

INDEPENDENT COMMISSION AGAINST CORRUPTION
Applicant



MARGARET CUNNEEN
First Respondent

STEPHEN WYLLIE
Second Respondent

SOPHIA TILLEY
Third Respondent

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APPLICANT'S SUBMISSIONS

PART I – PUBLICATION

1. This document is in a form suitable for publication on the internet.

PART II – ISSUES

2. Whether the power of the Applicant (**the Commission**) to investigate conduct that “adversely affects, or that could adversely affect” the exercise of official functions by any public official, within the meaning of s.8(2) of the *Independent Commission Against Corruption Act 1988* (**the Act**), extends to conduct within the ordinary meaning of that phrase (as held by Bathurst CJ in dissent at [22]) or whether that phrase should be read as being constrained to conduct which:
 - (a) “has the capacity to compromise the integrity of public administration”, such that the conduct has the potential to “lead a public official into dishonest, partial or otherwise corrupt conduct” (as held by Basten JA at [71] and [75]); and/or
 - (b) conduct which has the potential to cause “‘corruption’ in the exercise by [a] public official of his or her functions, or which could have [an] adverse outcome when viewed from a public corruption perspective” (as held by Ward JA at [189]).

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PART III – SECTION 78B NOTICES

3. The Applicant has considered whether notices should be given in compliance with s.78B of the *Judiciary Act 1903* (Cth). It considers that no such notices are necessary.

PART IV – DECISIONS BELOW

4. The reasons for judgment of the courts below are not yet reported. The decision of the primary judge may be cited as *Cunneen v Independent Commission Against Corruption* [2014] NSWSC 1571. The reasons for judgment of the Court of Appeal of the Supreme Court of New South Wales may be cited as *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421.

PART V – FACTS

5. Before the decision below by the Court of Appeal, the Commission was investigating an allegation (**the Allegation**) which had been expressed in the following terms:

10 That on 31 May 2014, [the First and Second Respondents], with the intention to pervert the course of justice, counselled [the Third Respondent] to pretend to have chest pains, and that [the Third Respondent], with the intention to pervert the course of justice, did pretend to have chest pains, to prevent investigating police officers from obtaining evidence of [the Third Respondent's] blood alcohol level at the scene of a motor vehicle accident.

6. The Commission decided to conduct a public inquiry into the Allegation under s.31 of the Act.

20 On 4 November 2014 the Respondents commenced proceedings in the Common Law Division of the Supreme Court of New South Wales seeking (inter alia) a declaration that the Commission was exceeding its power in conducting an investigation into the Allegation and a declaration that the decision to hold a public inquiry was invalid. The holding of the public inquiry was postponed pending the determination by first the primary judge (Hoeben CJ at CL), then by the Court of Appeal, of the Respondents' challenge.

8. All of the grounds for review raised by the Respondents were rejected by the primary judge. The Respondents then applied for leave to appeal to the Court of Appeal. Three issues arose on the application:

- 30 (a) whether the Commission had jurisdiction under ss.13(1) and 8(2) to investigate the Allegation;
- (b) whether the decision to hold a public inquiry under s.31 was invalid;
- (c) whether the trial judge erred in declining to order the Commission to provide reasons for its decision to investigate the Allegation and to hold a public inquiry, including because s.111 of the Act was unconstitutional (this constitutional argument had not been raised at first instance).

9. The Court of Appeal granted leave to appeal, which the Commission did not oppose.
10. On the jurisdictional issue, a majority of the Court allowed the appeal, albeit on an argument not raised at first instance or in written submissions on the appeal. The majority concluded that the Commission's power under s.8(2) of the Act to investigate conduct that "could adversely affect ... the exercise of official functions by any public official" should be construed as being limited to conduct that "has the capacity to compromise the integrity of public administration" such that the conduct has the potential to "lead a public official into dishonest, partial or otherwise corrupt conduct" (Basten JA at [71] and [75]), or conduct which has the potential to cause "corruption in the exercise by [a] public official of his or her functions, or which could have [an] adverse outcome when viewed from a public corruption perspective" (Ward JA at [189]). The majority held that, even though the Allegation could amount to perverting the course of justice, it could not "adversely affect ... the exercise of official functions by any public official" within the meaning of s.8(2) of the Act. It followed, on the majority's approach, that the Commission had no power to investigate the Allegation.
11. In dissent, Bathurst CJ held that the appropriate approach to s.8(2) was to "focus on the words of the section" (at [20], [21]). Applying that approach, his Honour held (at [22]) that the Allegation fell within s.8(2) of the Act with the result that it is within the power of the Commission to investigate, and conduct a public inquiry into, the Allegation.
12. In relation to the decision to hold a public inquiry, the majority judges held that it followed from their finding on jurisdiction that this was beyond power (see Basten JA at [93] and Ward JA at [197]). Ward JA would otherwise have rejected the Respondents' challenge to this decision (at [206]); Bathurst CJ agreed with her Honour in that respect (at [28]), and Basten JA did not consider it necessary to determine the point (at [93], though see also [117]).
13. In relation to the third issue, relating to the primary judge having declined to order the Commission to provide reasons, again Ward JA rejected this challenge (at [163]), with the agreement of Bathurst CJ (at [28]), and Basten JA did not consider it necessary to decide the issue (at [118]).
14. The Commission's application for special leave to appeal is directed to the majority's decision on the jurisdictional issue, which led to the majority's determination to hold invalid both the Commission's decision to investigate the Allegation and its decision to hold a public inquiry.

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PART VI – ARGUMENT

15. The Commission contends that Bathurst CJ’s reasoning was correct and that the majority of the Court of Appeal erred in failing to follow that reasoning.

