Submission
No 7

REPUTATIONAL IMPACT ON AN INDIVIDUAL BEING ADVERSELY NAMED IN THE ICAC'S INVESTIGATIONS

Name: Mr John McGuigan

Date Received: 14 July 2020

Partially
Confidential

Mrs Tanya Davies MP

Chair

Committee of the Independent Commission Against Corruption (ICAC)

Re: Inquiry into the Reputational impact on an individual being adversely named in the ICAC's investigations

This submission is in response to the Committee's inquiry into the reputational impact on an individual being adversely named in an ICAC investigation with particular reference to:

- whether the existing safeguards and remedies, and how they are being used, are adequate, and
- whether additional safeguards and remedies are needed, and
- whether an exoneration protocol should be developed to deal with reputational impact, and
- relevant practices in other jurisdictions, and
- any other related matters.

My name is John McGuigan and an adverse finding was made against me by ICAC in the Operation Jasper Inquiry. At the outset, I wish to acknowledge my gratitude to you and the members of your committee for your willingness to consider these important and fundamental issues.

In order that the Committee can appreciate the impact and long-term consequences of an adverse finding (particularly, where an adverse finding was made by ICAC beyond its statutory power) it is necessary that I outline the specific circumstances, arising out of the Jasper Inquiry, as they impacted on myself and the then directors of Cascade Coal Pty Ltd (Cascade Coal).

I will also address the policy issues raised by the Committee which are referenced in its Discussion Paper of 8th May 2020.

1. Personal History

   I have had a professional and business career spanning more than 50 years.
   I commenced my career at Price Warehouse and in 1973 I joined the major international law firm of Baker & McKenzie. I was a partner for more than 20 years and held leadership positions in Australia, Hong Kong, Asia and globally.
   In 1991 I was elected as the first Australian (and only the second non-American) Chairman of Baker & McKenzie and was based in Chicago. To hold such a position in the largest law firm in the world comprising, at that time, more than 600 partners, required attributes of honesty, transparency and fair dealing.
   In 1998 having returned to Australia I co-founded Hunter Bay Partners an investment and advisory firm. In this role, I have been actively involved in the development of numerous companies both listed and private. These businesses have spanned sectors as diverse as resources and energy, technology, food and beverage, medical and property.
   I have been directly responsible for the creation of thousands of jobs.

In addition to my direct business interests, I have played an active role in community organisations. For example, for 15 years I was actively involved as a director of the Victor Chang Cardiac Research Centre.
In short, my business and personal life, pre ICAC, was such that I was a respected and well-regarded member of the professional and business community.

2. My ICAC Experience

I have had an involvement in the coal mining sector (with a number of Cascade Coal directors) for more than 40 years. I was a founding shareholder and director of two companies involved in the coal industry, White Energy Company Ltd (WEC) an ASX listed company and Cascade Coal.
In 2009, Cascade Coal legitimately won a public tender, undertaken by the NSW Government, and was granted two coal exploration licences. One of these licences was over an area in the Western coal fields known as Mt Penny.
In 2012, ICAC, at the behest of the then NSW Premier Barry O'Farrell, initiated an inquiry known as Operation Jasper predominately into the creation of the Mt Penny exploration licence. It was asserted by ICAC that two senior NSW Parliamentarians, Eddie Obeid and Ian Macdonald were involved in the creation of the exploration area.
The principal focus of ICAC was related to the creation of the Mt Penny tenement and the subsequent grant of the Mt Penny exploration licence. It is important to note that Commissioner Ipp found that neither Cascade Coal nor any of its directors or shareholders were involved in any corrupt conduct in relation to the creation or the grant of the exploration licence awarded to Cascade Coal.

Nevertheless, the NSW Government subsequently cancelled the Mt Penny exploration licence (after millions of dollars had been spent) without granting any compensation to Cascade Coal or its shareholders. The factual circumstances on which Commissioner Ipp relied to support his finding of the corrupt conduct against myself and other Cascade Coal directors was unrelated to the main thrust of the Jasper Inquiry. It arose out of a takeover offer which Cascade Coal received from White Energy some two years after the grant of the exploration licence to Cascade Coal.

