*Isabella Dunning**

INDEPENDENT COMMISSION AGAINST CORRUPTION v CUNNEEN (2015) 318 ALR 391

I Introduction

In the case of *Independent Commission Against Corruption v Cunneen*,[1] the High Court of Australia considered for the first time the scope of the New South Wales Independent Commission Against Corruption's jurisdiction to investigate 'corrupt conduct'. Turning against existing ICAC practice, a majority of the Court interpreted the operative s 8(2) provision of the *Independent Commission Against Corruption Act 1988* (NSW) as requiring corrupt conduct that adversely affects the probity, and not merely the *efficacy*, of the exercise of a public official's functions. Prior to *Cunneen*, the meaning of 'adversely affects' under s 8(2) was unclear and in need of clarification. However, the High Court's approach lacks a sound legislative or policy basis and, coupled with the New South Wales Parliament's subsequent legislative reform, unnecessarily restricts the scope of the ICAC's jurisdiction into the future.

II The Facts

The case arose from allegations made against Margaret Cunneen, the Deputy Senior Crown Prosecutor for New South Wales, that on 31 May 2014 she counselled the third respondent (Sophia Tilley, her son's girlfriend) to pretend to have chest pains at the scene of a motor vehicle accident to prevent police measuring Tilley's blood alcohol level. It was alleged that this was done with the intention to pervert the course of justice.[2] The respondents were summoned by the New South Wales ICAC to give evidence at a public inquiry to investigate the allegations, but commenced proceedings in the Supreme Court seeking a declaration that the ICAC was acting beyond its power.[3] The proceedings were dismissed, but a majority of the New South Wales Court of Appeal allowed an appeal and declared that the ICAC did not have the power to conduct the inquiry,[4] on the basis that Cunneen's alleged conduct was not 'corrupt conduct' for the purposes of s 8(2) of the Act. The ICAC applied for special leave to appeal to the High Court, which was granted, the application heard before the Full Court.

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* Student Editor, Adelaide Law Review, University of Adelaide.

1 (2015) 318 ALR 391 ('*Cunneen*').

2 See *Independent Commission Against Corruption Act 1988* (NSW) s 8(2)(g) ('*ICAC Act*').

3 *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571 (10 November 2014).

4 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014).

III The Issues

The key issue before the Court was the scope and meaning of the phrase 'adversely affects' in s 8(2) of the *ICAC Act*, which deals with corrupt conduct by any person that 'adversely affects' the 'exercise of official functions' by a public official. The Court was thus concerned with the impact of Cunneen's actions upon the investigating police officer, rather than her own functions as a prosecutor. Prior to *Cunneen*, the provisions of s 8 'had stood [principally] unaltered since the enactment of the *ICAC Act* in 1988'[5] and had received minimal judicial attention.[6] However, two alternative interpretive approaches regarding the scope of s 8(2) were presented before the Court. Firstly, the established view of the ICAC, that conduct must only affect the *efficacy or use* of the public official's functions to constitute 'corrupt conduct' — ie they could have exercised their functions in a different way or come to a different decision.[7] Or secondly, that conduct must adversely affect the *probity* of the exercise of official powers[8] — ie it must cause officials to exercise their functions in a corrupt manner.[9] The majority of the Court (French CJ, Hayne, Kiefel and Nettle JJ, with Gageler J in dissent) chose the second approach. It concluded the alleged conduct did not constitute 'corrupt conduct' under s 8(2), as it merely prevented the police from carrying out a full investigation, and dismissed the ICAC's appeal.

IV The Decision

A *The Meaning of 'Corrupt Conduct' Within Section 8*

Section 8 of the *ICAC Act* contains two alternative limbs with distinct meanings for 'corrupt conduct'. Section 8(1)(a) provides for corrupt conduct by *any person*, whether or not a public official, that 'adversely affects' the 'honest or impartial' exercise of official functions by a public official.[10] It also provides in sub-ss (1)(b)–(d) for conduct by *public officials* that involves dishonesty or partiality, a breach of public trust or the misuse of public resources for private benefit. Section 8(2) provides for corrupt conduct by *any person*, whether or not a public official, that 'adversely affects' the exercise of official functions by a public official. However, the 'honest or impartial' requirement of sub-s (1)(a) is absent — instead, s 8(2) focuses on the relevant conduct of 'any person', requiring that it fall within one of the categories of criminal conduct listed (including bribery, tax evasion and perverting the course

5 *Cunneen* (2015) 318 ALR 391, 413 [98] (Gageler J). Excepting the 1990 amendment, which inserted 'which could involve' in place of 'which involves'.

