

**Submission
No 13**

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

Name: Dr PETER PHELPS

Date Received: 22 July 2019

SUBMISSION

Disclosure: I am currently a registered third-party lobbyist, with Cascade Coal as my sole client.

That being said, anyone familiar with my interest in the matters of ICAC's Operation Jasper and Operation Acacia will know that I make this submission for the rectification of an injustice, not for any financial reward. And for those unfamiliar with my interest in these matters I have included a list of my speeches in Parliament, on these matters, as appendices to this submission.

I will not relate the factual circumstances surrounding Jasper and Acacia. That has, presumably, been done in a number of other submissions. What I wish to address is the proposition, put forward by Premier O'Farrell in his original reasoning for not paying compensation, was that the awarding of the licences was so tainted with corruption that the whole process was corrupt – the 'you can't unscramble the egg' argument.

“So tainted by corruption”

This argument comes out of the third ICAC report, page 6: ‘... the granting of the authorities for Doyles Creek, Mount Penny and Glendon Brook was so tainted by corruption that those authorities should be expunged or cancelled’ – although it is worth noting that ICAC added that any expunging “could be accompanied by a power to compensate any innocent persons affected by the expunging ... to the extent that it was considered appropriate”. Clearly, ICAC envisioned that there were “innocent persons” in these matters. So while the ICAC formulated the “so tainted by corruption” argument, they did not consider that it voided any reasonable demand for compensation – rather, that is a later addition by Premier O'Farrell.

In his Briefing Note to the Coalition Party Room, dated 30 January 2014 (see Appendix), where the Coalition considered the proposed *Mining Amendment (ICAC Operations Jasper and Acacia) Bill 2014*, Premier O'Farrell repeated this assertion: “the grant of those licences and the decisions and processes that culminated in the grant of those licences were tainted by serious corruption” and thus the Bill had, as one of its objects, “to ensure no further direct or indirect financial benefit is derived from the tainted processes”.

In this document, Premier O'Farrell makes it clear that the denial of financial benefit is explicitly linked to the “tainted processes”. This theme is repeated in the Second Reading Speech to the Bill by the Hon Duncan Gay: “... the relevant licences and the processes that led to them being granted are tainted by serious corruption” and thus one of the objects is “to ensure that no person may derive any further financial benefit from the tainted process”. He then goes on to explain in detail why compensation is not being paid for the expropriation, in short, because of the “wrongful conduct or actions” of the companies' directors.

But is it true? Was the process “tainted by serious corruption”? And, even if it were, was the Government justified in ignoring the second part of the ICAC recommendation regarding the compensation of “innocent persons”?

Operation Jasper / Cascade

I will begin with Operation Jasper. The Premier's contention, at least as it related to Cascade, was not the view of either the Clayton Utz report commissioned by the then Minister, nor the main ICAC report into Operation Jasper, nor is it a matter being pursued by the Crown Prosecutor in the current criminal proceedings against Ian Macdonald and the Obeid family. The reason is fairly simple: Cascade did not win the original Expression of Interest (EoI) for Mount Penny.

If Macdonald acted corruptly to ensure Cascade's success, it was a miserable failure on his part, because the EoI was won by Monaro Mining. It was only when Monaro could not make its proposed 'up front' payment of \$25 million, contained in its bid proposal, that it fell by the wayside and the Exploration Licence went to Cascade.

Some may claim that Macdonald's decision to re-open the EoI process was corrupt. Again, that was not the finding of Clayton Utz, or ICAC, or the current Crown Prosecution. Indeed, the process at the time had a sign-off from the probity auditor used by the Department. So either there was a massive internal Departmental conspiracy to rot the allocation of licences, or there is no case to answer in relation to the re-opening of the EoI.

