

## **Enough is Enough – Time To Call Out The Cover-Up**

I pulled over the car in disbelief. I couldn't believe what I was hearing. Ben Fordham interviewing Premier Minns on why the State continued to refuse to compensate innocent shareholders following the unlawful expropriation of the assets of Nucoal and Cascade.

For years, this State has relied on carefully curated stories and wrongful declarations of corrupt conduct to justify the theft of valuable licenses from these companies, torpedoing the prospects of thousands of honest investors.

The normally cool and collected Premier immediately went into spin mode. He bumbled around uncomfortably for a few minutes citing long debunked reasons to justify his government's position.

Fordham didn't let Minns off the hook. He knew the facts.

Minns crumbled as Fordham pressed him.

Finally, the Premier revealed the truth. Compensating Nucoal alone would cost the State \$500 million. "Where is the State going to find that sort of money?" he blurted.

Sitting by the side of the road, I went numb.

I had spent the best part of the last decade searching for the truth. The same truth that Ben Fordham had been able to extract from the Premier in just four minutes. Finally, we had an answer. It wasn't about justice, it was just about money.

Forget the fact that ICAC acted unlawfully. Forget that it was only former politicians who were ever found guilty of anything related to the Nucoal and Cascade sagas. Forget the pain, suffering and financial loss inflicted on thousands of innocent investors as a result. Even forget the moral principle of doing the right thing. All the Premier could mutter was that it was just too expensive.

I am one of the thousands of victims of this serious blight on the State's reputation. I have suffered. My family have suffered. And worst of all, as I told a parliamentary inquiry, I believe the stress of what the government has done to my family contributed to the tragic death of my beautiful wife. Because of that, I have devoted myself to finding out what really happened and who in government is responsible.

But first, let's go back in time to understand what transpired and why this is such an important issue for the people of New South Wales to understand.

### ***ICAC takes a wrong turn***

The whole saga started with ICAC, way back when the late David Ipp was Commissioner. You may remember those days. It was 2012 and ICAC dominated the headlines. Using public show trials and the manipulation of some willing media desperate for a headline, Ipp was able to make ICAC the most feared court in the land.

The only problem was ICAC was not a court. Nor was what they were doing lawful.

Incredibly, Ipp's ICAC twisted the definition of corruption to unilaterally extend their own power. The High Court ultimately had to direct them that what they were doing was wrong at law. But the damage for Cascade and Nucoal shareholders was done. ICAC had become their judge, jury and executioner.

The truth is that Ipp's ICAC went rogue. They were prepared to do anything to get the public kill they were after. For example, they relied on a witness they knew had serious substance abuse problems, was mentally impaired and who falsely claimed to have a law degree. All facts that they knew. All facts they ignored. All facts that they failed to disclose.

But in Ipp's ICAC, that was all ok. Credibility issues were cast aside if the witness would tell them what ICAC wanted to hear. This heavily curated 'evidence' would then be used to declare the findings of fact necessary to fit the story ICAC was peddling. From there ICAC could do whatever they wanted. And they did.

Relying on these curated findings of fact and unlawful declarations of corrupt conduct, Ipp's ICAC convinced the O'Farrell government to expropriate assets from the innocent shareholders of Nucoal and Cascade.

But then it all began to unravel, for both ICAC and the government.

It was clear to all that ICAC had got out of control. Finally, in 2015, the High Court got the opportunity to examine ICAC's conduct and formally determined they were acting beyond power.

How ironic.

The institution that so desperately represented itself as society's saviour was formally pronounced by the highest court in the land to embarrassingly lack the legal authority to do what it was doing.

Panic then set in at Macquarie Street. The powers that be immediately realised the significance of the High Court's decision.

Only a year before, ICAC and the government had conspired to use the façade of ICAC's unlawful corruption findings to expropriate Nucoal and Cascade's assets. These assets were potentially worth billions of dollars. If the corruption findings that underpinned this extraordinary decision were now illegal, how could the government continue to justify their actions?

You would have hoped, even expected, that the first reaction of those senior public servants who understood the magnitude of the problem would be to work out how to right the wrongs done to the innocent victims of Nucoal and Cascade. The obvious response was for them to objectively advise the government on the steps needed to be taken to correct the issue and put in place an appropriate scheme to compensate the thousands of innocent victims of this massive mistake.

However, unfortunately, the senior bureaucrats tasked with solving the problem opted to take a different course. Instead of fixing the problem they decided to cover it up. From there lies, omissions, obfuscation and subterfuge became the go to strategy.

