



The Future of Australia's Independent Commission Against Corruption's Jurisdiction and Powers

Key Points

- On 28 September 2015, in response to the High Court of Australia's judgment in *ICAC v Cunneen* [2015] HCA 14 ("*Cunneen*") and recommendations in the Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report ("Panel's Report"), the State of New South Wales enacted the *Independent Commission Against Corruption Amendment Act 2015* (NSW) ("Amendment Act").
- The Independent Commission Against Corruption's ("ICAC") jurisdiction in relation to the conduct of those who are not public officials has been broadened from the position in which it was left following *Cunneen*, but not to the extent of ICAC's previous understanding of its jurisdiction.
- There are now two limbs in s 8 of the *Independent Commission Against Corruption Act 1998* (NSW) ("ICAC Act") under which persons who are not public officials can be subject to ICAC's jurisdiction.
- The interpretation given to s 8(2) of the ICAC Act in *Cunneen* still stands. Therefore conduct that adversely affects or that could adversely affect the probity of the exercise of an official function by a public official may be investigated under s 8(2) of the ICAC Act, provided the other conditions are met.
- In addition to s 8(2), ICAC can investigate the conduct of those who are not public officials under s 8(2A) in relation to enumerated actions such as collusive tendering, fraud in relation to applications for certain licences and permits, dishonestly obtaining or benefiting from the payment or application of public funds, defrauding the public revenue or fraudulently obtaining or retaining employment as a public official.
- Although ICAC's jurisdiction to investigate those who are not public officials has been broadened from the position in which it was left in following *Cunneen*, s 74BA has been inserted into the ICAC Act to provide that ICAC's power to make findings or give opinions of corrupt conduct in relation to all persons has been limited to only cases where the conduct is serious corrupt conduct.

Background

In April 2015, the High Court handed down the decision of *Cunneen* in which it held that the definition of "corrupt conduct" in the ICAC Act is narrower than ICAC had previously understood.¹ The High Court was tasked with attributing meaning to the phrase "adversely affects" in the meaning of s 8 of the ICAC Act, which provides the general nature of corrupt

conduct. The High Court found that ICAC could investigate only the conduct of those who are not public officials if their conduct could adversely affect the probity, as opposed to the efficacy, of the exercise of the official functions of a public official. This effectively narrowed the scope of ICAC's investigative jurisdiction.

In May 2015, the New South Wales Government appointed an independent panel of experts, consisting of former Chief Justice of the High Court of Australia the Honourable Murray Gleeson AC QC as Chair and Mr Bruce McClintock SC, to review the scope of ICAC's jurisdiction in light of *Cunneen*. Specifically, the Panel was tasked with reporting on the appropriate scope for ICAC's jurisdiction, any legislative measures required to provide ICAC with the 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 report was published on 30 July 2015. On 8 September 2015, the New South Wales Parliament introduced the *Independent Commission Against Corruption Bill 2015* ("Amendment Bill"), which further amended the jurisdiction and powers of ICAC to incorporate all of the recommendations in the Panel's report. The Amendment Bill was assented on 28 September 2015 and commenced operation as an Act on the same day.

The Panel's Report

The Panel focussed on the fact that ICAC does not deal with corruption generally; rather, it was established to deal with corruption that is connected to public administration. The Panel made the following recommendations, all of which were incorporated into the Amendment Act:

- "Corrupt conduct" should include specified conduct of persons who are not public officials where that conduct impairs, or could impair, public confidence in public administration.
- ICAC's power to make findings of "corrupt conduct" should be limited to circumstances of serious corrupt conduct.
- ICAC's education, advisory and preventative functions should be able to be used for the purpose of promoting the integrity and good repute of public administration.

- ICAC should be given jurisdiction to investigate possible criminal offences under electoral and lobbying laws.

Changes to the Meaning of "Corrupt Conduct"

The Panel reviewed the subject matter of ICAC's public inquiries in which findings of corrupt conduct were made between December 1990 and 3 June 2015 (a total number of 125 reports). The Panel found that out of the 125 reports, ICAC would have lacked jurisdiction to investigate only four of them based on *Cunneen*. The Panel noted the obscurity of s 8(2), however, and recommended that as the meaning of the section has been interpreted authoritatively in *Cunneen*, Parliament should not make any attempt to amend it or to use it as a basis for extending the meaning of corrupt conduct in s 8(2). As such, the meaning attributed to s 8(2) by the High Court in *Cunneen* still stands.

The Panel accepted that following *Cunneen*, some matters have been left beyond the scope of corrupt conduct that should be covered. Therefore, the Panel recommended taking a fresh approach to identifying corrupt conduct where that conduct does not involve any wrongdoing on the part of the public official. The Panel recommended inserting an additional limb, s 8(2A), into the definition of "corrupt conduct" in the ICAC Act. The additional limb will enable ICAC to investigate the conduct of persons, regardless of whether they are public officials, if that conduct impairs, or could impair, public confidence in public administration where that conduct could involve any of the matters listed in (a) to (e) of s 8(2A). The Panel considered such an addition adequate to indicate that "the confidence referred to is not confined to faith in the probity of individual public officials". The amendment applies retrospectively to conduct that occurred before the commencement of s 8(2A).

The Panel adopted the dissenting views of Gageler J in *Cunneen* who noted that pursuant to the meaning attributed to "corrupt conduct" by the majority of the High Court in *Cunneen*, conduct such as State-wide endemic collusion among tenderers for government contracts and serious and systemic fraud in applications of licences, permits or clearances under statutes designed to protect health or safety or to facilitate the management and commercial exploitation of resources would fall outside the ambit of what is considered

to be corrupt conduct.² The Panel considered the examples provided by Gageler J to be cases of “serious fraud, for private gain, practiced upon public administration, which have the potential to undermine its capacity to serve or protect the public interest”, which the Panel considered should be within the scope of corrupt conduct.

