
RULING

ON APPLICATION TO DISCONTINUE THE OPERATION SKYLINE INVESTIGATION

Introduction

1. This ruling concerns an application by Nicholas Petroulias dated 20 March 2019 to discontinue an investigation being conducted by the Commission under s 20 of the *ICAC Act*, the public inquiry for which is presently part-heard. The investigation is known as Operation Skyline.
2. Operation Skyline is an investigation into a series of transactions purporting to deal with land owned by the Awabakal Local Aboriginal Land Council ("the ALALC") in the period from 2014 to 2016, and the role of a number of individuals and companies in connection with these transactions, or attempted transactions. The ALALC is an incorporated body under Part 5 of the *Aboriginal Land Rights Act 1983 (NSW)* ("the ALRA"). It is one of 120 Aboriginal land councils in New South Wales. Pursuant to the ALRA, land is vested in these land councils, who in turn are charged with the acquisition and management of land and other assets in the interests of their members and other Aboriginal persons living within the land council areas. The ALALC operates across Newcastle and the Lake Macquarie area. It owns and is the custodian of a range of assets including vacant blocks of land, undeveloped parcels of land, commercial properties and urban residential land.
3. On 27 March 2018, the Commission commenced a public inquiry authorised under s 31 of the *ICAC Act*. The scope and purpose of the public inquiry announced in accordance with s 31(5) of the *ICAC Act* is in the following terms:
 - a) *Whether any public official, being a director of the Board of the Awabakal Local Aboriginal Land Council (the Land Council), acted dishonestly and/or in breach of his or her duty as a Board member in relation to a scheme involving proposals in the period of 2014-2016 for the sale and development of properties ("the Sale and Development Scheme") owned by the Land Council.*
 - b) *Whether any director of the Board of the Land Council acted dishonestly and/or in breach of his or her duty as a Board member in agreeing to, or purporting to retain or retaining*

Knightsbridge North Lawyers or anyone else to act for the Land Council in respect of the Sale and Development Scheme.

c) *Whether any director of the Board of the Land Council:*

- i. *acted dishonestly and/or in breach of his or her duty as a Board member by participating in or aiding or assisting any person in relation to the Sale and Development Scheme, including any dealings with:*
 - *Sunshine Property Investment Group Pty Ltd*
 - *Sunshine Warners Pty Ltd*
 - *Solstice Property Corporation Pty Ltd*
 - *Advantage Property Experts Syndications Pty Ltd and/or Advantage Property Syndications Ltd;*
- ii. *received any financial or other benefits as a reward or payment for their involvement in or for assistance or services rendered in relation to the Sale and Development Scheme or any matter connected therewith.*

d) *Whether any person or persons:*

- i. *encouraged or induced any director of the Board of the Land Council to dishonestly or partially exercise any of their official functions in respect of the Sale and Development Scheme and any other Land Council property; or*
- ii. *otherwise engaged in conduct connected with corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988.*

4. Following its commencement on 27 March 2018, the public inquiry continued on the following dates: 28 to 29 March 2018, 8 days from 3 April to 13 April 2018, 14 to 16 May 2018, 16 July to 20 July 2018, 9 days from 6 August to 17 August 2018 and 18 September to 21 September 2018.
5. The inquiry was re-listed to resume on Monday, 19 November 2018. However by reason of matters raised concerning the applicant's health the proceedings were stood over and re-listed for directions on 8 February 2019. The public inquiry was stood over to recommence on 18 March 2019. However, by reason of an alternative written application to discontinue the public inquiry received by the Commission from the applicant shortly prior to that date, the inquiry was adjourned on 20 March 2019 so that that application could be considered and determined (T3226.9-22). The Commission subsequently received this application to discontinue the investigation, on 21 March 2019.

