the present respondents' contention that the two parts of s. 8(2) could be satisfied only by separate acts or omissions, holding that what was required was at least an act having the two characteristics referred to in s. 8(2). He went on to say, however, that there was substance in the view that s. 8(2) should not be read as:

> "in a way which gives no work to the first presented characteristic, so that any conduct following within the list of unlawful activities (primarily criminal) would suffice to engage the functions of the Commission."

See too Ward JA at CA[176]. This approach too, it is submitted, was correct.

33. The question which then arose was to determine how the first part of s. 8(2) was to be interpreted.

34. In this regard a principle to be applied was that discussed by Gageler and Keane JJ in *Lee v NSW Crime Commission* (2013) 251 CLR at 307-311; [307]-[314], namely as stated in *United States v Fisher* 6 US 358 at 390 (1805) and referred to at 251 CLR 307, [307]:

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

See too the second passage quoted in this context in *Lee* at 308, [308]:

> "General words and phrases, therefore, however wide and comprehensive in their literal sense, must be construed *as strictly limited to the actual objects of the Act*, and as not altering the law beyond." (Emphasis added)

35. In addition it is appropriate to have regard, as did Ward JA at CA[184], to the second reading speech at the introduction of the bill for the *ICAC Act*. The then Premier said that ICAC:

> "...will not be a crime commission. Its charter is not to investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector. That is made clear in this legislation and it was made clear in the statements I made prior to the election. It is nonsense, therefore, for anyone to suggest that the establishment of the independent commission will in some way derogate from the law enforcement role of police or bodies such as the National Crime Authority. On the contrary, the legislation makes it clear that the focus of the commission is public corruption and that the commission is to co-operate with law enforcement agencies in pursuing corruption."[3]

36. Ward JA was correct to rely on the Second Reading Speech in providing a context for her approach to construction. It was permissible to do so either at common law, to

[3] This was emphasised by the insertion of s. 2A by the *Independent Commission Against Corruption Amendment Act 2005.*

assist in identifying the mischief or purpose underlying the proposed legislation;[4] and also by force of s 34(2)(f) of the *Interpretation Act.*

37. Basten JA was correct, it is submitted, in taking the view, at CA[66], that the term "adversely affect" in s. 8(2) should be read in a way:

> "is consistent with the ordinary understanding of corruption affecting public authorities and public officials. This approach excludes from the scope of the Commission's functions conduct which may be unlawful but does not involve corruption or corrupt conduct because it does not compromise public administration."

10 To do so was consistent with the stated objects of the Act.

38. Similarly Ward JA was also correct, at CA[189] in taking the view that:

> "Conduct which could have a potential effect on the exercise of official functions in the sense that it might cause a different decision to be made or the functions to be exercised in a different manner but which does not have the potential to cause any "corruption" in the exercise by the public official of his or her functions, or which could have no adverse outcome when viewed from a public corruption perspective, is not conduct that could "adversely" affect the proper exercise of official functions in the relevant sense."

20 39. Ward JA was also correct in emphasizing the presence in s. 8(2) of the word "exercise": [178], CA[179]. The Allegations needed to disclose an actual or potential adverse affect on the *exercise* of a public function by a public official, having regard to the objects of the Act and the purpose of the Parliament. See too Basten JA at CA[55].

40. The approach taken by the majority avoids rather surprising results. It is perfectly permissible for courts to have regard to the consequences of adopting a particular construction. As the plurality observed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78]:

> "The context of the words, the consequences of a literal or grammatical
30 construction, the purpose of the statute or the canons of construction[5] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

And in *CTM v The Queen*[6] Heydon J stated that "It is true that the consequences of a particular construction can be taken into account in assessing the likelihood of that construction being correct".

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[4] *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85; *Attorney-General v Oates* (1999) 198 CLR 162 at 175.

[5] At this point the plurality said "For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature had not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437."

[6] *CTM v The Queen* [2008] HCA 25; (2008) 236 CLR 440 at 509 per Heydon J.

41. There are surprising results resulting from the view contended for by the applicant. As Bathurst C.J. noted at CA[26], such reasoning necessarily had the effect that *any* offence of perverting the course of justice or attempting to do so would fall within s. 8(2). But that would not only be the position in relation to perverting the course of justice (s. 8(2)(q)). It would apply also to almost all, if not all, of the matters listed in ss. 8(2)(a) to (y).

42. The interpretation contended for by the applicant goes far beyond the concept of corruption contemplated by the objects of the Act. The majority were correct in treating the ambit of s. 8(2) as one in aid of the concept in s. 2A, not one expanding it. In particular the majority's approach and decision:

(a) was consistent with the Act read as a whole including its purpose, and policy, and in its context;

(b) ensured meaning was given to every word of the statutory text; and

(c) avoided absurd results (such as the consequence described by Basten JA at CA[45]; and the result described by Bathurst CJ at CA[25]).

There is no allegation that the first respondent misused her public office in making the statement or that she attempted to exercise her public functions to influence any person at the scene of the accident. There is simply nothing in the Allegations that demonstrates the *adverse* affectation required to enable ICAC to take jurisdiction within s 8(2).

Whether special leave should be granted

43. In the end the case is one where the three members of the Court of Appeal have stated the principles appropriate to the construction of the relevant provisions of the *ICAC Act,* but have differed in their application of them.

44. The essential difference is that Bathurst CJ looked only to the *words* of s. 8(2), whereas Basten JA and Ward JA looked to the words of s. 8(2) but in their context, including particularly the stated objects of the Act. There was nothing heterodox in the majority's approach or reasoning. And, it is submitted, it is the correct view of the provisions.

45. The consequences asserted by the applicant at AS[68]-[71] lack foundation which can be properly tested before this Court, and should not result in a grant of special leave.

46. The application of the Court of Appeal's decision to each of the matters there referred to will depend on the circumstances of each case. The view, stated at AS[68], that the reasons of the majority are "divergent" is, with respect, bereft of substance. Of course there are some differences in wording, but there is no divergence in result or core reasoning.

47. The contention, at AS[73], should also be rejected. There is no relevant difference between the decisions. See paragraph 23 above.

48. This is a case which has generated much publicity, and claims to urgency by the applicant. In reality, however, it involved a matter of a kind hardly consistent with the requirement of s. 12A of the *ICAC Act* that:

> "In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct."

~~Part IX:~~ Orders sought

49. Special leave should be refused with costs.

10 50. In the event that special leave is granted, the appeal should be dismissed with costs.

51. In accordance with the undertaking given by the applicant it should pay the costs of the appeal and application in any event

Part VIII: Estimate of time

52. The respondent will require 2 hours for the presentation of their oral arguments.

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