The legislative scheme

16. The Commission’s power to investigate is conferred by s.13(1) of the Act. That subsection relevantly provides that:

The principal functions of the Commission are as follows:

(a) to investigate any allegation or complaint that, or any circumstances which in the Commission’s opinion imply that:

- 10 (i) corrupt conduct, or
- (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
- (iii) conduct connected with corrupt conduct,
- may have occurred, may be occurring or may be about to occur, ...

17. The notion of “corrupt conduct” is defined in ss.7 to 9 of the Act (note also s.3(1)). Section 7(1) provides that:

For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.

- 20 18. In this case nothing turns on the exclusions in s.9 of the Act.

19. Section 8 relevantly provides as follows (emphasis added):

8 General nature of corrupt conduct

(1) Corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that **adversely affects**, or that could adversely affect, either directly or indirectly, the **honest or impartial** exercise of official functions by any public official, any group or body of public officials or any public authority, or
- 30 (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 that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is **also** any conduct of any person (whether or not a public official) that **adversely affects**, or that **could adversely affect**, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority **and** which could involve any of the following matters:

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- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
 - (b) bribery,
 - (c) blackmail,
 - (d) offering secret commissions,
 - (e) fraud,
 - (f) theft,
 - (g) perverting the course of justice,
 - (h) embezzlement,

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 - (i) election bribery,
 - (j) election funding offences, ...
 - (m) tax evasion, ...
 - (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.

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(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

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- Section 8(2) speaks simply of “any conduct of any person”. That encompasses one piece of conduct. What follows is identification of the requisite character of that conduct. That character must have two aspects (or what the members of the Court of Appeal called two “limbs”). The first character is the identified kind of actual or potential adverse effect. The second is that the conduct also could involve one of the identified types of matter.

21. The members of the Court of Appeal considered that the case before them turned on the meaning of the phrase “adversely affects” (and its contingent form “could adversely affect”) in the first “limb”: see Bathurst CJ at [19]; Basten JA at [60]; Ward JA at [178]-[190]. This issue was not directly addressed by the primary judge, as the issue was not raised before him.

The correct approach to construction of the phrase “adversely affects”

22. In *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, at 519 [39], this Court said the following (citation omitted):

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‘This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text’. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

23. Within s.8, sub-section (1) focuses on conduct of public officials/authorities, save that:
- (a) paragraph (a) also encompasses conduct of other persons which might adversely affect the honest or impartial exercise of official functions by public officials/authorities; and
 - (b) paragraphs (b), (c) and (d) extend also to former officials.

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24. Section 8(2) does not have that focus. The words of the first aspect or “limb” of s.8(2) are identical to those in s.8(1)(a), save that the words “honest or impartial” are omitted. In other words, conduct can also be corrupt conduct even if it does not lead (nor is liable to lead) to dishonest or partial conduct by public officials/authorities.

25. The words “adversely affects, or that could adversely affect” are found within both s.8(1) and s.8(2).

26. The words employed in s.8(2) are “ordinary English words and there is no ambiguity about them”: primary judge at [63]. On its clear and ordinary meaning, the phrase “adversely effects” connotes a negative effect or consequence – relevantly, on the exercise of official functions by any public official or authority. The *Macquarie Dictionary* (online edition as at January 2015) defines “adverse” in the following way:

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- 1. antagonistic in purpose or effect: *adverse criticism; adverse to slavery.*
- 2. opposing one’s interests or desire: *adverse fate; adverse fortune; adverse influences; adverse circumstances. ...*

27. What is involved here is conduct which may have an actual or potential effect which is antagonistic or detrimental to the exercise of public powers by public officials/authorities, or which is actually or potentially contrary to the interests or desires of such public officials/authorities seeking to exercise their powers properly. As Bathurst CJ put it at [22], “if the conduct in question limits or prevents the proper performance of the public official’s function, then the first limb will be satisfied”.
28. There is nothing in the text of s.8 – nor in ss.7, 9 or 13 – which suggests an intent to employ some confined notion of “adversely affect”. On the contrary, the language chosen in these provisions is broad:
- 10 (a) Section 13(1) authorises the Commission to investigate circumstances which in its opinion *imply* that corrupt conduct, or *conduct liable to allow/encourage/cause* the occurrence of corrupt conduct, or *conduct connected with* corrupt conduct, *may have occurred, may be occurring or may be about to occur*.
- (b) Section 7(1), and the word “also” in s.8(2), confirm that ss.8(1) and (2) are alternatives.
- (c) Section 8(2) speaks of conduct (inter alia) that *could adversely affect, either directly or indirectly*, the exercise of public functions by a public official, and *which could involve* a range of matters, including perverting the course of justice (or conspiring or attempting to do so).
- 20 (d) Section 8(6) reinforces the breadth and cumulative nature of the provisions identifying kinds of “corrupt conduct” in s.8.
29. The words employed are not words of limitation. The Commission’s function is investigative. The purpose of an investigation is to ascertain the facts; certainty is not required before the task of investigation can be undertaken. There is nothing surprising about the fact that the Parliament’s “prime aim is plainly to bring a broad area of conduct, detrimental to the public interest, within the investigative reach of the Commission. The concern is the public interest, irrespective of technical categories”: *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 183
- 30 per Priestley JA.
30. Of course, which potential investigations are worthy of pursuit involves a matter of judgment, to be made by the Commission. Such judgments may be informed by, for example, the objects provision in s.2A, the extent of the resources available to the Commission, and the nature and patterns of behaviours that come to its attention. And

the Parliament has given some guidance in s.12A, which provides that 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”. For the avoidance of doubt, however, s.12A does not alter the above analysis relating to s.8(2) – contrary to submissions made below by the Respondents (note Ward JA at [181]). Section 12A presupposes the separate definition of “corrupt conduct”.