6 See *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 628; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 23.

7 *Cunneen* (2015) 318 ALR 391, 392 [2] (French CJ, Hayne, Kiefel and Nettle JJ).

8 Ibid.

9 *Cunneen v ICAC* [2014] NSWCA 421 (5 December 2014) [71] (Basten JA), [189] (Ward JA).

10 *ICAC Act 1988* (NSW) s 8(1)(a).

of justice).[11] Section 9 attaches the additional requirement that conduct must also constitute a criminal offence, disciplinary offence or breach of a code of conduct.[12]

B *The High Court's Approach*

1 *Context Versus Plain and Ordinary Meaning*

The majority took a contextual approach to interpreting s 8(2) of the *ICAC Act*, rejecting the 'plain and ordinary meaning' approach advocated by counsel for the ICAC. They emphasised the broad, 'protean' nature of the phrase 'adversely affect',[13] concluding that its meaning was to be drawn from the legislative provisions surrounding it. As such, they analysed the interrelationship between ss 8(1) and (2), recognising they were not mutually exclusive and the potential for 'corrupt' conduct to fall underneath both. Section 8(6) of the Act makes specific provision for this, highlighting that the mention of a particular kind of conduct in one provision is not to be read as 'limiting the scope of any other provision'. Nevertheless, as highlighted by the majority, s 8(2) was clearly intended to do some 'additional work' by virtue of its inclusion and the absence of the phrase 'honest and impartial'.[14]

The majority concluded that the purpose of s 8(2) was to extend the reach of s 8(1)(c)–(d) to persons other than public officials.[15] As such, the meaning of 'adversely affect' in s 8(2) was to be informed and limited by its meaning in s 8(1).[16] As sub-ss (1)(b)–(d) are concerned with the 'improbity' of public officials (ie dishonesty, partiality and breach of public trust),[17] a requirement of 'improbity' would be imported into s 8(2). Despite the effect of s 8(6), the majority concluded that it would be textually illogical and improbable that s 8(2) was 'directed at any broader range of improbity in the exercise of official functions' than that set out in s 8(1).[18] Thus, to satisfy the requirements of s 8(2), the exercise by public officials of their official functions would have to be affected by the conduct of another person in one of the ways set out in s 8(1)(b)–(d).[19] The majority thus created a requirement in s 8(2) for wrongdoing on the part of the public official *in addition to* the corrupt conduct of the other person.

By contrast, Gageler J emphasised in dissent the importance of giving statutory terms their 'ordinary grammatical meaning' before turning to consider context.[20] As such, his Honour highlighted that 'adversely affect' simply requires that conduct

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11 Ibid ss 8(2)(a)–(y).

12 Ibid s 9(1).

13 *Cunneen* (2015) 318 ALR 391, 405 [57] (French CJ, Hayne, Kiefel and Nettle JJ).

14 Ibid 401–2 [38]–[42] (French CJ, Hayne, Kiefel and Nettle JJ).

15 Ibid 402 [43] (French CJ, Hayne, Kiefel and Nettle JJ).

16 Ibid 402–3[42]–[44] (French CJ, Hayne, Kiefel and Nettle JJ).

17 Ibid 403 [46] (French CJ, Hayne, Kiefel and Nettle JJ).

18 Ibid.

19 Ibid 402–3 [42]–[44] (French CJ, Hayne, Kiefel and Nettle JJ).

20 Ibid 409 [77], 410 [82] (Gageler J).

have the 'potential to limit or prevent the proper exercise' — ie the efficacy — of official functions.[21] Indeed, the ordinary meaning of the phrase 'connotes nothing more than impediment or impairment'.[22] Moreover, adopting this meaning gives s 8(2) a 'relatively precise operation' and does not import any 'unexpressed qualitative element' or limitation of improbity.[23] As emphasised by Gageler J, 'limitations and qualifications' should not generally be read into a statutory term unless 'clearly required by its terms or context'.[24] On his Honour's interpretation of s 8 and the *ICAC Act* more broadly, no such limitation was warranted.

