



Office of the Inspector of the
Independent Commission Against Corruption

**Report concerning a complaint by the
Australian Labor Party (NSW Branch)
and Country Labor about the conduct
of the Independent Commission
Against Corruption in investigating
political donations received by these
parties**

(Special Report 20/01)



Office of the Inspector of the
Independent Commission Against Corruption

17 July 2019

Our ref: C14 2019 – 20/01

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Jonathan O’Dea MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Mr Speaker

In accordance with sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* (“the *ICAC Act*”), I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament a *Report concerning a complaint by the Australian Labor Party (NSW Branch) and Country Labor about the conduct of the Independent Commission Against Corruption in investigating political donations received by these parties (Special Report 20/01)*.

Pursuant to section 78(1A) of the *ICAC Act*, I recommend that the Report be made public forthwith.

Yours sincerely,

A handwritten signature in blue ink that reads 'B. R. McClintock'.

Bruce R McClintock SC
Inspector, Independent Commission against Corruption

Executive Summary

1. I am pleased to provide pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 (the ICAC Act) a report determining a complaint against the Independent Commission Against Corruption (“ICAC”) made on behalf of the Australian Labor Party (NSW Branch) (ALP NSW) and Country Labor by its solicitors Messrs. Holding Redlich. That complaint is set out in a letter to me dated 6 May 2019.
2. The complaint concerns the circumstances in which officers of the ICAC obtained and executed a search warrant at the offices of the NSW ALP at Level 9, 377 Sussex Street, Sydney on 18 December 2018. The complaint also concerns two notices dated 17 and 20 December 2018 issued by ICAC to the General Secretary of the ALP NSW and Country Labor to attend ICAC and produce documents to it.
3. I have determined that the matters raised by the complainant do not amount to “abuse of power, impropriety and other forms of misconduct” nor “maladministration” as those terms are used in section 57B of the ICAC Act 1988.
4. Accordingly, I have decided that the complaint by ALP NSW and Country Labor should be dismissed.

Background

5. On 15 January 2018 the NSW Electoral Commission made a referral under section 13A(2) of the ICAC Act to the ICAC¹. Section 13A(1)-(4) is in the following terms:

13A Function of investigating matters referred by Electoral Commission

- (1) *The Commission has the function of investigating conduct that may involve possible criminal offences under the Electoral Act 2017, the Electoral Funding Act 2018 or the Lobbying of Government Officials Act 2011 that the Electoral Commission refers to the Commission for investigation under this section.*
- (2) *The Electoral Commission may refer any such conduct to the Commission for investigation*
 - (a) *if there are reasonable grounds to suspect that the conduct may involve a possible criminal offence to which this section applies (as set out in subsection (9)), or*
 - (b) *if the conduct is related to possible corrupt conduct that the Commission is already investigating, whether or not the time within which proceedings for the possible criminal offence may be instituted has expired*

¹ For the background to the introduction of section 13A by amendment into the ICAC Act see Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption 30 July 2015 which can be accessed here: <https://s0.whitepages.com.au/3334de30-632c-4e98-bdd0-65e43f071368/premier-cabinet-department-of.nsw-government-document.pdf>