It is important to understand the relevant facts as they clearly demonstrate the totally indefensible approach adopted by ICAC under Commissioner Ipp and his counsel assisting, Geoffrey Watson SC, throughout the Jasper Inquiry.

The summary facts which are relevant to the corruption finding are;

- Following the grant of the exploration licence over the Mt Penny area, Cascade Coal undertook extensive exploration which proved that the Mt Penny area contained a valuable steaming coal deposit. This resource combined with the adjacent rail infrastructure resulted in the Cascade Coal directors forming the view that a viable coal mine could be developed over the Mt Penny area,
- Cascade Coal proceeded to invest in developing a mine plan and seeking the requisite approvals for the development of a thermal coal mine. This exercise combined with the exploration activity involved the expenditure of millions of dollars,

- More than three years after the creation of the Mt Penny exploration licence (which involved the allegedly corrupt conduct of Ian Macdonald and Eddie Obeid and his son, Moses Obeid) Cascade Coal received a takeover offer from White Energy based on independent valuations from highly credible organisations, Deloittes and Citibank. This proposed takeover was largely a share for share offer which simply resulted in the Cascade Coal shareholders swapping their shares in Cascade Coal for shares in White Energy. This proposed takeover was one of many issues sensationalised by ICAC and its media cohort, Kate McClymont of the Sydney Morning Herald.
- Cascade Coal and White Energy had a number of common directors and shareholders. Upon the initiation of the takeover offer, the White Energy board appointed an independent board committee and adopted a detailed protocol to manage the takeover. Those directors and shareholders involved in Cascade Coal stepped aside from the White Energy board in the handling of this matter.
- ICAC through Commissioner Ipp found that five Cascade Coal directors engaged in corrupt conduct because they failed to adequately disclose to the White Energy independent board that interests associated with the family of Eddie Obeid had once held an indirect interest in the Mt Penny exploration licence.
- At the time of the White Energy takeover offer, the Obeid family did not hold such an interest. It is important to note that the interest was granted as partial consideration for the purchase of land held by interests associated with the Obeid family. In any mining operation it is fundamental that the land needs to be acquired and access must be secured. The acquisition deal with the Obeid interests was on commercially attractive terms to Cascade Coal.
- In my case, I gave specific evidence to ICAC that I had disclosed the relevant facts associated with the Obeid family involvement in the Mt Penny exploration licence to the Chairman of the WEC independent board committee
- I provided ICAC with the specific details of the time, place and circumstances of the disclosure
- Commissioner Ipp stated in the Jasper Inquiry report that he generally believed the evidence I gave to ICAC. However, on this critical issue he simply determined that he doubted such a disclosure was made. This was despite my detailed evidence addressing the time, location and circumstances when the disclosure occurred. Commissioner Ipp did not recall the Chairman of the independent WEC Board Committee to seek his evidence on this critical aspect. Clearly, my evidence did not fit in with Commissioner Ipp's "carefully constructed theory".
- It is important to note that the proposed White Energy takeover offer was a private commercial transaction occurring more than two years after the grant of the Mt Penny exploration licence.
- This normal commercial transaction did not proceed past the due diligence phase. It is critical to note that at no point did this transaction ever involve any public official. No public official was identified nor could any potential public official be identified.
- Commissioner Ipp's theory was that the alleged non-disclosure was driven by a concern on the part of the Cascade Coal parties that the disclosure of the previous Obeid involvement "could adversely impact" on the decision of a "public official" at some future point when and if Cascade Coal made an application for a mining lease.