Rather than reading down s 8(2) to conform to s 8(1)(b)–(d), Gageler J kept in mind the operation of s 8(6) and noted the relationship between s 8(1)(a) and (2) (both directed towards the conduct of another person), concluding that s 8(2) was intended to have a different scope of operation.[25] Moreover, looking to the Act as a whole, his Honour argued that the general power given to the ICAC in s 2A to investigate corruption 'involving or affecting' public officials should logically correspond to the more specific type of corrupt conduct defined in s 8 — with s 8(1) intended to cover conduct *involving* public officials, and s 8(2) relating to conduct *affecting* public officials, without requiring any wrongdoing or improbity on their part.[26]

Rather than complicating the meaning of 'adversely affect' in s 8(2) by reference to s 8(1), Gageler J took a more logical approach — looking to the ordinary meaning of the phrase, the words parliament had intentionally used and omitted, and the actual structure of the section. This approach also helps to rationalise the inclusion of the criminal offences in s 8(2)(a)–(y) of the Act, which direct attention towards the conduct of the *other person* and implicitly suggest that this conduct is itself serious enough to negate the need for the public official to also act in a corrupt manner.[27]

2 *Purpose, Objects and Legislative History*

As a general principle of statutory construction, the purpose and objects of a piece of legislation can be taken into account in its initial interpretation.[28] Moreover, extraneous legislative materials can be considered to confirm the ordinary meaning

21 Ibid 409 [74], 410 [81] (Gageler J), citing *Cunneen v Independent Commission Against Corruption* [2014] NSWCA (5 December 2014) 421 [22] (Bathurst CJ).

22 Ibid 410 [82] (Gageler J).

23 Ibid.

24 Ibid 409 [77] (Gageler J), quoting *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 310. See also, *Thompson v Goold & Co* [1910] AC 409, 420.

25 *Cunneen* (2015) 318 ALR 391, 409 [76], [79] (Gageler J).

26 Ibid 410 [83] (Gageler J).

27 See also Explanatory Note, Independent Commission Against Corruption Bill 1988 (NSW), pt 3, cl 8(2).

28 *Acts Interpretation Act 1987* (NSW) s 33. The same principle also applies at the federal level, see: *Acts Interpretation Act 1901* (Cth) s 15AA.

of a term or to resolve an ambiguity.[29] As highlighted by the High Court in *Cunneen*, the role of the Court in statutory construction is then to 'choose from among the range of possible meanings the meaning which parliament should be taken to have intended'.[30]

In seeking to determine the scope of s 8(2) of the *ICAC Act*, both the majority and Gageler J drew upon the legislative materials relating to the original Independent Commission Against Corruption Bill of 1988. The majority emphasised by reference to the second reading speech that the ICAC was not 'intended to function as a general crime commission',[31] and that the wider efficacy-based interpretation of s 8(2) would result in the inclusion of a 'wide variety of offences having nothing to do' with the common understanding of 'corruption' within the scope of the ICAC's investigative power.[32] Including, for instance: the telling of lies to a police officer; harbouring a criminal; or even the stealing of a public authority's vehicle, such as a garbage truck).[33] Justice Gageler, however, countered the majority's argument with his own equally 'improbable' and 'inconvenient' consequences if the 'narrower probity' reading of s 8(2) were adopted.[34] Just as it may be undesirable for the ICAC to investigate an 'isolated case of a witness telling a lie to a police officer' (as in the present case), Gageler J suggested that the ICAC should not lack the power to 'investigate, expose, prevent or educate about State-wide endemic collusion among tenderers in tendering for government contracts'.[35]

As Gageler J validly points out, either outcome could be seen as contrary to the objects of the Act and the underlying purpose of the ICAC.[36] As such, this line of argument does little to clarify the preferred statutory construction; indeed, 'the suggested absurdities rather cancel each other out'.[37] Moreover, it disregards the role of ss 12A and 20(3) of the Act, which provide a 'legislative answer' by directing the exercise of the ICAC's discretionary powers towards corrupt conduct of a 'serious and systemic', and not merely 'trivial', nature.[38]

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29 *Acts Interpretation Act 1987* (NSW) s 34(1), (2)(e). Again, the same principle also applies at the federal level, see: *Acts Interpretation Act 1901* (Cth) s 15AB.