Grounds of the application

The subject-matter of the investigation is trivial

6. Reference is made by the applicant to an earlier unsuccessful application made by Ms B Nolan of counsel on 11 April 2018, who was granted leave to appear at the public inquiry on behalf of Ms Bakis. In that application, Ms Nolan submitted, *inter alia*, that the conduct under investigation by the Commission was not serious or systemic corrupt conduct for the purpose of s 12A of the *ICAC Act*. Ms Nolan submitted in effect that the agreements under investigation by the Commission ultimately required the approval of the New South Wales Aboriginal Land Council and in the absence of that approval were of no legal effect. Ms Nolan submitted that the conduct under investigation did not even constitute the first step along the statutory pathway to approval. Ms Nolan referred to the provisions of s 20(3) of the *ICAC Act* which were said to be relevant to the Commission considering whether or not to continue or discontinue an investigation. The provisions are as follows:

20(3) The Commission may, in considering whether or not to conduct, continue or discontinue an investigation (other than in relation to a matter referred by both Houses of Parliament), have regard to such matters as it thinks fit, including whether or not (in the Commission's opinion):

(a) the subject-matter of the investigation is trivial, or

(b) the conduct concerned occurred at too remote a time to justify investigation, or

(c) if the investigation was initiated as a result of a complaint--the complaint was frivolous, vexatious or not in good faith.

7. In this application, Mr Petroulias has adopted the submissions made by Ms Nolan in support of Ms Bakis' application made in April 2018. In addition, Mr Petroulias submits that:

[12] ...the Act [the ALRA] has 'protective measures' which ensure that no 'land dealing' transaction can be binding 'as against the land Council' until an approval process is undertaken at the community level and then by the NSW Aboriginal Land council ('NSWALC') whose appointed expert panel assesses it, and issues a certificate.

...

[17] The Public Inquiry therefore inherently asks the wrong questions. It finds sin in 'signing' documents, 'without authority' to 'sell land' when that is well established that signing documents has no legal consequence.

[18] As far as Dates and Green were concerned, they simply allowed the community to discuss the proposals put before them.

8. Mr Petroulias submits that the following additional matters have arisen from the evidence adduced at the public inquiry since April 2018, which support his contention that the investigation should be discontinued. The paragraphs extracted below ([19-23]) are reproduced without correction of typographical errors:

[19] With ICAC not calling Advantage, at this time, there is no longer 'a string' of proposals to justify anything 'systemic'. There is only one transaction, Sunshine that cannot justify ICAC's jurisdiction. With Counsel Assisting having conceded that there was no simultaneously attempt "to sell the same land twice", there is nothing left in an isolated transaction in this inquiry to justify a "systemic" nature.

[20] The Slither of jurisdiction accepted by the CC when dismissing Ms Nolan's application cannot be maintained in the light of Zong's evidence. The highpoint of the CA's case is, as he put to Bakis, "on one reading the Deed of Variation says that \$400,000 should have been released to Awabakal".

[21] Firstly, as a matter of law, no obligations can arise from the Deed of Variation. Sunshine Warners Bay cannot vary an agreement that it was not party to. The document was invalid and falls short of amounting to even "one view of the documents".

[22] Leaving invalidity aside, no doubt if Zong had paid all the money he agreed to pay under the agreement, and had not signed trust account directions, this would have been correct. But Zong did not pay what he agreed he would pay, and nothing on behalf of ALALC.

*[23] Thus this allegation which is the foundation for the legal jurisdiction for the inquiry, is not even supported by Zong himself. The Statement of Claim with its verified affidavit by Zong says the opposite. On para [54] of his Statement of Claim, Zong swears that this \$400,000 was directed to be paid to Gows. Perhaps not surprisingly, CA did **not** tender this document but conceals it from the Public. Zong readily admitted that he directed the \$400,000 to Gows in his evidence.*

9. In addition, Mr Petroulias submits that the practice of executing agreements affecting land belonging to the ALALC was "expressly agreed upon to ensure that frivolous proposals were discarded" (see [27] of the application).

The subject-matter concerns commercial negotiations beyond ICAC's jurisdiction

10. Mr Petroulias further asserts that, to the extent that the Commission is investigating false or misleading representations made by Mr Petroulias or Ms Bakis in connection with their dealings with Mr Zong and what has been referred to as "the Sunshine transaction", those investigations are beyond ICAC's jurisdiction (see [32] – [40] of the application). This ground misunderstands the scope of the matters under investigation. The potentially false or misleading representations with which the Commission is concerned are not limited to representations which may have

been made by Mr Petroulias or Ms Bakis to Mr Zong in connection with their ability to obtain the approvals required of the Sunshine transaction by operation of the ALRA. Rather, the Commission is investigating representations made in connection with agreements said to have been entered into in December 2014 by the ALALC with a company by the name of Gows Heat Pty Ltd (“Gows Heat”), including whether or not, by virtue of those agreements, Gows Heat had the “rights” to purchase certain parcels of ALALC land, which Mr Petroulias then attempted to “on-sell” to Mr Zong (and subsequently other developers), and whether Mr Green and Ms Dates, in their capacity as Deputy Chairperson and Chairperson of the ALALC respectively, had the authority to sign those agreements (as well as the Sunshine agreements) on behalf of and bind the ALALC.

