

## **DUNCAN v INDEPENDENT COMMISSION AGAINST CORRUPTION (S101/2015)**

Court from which cause removed: New South Wales Court of Appeal

Date cause removed: 25 May 2015

Mr Travers Duncan is a substantial shareholder in Cascade Coal Pty Ltd (“Cascade”), a company of which he was a director from February to July 2009. In June 2009, following expressions of interest to the New South Wales Department of Primary Industries, Cascade was selected to receive a coal exploration licence for an area known as Mount Penny.

In July 2013 the Independent Commission Against Corruption (“ICAC”) published a report entitled “*Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*” after conducting a public inquiry. Findings made by ICAC in its report included that Mr Duncan and the other directors of Cascade had engaged in corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* (NSW) (“the Act”). That conduct was the taking of steps to deceive public authorities as to the involvement of the Obeid family in the creation of the Mount Penny tenement.

Mr Duncan commenced Supreme Court proceedings, seeking a declaration that the finding of corrupt conduct on his part was a nullity because, in making it, ICAC had exceeded its jurisdiction. On 29 July 2014 Justice McDougall dismissed Mr Duncan’s application.

Mr Duncan applied to the Court of Appeal for leave to appeal (“the leave proceedings”) from Justice McDougall’s decision. Following this Court’s judgment in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (“*Cunneen*”), Mr Duncan sought final orders in his favour in the leave proceedings. This was on the basis that *Cunneen* was fatal to ICAC’s position.

Meanwhile, on 6 May 2015, Schedule 4 to the Act was amended by the addition of Part 13. The provisions of Part 13 purport to validate ICAC’s actions done and findings made prior to the date of *Cunneen*, along with anything (including legal proceedings) done in reliance upon such actions and findings. In so providing, Part 13 extends the meaning of “corrupt conduct” in s 8(2) of the Act to include (contrary to *Cunneen*) conduct that could adversely affect the *efficacy* of the exercise of official functions by a public official.

In the leave proceedings, Mr Duncan amended his grounds of appeal and orders sought, adding a challenge to the validity of Part 13 of Schedule 4 to the Act. He then applied to this Court for it to remove that part of the leave proceedings from the Court of Appeal. On 25 May 2015 Justice Gageler granted the order sought.

A Notice of a Constitutional Matter was filed by Mr Duncan. The Attorneys-General of New South Wales, Victoria, Queensland, Western Australia and South Australia are intervening in the removed proceedings.

The grounds of appeal include:

- Part 13 of Schedule 4 to the Act is invalid on the basis that:
  - (i) on its proper construction, cl 35 of Schedule 4 to the Act does not alter the substantive law relating to:
    - (a) the powers or functions of ICAC; or
    - (b) the definition of “corrupt conduct” within the meaning of the Act, but instead merely deems certain action by ICAC to have been, and always to have been, valid if it would have been validly done, had corrupt conduct for the purposes of the Act included conduct that adversely affects, or could adversely affect, the efficacy (but not the probity) of the exercise of official functions;
  - (ii) as a consequence, the principal, if not the sole, effect of cl 35 of Schedule 4 to the Act is to oust the power of the Supreme Court of New South Wales to grant relief for a specific genus of jurisdictional error by ICAC, which error is not, as a matter of law, cured by cl 35; or
  - (iii) in the alternative to (ii) above, it is beyond the legislative competence of the New South Wales Parliament to enact a law purporting to direct the Supreme Court of New South Wales (or the High Court of Australia) so as to preclude it from making orders or granting relief reflective of the legal reality appertaining to the rights, powers or duties of the parties before it, being, in this case, the unaltered circumstance that ICAC did not have power to make findings of corrupt conduct on the basis of an asserted adverse effect upon the efficacy, as distinct from the probity, of an exercise of official functions.