30 *Cunneen* (2015) 318 ALR 391, 405 [57] (French CJ, Hayne, Kiefel and Nettle JJ).

31 Ibid 405 [54] (French CJ, Hayne, Kiefel and Nettle JJ). See also [4], quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 674–5.

32 *Cunneen* (2015) 318 ALR 391, 404–5 [52] (French CJ, Hayne, Kiefel and Nettle JJ).

33 Ibid.

34 Ibid 412 [92] (Gageler J). See also 411–13 [89]–[93].

35 Ibid 412 [92] (Gageler J).

36 Ibid 412–13 [93] (Gageler J).

37 Peter Heerey, 'Corrupt Conduct: the ICAC's Cunneen Inquiry' [2015] *Bar News: The Journal of the New South Wales Bar Association* 49, 51.

38 Ibid 413 [95] (Gageler J). This is supported in practice, with the ICAC only undertaking four (out of a total 125) investigations into corrupt conduct under the broader efficacy-based interpretation of s 8(2) since December 1990: Murray Gleeson and Bruce

Justice Gageler further noted the lack of any express indication in the broader legislative materials that s 8(2) was intended to import a requirement of 'probity'.[39] Public administration and the investigation of public rather than private individuals is clearly a central focus of the Act,[40] however, references to 'honesty' or 'corruption connected with public administration'[41] do little to clarify whether s 8(2) is directed towards the probity of individual public officials, or public administration more broadly. A review into the ICAC's jurisdiction in 2005 failed to provide any additional guidance. Despite the recommendations of Mr Bruce McClintock SC to place sub-ss 8(1) and (2) in separate sections to 'distinguish more clearly between corrupt conduct *by* public officials and [indirect] corruption *of* public administration',[42] these were not adopted by the New South Wales Parliament.

C *The 'Ordinary' Understanding of Corruption*

The legislative materials surrounding the *ICAC Act* provide little meaningful guidance regarding the interpretation of s 8(2). However, looking to the overarching purpose of the Act and the ordinary understanding of corruption, the broader approach of Gageler J has a more supportable basis. The majority in *Cunneen* invoked the concept of an 'ordinary' understanding of corruption on several occasions, but limited it to implying 'dishonest or partial exercise of an official function' — ie improbity.[43] The majority concluded that this narrower interpretation accords more closely with the objects of the Act on the basis that it only allows those offences affecting the 'integrity' of public administration to fall within the ICAC's jurisdiction.[44] This, however, sets an ambiguous threshold and rests on a presumption that 'corruption' as it is commonly understood necessarily requires an element of 'improbity' on the part of both individuals involved. Moreover, to reason that the 'the provisions of the *ICAC Act* as a whole … operate more harmoniously'[45] on this interpretation is

McClintock, 'Independent Panel — Review of the Jurisdiction of the Independent Commission Against Corruption: Report' (Report, NSW Department of Premier and Cabinet, 30 July 2015) ('*Independent Panel Report*') 30–1.

39 *Cunneen* (2015) 318 ALR 391, 414–15 [101]–[102] (Gageler J).

40 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 676.

41 Ibid 675–6.

42 *Cunneen* (2015) 318 ALR 391, 416–17 [109] (Gageler J), quoting Bruce McClintock, 'Independent Review of the Independent Commission Against Corruption Act 1988: Final Report, 2005' (Report, 2005) 53 [4.3.5] (emphasis in original) ('*2005 Report*').

43 Ibid 401 [38] (French CJ, Hayne, Kiefel and Nettle JJ), citing *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014) [62] (Basten JA).

44 *Cunneen* (2015) 318 ALR 391, 403 [46] (French CJ, Hayne, Kiefel and Nettle JJ). See *ICAC Act 1988* (NSW) s 2A(a) for use of the word 'integrity'.

