



# **Address to The Sydney Mining Club**

By John McGuigan

4 June 2015



## Introduction

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I am most grateful to the Sydney Mining Club for this opportunity to present the relevant facts with respect to the acquisition by Cascade Coal of the exploration rights over the Mt Penny Project and also to highlight a number of substantial concerns with respect to the ICAC process and the legislation which has followed.

While the relevant facts are extensive the issues of concern are straightforward and are fundamental. In summary they are:

- a. ICAC has operated a “parallel system of justice” not constrained by any of the legal protections which are fundamental to the judicial process.
- b. ICAC has cynically used innuendo and assertion and certain media outlets to irretrievably damage reputations.
- c. The NSW Government by legislating to expropriate assets acquired in reliance on government process, and where the only corruption was within the Government, has damaged innocent parties (both Australian residents and foreign investors) and has created significant sovereign risk issues for NSW and more generally for Australia.
- d. The NSW Government, by enacting retrospective legislation to effectively overturn the decision of the High Court in the Cunneen case, has totally disregarded the rule of law and the doctrine of separation of powers which principles underpin our democratic society.

## Introduction

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The concerns surrounding these actions are far more significant than the specifics of any particular ICAC inquiry. These concerns go directly to an undermining of the fundamental pillars of our democratic society.

It is most disturbing how easily these fundamental principles have been disregarded both by the elected legislature, for the sake of political opportunism and by ICAC, an administrative body with discrete powers, intent on dispensing its own brand of justice. The “ICAC Justice” is based on assertion and innuendo rather than evidence and also involves the cynical use of a complicit media intent on creating damaging and salacious headlines.

The fact that a number of powerful voices are now beginning to speak out is most encouraging. However, it should be of great concern that until recently all voices were silent as the public egged on by certain media outlets enjoyed the sport of watching hard won reputations being destroyed and the daily spectacle before a “Kangaroo Court”.

On the question of silence, I find it most surprising that the mining industry has been silent despite the obvious damage which the above actions have caused to those involved in the industry.

## Background

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I have been involved in the coal mining industry in NSW for more than 35 years in association with a number of the Cascade Coal shareholders whose reputations, along with mine, have been irrevocably damaged as a result of the ICAC findings.

In summary, these individuals have been responsible for the development of the Ulan Coal Mine, the Moolarben Coal Mine, the Ashford Coal Mine, the Ashton Coal Mine, and the United Collieries Coal Mine. They were responsible for the development of the Ulan-Sandy Hollow Railway the main infrastructure which allowed the Western Coal fields to be developed. This was built in 1982 at a then cost of \$82 million and was donated to the NSW Government.

The above mines have created more than 2000 mine site jobs and a multiple of that number in non-mine site jobs, have led to the introduction of technical innovations (such as in-pit crushing and conveying – a world first) and over the life of the above mines will contribute billions of dollars in royalties alone to the State of NSW.

## Background

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More generally, in my view the lack of regard for the contribution which the mining industry makes to this state alarming.

The minerals industry in NSW contributed \$12.5 billion in value in 2012/2013 – the coal industry contributed \$9.6 billion in value. The minerals industry is estimated to purchase approximately \$9.5 billion of goods and services of which 60% is sourced in NSW.

In 2012-2013 the minerals industry in NSW is estimated to have paid:

- \$1.6 billion to the NSW Government; and
- \$1.47 billion to the Commonwealth in company taxes.

The global view of NSW as a place to invest particularly in relation to the mining sector has diminished massively. The actions of the NSW Government in expropriating assets from innocent shareholders which include significant foreign investors and passing retrospective legislation, is damaging to the interests of this state and the country overall. I know there is significant concern by both the United States Government and the Japanese Government with respect to the NSW Government's actions.

## Relevant Facts

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- In February 2009 Cascade Coal responded to a tender issued by the NSW Government seeking expressions of interest from small to medium sized companies in relation to the grant of exploration licences over eleven coal areas. Cascade lodged an expression of interest in relation to two areas Glendon Brook near Singleton and Mt Penny near Mudgee.
- Four of Cascade Coal's seven shareholders had a significant involvement in the NSW coal industry as outlined above;
- At the time the Mt Penny tender was lodged neither Cascade Coal nor its directors and shareholders had any knowledge that interests associated with the Obeid family owned relevant landholdings or that Obeid interests had entered into an arrangement with another tenderer Monaro Mining. Cascade Coal had only heard of Monaro Mining when the names of the tenderers for each of the areas were announced;
- In May 2009 representatives of Cascade Coal were approached by Moses Obeid and Gardner Brook who advised that "Obeid family interests" owned or controlled a substantial portion of the land in the Mt Penny exploration area. It was made clear that any exploration or development of the Mt Penny area required the co-operation of the landowners which was only available on certain conditions.



