



Introduction 1

The ICAC Act 1988..... 2

Cunneen v ICAC (NSW Court of Appeal) 4

ICAC v Cunneen (the High Court).. 5

Consequences and comments 9

Where next? 12

“Corrupt conduct” in other jurisdictions..... 16

Conclusion 17

ICAC v Cunneen: the power to investigate corrupt conduct

by Gareth Griffith

Introduction

Since its establishment in 1988, the Independent Commission Against Corruption (ICAC) has been a major feature of the NSW political landscape, never more so than during the years of the 55th Parliament, from 2011 to 2015. Weekly, often daily, new claims and findings of corruption were made, across the entire political landscape, from State to local politics, affecting the public and private sectors alike; in *ICAC v Cunneen*,¹ ICAC’s reach extended into the legal profession. Margaret Cunneen SC is the State’s Deputy Senior Crown Prosecutor.

In brief, that case concerned the powers of the ICAC to investigate allegations that Ms Cunneen, along with her son Stephen Wyllie, with the intention of perverting the course of justice, counselled her son’s girlfriend, Sophia Tilley, to pretend to have chest pains to divert police from conducting a blood alcohol test at the scene of an accident.² The alleged conduct did not concern the exercise of Ms Cunneen’s official functions as a Crown Prosecutor. ICAC contended that the alleged conduct was corrupt conduct because it could adversely affect the exercise of official functions by the investigating police officers and by a court that would deal with any charges arising from the motor vehicle accident. The nub of the legal argument was whether such allegations constitute “corrupt conduct” under the *ICAC Act 1988*. In the relevant circumstances, by section 8(2) of the Act, the conduct at issue could constitute “corrupt conduct” if it could “adversely affect” the exercise of official functions by a public official.

The decision of the High Court, rejecting ICAC’s appeal and thereby restricting the breadth of its power to investigate corrupt conduct, has proved to be controversial. The ICAC Commissioner Megan Latham has called for the ICAC Act to be amended retrospectively, a submission Premier Baird is said to be considering.³ Jamie Parker, the Greens NSW anti-corruption spokesperson, is reportedly planning to introduce a Bill in the NSW Parliament to that effect.⁴ Indicating his support for legislative amendment, Labor’s Luke Foley suggested that the Joint Statutory Committee on the ICAC should hold an inquiry

into the ramifications of the High Court's decision.⁵ Mr Foley is also reported as saying that "Labor wants to see a powerful statutory corruption fighter", with consideration being given to the introduction of a Private Member's Bill.⁶

As for the Government's position, it was reported on 1 May 2015 that:

Premier Mike Baird met with ICAC Commissioner Megan Latham and Inspector-General David Levine this week but is still undecided over what to do about the mess caused by the corruption watchdog's overreach in the Margaret Cunneen inquiry.⁷

On 5 May 2015 [The Daily Telegraph](#) reported that:

Premier Mike Baird is expected to announce today he will change the laws around ICAC to stop a series of lawsuits in the wake of prosecutor Margaret Cunneen's win in the High Court against the corruption watchdog. Corruption findings already made will be protected under law changes expected to be approved by a special Cabinet meeting this morning as parliament sits for the first time post-election. But, as predicted by The Daily Telegraph last week, the government is also expected to announce a review into the future of ICAC and where the body goes from here in the wake of the Cunneen judgment.⁸

Outlined in this e-brief is the decision of the NSW Court of Appeal in [Cunneen v ICAC](#), followed by a more detailed account of the High Court's decision in [ICAC v Cunneen](#). Commentaries on the potential implications of the High Court's decision are also canvassed, along with potential options for the amendment of s 8(2) of the [ICAC Act](#). The e-brief starts with a summary of the relevant provisions of that Act.

The ICAC Act 1988

The ICAC's main function is to "promote the integrity and accountability of public administration" in NSW primarily by investigating, exposing and preventing "corruption involving or affecting public authorities and public officials" (s 2A). The term "public authorities" is defined in the Act to include "the NSW Police Force"; the term "public officials" is defined to mean "an individual having public official functions or acting in a public official capacity" and includes "a member of the NSW Police Force" and "a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions)" (s 3(1)).

Section 3 further defines "corrupt conduct" as having the meaning given by Part 3 of the Act, the key provisions of which are sections 7 and 8. Section 7 provides that corrupt conduct is to be understood by reference to the description of it found in sections 8(1) and (2). For the majority of the High Court these sections must be read together.

Section 8(1) provides that:

- (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.

Relevantly, s 8(2) provides (in part) that:

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:

....

(g) perverting the course of justice...

Section 8(2) imposes two requirements.⁹ The first limb is that the conduct at issue 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. For the second limb it is necessary that the conduct could involve one of the matters referred to in s 8(2)(a)-(y) of the Act, which includes reference to “perverting the course of justice”.

Limiting the operation of section 8, section 9 then provides that conduct will only constitute corrupt conduct if it constitutes or involves certain matters, including “a criminal offence”; this is defined to mean “a criminal offence under the law of the State or under any other law relevant to the conduct in question”. Relevantly, s 319 of the *Crimes Act 1900* (NSW) provides:

A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.