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31. That the construction adopted by the majority is contrary to the ordinary meaning of the phrase “adversely affect” appears to be conceded by Basten JA at [67], in stating that it is “evident” from the language in s.2A, and “the two-limbed structure of s 8(2), that the Act is not concerned with, nor does it require investigation of, *all unlawful conduct which could adversely affect public administration even quite directly*, such as tax evasion and revenue evasion: see s 8(2)(m) and (n)” (emphasis added). The reasons relied on by his Honour are addressed below.
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32. The oddity of the majority’s construction is put in stark relief by the fact that the whole Court accepted (in rejecting one part of the Respondents’ appeal) that the conduct the subject of the Allegation could potentially amount to the offence of perverting the course of justice: Basten JA at [82]-[91], Bathurst CJ agreeing at [9]-[12], and Ward JA at [195]; see also Hoeben CJ at CL at [77]-[94]. The Court of Appeal correctly applied this Court’s decision in *The Queen v Rogerson* (1992) 174 CLR 268, including this statement at 284 by Brennan and Toohey JJ:

An act which has a tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal or from adducing evidence of the true facts is an act which tends to pervert the course of justice and, if done with intent to achieve that result, amounts to an attempt to pervert the course of justice. It impairs the court's capacity to do justice in the actual circumstances of the case.

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33. If the conduct in question may have deflected the police from prosecuting a criminal offence, and in so doing may have impaired the courts’ capacity to do justice, it is difficult to see how this could not be said to involve an actual or potential adverse effect on the exercise of official functions by public officials (see further Bathurst CJ at [3], [9] and [24]-[25]).

The conclusions of the majority

34. Basten JA held that the phrase “adversely affect” in s.8(2) “should be understood to refer to conduct which has the capacity to compromise the integrity of public administration” (at [71]). In particular, this was taken to mean that the conduct has the potential to “lead a public official into dishonest, partial or otherwise corrupt conduct” (at [75]). In relation to the conduct the subject of the Allegation, his Honour said at [92] that, even assuming the facts alleged to be true:

10 it could not be said that the police officer acted otherwise than honestly and impartially in taking steps in accordance with his or her understanding of the circumstances. There was no suggested breach of public trust, in the sense of a statutory power being used for an extraneous purpose, nor any allegation of the misuse of information acquired in carrying out an official function.

35. Ward JA stated at [188] that what was required by the first part of the definition in s.8(2) was that the conduct in question 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”. That statement is consistent with the construction advocated by the Commission (save for what appears to be an erroneous inclusion of the words “of justice”). However, her Honour went on to qualify this at [189] by stating an
20 additional exclusion that conduct “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 applying this requirement to the facts, her Honour agreed at [193] with Basten JA’s analysis at [92], just quoted.

36. The conclusions of both judges impose, at the least, a substantial gloss on the statutory text. Insofar as these conclusions involved reading in words, no attempt was made to reconcile that approach with the discussion in *Taylor v Owners - Strata Plan No 11564* (2014) 306 ALR 547 at 554 [22]-[25], 557-558 [37]-[40] and 563-564 [65]-[66], and
30 the conditions there discussed were not satisfied.

37. The majority judges’ reasoning in the Court of Appeal appeared to turn on the following matters:

- (a) that s.8(1) of the Act supports construing s.8(2) as being constrained to expanding the coverage of s.8 in particular respects rather than as creating a separate species of “corrupt conduct” (Basten JA at [63]-[66]; Ward JA at [174]-[175]);
- (b) that, at least in some circumstances, the construction advanced by the Commission would make the first limb of s.8(2) otiose, and such a reading should be rejected (Basten JA at [61], [73]; Ward JA at [185]);
- (c) that the objects clause at s.2A of the Act confirms that the Act is directed to “corruption involving or affecting public authorities and public officials” with the result that “corrupt conduct” should be construed as being constrained to conduct which would constitute “corruption” as that term is ordinarily understood (Basten JA at [67]-[71]; Ward JA at [187]-[190]).

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38. These matters will be addressed in turn.

The relationship between s.8(1) and s.8(2)

39. Basten JA argued that s.8(2) expanded the coverage of s.8(1) in two respects: first, “it expands the scope of pars (b), (c) and (d) of subs (1), which are restricted to the conduct of public officials and, in the case of (c) and (d), former public officials” (at [63]). Secondly, picking up on the language in s.8(1)(c) and (d), his Honour argued at [64] that s.8(2):

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would, on one construction of the expression ‘adversely affect’, cover the conduct of a private person designed to achieve a breach of public trust by a public official, where the conduct of the private person would not fall within subs (1)(c). It could also cover the conduct of a public official who seeks to have others breach public trust or misuse information obtained in the course of their official functions.

40. These two claimed aspects led Basten JA to conclude at [66] – although it is not entirely clear how – that the first “limb” of s.8(2) had a third characteristic, namely imposing “a constraint on the term ‘adversely affect’ which is consistent with the ordinary understanding of corruption affecting public authorities and public officials”. Ward JA appeared to invoke a similar analysis at [174]-[175].

