

Submission
No 1

**INQUIRY INTO MINING AMENDMENT
(COMPENSATION FOR CANCELLATION OF
EXPLORATION LICENCE) BILL 2019**

Organisation: Cascade Coal
Date Received: 27 June 2019

Partially
Confidential



The Hon Niall Blair
Chairman
Law and Justice Committee
Parliament House
6 Macquarie Street
Sydney NSW 2000

27 June 2019

Dear The Hon Niall Blair

Submission to Law and Justice Committee – Cascade Coal Pty Ltd

Attached is a submission lodged by Cascade Coal Pty Ltd (Cascade Coal) requesting the Law and Justice Committee to recommend to the Parliament that the exploration licences over certain land at Mount Penny (EL 7406) and Glendon Brook (EL 7405) be added to the draft Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019 (the Bill) introduced by the Reverend the Hon FJ Nile MLC so that fair compensation for the cancellation of the Mount Penny exploration licence and the Glendon Brook exploration licence and the consequences thereof can be paid to persons financially affected by the cancellations. In this regard, the original Independent Commission Against Corruption (ICAC) recommendation dealt with the assets of both NuCoal Resources Limited (NuCoal) and Cascade Coal namely the exploration licences granted for Doyles Creek, Mount Penny and Glendon Brook. The Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 confiscated the assets of both Cascade Coal and NuCoal. In these circumstances, it is both logical and appropriate that persons financially affected by the cancellation of the exploration licences over land at Mount Penny and Glendon Brook should be entitled to compensation. The reasons are set out in the attached submission.

In addition, it is submitted that the Committee should recommend the introduction of a bill amending the Validation Act to allow certain private citizens against whom findings were made in the Operation Jasper Inquiry to rely on the High Court decision in the Cuneen case and seek a declaration from the NSW Supreme Court that the ICAC findings made against them were made beyond power and are a nullity.

If it would be of assistance I am available to meet with the Committee in relation to the attached submission at any time during the month of July.

Submission to Law and Justice Committee
Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019
Operation Jasper – Cascade Coal Pty Ltd

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4. Subsequent Action To Restructure ICAC
5. Recommendation in Relation to Amendment to the Validation Act

Annexures

- A. Letter, Cascade Coal to all NSW Members of Parliament, 15 March 2013
- B. Letter, Cascade Coal to Director-General, NSW Trade and Investment, 15 January 2014
- C. Letter, Cascade Coal to all NSW Members of Parliament, 15 January 2014
- D. Letter, Cascade Coal to all NSW Members of Parliament, 29 January 2014
- E. Letter, Nichigas to Prime Minister, 8 April 2014
- F. Email, Crown Solicitor's Office to various legal representatives, 23 April 2015
- G. Letter, John McGuigan to NSW Premier, 27 April 2015
- H. Letter, NSW Court of Appeal to various legal representatives, 6 May 2015
- I. Letter, Nichigas to NSW Premier, 10 June 2015
- J. Letter, Cascade Coal to NSW Premier, 5 March 2018
- K. Letter, Mr Bob Barraket to NSW Premier 28 June 2018 on behalf of Cascade Coal investor syndicate
- L. Draft Bill, Independent Commission Against Corruption Amendment (Nullification of Findings) Bill 2019

Submission to Law and Justice Committee

Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019

Operation Jasper – Cascade Coal Pty Ltd

I. Compensation Should be Available to Cascade Coal

1. Cascade Coal Fully Complied with all Government Processes

- Cascade Coal responded in good faith to a tender process determined by the responsible Government Department and complied with all relevant requirements of that process. As with any entity dealing with the Government, Cascade Coal expected to be able to rely on the Government process and to do so on the basis that the Government and its senior public servants acted appropriately at all times.
- The uncontested evidence given during the Operation Jasper ICAC public hearings was that Cascade Coal was selected from several applicants by the Department of Primary Industries exercising powers properly delegated to them for that purpose.
- There was no evidence that the former NSW Government Minister Ian Macdonald influenced the decision to grant the exploration licence to Cascade Coal. Indeed, the grant of the exploration licence to Cascade Coal was the result of a recommendation by an independent evaluation committee established by the Department of Primary Industries whose determination was overseen by a probity auditor with extensive experience in the award of licences of this nature. The exploration licences were in fact granted by Mr Richard Sheldrake, the Director General of the NSW Department of Primary Industries.
- The uncontested evidence of the probity auditor was that Cascade Coal received absolutely no favourable treatment in its application for the exploration licence. In fact, the original preferred bidder was a subsidiary of a small listed company called Monaro Mining NL. Monaro Mining NL aborted the project when it became clear it had to pay funds upfront which they did not have. Following the withdrawal of Monaro Mining NL, the exploration licence was awarded to Cascade Coal which was ranked second in line by the independent committee.
- The evidence has also established that, at the time, Cascade Coal applied in the ordinary way for the exploration licence by participation in the Expression of Interest process, Cascade Coal did not know that members of the Obeid family had any interest in the land over which the exploration licence operated.

