Di Girolamo Lawyers

10 January 2021

Ms Jessica Falvey
Committee Manager
Committee on the Independent Commission Against Corruption
Parliament of New South Wales

BY EMAIL: icaccommittee@parliament.nsw.gov.au

Dear Ms Falvey,

NSW Parliamentary Committee on the ICAC – Inquiry into Reputational Impact on an Individual being adversely named in the ICAC's Investigations - Answers to Question taken on Notice

I refer to your email sent on Tuesday, 15 December 2020, and in particular the transcript of the evidence I gave at the hearing before the Committee on Wednesday, 2 December 2020.

General Response to both questions by Mr Searle in relation to Messrs Bassett and Spence

Before answering the specific questions, I address the issue raised by Mr Searle concerning the right of persons to challenge or impugn a decision of the ICAC.

There is no right to a merits review. It is erroneous to suggest there is. A person cannot simply appeal to the Supreme Court against an adverse decision or finding by the ICAC.

There are limited criteria under which an application can be made to the Supreme Court and these were set out by the Supreme Court in *Duncan v ICAC* [2014] NSWSC 1018.

In paragraph 35 of that decision, his Honour Justice McDougall stated:

"35. Against that background, the authorities to which I have referred (and others) suggest that declaratory relief, of the type prayed by the plaintiffs in these proceedings with which I am dealing, may be granted where:

(1) there is a material error of law on the face of the record (which includes the reasons given for the decision – see s69(4) of the Supreme Court Act 1970 (NSW));

(2) the reasoning is not objectively reasonable in the sense that the decision was not one that could have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inference therefrom;

(3) there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding

(4) relevant matters have not been taken into account, or irrelevant matters have been taken into account; and

(5) there has been a denial of natural justice."

None of these are applicable to Messrs Bassett and Spence.

The decision in *Duncan v ICAC* was delivered in July 2014.

Subsequently in April 2015, the High Court of Australia delivered its decision in *ICAC v Cunneen* [2015] HCA 14.

Relevantly, the High Court held that the ICAC had no jurisdiction in cases which did not involve corrupt conduct defined as conduct that could adversely affect the probity of the exercise of an official function by a public officer.

The finding made in the ICAC Operation Spicer Report which Mr Searle refers to in his questions (to me) (hereinafter "the finding") is outside the jurisdiction of the ICAC as per the High Court decision in *ICAC v Cunneen*.

The finding was only possible because of two subsequent special Acts of the New South Wales Parliament. It is a fundamental principle of Australian law that individuals should not be adversely affected by retrospective legislation. This principle was overridden in the case of Messrs Bassett and Spence (and others in Operation Spicer).

The first act of Parliament which adversely affected Messrs Bassett and Spence was the *ICAC Validation Act 2015*.This was rushed through both houses of parliament on 6 May 2015 and assented to on that same day. The Act validated all ICAC actions prior to 15 April 2015 even where there was no corrupt conduct alleged. But for this Act, home and office search warrants, public and private examinations, bank account details together with their associated publicity against Messrs Bassett and Spence, which under the High Court ruling were illegal, were retrospectively declared valid.

In September 2015, a second Act of Parliament was passed which also retrospectively had an adverse impact on Messrs Bassett and Spence. This was the *ICAC Amendment Act 2015*. Relevantly, section 38(2) of the Act provided that:

"The electoral commission is taken to have referred to the Commission under section 13A the investigation of conduct that may involve possible criminal offences under the Parliamentary Electorates and Elections Act 1912, the Election Funding Expenditure and Disclosures Act 1981 or the Lobbying of Government Officials Act 2011 that have come to light as a result of investigations and proceedings of the Commission known as operation Spicer and operation Credo. The commission is taken to have determined under that section to continue that investigation."

Messrs Bassett and Spence have been denied the fundamental fairness and rights to which all citizens are entitled in a democratic system that upholds the rule of law.

I provide the following answers to the questions I took on notice at the said hearing:

Question 1:

The Hon. ADAM SEARLE: *You are aware – as far as I am aware – that Mr Bassett has not sought to challenge or impugn that decision.*

Mr DI GIROLAMO: *I would have to get instructions on that.*

Answer:

The question from Mr Searle appears to arise from the erroneous genesis that the finding caused reputational damage to Mr Bassett.

The horse had well and truly bolted prior to the release of the Operation Spicer Report.