Improper purposes

11. Further, Mr Petroulias contends that the Commission, in conducting the investigation, has been motivated by improper purposes, namely, publicly to humiliate Mr Petroulias and Ms Bakis (see [41], [24] – [29], [28] – [29] (sic) of the application). He contends that this must be so, as the alternative is that the public resources of the State of NSW are being expended by an investigation into “*whether an aboriginal land council can have a chat about what to do with land holdings*”. It must be first observed that in making this allegation, Mr Petroulias profoundly mischaracterises the nature of the matters under investigation. Further, as I observe below, there is no foundation for the allegation that the investigation is being conducted for the improper or extraneous purpose contended for by Mr Petroulias.

Consideration

12. In dealing with the contentions raised by the applicant it is appropriate that I refer to the observations I made about the nature of matters under investigation in the course of ruling upon the application made by Ms Nolan in 2018:

18. It was implicitly accepted by the applicant that the Commission has jurisdiction as the ALALC is a “public authority” within the meaning of the ICAC and that at all material times, Mr. Green and Ms Dates were public officials being respectively the Deputy Chair and Chair of the Board of the ALALC.

19. In the evaluation of the applicants’ submissions, it is necessary to identify the nature of the matters that arise for consideration under the scope and purpose of the Public Inquiry. Whilst they include real property owned by the ALALC and transactions concerning ALALC property, the Commission’s investigation extends beyond those matters to include the specific conduct of a number of persons in relation thereto.

The relationship between Mr. Petroulias and Mr. Green

20. *Mr. Petroulias, in his dealings with Sunshine/Mr. Zong, represented that he had an interest in the ALALC property. It is alleged that Mr. Green, then on the Board of the ALALC, by his conduct, represented that he had authority of the ALALC to sign the Sunshine agreements on behalf of the ALALC and that he in fact signed the agreements purportedly on its behalf on that basis. The relationship, if any, between Mr. Petroulias and Mr. Green, if established, is relevant to the investigation.*

The relationship between Mr. Green and the ALALC

21. *The obligation of Mr. Green as director of the Board of the ALALC required him to act at all times in the interests of the ALALC. However, whether he acted in the interests of others (including, in particular, Mr Petroulias) rather than in the interests of the ALALC, are matters that fall for investigation within the scope and purpose of the Public Inquiry. Potential issues arising include:*

- a) Whether any alleged conduct by Mr. Green involved a serious breach of trust and/or an abuse of public office s8(1) (c) of the ICAC Act,*
- b) Whether there existed an agreement or understanding between Mr. Green and Mr. Petroulias whereby Mr. Green would act in the interests of Mr. Petroulias in relation to the Sunshine agreements: s7(2) and section 8(1)(a) and/or s8(2) of the ICAC Act.*

The relationship between Mr Petroulias, Ms Bakis and the ALALC

22. *The investigation includes the examination of any commercial or business relationship between Mr Petroulias and Ms Bakis, in relation to transactions concerning the subject ALALC properties as well as Ms Bakis' relationship with the ALALC under a solicitor's retainer and, any conduct by her concerning the above ALALC transactions. Particular issues arise under the scope and purpose of the Public Inquiry as to any conduct by her concerning the preparation and execution of the retainer between KNL (Ms Bakis) and the ALALC, the drafting of agreements (including the Sunshine agreements) and whether any such work was undertaken at the behest of and/or for the benefit of Mr Petroulias and/or for the benefit of others.*

23. *A further question arises as to whether any conduct of Mr Petroulias, and/or Mr Green and/or Ms Bakis arose out of an agreement or joint enterprise between them and if so, the nature of such agreement or enterprise: s7(2) and s8(1) (a) and a s8(2) ICAC Act.*

24. *In summary, the Commission's investigation in Operation Skyline concerns amongst other matters, the conduct of a number of persons connected or associated with the ALALC and/or its Board and whether any such conduct could constitute corrupt conduct within the ICAC Act. The investigation involves, amongst other matters, a question as to whether any conduct of any Board members of the ALALC could constitute a breach of public trust and/or an abuse of public office. If so, whether or not any other person encouraged or induced any breach of public trust and/or involved dishonesty or impropriety on part of a public official(s) in the exercise of official functions.*

13. Contrary to Mr Petroulias' submissions, I am satisfied that no evidence has emerged from the public inquiry to suggest that the nature of the relationship between the applicant, Ms Bakis, Mr Green and the ALALC with regard to the proposed transactions under investigation is no longer a matter which can be properly investigated by the Commission.

