

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND NETTLE JJ

INDEPENDENT COMMISSION AGAINST
CORRUPTION

APPLICANT

AND

MARGARET CUNNEEN & ORS

RESPONDENTS

Independent Commission Against Corruption v Cunneen
[2015] HCA 14
15 April 2015
S302/2014

ORDER

1. *Special leave to appeal granted.*
2. *Appeal treated as instituted and heard instanter and dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

J K Kirk SC with S Robertson for the applicant (instructed by Crown Solicitor (NSW))

D F Jackson QC with A R Moses SC and R L Gall for the respondents (instructed by Cockburn and Co)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Independent Commission Against Corruption v Cunneen

Statutory bodies – Investigating commission – Independent Commission Against Corruption – Powers – *Independent Commission Against Corruption Act 1988* (NSW), s 8(2) defines "corrupt conduct" as conduct that could "adversely affect" exercise of official function by public official – Whether conduct that could adversely affect efficacy, but not probity, of exercise of official function by public official "corrupt conduct".

Statutes – Interpretation – Context and purpose – Statutory definitions – Effect of express statement of objects of Act – Where purpose of Act cannot be identified without reference to terms to be interpreted.

Statutes – Interpretation – Extrinsic materials – Legislative history – Where legislation not amended after review of Act.

Words and phrases – "adversely affect", "and which could involve", "corrupt conduct".

Independent Commission Against Corruption Act 1988 (NSW), ss 2A, 8, 9, 12A.

1 FRENCH CJ, HAYNE, KIEFEL AND NETTLE JJ. This is an application for special leave to appeal from a decision of the New South Wales Court of Appeal. The principal question for determination is what is meant by the expression "adversely affects, or that could adversely affect ... the exercise of official functions by any public official" in the definition of "corrupt conduct" in s 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW) ("the ICAC Act").

2 "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.

3 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.

The history of the ICAC Act

4 The Independent Commission Against Corruption Bill 1988 was introduced into the New South Wales Parliament on 26 May 1988. In the course of the second reading speech, the then Premier of New South Wales, Mr Greiner, observed¹:

"The third fundamental point I want to make is that the independent commission will not be a crime commission. Its charter is not to

1 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 May 1988 at 674-675.

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investigate crime generally. The commission has a very specific purpose which is to prevent corruption and enhance integrity in the public sector. That is made clear in this legislation, and it was made clear in the statements I made prior to the election. It is nonsense, therefore, for anyone to suggest that the establishment of the independent commission will in some way derogate from the law enforcement role of the police or bodies such as the National Crime Authority. On the contrary, the legislation makes it clear that the focus of the commission is public corruption and that the commission is to co-operate with law enforcement agencies in pursuing corruption.

...

My fourth point is that the independent commission is not a purely investigatory body. The commission also has a clear charter to play a constructive role in developing sound management practices and making public officials more aware of what it means to hold an office of public trust and more aware of the detrimental effects of corrupt practices. ...

The final point I want to make by way of introduction concerns the question of civil liberties. This commission will have very formidable powers. It will effectively have the coercive powers of a Royal commission. ...

There will be those who will say that this legislation is unjustified interference with the rights of individuals who may be the subject of allegations. Let me make a number of points in response to that sort of claim. First, though the commission will be able to investigate corrupt conduct of private individuals which affects public administration, the focus is public administration and corruption connected with public administration. The coercive powers of the commission will be concentrated on the public sector.

Second, corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain."

5

As a consequence of parliamentary debate, a number of amendments were agreed to and incorporated into the Independent Commission Against Corruption

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Bill (No 2) 1988 and that Bill was read a second time on 3 June 1988². The Bill, as amended, was enacted as the ICAC Act.

6 As enacted, ss 8 and 9 of the ICAC Act defined "corrupt conduct" as follows:

"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
- (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.

(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 involves any of the following matters:

2 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 1988 at 1548.

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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) obtaining or offering secret commissions;
- (e) fraud;
- (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;
- (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;

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- (v) treason or other offences against the Sovereign;
 - (w) homicide or violence;
 - (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.
- (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

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve—
- (a) a criminal offence; or

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- (b) a disciplinary offence; or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

..."

7 Thus, as enacted, s 8(2) had two limbs: the "that could adversely affect" limb and the "and which involves" limb, and s 9 imposed a third criterion, that the conduct involve a crime or breach of a relevant standard of conduct.

8 By Divs 2, 3 and 4 of Pt 4 of the ICAC Act, ICAC was vested with extraordinary powers, inter alia, to conduct investigations on its own initiative or on a complaint being made to it³; to compel the production of information and documents⁴ regardless of privilege or duty of secrecy⁵; to enter public premises⁶; to require any person to provide information regardless of the privilege against self-incrimination⁷; to conduct compulsory examinations and public inquiries⁸; to summon witnesses and take evidence⁹; and to issue and execute search warrants¹⁰.

9 Some two years later, following the decision of this Court in *Balog v Independent Commission Against Corruption*¹¹, the ICAC Act was amended by the *Independent Commission Against Corruption (Amendment) Act 1990* (NSW) to give ICAC a clear and wide power to make and report findings and opinions

3 ICAC Act, s 20(1).

4 ICAC Act, ss 21-22.

5 ICAC Act, s 24.

6 ICAC Act, s 23.

7 ICAC Act, ss 26, 37.

8 ICAC Act, ss 30, 37.

9 ICAC Act, s 35.

10 ICAC Act, Pt 4, Div 4.

11 (1990) 169 CLR 625; [1990] HCA 28.

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based on results of its investigations and to make recommendations for the taking of further action¹². The 1990 Act also amended s 8(2) by omitting the words "which involves" and inserting in their place "which could involve"¹³ so that s 8(2) now reads:

"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 ..."

10 Section 9(1)(d) was inserted in 1994¹⁴. Section 9(1) now reads:

"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."

11 Some ten years after that, on 11 November 2004, Mr Bruce McClintock SC was commissioned by letters patent to take over and conclude an inquiry into whether the terms of the ICAC Act remained appropriate for securing its objectives.

12 *Independent Commission Against Corruption (Amendment) Act* 1990, Sched 1, item 7.

13 *Independent Commission Against Corruption (Amendment) Act* 1990, Sched 1, item 6.

14 *Independent Commission Against Corruption (Amendment) Act* 1994 (NSW), s 3(a).

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12 In his final report, which was presented in January 2005, Mr McClintock stated¹⁵:

"ICAC was established to promote the integrity and accountability of public administration by investigating, exposing and preventing serious corruption and educating the public about the detrimental effects of corruption. I am satisfied that the terms of the Act remain generally appropriate for securing its objectives.

Some amendments to the Act are required, however, particularly to improve the accountability of ICAC and to make sure its role is properly understood."

13 Two of the amendments proposed by Mr McClintock are relevant for present purposes. The first was to include an express statement of the objectives of the Act in order to eliminate what was perceived to be residual confusion as to the role of ICAC. That recommendation was accepted. Sections 2A and 12A of the ICAC Act were enacted as follows¹⁶:

"2A Principal objects of Act

The principal objects of this Act are:

- (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

15 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at ix.

16 *Independent Commission Against Corruption Amendment Act 2005* (NSW), Sched 1 [1], [7].

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- (b) to confer on the Commission special powers to inquire into allegations of corruption.

...

12A Serious and systemic corrupt conduct

In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious 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."

- 14 In the second reading speech relating to those amendments, the Minister, Mr Sartor, stated that¹⁷:

"The main changes introduced by the bill are as follows. The bill inserts a new section 2A into the Act to specify the objectives of the Act. These objectives confirm the role of the ICAC as an independent and accountable body established to investigate, expose, and prevent corruption involving or affecting public administration. The bill inserts a new section 12A into the Act to require the ICAC, so far as practicable, to direct its attention to serious and systemic corruption. Under part 5 of the Act, other matters may be referred by the ICAC to any person or body considered by the ICAC to be appropriate in the circumstances."