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41. It is an error to read s.8(1) as imposing a “constraint” on s.8(2). As Bathurst CJ correctly noted at [15], s.8(6) confirms that the width of s.8(2) is not limited by any of the provisions in s.8(1). This is reinforced by s.7(1) of the Act which provides that, subject to the exclusions in s.9, “corrupt conduct is any conduct which falls within the description of corrupt conduct in **either** or both of subsections (1) and (2)” (emphasis added). The word “also” in s.8(2) further confirms that s.8(2) is prescribing an additional species of “corrupt conduct”.
42. Ward JA stated at [174] that it “is clear from s.7(1) that the legislature contemplated that conduct might fall within both s.8(1) and s.8(2), so the latter provision may not necessarily have been intended to have a wider operation than the former”. That reasoning is contrary to the plain intent of ss.7(1), 8(1), 8(2) and 8(6).
43. More specifically, the majority’s analysis does not grapple with the fact that the language of the first “limb” of s.8(2) is identical to the language employed in s.8(1)(a) but with the omission of the words “honest or impartial” before “exercise of official functions...”. The text makes clear that s.8(2) is meant to add to the scope of s.8(1)(a) in particular, by invoking the same language but without requiring that there be any question raised as to the honesty or impartiality of the officials exercising functions. This point appears to be acknowledged by Basten JA in the first sentence at [66], yet his Honour still sought to fill up the content of “adversely affect” in s.8(2) by reference to aspects of s.8(1)(b), (c) and (d), despite the absence of any textual basis, or reason, for doing so.
44. A point overlooked by the majority in seeking to import so much content into the phrase “adversely affects” – being content apparently derived from s.8(1) – is that the same phrase is employed in s.8(1)(a). If those words when used in s.8(2) import much of the content from s.8(1)(b), (c) and (d), presumptively they would do so when used in s.8(1)(a): cf *Courtauld v Legh* (1869) LR 4 Ex 126; *Taikato v The Queen* (1996) 186 CLR 454 at 461-462. It is as though all the words of the four sub-paragraphs in s.8(1) and in the first “limb” of s.8(2) are subsumed into some kind of homogenous blend. There is no textual basis for so doing.
45. On the majority’s construction of s.8 of the Act, it is difficult to conceive of any circumstances in which s.8(2) could have operation beyond that of s.8(1). No examples are proffered in the reasons of either judge. This conclusion is not surprising when one compares s.8(1)(a) (“conduct ... that adversely affects ... the **honest or**

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impartial exercise of official functions” (emphasis added)) with Basten JA’s formulation of how s.8(2) should be limited (“conduct which has the capacity to compromise the **integrity** of public administration” – at [71], emphasis added). “Honesty” is a synonym of “integrity”: see, eg, definition of “integrity” in the *Macquarie Dictionary*. That being so, it seems unlikely that there could be an example of conduct which could have “the capacity to compromise the integrity of public administration” but could not affect the “honest or impartial exercise of official functions”.

10 46. In this way, although Basten JA correctly accepts at [62] that it would be erroneous to read s.8(2) as being limited to conduct which affects the honest and impartial exercise of official functions (as that would make s.8(2) superfluous), his Honour’s approach effectively commits that very error by introducing such a limitation to s.8(2), save that his Honour’s conclusion broadens this a little by reference to the notions contained within s.8(1)(b), (c) and (d), which only reinforces the superfluity point.

20 47. That this is the effect of the majority’s approach – ie to denude s.8(2) of content beyond s.8(1) – is most clearly demonstrated by considering Basten JA’s conclusion at [92] (with which Ward JA agreed), quoted above, regarding whether the Allegation could fall within the scope of s.8(2). If s.8(2) can only apply to conduct which could cause a public officer to act “otherwise than honestly and impartially”, or in breach of public trust, or involving the misuse of information or material, then s.8(2) would be superfluous as such conduct would fall within s.8(1) in any event.

Surplusage in relation to the two “limbs”

30 48. Basten JA noted that on the Commission’s construction it might be said that there was an adverse effect on the exercise of official functions whenever State tax was understated (falling within “tax evasion” in s.8(2)(m)), or whenever there was conduct perverting the course of justice (falling within s.8(2)(g)): see at [61] and [73]. His Honour suggested that this would render the first “limb” of s.8(2) otiose, at least with respect to such conduct, and such a reading should not be accepted. Ward JA appeared to accept a similar point at [185].

49. The construction advanced by the Commission would not make the first limb of s.8(2) otiose. As Basten JA himself said at [55], s.8(2) must be given “a distributive operation”. So understood, there would remain many circumstances in which conduct would fall within one of the enumerated sub-paragraphs of s.8(2), satisfying the second aspect of s.8(2), but would not satisfy the first aspect. For example, bribery or blackmail of an officer of a private company (see s.8(2)(b), (c)), theft from an individual’s residence (see s.8(2)(f)), embezzlement of company funds (see s.8(2)(h)) or illegal drug dealing between individuals who were not public officials (see s.8(2)(p)) would all fall within the second aspect of s.8(2) but would not necessarily fall within the first – it would all depend upon the facts.

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50. Once this is accepted, it follows that there is no warrant for reading down s.8(2) by applying the presumption against surplusage, that is, the “known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent”: *Commonwealth v Baume* (1905) 2 CLR 405 at 414, quoted with approval in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71]. That presumption does not apply where the relevant words have some work to do and are therefore not “superfluous”. The majority erred in seeking to extend the presumption so as to require the first “limb” of s.8(2) to have additional work to do in *all* cases to which the provision could apply. That is so as a matter of general principle. That conclusion is reinforced by the Parliament’s clear indications in ss.7 and 8 that the various articulations of “corrupt conduct” were cumulative, and not to be used to read each other down.

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51. In truth, the presumption against surplusage militates strongly against the constructions proposed by the majority, for the reasons articulated above with respect to the relationship between ss.8(1) and 8(2).

