In April last year the Court (French CJ, Hayne, Kiefel and Nettle JJ, Gageler J dissenting) found that the NSW Independent Commission against Corruption (ICAC) was acting beyond its statutory charter when it decided to investigate Margaret Cunneen a deputy senior crown prosecutor. The investigation concerned an allegation was that Cunneen had “with the intention to pervert the course of justice” counselled her son’s girlfriend to fake chest pains to avoid a breathalyzer test at the scene of a serious motor vehicle accident. A majority of the Court found that the meaning of ‘corrupt conduct’ in the ICAC Act had been misunderstood and the inquiry was beyond power. The inquiry and the case have been remarkable for two things. First, for the adverse impact they have had on the reputation and standing of ICAC, until now, one of the nation’s most respected anti-corruption bodies. Second, and far less known, for the potentially significant (but not yet understood) ramifications for the circumstances in which the principle of legality might be engaged.

Dealing briefly with the first issue, partly for the benefit of our interstate visitors, and also because it cannot go unremarked.

A Parliamentary Committee is currently inquiring into ICAC’s handing of the Cunneen inquiry. This occurs on the back of a report published late last year by ICAC’s Statutory Inspector. It made amongst many criticisms the
extraordinary, scathing remarks that the inquiry had marked a “low point” in ICAC’s history and that ICAC had engaged in "unreasonable, unjust, [and] oppressive maladministration". The inspector is also pursuing new claims that ICAC has, amongst other things, withheld exculpatory evidence in other matters. The Inspector himself has also come in for some stinging criticism, for amongst other things, it is said, failing to provide procedural fairness to the Commission. ICAC has asked the Committee to ignore his report. The relationship between ICAC and its statutory inspector has, without doubt, irretrievably broken down.

As is often the case, the progressive and conservative media are utterly polarized. Today’s papers which contain revelation, claim and counterclaim about the contents of the recording upon which the inquiry is based, and events at yesterday’s Committee hearing being yet another case in point.

ICAC has weathered storms before but this is unprecedented.

Some of the questions being asked by the Committee include ICAC’s failure to explain to Cunneen or the public how it was that it devoted scarce public resources to such a trivial matter (s 20(3)) given the parliament’s insistence that ICAC should, as far as practicable, focus on serious and systemic corruption (s 12A). As Peter Heerey said in the Winter Edition of Bar News with devastating understatement: “In the absence of any explanation perhaps the charitable conclusion is that there is such a high level of purity in the public administration of New South Wales that ICAC has nothing better to do...”

Questions have been asked about the appropriateness of ICAC issuing a press release subsequent to its resounding High Court loss which, instead of demonstrating humility of any kind, made reference to potential disciplinary matters that it had discovered on Cunneen’s mobile telephone, which had nothing to do with corruption.

Beyond the Cunneen case, more questions have been asked about the routine practice by ICAC of issuing of suppression orders on the written
submissions of parties who appear in public hearings before it. There have been complaints about the widespread leaking of facts and matters to the local legal fraternity and to journalists. And more recently there are new claims about exculpatory evidence being excluded and evidence passed on to other agencies being censored. It is impossible to know the veracity of these claims but, if true, they are of course very serious.

Less serious matters have raised eyebrows. Like ICAC’s counsel assisting participating in media profile pieces, and the public remarks made (albeit in jest) by the Commissioner that “inquisitorial litigation” is “fun” and “fantastic” because you “have a free kick” and that questioning witnesses for counsel assisting was like “pulling wings off butterflies.”

Parliament of course, cannot codify for good judgment.