Some may claim that the process was corrupt from the start because of the drawing of the boundaries for the Mount Penny allotment, or because of the flow of Departmental information to the Obeids. I go through these allegations, and refute them in comprehensive detail in my 'Speech to Artarmon Liberal Branch' (see Appendix). In summary, neither argument is valid, based on the evidence that ICAC itself had in its possession.

In short, there is simply no evidence to support the idea that the process of awarding the licence to Cascade was "tainted with corruption". On the contrary, there are repeated affirmations that the process was essentially bureaucratic and objective. Thus, the rationale given by Premier O'Farrell for the denial of compensation is simply not sustainable.

Cascade should receive compensation, and the Bill should be amended to include them in the process.

Operation Acacia / NuCoal

NuCoal was also denied compensation on the basis that the process was inexorably tainted with corruption. Their situation is a little more complex – both Clayton Utz and ICAC considered the original allocation to be suspicious. There was also the fact is that a number of directors of Doyles Creek Mining (DCM) wound up, at least at first, on the board of NuCoal (which was not the situation with Monaro and Cascade).

Indeed, this transfer of personnel between boards was one of the reasons given to me, by a staff member of former Federal Minister Steven Ciobo, as the reason that the latter was reluctant to support compensation efforts (under the Australia-United States Free Trade Agreement) for US shareholders in NuCoal who were affected by the cancellation of the licence.

But these allegations cannot be sustained upon closer investigation. NuCoal's shareholders had every right to believe that their investment was safe and legal, based on reports given to them at the time by their independent probity assessors.

Nor can the claim that there was something 'fishy' about the direct grant of a licence by Ian Macdonald to DCM be sustained. It was not the first direct allocation, nor would it be the last. It was explicitly listed as an available (if not departmentally-preferred) option for the Minister in an initial brief to him. And in the final brief, it was a Departmental recommendation, signed off by both senior DPI official Brad Mullard and DPI Director-General Richard Sheldrake.

Public servants may do many things, but what they do not do is engage in high-level conspiracies to behave corruptly. What Macdonald did was not what the Department wanted, but it was unquestionably within his power to do so.

On that note, it is also worth considering the implications of this: if a Minister, exercising his or her judgement, were to make a legal decision different to the recommendation of departmental advice now falls under the rubric of "corrupt conduct", then there is no Minister who will now be anything more than a cats-paw or a rubber stamp for their Department.

But back to the situation with the NuCoal/DCM directors and the allegations of the awarding of the licence being 'tainted with corruption'. It is instructive to note that Ian Macdonald and John Maitland, although initially convicted of public misconduct, had their convictions overturned 5-0 in the Court of Criminal Appeal. The Court quashed the original conviction and ordered a new trial for the pair. That may happen in 2020, assuming that the whole matter is not No-Billed earlier than that.

Why do I assume that a No-Bill is likely? Because the prospects of successful conviction against them are almost non-existent.

In his original trial for corrupt conduct (flowing from ICAC's Operation Acacia), Macdonald's defence team relied on a ruling from Justice Robert Beech-Jones, which the latter made in an earlier corruption case involving the Obeid family trust. Justice Beech-Jones ruled that the 'mental element' required for a corruption conviction required the jury to find beyond reasonable doubt that the accused was 'solely motivated to benefit' the family's trust.

Justice Adamson, who presided at Macdonald's original corruption trial, instead adopted elements based upon a British case (*R v Speechley*) which lessened the 'solely motivated' element to 'substantially motivated to benefit' and 'not significantly motivated to benefit', in this instance, the State of NSW.

In the original trial of Macdonald and Maitland, the Crown argued that if Adamson agreed with the defence's use of Beech-Jones' ruling, there would be a 'no case to answer' application from the defence because of the clear evidence of the public good of the project.

The NSW Court of Criminal Appeal held (5-0) that the test applied by Justice Beech-Jones was the appropriate one, not *Speechley*. They said:

"... it seems to us that the direction as to the mental element of the offence should have been that Mr Macdonald could only be found to have committed the crime (subject to the other elements being made out) if the power would not have been exercised, except for the illegitimate purpose of conferring a benefit on Mr Maitland and DCM."