The amended s 8 now reads as follows:

8 General nature of corrupt conduct

(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.

(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 could involve 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,
- 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.

(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

- a) collusive tendering,
- b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
- c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
- d) defrauding the public revenue,
- e) fraudulently obtaining or retaining employment or appointment as a public official.

(3) Conduct may amount to corrupt conduct under subsection (1), (2) or (2A) even though it occurred before the commencement of that subsection, and it does not matter that some or all of the effects or other

ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official. This subsection extends to a person seeking to become a public official even if the person fails to become a public official.
- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) or (2A) refer to:
 - a) matters arising in the State or matters arising under the law of the State, or
 - b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting or expanding the scope of any other provision of this section.

Extension of “Corrupt Conduct” to Conduct of Those that Seek to Become a Public Official but Are Not Successful

Section 8(4) of the ICAC Act provides that conduct committed by, or in relation to, a person who was not or is not a public official may amount to corrupt conduct with respect to the exercise of their official functions after they become a public official. This subsection was amended to extend to persons who are seeking to become public officials even if they fail to become a public official. Therefore, if a candidate accepts an unlawful payment in return for a promise to do something once elected, the candidate will have engaged in “corrupt conduct” within the definition of the ICAC Act, regardless of whether he or she is elected or appointed as a public official.³ This amendment operates retrospectively to conduct that occurred prior to the amendment.⁴

Serious Corrupt Conduct

Prior to the amendments, s 12A of the ICAC Act provided guidance to ICAC to focus on serious and systemic corrupt conduct. These guidelines do not operate as a limitation on ICAC’s jurisdiction or powers. The Panel considered that ICAC’s powers to conduct investigations or hold inquiries should not be subject to limitation; however, it was of the view that as ICAC’s power to make findings of corrupt conduct has such obvious power to harm individuals, it should be limited so that it can be exercised only in circumstances where the misconduct has been serious. In accordance with this recommendation, s 74BA(1) has been inserted into the ICAC Act to provide that ICAC does not have the power to include in a report a finding or opinion that conduct is corrupt conduct unless it is serious corrupt conduct. Despite this, ICAC may still include a finding or opinion about the conduct of a person that may be corrupt conduct within the meaning of s 8 in a report, as long as the statement as to the finding or opinion does not describe the conduct as corrupt conduct. These amendments apply only to reports made after the commencement of the Amendment Act but extend to circumstances where the investigation was commenced or undertaken prior to the commencement of the section.⁵

Premier Mike Baird, in his Second Reading Speech for the Amendment Bill, stated that, as the High Court noted in *Cunneen*, the powers of ICAC are “extraordinary” and have the ability to “abrogate fundamental rights and privileges”.⁶ He explained that the Amendment Bill seeks to find a balance between the importance of eliminating corruption in New South Wales and ensuring that the powers to do so are exercised within appropriate boundaries.⁷ The Panel considered it unnecessary to define the phrase “serious corrupt conduct”, rejecting the suggestion that seriousness should be determined by reference to the penalty imposed for the crime in question. The Panel stated that matters may change and develop as the investigation develops; therefore, such matters may seem more or less serious as the investigation continues. The Panel provided that an issue will arise only where ICAC makes a finding in a case of “doubtful seriousness” in which case a person should have the right to argue that such a finding should not have been made due to the lack of serious corrupt conduct viewed objectively. “Serious” is defined in the Macquarie Dictionary as, amongst other

things, “weighty or important”. Presumably, this will prevent ICAC from making findings of corrupt conduct in circumstances where the conduct in question is objectively trivial.

ICAC’s New Jurisdiction to Investigate Breaches of Electoral and Lobbying Laws

The Panel noted that as the Act does not address corruption which is unconnected to public administration, some breaches of electoral and lobbying laws are not covered by the definition of “corrupt conduct” in s 8 and still would not be after the commencement of s 8(2A). Therefore, the Panel also recommended that ICAC be given a new jurisdiction to investigate breaches of electoral and lobbying laws because they are central to the democratic process and as such have a connection to public administration that the Panel noted may warrant special treatment. The Panel considered that the definition of “corrupt conduct” should not be amended to reflect this. Instead, the ICAC Act was amended, by the addition of s 13A, to give ICAC jurisdiction to investigate conduct that the Electoral Commission refers to ICAC for investigation that may involve possible criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011*. The Electoral Commission may refer conduct to ICAC if there are reasonable grounds to suspect that the conduct may involve a possible criminal offence specified in s 13A(9), or if the conduct is related to possible corrupt conduct that ICAC is already investigating. This jurisdiction is not tied to the concept of corrupt conduct and applies to possible criminal offences referred to in s 13A(9) that may have been committed before the commencement of the section.⁸

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Endnotes

- 1 See Jones Day Commentary, “[Jurisdiction of Australia’s Independent Commission Against Corruption Before and After Cunneen and Duncan](#)” for further background.
- 2 See *Cunneen* per Gageler J at [92].
- 3 Premier Mike Baird, Second Reading Speech, *Independent Commission Against Corruption Amendment Bill 2015* (NSW) p 1.
- 4 ICAC Act sch 4 s 37.
- 5 ICAC Act sch 4 s 39.
- 6 Premier Mike Baird, Second Reading Speech, *Independent Commission Against Corruption Amendment Bill 2015* (NSW) p 3.
- 7 Premier Mike Baird, Second Reading Speech, *Independent Commission Against Corruption Amendment Bill 2015* (NSW) p 3.
- 8 ICAC Act s 13A(4), sch 4 s 38(1).