- The overreach of ICAC through Commissioner Ipp in making the finding against Cascade Coal directors, including myself, was clearly demonstrated in April 2015 in the Cunneen case when the High Court held that the expression "adversely affect" in section 8(2) of the ICAC requires conduct by a private citizen which adversely affects or could adversely affect the probity of a public official.
- The High Court held that ICAC's jurisdiction should always have been confined to circumstances where the conduct of a private citizen third party would give or could give rise to wrong doing or impropriety on the part of a public official.
- The Cunneen decision determined that ICAC's findings against the Cascade Coal directors including myself was beyond power and was a nullity. The conduct which ICAC found constituted corrupt conduct was not and could not, ever have constituted "corrupt conduct" under the terms of the ICAC Act.
- Following this decision, ICAC through the NSW Crown Solicitors Office (see Annexure A) and the President of the Court of Appeal of the NSW Supreme Court (see Annexure B) all confirmed that as a consequence of the High Court decision in Cunneen, the ICAC findings against myself and the other directors of Cascade Coal were a nullity on the basis that ICAC has no jurisdiction to make such a corruption finding having regard to the relevant facts.
- Despite the fact that relevant orders declaring the ICAC findings a nullity were agreed by the Supreme Court unfortunately the orders setting aside ICAC's corruption findings were never made.
- The failure to set aside the ICAC findings against myself and the other Cascade Coal directors was due to the fact that the NSW Parliament rushed the passage of the Validation Act through Parliament, literally in the middle of the night, which validated ICAC's unlawful past actions. As a result of the passage of the Validation Act, ICAC withdrew its consent and the unlawful actions and findings of ICAC were retrospectively validated.
- Subsequent events make it clear that ICAC was active in lobbying the NSW Government and failed to disclose relevant information to the NSW Government.
- I have set the relevant facts out in some detail as they demonstrate the absolute and total overreach of ICAC, in making the corruption findings against myself and the other Cascade Coal directors involving a disregard by ICAC of clear and specific evidence and a failure to observe the statutory limitations on its powers. In addition, its activity in persuading Parliament to retrospectively validate ICAC's illegal conduct would seem to have involved a failure to disclose to the Parliament, relevant facts (see Annexure C – statement by Dr Peter Phelps, former Member of the Legislative Council to Parliament). These actions deprived myself and the other Cascade Coal directors from the ability to rely on the law as determined by the High Court.
- This manipulation of the legal system and the law, as determined by the High Court, demonstrates an unbelievable disregard of the fundamental principles of the legal system and the parliamentary process of New South Wales. It is totally at odds with the principles enshrined in the "rule of law" which represent the cornerstone of our judicial system. This manipulation, was perpetrated by ICAC, the body established to address corruption.

- The above facts demonstrate the fundamental importance of there being implemented an exoneration protocol to ensure that where ICAC has perpetrated an obvious injustice that its findings can be overturned.
- It should be noted that subsequent to the ICAC findings there has been a full and complete judicial investigation into Cascade Coal's dealings and those of its directors. On each occasion the conduct of Cascade Coal and its directors has been found to be simply commercial in nature and no wrongdoing has been found.
- The burden of carrying the "corrupt" label for the past seven years is extremely heavy and has resulted in massive reputational and financial damage. This is ongoing.
- Belatedly, ICAC advised me and the other Cascade directors on the 26th March 2020 that the Director of Public Prosecutions would not take any action on the matters referred to the DPP by ICAC arising out of the Jasper inquiry.

3. The ICAC Abuse of Power and Process

Quite apart from the impact of adverse findings in relation to specific individuals there are over-arching policy reasons as to why an effective exoneration protocol is essential.

Subsequent to the Jasper Inquiry many sensible and effective actions have been implemented by the New South Wales Parliament to reform and restructure ICAC in an attempt to ensure that the abuse and overreach perpetrated under the Ipp regime, cannot be repeated.

However, the notable omission is the fact that an exoneration protocol has not been implemented. Given the broad powers that are necessarily vested in a body such as ICAC, it is critical that fundamental protections (including an exoneration protocol) are implemented to ensure that if the rights of individuals are abused by ICAC, a rectification process is available.

It is important that your committee understands how ICAC, under former Commissioner Ipp operated;

(i) ICAC operated and was allowed (and arguably encouraged) to operate a "parallel system of justice" not constrained by any of the legal protections which are fundamental to the fair treatment afforded by the judicial system or indeed by the provisions of administrative law as those principles regulate the conduct of inquiries by bodies such as ICAC.