As outlined in pages 12 and 13 of the Submission to this Committee made on behalf of Mr Bassett and others dated 31 July 2020, Mr Bassett suffered significant and irreparable reputational damage on 6 August 2014 when the public inquiry in Operation Spicer resumed and Counsel Assisting, Mr Geoffrey Watson SC introduced scope *"m."* to the investigation.

On 6 August 2014, as a result of the introduction of scope *"m."* to the Operation Spicer investigation, Mr Bassett was stood down from the NSW Liberal Party and was publicly humiliated by being forced to sit on the crossbench in Parliament.

The gravamen of Mr Bassett's submission to this Committee is that had proper care been taken it would have been plain that there was no proper and reasonable evidentiary basis to introduce scope *"m."* into the scope of the Operation Spicer investigation.

In August 2016, the ICAC released the Operation Spicer Report. Importantly, the report concluded, inter alia, that there was no evidence to make out the allegation made in scope *"m."*.

Mr Bassett, thereafter, decided not to challenge or impugn the finding for the following reasons:

(i) the finding was **not** a finding of corrupt conduct.

(ii) the report made plain that Mr Bassett had not engaged in the conduct alleged in scope *"m."* and thus cleared him of the alleged wrongdoing.

(iii) the Supreme Court has no jurisdiction to conduct a merits review with respect to a finding made by the ICAC: see *Duncan v ICAC* [2014] NSWSC 1018 [35], and thus any challenge was likely to have proven futile.

(iv) the finding was inconsequential.

Question 2:

The Hon. ADAM SEARLE: *As far as you are aware, has Mr Spence sought to impugn or challenge these findings?*

Mr DI GIROLAMO: *Again, I would have to seek instructions.*

Answer:

The question from Mr Searle appears to arise from the erroneous genesis that the finding made in the ICAC Operation Spicer Report referred to in his question (hereinafter "the finding") caused reputational damage to Mr Spence.

The horse had well and truly bolted prior to the release of the Operation Spicer Report.

As outlined in pages 12, 13 and 14 of the Submission to this Committee made on behalf of Mr Spence and others dated 31 July 2020, Mr Spence suffered significant and irreparable reputational damage on 18 February 2014 when the ICAC released a statement announcing the public inquiry in Operation Spicer.

That announcement included scope *"a. and b."* – the terms of which are set out on page 12 of the Submission.

On 18 February 2014, Mr Spence was stood down from the NSW Liberal Party and was publicly humiliated by being forced to sit on the crossbench in Parliament.

The gravamen of Mr Spence's submission to this Committee is that had proper care been taken it would have been plain that there was no proper and reasonable evidentiary basis to make the allegations contained in scope *"a. and b."* of the Operation Spicer.

In August 2016, the ICAC released the Operation Spicer Report. Importantly, the report concluded, inter alia, that there was no evidence to make out the allegations made in scope *"a. and b."*.

Mr Spence, thereafter, decided not to challenge or impugn the finding for the following reasons:

(i) the finding was **not** a finding of corrupt conduct.

(ii) the report made plain that Mr Spence had not engaged in the conduct alleged in scope *"a. and b."* and thus cleared him of the alleged wrongdoing.

(iii) the Supreme Court has no jurisdiction to conduct a merits review with respect to a finding made by the ICAC: see *Duncan v ICAC* [2014] NSWSC 1018 [35], and thus any challenge was likely to have proven futile.

(iv) the finding was inconsequential.

Question 3:

The Hon. ADAM SEARLE: *First of all, I think in your submission you say that was Crown Solicitor's advice given to the Electoral Commission. You cite it but you do not produce it. Do you have a copy?*

Mr DI GIROLAMO: *I can produce a copy.*

Answer:

I was mistaken in my answer and apologise to the Committee.

I do not possess a copy of the Crown Solicitor's advice given to the Electoral Commission.

I have a copy, which is enclosed, of a Statement released by the Deputy of the Chairperson, NSW Electoral Commission made on 9 January 2017 which on page 2 thereof referred to advice received from the Crown Solicitor's Office as follows:

"***Conclusion***

The NSWEC received advice from the Crown Solicitor's Office that there was, in this instance, insufficient evidence to prove that:

- *These donors were property developers according to the EFED Act definition; and*
- *Payments to Spence and [redacted] were political donations as defined by the EFED Act."*

Yours faithfully

[redacted]

Di Girolamo Lawyers
Nicholas A Di Girolamo
Principal

electoral commission NSW

Statement

By the Deputy of the Chairperson, NSW Electoral Commission

NSW Electoral Commission concludes investigation into donations made to NSW Liberal Party candidates in the lead up to the 2011 State election

Background

In NSW, donations made to political parties, candidates and other election participants must be disclosed to the NSW Electoral Commission (NSWEC). Since 14 December 2009 property developers have been prohibited from making political donations. Since 1 January 2011 political donations at State elections have been capped.