- 15 The second recommendation of relevance was to redraft s 8 "to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing"¹⁸. In making that recommendation, Mr McClintock set forth his understanding of the effect of s 8(2) as follows¹⁹:

17 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 February 2005 at 14133.

18 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 53, recommendation R4.1.

19 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 53 [4.3.3].

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"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."

16 As will be seen, that was not an accurate assessment of the effect of s 8(2) and, in any event, the recommendation was not adopted.

Previous authority concerning the meaning of s 8(2)

17 Until now, s 8(2) has received little judicial attention. There was some reference to it in the judgments of the New South Wales Court of Appeal in *Greiner v Independent Commission Against Corruption*²⁰, but there was no need to consider what kind of effect would be required to qualify as an adverse effect within the meaning of s 8(2).

18 In *Independent Commission Against Corruption v Chaffey*, Gleeson CJ began his judgment with this observation²¹:

"Under the *Independent Commission Against Corruption Act* 1988 one of the principal functions of the Commission is to investigate allegations or complaints of corrupt conduct. The expression 'corrupt conduct' is widely defined. It includes conduct that may not be unlawful, and, in so far as it covers unlawful conduct, it includes criminal offences (such as homicide, illegal drug dealing, theft and many others) which are a part of the ordinary calendar of crime. Although the Act is aimed at official corruption, to be guilty of corrupt conduct a person need not be a public official, provided the conduct in question could adversely affect, directly or indirectly, the exercise of official functions by a public official."

19 Once again it was unnecessary to consider what kind of effect would be required to constitute an adverse effect for the purposes of s 8(2).

20 (1992) 28 NSWLR 125.

21 (1993) 30 NSWLR 21 at 23.

11.

20 In *Balog*, this Court stated that²²:

"'Corrupt conduct' is defined in ss 7, 8 and 9 and extends generally to any conduct of any person that adversely affects or could adversely affect the honest or impartial exercise of official functions or which constitutes or involves the dishonest or partial exercise of official functions or a breach of public trust. It also includes conduct that adversely affects or could adversely affect the exercise of official functions and involves any one of a number of specified criminal offences, including bribery, blackmail, perverting the course of justice and the like. Nevertheless, conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or dispensing with the services of a public official or otherwise terminating those services."

21 Again, there was no question in that case as to what is meant by "adversely affect" in s 8(2).

22 Significantly, however, in each of those three cases it was either assumed or concluded that the relative clause "and which could involve" limits and defines the "conduct" as opposed to "the exercise of official functions". Later in these reasons, it will be necessary to mention a possible alternative construction whereby the "and which could involve" clause would be taken to limit and control the exercise of the official function as opposed to the conduct. At this point, it is convenient to assume that the approach adopted in the three cases was correct.

The proceedings below

23 The first respondent to this application ("Ms Cunneen") is a Deputy Senior Crown Prosecutor of the State of New South Wales. Late last year, ICAC (the applicant) served a summons on her to appear before it to give evidence at a public inquiry to be conducted for the purposes of investigating an allegation or complaint²³:

22 (1990) 169 CLR 625 at 628 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

23 Stephen Wyllie and Sophia Tilley are the second and third respondents, respectively.

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"That on 31 May 2014 Deputy Senior Crown Prosecutor, Margaret Cunneen SC and Stephen Wyllie, with the intention to pervert the course of justice, counselled Sophia Tilley to pretend to have chest pains, and that Sophia Tilley, with the intention to pervert the course of justice, did pretend to have chest pains, to prevent investigating police officers from obtaining evidence of Ms Tilley's blood alcohol level at the scene of a motor vehicle accident."

24 It should be appreciated that Ms Cunneen's alleged conduct was not being investigated for the effect it might have on her official functions as a Crown Prosecutor in the sense that, as a public official, she might exercise her official functions in a different manner or make a different decision from that which would otherwise be the case.

25 Following service of the summons, Ms Cunneen instituted proceedings in the Common Law Division of the Supreme Court of New South Wales for, inter alia, a declaration that the alleged conduct was not corrupt conduct within the meaning of s 8 of the ICAC Act and, therefore, that ICAC was acting beyond power in issuing the summons.

26 At first instance, Hoeben CJ at CL held that the alleged conduct was corrupt conduct within the meaning of s 8 and so dismissed the application. On appeal to the Court of Appeal, the majority (Basten and Ward JJA) held that the alleged conduct was not corrupt conduct within the meaning of s 8 and therefore allowed the appeal.

The judgments in the Court of Appeal

27 Bathurst CJ, in dissent, reasoned in substance by the following steps:

- (1) Section 8(6) expressly provides that mention of a kind of conduct in one provision of the section does not limit the scope of any other provision of the section²⁴.
- (2) Unlike s 8(1), the first limb of s 8(2) does not expressly refer to any form of misconduct or potential misconduct by a public official. The

24 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [15].

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misconduct, or potential misconduct, is picked up in the second limb of s 8(2)²⁵.

- (3) Although the width of s 8(2) is such that, in many cases, conduct could fall within both s 8(1) and s 8(2), that is not a reason to read down s 8(2). It would be contrary to s 8(6) to do so²⁶.
- (4) It does not appear to be outside the contemplation of the legislature that both s 8(1) and s 8(2) could be satisfied by the same set of facts²⁷.
- (5) The critical question is what is meant by the expression "adversely affect, either directly or indirectly, the exercise of official functions"²⁸.
- (6) If conduct limits or prevents the proper performance of a public official's function, the first limb of s 8(2) will be satisfied²⁹.
- (7) In this case, the alleged conduct had the potential effect of diverting the investigating police officers from the performance of an investigation into a suspected crime. That is sufficient to satisfy the first limb of s 8(2), assuming the second limb of s 8(2) is made out³⁰.
- (8) The second limb of s 8(2) would be made out where the alleged conduct had the tendency to deflect the police from invoking the jurisdiction of the court, when it was their duty to do so. That could amount to perverting the course of justice³¹.

25 *Cunneen* [2014] NSWCA 421 at [16].

26 *Cunneen* [2014] NSWCA 421 at [17].

27 *Cunneen* [2014] NSWCA 421 at [18].

28 *Cunneen* [2014] NSWCA 421 at [19].

29 *Cunneen* [2014] NSWCA 421 at [22].

30 *Cunneen* [2014] NSWCA 421 at [22].

31 *Cunneen* [2014] NSWCA 421 at [23].

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(9) The alleged conduct had the tendency to frustrate or deflect the course of curial proceedings, thereby adversely affecting, at least indirectly, the exercise by a court of its official functions³².

28 In contrast, Basten JA held that it was evident from the principal object of the ICAC Act, as set out in s 2A and as emerges from the two-limbed structure of s 8(2), that the Act is not concerned with "all unlawful conduct which could adversely affect public administration"³³. In his Honour's view, it is necessary to read the expression "adversely affect" in s 8(2) as limited to "conduct which has the capacity to compromise the integrity of public administration"³⁴.

29 Ward JA reasoned to similar effect, although not identically, that conduct may not be regarded as having the capacity to "adversely affect" the exercise by a public official of his or her official functions within the meaning of s 8(2), even if it "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"³⁵, unless the conduct has "the potential to cause ... 'corruption' in the exercise by the public official of his or her functions" or could "have [an] adverse outcome when viewed from a public corruption perspective"³⁶. Her Honour was not persuaded that the alleged conduct satisfied that description³⁷.

30 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 manner³⁸. But their Honours considered that it did not have the capacity to lead the officers or any

32 *Cunneen* [2014] NSWCA 421 at [24]-[25].

33 *Cunneen* [2014] NSWCA 421 at [67].

34 *Cunneen* [2014] NSWCA 421 at [71].

35 *Cunneen* [2014] NSWCA 421 at [189].

36 *Cunneen* [2014] NSWCA 421 at [189].

37 *Cunneen* [2014] NSWCA 421 at [193].