- (3) *After a preliminary investigation, the Commission is to discontinue the investigation if:*
- (a) *the conduct does not involve any possible criminal offence to which this section applies and is not related to possible corrupt conduct that the Commission is already investigating, and the Commission is not otherwise authorised to investigate the conduct,*
 - (b) *or the Commission determines it should not carry out any further investigation.*
- (4) *Conduct may be referred under this section to the Commission for investigation whether or not it involves corrupt conduct. The fact that the conduct could be so referred does not prevent the Commission from investigating the conduct without a referral if it is otherwise authorised by this Act to do so.*
6. The Electoral Commission referral related to possible offences under sections 96H(2) (false statements in declarations), 96HA(2) offences relating to caps on donations), 96HB(1) (schemes to circumvent donation restrictions) 96I (other offences and failure to keep records) of the Election Funding, Expenditure and Disclosures Act 1981 (EFED Act). The offences in question were clearly intended to be regarded as serious by Parliament - they are punishable in most cases by prison terms of up to 2 years and in one case (section 96HB) up to 10 years².
7. In making the referral, so I am informed by the ICAC, the Electoral Commission expressed the view that, although it had been able to obtain some evidence through interviews, available documents and some financial transactions, it considered that further evidence might be obtained using the ICAC's extensive investigative powers.
8. On 24 January 2018 the ICAC decided to conduct a preliminary investigation into the matter which, on 7 June 2018, became a full investigation. In general terms the subject of the investigation is whether from January 2015, officials of ALP NSW and Country Labor, members of Chinese Friends of Labor, political donors and others entered into a scheme to evade the prohibitions and requirements of Part 6 of the EFED Act relating to political donations.
9. For the purposes of that investigation, the ICAC on 17 December 2018 applied for and obtained a search warrant³. As stated above, the search warrant was executed by the ICAC at the premises of NSW ALP and Country Labor Sydney Office on 18 December 2018.

² The election *Funding Expenditure and Disclosures Act 1981* has been repealed and replaced by the *Electoral Funding Act 2018* but was in force at the time of the conduct in question as well as the Electoral Commission referral.

³ It is not correct to say, as the complaint does, that the ICAC itself issues the warrant. It was in fact issued by Stephen Lister, the Chambers Registrar at Downing Centre Local Court. He is an authorised officer entitled to issue a warrant under s40(1) and (4) of the ICAC Act. While an ICAC Commissioner is empowered to issue a warrant by section 40(2) of the ICAC Act, that power has never been exercised in the 30 year history of the ICAC.

The Complaint

10. Messrs. Holding Redlich's complaint on behalf of ALP NSW by letter to me dated 6 May 2019 is in the following terms:

We act on behalf of the Australian Labor Party (NSW Branch) (ALP NSW) and Country Labor.

As you may be aware, the ICAC is conducting an investigation into donations received by the ALP NSW and/or Country Labor from Chinese Friends of Labor in 2015. The NSW Electoral Commission referred the investigation to the ICAC on 15 January 2018 and the ICAC executed a search warrant (enclosed), which was the subject of extensive media coverage, 11 months later on 17 December.

The ICAC also issued two notices to attend and produce documents addressed to the General Secretary of the ALP NSW and Country Labor dated 17 December 2018 and 20 December 2018 respectively (enclosed). The notices to attend and produce cover largely the same information and documents as the search warrant.

Our clients have fully complied with the investigation of the ICAC to date. The issues being investigated have also been investigated extensively by the NSW Electoral Commission and, again, our clients fully cooperated with that investigation and provided all relevant documents and information.

Given that the search warrant and the notices to produce cover largely the same documents and information, and that this matter has been previously investigated by the NSW Electoral Commission, as set out in the enclosed letter of 19 December from the President of the ALP NSW, Mr Mark Lennon, our clients are surprised that the ICAC chose to issue a search warrant in these circumstances. We enclose the ICAC's response of 21 December 2019 to our clients' letter.

Our clients are also surprised that the ICAC would choose to issue the search warrant and the notices to produce approximately eleven months after the referral and three months prior to the NSW State election. The senior officers of our clients are a small group and compliance with the search warrant and notices to produce while they were otherwise fully-occupied with the NSW State campaign placed immense pressure on them.

In addition, our clients are concerned about the extensive media coverage of the ICAC's search of our clients' premises and, in particular, the source from which the leak emanated.

In light of these circumstances, we are instructed to request that you conduct an investigation of the ICAC and the officers of the ICAC in accordance with section 57C(e) of the Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act).

