

INDEPENDENT COMMISSION AGAINST CORRUPTION
Applicant



MARGARET CUNNEEN
First Respondent

STEPHEN WYLLIE
Second Respondent

SOPHIA TILLEY
Third Respondent

APPLICANT'S REPLY (ANNOTATED)

PART I – PUBLICATION

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

PART II – ARGUMENT

2. In large part, the Respondents' Submissions (RS) reduce to an observation that it is appropriate to consider context and purpose in construing legislation: eg RS at [20]-[21], [24] -[27], [30]- [31], [35]-[36], [42(a)], [44]. So much may be accepted. But the Respondents' Submissions do not take the next step of demonstrating that considerations of context and purpose support reading the word "adversely" in s.8(2) of the Act otherwise than in accordance with its ordinary meaning. Context "has utility if, and in so far as, it assists in fixing the meaning of the statutory text": *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at 519 [39].
3. The Respondents' arguments on legislative purpose come to rest on the word "corruption" in the objects provision in s.2A, which leads to quotations from the *Macquarie Dictionary*, which leads at RS [17] to a generalised assertion that those quoted definitions "clearly suggest that the conduct which constitutes corruption goes beyond something which may simply cause an official to act differently from the way in which the official may have acted without that conduct". That is not a reasonable summation of the definitions (see AS [54]). More importantly, the argument is removed from any real consideration of what ss.8(1) and (2) actually provide. In response to such textual arguments, the Respondents incorrectly suggest at RS [20] that AS [57] "misquote" the joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of*

Territory Review (Northern Territory) (2009) 239 CLR 27 at 46-47 [47] to the effect that “[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention”.

10 4. Beyond that, the Respondents make little attempt to grapple with the textual issues, save for submitting that the construction advanced by the Applicant and accepted by Bathurst CJ would mean that “almost all, if not all, of the matters listed in ss.8(2)(a) to (y)” in the second “limb” of s.8(2) would also fall within the first “limb” of s.8(2): RS [41], also RS [31], [32] and [40]-[42]. Yet, as noted at AS [49], there are many circumstances in which conduct would fall within one of the enumerated sub-paragraphs of s.8(2) but not satisfy the first aspect of that subsection. That being so, it is erroneous to suggest at RS [42(b)] that an alternative construction is required in order to “ensure[] meaning was given to every word of the statutory text” (see also AS at [50]-[52]).

20 5. In relation to the principle derived from *The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 419 that it is circular to construe the words of a definition by reference to the term defined, the Respondents do not ask the Court to confine or overturn that statement of principle. Rather, they seek to rely on a statement in *Shin Kobe* itself (at 420), and a similar later one in *PMT Partners Pty Ltd (In Liquidation) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, about not reading in limitations to a statutory definition unless “clearly required by its terms or its context” (RS [21], relevantly quoting *PMT Partners* at 310). But that is not how Basten JA approached the matter at [69]-[70] (AB 124-125) – rather, his Honour effectively set this Court’s statement of principle about defined terms to the side.

6. The statement in *Shin Kobe* at 420, referred to at RS [21], was:

a statutory definition should be approached on the basis that Parliament said what it meant and meant what it said. The consequence of that is that a definition should be read down only if that is clearly required as, for example, if it is necessary to give effect to the evident purpose of the Act.

30 7. Nothing in the Respondent’s arguments establishes that the construction adopted by the majority was *clearly required* by the terms of the Act, or its context, or its evident purpose. Nothing establishes that the Parliament did not mean what it said in ss.8(1) and (2). The inversion of the correct approach to construction is illustrated by RS [42], stating that the majority were correct “in treating the ambit of s.8(2) as one in aid of the concept in s.2A, not one expanding it”. Section 8 contains a lengthy, detailed,

cumulative and exhaustive articulation of what Parliament meant by “corrupt conduct”; it was not a mere footnote to the generic objects statement in s.2A.