52. Furthermore, given that the first sub-paragraph in s.8(2) is “official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition)”, this would appear to capture all of the limited types of conduct that the majority said was encompassed by the notion of “adversely affect”. That factor itself militates against the majority’s conclusion.

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Section 2A and generic notions of “corruption”

53. Basten JA referred to the “ordinary understanding of corruption” (at [66]) and to “the ordinary meaning of corruption” (at [70]) as part of his constrained construction of s.8(2), and -similarly referred at [75] to “otherwise corrupt conduct”. His Honour sought to reinforce these invocations by reference at [67] to the language of the objects provision in s.2A. Ward JA similarly invoked a generic notion of “corruption” when her Honour spoke of an “adverse outcome when viewed from a public corruption perspective” at [189] (see also the reference to s.2A at [181]). A critical step in her Honour’s reasoning appears to have been the statement at [187] that “[t]he focus of the ICAC Act is on corruption in the public sector”.

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54. There is a series of overlapping errors in this reasoning. First, the “ordinary understanding of corruption” is not consistent with the majority’s approach. One of the definitions of “corrupt” in the *Macquarie Dictionary* is “4. infected; tainted”. Conduct which had a detrimental effect on the exercise of official functions by public officials/authorities could well be said to have infected or tainted resulting decisions, without any improper conduct by the public official of the kind required by the majority. For example, if a member of a political party who was not a “public official” bribed electors to vote for a particular candidate in an election, such conduct might be considered to involve corruption of the electoral process, despite the absence of any improper conduct by any public official or public authority.

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55. Such an outcome would also be inconsistent with the very objects clause which the majority call in aid. The objects set out in that clause include “to investigate, expose and prevent corruption involving **or affecting** public authorities and public officials”: s.2A(a)(i) of the Act (emphasis added) . While the electoral bribery referred to above might not be regarded as “involving” public authorities or public officials, it plainly affects public authorities.

56. That points to the second error. Section 2A does not support the majority’s approach; it undermines it. The objects clause contemplates that “corruption” might not only *involve* public authorities and officials – thus compromising the integrity of those authorities or officials in the way required by the majority – but might also only *affect* them.

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57. Thirdly, the majority's approach wrongly involves using broad considerations of purpose to read in requirements that are not found in the statutory text. Whilst it is of course appropriate to take account of an objects clause and general purposes when construing legislation, "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]. That is especially so where the Parliament has sought to articulate very carefully what is "corrupt conduct".
58. The "concept of corruption on which the ICAC Act focuses" (to quote Ward JA at [171]) is that defined by ss.7-9 of the Act. It sets the task of statutory construction on its head to apply some vague and generic notion of "corruption" in the face of these careful definitions. Indeed, it may be that the approach of the majority ultimately fails to answer the question at issue, as shown by Basten JA's reference at [75] to "dishonest, partial or otherwise corrupt conduct". What does "otherwise corrupt conduct" refer to? And what is meant by the "public corruption perspective" invoked by Ward JA at [189]? Whatever is meant by these notions, it is something well-removed from the terms of ss.7-9.
59. Moreover, the fact that the formulations of the two majority judges are somewhat different from each other illustrates the inability clearly to identify what precise notion, or omitted text, is being divined or supplied: cf *Taylor v Owners - Strata Plan No 11564* (2014) 306 ALR 547 at 554 [22]-[25], 557-558 [37]-[40].
60. Fourthly, the word "corruption" can be seen as a cognate term of "corrupt conduct" as defined in ss.7-9. Construing the word "corruption" as having a meaning which does not correspond with the definition of "corrupt conduct" in ss.7 to 9 offends the statutory (*Interpretation Act 1987* (NSW), s.7) and common law (see, eg, *R v Allen* (1872) LR 1 CCR 367) presumption that cognate words in legislation have corresponding meanings. Basten JA doubted that "corruption" was a cognate term to "corrupt conduct" (at [69]). If it was not, what was its relevance to construing s.8(2)?
61. Fifthly, the majority's approach is inconsistent with the statement by this Court in *The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, at 419, that it would be "quite circular to construe the words of a definition by reference to the term defined". In so holding, this Court cited the decision in *Walcal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, in which Gibbs J stated at 507 that "it is impermissible to construe a definition by reference to the term defined".

62. At [70] Basten JA argued (including by reference to his own decision in *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379) that the principle from *Shin Kobe* referred to above is not a “universal rule”. There is nothing in the passage from *Shin Kobe* quoted above which supports limiting that passage in the way suggested by Basten JA. If it is impermissibly circular for the words of a definition to be construed by reference to ordinary meaning of the term defined, that problem arises generally.
63. The majority’s setting aside of the *Shin Kobe* principle is inconsistent with *Esso Australia v Commissioner of Taxation* (2011) 199 FCR 226 at 256-258 [100]-[107], in which the Full Federal Court (Keane CJ, Edmonds and Perram JJ) treated the principle in *Shin Kobe* as being the “established law of this country” (at 257, [102]), and thus declined to consider the ordinary meaning of a defined word.
64. The *Shin Kobe* statement is correct as a matter of principle. Whether one prefers to cite Shakespeare’s Juliet and roses, or Lewis Carroll and Humpty Dumpty, if Parliament has provided an exhaustive definition of a term, then it is that definition which identifies what the Parliament means, and it is that definition – involving the words chosen by the Parliament – which is to be construed.
65. Even if, contrary to *Shin Kobe*, some account may be taken of the ordinary meaning of a defined term in construing that term, that does not aid the Respondents here, for the reasons articulated above. The ordinary meaning of both “corruption” and “adverse” supports the construction put by the Commission. And any such use of ordinary meaning would necessarily have to be secondary to the overriding requirement to give effect to the text of the statute. Lord Hoffman did not suggest to the contrary in *Macdonald (Inspector of Taxes) v Dextra Accessories Ltd* [2005] 4 All ER 107 at 112 [18].

