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COMMENTARY

Jurisdiction of Australia's Independent Commission Against Corruption Before and After *Cunneen* and *Duncan*

Key Points

- The Independent Commission Against Corruption ("ICAC") was established by the New South Wales Government in 1988 to investigate corruption.
- The scope of ICAC's power to conduct investigations is limited by the definition of "corrupt conduct" in s 8 of the *Independent Commission Against Corruption Act 1998* (NSW) ("ICAC Act").
- In *ICAC v Cunneen* [2015] HCA 14, the High Court of Australia held that ICAC did not have jurisdiction to investigate conduct if that conduct did not compromise the probity, as opposed to the efficacy, of the exercise of an official function by a public official. This effectively narrowed the scope of ICAC's power to investigate the conduct of persons who are not public officials and cast doubt on numerous previous ICAC investigations and findings.
- The New South Wales Parliament responded to the High Court's decision with the enactment of retrospective validating legislation known as the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) ("Validation Act").
- The Validation Act, in turn, was challenged on constitutional grounds by Travers Duncan as part of an appeal against findings of corruption against him in the New South Wales Court of Appeal.
- On 9 September 2015, the Full Bench of the High Court in *Duncan v ICAC* [2015] HCA 32 unanimously rejected Duncan's constitutional challenge to the validity of the Validation Act. The Court's decision has the effect of removing much of the doubt around other previous ICAC investigations and findings.

ICAC v Cunneen

In 2014, Margaret Cunneen, a Deputy Senior Crown Prosecutor of the State of New South Wales, was summoned by ICAC to give evidence at a public inquiry. The purpose of the inquiry was to investigate an allegation that she and her son, Stephen Wyllie, with the intention to pervert the course of justice, counselled Stephen's girlfriend, Sophia Tilley, to feign chest pains at the scene of a car accident in order to prevent police

officers from obtaining her blood alcohol level. Cunneen was not being investigated for the effect the alleged conduct might have on her official functions as a Crown Prosecutor.

Cunneen commenced proceedings in the NSW Supreme Court where she sought a declaration that the alleged conduct was not "corrupt conduct" within the meaning of the ICAC Act, and, therefore, ICAC was acting outside its power in issuing the summons. At first instance, the alleged conduct was considered to be corrupt conduct under the ICAC Act. On appeal, the majority of the NSW Court of Appeal found that the alleged conduct did not fall within the definition of "corrupt conduct" within the meaning of s 8. ICAC subsequently appealed to the High Court.

The High Court was tasked with determining the proper construction of s 8(2), which provides that:

Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect… the exercise of official functions by any public official….

and that could involve a number of specific offences including, amongst other things, perverting the course of justice. The High Court focussed on what kind of effect would be required to amount to an adverse effect for the purposes of s 8(2).

Probity or Efficacy? The High Court considered that, at a general level, there were two competing constructions available for s 8(2). On one hand, the "adversely affects" language could mean adversely affect the probity of the exercise of an official function in the sense that the public official is led to perform his or her official functions dishonestly or with a lack of integrity. Alternatively, it could mean adversely affect the efficacy of the exercise of an official function in the sense that the conduct could limit or prevent the performance of the official function in a way that does not involve any wrongdoing on the part of the public official.

In terms of the allegations against Cunneen, the alleged counselling of Sophia Tilley did not have the capacity to affect the probity of the exercise by the police officers of their investigatory powers as her conduct could not have led the officers to act without integrity or in a partial manner. However, Cunneen's conduct had the capacity to prevent police officers from conducting an investigation into a suspected crime; as such, it could have adversely affected the efficacy of the exercise of the officers' investigatory powers. If the meaning of "adversely affect" were extended to encompass adverse effects on efficacy, then it would be within ICAC's power to investigate Cunneen.

Decision of the High Court. The Court found that in order for ICAC to investigate a person who is not a public official, the following conditions must be met:

- The conduct must be such that it adversely affects or could adversely affect the *probity* of the exercise of an official function by a public official in one of the ways specified in s 8(1)(b)-(d). Specifically, the conduct of the public official must constitute or involve either the dishonest or partial exercise of his/her official functions, a breach of public trust, or the misuse of information acquired in the course of his/her official functions.

- The conduct must have the capacity to involve any of the offences listed in s 8(2)(a)-(y).