They overturned the conviction, and ordered that a retrial should take place. But the standard which the Court of Criminal Appeal agreed to, as the requisite mental element for the offence, is precisely the one which the original prosecutor stated, if accepted, would lead to Macdonald having 'no case to answer'.

And it is perhaps worth noting the judge at the retrial of Ian Macdonald will be Justice Robert Beech-Jones.

Putting that aside, it is also worth noting the failure of other prosecutions of people involved in DCM. Craig Ransley was tried for two separate matters at the behest of ICAC, and in both instances ICAC lost. But the most interesting legal proceedings involving DCM/NuCoal are those of Andrew Poole, a former director of DCM and current director and major shareholder of NuCoal.

The judgement is available online (*Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832), but here is the summary: Poole sought reimbursement for his legal expenses incurred during the ICAC hearings, but the company which held his Directors' Liability insurance, Chubb, refused to do so on the basis of ICAC's findings of 'corrupt conduct' against him.

Poole took his insurer to court and, essentially, litigated the entire Doyles Creek matter in a court of law. The judge in the case found not even the slightest evidence for corrupt conduct by Ian Macdonald or by Poole, and thus ordered Chubb to pay Poole's original ICAC legal bills plus costs for the case. The judgement is long, but well worth a read in utterly debunking, piece-by-piece, and in great detail, the allegations against DCM and Macdonald that were made by ICAC.

Once again, we see that there is no evidence to sustain the original assertion that the awarding of the licence to DCM, which was later on-sold to NuCoal, was "tainted with serious corruption". For this reason, the Bill should be supported and NuCoal shareholders should be gain access to the proposed method of determining compensation.

The 'Cunneen' Decision

I would also like to attend to one final matter that, in my view, should be before the Committee but is not. Originally, Rev the Hon Fred Nile MLC proposed a cognate Bill to go with this one. The draft of this Bill is included in the attachments. I am disappointed that Rev Nile has not proceeded with this Bill, and am unsure as to why he has not done so, other than

perhaps to ‘uncomplicate’ the issues. And, to be fair, the issues are complicated, which is why some history is in order.

For some time now there has been a measure of debate about the powers of ICAC to make findings in relation to people engaged in private activities, not directly bearing on their roles as public officials, or ICAC’s powers to make findings against private citizens not engaged with public officials.

After the former Deputy Director of the DPP, Margaret Cunneen, won her original case against ICAC, the latter took the issue to the High Court of Australia on appeal. ICAC again lost. In *Independent Commission Against Corruption v Cunneen* [2015] HCA 14, the court held that, as far 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.

So how does decision this relate to Cascade?

ICAC made a finding that the directors of Cascade Mining were guilty of ‘corrupt conduct’ but, for the reasons explained below, ICAC clearly misconstrued its role and it had no legal authority to make such a finding. Moreover, it is important to note that Cascade has never had any adverse findings made against it in relation to either its EoI, the assessment of the EoI by officials, or the granting of the licence.

What then was the basis of ICAC’s claims of ‘corrupt conduct’?

ICAC decided to comment on the dealings between Cascade and White Energy, both of which are mining companies, twelve months after the licence had been allocated. Importantly, no bureaucrats or politicians were involved in these matters whatsoever.

After *ICAC v Cunneen*, the Cascade directors who were adversely named by ICAC thought that a comparable situation to that of Margaret Cunneen applied to them, given that the HCA ruled that ICAC could not make findings of corrupt conduct against a private citizen, unless it involved “the probity of the exercise of official functions by a public official”.

Cascade’s directors took the matter to the NSW Supreme Court, where both the legal representative for ICAC and the Crown Solicitor admitted that ICAC had exceeded their powers. People often forget that, in 1992, former NSW Premier Nick Greiner had the ICAC finding against him overturned in the NSW Court of Appeal, not on the basis of error of fact, but on the basis that ICAC had exceeded its jurisdiction.