## Relevant Facts

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- For some considerable time prior to May 2009 the 'Obeid interests' had been dealing with one of the other parties to the tender – Monaro Mining. Cascade Coal was advised that the reason the Obeid interests had approached Cascade Coal was 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;
- Four further points are worth making. The first is that Cascade Coal would have been granted the exploration licence whether or not an approach had been made to it by Obeid interests. Secondly, the exploration licence was granted on the recommendation of the Government's impartial selection committee using criteria the Government department had selected. Thirdly, whoever was granted the exploration licence would have to deal with the Obeids because they controlled the land. Fourthly, there has never been any evidence that the Obeid interests in the land were acquired other than honestly and no finding was made by ICAC adverse to their acquisition and ownership of the land.
- 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 Mt Penny.

## Relevant Facts

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- Cascade Coal granted a right to an entity (which ultimately was shown to be held beneficially by Obeid interests) to acquire an interest in a joint venture to undertake the exploration over the Mt Penny area.
- 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. For those who have been directly involved in the development of mines in this state (or anywhere in Australia) the criticality of securing access to the relevant land on reasonable terms will be well understood. Indeed the fundamental principle is that unless the relevant land access and/or ownership rights are secured then do not even begin the project. There are many examples of companies who have regretted not adhering to this principle.
- In June 2009 Cascade Coal was advised that it was successful in its expression of interest for the Mt Penny exploration licence and the Glendon Brook 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.
- It is interesting to note that this licence was validly granted by the Government and there was no legal impediment to Cascade Coal entering into a joint venture arrangement with the landowners.



## Relevant Facts

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- Between October 2009 and November 2010 Cascade Coal undertook extensive exploration and other relevant steps in relation to the Mt Penny Project.
- In September 2010 the Board and shareholders of Cascade determined that for commercial reasons the “Obeid interests” in the Mt Penny 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 was terminated.
- By November 2010 based on the extensive exploration work and the assessment of the coal market the Board of Cascade determined that a viable open cut mining project could be undertaken and proceeded to undertake the necessary steps to seek the allocation of a mining lease. All the work was done in accordance with conditions imposed by the Government when the exploration licence was validly granted by it.
- In December 2010 Cascade offered to White Energy Company Ltd an option to acquire the Mt Penny and Glendon Brook interests. Five of the seven original Cascade shareholders (four of whom were or had been Cascade directors) were also directors and significant shareholders of White Energy.

## Relevant Facts

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- Negotiations, third party valuations and due diligence was undertaken until early April 2011. In April 2011 because agreement could not be reached on fundamental commercial terms the proposed sale to White Energy was abandoned. At the time negotiations were terminated the due diligence process had not been completed.

## ICAC Inquiry

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- Following compulsory private hearings held in July 2012 it was announced that there would be public hearings into matters related to Mt Penny. The public hearings commenced in November 2012 and concluded in March 2013.
- In July 2013 ICAC handed down findings of corrupt conduct against former Ministers Obeid and MacDonald and against Moses Obeid in relation to the decision to create a mining tenement at Mt Penny. Cascade Coal knew nothing about how this came about. Its application for an exploration licence was made in good faith to the department in accordance with criteria laid down by the department.
- Commissioner Ipp also found that five of the original Cascade shareholders/directors were corrupt on the basis that:
  - (i) They had either authorised or implemented the exit of the “Obeid interests” from the Mt Penny joint venture and
  - (ii) By not disclosing that “Obeid interests” had once held (but no longer held) an interest in the Mt Penny exploration venture to the White Energy Independent Board in a due diligence process that was not complete andthat the reason for the above actions was said to be such persons intended to mislead government officials who may ultimately review a mining lease application which may be lodged at some future date.

## ICAC Inquiry

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- The lack of any relevant connection between these events which occurred in a totally private (ie no public officials involved) commercial transaction in early 2011 and any mining lease application which would not take place (if at all) for at least two years and more likely three years is breathtaking.
- In summary, there simply was no relevant public official who could be identified with any degree of specificity as to time, location or circumstance who could possibly be misled by the alleged failure to disclose. This was in the context of a commercial transaction which did not complete and was undertaken at least two years earlier than the alleged misleading circumstance.
- ICAC published a third report in December 2013 whereby it was recommended that because the **grant** of the exploration licences for Mt Penny and Glendon Brook was so tainted by corruption that those authorities should be expunged or cancelled and that any pending applications regarding them should be refused. It is to be noted that there were no findings by ICAC in its first report that the **grant** of the exploration licences was tainted by corruption.

