

Arnold Bloch Leibler

Lawyers and Advisers

24 March 2016

The Hon. Keith Mason AC QC
Chairperson
NSW Electoral Commission
25/201 Kent Street
Sydney NSW 2000

Our Ref JOM
File No. 021808319

Contacts
Mark Leibler
Direct 61 3 9229 9600
mleibler@abl.com.au

Jonathan Milner
Direct 61 2 9226 7237
jmilner@abl.com.au

Dear Sir

NSW Electoral Commission and Liberal Party of Australia (NSW Division)

We act for Senator the Hon. Arthur Sinodinos AO.

We refer to your Statement as the Chairperson of the NSW Electoral Commission (**Commission**) together with the information released with it, published on the Commission's website on 23 March 2016 (**Statement**).

Senator Sinodinos ceased as Honorary Treasurer of the NSW Division on 16 August 2011 and does not presently hold any role within the NSW Division.

The declaration in relation to donations received in the period 1 July 2010 to 30 June 2011 was prepared and lodged by the Party Agent, Mr Simon McInnes (on 26 September 2011).

Senator Sinodinos has had no role in the NSW Division's decision to decline to update information disclosed in that declaration, as was requested by the Commission.

Our concerns

Senator Sinodinos does not intend to make any submission about the charitable trust law and others issues which are more properly addressed by the NSW Division.

However, the Commission's Statement, together with the Summary of Facts (in particular paragraphs 7 and 15) may erroneously convey to some readers that there was evidence that Senator Sinodinos was knowingly involved in the so-called scheme to disguise donations by prohibited donors and the preparation and filing of the 2011 declaration.

Any suggestion that Senator Sinodinos knew of (or was indifferent to) and was involved in a so-called scheme to disguise donations by prohibited donors is contrary to all of the evidence adduced by the ICAC during the Operation Spicer hearings. Critically, no such suggestion was ever put to Senator Sinodinos either privately, publicly or otherwise. We set out below a summary of that evidence to the extent it concerns Senator Sinodinos.

Level 24
Chifley Tower
2 Chifley Square
Sydney
NSW 2000
Australia

DX489 Sydney
www.abl.com.au

Telephone
61 2 9226 7100
Facsimile
61 2 9226 7120



MELBOURNE
SYDNEY

Partners

Mark M Leibler AC
Henry D Lanzer AM
Joseph Borensztein
Leon Zwiher
Philip Chester
Ross A Paterson
Stephen L Sharp
Kenneth A Gray
Kevin F Frawley
Michael N Dodge
Jane C Sheridan
Leonie R Thompson
Zevan Mardrossian
Jonathan M Wenig
Paul Sokolowski
Paul Rubenstein
Peter M Seidel
Alex King
John Mitchell
Ben Mahoney
Sam Dollard
Jonathan Milner
John Mengolian
Caroline Coulden
Matthew Lees
Genevieve Sexton
Jeremy Leibler
Nathan Briner
Jonathan Caplan
Justin Vaalstra
Clint Harding
James Simpson
Susanna Ford
Tyronne McCarthy

Senior Litigation Counsel

Robert J Heathcote

Senior Associates

Suo Koe
Benjamin Marshall
Teresa Ward
Christine Fleer
Nancy Collins
Kimberley MacKay
Andrea Towson
Daniel Mole
Laila De Melo
Damien Cuddihy
David Robbins
Krystal Pell
Jeremy Lanzer
Neil Brydges
Gia Cari
John Kim
Tanya Bastick
Katharina McPherson
Albert Ounapuu
Emily Simmonds
Liam Thomson
Jason van Grieken
Elyse Hillon
Amelia Smith
Meagan Grose
Ben Podbury
Bridget Little
Charles Gardiner
Vicki Bell

Consultants

Allan Fels AO

The loose language of this aspect of the Commissions' publications, couched in terms such as "washed through" (which of course is a concept unknown to the law), is to be regretted.

We are concerned that the Commission has not treated Senator Sinodinos fairly. As you would know, Senator Sinodinos made detailed submissions to the ICAC in relation to the matters considered by the Commission (his submissions being subject to a suppression order). It is apparent that Senator Sinodinos' submissions have not been taken into account by the Commission.

It is therefore most disappointing that Senator Sinodinos was not provided with any opportunity to dispute the Commission's draft Summary of Facts prior to their publication insofar as they concerned him.

The Statement and Summary has already been extensively cited by the media. In a number of instances, there has been erroneous commentary to the effect that Senator Sinodinos himself "concealed" illegal donations, and that his actions were somehow corrupt or illegal. That commentary is a direct consequence of the flawed publication.

In light of these matters, we invite the Commission immediately to retract all reference to Senator Sinodinos in the publications. We also invite the Commission to publish a correction to that effect on its website.