38 *Cunneen* [2014] NSWCA 421 at [90] per Basten JA, [195] per Ward JA.

other public official into dishonest, partial or otherwise corrupt conduct³⁹. Consequently, it was not corrupt conduct within the meaning of s 8(2).

Difficulties with the approaches taken in the Court of Appeal and by the parties

31 As was said in *Project Blue Sky Inc v Australian Broadcasting Authority*⁴⁰:

"The primary object of statutory construction is to construe the relevant provision so that it is *consistent with the language and purpose of all the provisions of the statute*. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. ...

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while *maintaining the unity of all the statutory provisions*." (emphasis added, footnotes omitted)

32 Judged by reference to those imperatives, there are potential difficulties with each of the approaches adopted in the Court of Appeal. The difficulty with the approach taken by Bathurst CJ, which ICAC urged this Court to approve, is 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.

33 Conversely, the approach adopted by the majority, which counsel for the respondents urged this Court to adopt, is susceptible to circularity. Counsel for

39 *Cunneen* [2014] NSWCA 421 at [92] per Basten JA, [193] per Ward JA.

40 (1998) 194 CLR 355 at 381-382 [69]-[70] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, recently applied in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24] per French CJ and Hayne J; [2012] HCA 56 and in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at 855 [42] per French CJ, Hayne, Crennan, Kiefel and Keane JJ; 312 ALR 537 at 546; [2014] HCA 34.

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ICAC characterised it as circularity of the kind identified in *Shin Kobe Maru*⁴¹; which is to say the circularity which arises when the terms of a definition are interpreted by reference to the term defined. It would be more accurate to say, however, that if there is any circularity in the majority's reasoning, it is constituted of assuming the purpose of the Act and then reasoning, as if 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.

34 More specifically, Basten JA referred to the concern of the ICAC Act being with "conduct which has the capacity to compromise the integrity of public administration"⁴² – the assumption being that the compromise of public administration in that sense is limited to adverse effects upon the probity of public administration – and thus concluded that "adversely affect" in s 8(2) should be taken as limited to adversely affects the probity of the exercise of official functions by public officials. Similarly, Ward JA took as a starting point that the "focus of the ICAC Act is on corruption in the public sector"⁴³. Her Honour stated that the ICAC Act is directed to dealing with adverse effects on the exercise of official functions by public officials from a "public corruption perspective"⁴⁴ – the assumption being that the "public corruption perspective" is limited to adverse effects upon the probity of public administration – and thus concluded that "adversely affect" in s 8(2) should be taken as limited to adverse effects upon the probity of the exercise of official functions by public officials.

35 In a case like this, however, it is not logically open to apply that kind of syllogistic reasoning. 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

41 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1994] HCA 54.

42 *Cunneen* [2014] NSWCA 421 at [71].

43 *Cunneen* [2014] NSWCA 421 at [187].

44 *Cunneen* [2014] NSWCA 421 at [189].

17.

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.

The meaning of "adversely affect"

36 The question remains whether s 8(2) should be seen as limited to "corruption in public administration" in the sense of something which has or could have an effect upon the probity of public administration, or whether it comprehends something more.

37 Counsel for ICAC contended that "corruption" is a term of such variable content as to be capable of including even mere alteration or marring; and that, in this context, there is no reason to suppose a statutory intention that it be any more limited than that. For the reasons which follow, that submission must be rejected.

38 As Basten JA observed, the ordinary meaning of corruption in public administration implies dishonest or partial exercise of an official function⁴⁵. But to read "adversely affect" in s 8(2) as limited to causing a public official to act dishonestly or partially in the exercise of an official function would be to read s 8(2) as adding nothing to s 8(1); and it would not be right to read s 8(2) in a way that gave it no work to do beyond that already done by s 8(1)(a).

39 Equally, however, it would not be right to read the four paragraphs of s 8(1) and the provision made by s 8(2) as if they were mutually exclusive. Rather, s 8(1) and (2) must be read recognising that s 8 describes "corrupt conduct" as not only misconduct *by* public officials but also misconduct (by *any* person) that does or could affect what public officials do. The provisions must further be read recognising that conduct of a public official that falls within s 8(1)(b) may also be conduct of a kind described in s 8(1)(c) or s 8(1)(d) and that the conduct of a public official may, but need not, be accompanied or preceded by conduct of another person (whether or not a public official) that falls within either or both of s 8(1)(a) and s 8(2). And the provisions must be read recognising that conduct of a person (whether or not a public official) that falls within s 8(1)(a) or s 8(2), or both, may, but need not, be accompanied or followed by conduct of a public official that falls within any of s 8(1)(b)-(d), or within either or both of s 8(1)(a) and s 8(2).

45 *Cunneen* [2014] NSWCA 421 at [62].

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Hayne J
Kiefel J
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40 Hence, when it is said that s 8(2) must be given work to do *beyond* the work done by s 8(1) (and s 8(1)(a) in particular) the concern is to identify additional work done by the provision, not some wholly distinct and separate field of operation.

41 At the same time, it is necessary to keep in mind that s 8(1) demonstrates that "corrupt conduct" is not confined to conduct of any person (whether or not a public official) that does, or could, adversely affect the *honest and impartial* exercise of official functions (s 8(1)(a)) or conduct of a public official that constitutes or involves the dishonest or partial exercise of official functions (s 8(1)(b)). "Corrupt conduct" includes conduct by a public official of a kind described in either or both of s 8(1)(c) and (d).

42 All of that combines to inform the natural and ordinary meaning of "adversely affect" in s 8(2). In that context, the expression appears to have the sense of having an injurious effect upon or otherwise detracting from the exercise of an official function by causing it to fall short of or below a set or given standard⁴⁶. Standing alone in s 8(2), that could mean either to adversely affect something about the manner in which the official function is exercised or to adversely affect the results of the exercise of the official function; or possibly both. Viewed in the context of s 8(1)(b)-(d), however, and the interrelationship between ss 8(1)(b)-(d) and 8(2), it will be seen that what was intended is an adverse effect upon the exercise of an official function by a public official such that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)-(d).

43 As Basten JA appreciated, the key to the interrelationship between ss 8(1)(b)-(d) and 8(2) is what it is that was sought to be achieved by the omission of "honest or impartial" from s 8(2)⁴⁷. Logically, it appears to have been designed to expand the scope of s 8(1) in two respects: by extending the reach of ss 8(1)(c) and 8(1)(d) from public officials (and former public officials) to persons who are not public officials; and by including in the definition of "corrupt conduct" conduct which could adversely affect the exercise of official functions by any public official in either of the respects identified in ss 8(1)(c) and 8(1)(d).

44 Accordingly, the effect of s 8(1) and (2) is to mark out two distinct kinds of conduct as corrupt conduct, as follows:

46 *The Oxford English Dictionary*, 2nd ed (1989), vol 1 at 189, "adverse", sense 2.

47 *Cunneen* [2014] NSWCA 421 at [54].

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- (1) conduct of a public official that:
 - (i) constitutes or involves the dishonest or partial exercise of an official power (s 8(1)(b)); or
 - (ii) constitutes or involves a breach of public trust (s 8(1)(c)); or
 - (iii) involves the misuse of information or material acquired in the course of the public official's official functions (s 8(1)(d)); and
- (2) conduct of any person, whether a public official or not, which could "adversely affect" the exercise of official functions by any public official in one of the following ways:
 - (i) if the conduct could "adversely affect" the honest or impartial exercise of the official function (s 8(1)(a)); or
 - (ii) if the conduct could otherwise "adversely affect" the exercise of the official function and the conduct could involve one of the matters mentioned in s 8(2)(a)-(y).