In particular, our clients are of the view that the search warrant may have been issued for purposes other than the proper exercise of the ICAC's investigative powers and may amount to maladministration under section 57B(1)(c) of the ICAC

Act. As you know, section 57B(4) of the ICAC Act provides that conduct will amount to maladministration if it involves action or inaction of a serious nature that is “unreasonably, unjust, oppressive or improperly discriminatory” or “based wholly or partly on improper motives”.

11. I sought clarification of the basis upon which ALP NSW and Country Labor alleged that the ICAC “leaked” news of the execution of the search warrant to the media by letter dated 8 May 2019. Messrs. Holding Redlich replied by letter dated 21 May 2019 relevantly in the following terms:

Thank you for your letter addressed to Ian Robertson of this firm dated 8 May 2019.

Our clients do not know the source from which the leak to the news media emanated, except that it was not from our clients or their officers.

As set out in our letter of 6 May 2019, our clients’ principal concern is the fact that the search warrant issued by the ICAC on 17 December 2018 was issued in the first place, when all of the documents sought were able to be obtained under notices to produce. Our clients consider that the matter could not in any way have been considered urgent, noting in particular that the ICAC had the referral from the NSW Electoral Commission for eleven months prior to acting. Additionally, our clients had a history of full cooperation with the NSW Electoral Commission in respect of the 2015 Chinese Friends of Labor dinner, a fact that should have been known to the ICAC.

Approximately ten officers of the ICAC executed the search warrant at the premises of our clients and, within a relatively short timeframe, representatives of all major news media outlets arrived to cover the search (which they described as a “raid”), ensuring that it received blanket media coverage, including being the lead item on a number of television bulletins, less than four months prior to the NSW State election. When Ian Robertson of this firm telephoned a Senior Investigator of the ICAC, Mr Jeffery Lawrence, at 3.00pm on 18 December 2018 to enquire as to how the execution of the search warrant had been extensively “leaked” to the news media, Mr Lawrence replied “it must have been the ALP”. Mr Robertson has a contemporaneous file note of that conversation.

Our clients are of the view that the Inspector of the ICAC should investigate who outside the ICAC was informed in advance of the execution of the search warrant at our clients’ premises – such as, for example, Ministerial staff within the NSW Government – to ascertain who may have been in a position to alert the news media in the manner which occurred.

12. The response of the Commission to the complaint is set out also in a letter dated 21 May 2019 to me:

I am writing in response to your letter of 8 May 2019 concerning certain matters

raised in a letter of 6 May 2019 from Holding Redlich (the Letter) concerning the Commission's investigation into certain political donations received by the NSW branch of the Australian Labor Party (ALP) in 2015. This investigation is Operation Aero.

The suggestions in the penultimate paragraph of the Letter that the Commission's decision in Operation Aero to execute a search warrant on the premises of the ALP NSW branch may have been "...for purposes other than the proper exercise of the ICAC's investigative powers..." and may have been based on "improper motives" are entirely scurrilous. There is no foundation for any such assertions and it is of significance that no evidence in support of such assertions is offered in the Letter.

The need to exercise the Commission's search warrant powers in Operation Aero and the timing of the execution of the search warrant were based entirely on operational considerations. That there was a proper basis for the granting of the application for the search warrant was accepted by an independent authorised officer acting under s 40(1) of the ICAC Act.

It is relevant to set out some details concerning the investigation, the search warrant and the notices referred to in the Letter.

Operation Aero is the result of a referral made on 15 January 2018 by the NSW Electoral Commission pursuant to s 13A(2) of the ICAC Act. The referral concerned possible offences under ss 96H(2), 96HA(2), 96HB(1) and 96I of the Election Funding, Expenditure and Disclosures Act 1981 (EFED Act). In making the referral, the Electoral Commission noted that, although it had been able to obtain some evidence through witness interviews, available documents and some financial transactions, it was of the view that further evidence might be obtained using the Commission's investigative powers. It also noted that there was no ongoing investigation by the Electoral Commission of the conduct that was the subject of the referral.