45 *Cunneen* (2015) 318 ALR 391, 406 [59] (French CJ, Hayne, Kiefel and Nettle JJ).

erroneous, as it retrospectively adjusts the meaning of 'corruption' in s 2A to fit the Court's chosen construction of s 8(2).[46]

By contrast, Gageler J acknowledged that 'corruption' connotes a broader 'moral impropriety' and has 'never acquired a more precise' legal or ordinary meaning.[47] Indeed, corruption 'takes its meaning from its context'[48] and is a question of fact and degree in the circumstances of each case. In light of the Act's overarching purpose — to establish the ICAC with a broad mandate to combat endemic corruption and increase public confidence in the integrity of the New South Wales public administration as a whole[49] — a more expansive and inclusive approach towards determining what constitutes corrupt conduct under s 8(2) would surely have a more sound legislative and policy basis. As suggested by both Gageler J in *Cunneen* and McClintock in his 2005 Report, conduct should be considered corrupt for the purposes of the *ICAC Act* 'because of its potential to adversely affect official functions', such that the integrity of the public official has been perceivably undermined, not because of any wrongdoing on their part.[50]

This broader approach to the statutory construction of s 8(2) is also supported by past practice of the ICAC in carrying out its investigations. For instance, its finding of corrupt conduct where an individual had fraudulently provided forged trade qualifications in licence applications to the Department of Fair Trading ('Operation Squirrel'),[51] and where a person had falsely claimed academic qualifications that mislead officials dealing with his application, allowing him to become a public official by fraudulent means ('Operation Bosco').[52] Such corrupt conduct clearly has the capacity to reduce public confidence in the integrity of public administration, yet it would fall beyond the scope of the ICAC's jurisdiction under the narrower probity-based interpretation of s 8(2) taken by the majority in *Cunneen*. It is broadly impermissible to rely upon the ICAC's previous actions — undertaken

46 By reasoning in this way, the majority in *Cunneen* appears to engage in the type of circular, syllogistic argument for which it criticises the majority in the earlier Court of Appeal decision in their interpretation of the legislation: Ibid 400 [33] (French CJ, Hayne, Kiefel and Nettle JJ).

47 *Cunneen* (2015) 318 ALR 391 409 [76] (Gageler J).

48 *Independent Panel Report*, above n 38, 22.

49 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 673, 675.

50 *Cunneen* (2015) 318 ALR 391 416–7 [109] (Gageler J), quoting McClintock, *2005 Report*, above n 42, 53 [4.3.3].

51 *Cunneen* (2015) 318 ALR 39 415 [103] (Gageler J), citing Independent Commission Against Corruption, 'Report on Investigation into Certain Applications Made to the Department of Fair Trading for Building and Trade Licences' (Report, November 2003). See also, *Independent Panel Report*, above n 38, 31 [6.3].

52 *Cunneen* (2015) 318 ALR 39 415 [104] (Gageler J), citing Independent Commission Against Corruption, 'Report on Investigation into Mr Glen Oakley's Use of False Academic Qualifications' (Report, 2003). See also, *Independent Panel Report*, above n 38, 31 [6.3].

in purported pursuance of its legislative mandate — to determine the appropriate statutory construction of s 8(2). However, in light of the New South Wales Parliament's decision not to adopt McClintock's proposed s 8 reforms in 2005, it could be argued (as Gageler J indeed does) that this evidenced an express intention by Parliament not to override the existing (ie broader, efficacy-based) interpretation of the section, as relied upon in previous ICAC investigations.[53]

V Looking to the Future — Legislative Change and the Scope of the ICAC's Power

Despite concerns about the impact of *Cunneen* upon the validity of prior ICAC investigations and findings,[54] the state of the law has since been clarified. In May 2015, the New South Wales Parliament introduced the *Independent Commission Against Corruption Amendment (Validation) Act 2015* to retrospectively validate ICAC actions previously taken under s 8(2),[55] and in September 2015 a bill implementing the recommendations of an Independent Panel commissioned by the New South Wales Government to investigate the scope of the ICAC's power was passed.[56] The esteemed Panel, comprised of former High Court Chief Justice the Honourable Murray Gleeson AC and the aforementioned Mr Bruce McClintock SC, made two key recommendations which were both adopted by Parliament: firstly, to leave s 8(2) unchanged but extend the ICAC's jurisdiction regarding 'corrupt conduct' to include certain acts of 'non-public officials that could impair public confidence in public administration' in a new s 8(2A);[57] and secondly, to limit the ICAC's power to make findings of 'corrupt conduct' against individuals to 'serious' cases under a new s 74BA.[58]

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53 *Cunneen* (2015) 318 ALR 391, 417–18 [111]–[115] (Gageler J). It is worth noting, however, that this argument is potentially limited by the fact that Parliament did choose to adopt other of McClintock's recommendations in 2005, namely, insertion of ss 2A and 12A into the *ICAC* Act.

