NuCoal – Our continuing quest for compensation

8th Anniversary edition

The more than three thousand shareholders of NuCoal Resources Ltd (**NuCoal** or **Company**) are still waiting for justice and compensation for the January 2014 cancellation of its Exploration Licence EL7270, Doyles Creek (**EL** or **Licence**). For the most part, the shareholders who were spectacularly "dudded" by the O'Farrell regime in 2014 still remain shareholders today. They have been very patient and remain very determined.

An anniversary is a time for reflection, so with the benefit of what has happened since January 2014, the relevant questions for our shareholders at this time are:

- how did this all happen, and
- when and how do we get what we are owed?

The "how" is quite straightforward. The Premier of the day directed his relevant Minister to refer a report by legal firm Clayton Utz to the Independent Commission Against Corruption (**ICAC**), a body ultimately under the control of the Premier. The Clayton Utz report concluded that a Special Commission of Inquiry be set up to consider the matter which was supported by the Minister. Spectacularly, the Minister was overruled and the matter was referred to ICAC. During the subsequent ICAC hearing (Operation Acacia), the ICAC Commissioner discussed things with the Premier while the investigation was ongoing – amazing but true - and then sought legal advice to enable the cancellation of the EL without a need to follow the processes laid down in the *Mining Act* 1992. This was a political process – not a judicial process. Apparently, the Premier had a personal interest in Operation Acacia.

ICAC found the four Directors of Doyles Creek Mining Pty Ltd (**DCM**), and the Minister of the day, to be corrupt - but the Commissioner also declared that NuCoal and its shareholders were innocent parties. Was this his conscience getting to him? At one stage, the Commissioner even asked why NuCoal was appearing at all! Nevertheless, ICAC recommended that the EL be cancelled.

The Government then urgently asked NuCoal to show cause why the tenement should not be cancelled, then promptly ignored the Company's submission. Parliament was recalled from the Christmas holidays for a one day sitting to pass the one punch legislation and the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014 (**MAA**) was added to the agenda and rushed through on the same day. Parliamentarians were given at most a few hours for review before they were called on to vote and certainly did not receive NuCoal's submission or any advice from ICAC. Given the timing of all these events there is no doubt that the MAA was being written while NuCoal was writing and filing its submission. The judgement had already been made by the Government so why did they bother getting us to write our submission?

Members were not appraised of the key fact that ICAC had – in addition to recommending cancellation by the passing of a new Law which bypassed the protections afforded by using existing statutes - also recommended that NuCoal be considered for compensation, that relevant decision makers consider issues of procedural fairness, or that NuCoal was a declared innocent party. The recommendations and the declaration were deliberately omitted from the information that members received before they were impelled to vote.

One can only conclude that Parliament was deliberately not told the full story - so they were uninformed, misinformed and therefore by definition – the Parliament was misled.

What the MAA actually did, contrary to the advice of both ICAC and its senior counsel Brett Walker SC, was:

- it cancelled the Licence without the due process or procedural fairness afforded under the *Mining Act* 1992, without any public hearing and/or any right of appeal and without recourse to normal Rule of Law measures including the legal system and courts and just compensation;
- it removed any right to compensation that NuCoal or other innocent parties would otherwise have had;
- it retrospectively absolved the Government of any liability for corrupt conduct of its ministers and employees; and
- it required NuCoal to hand over, at no cost to Government, all exploration core and data and intellectual property that the Company had solely funded.

Throughout the Operation Acacia "circus" and the ensuing MAA, the media scrum feasted daily on the scandals "outed" by ICAC and talked up how strong the Premier was to smash the Company and those found to be corrupt, while at the same time taking away all rights available to the company and its shareholders to defend themselves.

When shareholders complained at a Community Cabinet in February 2014, the Premier targeted and defamed the current Directors of NuCoal, stating "that the Directors of NuCoal were attempting to distract shareholders from their responsibilities as Directors". The Premier was forced to publicly apologise when taken to task about this and faced with defamation proceedings. The State (i.e., the poor taxpayer) paid the costs of the Premier's allegations. The Premier then fell foul of ICAC and resigned in disgrace for a "memory fail" over a bottle of wine. What a tawdry ending.

We should note here that the MAA also cancelled two Exploration Licences held by Cascade Coal – a party unrelated in any way to NuCoal. Cascade Directors had been found to be corrupt in Operation Jasper, which preceded Operation Acacia, and Premier O'Farrell decided to kill two birds at once with the MAA legislation.

Back to the ICAC itself - we now know that in 2011, when the Operation Acacia inquiry commenced, and later at the date of the first Operation Acacia Report in August 2013, the ICAC actually had no power to conduct the Operation Acacia investigation as it did. The whole exercise was illegal, as established by the High Court's conclusions about the Cunneen investigation in 2015.[1] The findings of corrupt conduct against the Directors of DCM were therefore not made according to law and were a nullity. The findings against the Cascade Directors were also a nullity.

