JOHN MCGUIGAN: OPENING STATEMENT –NSW PARLIAMENT'S ICAC COMMITTEE - DECEMBER 2, 2020

I appreciate the opportunity to appear in person before the Committee.

I would like to provide my perspective on why the work of this Committee is so important not only from the perspective of those impacted by adverse ICAC findings but also to the community at large. In my view, the implementation of an exoneration protocol combined with addressing certain other matters arising out of the enactment in 2015 of the Validation Act are critical actions which need to be taken at this time.

By way of background, for a number of years I occupied the position of Global Chairman of Baker & McKenzie, the leading international law firm based in Chicago. During this period, I was able to observe, at first hand, the structure of the constitutional, legislative and judicial systems in a number of countries where principles such as the rule of law, the separation of powers, the rules of evidence and respect for individual property rights, did not constitute cornerstone principles in the structure of these countries. It is of course, these principles which underpin the fabric and operation of a democratic society in countries such as Australia.

It is my submission that in New South Wales during the period when former Commissioners Ipp and Latham were in charge of ICAC, these core principles which are fundamental to the operation of our democratic structure were disregarded by ICAC and, to a certain extent, by the NSW Parliament. The consequential damage to affected persons, including high profile international investors, and the community generally cannot be under-estimated. These issues need to be addressed and rectified and the work of this Committee is critical to achieving such a result.

By way of summary, the disregard of the principles outlined above impacted the Cascade Coal directors and myself in the following manner.

I. FAILURE TO ADHERE TO THE PRINICIPLES OF PROCEDURAL FAIRNESS

ICAC's operation under former Commissioner Ipp failed to do the following:

- disclose exculpatory and other relevant evidence to affected persons
- provide the opportunity to allow proper cross examination of key witnesses as to their credibility
- provide timely access to relevant documents in advance of evidence being provided
- inform key witnesses of the nature and particulars of the allegations being investigated

Fortunately, many amendments and improvements have been made to the structure and operation of ICAC following the Ipp/Latham era. However, the job, in my view, is not complete.

In summary, the adverse findings against me arose out of a totally private and normal commercial transaction which took place several years after the core transactions being investigated by ICAC. This fact has been acknowledged by four Federal Court judges in proceedings initiated by the ACCC

and also by the Crown in the Macdonald/Obeid proceedings currently being heard by the NSW Supreme Court. Ultimately, the commercial transaction did not proceed. Moreover, no public official was involved and no communications whatsoever occurred with any public official.

In 2015, as a result of the High Court decision in the Cunneen case the adverse findings against me and other Cascade Coal directors by Commissioner Ipp were determined to be beyond ICAC's powers and as a consequence the findings were a nullity. Nevertheless, because of the Validation Act which retrospectively validated ICAC's previous actions, these findings from a technical and reputational perspective still stand.

A corrupt conduct finding is a heavy burden. In fact, it is a life sentence which continues to impact my personal and business life even though the High Court has determined that there was no corrupt conduct and the adverse finding is therefore a nullity.

For ICAC to operate effectively, it necessarily needs to be vested with broad powers. Under the current structure, ICAC is not only charged with conducting the investigations but it also undertakes the inquiries and makes the determinations of corrupt conduct. In such a structure it is of the utmost importance that where ICAC fails to adhere to fundamental rules of procedural fairness, that there exists an exoneration protocol which can be accessed by parties who are adversely affected.

The other issue which it is appropriate to address is the role of public inquiries. There is no doubt that in the Ipp/Latham era (and arguably in the recent ICAC hearings involving Premier Berejiklian) ICAC used public hearings in conjunction with a skillful use of certain media outlets to denigrate witnesses and persons of interest. In short, irrespective of the merits or the legal basis, by the time the sensational reporting in certain segments of the media was complete – the damage was irretrievably done.

It is my submission that public inquiries should be the exception rather than the norm. In my view the holding of a public inquiry should not only be sanctioned unanimously by all of the ICAC Commissioners but also by a judge of the NSW Supreme Court as being in the public interest.

II. FAILURE BY ICAC TO ACT WITHIN ITS STATUTORY POWER AND THE IMPACT OF THE ICAC VALIDATION ACT 2015

It is a matter of record that the ICAC findings against Cascade Coal directors including myself were made beyond its legislative power. The High Court decision in the Cunneen case held that for private citizens to be corrupt their conduct must affect the probity of a public official. Immediately after the Cunneen decision the Crown Solicitors Office (on behalf of ICAC), and the President of the NSW Court of Appeal acknowledged that the ICAC findings against the Cascade Coal directors were beyond power, unlawful and should be overturned.

As it happens, at that time, the Cascade Coal directors were before the Supreme Court of NSW challenging the ICAC findings. On the 6 May 2015, two days before the NSW Supreme Court was scheduled to set aside the findings against the Cascade Coal directors, the NSW Government passed the Validation Act. This was the same day the President of the Court of Appeal confirmed the orders it proposed to make declaring that ICAC had no jurisdiction.

This ad hominem legislation operated retrospectively to validate the ICAC findings made beyond power and without jurisdiction. It transpired that at the same time as ICAC's legal representatives (led by Geoffrey Watson SC) were conceding to the Supreme Court that the ICAC findings were a

nullity, ICAC was aggressively lobbying the NSW Government to introduce retrospective legislation to validate ICAC's past conduct.