## ICAC Inquiry

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- In mid inquiry (January 2013) the Government and Commissioner Ipp corresponded with each other about how best to achieve the action which the Government and Commissioner Ipp wanted, namely the cancellation of the exploration licences.
- For example on 31 January 2013 the Director General of the Department of Premier & Cabinet had a telephone conversation with then Commissioner Ipp. This conversation was followed by a letter in which the Commissioner explored the different approaches which the Director General and the Minister should take concerning the exploration licences and the subsequent grant of mining licences. The Commissioner's letter concluded by indicating that the evidence given by witnesses at the Inquiry was available to be used by Ministers before the Commission published its report. This correspondence took place mid inquiry prior to any evidence from key witnesses.

## ICAC Inquiry

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- In a letter to the Premier dated 20 February 2013 Commissioner Ipp stated:

*“The Commission is aware that the Department of Planning and Infrastructure has received legal advice which casts doubt on whether evidence relating to the circumstances in which an exploration licence was granted could be taken into account in assessing a development application because of a lack of legal between the granting of an exploration licence and the approval of the development application. The Commission disagrees with that advice”*
- It is most concerning that an investigatory body such as ICAC, given the unusual nature of its processes, can make determinations which affect valuable proprietary rights held by parties who had no involvement in any ICAC inquiry. It is even more disturbing that mid inquiry the ICAC Commissioner essentially directs a Minister to make findings of fact based upon “evidence” of this nature and in circumstances where the Minister has not seen or heard the evidence and where the circumstances in which the evidence has been extracted are, to say the least, questionable.
- A detailed submission has been lodged with the ICAC Inspector addressing the manner in which the Inquiry, codenamed, Operation Jasper, was conducted by Commissioner Ipp and Counsel Assisting Geoffrey Watson.

## The Expropriating Legislation

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- In December 2013 the Commission published its Third Report titled 'Operations Jasper and Acacia – addressing outstanding questions'. In that report it made a finding, unsubstantiated by the evidence and inconsistent with the findings in the First Report, when it stated:

*'The Commission is of the view that the **granting** of the authorities for Doyles Creek, Mt Penny and Glendon Brook was so tainted by corruption that those authorities should be expunged or cancelled and any pending applications regarding them should be refused.'*

- There was no evidence of corrupt conduct nor were there any findings concerning the grant of the exploration licences by any party. In fact the Commission acknowledged that the process involving departmental officials and the probity officer acted in accordance with proper departmental process. Notwithstanding, this fundamental omission the Commission recommended that the NSW Government should enact legislation to expunge the authority and stated (at page 20 of the Third Report):

*'Counsel Advising have considered the constitutionality of such legislation and are not of the view that the State would be prohibited from so legislating. Such legislation would, of course, need to be carefully drafted to avoid successful constitutional challenge.'*

- The *Mining Amendment (Operations Jasper and Acacia) Amendment Act 2013* (NSW) was enacted on 31 January 2013. Cascade Coal challenged the constitutional validity of this legislation in the High Court. This challenge was not successful.



## The Expropriating Legislation

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In respect of the findings in the First and Third Reports, the following further matters should be noted:

- (a) Neither Cascade Coal nor its wholly owned subsidiaries, Mt Penny Coal and Glendon Brook Coal were investigated by ICAC and there were no findings against either company. At all times, Cascade Coal, Mt Penny Coal and Glendon Brook Coal have complied with all relevant disclosure obligations and conditions of the Exploration Licence. In fact millions of dollars were spent in such compliance with respect to exploration and compliance with approval requirements.
- (b) The First Report contains no evidence or findings that either Cascade, Mt Penny Coal or the respective directors had knowledge of corrupt conduct involved in the creation of the Mt Penny tenement.
- (c) The creation and grant of the exploration licence (EL7406) over the Mt Penny tenement to Mt Penny Coal is not tainted by any adverse findings of corruption against Cascade Coal, Mt Penny Coal or its directors.
- (d) The First Report contains findings that the Mt Penny Exploration Licence was granted by the NSW Government in accordance with procedures and processes laid down by the Government. The First Report expressly states that no findings reflect adversely on the integrity of any of the members of the EOI Evaluation Committee or the Probity Auditor and states that each of those persons did their task honestly and to the best of their ability.