45 The symmetry of that structure implies 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).

46 More precisely, pars (b)-(d) of s 8(1) limit the range of "corrupt conduct" which may be committed by a public official in the exercise of an official power to the three kinds of misconduct delineated in pars (b)-(d). Those three categories of misconduct thereby define the nature of improbity of public officials in the exercise of official functions which the ICAC Act conceives to be anathema to integrity in public administration. Section 8(2) is directed at conduct which adversely affects the exercise of an official function by a public official. Given that pars (b)-(d) of s 8(1) define the extent of improbity of public officials at which the ICAC Act is directed, it is inherently improbable that s 8(2) is directed at any broader range of improbity in the exercise of official functions than is covered by s 8(1)(b)-(d). It is more logical and textually symmetrical to read "adversely affect" in s 8(2) as confined to having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined by s 8(1)(b)-(d). That construction is also more consonant with the language of ss 2A and 9 in that it embraces offences which could affect the integrity of public administration and excludes those which could not.

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47 Of course, it may be queried why, if s 8(2) is aimed only at conduct which could cause a public official to act in the exercise of an official function in a manner which could involve one or other of the forms of misconduct described in s 8(1)(b)-(d), s 8(2) does not simply provide that conduct is also corrupt conduct if it could adversely affect the exercise of an official function by a public official in that manner. What is the purpose of the added requirement that the conduct could involve one or other of the kinds of offences listed in s 8(2)(a)-(y)?

48 A possible explanation, which would weigh against construing "adversely affect" as limited to having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined by s 8(1)(b)-(d), is that Parliament conceived of the heinousness of the offences listed in s 8(2)(a)-(y) as sufficient in itself to regard any offence of that kind as "corrupt conduct" so long as it had or could have an adverse effect howsoever on the efficaciousness of an exercise of an official function by a public official.

49 Given, however, the diverse range of offences listed in s 8(2)(a)-(y), and that, relatively speaking, some might not be particularly serious, that is an unlikely explanation.

50 Each of the matters listed in pars (a)-(y) is capable of being either in itself a diversion from proper administration (as would be the case where the conduct constitutes official misconduct or any of the forms of election misconduct identified) or conduct of a kind that, depending upon the circumstances, could be calculated to have an adverse effect on the probity of the exercise of official functions by public officials in one or more of the ways described in s 8(1)(b)-(d). The matters specified in s 8(2)(a)-(y) are, therefore, matters of a kind that direct particular attention to whether the conduct in question did or could adversely affect the exercise of official functions by a public official engaging in conduct of a kind described in any of s 8(1)(b)-(d). Hence the competing, and 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".

51 Both of these conditions must be met in order to satisfy s 8(2). It is not enough to show only that there was conduct by a person (whether or not a public official) that could involve one or more of the matters listed in pars (a)-(y). It is necessary to show also that the conduct did or could adversely affect the exercise of an official function in one of the ways listed in s 8(1)(b)-(d).

52 That view of s 8(2) is also rendered more likely by the realisation that, if "adversely affect ... the exercise of official functions" meant adversely affect

howsoever the efficaciousness of the exercise of the official function, as opposed to adversely affect the probity of the exercise of the function, it 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. Thus, for example:

- (1) In any case where a public authority relied on the advice, say, of a fraudulent stockbroker, insurance company or savings institution (just as other institutions and members of the public might do), and was thereby caused to suffer financial loss, the broker, insurance company or savings institution's fraud would count as corrupt conduct under s 8(2)(e) because the authority's financial loss could leave it less able to discharge its official functions.
- (2) 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.
- (3) Any offence of telling lies to a police officer with the object of deflecting the officer from instituting a prosecution would count as corrupt conduct under s 8(2)(g).
- (4) If the employee of a government contractor – say a computer software contractor – embezzled funds from the contractor, the embezzlement would qualify as corrupt conduct under s 8(2)(h) because the contractor's loss could deplete the contractor's ability to perform the contract and in turn that could lead to a government official being less well equipped with the computer software necessary to perform his or her official functions.
- (5) Any form of state tax or revenue evasion would qualify as corrupt conduct under s 8(2)(m) because the evasion of tax could deprive state tax officers of the ability to collect the tax evaded and deprive other departments of revenue with which to carry out their functions.
- (6) Currency violations would count as corrupt conduct under s 8(2)(o) just because they could result in public officials being less able to control the flow of currency.
- (7) Bankruptcy and company offences would be corrupt conduct under s 8(2)(s) because they could lead to a reduced return in insolvency to a public authority and thereby lessen the authority's capacity to perform its official functions.

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- (8) Any offence of harbouring a criminal would count as corrupt conduct under s 8(2)(t) because it could have a negative effect on the exercise by police officers of their official function of detecting and arresting criminal offenders.
- (9) Any unlawful killing of a public official or other violent offence committed against a public official (even if wholly unrelated to the official's status or duties) would count as corrupt conduct under s 8(2)(w) because the killing or violence could terminate or inhibit the official's exercise of official functions. Even an act of domestic violence, if committed against a victim employed as a public official, would be corrupt conduct.
- (10) All forms of treason would be corrupt conduct under s 8(2)(v) because they could compromise the exercise of official functions by public officials.

53 It is not likely that an Act which is avowedly directed to investigating, exposing and preventing corruption affecting public authorities – and for which the justification for the conferral of extraordinary powers on ICAC was said to be the difficulty of discovering and exposing corruption in the nature of a consensual crime of which there is no obvious victim willing to complain – should have the purpose or effect of extending the reach of ICAC to a broad array of crimes having nothing to do with corruption in public administration apart from such direct or indirect effect as they might conceivably have upon the efficaciousness of the honest and impartial exercise of official functions by public officials.

54 The principle of legality⁴⁸, 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

48 See, eg, *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 30-31 [42] per French CJ; [2013] HCA 3; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 217-218 [29] per French CJ, 264-265 [171]-[173] per Kiefel J, 307-311 [307]-[314] per Gageler and Keane JJ; [2013] HCA 39.

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 administration⁴⁹.

55 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).

56 Counsel for ICAC criticised that conclusion as in effect rejecting the plain and ordinary meaning of "adversely affect" in favour of an inference impermissibly drawn from the statement of the objects of the ICAC Act in s 2A.

57 The criticism is misplaced. As was earlier observed, "adversely affect" is a protean expression capable of a number of meanings according to the context in which it appears. The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended. Contrary to counsel's submission, there was and is nothing impermissible about looking to the context in which s 8(2) appears or seeking guidance from the objects of the ICAC Act as stated in s 2A. Rather, as Mason J stated in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*, it was and is essential to do so⁵⁰:

"[T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*⁵¹; *Attorney-General v Prince Ernest Augustus of Hanover*⁵². Problems of legal

49 *Cunneen* [2014] NSWCA 421 at [61].

50 (1985) 157 CLR 309 at 315; [1985] HCA 48. See also *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *Project Blue Sky* (1998) 194 CLR 355 at 381 [69]; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 148 [4.3].

51 (1981) 147 CLR 297 at 304 per Gibbs CJ, 319-320 per Mason and Wilson JJ; [1981] HCA 26.

52 [1957] AC 436 at 461 per Viscount Simonds, 473 per Lord Somervell of Harrow.

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interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

58 Counsel for ICAC further submitted that, even if that were so, "corruption" was an expression of such uncertain connotation – as noted earlier, he suggested that it might mean no more than alteration or marring – that there was no warrant for inferring from the objects of the ICAC Act stated in s 2A that the kind of corrupt conduct defined in s 8(2) is limited accordingly.

59 So to reason, however, is to invert proper processes of construction. It amounts to assuming that the words of s 8(2) are used in their broadest possible sense and then excluding all the contextual indications which imply that they have a more narrow and focussed meaning. Expressions of indefinite connotation are especially susceptible to context. They may and frequently do mean one thing in one legislative context and something quite different in another. To ignore context in those circumstances is calculated to lead to error⁵³. For the reasons that have been given, 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.

60 As has been mentioned, counsel for ICAC also criticised the approach of the majority of the Court of Appeal as in effect making the mistake identified in *Shin Kobe Maru* of seeking to interpret a defined term by reference to the term itself. But, as has been explained, that was not the case. If there were any difficulty with the way in which the majority approached the matter, it was by appearing to apply syllogistic reasoning to identify the meaning of "adversely affect" by reference to the purpose of the Act in circumstances where it is not possible to identify the purpose without reference to the provisions to be interpreted.