Conclusion

66. For the above reasons the majority’s construction was in error. Had the majority focused on the words of s.8(2) – as Bathurst CJ did at [20]-[27]), and as the primary judge had done – the Court would have been bound to conclude that the Allegation could amount to an allegation that “corrupt conduct” within the meaning of ss.7 to 9 of the Act may have occurred.

67. As noted, it was accepted by the whole Court that the conduct in question (if established) may have deflected the police from prosecuting a criminal offence, and in so doing may have impaired the courts' capacity to do justice. That being so, it involved an actual or potential adverse effect on the exercise of official functions by public officials. Members of the NSW Police Force and judges are "public officials" for the purposes of the Act pursuant to s.3(1). Police Officers exercise functions in relation to the detection of crimes (*Police Act 1990* (NSW), s.6(3)(a)), including offences relating to "drink driving" (see *Road Transport Act 2013* (NSW), s.110). Thus it was potentially "corrupt conduct" within s.8(2); s.13(1) of the Act empowers the Commission to investigate the Allegation; and s.31 authorises a public inquiry.

10

Special leave to appeal should be granted

68. The Commission is charged with an important role in promoting the integrity and accountability of public administration in New South Wales. It is of public importance for this Court to resolve authoritatively which of the divergent views expressed below as to the scope of that important role is correct. Resolving the issue created by the decision below as to the scope of the Commission's power is not just relevant to the investigation involving the Respondents – it is relevant to a number of other current investigations as well as past and future inquiries. The decision below also has implications for other pending litigation.

20

69. As for other current investigations, the Commission has decided to defer completing its reports into the investigations known as "Operation Credo" (allegations concerning corrupt conduct involving Australian Water Holdings Pty Ltd) and "Operation Spicer" (allegations concerning soliciting, receiving and concealing political donations) pending the determination of the present application for special leave to appeal and, if leave be granted, the appeal: see affidavit of Roy Alfred Waldon sworn 10 December 2014 (**Waldon 1**) at [8]. That decision has been taken because there is now uncertainty as to whether the Commission has the power to investigate all the allegations the subject of those inquiries such as allegations regarding conduct which could have negatively affected the exercise of public functions by public officials but which did not involve dishonesty or impartiality, or such like, on the part of those officials. The decision below also has potential implications for at least three other current investigations which (unlike Operation Credo and Operation Spicer) have not yet been the subject of public inquiries: **Waldon 1** at [14].

30

70. As for past investigations, an analysis of the investigation reports published by the Commission between 10 June 2010 and 29 October 2014 (the date of the Commission's most recent investigation report) suggests that, during that period, the Commission has made findings of "corrupt conduct" against 26 persons on the basis of its then understanding as to the scope of s.8(2) of the Act: Waldon 1 at [21]. If the decision of the majority of the Court of Appeal is correct, issues might arise as to whether some of those findings should have been made (of course, whether issues of that nature actually arise would require a close analysis of the facts and circumstances of each particular case).

10 71. As for current litigation, applications for leave to appeal from the decision of McDougall J in *Duncan v Independent Commission Against Corruption* (2014) 311 ALR 750 (**Duncan decision**) are presently pending in the NSW Court of Appeal. That decision related to the Commission's report regarding the "Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others" (Operation Jasper). All of the natural person applicants for leave to appeal propose to argue that, in light of the Court of Appeal's decision in *Cunneen*, it was not open to the Commission to make a finding of "corrupt conduct" against those applicants: Waldon 1 at [15]-[19]; affidavit of Roy Alfred Waldon sworn 15 January 2015 (**Waldon 2**) at [5]-[8]. The respondent to the Commission's application for leave to appeal from the
20 *Duncan* decision (Mr Kinghorn) also proposes to raise the Court of Appeal's decision in *Cunneen* in support of a proposed notice of contention: Waldon 2 at [9].

72. In this context, it is of public importance for the uncertainty created by the decision below to be resolved authoritatively by a judgment of this Court.

73. Special leave to appeal is also warranted given the differences in opinion between the Court of Appeal and the Full Federal Court as to the scope of the principle in *Shin Kobe* with respect to construction of defined terms. That question is one of general importance for statutory construction.

74. A general issue of statutory construction also arises in relation to whether the presumption against surplusage extends to support approaches of the kind taken by the
30 majority of the Court of Appeal in this case.

PART VII – APPLICABLE PROVISIONS

75. The applicable legislative provisions are set out in Annexure A to this submission.

PART VIII – ORDERS SOUGHT

76. The Commission seeks orders to the following effect:

- (a) Grant the Applicant special leave to appeal;
- (b) Appeal allowed;
- (c) Set aside orders 3 to 4 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 5 December 2014 and in lieu thereof order that the appeal to that Court be dismissed.

10 77. On 12 December 2014 the Commission undertook not to seek to disturb any costs order favourable to the Respondents made by the Court of Appeal and to pay the Respondents' costs of the application for special leave to appeal and the appeal in any event.

78. That undertaking having been given, no orders should be made with respect to the costs of the proceedings below and the Court should order the Commission to pay the Respondents' costs in this Court in any event.

PART IX – TIME ESTIMATE

20 79. The Commission estimates that it will require approximately 1.5 hours for the presentation of its oral argument in chief, and some 15 minutes in reply (on the assumption that no additional issues are raised by the Respondents by way of draft notice of cross-appeal or contention).