- There was uncontested evidence on behalf of Cascade Coal that no confidential information was used in the preparation of the expression of interest submitted to the department.
- In summary, Cascade Coal responded in good faith to a tender process initiated and supervised by the responsible Government Department and complied with all requirements of that process. The process was subsequently the subject of one internal departmental review and two external reviews. All reviews confirmed that the process had been properly followed.

2. Relevant ICAC Findings

Arising out of the Operation Jasper, ICAC issued three separate reports.

The Main Report issued on 31 July 2013 concerned a number of matters including the circumstances surrounding a decision made in 2009 by Mr Richard Sheldrake, the Director General of the NSW Department of Primary Industries to grant EL 7406 over the Mt Penny Coal Pty Ltd (MPC) tenement, the circumstances relating to the tendering process and the way in which the tender bids were assessed.

ICAC found that Hon Ian Macdonald MLC and the Hon Edward Obeid MLC acted contrary to their public duty as ministers of the Crown and engaged in corrupt conduct in relation to the creation of the MPC Tenement. In addition, Moses Obeid was found to have engaged in corrupt conduct in relation to this aspect of the creation of the tenement. This alleged activity occurred prior to any involvement of Cascade Coal in the Expression of Interest Process.

The Main Report explicitly found that the grant of the exploration licence to Cascade Coal's subsidiaries was completely in accordance with the approved Government procedure. In this regard, Cascade Coal and its directors and officers relied on the NSW Government approved processes in place at the relevant time.

In the Main Report there are no findings against Cascade Coal or Mount Penny Coal Pty Ltd or Glendon Brook Coal Pty Ltd (GBC).

ICAC did make adverse findings against the directors of Cascade Coal relating to alleged non disclosures in a private commercial transaction which took place more than twelve months after the award of EL7406. As a consequence of the High Court decision in the Cunneen case (see below under section II) these ICAC findings were legally beyond the power of ICAC and were therefore a nullity. Subsequently in 2015 the NSW Government passed the Independent Commission Against Corruption (Validation) Act 2015 which effectively overruled the Cunneen decision.

These matters were completely unrelated to the creation of EL 7406, the grant of EL 7406 or the award of EL 7406 to MPC, or the subsequent development of the exploration licence.

Cascade Coal, MPC and its directors at all times complied with all obligations including disclosure obligations in relation to the Expression of Interest ('EOI') process, with all subsequent disclosure obligations and with all conditions of EL 7406.

In the second report issued on 30 October 2013 ICAC addressed issues in relation to the Governments' policy and regulatory environment. Although ICAC identified certain shortcomings in the Departmental systems created and operated by the Government any such shortcomings should not result in the assets of Cascade Coal and MPC being adversely impacted.

The third report issued in December 2013 was titled 'Operation Jasper and Acacia – Addressing Outstanding Questions' (the Mining Report). The Mining Report's recommendation was to expunge or cancel the MPC and GBC Exploration Licences. The Mining Report contained assertions which were at odds with ICAC's detailed findings in the Main Report and were without evidentiary support. In summary the Main Report findings are:

- That the creation and grant of the Exploration Licences for the MPC and GBC tenements to Cascade Coal are not, in any way, tainted by any adverse findings against the Cascade Coal Group or its directors;
- That the relevant exploration licences were granted by the Department in accordance with the procedures and processes laid down by the Government.
- That Cascade Coal, its subsidiaries and directors relied on and complied in all respects with the procedures and processes laid down by the Government.