Inserted in the ICAC Act in 2005 under Part 4 “Functions of the Commission” was section 12A which provides:

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

Note that, as originally enacted the provision read “serious and systemic corrupt conduct”. In 2008 this was amended to read “serious corrupt conduct and systemic corrupt conduct”. As explained in the Second Reading speech for the [ICAC Amendment Bill 2008](#):

The bill will amend the Act to clarify that the Commission is to direct its attention to two types of corrupt conduct: serious corrupt conduct and systemic corrupt conduct. This amendment was recommended by the Committee on the Independent Commission Against Corruption to avoid any doubt in relation to the issue.¹⁰

Cunneen v ICAC (NSW Court of Appeal)

Margaret Cunneen, Stephen Wyllie (her son) and Sophia Tilley (her son's girlfriend) commenced proceedings in the NSW Supreme Court challenging the ICAC's inquiry on a number of grounds, including that it was acting beyond its jurisdiction in investigating the allegations. In a decision handed down on 10 November 2014 in the common law division of the NSW Supreme Court, Hoeben CJ found in favour of the ICAC, including in respect to the approach taken to the interpretation of 'corrupt conduct' in s 8(2) of the ICAC Act.¹¹

Ms Cunneen and her fellow plaintiffs then commenced proceedings in the Court of Appeal challenging the ICAC's inquiry on the basis that the allegations could not constitute "corrupt conduct" under the ICAC Act. By majority (Basten JA and Ward JA; Bathurst CJ dissenting), the appeal was upheld.

A key issue again was the interpretation of s 8(2) of the ICAC Act, with the focus of judicial consideration falling on what is meant by the expression "adversely affecting directly or indirectly the exercise of official functions". Similar to the "probity" approach taken by the majority judgment of the High Court, Basten JA was of the view that, for conduct that adversely affects or could adversely affect official conduct to constitute "corrupt conduct", it must be conduct that has "the capacity to compromise the integrity of public administration".¹² It is not sufficient that the conduct in question "simply, for example, adversely affect government revenue".¹³

Similarly, Ward JA was of the opinion that for the first limb of the s 8(2) to be satisfied it is necessary for the conduct to have the capacity to divert the relevant public officer from the proper exercise of his or her functions. Her Honour observed that:

What is required by the first part of the definition, in my opinion, is that the conduct the subject of the relevant allegation be conduct that has at least the potential to affect the exercise of the relevant public official's functions in a manner adverse to the public administration of justice in the sense of diverting the proper exercise of those functions.

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.

In other words, if there is conduct which, though it might involve an attempt to pervert the course of justice, could not have the potential "adversely" to affect the exercise of official functions in the sense of diverting the proper exercise of those functions, such conduct would not in my opinion fall within the definition in s 8(2).¹⁴

Rejecting ICAC's appeal, for Basten JA and Ward JA alike, the conduct at issue – Ms Cunneen's advice to Ms Tilley to pretend to have chest pains to divert police from conducting a blood alcohol test at the scene of an accident – was "not conduct that could adversely affect the exercise of

official functions by the investigating police officers” at the scene of the accident.¹⁵ As Basten JA concluded, “it could not be said that the police officer acted otherwise than honestly and impartially”.¹⁶

According to the majority judgement of the High Court:

Basten and Ward JJA both accepted that the alleged conduct had the capacity to affect detrimentally the exercise by the investigating police officers of their investigative powers, in the sense that the police officers might make a different decision or exercise their functions in a different manner. But their Honours considered that it did not have the capacity to lead the officers or any other public official into dishonest, partial or otherwise corrupt conduct. Consequently, it was not corrupt conduct within the meaning of s 8(2).¹⁷

Bathurst CJ dissented, taking the view that the words “could adversely affect” under the first limb of s 8(2) “require no more than that the conduct have the potential to limit or prevent the proper exercise of official functions by the public official”.¹⁸

In effect, Basten JA and Ward JA preferred a narrower interpretation of the first limb of s 8(2) based on the *motives* of public officials in the performance of their official functions, requiring them to be made in bad faith in order to constitute corrupt conduct. Bathurst CJ on the other hand favoured a broader interpretation that looked to the *effect or outcome* of decisions made, whether made in good or bad faith. The focus in this second approach is not on the integrity of the individual public official at the point where a decision is made; rather, it is on the integrity of the process and of public administration and on the outcomes produced.

ICAC v Cunneen (the High Court)

The High Court held by majority (French CJ, Hayne, Kiefel and Nettle JJ; Gageler J dissenting) that the ICAC did not have the power to investigate the alleged conduct, because the alleged conduct was not “corrupt conduct” as defined in s 8(2) of the ICAC Act.

The joint majority judgment. An approach akin to the narrower interpretation favoured by Basten JA and Ward JA was upheld by the High Court. The [summary](#) of the decision explained that:

The majority held that the expression “adversely affect” in s 8(2) refers to conduct that adversely affects or could adversely affect the probity of the exercise of an official function by a public official. The definition of “corrupt conduct” does not extend to conduct that adversely affects or could adversely affect merely the efficacy of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision.

The alleged conduct was not conduct that could adversely affect the probity of the exercise of an official function by a public official. The alleged conduct was therefore not corrupt conduct within the meaning of s 8(2) of the ICAC Act and ICAC has no power to conduct the inquiry.

The joint judgment set out its approach to the interpretation of s 8(2) at the outset, stating:

"Adversely affect" is a protean expression. In this context, however, there are only two possibilities. Either it means adversely affect or could adversely affect the *probity* of the exercise of an official function by a public official, or it means adversely affect or could adversely affect the *efficacy* of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision from that which would otherwise be the case.