For reasons that are difficult to comprehend, this legislation was passed without any disclosure to the Parliament that court proceedings to set aside the ICAC findings were on foot in the Supreme Court and draft orders had been prepared and agreed.

The Cascade Coal directors through freedom of information requests have attempted, without success, to obtain information on what exactly transpired between ICAC, the then Premier Mike Baird and others in the parliamentary sphere.

In simple terms, the failure to disclose all relevant facts to Parliament at the time of the enactment of the Validation Act resulted in the NSW Parliament being misled.

The Validation Act, in my submission, should be amended. It is suggested that the committee should recommend the introduction of a Bill to amend the Validation Act to allow those private citizens (specifically the Cascade Coal directors) impacted by the Validation Act to approach the NSW Supreme Court and request an order nullifying the adverse findings made against them.

III. FAILURE TO RESPECT THE REQUIREMENT OF SEPARATION OF POWERS

ICAC has been established as an independent body to conduct, amongst other things, independent inquiries.

It is now clear that from the commencement of the Jasper Inquiry in 2012 and throughout the period of the Inquiry, substantial interaction was taking place between Commissioner Ipp, the then Premier Barry O'Farrell and other senior figures in the NSW Government.

It would seem that the decision to confiscate Cascade Coal's valuable assets and cancel its exploration licences, was made by Ipp and O'Farrell well before the conclusion of the Inquiry. In this regard, during the period of the Inquiry, Cascade Coal was pursuing, in the normal manner and at a cost of millions of dollars, the process to convert its exploration licence into a mining lease. At Commissioner Ipp's suggestion and/or direction made in the midst of the Inquiry, the Premier and senior ministers were involved in a process to deliberately "slow down/derail" the perfectly lawful process which Cascade Coal was pursuing. How can such conduct be consistent with that of an independent body conducting an independent inquiry?

IV. FAILURE TO RESPECT INDIVIDUAL PROPERTY RIGHTS

Following the ICAC Jasper Inquiry (involving Cascade Coal) and the Acacia Inquiry (involving NuCoal Resources Limited) the NSW Parliament, on 3 January 2014, passed the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014. By this legislation the valuable assets granted to Cascade Coal and NuCoal Resources were cancelled without any compensation in respect of the cancellation. NuCoal Resources was a listed company with thousands of shareholders (both Australian and overseas residents) and Cascade Coal had more than 30 shareholders (both Australian and overseas). In commenting on this legislation, Dr Peter Phelps (then a member of the NSW Legislative Council) stated to the NSW Parliament;

"what we have here appears to me to be gross maladministration by ICAC. Even more importantly, I believe we, namely the NSW Parliament, may have been misled by the then Premier (Barry O'Farrell) into introducing and passing bills that have expropriated a property right completely unjustifiably"

The second reading speech stated that the rationale for the extraordinary action of cancellation of the exploration licence was that the "relevant licences and the processes that led to them being granted are tainted by serious corruption".

From the perspective of Cascade Coal and its directors (and this is also the position in relation to NuCoal and its directors), this is not the case. ICAC found that Cascade Coal and its directors had, at all times, acted appropriately in complying with the terms of a government tender. It is a matter of record that from the perspective of Cascade Coal and its directors these transactions have been examined by a number of Supreme Court judges and four Federal Court judges and all have found the involvement by Cascade Coal and its directors to be purely commercial in nature.

While I recognise that this issue is outside the scope of the Committee's terms of reference, it highlights the blatant disregard of personal property rights by the NSW Government.

There has been ongoing pressure on the NSW Government to resolve this matter. In fact, immediately after the last NSW election, Cascade Coal was approached by senior personnel in the Premier's Office to initiate a process to provide compensation. Despite numerous discussions over the past several years, no progress has been made.

V. POLICY ISSUES AND IMPROVEMENTS

It is acknowledged that as a result of various reviews and reports with respect to the structure and operation of ICAC, a number of important changes have been made with respect to investigations and inquiries undertaken by ICAC.

It is common ground that in our complex society, where there exists significant interaction between government and business, an anti-corruption body is required. However, I can attest to the fact that the consequences of an adverse ICAC finding are both serious and damaging. ICAC has such broad powers and is the investigator, the entity which conducts the inquiry and the body which makes the determination.

There is now clear evidence that ICAC is not infallible. The reality is that the various protections all depend on the individuals who are the ICAC Commissioners. Necessary protections must be incorporated to ensure adequate safeguards and remedies. I believe that the following are of critical importance and should be implemented by the Committee;

- An exoneration protocol to be implemented to enable persons to be exonerated in circumstances where they have been impacted by an adverse finding in circumstances where ICAC has acted beyond power, has failed to operate with procedural fairness or where a person has been acquitted of the wrongdoing alleged by ICAC
- An oversight mechanism to ensure that ICAC cannot be used as a "political instrument" by the government of the day
- ICAC inquiries should, as a matter of normal procedure, be private inquiries. The long-standing damage done to reputations as a result of the "media circus" which

was orchestrated in various inquiries including the Jasper Inquiry should not be possible

- An amendment to the Validation Act to allow the admittedly small class of persons who were precluded from relying on the High Court decision in the Cunneen case to approach the Supreme Court to have the adverse findings legally declared a nullity

Respectfully submitted

John McGuigan