So how did this all get covered up by those in the know?

## ***Covering ICAC's tracks***

The first move was to convince the parliament to pass retrospective legislation to validate ICAC's sins of the past. This legislation effectively stopped anyone who had wrongfully suffered from ICAC's unlawful activities from having any recourse to the judicial system. A very innovative and clever solution to bury facts that could be injurious to ICAC and the government's reputation.

For those who orchestrated this cover up, there was another imperative. Retrospective validating legislation meant that any attempts to publicly challenge the government for taking away Nucoal and Cascade's billion-dollar coal assets could continue to be waved away. The veil of corruption could be maintained, albeit based on 'validated' but still illegal ICAC findings.

It is important to note that this highly unusual retrospective legislation was passed by unsuspecting members of parliament in record time, in the dead of night. However, it is now clear that when voting on the legislation, crucial facts were deliberately hidden from members of parliament by the executive arm of Premier Baird's government. Many of them are now on the public record confirming that fact.

The most common complaint by those that voted was that no one told parliament that ICAC had already recognised and acknowledged that four of its victims, all directors and shareholders of Cascade, were not corrupt. In fact, unbeknownst to anyone voting except presumably the Premier and his executive, ICAC had already agreed to consent orders in the Supreme Court to overturn the unlawful corruption findings inflicted by ICAC on these innocent people.

Consequently, when parliament passed the retrospective validation act, these four victims were left stranded at the court's door. They were literally just hours away from having their unlawful ICAC findings overturned by the Supreme Court. Suddenly, the Act was passed, and the illegal corruption findings were validated. Game over, or so thought those responsible.

Remember, having these findings continue to persist in some form or another was and remains critical to the government's ongoing narrative

justifying the decision to expropriate Cascade and Nucoal's legitimately owned assets. Premier Minns said as much to Ben Fordham.

### ***The truth will out***

My journey to find the truth has taken many twists and turns.

I started by hiring lawyers to review whatever documents they could as various proceedings meandered their way through the court system. This exercise revealed enough to make me realise that something was seriously amiss. But it didn't resolve why the government did what it did and who was responsible.

The first real break came from a very unlikely source. A former government minister directly responsible for mining in New South Wales, Chris Hartcher, decided he needed to come clean. He provided a written statement through lawyers that made for some pretty damning reading.

Hartcher claimed he had been a party to discussions with his cabinet colleagues, including then Premier, Barry O'Farrell, where it was made absolutely clear that Ipp's ICAC was "*going to really go after...*" Nucoal and Cascade. Hartcher states that these comments were made at least a year before ICAC even launched its investigation. An amazing revelation. The shareholders of Cascade and Nucoal never stood a chance. Any possibility of procedural fairness was trashed.

Hartcher goes on to recount another conversation that occurred before Ipp's ICAC had even concluded its public hearings, let alone issued its report on Cascade and Nucoal. The former minister recalls that he took part in a conversation where his cabinet colleagues said "*Ipp doesn't think it would be helpful if the mining lease (Mt Penny EL) was approved prior to his report.*"

Apparently this instruction was given because Ipp had realised that notwithstanding his investigations into the grant of Nucoal and Cascade's exploration licenses, the government had no choice but to issue the respective company's with their mining leases. You see, both company's had met all necessary regulatory and procedural requirements. Under the relevant laws, there was no ability for anyone to exercise discretion. Having met all the requirements, Cascade and Nucoal were entitled to have their

mining licenses issued. That is, unless someone somehow conjures up a way to interfere with the legal process.

And that is what happened. When Ipp discovered that the government was obligated to issue Cascade and Nucoal with their mining leases, he went into a frenzy. He started opinion shopping to try and find a senior barrister to tell him that the State did in fact have discretion and therefore had the power to withhold the mining licenses. Unfortunately for him, he couldn't find anyone to agree with that proposition.

At that time, Hartcher recalls some unusual interactions with his senior cabinet colleagues where he was instructed that Cascade and Nucoal's final mining lease applications should: "... *go to the bottom of the pile.*", with directions given from the very top of the State government to "*allow bureaucratic inertia.*"

As for Ipp's opinion shopping exercise, the State's Solicitor General at that time and then two other eminent barristers all told Ipp the same thing: the government had no power to not issue Cascade and Nucoal with mining leases over their assets.