It can’t say in the governing Act: look, we want you to have extraordinary power because we are committed to uncovering corruption in public administration, something which courts find hard to do. While we want you to be diligent and even courageous in uncovering corruption, we also want you to behave with the corresponding caution and restraint when the circumstances demand it. That is because you have been afforded power – power that go way beyond what a court exercising judicial power can ever have. The power permits you to ignore many of our cherished rights, freedoms and immunities –the right to silence, the right to procedural fairness, the right to engage in political speech by defending oneself in public. These freedoms have evolved over centuries to protect citizens from the power of the state. You may overlook, ignore, indeed trample on them in the pursuit of the important but essentially grave task of exposing corruption. Why? So that our community has a level of trust with respect to the mechanisms of governance. As an extension of the executive arm of government you will be scrutinised, you are fair game, and so you should be. You must not become self absorbed. Your job is to inquire into corruption; you are neither an adversary nor a prosecutor. Where possible you must be fair, and be seen to be fair. In other words, you must use your almost unlimited power carefully.
The parliament cannot write this into the ICAC Act.

Despite its long history of largely excellent work which includes very good work done by the present Commissioner (the two other cases this session deals with clearly attest to that) as a result of the Cunneen case in particular, the public confidence in ICAC has been shaken.

Its authority is diminished. The previous broad community and political consensus that the provision to ICAC of its extraordinary powers is a trade-off worth making is in the balance. (Perhaps not in this room, but it is elsewhere.)

You need that consensus for ICAC to be effective. That consensus and ICAC’s authority must be somehow restored. And the government, indeed the Parliament to which ICAC is answerable, must find some way to restore it.

Moving on to the second issue – the principle of legality in the ICAC v Cunneen.

Many of you would be aware that for time the principle of legality has been getting a very good run in the High Court.

Things really kicked off in 2004 with Gleeson CJ’s thrilling dissent in Al Kateb. (I would argue though that Al Kateb was an utterly conventional application of the principle.)

Things got interesting in 2009 with Saeed. That case was described by Justice Nettle (extra-curially) as exposing a “vivid insistence of the sanctity of text” and by Dan Meagher as revealing legality as a principle having a “binary, all or nothing nature.”

In Saeed the Court unanimously held that the attempt by the federal parliament to remove the right to natural justice for offshore visa applicants was ineffective because the text was not sufficiently clear. The
Court held it was erroneous to even consider extensive and coherent extrinsic materials which really, could not have been clearer – indeed the provision had inserted into the Migration Act by a 2002 amending Act as a natural justice code to remedy the result Miah’s case, with the sole object of removing the right to natural justice. Since Saeed, there have been a number of legality cases, Pearce & Geddes have dedicated an entire chapter in their recent edition and there’s been a corresponding huge amount of scholarship. A book is on its way. (I feel compelled to acknowledge the truly impressive contributions of Dan Meagher and Brendan Lim in this area, which I have drawn on extensively).

Why? Well, there has been movement at the station.

The interpretative principle of legality has a long history dating back to the seminal Potter v Minehan where O’Connor J said: “it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness.” The requirement for irresistible clearness in a rights altering statute was justified by the original, simple objective of ascertaining the parliament’s intent. Put another way it was a (as Lord Styne explained in Ex Parte Pierson) “a common sense guide” to what the words meant. (That parlance was embraced by Gleeson CJ in Electrolux.)

A related but normative justification is about ensuring the parliament has paid sufficient attention to rights, articulated by Lord Hoffmann in ex Parte Simms when his Lordship said that Parliament cannot override freedoms with general or ambiguous words “because there is a risk the full implications might have gone unnoticed in the democratic process.” This is about ensuring a rights altering law does not have unintended consequences.

The other normative justification for the principle is the claim that parliament should make its intentions in legislation clear enough for the public to understand: “Parliament must confront what it is doing and
accept the political cost.” (Lord Simms again). A court imposed disciplinary measure, if you like!

However, it now appears that the principle has gone beyond principally a mechanism to understand what the parliament intended or to protect individuals from inadvertent and/or collateral alteration of rights and freedoms (and here I am drawing on some of the language used by Justices Gageler and Keane in *Lee*) but has morphed into something more like a judicially supervised shield (my words) against the violation of rights – even when the parliament is evidently pursuing such an object within its perceived constitutional competence.

