

CHRIS MERRITT

Albo needs to make fair point on dealing with US



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In a perfect world, this country's record for fair dealing with American companies would be enough to persuade [Donald Trump to exempt Australia from the tariffs](#) he plans to impose from March 12.

But Australia's treatment of US companies has not always been fair. Far from it.

If Anthony Albanese is serious about securing an exemption from Trump's tariffs, he has less than three weeks to remove a scandal that has been blighting Australia's reputation for fair dealing with America for more than a decade.

If the government declines to act before entering caretaker mode for the election, this is unlikely to be ignored by the Coalition if that tariff exemption fails to materialise.

The risk confronting Australia is this: With a little digging, the tariff hawks advising Trump will find that successive Australian governments have all treated the free trade agreement with the US with what can only be described as contempt.

They will find that US investors in this country have been stripped of assets worth tens of millions of dollars and denied due process and compensation – which are key requirements of the Australia-US Free-Trade Agreement.

This took place in 2014 and had a devastating impact on Americans who held a big stake in Australian mining company NuCoal Resources when it was stripped of its main asset, an exploration licence, and denied compensation.

This destroyed their faith that US investments are protected in this country not just by the rule of law but by treaty obligations put in place to prevent arbitrary seizure of American assets.

NuCoal's licence was cancelled not because it had done anything wrong, but because Ian Macdonald, a corrupt former NSW minister, had originally issued the licence to another company that was later bought by NuCoal.

When this affair was eventually sorted out by the justice system, the only wrongdoing found to have taken place was inside the NSW government, not inside NuCoal or the original licence-holder that was bought by NuCoal.

Yet by cancelling the licence after it had been bought by NuCoal, NSW ensured the losses from Macdonald's corruption were transferred entirely to innocent shareholders. Australians as well as Americans were all treated like mugs.

This plays into the hands of those in Washington who are looking for reasons to persuade Trump to ignore Albanese's lobbying and push ahead with 25 per cent tariffs on Australian aluminium and steel.

The tariff hawks are led by Peter Navarro, a Trump loyalist who was barking up the wrong tree when he accused Australia's aluminium exporters of being backed by China, a long-time target for this Harvard-trained economist.

Navarro, who wrote a book called *Death by China*, would have been on stronger ground had he pointed to the fact that NuCoal had been treated less favourably in this country than Shenhua Watermark, a mining company owned by China's communist dictators.

When NSW decided to take back exploration licences held by both companies, Shenhua's communists were paid \$362m while NuCoal received nothing.

Americans owned 30 per cent of NuCoal which had a peak valuation of \$400m before the cancellation of the licence. NuCoal is now worth \$2m.

By refusing to pay compensation NSW imposed immense losses on American individuals and institutions who include the Taurus Resources Fund based in Delaware, the Sparta Group and Ventry Industries from Massachusetts, Jean M. Pfeffer from New Jersey and private clients of Charles Schwab in California.

While all this happened under the Coalition government of NSW, the free trade agreement with the US was signed by the federal government which is responsible for ensuring its terms are honoured. Yet successive federal governments refused to insist that NSW abide by the terms of that treaty and ensure NuCoal's US investors were treated fairly.

Albanese and federal trade officials might be hoping that the tens of millions of dollars taken from American investors in NuCoal will be overshadowed by the fact that America enjoys a trade surplus with Australia.

But consider the context. Trump is pursuing tariffs in the belief that the rest of the world is taking advantage of the US.

He has already accused Australia of failing to honour an earlier agreement to restrain exports of aluminium to "reasonable levels" – a claim that has been contested by recently published analysis undertaken by the Lowy Institute.

Yet even if Trump accepts the Lowy analysis on aluminium, the NuCoal affair shows conclusively that Australia is among those who have indeed been taking advantage of Americans.

Federally, Labor and the Coalition have both refused to ensure that the provisions of the free trade treaty are upheld.

Article 11.7 of the treaty is clear. It says neither party may expropriate an investment unless it is followed by payment of prompt, adequate and effective compensation and is done in accordance with due process of law.

NuCoal did nothing wrong.

If Albanese declines to act, it amounts to implicit recognition by his government – just like every federal government since 2014 – that Australia will continue to treat NuCoal's American investors like mugs.

But if Albanese were to force NSW to address this issue, Australians would also benefit – particularly thousands of NuCoal’s small shareholders in electorally sensitive parts of the Hunter Valley.

That would make it difficult for NSW to resist demands for compensation from another mining company, Cascade Coal, which was also stripped of a Macdonald-issued licence and denied compensation. Nobody associated with Cascade has been convicted of anything.

Chris Merritt is vice-president of the Rule of Law Institute of Australia

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