Despite these findings in the Main Report the recommendation of ICAC in the Mining Report was that the exploration licences over the MPC and GBC tenements should be cancelled by legislative enactment. However, the ICAC recommendation did provide that any such legislation could be accompanied by a power to compensate affected persons.

3. Confiscation of Property Rights – The Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014

On 30th January 2014 the Premier of NSW introduced legislation to a special sitting of the NSW Parliament to confiscate the valuable property of Cascade Coal being the exploration licences issued to its subsidiaries MPC and GBC. This legislation specifically provided that no compensation would be paid.

Essentially this legislation targeted two companies, Cascade Coal and NuCoal Resources NL. The special legislation provided amongst other things for the following:

- Cancellation of the relevant exploration licences and expropriation of relevant intellectual property and

- Rejected the payment of compensation to the investors in these companies.

As detailed above, neither Cascade Coal or its subsidiaries or the investors in Cascade Coal were found to have done anything other than comply with the formal tender process conducted by the NSW Government.

In these circumstances it is submitted that Cascade Coal and its wholly owned subsidiaries MPC and GBC should be entitled to fair compensation for the cancellation of the exploration licences and the consequences that flowed from the cancellation as a result of the above legislation.

The legislation highlighted the issue of sovereign risk arising out of the cancellation of the licences without compensation. In this regard, attached as annexures (E) and (I) are two letters written by Nippon Gas Co Ltd a Japanese investor in Cascade Coal. The first letter is dated April 8 2015 and is addressed to the then Prime Minister Tony Abbott. The second letter is dated June 10 2015 and is addressed to the then Premier Mike Baird.

The actions of the NSW Government in confiscating the assets of Cascade Coal are stated to be based on the ICAC findings in Operation Jasper. With respect to the ICAC findings the following matters should be noted:

- a) Neither Cascade Coal or its wholly owned subsidiaries MPC and GBC were investigated by ICAC and there were no findings against any of the companies (in fact GBC was not even mentioned in the Main Report). At all times, Cascade Coal, MPC and GBC complied with all relevant disclosure obligations and conditions of the exploration licence.
- b) the Main Report contains no evidence or findings that either Cascade Coal or MPC or the directors of those companies had any knowledge of the alleged corruption on the part of the former Ministers Obeid and Macdonald in the initial creation of the MPC tenement.
- c) the creation and grant of the exploration licence over the MPC tenement is not tainted by any adverse findings against Cascade Coal or its directors and
- d) the Main Report finds that the MPC exploration licence was granted by the NSW Government in accordance with procedures and processes laid down by the government and that Cascade Coal and its subsidiaries complied with these in all respects.

4. Deceptive Behaviour by Obeid Interests

It is both appropriate and important to outline the facts surrounding the involvement of Obeid interests in Cascade Coal. Much has been written about the involvement of the Obeid interests but at its core the simple reason the Obeid interests became involved was due entirely to the fact that Obeid interests owned or controlled the land upon which the exploration licence was created.

From a Cascade Coal perspective it had no option other than to deal with the parties who controlled the relevant land if Cascade Coal wished to undertake its exploration and mining activities. However, it is clear from admissions made by Obeid representatives that they acted in a deceptive and misleading manner in their dealings with Cascade Coal.

The relevant facts are:

- Moses Obeid and Gardner Brook approached Cascade Coal. The reason advanced by Obeid and Brook was that Obeid controlled the land relevant to the Mt Penny tenements and that Brook had an interest in Monaro Mining, one of the

tenderers. They advised that Monaro Mining had formally resolved to withdraw from the tender process for the reason that it was unable to satisfy the financial conditions contained in its expression of interest. In these circumstances they indicated they wished to deal with Cascade Coal.