*Saeed* was and remains in many respects the high point of the *shift*. But with the appointment of Justices Gageler and Keane and we began to see a *rift*.

Prior to *Cunneen* the legality cases have been squarely concerned with the abrogation of fundamental rights, freedoms, immunities. Often the Court is being asked to invalidate the claimed encroachment on the freedom: for example, *Saeed* (natural justice denied) (*Lee* and *X7* – both challenges to coercive pre-trial questioning at odds with right to silence) *Adelaide City* (free speech) *Lacey* (protection against double jeopardy) *Al Kateb* (deprivation of liberty).

Some of these cases, including *Cunneen* and more recently, *NAAJAL* have exposed what is now an obvious fault line in the court. There is no time to explore the detail. Suffice to say that on the current court we have Chief Justice French and Justices Keifel and Bell, and it’s probably not too early to call, Justices Nettle and Gordon, in what I colloquially call the ‘shield’ camp. And Justices Gageler and Justice Keane on the other side in what I call the ‘deference’ camp, seriously outnumbered.

The disagreement, or the situation can be summed up in the following broad brush way: it appears a majority of the judges seem very quick to invoke the legality principle and are often inclined to apply it very strictly
and very robustly. (It has been suggested by Justice Gageler that this is because “the interpretive strictures of the legality principle are being applied inflexibly.”) Those judges demand absolute clarity from the parliament, the clearest words of necessary intendment and then some. Text is sacrosanct, context arguably a distant second. Purpose can not be obtained outside the statute, so you can probably forget assistance from extrinsic materials. It is erroneous to look at them before exhausting the process of construction.

What will likely happen when this approach prevails? The case is knocked off in the interpretation phase, the constitutional question is not reached, and the parties walk away with an altered, read down meaning of the statute. Justice Gageler is not of the same mindset. His Honour seems more interested and happy to engage with the text in full context. Extrinsic material can never be determinative but it is available as an aid to interpretation. It can not displace the text but can illuminate the meaning conveyed by the text. Justice Keane did not address the construction point in NAAJAL and did not sit on Cunneen, so hasn’t been at the heart of the recent disagreement, but on past form it seems likely his Honour is with Justice Gageler.

In NAAJAL Justice Gageler implied that the majority applied a judicial gloss to alter what his Honour thought was an obvious meaning in the text itself – which His Honour then found was supported in the Minister’s speech. His Honour suggested that the majority were content to alter the meaning of the Act and pointedly cited the Chief Justice’s assertion in International Finance (2009) that when courts work to alter the meaning of the statute, it diminishes accessibility of the law to the public and the accountability of Parliament to the electorate.

Underpinning this movement in legality reasoning and indeed the split in the Court, is undoubtedly a move by the Court back towards literalism in statutory interpretation. Most of the judges seem inclined to eschew the idea that the meaning of words in a statute can in any way be discerned, even confirmed, by going to extrinsic materials, drawing strongly, it seems
on former Justice Hayne’s intolerance for the notion that politicians making speeches in the parliament are of any assistance at all.

It is in this important context that *Cunneen* was decided in April last year. In *Cunneen* the majority found the principle of legality helpful, along with other reasons, to the construction of s 8 of the ICAC Act. The majority wrote: “The principle of legality, coupled with the lack of a clearly expressed legislative intention to override basic rights and freedoms on such a sweeping scale as ICAC’s” favoured a narrow construction so that ICAC’s coercive powers should not apply to such a wide range of, and severity of conduct – thereby restricting it’s operation to conduct that affected the probity of the exercise of an official function by a government official.

So, in *Cunneen’s* case, the allegation about her encouraging someone to tell a lie to a police officer could not be corrupt conduct, because there was no suggestion the police officer was or could have been dishonest in performing his functions. Accordingly, the investigation was beyond power.

The Court’s invocation of the principle was fleeting and it is possible that the principle did not play a big part in the constructional choice of the majority. But you might immediately spot the difference between this and other cases. This was not a case about the Parliament infringing Cunneen’s rights. This was just a simple statutory interpretation case about the meaning of the term ‘corrupt conduct’ in the ICAC Act.