16 January 2015



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ANNEXURE A
APPLICABLE LEGISLATIVE PROVISIONS

Independent Commission Against Corruption Act 1988 (NSW) – current version

2A Principal objects of Act

The principal objects of this Act are:

- 10 (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
- (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
- (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the Commission special powers to inquire into allegations of corruption.

3 Definitions

20 (1) In this Act:

[...]

Commission means the Independent Commission Against Corruption constituted by this Act.

Commissioner means the Commissioner for the Independent Commission Against Corruption.

[...]

conduct includes neglect, failure and inaction.

corrupt conduct has the meaning given by Part 3.

Inspector means the Inspector of the Independent Commission Against Corruption, appointed under this Act.

30 ***investigate*** includes examine.

investigation means an investigation under this Act, and (without limitation) includes a preliminary investigation referred to in section 20A.

[...]

public authority includes the following:

- (a) a Public Service agency or any other government sector agency within the meaning of the *Government Sector Employment Act 2013*,
- (b) a statutory body representing the Crown,
- (c) (Repealed)

- (d) a person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:
- (i) is part of the accounts prepared under the Public Finance and Audit Act 1983, or
 - (ii) is required by or under any Act to be audited by the Auditor-General, or
 - (iii) is an account with respect to which the Auditor-General has powers under any law, or
 - (iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
- (e) a local government authority,
- (f) the NSW Police Force,
- (g) a body, or the holder of an office, declared by the regulations to be a body or office within this definition.

public inquiry means a public inquiry under this Act.

public official means an individual having public official functions or acting in a public official capacity, and includes any of the following:

- (a) the Governor (whether or not acting with the advice of the Executive Council),
- (b) a person appointed to an office by the Governor,
- (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
- (d) a member of the Legislative Council or of the Legislative Assembly,
- (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both,
- (e1) a person employed under the Members of Parliament Staff Act 2013,
- (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),
- (g) a person employed in a Public Service agency or any other government sector agency within the meaning of the Government Sector Employment Act 2013,
- (h) an individual who constitutes or is a member of a public authority,
- (i) a person in the service of the Crown or of a public authority,
- (j) an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of *public authority* is kept, of attending meetings or carrying out the business of any body constituted by an Act,
- (k) a member of the NSW Police Force,
- (k1) an accredited certifier within the meaning of the Environmental Planning and Assessment Act 1979,
- (l) the holder of an office declared by the regulations to be an office within this definition,
- (m) an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.

[...]

- (2) In this Act:
- (a) a reference to a function includes a reference to a power, authority and duty, and
 - (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.
- (3) Notes included in this Act do not form part of this Act.

[...]

7 Corrupt conduct

- 10
- (1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.
- (2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).
- (3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

8 General nature of corrupt conduct

- 20
- (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.
- 30
- (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:
- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
 - (b) bribery,
 - (c) blackmail,
 - (d) obtaining or offering secret commissions,
 - (e) fraud,
- 40

- (f) theft,
- (g) perverting the course of justice,
- (h) embezzlement,
- (i) election bribery,
- (j) election funding offences,
- (k) election fraud,
- (l) treating,
- (m) tax evasion,
- (n) revenue evasion,
- 10 (o) currency violations,
- (p) illegal drug dealings,
- (q) illegal gambling,
- (r) obtaining financial benefit by vice engaged in by others,
- (s) bankruptcy and company violations,
- (t) harbouring criminals,
- (u) forgery,
- (v) treason or other offences against the Sovereign,
- (w) homicide or violence,
- 20 (x) matters of the same or a similar nature to any listed above,
- (y) any conspiracy or attempt in relation to any of the above.

- (3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.
- 30 (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:
 - (a) matters arising in the State or matters arising under the law of the State, or
 - (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

- 40 (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
 - (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

(2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

(3) For the purposes of this section:

applicable code of conduct means, in relation to:

- (a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
- (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

10

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

20

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

(6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the Local Government Act 1993, but does not include a reference to any other breach of such a requirement.

30

[...]

12A Serious corrupt conduct and systemic corrupt conduct

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.

13 Principal functions

(1) The principal functions of the Commission are as follows:

- (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

40

- (i) corrupt conduct, or
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
 - (iii) conduct connected with corrupt conduct,
- may have occurred, may be occurring or may be about to occur,

[...]

20 Investigations generally

- (1) The Commission may conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it.
- 10 (2) The Commission may conduct an investigation even though no particular public official or other person has been implicated.
- (3) The Commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion):
 - (a) the subject-matter of the investigation is trivial, or
 - (b) the conduct concerned occurred at too remote a time to justify investigation, or
 - 20 (c) if the investigation was initiated as a result of a complaint—the complaint was frivolous, vexatious or not in good faith.
- (4) (Repealed)
- (5) If the Commission decides to discontinue or not to commence an investigation of a complaint or report made to it, the Commission must inform the complainant or officer who made the report in writing of its decision and the reasons for it.

[...]

57B Principal functions of Inspector

- (1) The principal functions of the Inspector are:
 - 30 (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
 - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
 - (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and
 - (d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.
- 40 (2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.

- (3) The Inspector is not subject to the Commission in any respect.
- (4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
 - (a) contrary to law, or
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or
 - (c) based wholly or partly on improper motives.
- (5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:
 - (a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and
 - (b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

10

[...]