- Cascade Coal ultimately entered into two agreements with interests associated with the Obeids – one being a commitment to enter into a 'put and call' option over the relevant land whereby Cascade Coal agreed to pay a multiple of the agricultural value in the event that Cascade Coal was ultimately awarded a mining lease (after compliance with all necessary requirements) and made a decision to develop a mine. In short, the costs associated with land acquisition were deferred until a decision was made by Cascade Coal to undertake a mining operation at MPC.
- Cascade Coal granted a right to an entity (which ultimately was discovered to be held beneficially by Obeid interests) to acquire a 25% interest in a joint venture to undertake the exploration over the MPC area subject to those interests meeting their proportionate share of the costs over an agreed threshold.
- The sole reason for entering into the above arrangements was to secure rights over the relevant land and to defer payment for such rights until a decision had been taken in Cascade Coal's sole discretion to undertake, the development of a mine. The fundamental principle of any mining operation is that unless the relevant land access and/or ownership rights are secured then do not even begin the project.
- In June 2009 Cascade Coal was advised by the Department that it was successful in its expression of interest for the MPC exploration licence and the GBC exploration licence.
- It should be noted that initially the tender was awarded to Monaro Mining but the company withdrew when it could not satisfy the financial conditions attached to its tender. Monaro Mining, a company with no experience in coal mining and no apparent financial capacity to meet the conditions of its tenders (aggregating some \$50 million) was initially successful in 5 out of the 6 tenders it lodged.
- There was no legal impediment to Cascade Coal entering into a joint venture arrangement with the landowners.
- Between October 2009 and November 2010 Cascade Coal undertook extensive exploration and other relevant steps in relation to the MPC Project
- In September 2010 the Board and shareholders of Cascade Coal determined that for commercial reasons the "Obeid interests" in the MPC exploration venture should be either terminated or acquired. Those commercial reasons were that the increasing adverse publicity about the Obeids was going to make it difficult to raise the capital to develop the mine if they continued to have an involvement.

- In October 2010 the Obeid interest in the MPC joint venture was terminated. It is confirmed that the Obeid interests do not have any interest in Cascade Coal.

5. Entitlement of Cascade Coal To Compensation

As stated above on 30th January 2014 the NSW Parliament passed the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 No 1. By this legislation the valuable assets granted to two companies Cascade Coal and NuCoal Resources NL were cancelled without any compensation in respect of the cancellation.

For the reasons detailed above just as NuCoal should be compensated so too should Cascade Coal. As Dr. Peter Phelps has stated to the NSW Parliament in relation to the above legislation;

'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 into introducing and passing bills that have expropriated a property right completely unjustifiably.'

For the reasons detailed above there can be no justification for addressing the legitimate concerns of NuCoal to receive fair compensation but not the concerns and justification of Cascade Coal.

The second reading speech in both the Legislative Council (the Hon. Duncan Gay) and the Legislative Assembly (Mr Barry O'Farrell) stated that the rationale for the extraordinary action of cancelling the exploration licences was that the "relevant licences and the processes that led to them being granted are tainted by serious corruption".

In the case of the exploration licences held by the Cascade Coal subsidiaries there were no such findings that in any way impacted Cascade Coal, MPC or GBC or the directors and shareholders of those companies.

6. Recommendation in relation to Amendment to the Draft Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019 (the Bill)

That the Law and Justice Committee should recommend to the Parliament that the exploration licences over certain land at Mount Penny and Glendon Brook be added to the Bill so that fair compensation should be available to persons financially affected by the cancellation of the Mount Penny exploration licence (EL 7406) and the Glendon Brook exploration licence (EL 7405) and the consequences thereof. Finally, it should be noted that, the original ICAC recommendation dealt with the assets of both NuCoal and Cascade Coal namely the exploration licences granted for Doyles Creek, Mount Penny and Glendon Brook. The Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 confiscated the assets of both Cascade Coal and

NuCoal. In these circumstances, it is both logical and appropriate that persons financially affected by the cancellation of the exploration licences over land at Mount Penny and Glendon Brook should be entitled to compensation. The reasons are set out above.

II. Amendment to the Independent Commission Against Corruption Amendment (Validation) Act 2015 (the Validation Act)

For the reasons detailed below the Committee should also recommend the introduction of a Bill amending the Validation Act to allow certain private citizens against whom findings were made in Operation Jasper to rely on the High Court decision in the Cunneen case and thereby seek a Supreme Court declaration that the ICAC findings were made beyond power and were a nullity.