Enter Justice Gageler in dissent. His Honour could not see how the principle of legality had any application. Noting the principle had not been invoked, employed or argued in the Court of Appeal, he remarked that no attempt was made by *Cunneen* to identify any right or principle said to be put in jeopardy by the broader construction advanced by ICAC. His Honour observed there was little clarity around the scope of provisions that derogated from common law rights. His Honour suggested, in effect, that the fact that ICAC could use coercive powers had nothing to do with
the legislature’s view about the meaning of corrupt conduct. His Honour concluded: “Unfocussed invocation of the principle…… can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy.

The situation is stark: in *Cunneen* the Court invoked the principle of legality where the governing or background statute undoubtedly trampled over freedoms, rights, immunities - but none of those provisions were in issue. This is different to the other cases. This is not about the content of the rule (and on the face of it, it tells us nothing about the now entrenched disagreement in the Court as to application of the rule) but appears to be a big shift in the circumstances in which it can be invoked.

The obvious implication: the principle of legality could – arguably should – now be invoked to assist in the interpretation of any disputed provision (whether it alters a right or not) in any rights altering statute.

Think about it.

The governing or framework statutes for integrity bodies (audit offices, independent corruption commissions, police commissions, royal commissions), for investigatory agencies, for any terrorism legislation or policing legislation – just for starters - may now be vulnerable to the new legality ‘shield’. I qualify this by accepting that are a number this aspect of *Cunneen* might be qualified or retreated from by the Court.

But right now, on the face of it, it does appear to be a significant new development.

There are a host of other questions to which one can devote hours of thought as a result of both the legality shift and the rift, as they have emerged in the Court in recent years.:

1. The first is, a question as to whether the Court’s new approach is overly paternalistic especially given:
A. The advent of the administrative state, the fact that every session of parliament produces laws which infringe or alter rights of some kind. Do courts in this day and age really need to start from the assumption that that parliament did not intend to abrogate rights, including fundamental rights? Justice McHugh highlighted this in 2001 in Malika.

B. the ever increasing rights awareness both in the community and in the parliament? By that I mean the much improved public accessibility and awareness of freedoms and rights generally via digital media and due to activist campaigns, together with the myriad scrutiny provisions under the Human Rights (Parliamentary Scrutiny) Act 2011 including well resourced, tax payer funded joint parliamentary committee dedicated exclusively to human rights scrutiny of all acts of parliament. Is it necessary or desirable for the Court to flex more muscle against the Parliament given this improved scrutiny and improved democratic input into the development of rights altering legislation?

2. Or, to take an entirely different tack, in the context of the parliament now being called upon to enact more rights infringing legislation to deal with new issues like terrorism, border control and organized crime – is there a strong case for the common law to develop in a way that results in the Court being more demanding, more exacting and less deferential to the Parliament when interpreting rights altering legislation?

3. Finally, concerning certainty - remembering that one of the reasons Parliaments enact statutes, at least in theory, is to enhance certainty. Any development in a common rule of statutory interpretation which increases uncertainty an in age of statutes would seem, to me at least, a little counter-intuitive.

That invites two possibilities: Is the Court’s new approach conducive to certainty because it sends clear and prior notice to the parliament that the courts will protect fundamental rights and freedoms? Or, on
the other hand, does the expansion of the operation of the rule, and its scope, simply increase the number of interpretation disputes and create uncertainty about its application?

These are the questions. I don’t know the answers.

In conclusion, who on earth ever said public law was boring?

And who would have thought that a car crash on a warm Saturday evening in leafy Willoughby would have such far reaching consequences?

ICAC will at some point in the future recover from the ignominy it has suffered as a result of its decision to investigate Margaret Cunneen, but it will forever be more scrutinized as a result – and I personally think that is a good thing.

The legality debate in the High Court? This goes to the heart of the relationship between the court and the parliament.

Watch this space. No one knows where it is headed.