The former meaning accords with the ordinary understanding of corruption in public administration and consequently with the principal objects of the [ICAC Act](#) as set out in [s 2A](#). The latter would result in the inclusion in "corrupt conduct" of a broad array of criminal offences and other unlawful conduct having nothing to do with the ordinary understanding of corruption in public administration or the principal objects of the [ICAC Act](#). It would also enable the Independent Commission Against Corruption ("ICAC") to exercise its extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges) in areas ranging well beyond the ordinary understanding of corruption in public administration and the principal objects of the [ICAC Act](#). For those reasons, and the reasons which follow, the former meaning is to be preferred.¹⁹

In arriving at this conclusion, the majority reviewed the history of the ICAC Act and amendments and proposed amendments to it. Particularly significant in this last respect was the 2005 [Final Report](#) of the Independent Review of the ICAC Act by Bruce McClintock SC. That report was the basis for the insertion in 2005 of sections 2A and 12A into the ICAC Act. The report also reviewed s 8(2) in this context of its legislative setting, notably in respect to s 9. As the majority decision acknowledged, McClintock's interpretation of s 8(2) was consistent with the dissenting views of Gageler J (High Court) and Bathurst CJ (NSW Court of Appeal). According to the McClintock review:

Section 8(2) corrupt conduct can be distinguished from section 8(1) conduct as it requires no wrongdoing on behalf of the public official. The conduct is corrupt because of its potential to adversely affect official functions, not because of any wrongdoing by the official. An example of section 8(2) corruption might be fraudulent action by person A that caused a public official to unknowingly hand over money to which person A was not entitled. This amounts to corruption because it undermines the integrity of public administration by the wrongful payment of public monies.²⁰

The review recommended that:

consideration should be given to re-drafting section 8 to distinguish more clearly between corrupt conduct by public officials and corruption of public administration, the latter being conduct that does not require any wrongdoing on the part of a public official. This could be achieved by section 8(2) corruption being classified as indirect corruption, placed in a separate section, and no longer being subject to the operation of section 9. Alternatively, it could be placed in a separate section, the list of items of criminal conduct deleted but remain subject to section 9.²¹

In the opinion of the majority judgment, the McClintock approach was "not an accurate assessment of the effect of s 8(2) and, in any event, the recommendation was not adopted".²²

The majority judgment then set out its approach to statutory interpretation, as a prelude to its interpretation of s 8(2). The dissenting Bathurst CJ approach was rejected on the grounds that:

it assumes that the plain and ordinary meaning of "adversely affect" is its broadest possible meaning and does not attempt any kind of reconciliation of the meaning of that expression with the statutory context in which it appears.²³

Rejected too were the approaches adopted by Basten JA and Ward JA, as "susceptible to circularity" - by first assuming the purpose of the Act and then reasoning, syllogistically, that "because a meaning of 'adversely affect' limited to an adverse effect on probity is more consonant with the assumed purpose of the Act, that meaning should be preferred".²⁴

Instead, the majority High Court judgment adopted an approach based on the examination of relative consistency, arguing that:

It is impossible to identify the purpose of the ICAC Act (and, therefore, impossible to establish a major premise against which to compare the relative consistencies of the competing constructions of ss 8 and 9) without reference to the scope of operation of the Act as defined by ss 8 and 9. For the same reason, it is not open to express a conclusion as to the meaning of "adversely affect" in s 8(2) in terms of absolute validity. The best that can be done is to reason in terms of relative consistency – internal logical consistency and overall consistency in accordance with the principles of statutory interpretation adumbrated in *Project Blue Sky* – to determine which of the two competing constructions of "adversely affect" is more harmonious overall.²⁵

As to the result of the majority's deliberations, it is enough to say that, from the symmetry between s 8(2) and s 8(1), it was inferred that:

the expression "adversely affect" in s 8(2) means to adversely affect the exercise of an official function by a public official in such a way that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)-(d).

Referred to in sub-sections 8(1)(b)-(d) were such matters as "the dishonest or partial exercise" of official functions, conduct that amounts to "a breach of public trust" and the "misuse of information or material" acquired in the course of official functions.

From there it was a relatively small step to arrive at the narrower interpretation of s 8(2), confined to the issue of probity. For the majority:

the more compelling, construction of s 8(2) is that, if the conduct in question "could involve" any of the matters in pars (a)-(y) and if the conduct adversely affects or could adversely affect the probity of the exercise of an official function in one of the ways listed in s 8(1)(b)-(d), the conduct is "corrupt conduct".²⁶

The competing and broader view of s 8(2) would result "in the inclusion in the definition of 'corrupt conduct' of a wide variety of offences having nothing to do with corruption in public administration as that concept is commonly understood".²⁷ Ten examples were provided in the majority judgment, which went on to make this broader comment:

The principle of legality, coupled with the lack of a clearly expressed legislative intention to override basic rights and freedoms on such a sweeping scale as ICAC's construction would entail, points strongly against an intention that ICAC's coercive powers should apply to such a wide range of kinds and severity of conduct. So does the impracticality of a body with such a wide jurisdiction effectively discharging its functions. It would be at odds with the objects of the Act reflected in s 2A. It would be inconsistent with the assurances in the extrinsic materials earlier referred to that ICAC was not intended to function as a general crime commission. And, last but by no means least, as Basten JA observed, an extended meaning of "corrupt conduct" would be far removed from the ordinary conception of corruption in public administration.²⁸

The judgment continued:

Logically it is more likely and textually it is more consonant with accepted canons of statutory construction that the object of s 8(2) was to extend the reach of ICAC's jurisdiction no further than to offences of the kind listed in s 8(2)(a)-(y) which could adversely affect the probity of the exercise of official functions by public officials in one of the ways described in s 8(1)(b)-(d).²⁹

In respect to the ICAC Act more generally, it was said that:

the provisions of the ICAC Act as a whole (including s 2A) operate more harmoniously on the footing that the Act is directed towards promoting the integrity and accountability of public administration in the sense of maintaining probity in the exercise of official functions. That is the context from which the relevant concept of "corruption" emerges.³⁰

In effect the majority agreed with Basten JA that, further to s 2A, the "explicit mischief to which the Act is directed is 'corruption involving or affecting public authorities and public officials' and the detrimental effect of such corruption on 'public administration and on the community'".³¹