(ii) In the Ipp era, ICAC cynically used innuendo and assertion and certain media outlets to irretrievably damage reputations. The damage to reputations resulting from an adverse ICAC finding is equivalent in many respects to a criminal conviction. The difference being that in criminal proceedings the accused has the benefit and protection of the fundamental legal principles enshrined in our judicial system.

(iii) The NSW Government at ICAC's urging, enacted the Validation Act which retrospectively validated ICAC's unlawful actions totally disregarding the rule of law and the doctrine of separation of powers

In summary, ICAC, under former Commissioner Ipp was characterised by conduct which should be neither permitted or tolerated whereby witnesses were prevented from presenting relevant facts and their counsel was not able to undertake proper examination. Witnesses were requested to present a positive case without knowing the case which was being asserted against them. Evidence which did not suit the ICAC construct was either ignored or suppressed. Fortunately, as a consequence of the abuse of process undertaken by ICAC during the Ipp era, the NSW Government has made substantial changes to the structure and operation of ICAC.

These changes unfortunately, do not benefit those who have had adverse findings made against them as a result of ICAC's abuse of power and process.

For the sake of parties adversely impacted from the past ICAC findings such as myself and the Cascade Coal directors and also to ensure appropriate protections for the future, it is of fundamental importance that an exoneration protocol be implemented by the New South Wales government.

4. Issues Arising Out of The Jasper Inquiry Which Still Require Remedy

The NSW Supreme Court and the Federal Court have undertaken a complete investigation into Cascade's business dealings and those of its shareholders and directors. The courts have found the conduct and actions to be completely legal in all respects and simply commercial in nature. Nevertheless, the corrupt conduct findings stand and as outlined the damage from both a reputational and financial perspective continue. In my case, quite apart from the ongoing reputational damage, my ability to conduct significant business transactions is severely impeded in Australia and internationally.

In April and May 2015, the NSW Crown Solicitors (letter of 23 April 2015 Annexure A), confirmed that ICAC determined, following the Cunneen High Court decision, that the findings made against myself and the other Cascade directors were beyond power and that the findings should be dismissed. On 6th May 2015 the Hon. Justice M Beazley, the President of the NSW Court of Appeal (annexure B), confirmed to myself and the other Cascade directors that the NSW Supreme Court would declare that ICAC had no jurisdiction to determine that the Cascade directors had engaged in corrupt conduct and its findings were therefore a nullity.

Despite these determinations, the NSW Government just days before the Supreme Court had been convened to make the above declaration, introduced the Validation Act which retrospectively validated ICAC's illegal conduct. As a consequence, the corrupt findings still stand.

In January 2013, the NSW Government enacted the Mining Amendment Act (Operations Jasper and Acacia) which cancelled the Mt Penny Exploration Licence thereby expropriating assets acquired in reliance on government process. Moreover, factual circumstances made it clear that the only possible corruption was within the Government and was committed long before Cascade Coal had even submitted its tender in the NSW Government process.

As a consequence of the above, the following actions should be undertaken by the NSW Government;

- To introduce an exoneration protocol which will enable myself and the other Cascade Coal directors (existing and former) to make application to set aside the corrupt conduct findings made by Commissioner Ipp
- To amend the Validation Act to allow myself and the other Cascade Coal directors to rely on the High Court decision in the Cunneen case and seek a declaration setting aside the corrupt conduct findings. The amendment required is very straightforward. It should simply provide that those private citizens who have been subject to a finding of corrupt conduct in an ICAC report prior to the enactment of the ICAC (Validation) Act and have not or could not have adversely affected the probity of the exercise of official functions by public officials, are able to have such findings of corrupt conduct declared a nullity.
- To put in place a process to review the circumstances surrounding the cancellation of the Mt Penny exploration licence with the objective of granting compensation to Cascade Coal arising out of the NSW Government decision to cancel the Mt Penny licence without compensation.

5. 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.

Important changes have been made in relation to procedural fairness and the use of and disclosure of exculpatory evidence. Unfortunately, during the Ipp era little, if any regard was given to these important matters.