Finally, presumably as a last resort, Ipp went to another leading barrister and asked him a slightly different question. Would it be possible to legislate to expropriate the assets if adequate compensation was paid? That barrister, dealing with the hypothetical question raised responded in a very guarded and highly qualified manner.

Ignoring the qualifications, it was enough for Ipp. He carefully lifted a few select paragraphs from the opinion and made a recommendation to the government to introduce legislation to expropriate Cascade and Nucoals assets. To be fair, and consistent with the barristers advice, his recommendation did also support the proposition that innocent shareholders should be paid compensation.

It is important to note that Hartcher's recollections coupled with the uncovering of Ipp's desperate opinion shopping exercise, raise some very serious concerns that go to the heart of procedural fairness. The uncovering of these issues indicate that Ipp, possibly in collusion with some senior members of the executive arm of government, had already decided what was to be done to Cascade and Nucoal way before ICAC's public hearings had concluded. An extraordinary situation which is both scandalous and disgraceful.

The result was a serious wrong being inflicted on the innocent shareholders of Cascade and Nucoal. But equally disturbing was the direct interference with established government regulation and process. A fact that should be of real concern, and a salutary lesson to all.

### ***The art of hiding information from the public***

At this point, I had at least uncovered enough information to make targeted freedom of information applications. How naïve I was about that process! I had no idea how fiercely the government would fight to stop me getting access to critical documents.

ICAC, the Department of Premier and Cabinet and the little-known Office of the Premier pulled out all stops to prohibit me from accessing documents I knew existed but were hidden from public view. My applications for access to these documents were continually denied.

The arguments used against me ranged from claiming cabinet in confidence to the self-incriminating claim that it was 'not in the public's interest' for the documents to be released because it could adversely impact the public's perception of institutions like ICAC. At one point, they even invoked the little used secrecy provisions in the ICAC Act to try and stop the documents from seeing the light of day.

Whatever I threw at them, the reply was effectively the same. The documents contained such sensitive information they should never be seen by the public.

That said, my efforts were not entirely in vain. After a couple of years of continually agitating under the enormously frustrating freedom of

information regime, I got a surprising break. A whistleblower, I assume concerned by the governments complete lack of responsiveness to my various freedom of information applications, suddenly emerged.

Documents that I had been seeking were discreetly leaked. These documents definitively proved what I had long suspected. Senior bureaucrats had failed to provide thorough and accurate advice to government ministers when tasked with advising on issues related to Cascade and Nucoal, including compensation.

The documents revealed that internal memos to senior ministers consistently omitted crucial facts and, therefore, completely distorted the truth. Ministers were being presented with recommendations that no compensation could be justified to either Nucoal or Cascade because both of their claims continued to be tainted by corruption. Naturally, the ministers blindly followed the advice of their trusted bureaucrats, completely ignorant of the fact that what they were being advised omitted crucial facts, was carefully curated, and wrong.

### ***Why go to such great lengths to hide the truth?***

Creating your own version of the truth became an art form under Ipp's ICAC. Sadly, some in the upper echelons of the bureaucracy seem to have adopted the same practice.

And now we have the Premier's remarks on Ben Fordham Live. He implies it is all just about the money. But to be fair, the Premier does not know all the facts. How could he. Critical information has consistently been hidden from him, his predecessors and members of the last few cabinets.

So, what motivates those responsible for perpetuating this wrong?

I suspect they justify their actions to themselves on the basis that protecting ICAC's reputation, and the governments purse, is part of their job description.

However, I think the truth lies elsewhere. I believe that the individuals involved, having discovered that they were somehow party to a serious wrongdoing, opted to put their careers ahead of doing the right thing.



In every court in the land where this issue has come up, the directors and shareholders of Cascade or Nucoal have been completely exonerated.

It is only two former politicians who have ever been found guilty of anything, and those charges related to the creation as opposed to the grant of the original exploration tenements. Activity that occurred years before Cascade or Nucoal even got involved.

Supreme Court Justice Elizabeth Fullerton confirmed that “...*if any conspiracy to commit corrupt conduct had been undertaken, it would have had to have taken place before the Cascade application*”. She then went on to echo what the Crown Prosecutor had said about the Cascade directors and shareholders, namely that they were simply involved in “*a series of legitimate arm’s length commercial transactions*”. Similar statements have been made about individuals involved in Nucoal by judges in court cases. The truth is that both Cascade and Nucoal were just unfortunate victims in conspiracies they had nothing to do with.