After Cunneen, and to deliberately circumvent the clear outcomes which would flow from the High Court's decision, (the new) Premier Baird passed the *Independent Commission Against Corruption Amendment (Validation) Act* 2015 (**Validation Act**) in May 2015.[2] This heinous Validation Act – perhaps the most debased piece of legislation ever considered by a Parliament in Australian history – was passed, again after basically no briefing to members, to retrospectively make legal the illegal actions of ICAC. When we tell people, both in Australia and particularly overseas, that such an Act exists we are greeted by blank stares. No one believes that an Australian State Government could do

[1] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14
[2] *Independent Commission Against Corruption Amendment (Validation) Act 2015*

this for no other reason than to absolve itself and its institutions from dealing with their illegal acts. Rule of Law? Nowhere to be seen. **The Government is still – to this day - hiding behind this legislation.**

In early 2015, the directors of DCM had commenced judicial review proceedings for a declaration that the findings they had engaged in corrupt conduct were not made according to law and were a nullity. Of course, this action did not proceed after the passing of the Validation Act.

The findings of corruption for five people by ICAC in Operation Acacia are still in place today, but not one of them has a conviction for a crime against their name for the actions alleged against them, despite the fact that the State of NSW has worked assiduously, for eight years and at great expense to the taxpayer, to prosecute them. Two were initially convicted and spent two years each in prison before the Court of Appeal quashed their convictions by five to nil (fairly clear!). One other was tried and found not guilty. The other two have never been prosecuted. What an incredible waste of time, money, and worst of all – what an incredible abuse of people's lives.

Operation Acacia was nothing but an illegal "show trial" which exhibited some of the worst aspects of ICAC's aggressive behaviour with political blessing and backing. Rather than demonstrating that ICAC can root out and punish corrupt persons, Operations Acacia and Jasper showed that the ICAC was perfectly comfortable with undertaking illegal prosecutions and then running to the Premier to fix its mistakes when it was caught out. All this from a "model litigant." We have tried multiple times to get documents from this time between the Premier and ICAC under FOI – but have been continuously blanked by the relevant Government Departments.

It is clear that ICAC was aided and abetted – or maybe it should be the other way around – by the leaders of the Government of the day. The driving force for these people was the political gain obtained by exposing "corruption" in the Labor Party. In the face of this political expedient, NuCoal's EL was collateral damage, as was – and still is – the Rule of Law which is supposed to be the "light on the hill" for all Governments in Australia.

Operation Acacia caused significant reputational and financial damage to our Company, its shareholders, and Directors, and to international relations between Australia and investor countries. **The huge financial loss caused to NuCoal by ICAC's flawed Operation Acacia investigation was more than $300m and is unmatched in the history of ICAC**.

Now - when and how do we get what we are owed?

In 2019, NuCoal was the subject of a Private Members Bill and then appeared at a Law and Justice Committee hearing. The Committee recommended "*That the NSW Government address the outstanding matters raised during this inquiry, where appropriate, including the issue of compensation for innocent shareholders".*

Approximately 18 months ago, on 8 May 2020, the Committee on the Independent Commission Against Corruption commenced an inquiry into the reputational impact on an individual being adversely named in the ICAC's investigations. NuCoal made a detailed submission to the inquiry – which can be accessed at *https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2595#tab-submissions*.

In the final, unanimous and multi-partisan report, the Committee said "*the Legislative Council Standing Committee on Law and Justice's inquiry on the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019, recommended for the Government to address the outstanding matters in relation to NuCoal, including the issue of compensation for 'innocent stakeholders. The Government's response reserves its position this matter. Given the time that has passed since then, the Committee urges the NSW Government to respond to the Legislative Council's Law and Justice report as a matter of urgency."*

These statements show that over the eight years the allegations and innuendo of both ICAC and the Government have been disproved. More and more members of Parliament are becoming aware of the way they were misled, and why, and are starting to focus on the facts and inevitably therefore to support NuCoal at last. A lot of the current members of Parliament want to see this dealt with fairly in the immediate future, because the longer a wrong persists then the more difficult it is for decent elected people (the majority of our politicians hopefully) to condone the wrong.

The way to do this is to modify the MAA to remove the ban on compensation. That's a fairly simple task.

Unfortunately, as the MAA dealt with Cascade and NuCoal the modification has to be preceded by the modification – preferably repeal – of the Validation Act so that the "corrupt" Directors of Cascade are no longer corrupt. Then, with NuCoal as a declared innocent party and no corrupt Cascade Directors, the MAA can be easily modified to remove the compensation ban.

After that, the quantum for compensation can be addressed. No one wants the El back – and in fact the Doyles Creek area has now been placed on a "not to be explored" list by the Government, so it can't be given back in any case. The compensation should be done by making an ex-gratia payment by the Government. The precedents are set - in the past eight years the Government has paid out many millions to Shenua and BHP as compensation payments. While these large, foreign companies obviously have more clout than our Company, we are at least as deserving, because we invested substantial amounts in the State of NSW just as they did.

It is time to give our shareholders a go, Mr Premier. We know you understand their plight. A very large number of your colleagues on both sides and on the crossbenches of both houses are just waiting for you to tell them you are going to right this wrong and lead them to a just conclusion of the matter.

Sure – times are tough and there will always be a squeakier wheel than NuCoal. Times are always tough, however. But they are extremely tough for the poor NuCoal investors who did nothing more than to believe in their State and to support its economy by putting up their hard-earned cash and who have been waiting patiently for eight years. You cannot do more than that!

Let us hope this can happen before we get to anniversary number 9!