8. Despite the central place given to s.2A in the Respondents’ submissions, beyond saying at RS [19] that s.2A(a)(ii) refers to “corruption ... affecting” rather than “conduct affecting”, they do not address the point that that part of the object statement itself contemplates that the Act deals with conduct which affects public authorities and officials *without involving them* (cf AS [54]).
9. Section 33 of the *Interpretation Act* does not advance the argument beyond taking s.2A into account; that section involves no radical departure from established principles of construction (cf RS [25]-[27]). The Respondents assert at RS [26] that s.7 of the *Interpretation Act* has no application with respect to cognate terms because of s.33, but that is simply to ignore s.7, which is just as much part of that Act as s.33 is.
10. The Respondents rely at RS [37]-[38] on statements by the majority that s.8(2) should be read in a way that “does not compromise public administration” (quoting Basten JA at [66], AB 123) and “which could have no adverse outcome when viewed from a public corruption perspective” (quoting Ward JA at [189], AB 161). But conduct can have an adverse effect on public administration without involving public officials, as the electoral bribery example given at AS [54] illustrates.
11. The Respondents argue at RS [39] that, in this case, the Allegations “needed to disclose an actual or potential adverse effect on the *exercise* of a public function by a public official”. But such was clearly found by all members of the Courts below, for such an adverse effect on the administration of justice is precisely what is required potentially to amount to the offence of perverting the course of justice (see discussion and references at AS [32]).
12. The Respondents are wrong to suggest that the Commission’s approach to s.8(2) would cause or permit the Applicant to become a “general crime commission” (see RS [18], [35]). The Commission has made no such claim. It cannot be disputed that Parliament has authorised the Commission to investigate *some* crimes which involve or affect public authorities and public officials such as to fall within the definition of “corrupt conduct”: see eg ss.8, 9(1)(a), 9(5), 13(3A)-(5), 14, 16, 74B. In this context, to submit that “[t]here are surprising results resulting from the view contended for by the applicant” (RS [41]) is to assume the conclusion the Respondents argue for. There is

nothing inherently surprising about the Commission having been authorised to act as an investigative body in relation to matters which may have some detrimental effect on the exercise of public functions.

10 13. Further, although the Commission may have jurisdiction to investigate a particular matter, the Commission retains a discretion as to whether it should exercise that jurisdiction (leaving aside matters referred to it by both Houses of Parliament under s.73): see ss.12, 12A, 13, and 20(3) of the Act; note also s.31 with respect to holding public inquiries. The Commission may take the view in a particular case that a particular alleged crime is better investigated by some other body, or does not warrant its attention. This might be appropriate, for example, where a particular alleged crime strictly falls within the Applicant's investigatory powers but does not amount to "serious corrupt conduct" or "systemic corrupt conduct", and/or does not otherwise warrant investigation by the Commission: see s.12A of the Act. It should be noted that, beyond seeking to defend the majority's decision on jurisdiction, the Respondents have not sought to re-raise the challenges put and rejected below with respect to the Commission's exercise of its discretion under s.13(1) to investigate, and its decision to hold a public inquiry under s.31.

20 14. The Respondents refer to the principle of legality at RS [34]-[35]. The principle was not relied on by the majority in the Court of Appeal (though the Respondents had raised it). The Respondents do not state what fundamental right or principle is said to be abrogated or curtailed by construing the word "adversely" in s.8(2) in accordance with its ordinary and contextual meaning. There is no fundamental right in suspects to be investigated for possible criminal conduct only by the Police. That being so, there is no occasion for applying the principle of legality to read down the scope of the Applicant's investigatory jurisdiction.

30 15. No doubt there are provisions in the Act which do impinge on fundamental rights. That does not mean the whole Act must be read strictly, including the general grant of jurisdiction to investigate: see, by analogy, *ADCO Constructions v Goudappel* (2014) 308 ALR 213 at [29] ("to accept the beneficial purpose of the [*Workers Compensation Act*] as a whole does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially"). Cases such as *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *Lee v NSW Crime Commission* (2013) 251 CLR 196 were directed to exercises of particular powers directly infringing on fundamental rights.

16. The principle of legality supports construing legislation so as to avoid “inadvertent and collateral” abrogation or curtailment of fundamental rights, freedoms or immunities: see *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 310 [313]; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Bropho v Western Australia* (1990) 171 CLR 1 at 18. The principle “operates ‘to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted’”: *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 382 [194] per Kiefel and Keane JJ, quoting Gleeson CJ in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]; see also *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ.

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17. Here, where rights and freedoms have been curtailed, that intent has been clearly manifest. For instance, it is clear from the Act (see, in particular, ss. 26 and 37) that the legislature has directed its attention to the existence of the privilege against self-incrimination and positively decided to curtail that privilege in a limited way. As Gageler and Keane JJ observed in *Lee* (at 310 [314]), the principle of legality:

is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed.

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18. In relation to whether special leave should be granted, the Respondents argue, in effect, that no issue of general significance arises: RS [46]. That is incorrect not only for the reasons given at AS [68]-[74], but also because the majority’s decision is likely to have consequences in Queensland and Victoria, the equivalent legislation for each of which contains a similar (although not identical) invocation of the notion of “adversely affecting” the exercise of public functions by public officials and bodies: s.15(1)(a), *Crime and Corruption Act 2001* (Qld); s.4(1)(a), *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

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