54 Eg Operation Credo and Spicer. See, eg, Independent Commission Against Corruption — New South Wales, 'Public Statement Regarding *ICAC v Cunneen*' (Public Statement, 20 April 2015); Australian Broadcasting Corporation, 'Corruption Findings Face Legal Challenge After ICAC'S High Court "Disaster"', *7.30*, 15 April 2015 (Adam Harvey) <http://www.abc.net.au/7.30/content/2015/s4217249.htm>.

55 See Explanatory Note, Independent Commission Against Corruption Amendment (Validation) Bill 2015 (NSW). Validity upheld by *Duncan v ICAC* [2015] HCA 32 (9 September 2015).

56 Independent Commission Against Corruption Amendment Bill 2015 (NSW). See the second reading speech: New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 2015 (Mike Baird). See also *Independent Panel Report*, above n 38, vii.

57 Explanatory Note, Independent Commission Against Corruption Amendment Bill 2015 (NSW), 1. See Independent Commission Against Corruption Amendment Bill 2015 (NSW) sch 1 cl 3, inserting s 8(2A) into the *ICAC Act 1988* (NSW).

58 Explanatory Note, Independent Commission Against Corruption Amendment Bill 2015 (NSW), 1. See Independent Commission Against Corruption Amendment Bill 2015 (NSW) sch 1 cl 15, inserting s 74BA into the *ICAC Act 1988* (NSW).

The Panel acknowledged the uncertainty surrounding the scope of s 8(2) prior to *Cunneen* and thus accepted the decision of the High Court as authoritatively producing a 'coherent statutory policy, resting on a widely accepted understanding of corruption'.[59] Moreover, the Panel adopted the unnecessarily restrictive reasoning of the Court with regards to the intended scope of s 8(2), including its invocation of absurd results and argument that an otherwise broad and inappropriate amount of conduct would come within the scope of the ICAC's jurisdiction.[60] However, it also (correctly) recognised that the Court's construction of s 8(2) left 'beyond the scope of corrupt conduct [and beyond the ICAC's investigative jurisdiction] some matters which should be covered'. [61] Namely, the type of conduct previously investigated by the ICAC under s 8(2) and highlighted by Gageler J in *Cunneen* — including, for instance, collusive tendering for government contracts and fraudulently obtaining government approvals, leases and employment.

As such, the Panel's proposal to insert a supplementary s 8(2A) (and the New South Wales Parliament's action to legislate accordingly) was both a necessary and beneficial outcome, as it ensures that the ICAC's investigative jurisdiction is not unduly constrained by the narrow statutory construction adopted by the majority of the High Court in *Cunneen*. It maintains the *ICAC Act*'s focus on preserving the 'integrity and reputation of public administration', but ensures that conduct not involving any wrongdoing by a public official (such as that mentioned above) can still fall within the scope of 'corrupt conduct' in s 8 where that conduct impairs or could impair 'public confidence in public administration'.[62] Moreover, the Panel's Independent Report explicitly makes clear that this reference to confidence is 'not confined to faith in the *probity* of individual public officials'[63] — thus resolving any potential legislative ambiguity as was formerly connected with the phrase 'adversely affect' in s 8(2). Importantly, the insertion of s 8(2A) helps to ensure that such indirect, yet potentially serious and systemic, corrupt conduct does not go un-investigated — especially given that other New South Wales public authorities with potential jurisdiction, including the police, DPP and Crime Commission, often lack the extensive investigatory and coercive powers afforded to the ICAC under the Act.[64]

In his second reading speech for the September 2015 Bill, Premier Mike Baird highlighted that the Panel's recommendation constituted a 'fresh approach' to the

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59 *Independent Panel Report*, above n 38, ix.