Not disclosing all the truth is the same as telling a lie.

As mentioned, documentary evidence from a government whistleblower is now doing the rounds. These documents definitively reveal that when government ministers have tried to get to the bottom of what really happened with Cascade and Nucoal, they have been misled. Possibly, deliberately misled.

The documents, authored by officials at the highest level of the bureaucracy and stated to be definitive advice, omit key facts that are critical to understanding the whole story.

Instead of dutifully re-telling the whole truth, important facts are mis-stated or omitted entirely. Even the High Court’s decision that ICAC acted unlawfully is expressed to be somehow doubtful. Senior bureaucrats throw around words like ‘loophole’ and ‘technical’ to undermine the legitimacy of the High Court’s decision that Ipp’s ICAC had been acting beyond power.

Relying on this falsehood, and not detailing the complete story, seems to be the go-to strategy. Government ministers have consistently been

advised to do nothing and ignore the legitimate claims of the Cascade and Nucoal shareholders.

### ***Will Chris Minns right the wrong?***

Doing nothing means ignoring the claims of more than 5,000 people. I understand Nucoal has about 4,000 affected shareholders. In addition, Cascade has over 1,000 direct and indirect investors impacted by this saga (taking into account the shareholders of the Japanese listed company Nippon Gas Co Ltd.

These people primarily come from New South Wales but also include innocent shareholders from Japan and the United States which of course raises important sovereign risk concerns around doing business with the New South Wales government.

Again, remember it is ICAC's unlawful findings that underpin the governments public stance not to compensate Nucoal and Cascade shareholders. So, this consistent misrepresentation of the actual truth by the upper echelons of the bureaucracy is critical to the governments failure to rectify their wrong.

This pattern of obfuscation and subterfuge extends beyond mere negligence. It speaks to a culture within a group of senior bureaucrats. A culture that prioritizes self-preservation over transparency and truth.

Time and time again, crucial facts have been withheld from cabinet members or the parliament at large on this issue, with the result of stifling any genuine efforts towards justice.

The question of why such a cover-up persists is not easily answered. However, the consequences are undeniable. Thousands of innocent people have lost their life savings, and, in the case of the Cascade directors, their lives have been thrown into disarray by allegations that have no substance.

Fortunately, amidst this sea of deceit, a beacon of hope emerged in the form of the Parliamentary ICAC Oversight Committee.

Through meticulous examination of the relevant facts and with bipartisan collaboration, this committee arrived at a unanimous conclusion: the directors of Cascade had committed no wrongdoing and that unlawful findings made against them by ICAC should be overturned. The Oversight Committee's recommendation for exoneration was clear and unequivocal, backed by a comprehensive review of all the facts at hand.

Yet, even in the face of such political consensus, bureaucratic manoeuvring has derailed the path to justice. Efforts to enshrine the Committee's recommendation in law are still being met with resistance, despite assurances of support from both sides of the aisle.

Interestingly, the same senior bureaucrats seem to have been involved throughout. Their fingers are everywhere. Even since way back, when the retrospective validation legislation was conjured up to make sure the State's decision to expropriate the assets of Cascade and Nucoal assets could not be unwound.

Why are these people so intent on perpetuating this lie and what are they hiding?

While in opposition, the current Attorney General recommended to his caucus that the Oversight Committee's recommendations should be fully supported. But again, the same senior bureaucrats got to work. Old opinions were dusted off and used to confuse the issue. When the issue was raised recently, senior ministers were again misled by only being given convenient, selected facts. Not the whole story.

We saw this movie play out again just a few months ago. But this time, on a public stage.

When The Hon. Rod Roberts grilled The Hon John Graham, The Special Minister for State, in a Budget Estimates hearing on the ongoing plight of the Cascade directors, John Graham turned to the then General Counsel of the Premier and Cabinet Office, Ms Kate Boyd, for answers. Under oath, Ms Boyd reeled out the same standard lines we have come to expect. Although she presumably understands all the relevant facts, Ms Boyd somehow failed to tell the full story. Yet again, a senior official at the highest level of the bureaucracy keeping parliamentarians in the dark about the whole truth.

Crucial omissions continue to undermine any semblance of fairness or accountability, leaving the Cascade and Nucoal shareholders, and indeed, all those affected by ICAC overreach, in a state of limbo.

Cascade and Nucoal shareholders' repeated requests for meetings with government to bring this matter to a close continue to fall on deaf ears.