The minority judgment. Alone in dissent, Gageler J said he preferred a reading of s 8(2):

as descriptive of conduct having the potential to limit or prevent the exercise of an official function by a public official, without necessity for any wrongdoing on the part of that public official.³²

For Gageler J, the categories of corrupt conduct described in s 8(1) and s 8(2) are "not to be read as limiting each other";³³ the focus of s 8(1) being on conduct "involving" public officials and the focus of s 8(2) on that "affecting" public officials.³⁴

For what were described as "a number of mutually reinforcing textual reasons", Gageler J sided therefore with the broader "efficacy" interpretation of Bathurst CJ. Included among the "reasons" were that the words "could adversely affect" in s 8(2) are given an ordinary grammatical meaning, connoting no more than impediment or impairment, and that the "efficacy" interpretation avoids reading into s 8(2) a limitation or qualification that is not expressed in the text.³⁵

The potential breadth of the "efficacy" reading of s 8(2) was acknowledged by Gageler J, as extending to "some" conduct falling within the ten examples enumerated by the majority and, as in the *Cunneen* case, to

ICAC having power to investigate an isolated case of a witness telling a lie to a police officer.³⁶

On the other hand, serious practical limitations would follow from the narrower “probity” interpretation, with Gageler J stating:

What is equally important to acknowledge, however, is that a consequence of limiting the first condition in s 8(2) to conduct which has the potential to lead to some want of probity on the part of a public official in the exercise of an official function is entirely to exclude from the definition of corrupt conduct a case of fraud on a public official or of conspiracy to defraud a public official (within the subject matters of pars (e) and (y) of s 8(2)) which entails no wrongdoing by the public official. That is so no matter how widespread the conduct might appear and no matter how detrimental its effects on public administration or on the community or the environment.³⁷

Dismissed by Gageler J was the “principle of legality” argument as a basis for the narrower interpretation of the ICAC’s investigative powers.³⁸ More positively, the “probity” interpretation was said to be supported by legislative history, as well as by reference to the McClintock report. According to Gageler J, the insertion of sections 2A and 12A were based “almost word-for-word” on that report and were to be read in the wider context of its recommendations for the amendment of s 8(2).³⁹ Moreover, there was nothing to suggest in the legislative history of s 2A that it was intended “to confine or otherwise affect the definition of corrupt conduct in ss 7 to 9 of the ICAC Act”.⁴⁰ As for Parliament’s non-amendment of s 8(2) along the lines proposed in that report, Gageler J argued:

That a legislature has refrained from amending a statutory provision following receipt of a report explaining the provision to have a particular textually available meaning is a factor which tells in favour of not departing from that meaning in construing the provision in the context of the statute as otherwise amended. The weight to be afforded to any such aspect of legislative history must, of course, vary with the circumstances.⁴¹

Consequences and comments

The stakes in the *Cunneen* case were always high. Writing in the *Sydney Morning Herald* in January 2015, Michaela Whitbourn commented that, as a result of the adverse majority judgment of the NSW Court of Appeal, the ICAC had:

deferred releasing its reports in high-profile inquiries into Obeid-linked company Australian Water Holdings and Liberal Party donations until the Cunneen case is resolved.⁴²

Writing in March 2015, Sydney lawyer Tim Dick said the High Court’s decision would have “profound consequences for NSW”. He asked:

Will it declare that the Commission has the power to hold what appears to be a questionable inquiry into Cunneen, or will it put a disastrous limitation on the Commission’s power to fight corruption?⁴³

In the event, the fall-out from the High Court’s decision was immediate. The *Sydney Morning Herald’s* [editorial](#) of 16 April 2015 said in part that:

The High Court has limited the power of the NSW anti-corruption watchdog in a way that will dangerously undermine community trust in governments, politician and public officials.

Dozens of findings by the ICAC, including some involving Labor and Liberal figures, are under a cloud. While cases involving former Labor ministers Eddie Obeid and Ian Macdonald are unlikely to be affected, many investigations aimed at unlocking systemic corruption will never be pursued.⁴⁴

ICAC itself was under scrutiny. On 17 April 2015 the *Daily Telegraph* reported that:

In an unprecedented move, the Inspector of ICAC, David Levine, has revealed he has asked the commission to also explain the implications it sees as a result of its defeat in the High Court on Wednesday. The move came as the ICAC's powers came into question again yesterday in Downing Centre Local Court after it instigated a prosecution against disgraced former Labor minister Ian Macdonald.⁴⁵

On 20 April 2015 the ICAC issued this [public statement](#):

The decision in this matter about the scope of section 8(2) of the *Independent Commission Against Corruption Act 1988* by the majority of the High Court of Australia adopted a construction of the section that had never previously been argued or accepted since the ICAC's inception.

The narrow construction given to section 8(2) by the Court will substantially damage the Commission's ability to carry out its corruption investigation and corruption prevention functions.

The decision means that the Commission will be unable to investigate or report on several current operations, and will severely restrict its ability to report on Operations Spicer and Credo.

It has the potential to involve the State of NSW and the Commission in costly and protracted litigation involving persons who have been the subject of corrupt conduct findings based on investigations conducted under section 8(2), and will affect current litigation involving such findings. It also has the potential to call into question the prosecutions and convictions of persons where evidence against them was obtained during Commission investigations based on section 8(2).

In the Commission's view, the narrow construction adopted by the majority in the High Court is contrary to the legislative intention evidenced by the second reading speech when the ICAC Act was first introduced, the analysis of the section in the report of the McClintock review of the ICAC Act and the ordinary meaning of the words used in the section.