## Further Action by Government Agencies – ACCC Prosecution

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- The Australian Competition and Consumer Commission has now commenced proceedings against Cascade Coal, me and 9 other parties alleging that these parties engaged in cartel conduct. As the matter is sub judice, I will not comment on it in detail but our advice is that it lacks legal or factual substance.
- I do wish to comment on the disappointing conduct of the ACCC in its recent dealings with the press, which demonstrate as cavalier an attitude to the facts of this matter as that displayed by the NSW government. The ACCC Chairman, Rod Sims, has said to the press that the alleged agreements which are at the heart of the ACCC's proceedings cost New South Wales taxpayers \$25 million in fees. Mr Sims said this amount would have been paid to the government by an Obeid-linked company named Loyal Coal were it not for the agreements in issue. This claim, as is apparent from the evidence before ICAC, is nonsense. It is disappointing that the ACCC, which is obliged to act as a 'model litigant', would allow its Chairman to make such a statement to the press.
- Evidence before ICAC made clear that the promised payment of \$25 million could never have been made and its non-payment was unconnected with anything done by Cascade or anyone connected with Cascade. I cannot see how Mr Sims's comments can possibly be said to comply with the ACCC's obligation, as a model litigant, to 'act with complete propriety, fairly and in accordance with the highest professional standards'.

## Further Legislative Retribution

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- The NSW Parliament has now enacted three pieces of legislation arising out of the findings in Operation Jasper.
- In addition to the Mining Amendment (Operation Jasper and Acacia) Amendment Act 2013 which cancelled the Mt Penny and Glendon Brook exploration licences section 380A of the Mining Act was inserted which effectively brands the directors of Cascade Coal and NuCoal as being not fit and proper persons to be engaged in mining in NSW because they were directors of companies which had their exploration licences cancelled.
- More recently the ICAC (Validation) Act 2015 has retrospectively declared legal that which the High Court comprehensively declared to be illegal.
- The above pieces of legislation must hold the record for the fastest pieces of legislation ever to be passed through the NSW Parliament. There was no analysis, there were no questions.

## Current Position & Where To From Here

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The current position is:

- (i) That ICAC has been held to act in excess of its power and therefore illegally. Following the High Court decision in the Cunneen Case, ICAC conceded to the NSW Court of Appeal that the findings made against the Cascade directors and shareholders should be declared a nullity.
- (ii) At the same time that this representation was made to the Court ICAC was lobbying the NSW Government behind the scenes to enact retrospective legislation to circumvent the High Court decision. Subsequently the NSW Government enacted retrospective legislation “validating” all of ICAC’s previous illegal conduct and findings
- (iii) The constitutional validity of that legislation is being challenged before the High Court. In addition, the NSW Court of Appeal proceedings seeking to overturn the ICAC findings on a number of other grounds will be heard in due course.

## Current Position & Where To From Here

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- (iv) Numerous submissions have been made by affected parties to the ICAC Inspector in relation to the conduct of recent inquiries held under former Commissioner Ipp and Commissioner Latham. I understand these submissions include allegations of extreme gravity in relation to the way in which the inquiries have been conducted such as:
- The planting of critical evidence
  - The inducement of false testimony
  - Threats to witnesses and deals with witnesses
  - The obtaining of evidence illegally
  - The interference by the ICAC Commissioner in the executive arm of government
  - The communications mid inquiry between former Premier O'Farrell and the ICAC Commissioner which indicate that the results of the inquiry were essentially predetermined prior to evidence being heard from crucial witnesses.

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## Current Position & Where To From Here

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- (v) The NSW Government has enacted legislation to expropriate assets from innocent investors based on an “ICAC recommendation of a finding” that was never made – namely the grant of the licences was so tainted by corruption. Such a finding was not made in the First Report. Indeed the Glendon Brook licence was not even addressed in the first report.
  
- (vi) The NSW Government has exposed the state directly and the Federal Government indirectly to a significant sovereign risk.
  
- (vii) The NSW Government has enacted retrospective legislation over ruling the High Court decision which disregards the rule of law and the doctrine of separation of powers which principles underpin our democratic society.

## Current Position & Where To From Here

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In terms of “where to from here” the position, in my view, is quite straight forward:

- i. All legal options to challenge the above conduct need to be and will be pursued.
- ii. Concerned members of the public and the media should continue to challenge the desirability of a “parallel system of justice”, not constrained by fundamental legal protections, acting as judge, jury and executioner and causing irretrievable damage to innocent parties and
- iii. Most importantly there should be a full public judicial inquiry, into the recent ICAC hearings conducted by former Commissioner Ipp and present Commissioner Latham





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