If the Commission chooses not to do so, we invite the Commission to publish a copy of this letter in a prominent position on its website.

Set out below is the evidence and submissions which should have been taken into account if the Commission had operated in a fair and reasonable manner with respect to Senator Sinodinos.

Summary of evidence concerning Senator Sinodinos

People within the Liberal Party, including Senator Sinodinos,¹ but by no means limited to him, went to great lengths to ensure that the NSW Division understood and complied with the law.

A selection of contemporaneous documentary evidence supported this conclusion, including the Finance Committee and State Executive Minutes and meeting papers,² the Finance Code of Practice and updated Treasurer's Guidelines,³ the remodelled agreements and declarations candidates were required to sign,⁴ the notations on receipts to be issued for cash donations,⁵ the SEC Financial Disclosure Returns,⁶ and the letter sent by Senator Sinodinos and Mr Neeham to all party members.⁷ That letter was in the clearest terms. It said that:

"Once this Bill is law you must not receive or solicit any donation or loan from a property developer."

Mr Neeham also explained how, through the Party Agent, advice was obtained from the EFA as to the proper interpretation of the new legislation,⁸ and Mr McInnes reported to the State Executive that the NSW Liberal Party was complying with the law.⁹

It was reasonable for Senator Sinodinos (and others) to rely upon those senior officers of the NSW Division. Mr McInnes took his role seriously,¹⁰ he was well qualified, he was diligent, he was honest and suitable for the role of Party Agent¹¹ and he was supported by top tier professional auditors, KPMG.¹²

A recurring theme during the ICAC hearings in Operation Spicer was the postulation that Senator Sinodinos (and the other members of the Finance Committee) must have been aware that the Free Enterprise Foundation (FEF) was the largest donor prior to the 2011 election, and that it was used to disguise the identity of donors. Why this was said to be obvious was never explained, was contradicted by the oral and documentary evidence and was irrational and illogical.

Senator Sinodinos denied knowing that persons donating to the FEF were prohibited donors.¹³ He also denied knowing at the relevant time that there was money coming from prohibited donors that was sent to the FEF with a request that that money come back to the NSW Division.¹⁴ The Finance Committee was "not monitoring individual donations, because [we] would have had thousands of donations coming in from across the State finding their way into the system".¹⁵

The unchallenged evidence of the full-time employed executives of the NSW Division, who were in a position to inform Senator Sinodinos (and the other volunteers on the Finance Committee) of their discussions with Mr Carter and Mr Bandle¹⁶ and each other,¹⁷ and who knew the identity of the donors to the FEF¹⁸, was that they did not do so.¹⁹ Specifically:

- (a) Despite Mr McInnes' view that their activity was within the law but might not be within the 'spirit of the law', he conceded he did not raise that concern with the Finance Committee,²⁰ nor with the auditor of the electoral returns²¹ (with the consequence that KPMG had no opportunity to raise it in turn with the Finance Committee);
- (b) Mr Neeham, who was aware that donations were being received from the FEF²², sought and received an assurance from Mr Nicolaou that the NSW Division was not directing donations from property developers to the FEF.²³ Mr Neeham did not relay his conversation with Mr Nicolaou to members of the Finance Committee,²⁴ and the matter was not discussed at any meeting following the Federal Election,²⁵
- (c) Indeed, during the whole of the process, there was *never a suggestion* from Messrs McInnes, Neeham or Nicolaou or anyone else in management to the effect that there was a suspicion that the law was either being broken or perhaps that the 'spirit of the law' had been breached.²⁶

As Senator Sinodinos explained in his evidence to the ICAC, if Mr McInnes had said to him "I've got qualms about this practice, I've looked at it, I think it's legal but I just don't think it's within the spirit of the law, I would have said I think two things, the first is what is the legal position, right, just so, in case something's already happened ... and then the second thing would have been if we're going to look at getting advice I would ... have said go to the EFA to get the legal advice because apart from this Commission I'm not sure what other body in New South Wales could give a definitive answer on that".²⁷ Similarly "If Simon

had said I've looked at these, I think there's a problem with them, we would have sent them as we have on other occasions to the EFA".²⁸

There is no reason to doubt that this is what Senator Sinodinos would have done – as he acknowledged (and Mr McInnes did not dispute either in his evidence or through his counsel), *"I had an open enough relationship with Simon who I regard as an honest, straightforward person that if he had raised something with me"*. Because, as Senator Sinodinos explained *"It wouldn't have passed the pub test ... It doesn't look right"*.²⁹

Senator Sinodinos had, with the State Director Mr Neeham, instigated an inquiry to try to get the bottom of the conduct of Ray Carter on the Central Coast and the EightbyFive invoices, and when he formed the view that Mr Carter and Mr Koelma refuse to co-operate, it was referred to the EFA, and subsequently ended up at the ICAC, and thereby provoking Operation Spicer itself.³⁰

There was no other reason for any member of the Finance Committee to be apprehensive about the way in which fundraising activity was being undertaken, nor was there a rational basis to second-guess or question campaign funding needs or forecasts.