53 See, eg, *Corkery v Carpenter* [1951] 1 KB 102 at 105-106 per Lord Goddard CJ; *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 59 at 62 per Gummow J; Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 148 [4.3].

61 Counsel for ICAC invoked the observations of Brennan CJ, Gaudron and McHugh JJ in *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service*⁵⁴ in support of his submission that one may not depart from the plain and ordinary meaning of "adversely affect" unless it is clearly necessary to do so and, counsel contended, it was not clearly necessary to do so.

62 The problem with that submission is likewise that, so far from having a plain and ordinary meaning, "adversely affect" is a term of uncertain connotation which derives its intended meaning from its context. As their Honours said in *PMT Partners*⁵⁵, a statutory definition is susceptible to limitation where "clearly required by ... its context, as for example if it is necessary to give effect to the evident purpose of the Act". In context, as demonstrated above, the expression means to affect adversely the probity of the exercise of an official function by a public official in one of the ways described in s 8(1)(b)-(d).

63 Finally, counsel for ICAC invoked s 12A as an indication, he submitted, that ICAC was intended to have very broad powers subject only to the exercise of its discretion to direct its attention to what it considers to be serious corrupt conduct and systemic corrupt conduct.

64 That submission must also be rejected. The fact that ICAC is directed to concentrate on serious and systemic "corrupt conduct" says nothing about the meaning of "corrupt conduct", or at least nothing that aids ICAC's contentions.

The possible alternative construction

65 It remains to deal with the possible alternative construction of s 8(2) earlier referred to, according to which the relative clause "and which could involve" would be read as limiting and defining "the exercise of official functions" as opposed to the "conduct".

66 There are at least five reasons why the alternative construction should be rejected. To begin with, it is syntactically difficult to accommodate. The only possible indication that the "which could involve" clause might be directed to the exercise of official functions, as opposed to the conduct, is the change from the pronoun "that", which appears as the first word of the clause "that adversely affects ... the exercise of official functions", to the pronoun "which", which

54 (1995) 184 CLR 301 at 310; [1995] HCA 36.

55 (1995) 184 CLR 301 at 310 per Brennan CJ, Gaudron and McHugh JJ (footnotes omitted).

French CJ
Hayne J
Kiefel J
Nettle J

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appears as the first word of the clause "which could involve". Of itself, the change in pronoun is not a strong indication of anything. As counsel for ICAC submitted, if the "which could involve" clause were intended to control the exercise of official functions, it is more likely that the conjunction "and" which precedes it would have been deleted. Additionally, the only preceding expression of equal grammatical weight to the "and which could involve" clause is the "that could adversely affect" clause. As a matter of English usage, that implies that the "and which could involve" clause, like the "that could adversely affect" clause, is directed to the conduct⁵⁶.

67 Secondly, to the extent that anything can be drawn from the extrinsic materials, the understanding of s 8(2) expressed in the Explanatory Note relating to the Independent Commission Against Corruption Bill 1988 (No 2)⁵⁷ was that the "and which could involve" clause related to the conduct.

68 Thirdly, as has been seen, there are a number of previous decisions in which s 8(2) has been approached expressly or implicitly on the basis that the "and which could involve" clause governs the conduct as opposed to the exercise of official functions.

69 Fourthly, for the reasons already given, if the "that could adversely affect" clause is construed according to its natural and ordinary meaning in the context in which it appears, it limits the operation of s 8(2) to conduct that could have the effect of adversely affecting the probity of the exercise of an official function by a public official in one or other of the ways described in s 8(1)(b)-(d). As such, it renders unlikely that the "and which could involve" clause was intended to impose some further restriction on the nature of the improbity in the exercise of an official function caused by conduct to which s 8(2) is directed. It is more likely that s 8(2) was intended to cover conduct which could adversely affect the probity of the exercise of an official function by a public official in any of the ways described in s 8(1)(b)-(d), provided the conduct satisfies one or other of the descriptions listed in s 8(2)(a)-(y) and, perforce of s 9, that it constitutes or involves a criminal offence or other breach of a relevant standard of conduct.

70 Finally, many of the offences listed in s 8(2)(a)-(y), such as bribery, blackmail, offering secret commissions, treating, tax and revenue evasion,

56 See Burchfield, *Fowler's Modern English Usage*, 3rd ed (rev) (2004) at 357-358, "hendiadys".

57 New South Wales, Independent Commission Against Corruption Bill 1988 (No 2), Explanatory Note at 2.

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currency violations, drug dealing and illegal gambling, are of a nature which logically could adversely affect the probity of the exercise of an official function by a public official but at the same time are unlikely to be capable of commission by a public official in the exercise of an official function.

Conclusion

71 It was not disputed that, if "adversely affect ... the exercise of official functions by any public official" in s 8(2) means adversely affect the probity of the exercise of an official function by a public official in one of the ways listed in s 8(1)(b)-(d), the alleged conduct was not corrupt conduct within the meaning of s 8(2).

72 ICAC sought special leave to appeal against the orders of the Court of Appeal. The application for special leave was referred for argument before an enlarged bench as on an appeal. The respondents submitted that special leave should be refused. But in light of the way in which the disputed question of construction of the ICAC Act should be resolved, it is better that special leave be granted, the appeal treated as instituted and heard *instanter* and dismissed with costs.

73 GAGELER J. The question of public importance, on which special leave to appeal is sought, is whether ICAC has power to investigate an allegation of criminal conduct having the potential to impede or impair the exercise of an official function by a public official in a manner involving no wrongdoing on the part of that public official. The question is about whether ICAC has power to undertake any investigation into any allegation of criminal conduct of that nature. The question is not about the propriety or prudence of ICAC choosing to undertake the particular investigation in this case.

74 I would grant special leave to appeal, determine the question in the affirmative, and allow the appeal. To explain at the outset how I differ from the majority in this Court, I consider it sufficient, to be investigated by ICAC, that criminal conduct has the potential to impair the *efficacy* of an exercise of an official function by a public official. I do not consider it necessary that the criminal conduct has the potential to affect the *probity* of an exercise of an official function by a public official.

75 My reasons accord substantially with those of Bathurst CJ in dissent in the Court of Appeal. In stating my reasons, I adopt the abbreviations of the majority in this Court.

76 The word "corruption" appears in the ICAC Act in its title and in its objects clause. The word connotes moral impropriety in, or in relation to, public administration. It has never acquired a more precise meaning in the language of the law or in ordinary speech⁵⁸. Standard dictionary definitions of "corrupt", used as an adjective, provide a range of meanings, from "dishonest" or "without integrity" to "infected" or "tainted"⁵⁹.

77 The operative provisions of the ICAC Act do not use the word "corruption". They use the term "corrupt conduct". That term is the subject of elaborate definition in ss 7, 8 and 9 of the ICAC Act. In construing that definition, as in construing any other statutory definition, it is "of fundamental importance" that the language of the definition is accorded its "natural and ordinary meaning unless some other course is clearly required", and that "limitations and qualifications are not read into" the definition unless "clearly required by its terms or its context"⁶⁰. That is not to "make a fortress out of the

58 *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 138.

59 *Eg Macquarie Dictionary*, 6th ed (2013) at 339, senses 1 and 4.

60 *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310; [1995] HCA 36.

dictionary"⁶¹. It is not to underplay the significance of context. It is rather to recognise that a statutory definition is ordinarily framed in language chosen for the grammatical meaning it conveys. The definition of a term is the creation of the most basic building block of a statutory structure.

78 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. The focus for the purpose of determining the present question is on the language of s 8(2). Within the structure of the definition, s 8(2) describes a category of corrupt conduct in addition to the categories described in s 8(1). Section 8(6) makes clear that the categories so described in s 8(1) and s 8(2) are not to be read as limiting each other. Conduct which meets a description in either or both of s 8(1) or s 8(2) is included within the definition of "corrupt conduct" unless excluded by s 9.