The ICAC investigated allegations of breaches of the *Election Funding, Expenditure and Disclosures Act 1981* (EFED Act) in relation to political donations made to the NSW Liberal Party in the lead up to the 2011 State election. The allegations included: political donations that were not disclosed as required by the EFED Act; political donations made by prohibited donors such as property developers; political donations that exceeded the cap; as well as donations that were channelled through other entities to evade NSW election campaign financing laws.

Investigation

One matter investigated by the NSWEC was in relation to payments made to the business titled Eightbyfive. For its decision-making concerning that matter the NSWEC was chaired by the Deputy of the Chairperson.

It was suspected that payments had been made by a number of corporations through Eightbyfive to two candidates endorsed by the NSW Liberal Party for the 2011 State general election. The candidates were Christopher Spence and [redacted]. The donations had not been disclosed and were made by potential property developers.

The payments investigated by the NSWEC were made by the following companies:

- Australian Water Holdings Pty Ltd, between March 2009 and May 2011, for the amount of AU$183,342.50
- Gazcorp Pty Ltd, between May 201 and March 2011, for the amount of AU$121,000; and
- Patinack Farm Pty Ltd, between July 2010 and March 2011, for the amount of AU$66,000.

Determination assessment

To determine whether the payments made by these companies were unlawful political donations the NSWEC needed to establish that:

- Payments made through Eightbyfive to Spence and [redacted] were political donations made to them as candidates for the 2011 State general election; and
- Payments were made by corporations that were property developers.

Further information

In its report in relation to Operation Spicer[1], the ICAC found that Mr Timothy Koelma registered the business named Eightbyfive in March 2009. Eightbyfive operated until March 2011. It was alleged that Christopher Hartcher (the then member for Terrigal) was involved in the creation of Eightbyfive and its initial agreement with Australian Water Holdings and was subsequently involved in the creation of agreements with Gazcorp and Patinack Farm. Mr Hartcher was updated on the activities of Eightbyfive and was actively involved in those activities concerning Australian Water Holdings, Gazcorp and Patinack Farm.

Following the State election in March 2011, Mr Koelma was employed as a senior policy advisor for Mr Hartcher who was returned at the election as the member for Terrigal.

Eightbyfive entered into agreements with each of a series of entities whereby each entity made regular payments to Eightbyfive, purportedly for the provision of media, public relations and other services and advice. Payments received by Eightbyfive were principally from Australian Water Holdings, Gazcorp and Patinack Farm. In its report, the ICAC noted that Timothy Koelma and representatives of these companies could not produce any documents in relation to the agreements and were not able to substantiate claims by way of documentary evidence that the payments were made for services rendered.

Conclusion

The NSWEC received advice from the Crown Solicitor's Office that there was, in this instance, insufficient evidence to prove that:

- These donors were property developers according to the EFED Act definition; and
- Payments to Spence and [redacted] were political donations as defined by the EFED Act.

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[1] Independent Commission Against Corruption NSW, *Investigation into NSW Liberal Party electoral funding for the 2011 State election campaign and other matters* (2016) www.icac.nsw.gov.au/docman/investigations/reports/4865-investigation-into-nsw-liberal-party-electoral-funding-for-the-2011-state-election-campaign-and-other-matters-operation-spicer/file.

ABOUT THE NSW ELECTORAL COMMISSION

In December 2014, the three member Electoral Commission was constituted. It is separate to the agency led by the Electoral Commissioner. The Commission is an independent, statutory authority. It approves public funding to the political parties and others and enforces the provisions of three NSW Acts. These provisions govern electoral funding, expenditure and disclosures, the conduct of State elections and the lobbying of government officials. The Commission's Chairperson is the Hon Keith Mason AC QC, a former President of the NSW Court of Appeal (1997 to 2008). The Deputy of the Commission's Chairperson is Adjunct Professor Joseph Campbell, a former judge of the NSW Court of Appeal and the Supreme Court of New South Wales (2001 to 2012). Information about this independent Commission's work can view viewed at: www.elections.nsw.gov.au/about_us/work_of_the_commission.

More information about funding and disclosure laws is available at: www.elections.nsw.gov.au/fd