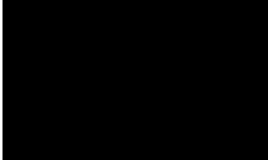
It is common ground that in our complex society, where there exists significant interaction between government and business, an anti-corruption body is required. Necessarily in order to be effective, such a body requires extensive powers of investigation and inquiry. In determining the basic protections which should be incorporated to ensure adequate safeguards and remedies I believe that the following are of critical importance;

- 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.
- The ICAC legislation should embody the requirements of procedural fairness including the right of proper representation and the disclosure of exculpatory evidence
- The ICAC inquiries should 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 particularly by the Counsel Assisting, should not be possible

As stated at the outset, I am grateful for the opportunity afforded by your Committee to provide this submission. If it would assist, I would be pleased to meet with you or your committee members to address in more detail any of the matters covered in this document.

Yours sincerely

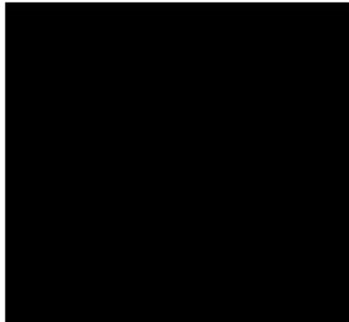


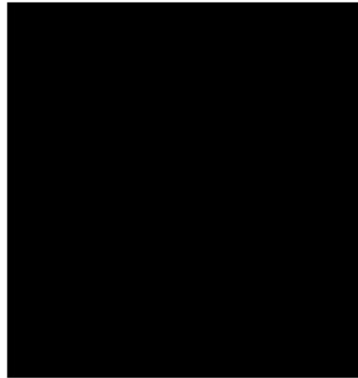
John McGuigan

ANNEXURE A

Crown Solicitor's Office

23 April 2015





By email

Dear all

Duncan v Independent Commission Against Corruption
McGuigan and Poole v Independent Commission Against Corruption
Cascade Coal and Ors v Independent Commission Against Corruption
Atkinson v Independent Commission Against Corruption
Independent Commission Against Corruption v Kinghorn

I refer to the High Court judgment in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 ("*Cunneen*") and to the correspondence that has been sent by the parties since the delivery of judgment regarding the implications of that judgment for the above proceedings.

The purpose of this letter is to set out the Commission's position on the following two issues:

- the effect of *Cunneen* on the five proceedings listed above; and
- the appropriate process for now resolving or otherwise dealing with each of the five proceedings.

Beyond addressing these matters, I do not propose to respond in detail to the various criticisms of the Commission that have been made in recent correspondence from the parties. I observe, however, that it has been necessary for the Commission to give careful consideration to the substantive and procedural implications of *Cunneen*, which differ as

between the different proceedings, as explained in more detail below. The Commission does not accept the suggestion that it has delayed unduly in responding to *Cunneen*, let alone the suggestion that it has done so for an improper purpose.

Effect of *Cunneen*

In *Cunneen*, a majority of the High Court concluded that, in order for conduct to "adversely affect" the exercise of official functions within the meaning of s. 8(2) of the *Independent Commission Against Corruption Act 1988* ("*ICAC Act*"), it must adversely affect the "probity" of the exercise of those official functions: at [3]. On the majority's construction, the "probity" of the exercise of those official functions is only adversely affected where the exercise of official functions constitutes or involves conduct falling within s. 8(1)(b) (the dishonest or partial exercise of functions) or s. 8(1)(c) (a breach of public trust) or s. 8(1)(d) (the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person): see, for example, *Cunneen* at [42], [46], [55], [62].

As announced publicly on 20 April 2015, the Commission has made a submission to the NSW Government to consider, as a matter of priority, amending s. 8(2) with retrospective effect. Of course, the law as declared by the High Court in *Cunneen* stands unless and until it is amended by appropriate legislation.

Based on the law as it currently stands, the Commission's position is that the following findings made by it in its report Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others, dated July 2013, were beyond power:

- that Mr Travers Duncan engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject of the Duncan proceedings);
- that Mr John Kinghorn engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject the Kinghorn proceedings);
- that Mr John McGuigan engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject of the McGuigan proceedings);
- that Mr Richard Poole engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is also the subject of the McGuigan proceedings); and
- that Mr John Atkinson engaged in corrupt conduct within the meaning of the *ICAC Act* (which finding is the subject of the Atkinson proceedings).