60 See, eg, ibid, 24 [4.2.8].

61 Ibid ix.

62 Ibid ix–x; Independent Commission Against Corruption Amendment Bill 2015 (NSW) sch 1 cl 3.

63 *Independent Panel Report*, above n 38, 40 (emphasis added), also quoted in New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 2015 (Mike Baird) 1.

64 See, eg, *ICAC Act 1988* (NSW) divs 2-3, ss 17(1), 24(3), 26, 33, 37. ICAC is not, for instance, bound by the rules of evidence, can override privilege and the right against self-incrimination in certain circumstances, and has the power to conduct compulsory examinations and public inquiries.

scope of s 8, neither supporting the 'broader definition of corrupt conduct proposed by the ICAC', nor limiting the ICAC's jurisdiction to the 'High Court's narrower definition'.[65] This reflects the difficult balancing Act required by the Independent Panel and the New South Wales Parliament in seeking to amend the *ICAC Act* post-*Cunneen* — characterised by, on the one hand, a desire to uphold the High Court's interpretation as a gesture of legal deference and to maintain legal certainty in light of past confusion about the scope of s 8(2), coupled with a recognition that the result in *Cunneen* did not necessarily reflect the type of conduct that should fall within the scope of the ICAC's jurisdiction in practice. This perhaps helps to explain why the Independent Panel considered the insertion of the new s 8(2A) as a legislative matter 'for Parliament',[66] yet found the novel construction of s 8(2) to properly lie within the High Court's jurisdiction.

The proposed s 74BA (to explicitly constrain ICAC investigations solely to 'serious' cases) is, however, more difficult to rationalise. It smacks of a political impetus to appear to be restricting the ICAC's powers, without proper regard for the terms or objects of the legislation, or indeed the ICAC's past track record. In light of the operation of the existing ss 12A and 20(3) in the Act, it simply appears unnecessary.[67] Moreover, it unreasonably restricts the ability of the ICAC to effectively investigate corrupt conduct. As the ICAC itself submitted to the Independent Panel, often the 'degree of seriousness of conduct or whether it raises systemic issues' will not be prima facie apparent and the scope for 'further investigation' is thus necessary.[68] Corruption is, by its very nature, 'secretive and difficult to elicit'.[69] A similarly restrictive provision in Victoria's Independent Broad-based Anti-Corruption Commission legislation, introduced in 2011, has been widely criticised on the same basis.[70]

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65 New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 2015 (Mike Baird) 1.

66 *Independent Panel Report*, above n 38, 29 [5.4.3–4].

67 Ibid 65 [9.6.8]. See above n 38.

68 Ibid 67 [9.7.2].

69 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 675.

70 *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 60(2): 'The IBAC *must not* conduct an investigation under subsection (1) unless it is reasonably satisfied that the conduct is serious corrupt conduct.' (emphasis added) See also, Stephen Charles, 'Victoria's Corruption Body Lacks ICAC's Bite', *The Age* (online) 11 September 2014 <http://www.theage.com.au/comment/victorias-corruption-body-lacks-icacs-bite-20140910-10etp7.html>; Royce Miller, 'IBAC Admits it Cannot Do its Job', *The Age* (online), April 16 2014, <http://www.theage.com.au/victoria/ibac-admits-it-cannot-do-its-job-20140415-36pv9.html>; Peter Sise, *Victoria's New Independent Broad-Based Anti-Corruption Commission Becomes Fully Operational* (14 March 2013) Clayton Utz <http://www.claytonutz.com/publications/edition/14_march_2013/20130314/victorias_new_independent_broad-based_anti-corruption_commission_becomes_fully_operational.page>.

New South Wales Premier Mike Baird sought to justify the proposed s 74BA on the basis that a balance needed to be struck between the ICAC's 'extraordinary' powers and their ability to 'abrogate fundamental rights and privileges'.[71] This is a crucial point and lies at the heart of the Act.[72] However, as Gageler J highlights in *Cunneen*, the intrusive nature of the ICAC's powers and its ability to use those powers coercively in conducting investigations is not itself sufficient reason to narrowly interpret the operative provisions of the *ICAC Act* — '[t]here is no common law right not to be investigated for a crime'.[73] This does not negate the need for oversight and regular review of the ICAC's jurisdiction, but we should not be too quick to allow the Courts to overrule express legislative provision of an intentionally broad, discretionary power.