On 24 January 2018, the Commission determined to conduct a preliminary investigation. As a result of that preliminary investigation, on 7 June 2018 the Commission determined to conduct a full investigation. The decision to conduct a full investigation was made for the following reasons:

- 1. There is evidence or reliable information to suggest the occurrence of the conduct referred, requiring a more complete investigation;*
- 2. The subject matter of the conduct referred is:*
 - (a) serious, involving two registered political parties, being the ALP and the Country Labor Party (CLP), both eligible for public funding;*
 - (b) complex, involving a large number of witnesses, including non-English speaking witnesses; and*
 - (c) of significant public interest, given its context in connection with possible foreign influence in NSW electoral processes;*

3. *The effective investigation of the conduct referred is likely to require the use of the Commission's coercive powers;*
4. *There is currently no ongoing investigation by the Electoral Commission that relates to the referred conduct; and*
5. *The limitation period for prosecution of possible offences involved in the conduct referred has not expired and, for most of the possible offences, will not do so until 2025, noting there is no limitation period for offences against s 96HB of the EFED Act.*

The specific allegation under investigation is whether, from January 2015, officials of the NSW branch of the ALP, members of Chinese Friends of Labor, political donors and others have entered into or carried out a scheme to circumvent prohibitions or requirements under Part 6 of the EFED Act relating to political donations.

Contrary to the assertion in the fifth paragraph of the Letter, the Commission did not issue a search warrant. On 17 December 2018, the Commission applied to an external authorised officer for the issuing of a search warrant in relation to the ALP NSW branch head office. The authorised officer granted the application and issued the search warrant upon being satisfied that there were reasonable grounds for doing so (s 40(1) ICAC Act). The Commission executed the warrant on 18 December 2018.

The Commission decided to proceed by way of search warrant rather than by way of a notice under s22 of the ICAC Act in order to maintain operational integrity by ensuring that all relevant records actually held at the ALP NSW branch head office were identified and obtained by the Commission.

On 17 December 2018, I issued a notice under s22 of the ICAC Act addressed to the General Secretary of the ALP NSW branch. This was to cover the possibility that documents and other things covered by the search warrant might be held in off-site storage or hosted on servers located at other places. During the course of executing the search warrant, it was ascertained that the main server was located off-site. In these circumstances, the s 22 notice was served in order to obtain copies of relevant documents held on that server.

During the execution of the search warrant a shared electronic folder known as the "G" drive was partially reviewed by a Commission officer who identified that it held material relevant to the Commission's investigation. The G drive contained over 500,000 files amounting to nearly one terabyte of information. Material relevant to the Commission's investigation was scattered through different folders but it was difficult to identify whether any particular folder contained relevant material. I understand that a keyword search to identify relevant material was not possible as the server was not physically located on the premises. In these circumstances, on 20 December 2018, I issued a further s 22 notice requiring production of the G drive. That notice also sought production of further electronic material for Mr

Clements extending beyond the date range in the notice of 17 December 2018.

13. In summary, the NSW ALP complaint involves the following two matters:

- a) Whether the ICAC was justified in obtaining and executing a search warrant as opposed to reliance upon a section 22 notice to produce.
- b) Whether any ICAC officer was responsible for informing the media of the fact that the ICAC was executing a search warrant at ALP NSW headquarters.

Consideration

14. My powers in respect of complaints are relevantly stated in section 57B(1) of the ICAC Act:

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
- (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission

“Maladministration” is defined in section 57B(4) as follows:

For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:

- (a) contrary to law, or
- (b) unreasonable, unjust, oppressive or improperly discriminatory, or
- (c) based wholly or partly on improper motives

15. The question I must therefore address is whether on the basis of the materials available to me any Commissioner or officer of the Commission has engaged in abuse of power, misconduct, or other forms of impropriety or maladministration (as defined).