Accordingly, based on the law as it currently stands, the Commission would consent to orders:

- granting leave to appeal in the Duncan, McGuigan and Atkinson proceedings, allowing the appeals, setting aside the primary judge's orders in those proceedings and, in place of those orders, declaring the corrupt conduct findings against Messrs Duncan, McGuigan, Poole and Atkinson invalid. The issue of costs should be dealt with separately, as addressed below;
- dismissing the summons seeking leave to appeal in the Kinghorn proceedings, with costs.

The Cascade Coal proceedings are in a different category. The Commission's position is that *Cunneen* has no relevant impact on the validity of the recommendations, and any alleged findings, made in its report Operations Jasper and Acacia – addressing outstanding questions, dated December 2013 (which are the subject of the Cascade Coal proceedings). The Commission continues to oppose the orders sought in those proceedings.

Next steps

Duncan, McGuigan and Atkinson proceedings

The fact that the parties consent to orders in the above terms is not, on its own, sufficient for the Court of Appeal to make those orders. The Court of Appeal must be satisfied that it is appropriate to allow the appeals (which requires it to be satisfied that there was error on the part of the primary judge: see *Young v King* [2013] NSWCA 364). The Court of Appeal must also be satisfied that it is appropriate to issue declaratory relief: see *KJD York Management Services Pty Ltd v City of Sydney Council* [2006] NSWLEC 218 at [19]-[22]. While those should prove to be relatively straightforward matters, it is clear that the Court of Appeal must, in addition to receiving the parties' proposed short minutes of order, receive some evidence and short submissions on the effect of *Cunneen* on the relevant findings against Messrs Duncan, McGuigan, Poole and Atkinson.

There is also a question as to whether orders in the above terms can be made by a single Judge of Appeal or whether they must be made by three judges. In the Commission's view, the orders must be made by three judges (even if they are made with the consent of the parties). In particular, the granting of declaratory relief does not fall within the power conferred on a single Judge of Appeal by s. 46(1)(a) of the *Supreme Court Act 1970*. That is because the granting of declaratory relief involves an exercise in evaluation and discretion on the part of the Court: see *Shafron v ASIC* [2012] NSWCA 255.

Accordingly, the Commission's position is that the Duncan, McGuigan and Atkinson proceedings cannot be finally disposed of at the next directions hearing on 4 May 2015, or at an earlier time, unless there are three judges available to deal with the matter. Given it is certain that there are three judges available on the current hearing dates of 15-17 June 2015 (which it will be necessary to preserve for the Cascade Coal proceedings, as discussed below), one option is for the matter to be dealt with at the commencement of that hearing with the opportunity to file short written submissions beforehand on the appropriateness of the orders sought. However, if the Court is able to convene three judges to deal with the matter at an earlier time, the Commission would not oppose that course provided, again, that there is the opportunity to file short written submissions beforehand.

In respect of costs, the Commission suggests that the following costs orders be made:

1. In respect of the costs of the proceedings before McDougall J, each party to bear their own costs.

2. In respect of the appeal proceedings, each party to bear their own costs up to the date on which the applicant in each proceeding filed its amended summons relying on the *Cunneen* decision and/or the reasoning in the *Cunneen* decision; the Commission to pay each applicant's costs from that date as agreed or assessed.

The Commission suggests that any dispute regarding what costs orders are most appropriate can be dealt with on the papers.

Kinghorn proceedings

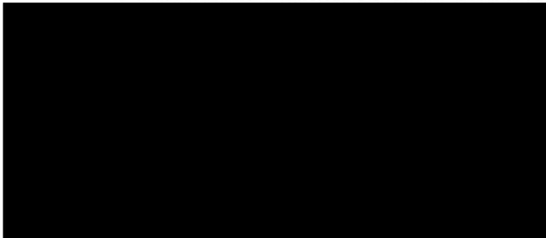
The position differs in relation to the Kinghorn proceedings. As noted above, based on the law as it currently stands, the Commission would consent to orders dismissing the summons seeking leave to appeal with costs, as per the proposed short minutes forwarded to me on 16 April 2015. A single Judge of Appeal has the power to make such an order under s. 46(1)(c) of the *Supreme Court Act 1970*. Such an order could be made by a Judge of Appeal at the next directions hearing on 4 May 2015.