79 The present question turns on the content, within that structure, of the description by s 8(2) of corrupt conduct as "any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect ... the exercise of official functions by any public official ... and which could involve any of the ... matters" in pars (a) to (y) of s 8(2). The description is designedly of conduct which is in addition to (although it may overlap with) that described in s 8(1)(a) as "any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect ... the honest or impartial exercise of official functions by any public official". Both descriptions are of conduct which is then excluded by s 9 from corrupt conduct unless it could constitute or involve "a criminal offence" or one of the other categories of conduct in pars (a) to (d) of s 9(1).

80 Together with the other members of the Court of Appeal, Bathurst CJ assumed that s 8(2) describes conduct which meets two distinct conditions. The first condition is that the conduct adversely affects or could adversely affect the exercise of official functions by a public official. The second condition is that the same conduct could involve any of the matters in pars (a) to (y) of s 8(2).

81 The difference between Bathurst CJ and the members of the Court of Appeal who formed the majority was in the content each thought it appropriate to give to the words "could adversely affect" in the first of those conditions. To Bathurst CJ, the words require no more than that the conduct have the potential to limit or prevent the proper exercise of official functions by the public

61 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [27]; [2000] HCA 33, quoting *Cabell v Markham* 148 F 2d 737 at 739 (1945).

official⁶². To Basten and Ward JJA, the words require the conduct to have the potential to lead the public official to exercise official functions in a way that is "dishonest, partial or otherwise corrupt"⁶³.

82 On the issue which divided the members of the Court of Appeal and on which I differ from the majority in this Court, I consider the view of Bathurst CJ to be the preferable reading of the statutory text for a number of mutually reinforcing textual reasons. First, it accords to the words "could adversely affect" in s 8(2) an ordinary grammatical meaning, identical to the ordinary grammatical meaning of the same words in s 8(1)(a). The ordinary grammatical meaning connotes nothing more than impediment or impairment. Second, it imports no unexpressed qualitative element into the nature of that impediment or impairment. It avoids reading into s 8(2) a limitation or qualification which is not expressed in the text of s 8(2), but which is expressed, at least in part, in the text of s 8(1)(a). Third, in so doing, it gives s 8(2) a relatively precise operation which depends entirely on the language of that sub-section. That in turn gives the defined term "corrupt conduct" a relatively precise operation which does not depend on drawing some negative implication from the undefined and indefinite concept of corruption.

83 The objects clause, s 2A, can be read as pointing in a different direction only if some particular and legislatively unexpressed limitation is read into its use of the word "corruption". The significance of the objects clause is quite different if that word is read, as I think it should be, as an introductory and generic description of the phenomenon described with precision in the definition of "corrupt conduct" in ss 7, 8 and 9. Section 2A(a)(i) can then be seen to indicate that corrupt conduct, which ICAC has been constituted "to investigate, expose and prevent", extends not only to that "involving" public officials (the focus of s 8(1)) but additionally to that "affecting" public officials (the focus of s 8(2)). Section 2A(a)(i), when so understood, supports the grammatical reading of s 8(2) as descriptive of conduct which has the potential to affect a public official, by limiting or preventing the exercise of an official function by a public official, without necessity for any wrongdoing (or want of probity) on the part of that public official.

84 That 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) and that reading

62 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [22].

63 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [75], [92], [193].

of s 2A (as confirming rather than confining the broad reading of s 8(2)) is supported by legislative history. I will come to the legislative history later.

85 On the issue which divided the members of the Court of Appeal and on which I differ from the majority in this Court, it is appropriate at this point to make two observations. One is that, in light of provisions within the ICAC Act (inserted after the decision of this Court in *Balog v Independent Commission Against Corruption*⁶⁴) which make clear that ICAC has no power to make, opine on and report any finding of criminal guilt⁶⁵, no principle or presumption of the common law requires a particularly narrow construction of the provisions which define the scope of the alleged conduct which ICAC is permitted to investigate and expose⁶⁶. None was suggested in the Court of Appeal.

86 Mention was made of the "principle of legality" in written submissions in this Court. No attempt was made, however, to identify any right or principle said to be put in jeopardy by an interpretation of the ICAC Act which would permit ICAC to investigate criminal conduct which has the potential to impair the efficacy of an exercise of an official function by a public official as distinct from limiting ICAC to investigating criminal conduct which has the potential to impact on the probity of an exercise of an official function by a public official.

87 That ICAC can exercise coercive powers in derogation of common law rights is a reason for favouring a narrow purposive construction of the provisions of the ICAC Act which confer those coercive powers, if and to the extent that the scope of those provisions is unclear. That ICAC can exercise those coercive powers for the purpose of conducting investigations is no reason for straining to adopt a narrow interpretation of the provisions of the ICAC Act which define the scope of the corrupt conduct ICAC is empowered to investigate. There is no common law right not to be investigated for a crime.

88 Unfocussed invocation of the common law principle of construction sometimes now labelled the "principle of legality" can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy.

64 (1990) 169 CLR 625; [1990] HCA 28.

65 Sections 13(4) and 74B.

66 Cf *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 89 ALJR 382 at 397 [68]-[69]; 317 ALR 279 at 296-297; [2015] HCA 7.

89 The other observation appropriate to be made at this point is that it is important to acknowledge, as did Bathurst CJ⁶⁷, that a consequence of reading the first condition in s 8(2) as describing any conduct which has the potential to limit or prevent the exercise of any official function by any public official, without necessity for any wrongdoing on the part of that public official, is that it brings within the definition of corrupt conduct any case of perverting the course of justice (the subject matter of par (g) of s 8(2)) as well as any case of attempting to pervert the course of justice (within the subject matter of par (y) of s 8(2)). That is so no matter how trivial or confined the conduct in question might be. Another consequence, accepted by counsel for ICAC in the course of argument, is that the reading brings within the inclusive element of that definition any case of tax evasion or revenue evasion (the subject matters of pars (m) and (n) of s 8(2)), no matter how small the revenue consequences and, again, no matter how trivial or confined the conduct might be.

90 Whether the interpretation that I prefer has the effect of bringing within the definition of corrupt conduct all conduct which might fall within all of the ten enumerated examples given in the reasons for judgment of the majority in this Court was not explored in argument and is not something on which I find it necessary to reach a concluded view. I acknowledge that the reading would have the effect of bringing within the definition at least some conduct falling within most of the examples.

91 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.

92 The choice, starkly illustrated, is between two extreme consequences. At one extreme is that to which the broader *efficacy* reading of s 8(2) leads: ICAC having power to investigate an isolated case of a witness telling a lie to a police officer. At the other extreme is that to which the narrower *probity* reading of s 8(2) leads: ICAC having 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

67 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [26].

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)).

93 Either of those extreme consequences might plausibly be argued to be improbable or inconvenient in light of the objects appearing in s 2A of the ICAC Act⁶⁸. That ICAC might be denied power to investigate, expose, prevent or educate about serious and systemic fraud is, I think, the less probable and the less convenient of the alternatives. But the choice between the alternatives need not be left to unguided inference about what the Parliament might or might not reasonably be taken to have intended. That ICAC has power to investigate corrupt conduct which need not be serious or systemic is the underlying premise of the permission which s 20(3) of the ICAC Act grants to ICAC (in considering whether or not to conduct, continue or discontinue an investigation) to have regard, amongst other considerations, to whether or not in ICAC's opinion "the subject-matter of [an] investigation is trivial".

94 That ICAC has power to investigate, expose, prevent and educate about forms of corrupt conduct which might be neither serious nor systemic is further acknowledged and addressed in s 12A. Section 12A specifically requires that ICAC, in exercising its functions, "is, as far as practicable, to direct its attention to *serious* corrupt conduct and *systemic* corrupt conduct" (emphasis added). The same section goes on to address the potential for the exercise of ICAC's powers to overlap with those of conventional law enforcement agencies, by specifically requiring ICAC "to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct".