In the circumstances, the Commission has made a submission to the NSW Government to consider, as a matter of priority, amending section 8(2) to ensure that the section can operate in accordance with its intended scope and making any such amendment retrospective.

The Commission will be making no further comment on this matter at this time.

ICAC v Cunneen: the power to investigate corrupt conduct

The statement earned the Commission the sobriquet of “poor loser” from no other than the Inspector of the ICAC.⁴⁶ The *Daily Telegraph* reported on 21 April 2015:

In one of the most serious attacks ever on the commission, the former Supreme Court judge who oversees the commission, Justice David Levine, has urged the government to avoid any “knee jerk” reaction that would turn it into a second police force or crime commission. Legal sources said the future of the commission’s current administration, including its commissioner Megan Latham, is now under a cloud.⁴⁷

Several commentators came out on different sides of the argument, for and against the ICAC’s position. Professor Gary Sturgess and former Premier Nick Greiner, both architects of the ICAC, thought the High Court had “got it right”.⁴⁸ Conversely, former Premier Bob Carr thought “everything should be considered” including retrospective legislation to ensure that the ICAC retains “robust powers”,⁴⁹ a position supported by another former Premier Morris Iemma.⁵⁰

Bruce McClintock said that, had the amendment he recommended to s 8(2) in 2005 been enacted, the ICAC’s powers to undertake the Cunneen investigation would not have been in doubt. However, as matters stood, he could see “arguments on both sides”. Mr McClintock also expressed the view that “ICAC should not have commenced the Cunneen investigation”.⁵¹

Citing the 800th anniversary of Magna Carta, Malcom Stewart, vice-president of the Rule of Law Institute, counselled against passing retrospective legislation, saying that the Commission “wants a free pass for contravening its own governing statute”.⁵²

By 27 April 2015 the *Sydney Morning Herald* was reporting that at least 50 findings by the ICAC over the past decade had been “thrown into doubt” by the *Cunneen case*. The relevant ICAC inquiries were listed by Michaela Whitbourn as follows:⁵³

2013 OPERATION JASPER
Travers Duncan and his associates John McGuigan, John Atkinson and Richard Poole found to have acted corruptly by concealing Obeids' involvement in coal tenement. ICAC will agree to findings being set aside.
2013 OPERATION ACACIA
Former union boss John Maitland and his associates Craig Ransley, Andrew Poole and Mike Chester found to have made or agreed to Maitland making "false and misleading" statements to officials.
2011 OPERATION CHARITY
Money fraudulently obtained from the Royal Hospital for Women and Royal North Shore Hospital. Two findings.
2011 OPERATION CARINA
Misuse by private citizens of Land and Property Management Authority database. Four findings
2010 OPERATION SEGOMO
Barrister and solicitor knowingly misled courts to assist clients and agreed to submit deliberately inflated claim for legal costs. Two findings.
2009 OPERATION COLUMBA
People running security training course improperly assisted candidates to get licences from the Security Industry Registry. Ten findings.
2006 OPERATION CADMUS
Falsification of Community Service Order time sheets. Eight findings.

2005 OPERATION AMBROSIA

Schemes to fraudulently obtain building licences. At least 21 findings.

Premier Baird is reported to be “open to whatever's required to ensure those who have been found corrupt don't get away with it”, including retrospective laws.⁵⁴ The Government's position will be formulated after consultation with Commissioner Latham and with the benefit of independent legal advice. Mr Baird has said that the Government wants a “strong ICAC” but that it would “consider this with a cool head”.⁵⁵ As noted, it was reported on 1 May 2015 that the Government may order a review of the ICAC and its operation.⁵⁶

In the meantime, the ICAC faces a new wave of litigation with several persons seeking to have corruption findings against them overturned. On 2 May the *Sydney Morning Herald* reported that:

As the Baird government considers calls by the ICAC to pass retrospective laws to shore up its powers, former Doyles Creek Mining directors Andrew Poole, Craig Ransley and Mike Chester have asked the Supreme Court to revisit corruption findings made against them.⁵⁷

Where next?

Amending s 8(2): A point of general agreement is that, in the words of Gageler J:

The structure of the definition in ss 7, 8 and 9 of the ICAC Act is complex, and the language in which each of its component sections is framed is cumbersome.⁵⁸

In light of this ambiguous legislative context, the majority judgment of the High Court took the view that the meaning of s 8(2), in particular of the words “adversely affect” in its first limb, could not be resolved “in terms of absolute validity” - “The best that could be done is to reason in terms of relative consistency”.⁵⁹ It is with that degree of certainty that the majority declared its “probity” reading of s 8(2).

Either way seemingly, whichever interpretation is supported, there is a case for legislative amendment: from the narrower “probity” view to clarify that interpretation in the interest of the intelligibility of the law to the community at large; from the broader “efficacy” view to reinstate an interpretation that has been relied upon by the ICAC for over two decades in its endeavours to promote integrity in public administration in this State.

From the narrower viewpoint, the amendment might be achieved by the simple insertion of the words “the probity of” into s 8(2), without need for further elaboration. As amended, the first limb of s 8(2) would read:

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 probity of** the exercise of official functions by any public official, any group or body of public officials or any public authority...

The same strategy might also be adopted in support of the broader viewpoint, with an amended s 8(2) reading:

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 efficacy of** the exercise of official functions by any public official, any group or body of public officials or any public authority...