1. High Court Declares ICAC Acted Beyond Power and Unlawfully

- Subsequent to the issuing of the various ICAC reports including in the Operation Jasper Inquiry, numerous challenges were made to the NSW Supreme Court and the High Court with respect to the scope and powers of ICAC particularly with respect to ICAC's powers in relation to private citizens as opposed to public officials.
- This culminated in the decision of the High Court in *ICAC v Cunneen* (2015) (**Cunneen**) which held that, insofar as private citizens are concerned, in order for the conduct of a private citizen to constitute corrupt conduct it must affect the probity of the exercise of official functions by a public official.
- It is a matter of record that in relation to the ICAC findings against the Cascade Coal directors that not only did the conduct of those persons not affect the probity of any public official but the Cascade Coal directors did not have any contact whatsoever with a public official.
- As a consequence of the Cunneen decision, it was agreed by the Crown Solicitors Office (on behalf of ICAC) and the NSW Solicitor General that the ICAC findings against the Cascade Coal directors were unlawful and exceeded ICAC's statutory powers. In the case of these individuals, it was formally agreed that ICAC had unlawfully misapprehended and misapplied the legal test for what constituted corrupt conduct.

2. ICAC Admits It Acted Beyond Power and Agrees to Overturn Corruption Findings Against Cascade Coal Directors

- Immediately after the High Court decision in *Cunneen*, ICAC, the Crown Solicitors Office and the NSW Solicitor General formally acknowledged that the ICAC findings against the Cascade Coal directors were beyond power, unlawful and should be overturned. Annexure (F)

- As a consequence, consent orders were agreed between the Crown Solicitors Office (on behalf of ICAC) and the Cascade Coal directors to overturn the ICAC findings against the Cascade Coal directors. The NSW Supreme Court accepted this position and it was agreed that the Court would meet on 8 May 2015 to formally overturn the corruption findings. Annexure (H)

3. Retrospective Legislation To Validate ICAC's Actions

- On 6 May 2015, two days before the NSW Supreme Court was scheduled to convene to set aside the findings against the Cascade Coal directors, the NSW Parliament passed the Independent Commission Against Corruption Amendment (Validation) Act 2015 (**The Validation Act**).
- This *ad hominen* legislation operated retrospectively to validate the ICAC findings of corrupt conduct which were made beyond power and without jurisdiction as the law was at the time of the impugned conduct and at the time of the findings by ICAC.
- In effect, The Validation Act retrospectively validated all previous ICAC findings and actions. Although denied at the time, the effect of the legislation was to retrospectively overrule the High Court decision in Cunneen.

4. Subsequent Action To Restructure ICAC

- Since the Cancellation Act and Validation Act were passed, Parliament has appropriately seen fit to significantly change the structure of the ICAC. These changes were required as a direct result of the overwhelming evidence that the old ICAC had not only exceeded its statutory remit and acted unlawfully, but it has also been indulging in behaviour unbecoming a government agency, namely:
 - The inducement of false testimony
 - Threats to witnesses and deals with witnesses
 - The obtaining of evidence illegally
 - The deliberate failure to disclose exculpatory evidence or allow it to be led
 - The interference by the ICAC Commissioner in the executive arm of government
- It is now a matter of record that the serious issues raised above clouded the conduct and findings of ICAC in both the Acacia and Jasper Inquiries – the Inquiries that led directly to the enactment of the Cancellation Act and the Validation Act.

- In particular ICAC failed to inform Parliament about a number of crucial matters resulting in Parliament being misled at the time of its enactment of the Cancellation Act and the Validation 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 Coal directors and had already consented to their corruption findings being overturned by the NSW Supreme Court.
- As Mr Chris Merritt stated in his article in the Australian newspaper entitled "Federal ICAC: Hard Lessons From State Wrongs" dated 3 May 2019:

"The Validation Act neutralised the legal rights of the victims of ICAC's unlawful actions and prevented them obtaining declarations based on the High Court's ruling."

Mr Merritt continued:

"To placate this agency and save its blushes, the parliament of NSW put itself on the wrong side of the rule of law. It will remain there until the Validation Act is repealed and the normal law, as expounded by the High Court, again prevails."

5. Recommendation in Relation to Amendment to the Validation Act

It is submitted that the Committee should recommend the introduction of a Bill amending the Validation Act along the lines of Annexure (L) to allow certain private citizens against whom findings were made in the Operation Jasper Inquiry to rely on the High Court decision in the Cunneen case and seek a declaration from the NSW Supreme Court that the ICAC findings made against them were made beyond power and are a nullity.

Annexures

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- K. Letter, Mr Bob Barraket to NSW Premier 28 June 2018 on behalf of Cascade Coal investor syndicate
- L. Draft Bill, Independent Commission Against Corruption Amendment (Nullification of Findings) Bill 2019