

# PERFECT TIME FOR PM TO FINALLY FIX O'FARRELL'S FOLLY

CHRIS MERRITT

It could just be a few weeks before Anthony Albanese flies to Washington for long-delayed talks with Donald Trump.

It would therefore be wise to remove an obvious impediment to the success of those discussions.

That means taking seriously diplomatic overtures from the Americans about a longstanding grievance by US investors that has been ignored by successive federal governments – Coalition and Labor.

Treating American investors and their government with such disdain was never a good idea.

But with a mercurial president in the Oval Office, it should be clear to Albanese and his advisers that it is simply too dangerous to allow this grievance to remain unresolved when the two leaders meet.

Recent events have provided some blunt lessons about what can happen to world leaders who fail to properly prepare the ground before engaging with Trump.

Before the talks begin, the President is likely to be briefed not just on tariffs and military co-operation, but on the issue that has marred relations between the two countries since 2014 – the expropriation by NSW of US-owned assets in mining company NuCoal Resources.

The amount stripped from US investors is relatively trivial – about \$120m compared to \$88.2bn of US exports to this country. But that's not the point.

The manner in which those assets were taken – without due process of law or compensation – is the real issue.

It amounts to a breach of the US-Australia Free Trade Agreement and that goes to a much more important issue: trust.

Consider this from the US perspective: if Australia is prepared to breach a treaty with America over a relatively trifling amount of money, what does this say about Australia's commitment to treaties on much bigger issues?

Why should Australia or any other country be rewarded with favourable treatment after ignoring its treaty obligations with America, seizing US assets, refusing to pay compensation and then repeatedly ignoring formal diplomatic overtures by the US government?

How would Australia react if the positions were reversed?

Before Albanese walks into the Oval Office, Trump is likely to be briefed on how Australia failed to address this issue despite entreaties in 2017 by former US ambassador Robert Lighthizer and in March this year by the current US trade representative, Jamieson Greer.

He is also likely to be reminded that this incident is once again listed in the US government's latest annual report on foreign trade barriers.

The real blame for this rests squarely with former NSW premier Barry O'Farrell and the NSW Coalition parties that formed his government.

Instead of allowing the normal law to take its course, O'Farrell's government rammed through special legislation in 2014 to strip NuCoal of an exploration licence without proof – or even an accusation – of wrongdoing.

But Albanese is on the hook because the federal government – not NSW – is obliged under the treaty with the Americans to protect US investments from exactly the sort of Third World lawmaking that took place under the Coalition parties in NSW.

The great irony in all this is that it falls to federal Labor to clean up the mess left by a Coalition government's attack on legal certainty and property rights.

NuCoal's licence was cancelled not because the company had done anything wrong. Nobody associated with the company, past or present, has a conviction against their name.

O'Farrell cancelled the licence because it had originally been issued to another company by Ian Macdonald, a corrupt former minister for mineral resources who is now in prison.

NuCoal had no involvement with Macdonald and only bought the original licence holder after commissioning due diligence from corporate lawyers who reported the licence had been granted in a regular manner.

NuCoal then spent \$94m buying the licence holder and another \$40m on exploration, development studies and land acquisitions – all of which has been lost.

Years later, the state's Independent Commission Against Corruption urged O'Farrell to cancel the licence. But the premier ignored the fact that the commission went on to recommend that innocent parties could be compensated.

And in proceedings before the NSW Supreme Court, ICAC made the point 10 years ago that NuCoal was "innocent of any wrongdoing".

The bottom line is this: After ICAC called for action, O'Farrell's government took careful aim and hit the wrong target.

By rushing through special legislation that punished a company without proof of wrongdoing, the NSW parliament ignored what ICAC said about compensating the innocent and punished them instead.

The lesson is that parliament should never have ventured into an area that required it to decide who should be punished over allegations that had not even been tested by independent prosecutors, let alone a court.

Now that the courts have had 11 years to sort out this affair, it is clear that the only unlawful conduct associated with this matter was confined to Macdonald.

But while this misconduct took place entirely within the NSW government, the financial cost of that corruption has been transferred entirely to the private sector – to thousands of innocent Australians and Americans.

Americans owned 30 per cent of NuCoal which had a peak valuation of \$400m. So while Australia owes Americans \$120m, Australians are owed \$280m.

For Albanese, the way forward should be clear. Ignoring this affair means risking embarrassment in the Oval Office.

Somehow, the issue of compensation needs to be taken off the table before he meets Trump.

That means compensation for the Americans. And if that happens, the Australian victims of O'Farrell's folly will also need to be compensated.

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

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