Ultimately, the court accepted the position put forward by the Cascade directors, on the basis of the *Cunneen* decision, and orders were drawn up by Justice Beazley to overturn the corrupt conduct findings.

However...

Two days before Cascade’s directors were about to win their case, the NSW Government intervened and rushed a law through Parliament, effectively overruling the *Cunneen* decision,

and retrospectively validating the findings of ICAC with no appeal possible. I have included a copy of the Party Room Brief in the Appendix, and you will no doubt note its deliberate opacity, and its failure to mention the fact that there was a case currently before the Supreme Court of NSW on this very matter.

The actual legislation that was introduced and passed may not have been as crass as an outright Bill of Attainder, but by denying access to the *Cunneen* decision to people in that situation, that was precisely the effect: Parliament says you are guilty and denies you any opportunity to clear your name through judicial processes.

Moreover, there is now an apparent massive inconsistency at play in the Validation Act. The *Cunneen* decision remains the law in NSW, and has prospective effect – ICAC's inquires and findings must now abide by the rules set down in *Cunneen*. For those people who 'got in early' and had their findings quashed by a court, before the Validation Act took effect, those court decisions still stand. But there remains a cohort of people who still have adverse findings against them, and no way to remedy what was clearly an unlawful finding of the ICAC.

Some might say that there is no need to bother, as it only affects a small group of people. I disagree. An injustice done to one is an injustice done to us all – especially when it has been done by the precipitous actions of the Parliament. If we can change the law to help the innocent victims in other instances of failings by Executive agencies in NSW, then we can – and should – do the same for those damaged by the Validation Act.

It is important to note that the proposed draft Bill does not seek to invalidate any of the actions of ICAC officers or of the ICAC itself. The Parliament – of which I was a Member at the time – was correct to retrospectively validate their activities, so as to prevent ICAC, or their officers, or the NSW government from being sued. Their actions were not lawful, but they probably had reason to believe, at the time, that those actions may have been lawful, and so it is only fair to legislatively 'immunise' those action.

What is not fair is that the findings should remain sacrosanct. The proposed changes to the law contained in the draft Bill merely relate to the findings of the ICAC, not their actions leading up to those findings. It permits those people in this limited cohort to go to Court and to seek to have ICAC's findings against them quashed.

This must be done. The contrary position is that it is OK for Executive agencies to exceed their legal authority, but there is no recourse through the courts for individuals adversely affected by such actions to seek a remedy! I would find it impossible to believe that there is a single parliamentarian who would hold with this position.

To that end, it is my sincere hope that the Committee recommends (even as *obiter dicta* to this report) to the Attorney-General that he add this to the list of items in his next Miscellaneous Amendment Bill. Or even to bring forward the draft Bill himself, given its relatively non-controversial nature, in the Spring sitting.

Alternatively, if the Committee were not of a mind to do so yet, it might seek a reference from the Attorney-General to examine this matter. But whatever approach is chosen, I hope that this matter – of which I was an undeniably culpable party, in voting for it – will be resolved in a very timely manner.

Recommendations

That the Law and Justice Committee:

- 1) Endorses the principle of compensation for the shareholders of NuCoal, and the proposed mechanism in the Bill for determining fair compensation;
- 2) Recommends that the Bill be amended to extend the endorsed principle, and the proposed mechanism, to include Cascade shareholders; and
- 3) Either:
 - a) Explicitly endorses a repeal of that part of the Validation Act which does not allow for the application of the *Cunneen* decision, in relation to any adverse findings made against private citizens; or,
 - b) Seeks a reference from the Attorney-General to examine whether the Validation Act's excising of the *Cunneen* decision, in relation to findings made by ICAC, has resulted in injustices to private citizens that would require corrective legislation.

PETER PHELPS

22 July 2019