One difficulty with that approach is that it would not address the concerns of the majority judgment as to the potential breadth of the application of s 8(2), as set out in the judgment's ten enumerated examples. These examples are varied in nature, reflecting the offences under s 8(2)(a)-(y). For instance:

If a thief stole one of a public authority's vehicles – say a garbage truck – the theft would qualify as corrupt conduct under s 8(2)(f) because, having lost the use of the truck, the authority could be rendered less able to discharge its official function of collecting garbage.⁶⁰

Such an example may seem fanciful, except that, by its pursuit of Cunneen, it might be said that the ICAC employed its investigative powers in an unpredictable way, one not readily associated with the legislative direction in s 12A to “direct its attention to serious corrupt conduct and systemic corrupt conduct”. Telling in this respect was Gageler J's opening remark that “The question is not about the propriety or prudence of ICAC choosing to undertake the particular investigation in this case”.⁶¹

To limit the application of ICAC's investigative powers to what might be called “core” mandate, an alternative approach to amending s 8(2) can be suggested. This would be to incorporate the words of s 12A into s 8(2), in addition to the words “the efficacy of”, so that the amended provision would read:

Corrupt conduct is also **any serious corrupt conduct or systemic corrupt conduct** of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, **the efficacy of** the exercise of official functions by any public official, any group or body of public officials or any public authority...

As noted, these suggested approaches are in addition to those found in the 2005 McClintock report, which said the amendment of s 8(2):

could be achieved by section 8(2) corruption being classified as indirect corruption, placed in a separate section, and no longer being subject to the operation of section 9. Alternatively, it could be placed in a separate section, the list of items of criminal conduct deleted but remain subject to section 9.⁶²

Amendment to have retrospective effect? In its [public statement](#) on 20 April 2015 the ICAC submitted that the amendment of s 8(2) should be retrospective. Perhaps more than any other aspect of the debate that has developed since the High Court handed down its judgment, it is this suggested retrospective amendment that has caused the greatest consternation.

The courts generally assume that legislation is not intended to operate retrospectively, a presumption that is “most strictly applied in relation to Acts creating an offence because of the manifest injustice that the alternative approach would bring about”.⁶³ Often quoted is the passage from *Maxwell on the Interpretation of Statutes*: “Upon the presumption that

the legislature does not intend which is unjust rests the leaning against giving certain statutes a retrospective operation".⁶⁴ The broad rule is that Parliaments have the power to pass retrospective legislation; if they do so, the courts "will proceed on an assumption that Parliament intended to act fairly".⁶⁵

Specifically in respect to retrospectivity and the criminal law, it is the case that the ICAC stands in a somewhat anomalous position. As Malcolm Stewart explained:

ICAC is not authorised to make a finding of guilt or even to recommend someone be prosecuted, let alone impose a penalty. The only finding ICAC can make is a finding of corrupt conduct. However, such a finding had very significant implications for the person concerned, in particular its impact on their reputation.⁶⁶

It is also the case that, further to a finding of corrupt conduct, the ICAC can recommend that the DPP give consideration to prosecuting individuals for criminal offences. Further to s 113 of the ICAC Act, evidence acquired by the ICAC may be made available to the court in relevant criminal proceedings.

In the present circumstances the key issues would seem to be twofold:

- without retrospective legislation, the ICAC will be limited in respect to investigations already under way, those which have now been found to be beyond its jurisdiction; and
- without retrospective legislation, former corrupt conduct findings may be overturned.

Mr Stewart stated:

If ICAC has previously made a finding of corrupt conduct that it should not have made or is currently conducting an investigation it should not be undertaking, those findings and investigations should not now be given the sanction of the NSW parliament.⁶⁷

Lawyer Scott McDonald has commented that:

A guiding principle of the rule of law is that laws are enacted prospectively so that citizens are informed of the law in advance and can ensure that their conduct is lawful.

It is wrong for ICAC to suggest that retrospective legislation might avoid costly and protracted litigation.⁶⁸

A weighty counterbalance is found in the views of former ICAC Commissioner David Ipp, stating:

The [High Court's] decision does not validate the conduct that ICAC inferred was corrupt and does not vindicate that conduct. Retrospective legislation, which would give ICAC the powers it thought it had, would allow the facts exposed by ICAC to be used by various law enforcement agencies for prosecution purposes in the way the ICAC Act contemplates. Without such legislation, damning evidence of this kind is likely to be unusable. This is one of the many reasons why such retrospective legislation should be passed as soon as possible.⁶⁹

It is further suggested that the issue of retrospectivity raises difficult considerations of political practice. Writing in *The Daily Telegraph*, Andrew Clennell commented:

Mr Baird would face party room opposition to retrospective legislation. He would also face criticism if some of his former MPs — such as Tim Owen and Andrew Cornwell, who were not public officials when they took cash from a developer — escaped corruption findings if Operation Spicer collapsed.⁷⁰

The meaning of corruption and the scope of ICAC's powers: Retrospectivity is one issue of principle and practice raised in this context. Central to the broader debate is whether the scope of the ICAC's investigative powers should extend to the integrity of the outcomes of public administration, even where no impropriety, wrongdoing or bad faith is imputed to any public official?

The concern of the majority of the High Court was that this would extend the meaning of “corrupt conduct” to one “far removed from the ordinary conception of corruption in public administration”.⁷¹ That would seem to concur with the meaning of corruption set out in the standard text, *Corruption and Misuse of Public Office* by Colin Nicholls et al where it is said that the “popular meaning” of corruption “encompasses all those situations where agents and public officers break the confidence entrusted to them”.⁷² It would also seem to concur with the dictionary and legal definitions of corruptions set out in the same text.