Calls for compensation and exoneration continue to be ignored. Instead of admitting wrongdoing, the same one-sided narrative that has plagued this issue from the outset continues to justify government inaction.

That position must change. Government must redress this wrong.

Parliament should implement the Oversight Committee's recommendations with the effect that ICAC's unlawful findings against the Cascade directors can be overturned.

As for compensation for the shareholders of Cascade and Nucoal, the government must negotiate with them and come to a fair and just conclusion.

It is incumbent upon all those with a stake in justice, be they the Premier, lawmakers, civil servants, or concerned citizens, to demand accountability and transparency from those in power. The veil of deception must be lifted, and the truth brought to light. Only then can we begin to rebuild trust in our institutions and ensure that justice is truly served.

Let's hope the Premier reads this article and goes back on Ben Fordham Live to announce that he wants to know all the facts. Armed with the whole story, and not the carefully curated story presented to date by senior bureaucrats, hopefully the Premier will do the right thing and fix the problem, rather than just say it is all too expensive.

**By John Atkinson\***

## **\*My Story**

You have probably already realised that I am not an author or a journalist. My only real claim to fame is that, together with my late wife, we produced three wonderful children who have grown up to be caring, curious and productive adults.

That said, I am a victim of Ipp's ICAC. As a director and shareholder of Cascade Coal I was unlawfully found corrupt by Ipp in Operation Jasper. My family and I and have had to live with that stigma for the last 12 years.

I originally trained as a lawyer. Somewhat ironically, I started my legal career at Parker & Parker in Western Australia where the late David Ipp was a partner. Because of that, I knew Ipp well. A fact that he failed to acknowledge, let alone disclose, during Operation Jasper.

I practised law in Australia, Hong Kong and New York. I was lucky enough to rise through the ranks to run the worlds largest law firms global M&A practice.

After leaving the law, I came back to live in Australia. Since then, I co-founded a venture capital firm; have started a number of businesses; and became Chief Executive Officer of an ASX200 company. Through the various companies I have been involved with as Founder, Co-Founder, CEO, Chairman or investor, I have been able to generate well over 1000 jobs – something of which I am very proud.

After a long and highly publicised Inquiry, in June of 2013, Ipp incorrectly and unlawfully issued a finding of corrupt conduct against me and the other directors of Cascade Coal.

It is important to note that Ipp did not find that Cascade, or any of the directors or investors (including myself) was involved in corrupt conduct in relation to the **creation** or **grant** of the coal exploration licences awarded to Cascade. Nor was there any suggestion of any illegal dealings with public officials.

For reasons only known to him, Ipp misapprehended and misapplied the legal test for what constituted “corrupt conduct”, and unlawfully went beyond his statutory remit to make his adverse findings against me and the other Cascade directors.

Why Ipp did this is bewildering.

The transaction for which we were found corrupt never involved any public officials – which, of course, is fundamental to ICAC’s jurisdiction. It was just a very normal and typical business transaction, a fact that has been formally acknowledged by every court who has ever analysed the matter.

Perhaps the public expectation so successfully fuelled by Ipp’s ICAC and its symbiotic relationship with the media, meant that there was no turning back for him. He had to deliver, irrespective of the truth.

Some argue that there was external pressure applied to the Commission that encouraged Ipp to deliver a result that publicly justified the expropriation of Cascade’s legitimately won licenses.

Who knows?

But whatever the reason, the fact that Ipp presided over an Inquiry that was so fundamentally flawed both in law and fact is troubling. Particularly when viewed through the lens of the extraordinary interactions uncovered between the Commissioner and the executive government of the day.

Whatever the motivation, the impact on my colleagues and me has been profound. Our reputations have been irreparably destroyed and our lives deeply impacted as a consequence - with no recourse available to us to right the wrong.

When Ipp handed down his damning findings against me and my colleagues in mid 2013, a newspaper showed a picture of all of us depicted behind bars on the front page with the tagline ‘Guilty’. We had been successfully portrayed by ICAC as criminals, - even though, as time has shown, we did nothing wrong. To top it off, I also received a death threat in my letterbox at home. They were very difficult times for me and my family.

The truth is that my Cascade colleagues and me were road-kill in a politically charged inquiry that clearly served a purpose for someone. We may never know why Ipp was prepared to stretch his statutory remit beyond the realms of the law but what is certain, that in so doing, he successfully

destroyed the hard-won reputation of me and my colleagues in the process.