

**INDEPENDENT COMMISSION AGAINST CORRUPTION v CUNNEEN & ORS
(S302/2014)**

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 421

Date of judgment: 5 December 2014

Date referred to Full Court: 12 December 2014

The Respondents to this application for special leave to appeal are Ms Margaret Cunneen SC (a senior prosecutor in New South Wales), her son Mr Stephen Wyllie and Ms Sophia Tilley. In October 2014 the Respondents were each served with a summons to give evidence at a public inquiry (“the Inquiry”) to be conducted by the Independent Commission Against Corruption (“ICAC”). The Inquiry was to be held for an investigation into an allegation that at the scene of a car accident Ms Tilley, on the advice of Ms Cunneen and Mr Wyllie, pretended to have chest pains to avoid police testing of her blood alcohol level and that each of the three had acted with an intention to pervert the course of justice (“the Allegation”).

The Respondents commenced Supreme Court proceedings, seeking orders restraining ICAC from holding the Inquiry and investigating the Allegation. They contended that the Allegation could not constitute “corrupt conduct” within the meaning of the *Independent Commission Against Corruption Act 1988* (NSW) (“the Act”) and that the Inquiry was therefore beyond the scope of ICAC’s principal functions as set out in s 13 of the Act.

Section 8(2) of the Act relevantly provides that “corrupt conduct” includes conduct by any person (whether or not a public official) that could adversely affect, either directly or indirectly, the exercise of official functions by a public official (or a body of such officials) and which could involve any of certain matters listed in the sub-section. Those matters included perverting the course of justice, or attempting to do so.

On 10 November 2014 Hoeben CJ at CL dismissed the Respondents’ claim. His Honour found that, assuming the facts supporting the Allegation were true, the alleged conduct of the Respondents could amount to perverting, or attempting to pervert, the course of justice. Justice Hoeben held that the conduct satisfied both tests for “corrupt conduct” contained in s 8(2). The Respondents appealed.

The Court of Appeal allowed the appeal (Basten & Ward JJA; Bathurst CJ dissenting). Their Honours unanimously held that the conduct alleged in the Allegation could amount to attempting to pervert the course of justice.

Basten and Ward JJA each held that the alleged conduct did not fall within the scope of ICAC’s functions. This was after construing s 8(2) in light of the focus of the Act, which was on corruption in the public sector rather than on any unlawful conduct that may affect public administration. Their Honours held that the first test (or limb) of s 8(2) was not satisfied, as a police officer being

dissuaded by the alleged conduct from giving a blood alcohol test would not be acting dishonestly in the performance of his or her duties. It could therefore not be said that the exercise of official functions by a public official could be adversely affected.

Bathurst CJ however held that the alleged conduct of the Respondents could have the relevant adverse effect, due to potential impacts on court proceedings (a court being a body of judicial officers, each of whom is a public official). First, the conduct could divert a police officer from investigating a suspected crime and thereby deflect the police from invoking the jurisdiction of a court. Secondly, it could frustrate the course of potential court proceedings or impair a court's capacity to do justice.

On 12 December 2014 Chief Justice French referred this application to the Full Court for hearing in the March 2015 sittings as if on appeal.

The proposed ground of appeal is:

- The majority of the Court of Appeal erred in holding that the allegation then being investigated with respect to the Respondents could amount to perverting the course of justice, but could not amount to conduct that “adversely affects, or could adversely affect ... the exercise of official functions by any public official” within the meaning of s 8(2) of the Act, such as to be capable of being investigated by ICAC under s 13(1).