95 Sections 20(3) and 12A combine to provide a legislative answer to the arguable improbability or inconvenience illustrated by postulating the extreme example of ICAC having power to investigate an isolated case of a witness telling a lie to a police officer. The legislative answer is not to deny or withdraw that power. It is specifically to permit ICAC to refrain or disengage from an investigation into a particular allegation of corrupt conduct which ICAC assesses to be trivial, and more generally to guide ICAC in the exercise of its powers towards corrupt conduct that is either serious or systemic.

68 Cf *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321; [1981] HCA 26; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

96 It is necessary, however, to go beyond the issue which divided the members of the Court of Appeal. That is because the assumption of all members of the Court of Appeal, that s 8(2) describes conduct which meets two distinct conditions, was questioned in this Court. Here the possibility was raised of an alternative construction. The alternative construction would treat the words "which could involve" in s 8(2) as referring not to "any conduct of any person" but instead to "the exercise of official functions". Adoption of the alternative construction would result in s 8(2) being read as describing conduct which meets a single composite condition: that the conduct adversely affects or could adversely affect the exercise of official functions by a public official, which adverse exercise of functions by the public official could involve any of the matters in pars (a) to (y).

97 Together with the majority in this Court, I reject the alternative construction. I accept that the alternative construction is textually available, even if it is somewhat textually awkward. I also accept that the alternative construction has the attraction of eliminating the substantial duplication to which the construction assumed by the members of the Court of Appeal gives rise, in that the alternative construction would eliminate the overlap between pars (a) to (y) of s 8(2) and pars (a) to (d) of s 9(1). Those paragraphs of s 8(2) and those paragraphs of s 9(1) would, on the alternative construction, refer to the conduct of different persons. Whatever its textual attraction, however, the alternative construction is not contextually open, in light of ss 2A and 12A, and in light of the legislative history of the ICAC Act.

98 I now turn to that legislative history. Save for an amendment in 1990, substituting "which could involve" for "which involves"⁶⁹, the text of s 8(2) has stood unaltered since the enactment of the ICAC Act in 1988. The Bill for the ICAC Act as originally enacted was accompanied by an explanatory note, which was then, and remains, permitted by statute to be taken into account either to confirm the plain meaning of the ICAC Act or to resolve an ambiguity in the ICAC Act⁷⁰.

99 The explanatory note to the Bill for the ICAC Act as originally enacted explained its legislative object as being to constitute ICAC and "to confer on it wide powers, with special emphasis on ... investigating corruption or possible corruption where public officials are involved"⁷¹. The explanatory note went on

69 *Independent Commission Against Corruption (Amendment) Act 1990* (NSW), Sched 1, item 6.

70 *Interpretation Act 1987* (NSW), s 34(1), (2)(e).

71 New South Wales, *Independent Commission Against Corruption Bill 1988* (No 2), Explanatory Note at 1.

to explain that "[t]he expression used in the Bill" was "corrupt conduct", which had "an extensive description" in cl 7 to 9 of the Bill⁷². After setting out the text of cl 8(1), the explanatory note said of cl 8(2)⁷³:

"Subclause (2) states that conduct is also corrupt conduct if it adversely affects, or could adversely affect, any exercise of official functions by a public official and it is of a criminal nature, eg bribery, obtaining or offering secret commissions or perverting the course of justice."

100 That explanation of s 8(2) as it came to be enacted in the ICAC Act is unambiguous in explaining s 8(2) to refer to conduct which meets the two distinct conditions assumed by all members of the Court of Appeal: the first condition being that the conduct adversely affects, or could adversely affect, any exercise of any official function by a public official; the second condition being that the same conduct could involve any of the matters in pars (a) to (y) of s 8(2), being matters generally (although not exclusively) of a criminal nature.

101 The understanding that s 8(2) as originally enacted described conduct which met those two distinct conditions was implicit in the observation made by Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in *Balog* that "corrupt conduct", as defined in ss 7 to 9 of the ICAC Act, "includes conduct that adversely affects or could adversely affect the exercise of official functions and involves any one of a number of specified criminal offences, including bribery, blackmail, perverting the course of justice and the like"⁷⁴. The same understanding was implicit in observations directed to the operation of s 8(2) (which in 1990 had been amended to take its current form) made by Gleeson CJ and Priestley JA in *Greiner v Independent Commission Against Corruption*⁷⁵.

102 Between 1990 and 2004, ICAC conducted many investigations, reports of which were presented to the Houses of Parliament and made public. The reports of a number of those investigations reveal that, conformably with the explanatory note to the Bill for the ICAC Act as originally enacted and with the observations in *Balog* and *Greiner*, ICAC conducted investigations on the understanding that s 8(2) described conduct which met the two distinct conditions of being conduct

72 New South Wales, Independent Commission Against Corruption Bill 1988 (No 2), Explanatory Note at 1.

73 New South Wales, Independent Commission Against Corruption Bill 1988 (No 2), Explanatory Note at 2.

74 (1990) 169 CLR 625 at 628.

75 (1992) 28 NSWLR 125 at 135, 182-184.

that adversely affects or could adversely affect the exercise of official functions by a public official and that could involve any of the matters in pars (a) to (y) of s 8(2). The same reports also reveal that ICAC conducted investigations on the understanding that the first condition was met where the conduct had the potential to impair the efficacy of an exercise of an official function by a public official.

103 Two examples will suffice to illustrate the outworking of that understanding. One was a report, presented to the Houses of Parliament and published in November 2003, entitled "Report on investigation into certain applications made to the Department of Fair Trading for building and trade licences". ICAC found in that report that a named individual had engaged in corrupt conduct within the description in s 8(2) by fraudulently providing forged documents and false information concerning trade qualifications in applications for trade licences which he submitted to the Department of Fair Trading on behalf of other persons whom he charged high fees⁷⁶. ICAC recommended that the Department consider a number of changes to its policies and procedures for the purpose of detecting and preventing fraud of that nature⁷⁷.

104 The other was a report, presented and published in December 2003, entitled "Report on investigation into Mr Glen Oakley's use of false academic qualifications". ICAC found in that report that, over a period of 15 years, a named individual had created and used false academic qualifications for the purpose of applying for employment, which he was successful in obtaining, with a number of public authorities in New South Wales⁷⁸. That conduct was explained by ICAC to fall within s 8(2) because it was "conduct that involve[d] fraud and forgery and could adversely affect the exercise of official functions by a public official in considering Mr Oakley's applications for the positions for which he applied, evaluating his candidacy for the positions, and, where his applications were successful, causing him to be appointed to the relevant position"⁷⁹. ICAC explained its reasons for conducting the investigation to

76 Independent Commission Against Corruption, *Report on investigation into certain applications made to the Department of Fair Trading for building and trade licences*, (2003) at 30-36.

77 Independent Commission Against Corruption, *Report on investigation into certain applications made to the Department of Fair Trading for building and trade licences*, (2003) at 37-40.

78 Independent Commission Against Corruption, *Report on investigation into Mr Glen Oakley's use of false academic qualifications*, (2003) at 7.

79 Independent Commission Against Corruption, *Report on investigation into Mr Glen Oakley's use of false academic qualifications*, (2003) at 16.

include ensuring integrity in public sector recruitment processes, emphasising that "[t]he public have a right to expect not only that those appointed to public sector positions are appropriately qualified but that they are honest"⁸⁰. ICAC went on in the report to recommend a number of specific changes to the recruitment policies of public sector agencies⁸¹.

105 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.

106 It was against that background of judicial exposition and administrative practice that the Governor of New South Wales in late 2004 commissioned Mr Bruce McClintock SC to conduct a review into the ICAC Act for the purpose of determining whether its terms remained appropriate to securing its objectives⁸². Mr McClintock's commission required him, as part of that review, to consider a range of specified topics. Those topics included "whether the functions of ICAC remain appropriate" and "the definition of corrupt conduct, and the capacity of ICAC to make findings of corrupt conduct"⁸³.