- Further, s 9 provides that in order to amount to corrupt conduct, the conduct must have the capacity to constitute or involve either a criminal offence, a disciplinary offence, reasonable grounds for dismissing a public official, or breach of an applicable standard of conduct.

Different Approaches to Statutory Interpretation. The issue for consideration by the High Court was one of statutory interpretation, which involves assessing the competing constructions of an expression to determine which construction "Parliament should be taken to have intended".[1]

The majority of the High Court, French CJ, Hayne, Kiefel and Nettle JJ, interpreted s 8(2) by reference to the context in which it appears. Such an approach involves interpreting the relevant provision "… so that it is consistent with the language and purpose of all the provisions of the statute".[2] The ICAC Act as a whole was considered to be directed toward promoting the integrity and accountability of public administration in a probity sense. The majority sought to determine which of the competing constructions is more consistent or "harmonious" with the ICAC Act as a whole.

The majority construed s 8(2) in light of the provisions surrounding it and the objects of the ICAC Act. The misconduct identified in s 8(1)(b)-(d) was taken to define the extent of improbity of public officials in the exercise of official functions to which the ICAC Act is directed. The majority used the contextual approach to import this into the definition of "corrupt conduct" in s 8(2). Accordingly, the majority concluded that the phrase "adversely affects, or that could adversely affect…" means adversely affect the *probity*, not merely the *efficacy*, of the exercise of an official function by a public official in one of the ways specified in s 8(1)(b)-(d). The majority considered this interpretation to align with the ordinary understanding of corruption in public administration and the principal objects of the ICAC Act.

In contrast, Gageler J (in dissent) focussed on the natural and ordinary meaning of the text of the clause under consideration. His approach is based on the recognition that the language in which a statutory definition is framed is ordinarily chosen for the meaning it conveys. Gageler J preferred an expansive literal definition of the phrase "adversely affects, or that could adversely affect" extending to include adverse effects on efficacy. Gageler J considered it sufficient for ICAC to be able to investigate where the alleged conduct had the capacity to limit or prevent the proper performance of an official function by a public official.

The Response of the NSW Legislature

The High Court's judgment limited the scope of ICAC's investigatory powers. As a result, ICAC did not have the power to conduct an investigation into the allegations against Cunneen. The decision also cast doubt on the validity of previous ICAC investigations and findings.

On 6 May 2015, the New South Wales Parliament responded to the High Court's decision by passing the *Independent Commission Against Corruption Amendment (Validation) Bill 2015* (NSW). The Bill commenced operation as an Act on the same day.

The Validation Act added Part 13 (clauses 34 and 35) to Schedule 4 of the Act, which validates actions taken by ICAC prior to the High Court's decision (including investigations, examinations and directions by ICAC) that would otherwise have been valid if s 8(2) of the ICAC Act extended to "conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions". Such actions are validated from the date they were done or purported to have been done. The validation extends to acts by other persons or bodies and legal proceedings which took place prior to the High Court's decision where their validity relies on the validity of ICAC's past actions (e.g., previous prosecutions, convictions and sentences following ICAC investigations will stand). ICAC is also authorised (and taken to have always been authorised) to refer matters and evidence to other persons or bodies.

Duncan v ICAC

In late May 2015, a constitutional challenge to the validity of the Validation Act was brought by Travers Duncan, as part of an appeal to the New South Wales Court of Appeal against findings of corruption made against him by ICAC. ICAC, in its report titled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others" ("Report"), had previously found that Duncan had engaged in conduct which adversely affected (or could have adversely affected) the efficacy, but not the probity, of the performance of official functions by the New South Wales Executive Government.

It was common ground in *Duncan v ICAC* that, given the High Court's decision in *Cunneen,* ICAC's findings of corruption against Duncan were based on a misconstruction of s 8(2) and, as such, the Report was affected by jurisdictional error at the time of its original publication. Duncan challenged ICAC's findings in the New South Wales Court of Appeal on that basis. Further, following the enactment of the Validation Act, Duncan additionally sought a declaration that Part 13 of the Act (inserted by the Validation Act) was invalid on constitutional grounds.

On 25 May 2015, Gageler J of the High Court made orders for the constitutional challenge to be removed from the New South Wales Court of Appeal and heard by the High Court. The challenge was heard by a Full Bench of the High Court in August 2015.