74 Reports on referred matters etc

- (1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.
- (2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.
- (3) The Commission shall prepare reports in relation to matters as to which the Commission has conducted a public inquiry, unless the Houses of Parliament have given different directions under subsection (2).
- (4) The Commission shall furnish reports prepared under this section to the Presiding Officer of each House of Parliament.
- (5), (6) (Repealed)
- (7) A report required under this section shall be furnished as soon as possible after the Commission has concluded its involvement in the matter.
- (8) The Commission may defer making a report under this section if it is satisfied that it is desirable to do so in the public interest, except as regards a matter referred to the Commission by both Houses of Parliament.
- (9) (Repealed)

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Interpretation Act 1987 (NSW) – current version

7 Cognate words

If an Act or instrument defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings.

Police Act 1990 (NSW) – current version

6 Mission and functions of NSW Police Force

- (1) The mission of the NSW Police Force is to work with the community to reduce violence, crime and fear.
- (2) The NSW Police Force has the following functions:
- (a) to provide police services for New South Wales,
 - (b) to exercise any other function conferred on it by or under this or any other Act,
 - (c) to do anything necessary for, or incidental to, the exercise of its functions.
- (3) In this section:
- police services* includes:
- (a) services by way of prevention and detection of crime, and
 - (b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and
 - (c) the provision of essential services in emergencies, and
 - (d) any other service prescribed by the regulations.
- (4) A reference in this section to the functions of the NSW Police Force includes a reference to the functions of members of the NSW Police Force.
- (5) The provision of police services in emergencies and rescue operations is subject to the State Emergency and Rescue Management Act 1989 and to the Essential Services Act 1988.
- (6) Nothing in this section confers on the NSW Police Force a power to provide a police service in a way that is inconsistent with any provisions applicable to police officers under the Law Enforcement (Powers and Responsibilities) Act 2002.

Road Transport Act 2013 (NSW) – current version

110 Presence of prescribed concentration of alcohol in person's breath or blood

- (1) **Offence—novice range prescribed concentration of alcohol**
- A novice driver must not, while there is present in the driver's breath or blood the novice range prescribed concentration of alcohol:
- (a) drive the motor vehicle, or
 - (b) occupy the driving seat of the motor vehicle and attempt to put the motor vehicle in motion.

Maximum penalty: 10 penalty units (in the case of a first offence) or 20 penalty units (in the case of a second or subsequent offence).

(2) **Offence—special range prescribed concentration of alcohol**

A person must not, while there is present in the person's breath or blood the special range prescribed concentration of alcohol:

- (a) if the person is a special category driver in respect of a motor vehicle—drive the motor vehicle, or
- (b) if the person is a special category driver in respect of a motor vehicle—occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or
- (c) if the person is a special category supervisor in respect of a motor vehicle and the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)—occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle.

Maximum penalty: 10 penalty units (in the case of a first offence) or 20 penalty units (in the case of a second or subsequent offence).

(3) **Offence—low range prescribed concentration of alcohol**

A person must not, while there is present in the person's breath or blood the low range prescribed concentration of alcohol:

- (a) drive a motor vehicle, or
- (b) occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or
- (c) if the person is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)—occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle.

Maximum penalty: 10 penalty units (in the case of a first offence) or 20 penalty units (in the case of a second or subsequent offence).

(4) **Offence—middle range prescribed concentration of alcohol**

A person must not, while there is present in the person's breath or blood the middle range prescribed concentration of alcohol:

- (a) drive a motor vehicle, or
- (b) occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or
- (c) if the person is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)—occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle.

Maximum penalty: 20 penalty units or imprisonment for 9 months or both (in the case of a first offence) or 30 penalty units or imprisonment for 12 months or both (in the case of a second or subsequent offence).

(5) **Offence—high range prescribed concentration of alcohol**

A person must not, while there is present in the person's breath or blood the high range prescribed concentration of alcohol:

- (a) drive a motor vehicle, or
- (b) occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or

- (c) if the person is the holder of an applicable driver licence (other than an applicable provisional licence or applicable learner licence)—occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle.

Maximum penalty: 30 penalty units or imprisonment for 18 months or both (in the case of a first offence) or 50 penalty units or imprisonment for 2 years or both (in the case of a second or subsequent offence).

(6) **Alternative verdicts for lesser offences**

If the court on a prosecution of a person for an offence against any subsection of this section is not satisfied that the offence is proven but is satisfied that the person has committed an offence against any other subsection of this section of a less serious nature, the court may acquit the person of the offence with which the person is charged and find the person guilty of an offence against the other subsection. The person is liable to be punished accordingly.

(7) For the purposes of subsection (6):

- (a) an offence against subsection (1), (2), (3) or (4) is of a less serious nature than an offence against subsection (5), and
- (b) an offence against subsection (1), (2) or (3) is of a less serious nature than an offence against subsection (4), and
- (c) an offence against subsection (1) or (2) is of a less serious nature than an offence against subsection (3), and
- (d) an offence against subsection (1) is of a less serious nature than an offence against subsection (2).

(8) **Presence of higher concentration of alcohol not defence**

It is not a defence to a prosecution for an offence against a subsection of this section if the defendant proves that, at the time the defendant engaged in the conduct that is alleged to have contravened the subsection, a greater concentration of alcohol was present in the defendant's breath or blood than the prescribed concentration of alcohol referred to in the subsection.

(9) **Defence for offence relating to novice range prescribed concentration of alcohol**

It is a defence to a prosecution for an offence against subsection (1) if the defendant proves to the court's satisfaction that, at the time the defendant engaged in the conduct that is alleged to have contravened the subsection, the presence in the defendant's breath or blood of the novice range prescribed concentration of alcohol was not caused (in whole or in part) by any of the following:

- (a) the consumption of an alcoholic beverage (otherwise than for the purposes of religious observance),
- (b) the consumption or use of any other substance (for example, food or medicine) for the purpose of consuming alcohol.