Among other reasons, this was because steps had been taken to deal with the forecast reduction in donations, by lowering the fundraising budget,³¹ introducing a new membership category for property developers who would otherwise be excluded from donating to the NSW Division,³² substantially increasing SEC "Victory Targets"³³ and subsequently budgeting to use the \$500,000 surplus from the Federal campaign.³⁴

Any assertion to the effect that the evidence of each relevant witness should be disbelieved because donors would need to be thanked and because of the size of the donations made by the FEF is misconceived:

- (a) Neither the State Executive nor the Finance Committee received lists of donors.³⁵ Mr Pegg explained that the detail of donors was closely held, to avoid compromising the politicians;³⁶
- (b) Senator Sinodinos explained coherently and rationally in his evidence why it was that the aggregate statements provided to the Finance Committee were not presented in a way that disclosed the identity of any particular donor.³⁷ Others also explained how the total (or *en globo*) funds raised by Mr Nicolaou was reported monthly, and tracked against budget.³⁸

Some witnesses recalled that the *possible* future use of the FEF was raised at an early meeting.³⁹ Other witnesses, including Senator Sinodinos, did not recall (but did not deny) a discussion to that effect.⁴⁰

This evidence was not inconsistent at all:

- (a) Mr Neeham said that the suggestion was made as part of a range of ideas raised at a meeting of the Finance Committee prior to the amendments to the electoral laws.⁴¹ The documentary record places a discussion at a meeting in late 2009.⁴² Mr Nicolaou accepted he raised

the possibility of using the FEF at a Finance Committee meeting⁴³ as an option.⁴⁴ Importantly, he agreed that the context involved *the money going to the Federal Secretariat and not as a way for money to be sent to the State Branch for use in any State Election campaign.*⁴⁵ This was consistent with the minutes of the November 2009 meeting subsequently tendered in evidence;

- (b) Mr Pegg, who recalled a discussion about the impact of the prohibition on developer donations, but did not recall a suggestion that FEF be used to enable prohibited donors to donate to the NSW Liberal Party, was present at the November but not the October 2009 meeting;⁴⁶
- (c) Mr Photios said the option was raised *en passant*⁴⁷ but could not specify when as he attended meetings of State Executive and the Finance Committee where it was raised at both;
- (d) Mr Neeham confirmed the suggestion was brought up at the State Executive in late 2009 in the context of a report from the Finance Committee.⁴⁸ This is not inconsistent with Senator Sinodinos' evidence, as he did not attend the meeting of the State Executive on 12 December 2009.⁴⁹

No decision was ever taken by the Finance Committee to use the FEF to receive donations from prohibited property developers.⁵⁰ Nor was there any evidence to suggest that members of the Finance Committee knew of such a use. Mr Photios, who recalled discussions at both the Finance Committee and State Executive concerning the FEF, was adamant that no recommendation was made to utilise the FEF to circumvent the law in NSW, and no such suggestion was ever resolved or sanctioned.⁵¹ The Federal Party Treasurer, Mr Yabsley, talked to Senator Sinodinos about co-ordinating fundraising.⁵² Mr Yabsley did not recall any suggestion being made by anyone that the FEF could be used to recirculate funds from otherwise prohibited donors.⁵³

The evidence, far from being inherently implausible, was cogent, coherent, plausible and ought be accepted.

Finally, and most importantly, we again reiterate that Senator Sinodinos was never the Party Agent appointed under the relevant statute (that was, and is, Mr Simon McInnes).

The Commission's publications

Ultimately, to the extent the Commission's Statement and accompanying information suggests the Commission has concluded that Senator Sinodinos knew (or condoned or supported) the use of the FEF to disguise donations, such a conclusion is manifestly wrong, and was formed without affording Senator Sinodinos what lawyers would call procedural fairness and others would call basic decency.

The Commission ought to have said nothing about Senator Sinodinos (and indeed the Finance Committee more generally).

If the Commission was determined to say something, it should make a positive finding that (at least) Senator Sinodinos was diligent in his determination that the party officers who were acting on behalf of the Liberal Party would acknowledge and understand the law to ensure that the law was complied with.

Yours sincerely

Mark Leibler AC
Partner

Jonathan Milner
Partner

¹ T7676.5-10 (Sinodinos).

² See Exhibits Z120 and Z121.

³ Ex Z90/137 and Ex Z90/147 (May 2010) respectively.