Conversely, experience in NSW indicates that the integrity of public administration, understood in terms of outcomes, can be corrupted by indirect means, where public officials are deceived into making decisions the efficacy of which are less than optimal. Two examples drawn from previous ICAC reports were presented in Gageler J's dissenting judgment, concerning which he commented:

In both examples, ICAC investigated and reported on conduct which had the potential to impair the efficacy of an exercise of an official function by a public official. Neither would have been within ICAC's power had s 8(2) been interpreted as confining corrupt conduct to conduct having the potential to impair the probity of an exercise of an official function by a public official.⁷³

As formulated by Gageler J, the “probity” reading would mean that the ICAC would have:

no power to investigate, expose, prevent or educate about State-wide endemic collusion among tenderers in tendering for government contracts; as well as ICAC having no power to investigate, expose, prevent or educate about serious and systemic fraud in the making of applications for licences, permits or clearances issued under New South Wales statutes designed to protect health or safety (such as the *Child Protection (Working with Children) Act 2012* (NSW) or the *Work Health and Safety Act 2011* (NSW)) or under New South Wales statutes designed to facilitate the management and commercial exploitation of valuable State-owned natural resources (such as the *Mining Act 1992* (NSW), the *Fisheries Management Act 1994* (NSW) or the *Forestry Act 2012* (NSW)).⁷⁴

Certainly, in the wake of the High Court's decision and in light of the many Obeid-related inquiries undertaken by the ICAC over recent years, there is a body of opinion in NSW that fears that a loophole for the unscrupulous has been discovered. From that standpoint, one might say that in NSW, by the ICAC's work, a more nuanced and deeper understanding of the practical means by which corruption can impact upon public administration has come into focus and that it is this understanding which should be unambiguously inserted in any amendment of the ICAC Act.

In the words of former ICAC Commissioner David Ipp:

The High Court has found that corrupt conduct under the ICAC Act only occurs when a public official has acted dishonestly (without "probity"), and not when dishonest persons deceive innocent public officials. This means, for example, that ICAC cannot investigate allegations of serious and systemic fraud in state elections or in the making of applications for mining and other licences. Surely this is a perversion of the community's idea of what ICAC should be doing. It is important that this be remedied by the government.⁷⁵

As Mr Ipp acknowledged, the alternative view is that such instances of corruption should be investigated, not by the ICAC with its distinctive inquisitorial powers, but by the police. To which Mr Ipp responded: "Of course, the police could investigate this kind of corrupt conduct, but the fact is they seldom do".

At its broadest the current debate goes to the very rationale for the existence of the ICAC as an investigative body that complements the roles performed by other criminal justice agencies. The Joint Parliamentary Committee on the ICAC defined the Commission's "primary role" as "being an investigative, 'truth-seeking' body, rather than being another law enforcement body".⁷⁶ The McClintock report said this of ICAC's role:

Its particular focus must be matters for which there is no other remedy – where there are serious allegations of corruption that are not amenable to ordinary policing methods, where there are corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.⁷⁷

“Corrupt conduct” in other jurisdictions

Other Australian jurisdictions have anti-corruption bodies comparable to the ICAC. Bearing in mind the complex statutory interpretation undertaken by the High Court to arrive at the correct meaning of “corrupt conduct” under s 8(2) of the ICAC Act, one must approach any comparable definitions in the legislation of other States with caution. The following comments are therefore tentative in nature, with the interpretation based solely on the face of the legislation. All of the relevant provisions in the other jurisdictions appear to be limited to matters of “probity”.

The key provisions are listed below:

- [*Crime and Corruption Act 2001*](#) (Qld), s 15: basically the provision combines elements of ss 8(1) and (2) of the ICAC Act but appears to limit the scope of corrupt conduct to matters of probity.

- [Independent Broad-based Anti-corruption Commission Act 2011](#) (Vic), s 4: again the provision borrows from the ICAC formulation but appears to be limited to the probity approach, with a focus on the honesty and trust of public officials.
- [Integrity Commission Act 2009](#) (Tas), s 4: It is [explained](#) in a commentary on the statute that “misconduct” under the Act does not include “administrative decisions or actions by public authorities where there is no suggestion that the decisions were made dishonestly or improperly”.
- [Independent Commissioner Against Corruption Act 2012](#) (SA), s 5: The terms “corruption, misconduct and maladministration” are separately defined, with corruption defined in connection with specified offences relating to breaches of public trust.
- [Corruption and Crime Commission Act 2003](#) (WA), s 4: The term “misconduct” is defined in relation to public officials and is restricted to the “probity” approach. Neither the term “corruption” nor “corrupt conduct” is defined.

Conclusion

As discussed in the Research Service’s [Key Issues for the 56th Parliament](#), the ICAC’s lead role in the drama of NSW politics has resulted in questions being asked of the Commission itself, including questions about ICAC’s procedures, with the damage done to high profile reputations.⁷⁸ Criticism has also accompanied the *Cunneen* case and its aftermath. An editorial in *The Daily Telegraph* from 21 April 2015 commented:

So the blame entirely lies with ICAC itself for trying on a flimsy case and as a result losing much of its previous impressive reputation and a great deal of power besides.⁷⁹

The decision in *ICAC v Cunneen* presents an opportunity for a thorough reconsideration of the appropriate scope and nature of the Commission’s powers. What do we want ICAC to do on behalf of the people of NSW? What is its purpose?

¹ [2015] HCA 14 (15 April 2015); [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014); [Cunneen v ICAC](#) [2014] NSWSC 1571 (10 November 2014).

² The facts in the case were set out in the decision of the primary judge Hoeben CJ in [Cunneen v ICAC](#) (NSW Supreme Court) 2014 NSWSC 1571 at paras 3-13 and in the judgment of Basten JA in [Cunneen v ICAC](#) [2014] NSWCA 421 at paras 31-37.

³ S Nicholls and M Whitbourn, “Baird considers law to keep ICAC strong”, *SMH*, 25-26 April 2015, p 7.

⁴ “Greens devise bill to support ICAC”, *SMH*, 17 April 2015, p 6.