14. Mr Green has given evidence that, in his capacity as the Deputy Chairman of the Board of the ALALC, he executed a retainer with Knightsbridge North Lawyers or "KNL" (Ms Bakis) and various agreements that had the potential to affect land belonging to the ALALC without the Board's authority including the Gows Heat Heads of Agreement (T1401), the Sunshine agreements and the Solstice Heads of Agreement (T1554) and without disclosing that he had done so to the Board. Evidence has been adduced at the public inquiry that Mr Petroulias and Mr Green represented to Mr Zong that Mr Petroulias had an interest in the ALALC land by reason of the Gows Heat Heads of Agreement. The Commission is investigating whether this representation is false.

15. There is evidence from Mr Zong that payments made by him to KNL were referable to the agreements executed by Mr Green and intended by Mr Zong to be held on trust for the benefit of the ALALC (T583.22). Whether or not the payments made by Mr Zong should be construed in the manner suggested by Mr Petroulias in his submission is a matter for further evidence and submissions.

16. Mr Petroulias submits that in light of a concession made by counsel assisting that there was no simultaneous attempt to "sell the same land twice" there is no evidence of any systemic corrupt conduct requiring investigation by the Commission. I reject this submission. I am satisfied that no such concession was made by counsel assisting. Moreover, evidence has been adduced at the public inquiry that the same valuations that had been used in the Sunshine transaction were sent by Mr Say to Mr Strauss of the Solstice Corporation (T1041.5) and that site visits with Solstice included the Warners Bay lots (which were the subject of the Sunshine transaction), as well as others (T1878.25-1878.32). Draft agreements were sent on 1 April 2016 to Mr Strauss that included the same lots of land as those involved in the Sunshine transaction (PI Exhibit 42 Volume 10 page 137). Whether this evidence should be accepted as establishing that an attempt was made to "sell the same land twice" can only be determined in the light of further evidence adduced on this topic and the submissions of counsel assisting and affected persons including Mr Petroulias.

17. Evidence has emerged during the public inquiry that Mr Green and Mr Petroulias opened various bank accounts through which it appears Mr Green received substantial financial benefits, the funding of which can be sourced to the monies paid by Mr Zong. The applicant submits that the payments to Mr Green are explicable on the basis of a business enterprise that he and Mr Green pursued through United Lands Council or "ULC" and that evidence in support of this contention has been excluded from the public inquiry. For the reasons set out in my ruling on the separate application made by Mr Petroulias that the "*proceedings be discontinued on the grounds of bias and/or denial of procedural fairness*" I am satisfied that it is not correct to say that such evidence has been excluded from the public inquiry. Mr Petroulias will have ample opportunity to adduce evidence and make submissions about this issue prior to the completion of this inquiry.
18. Mr Petroulias asserts that Ms Bakis was improperly questioned by counsel assisting about payments she made using funds that had been paid by Mr Zong to Gows Heat. I reject this submission. As stated above, the Commission is investigating whether the representation contained in the Gows Heat Heads of Agreement executed by Mr Green that Gows Heat had an interest in ALALC land was false. I am satisfied that whether or not Ms Bakis received financial benefits that flowed from the money paid to Gows Heat is a relevant matter to be investigated by the Commission.
19. Finally, as noted above Mr Petroulias asserts that the real purpose behind the inquiry is to improperly cause damage to his reputation and the reputation of Ms Bakis. I reject this submission. There is no evidentiary basis for what is an entirely unsupported assertion. The Commission's investigation in Operation Skyline concerns amongst other matters, the conduct of a number of persons connected or associated with the ALALC and/or its board and whether any such conduct could constitute corrupt conduct within the meaning of the *ICAC Act*.
20. There is no basis for finding that the subject-matter of the investigation in terms of s20(3)(a) of the *ICAC Act* is trivial or concerns matters beyond the Commission's jurisdiction. It is apparent from the nature of the subject-matters of the public inquiry that there exists a sound jurisdictional basis for the Commission's investigation.
21. For the above reasons the application is dismissed.