VI Conclusion

The decision of the High Court in *Cunneen* has had far-reaching consequences for the scope of the New South Wales ICAC's power to investigate corrupt conduct and for statutory interpretation more broadly. What began as an isolated investigation into lies allegedly told by a senior crown prosecutor to a New South Wales police officer has ended in significant legislative change and a restricted investigative mandate for the ICAC. The scope of s 8(2) had long been unclear, and it is with some relief that the law, at least, is now settled. However, the unduly restrictive approach of the majority in *Cunneen* should be carefully critiqued. Their reasoning invokes unnecessarily complex methods of statutory construction and is not clearly supported by either the legislative history of the Act, its overarching purpose or past practice of the ICAC.

The subsequent legislative reforms by the New South Wales Parliament, based as they were upon the recommendations of the Independent Panel Report, display a similarly flawed approach. Rather than approaching what was a poorly drafted and ambiguous legislative power in s 8(2) — and addressing the fundamental question of the proper scope of the ICAC's power — in a considered, consultative and responsive manner, Parliament's proposed insertion of s 8(2A) appears merely as a band-aid solution to remedy the effects of the High Court's decision in *Cunneen*. Although it creditably ensures that certain conduct by persons other than public officials may still fall within the scope of s 8 'corrupt conduct' if it affects public confidence in public administration, it is essentially the product of complex and unnecessary judicial reasoning and a long-standing failure by the New South Wales Parliament to remedy

71 Explanatory Note, Independent Commission Against Corruption Amendment Bill 2015 (NSW), 3.

72 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988 (Mr Greiner) 675.

73 *Cunneen* (2015) 318 ALR 391 411 [87] (Gageler J). Indeed, in invoking the 'principle of legality', the majority fails to explicitly 'identify any right or principle … put in jeopardy' by continuing to allow the ICAC to investigate conduct under the broader efficacy-based construction of s 8(2), as opposed to the narrower probity-based construction it ultimately adopted: Ibid 411 [86]–[88] (Gageler J), and see 404 [54] (French CJ, Hayne, Kiefel and Nettle JJ).

deficiencies in the construction of s 8 of the *ICAC Act*. Additionally, the proposed insertion of s 74BA appears to ignore the existing limitations placed upon the ICAC's jurisdiction by the 'serious' and 'systemic' requirements in ss 12A and 20(3) of the Act, unnecessarily restricting the ICAC's much-needed discretion to investigate a broad range of corrupt conduct still plaguing the New South Wales public sector.

Ultimately, *Cunneen* has generated a process of retrospective legislative amendments that not only limits the effectiveness of the ICAC in seeking to investigate and prevent corrupt conduct, but also fails to present a coherent policy towards combatting corruption in the New South Wales public administration into the future. This is reflective of a state government that is increasingly questioning the role and purpose of its once groundbreaking and widely respected Independent Commission Against Corruption.[74] However, it also reflects a broader confusion about the proper role of the Courts vis-à-vis Parliament in making the law of this country. *Cunneen* reveals the potentially tumultuous consequences when Parliament fails to make clear its intention with regards to the interpretation and operation of legislation, leaving the courts to reach a statutory construction which appears to be at odds with the legislative history, objects and effective operation of the Act.

74 See, Office of the Inspector of the Independent Commission Against Corruption, 'Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988 Operation "Hale" ICAC re Margaret Cunneen SC & Ors' (Report, Independent Commission Against Corruption, New South Wales, 4 December 2015); and see, eg, Paul Kelly, 'Anti-Corruption Body Loses Its Way', *The Australian*, 5–6 December 2015, 15–6; Michaela Whitbourn, 'ICAC "acted illegally" in Margaret Cunneen inquiry, Inspector says', *The Sydney Morning Herald* (online), 5 December 2015 <http://www.smh.com.au/nsw/icac-acted-illegally-in-margaret-cunneen-inquiry-inspector-says-20151203-glfbvd>.