Cascade Coal proceedings

As noted above, the Commission's view is that *Cunneen* does not affect the validity of the recommendations and alleged findings that are the subject of the Cascade Coal proceedings. On that basis, and on the assumption that the applicants in that matter wish to maintain the appeal, it will be necessary to preserve at least some of the hearing dates of 15-17 June 2015 for the purpose of dealing with those proceedings.

Directions on 4 May 2015

The President of the Court of Appeal has listed all five proceedings on 4 May 2015 "to ascertain the position of all parties to the various appeals". At that directions hearing the Commission intends to explain its position, as outlined in this letter, on the effect of *Cunneen* and how the five proceedings should be dealt with.



ANNEXURE B

6 May 2015

Dear Legal Representatives,

Re:
2014/00239426 - Travers William Duncan v Independent Commission Against Corruption
2014/00249038 - John Vern McGuigan v Independent Commission Against Corruption
2014/00319803 - John Charles Atkinson v Independent Commission Against Corruption

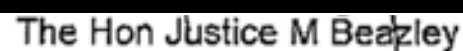
The Court constituted in this matter is the Chief Justice, the President and Justice Basten.
The Court has had the opportunity of considering the submissions of the parties and the draft short minutes of order provided by the parties.
Subject to any further submissions the parties may wish to make, the Court is presently minded to make a declaration in the following form in each matter:

> Set aside the orders of the Supreme Court of New South Wales in proceedings 2013/325031 dated 29 July 2014 insofar as they concern [insert name] and, in place thereof, declare that the Independent Commission against Corruption had no jurisdiction to determine, as recorded in the report entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others* ' dated July 2013 that [insert name] had engaged in corrupt conduct within the meaning of s 8(2) of the *Independent Commission Against Corruption Act 1988* (NSW).

As this form of declaration is different from the orders proposed by the parties in each matter, the Court considers it appropriate that there be an opportunity for the parties to address the proposed form of declaration indicated above. The parties may also wish to address the court on the timing of the making of the final orders.

Accordingly, the matter is to be listed at 9.15 am on Friday 8 May 2015. It is anticipated that the matter will not extend beyond one hour. It will not be necessary for counsel to robe.

Yours Faithfully,



The Hon Justice M Beazley

Cc The Hon T.F. Bathurst, Chief Justice of New South Wales, The Hon Justice J Basten

The Hon Justice M J Beazley AO
President, Court of Appeal, Supreme Court of New South Wales
Telphone +612 9230 8519 Fax +612 9230 8135
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ANNEXURE C

It seems clear that ICAC and the Executive failed to inform Parliament about a number of crucial matters resulting in Parliament being misled at the time of its enactment of the Mining Amendment Cancellation Act, the Validation Act and related amendments to the Mining Act. In particular, it has now become apparent that in passing the Validation Act, Parliamentarians were not made aware that ICAC had acted unlawfully in the context of the Cascade directors and had already consented to their corruption findings being overturned by the NSW Supreme Court.

This very important omission was publicly confirmed by Dr Peter Phelps, former Member of the Legislative Council, who advised Parliament that he had grave concerns that the NSW Parliament was misled in regard to the enactment of the Mining Amendment Cancellation Act, the Validation Act and related amendments to the Mining Act on the basis of misinformation, deliberate deception and even possible gross maladministration by the ICAC. He said:

> *"What we have here appears to me to be gross maladministration by ICAC. Even more importantly, I believe we may have been misled by the then Premier into introducing and passing three bills that have expropriated a property right completely unjustifiably."*

Dr Phelp's views on the wrongful expropriation of valuable property rights is one thing, but the enactment of the retrospective Validation Act, designed to estop any legal challenge of my right to have wrongful corruption findings overturned, is a shocking manipulation of this State's legal processes.