⁵ N Hasham, “Legislators reconsider corruption framework”, *SMH*, 16 April 2015, p 9.

⁶ M Coultan, “ICAC challenges Mike Baird to restore powers it thought it had”, *The Australian*, 21 April 2015.

⁷ A Clennell, “ICAC: corruption watchdog’s future could be determined by review”, *DT*, 1 May 2015.

⁸ A Clennell, “ICAC: Mike Baird throws corruption watchdog a lifeline in the wake of Cunneen ruling”, *Daily Telegraph.com.au*, 5 May 2015.

⁹ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at paras 6 and 7.

¹⁰ [NSWPD](#), 28 November 2008.

- ¹¹ [Cunneen v ICAC](#) [2014] NSWSC 1571 (10 November 2014) at para 63.
- ¹² [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at para 71.
- ¹³ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at para 71.
- ¹⁴ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at paras 188-190.
- ¹⁵ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at para 193.
- ¹⁶ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at para 92.
- ¹⁷ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 30.
- ¹⁸ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at para 22; and as summarised by Gageler J in [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 81.
- ¹⁹ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at paras 2 and 3.
- ²⁰ B McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988, Final Report*, (2005) at 53 [4.3.3].
- ²¹ B McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988, Final Report*, (2005) at 53 [4.3.5].
- ²² [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 16.
- ²³ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 32.
- ²⁴ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 33.
- ²⁵ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 35.
- ²⁶ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 50.
- ²⁷ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 52.
- ²⁸ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 54.
- ²⁹ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 55.
- ³⁰ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 59.
- ³¹ [Cunneen v ICAC](#) [2014] NSWCA 421 (5 December 2014) at para 67; [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 28.
- ³² [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 84.
- ³³ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 78.
- ³⁴ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 83.
- ³⁵ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 82.
- ³⁶ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at paras 90-91.
- ³⁷ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 91.
- ³⁸ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at paras 86-87.
- ³⁹ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 116.
- ⁴⁰ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 118.
- ⁴¹ [ICAC v Cunneen](#) [2015] HCA 14 (15 April 2015) at para 113.
- ⁴² M Whitbourn, "Dozens of ICAC findings in doubt", [SMH](#), 24 January 2015, p 11.
- ⁴³ T Dick, "If Crown prosecutor wins 'corruption' case, the real losers will be the community", [SMH](#), 10 March 2015, p 18.
- ⁴⁴ Editorial, "High Court restricts the ICAC and erodes democracy", [SMH](#), 16 April 2015.
- ⁴⁵ J Fife-Yeomans, "ICAC issued please explain over Margaret Cunneen investigation fiasco by former Supreme Court judge", [DT](#), 17 April 2015.
- ⁴⁶ M Whitbourn, "ICAC: watchdogs watcher bites back", [SMH](#), 21 April 2015, p 1.
- ⁴⁷ J Fife-Yeomans, "Poor loser: cracks deepen in the ICAC after High Court loss in Margaret Cunneen case", [DT](#), 21 April 2015.
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- ⁴⁹ S Nicholls and M Whitbourn, "Carr says robust powers must be retained", [SMH](#), 22 April 2015, p 8.
- ⁵⁰ S Nicholls and M Whitbourn, "Former Premiers differ over ICAC role", [SMH](#), 23 April 2015, p 9.
- ⁵¹ S Nicholls and M Whitbourn, "Carr says robust powers must be retained", [SMH](#), 22 April 2015, p 8.
- ⁵² M Stewart, "Don't give ICAC retrospective protection against contraventions", [The Australian](#), 24 April 2015.
- ⁵³ M Whitbourn, "At least 50 ICAC findings in doubt following High Court Cunneen ruling", [SMH](#), 27 April 2015.
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- ⁵⁵ S Nicholls and M Whitbourn, "Carr says robust powers must be retained", *SMH*, 22 April 2015, p 8.
- ⁵⁶ A Clennell, "ICAC: corruption watchdog's future could be determined by review", *DT*, 1 May 2015.
- ⁵⁷ M Whitbourn, "ICAC hit with a fresh wave of litigation", *SMH*, 2-3 May 2015, p 13.
- ⁵⁸ *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 78.
- ⁵⁹ *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 35.
- ⁶⁰ *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 52.
- ⁶¹ *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 73.
- ⁶² B McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988, Final Report*, (2005) at 53 [4.3.5].
- ⁶³ D Pearce and R Geddes, *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths 2014, p 374 [9.18].
- ⁶⁴ Quoted in D Pearce and R Geddes, *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths 2014, p 403 [10.8].
- ⁶⁵ *Attorney General of New South Wales v World Best Holdings Limited & Ors [2005] NSWCA 261* (11 August 2005) at para 54 (Spigelman CJ).
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- ⁷⁰ A Clennell, "ICAC: corruption watchdog's future could be determined by review", *DT*, 1 May 2015.
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- ⁷² C Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed, Oxford University Press 2011, p 1.
- ⁷³ *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 105. The two reports cited were the "Report on investigation into certain applications made to the Department of Fair Trading for building and trade licences" (2003) and "Report on investigation into Mr Glen Oakley's use of false academic qualifications" (2003).
- ⁷⁴ *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 92.
- ⁷⁵ D Ipp, "Why ICAC powers to investigate corruption must be restored" *SMH*, 28 April 2015.
- ⁷⁶ Joint Parliamentary Committee on the ICAC, *Prosecutions arising from ICAC corruption investigations*, November 2014, para 2.46.
- ⁷⁷ B McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988, Final Report*, (2005) at 23 [2.1.8]; quoted in *ICAC v Cunneen* [2015] HCA 14 (15 April 2015) at para 117.
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