16. In my opinion such misconduct has not been established. First, I can see no basis for the allegation that the ICAC should not have proceeded by way of search warrant whether because the ALP NSW and Country Labor had “complied” with the investigation previously, nor because the ALP NSW and Country Labor had co-operated with the Electoral Commission investigators or because there was an alternative available, that is the issuance of a notice under section 22 of the ICAC Act.

17. In this connection, while executing a search warrant involves a major incursion into the rights and freedoms of members of our community, there are situations when exercise of that power is justified. This seems to me to be one of those situations where, unless there was cogent evidence of impropriety, the ICAC’s judgement that it was necessary and/or desirable to use that mechanism for operational reasons should be respected.

There must always be a possibility - I am not suggesting this actually happened here - that service of a section 22 notice might not be complied with, even through honest but mistaken interpretation of the terms of the notice. It seems to me reasonable for the ICAC to decide itself to act to obtain the documents covered by the warrant, rather than leaving decisions as to compliance in the hands of those served with a section 22 notice.

18. Secondly, there does not appear to me to be any basis for the assertion by Holding Redlich that the warrant may have been issued “for purposes other than the proper exercise of the ICAC’s investigative powers”. I assume the suggestion is that the warrant was obtained and executed publicly in an attempt to embarrass ALP NSW and Country Labor shortly before a state election was due to be held. But there is no evidence that is the case. I am satisfied that as the ICAC says in the 21 May 2019 letter quoted above, the need to exercise the search warrant and the timing of its execution were based on operational considerations.
19. As to the allegation of unauthorised disclosure to the media, there is simply no evidence available to me that an ICAC officer was responsible for that. I note what the Chief Commissioner says in his letter to me dated 27 May 2019 that:

Commission officers executing the search warrant observed a number of ALP staff at the ALP NSW branch premises making telephone calls on their phones during the execution of the warrant

20. I cannot, of course, say that any of them informed the media but it is an obvious possibility and suffices to demonstrate that that is an alternative method by which the press might have been alerted.
21. I note the request by Messrs. Holding Redlich that I hold an investigation into the source of the leak. I have power to do so under section 57C of the Act, which amongst other things, empowers me to investigate and assess complaints about the Commission or its officers⁴. I also have the power to make or hold inquiries pursuant to the Royal Commission Act 1923⁵. I do not believe, however, that it is in the public interest to do so. Such an inquiry would most likely be fruitless, involve considerable expenses and require allocation of resources which my Office does not have. To illustrate the scope of the task, it would require me to determine each officer of the ICAC who knew of the warrant and interview or examine every one of them. It would also involve identifying each person associated with the ALP NSW and Country Labor who became aware of execution of the warrant and interview or examine each such person to determine whether he or she leaked the information. There would be scores of such people. In such circumstances I require a prima facie demonstration that an ICAC officer was responsible for the leak which is absent in this case.

⁴ S57C(e) ICAC Act

⁵ S57D ICAC Act

Conclusion

22. For these reasons I have decided that the complaint by the ALP NSW and Country Labor should be dismissed.
23. I provided a draft copy of this Report to the Complainants (through their legal representatives) and the Commission to give them an opportunity to make any comments before its submission to Parliament.
24. Pursuant to 78(1A) of the ICAC Act I recommend that this Report be made public forthwith⁶.

B. R. M. Clintock

Bruce R McClintock SC
Inspector
Independent Commission Against Corruption
17 July 2019

⁶ Disclosure: It has been disclosed to me informally that the ICAC investigation Aero may involve conduct by a wealthy Chinese businessman whom I advised some years ago in my private practice as a barrister. The matters upon which I gave advice had no connection to this matter and so I did not regard that as giving rise to any conflict which would prevent me from determining the matter. Also, I have been briefed by Messrs Holding Redlich in the past to give advice to the ALP and ALP figures and did so as counsel. Once again, no such matter involved anything the subject of this ICAC investigation so I did not see any conflict that would prevent me from dealing with this complaint.