Duncan argued that, on the proper construction of Part 13 (clauses 34 and 35) of the Act, the conduct referred to in the Report was not deemed to be "corrupt conduct". It was argued that, rather than validating invalid acts of ICAC, Part

13 "directs courts to treat as valid acts that were, and remain, invalid". [3] Duncan submitted that, in doing this, Part 13 contravened and offended constitutional principles previously established in the High Court.

On 9 September 2015, the Full Bench of the High Court delivered its judgment in *Duncan v ICAC*. The High Court unanimously dismissed the challenge, holding that ICAC's findings of corrupt conduct against Duncan were properly deemed valid by Part 13, which operated to alter the substantive law in relation to the meaning of "corrupt conduct" and retrospectively conferred jurisdiction upon ICAC.

Another Look at Statutory Interpretation. The majority of the High Court, French CJ, Kiefel, Bell and Keane JJ, considered Duncan's proposed construction of clauses 34 and 35 to be "distinctly implausible" in light of the purpose of Part 13's enactment and considered that it strained too hard against the ordinary meaning of the provisions. The majority focussed on the ordinary use of the language in clauses 34 and 35 and concluded that:[4]

> [Clauses] 34 and 35 deem to be valid acts done by [ICAC] before 15 April 2015 [the date of the judgment in *Cunneen*] to the extent that they would have been valid if corrupt conduct as defined in s 8(2) of the ICAC Act encompassed conduct which adversely affected the efficacy, but not the probity, of the exercise of official functions.

The majority was of the opinion that clauses 34 and 35 operate to amend s 8(2) of the ICAC Act with respect to its application to acts done by ICAC prior to *Cunneen.* Therefore, as a matter of substantive law, the Validation Act widened the scope of "corrupt conduct" from the meaning attributed to the phrase in the *Cunneen* decision with respect to that period, which in turn widened ICAC's jurisdiction in relation to the conduct of the investigation into Duncan. The majority concluded that, as a matter of law, the Report into Duncan became a report into "corrupt conduct" made under the ICAC Act and accordingly Duncan's challenge to the validity of clauses 34 and 35 must fail.

Gageler J came to the same conclusion as the majority, noting that on a plain reading, the text of clauses 34 and 35 does no more than provide that the authority conferred on ICAC extends to include the authority to have done past acts which would have been in excess of ICAC's power due to the reasons stated in *Cunneen* if it were not for the enactment of the Validation Act. The Validation Act simply (and permissibly) made the "invalid" exercise of power "valid".

Nettle and Gordon JJ also agreed with the majority's finding; however, they were of the opinion that rather than amending s 8(2) of the ICAC Act, clauses 34 and 35 create a new or different legal regime.

The Future of ICAC's Powers

At the same time as the introduction of the Validation Act, the NSW Government commissioned an independent panel of experts, chaired by former High Court Chief Justice the Honourable Murray Gleeson AC QC, to review the scope of ICAC's jurisdiction going forward.[5] The panel was asked to consider and report on any legislative measures required to provide ICAC with appropriate powers to prevent, investigate and expose serious corrupt conduct and/or systemic corrupt conduct involving or affecting public authorities and/or public officials and whether any limits or enhancements should be applied to the exercise of ICAC's powers. The panel's report was issued on 30 July 2015. Following this, on 8 September 2015, the *Independent Commission Against Corruption Bill 2015* was introduced into New South Wales Parliament, the object of which is to further amend the jurisdiction and powers of ICAC to incorporate the recommendations in the panel's report. A further Jones Day *Commentary* will follow regarding the future of ICAC's jurisdiction and powers.

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Endnotes

1 *ICAC v Cunneen* [2015] HCA 14 at [57].

2 *ICAC v Cunneen* [2015] HCA 14 at [31] quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70].

3 *Duncan v ICAC* [2015] HCA 32 at [9].

4 *Duncan v ICAC* [2015] HCA 32 at [10].

5 Premier Mike Baird, Second Reading Speech, *Independent Commission Against Corruption Amendment (Validation) Bill 2015*; The Hon. Duncan Gay, Second Reading Speech, *Independent Commission Against Corruption Amendment (Validation) Bill 20*15.