⁴ T7691.36 and T7696.40 (Sinodinos). See Ex Z56/263-274 (pro forma Agreement on the Conduct of Political Fundraising and Expenditure State General Election 2011); also Ex Z90/147 and Robyn Parker MP's returns in Ex Z31.

⁵ See T7691.39-T7692.8 (Sinodinos).

⁶ See Ex S29 (Wyong SEC return) and Ex Z90/1 (Willoughby SEC return).

⁷ Ex S5/1262-1263; see T7681.13-24, .42 (Sinodinos); T7349.30-38 (Neeham). The letter was drafted by the Party Agent, Mr McInnes: T7357.23 (Neeham).

⁸ T7327.1-7; .44-.46; T7360.25-.35 (Neeham); also T7374.6-9 (Photios).

⁹ T7360.40 (Neeham).

¹⁰ T7693.46, T7694.20 (Sinodinos).

¹¹ T7160.25 (Webster).

¹² T7160.27-29 (Webster). See minutes of meeting of Finance Committee attended by the auditors on 23 November 2010 at Ex Z120/49.

¹³ T7672.22 (Sinodinos).

¹⁴ T7672.28 (Sinodinos).

¹⁵ T7680.16-18 (Sinodinos).

¹⁶ T7295.15-27 (Nicolaou).

¹⁷ T7314.12-17 (Nicolaou); T7211-T7213, T7221.27-29 (McInnes).

¹⁸ T7209.42 – T7210.2 (McInnes); Ex Z89; Ex Z83/68, 70.

¹⁹ T7340.19-48 (Neeham); T7214.18-26 (McInnes).

²⁰ T7236.8-15 (McInnes).

²¹ T7235.37-39 (McInnes).

²² T7331.16-17 (Neeham).

²³ T7365.44-T7336.8 (Neeham).

²⁴ T7365.27-28; T7350.35-47 (Neeham).

²⁵ T7335.1-4 (Neeham).

²⁶ T7695.21 (Sinodinos). Webster's evidence was consistent: T7162.8-11. See also T7161.44-46.

²⁷ T7688.8-19 (Sinodinos).

²⁸ T7690.33-35 (Sinodinos).

²⁹ T7688.25-28 (Sinodinos).

³⁰ see T 7697.13-T7698.3

³¹ T7150.46; T7151.19-21; T7161.1-8 (Webster).

³² T7356.18-31 (Neeham).

³³ T7356.33-38 (Neeham).

³⁴ Ex Z121/15 and 20 (Minutes of 12 October 2010 Finance Committee meeting). Neeham confirmed the practice of the Executive sometimes making a decision to donate some of the Federal funds to the State campaign or vice versa: at T7332.2-3.

³⁵ T7376.8-.15 (Photios); T7390.1 (Pegg).

³⁶ T7392.40-43 (Pegg).

³⁷ T7684.41-.46 (Sinodinos). Webster's evidence was consistent: T7159.46-T7160.3. See also minutes of 12 October 2010 Finance Committee meeting at Z120/20 re State EAC reports.

³⁸ T7150.34-.35 (Webster); Ex Z120/ (Minutes of 12 October 2010 Finance Committee meeting); Ex Z120/49 (Minutes of meeting of Finance Committee on 23 November 2010); Ex Z120/102 (Minutes of meeting of Finance Committee of 22 February 2011). T7684.41-.46 (Sinodinos). Neeham, Webster and Pegg's supports this: see T7337.43-.44 and T7159.46-T7160.3 and T7393.33 respectively.

³⁹ T7329.34-37 (Neeham).

⁴⁰ T7151.29-.35 (Webster); T7392.1-20 (Pegg); T7355.44 (MacLaren-Jones); T7683.26, .31 (Sinodinos).

⁴¹ T7328.2-.5; T7348.34-36 (Neeham).

⁴² Ex Z121/6-7 (Finance Committee, October 2009); Ex Z121/9 (Finance Committee, November 2009)

⁴³ T7267.38-40 (Nicoloau).

⁴⁴ T7269.8 (Nicoloau).

⁴⁵ T7293.17-33; T7294.11-15 (Nicoloau).

⁴⁶ T7392.1-.28 (Pegg).

⁴⁷ T7370.12 (Photios).

⁴⁸ T7369.7 (Photios).

⁴⁹ Ex Z121/ (State Executive, 12 December 2009).

⁵⁰ T7330.12-.14; T7348.43-46; T7349.1-.5; T7363.1-2 (Neeham); T7294.21-24 (Nicoloau).

⁵¹ T7370.14-.16; T7377.34-46 (Photios).

⁵² Ex Z83/20.

⁵³ T7386.39-7387.3 (Yabsley).