107 Mr McClintock's report, which he presented to the Governor in early 2005, contained a number of recommendations. Most, but not all, of those recommendations were taken up by the Parliament later in 2005 in amendments it made to the ICAC Act by the *Independent Commission Against Corruption Amendment Act 2005* (NSW) ("the 2005 Amendment Act").

108 The principal significance of Mr McClintock's report for present purposes lies in the detailed explanation Mr McClintock there gave of the scope and operation of the definition of corrupt conduct. Mr McClintock expressed the view that the definition was not overly broad and had not been applied unfairly⁸⁴.

80 Independent Commission Against Corruption, *Report on investigation into Mr Glen Oakley's use of false academic qualifications*, (2003) at 8.

81 Independent Commission Against Corruption, *Report on investigation into Mr Glen Oakley's use of false academic qualifications*, (2003) at 23.

82 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at viii.

83 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at viii.

84 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 52 [4.2.25].

He said that, with the exception only of the report considered in *Greiner*, his attention had not been drawn to any investigation or report of ICAC "where the conduct (if it occurred) was not clearly within what members of our community would readily agree was corrupt"⁸⁵. He said that he did not regard that one example as establishing that the definition resulted in any serious or substantial injustice and did not consider that the definition should be amended to limit its breadth or generality⁸⁶. "Whilst the definition of corrupt conduct is broad, general and complex", he said, "I do not consider that it is desirable to make substantive changes that will alter ICAC's investigatory jurisdiction."⁸⁷

109 Consistently with the view on which ICAC had until then acted, Mr McClintock explained s 8(2) to extend to criminal conduct which had the potential to impair the efficacy of an exercise of an official function by a public official and which need not have the potential to impair the probity of an exercise of an official function by a public official. As Mr McClintock explained it⁸⁸:

"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."

That explanation of s 8(2) informed the criticisms which Mr McClintock went on to make of its drafting. He said⁸⁹:

85 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 52 [4.2.25]-[4.2.26].

86 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 52 [4.2.27].

87 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 52 [4.2.29].

88 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 53 [4.3.3].

89 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 53 [4.3.4] (emphasis in original).

"There are two problems with this aspect of the definition. It is a different category of corruption as it *requires* no wrongdoing on behalf of a public official. Further, it is circular and otiose to apply section 9 to section 8(2) corrupt conduct, given the lengthy list of criminal conduct included in the latter section."

Mr McClintock continued⁹⁰:

"For these reasons, 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."

110 Mr McClintock went on specifically to recommend that, subject to another recommendation which he made concerning s 9 (which is of no present relevance)⁹¹:

"[N]o substantial amendments to the definition of corrupt conduct in sections 7-9 of the Act be made, except to redraft the provisions to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing."

111 That recommendation by Mr McClintock was not taken up in the 2005 Amendment Act in so far as the recommendation was that ss 7 to 9 be redrafted. The 2005 Amendment Act did amend s 9 in a minor way, but it left s 8 entirely unaltered. That cannot be treated as legislative oversight, but rather as a considered legislative judgment. The explanatory note to the Bill for the 2005 Amendment Act contained the statement⁹²:

"The definition of corrupt conduct in sections 8 and 9 of the Principal Act is crucial to the effectiveness of ICAC as it defines the scope of its power

90 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 53 [4.3.5] (emphasis in original).

91 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 53, recommendation R4.1.

92 New South Wales, Independent Commission Against Corruption Amendment Bill 2005, Explanatory Note at 6.

to investigate corrupt conduct that has occurred, is occurring or is about to occur."

112 The non-amendment of s 8(2) by the 2005 Amendment Act is consistent with the New South Wales Parliament's acceptance of the principal aspect of Mr McClintock's recommendation – that there be "no substantial amendments" to the definition of corrupt conduct in ss 7 to 9 of the ICAC Act – and with its concurrent rejection of the subsidiary aspect of his recommendation that those sections be redrafted in a more limited manner. What is significant in this respect is that, although Mr McClintock suggested that the sections could be redrafted so as to be expressed "more clearly", he did not suggest that there was any existing ambiguity. The redrafting he recommended was directed to highlighting and simplifying the description of the distinct category of corruption which he explained s 8(2) already to encompass: corruption adversely affecting the performance of public official functions, without involving official wrongdoing.

113 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 amended⁹³. The weight to be afforded to any such aspect of legislative history must, of course, vary with the circumstances.

114 The relevant circumstances here include: the specific focus of Mr McClintock's review on the scope and operation of the definition of corrupt conduct; the specificity and clarity of Mr McClintock's explanation of s 8(2); the consistency of his explanation with previous judicially articulated understandings of the operation of s 8(2); the consistency of his explanation with the view on which ICAC had acted in undertaking prior investigations which had been reported to the Houses of Parliament; and the obvious close attention given to the contents of Mr McClintock's report in the process of enactment of the 2005 Amendment Act. Those circumstances combine to make the Parliament's choice not to amend s 8(2) in light of the explanation of its meaning given by Mr McClintock a compelling reason for not departing from that meaning.

115 Nothing in the extrinsic material accompanying the 2005 Amendment Act suggests that the construction of s 8(2) as explained by Mr McClintock was a construction which the Parliament disfavoured. Given that it was the construction on which ICAC had in fact acted in the past, the Parliament might be expected to have amended s 8(2) to make its true intention clear had the

93 Cf *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10 at [15]-[16].

Parliament disfavoured that construction, had it intended to reject Mr McClintock's recommendation that there be no substantive change to the scope of ICAC's investigatory jurisdiction, and had it intended instead to confine ICAC in the future to investigating criminal conduct which had the potential to affect the probity of an exercise of an official function by a public official. That is particularly so in light of the acknowledgement in the explanatory note to the Bill for the 2005 Amendment Act, to which I have already referred, that the definition of corrupt conduct in ss 8 and 9 of the ICAC Act was seen by the Parliament to be crucial to the effectiveness of ICAC.

116 To complete the analysis of what can relevantly be drawn from the history of the ICAC Act, it remains to notice that two of the most significant of the recommendations which Mr McClintock made for the amendment of the ICAC Act were taken up almost word-for-word by the Parliament in the 2005 Amendment Act in the insertion of ss 2A and 12A⁹⁴. It is important to recognise that those recommendations were made by Mr McClintock, and acted upon by the Parliament, against the background of Mr McClintock's explanation of the substantive operation of s 8(2) and against the background of his recommendation that there be no substantial amendments to the definition of corrupt conduct in ss 7 to 9.

117 It is also important to recognise the nature of the role which Mr McClintock expressly attributed to ICAC in making those recommendations, and which the Parliament implicitly adopted in acting on them. Mr McClintock explained⁹⁵:

"ICAC complements, rather than replaces, the roles performed by other criminal justice institutions and oversight agencies. 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."

118 That it was the role of ICAC to be in a position to step in where conventional law enforcement agencies were unwilling or unable to cope informed both the breadth of the statement of objectives in s 2A and the

94 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 24, recommendation R2.1 and 29-30, recommendation R2.2.

95 McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 23 [2.1.8]. See also at 29 [2.8.7].

specificity of the direction given in s 12A⁹⁶. Echoing the justification given by Mr McClintock for his recommendation that the ICAC Act be amended to specify its objectives, the explanatory note to the Bill for the 2005 Amendment Act explained that the purpose of the insertion of the new s 2A was "to specify the objectives of the Act and so to *confirm* the role of ICAC as an independent and accountable body with special powers to inquire into allegations of corruption"⁹⁷. Neither the report nor the explanatory note contained any hint that the specification of the objectives in s 2A was in any way to confine or otherwise affect the definition of corrupt conduct in ss 7 to 9 of the ICAC Act.

⁹⁶ McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988: Final Report*, (2005) at 23 [2.1.8], 29 [2.8.7].

⁹⁷ New South Wales, Independent Commission Against Corruption Amendment Bill 2005, Explanatory Note at 3 (emphasis added).

