



Office of the Inspector of the
Independent Commission Against Corruption

**Report and Supplementary Report
concerning a Complaint by Mr John
Atkinson about the conduct of the
Independent Commission Against
Corruption in Operation Jasper**

(Special Report 18/01)



Office of the Inspector of the
Independent Commission Against Corruption

12 April 2018

Our ref: C7 2018 - 18/01

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Madam Speaker

In accordance with sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the *ICAC Act*"), I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament a *Report concerning a Complaint by Mr John Atkinson about the Conduct of the Independent Commission Against Corruption in Operation Jasper (Special Report 18/01)*.

Pursuant to section 78(1A) of the *ICAC Act*, I recommend that the Report be made public forthwith.

Yours sincerely,

A handwritten signature in black ink that reads "B. R. McClintock". The signature is written in a cursive style with a horizontal line underneath the name.

Bruce R McClintock
Inspector, Independent Commission against Corruption.

1. I am pleased to provide pursuant to sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* (the ICAC Act) a report determining a complaint against the Independent Commission Against Corruption (“ICAC”) made by Mr John Atkinson.

Executive Summary

2. Mr Atkinson was the subject of a finding of corrupt conduct by the ICAC in its July 2013 report concerning Operation Jasper (“the first Jasper Report”)¹. The ICAC, in effect, found Mr Atkinson engaged in corrupt conduct in two respects as follows:
 - a) *deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement, and*
 - b) *authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments, with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.*²
3. The New South Wales Court of Appeal upheld such findings in one respect but not the other. See *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143.
4. Mr Atkinson, by letter dated 30 November 2017, now complains about ICAC’s conduct. His complaint is encapsulated by the following passage from the letter referred to (see attached):

Commissioner Ipp actively interfered with the executive arm of Government with the objective of influencing government actions which ultimately led to Cascade Coal’s lawfully acquired assets (coal licences) being confiscated and retrospective legislation being introduced to protect ICAC’s unlawful activity from challenge.
5. The retrospective legislation referred to is the *Mining Amendment (ICAC Operation Jasper and Acacia) Act 2014* No 1 and the *Independent Commission Against Corruption Amendment (Validation) Act 2015*. I note also the insertion at about the same time of section 380A into the *Mining Act 1992* which enables decision makers to take account of the fitness of a person to hold a mining right under the Act.
6. In my opinion, the matters of which Mr Atkinson complains do not amount to “abuse of power, impropriety and other forms of misconduct” nor to “maladministration” as those terms are used in section 57B of the ICAC Act 1988.
7. Accordingly, I have decided his complaint should be dismissed.

¹ *Investigation into the conduct of Ian MacDonald, Edward Obeid Senior, Moses Obeid and others, July 2013* p 152 (“Operation Jasper Report”)

² ² The IBC was the Independent Board Committee of White Energy which was considering acquisition of assets of Cascade Coal. The Stock Exchange listing rules required the establishment of such a committee because of conflicts of interest on the part of a number of directors of White Energy.

Background—ICAC Operation Jasper

8. Operation Jasper concerned, principally, the circumstances surrounding a decision made in 2008 by Ian McDonald, then Minister for Mineral Resources, to grant a coal exploration licence in the Bylong Valley, including determining whether that decision was influenced by Edward Obeid, who was, of course, a member of the Legislative Council and a former Minister in the Carr Government, or by members of the Obeid family. The licence in question was known as the Mount Penny Tenement. As part of its investigation, the ICAC conducted a public enquiry over 45 days between 12 November 2012 and 20 May 2013 and published the first Jasper Report in July 2013
9. The facts found by the ICAC in the Jasper Report are both lengthy and complex and many do not concern Mr Atkinson. I summarise the background facts as follows. The ICAC found that Mr MacDonal, as Minister for Mineral Resources, had directed that a mining tenement known as Mount Penny be created and that he did so to benefit the Obeids, and not for any legitimate public purpose. The Obeids sought to submit an expression of interest over the Mount Penny and Glendon Brook tenements as part of a joint venture with Monaro Mining NL and their company, Voope Pty Limited. Monaro made bids for exploration licences for each of the Mount Penny and Glendon Brook tenements. Monaro subsequently sold to Voope all the shares in the subsidiary, which had been intended to apply for the exploration licences. Before the expression of interest process was completed, Mr McDonald reopened it as a favour to Travers Duncan, a wealthy investor. That permitted Cascade Coal, in which Mr Duncan had an interest, to lodge a bid for Mount Penny and Glendon Brook. The other investors in Cascade Coal included Messrs McGuigan, Poole, and Atkinson. The Obeids reached an agreement with Cascade Coal to enter into a joint venture, using an Obeid controlled entity, Buffalo Resources Pty Limited. Those negotiating on behalf of Cascade Coal, including Messrs McGuigan, Poole and Atkinson knew that the Obeids were the party with whom they are entering into a joint venture. One aspect of the joint venture involved Buffalo Resources arranging the withdrawal of the Monaro Mining bids with respect to Mount Penny and Glendon Brook tenements. That withdrawal resulted in Cascade Coal's bid being successful.
10. In its December 2013 report *Operations Jasper and Acacia--Addressing Outstanding Questions* the ICAC, amongst other things, recommended that the New South Wales Government consider enacting legislation to expunge the authorities for the Mount Penny and Glendon Brook tenements. The ICAC notes at page 20 of that Report that any expungement could be accompanied by a power to compensate any innocent person affected by the expunging.
11. Subsequently, the New South Wales Parliament enacted the legislation to which I have referred to above which, inter alia, had the effect of expunging the authorities for the Mount Penny and Glendon Brook tenements.

Background – ICAC Findings and Litigation involving Mr Atkinson

12. In the first Jasper Report, the ICAC included the following statements concerning Mr Atkinson.

Mr Atkinson

Mr Atkinson was the least aggressive, least assertive, and probably the most reliable of the witnesses amongst the Cascade investors. Generally speaking, he made a genuine attempt to answer questions accurately, and the Commission is inclined to accept most of his claims about difficulties caused by a defective memory.

Mr Atkinson was, like John McGuigan, an experienced and accomplished lawyer. He was a director of White Energy and had previously been its managing director. He agreed that he knew that the IBC was looking for information on a potential Obeid involvement, and the information was important to it. Mr Atkinson, like Mr McGuigan seemed to think that a fiduciary duty could be turned on and off:

“The Commissioner: Yes, you remain silent about your knowledge of the Obeid involvement? – That’s yes that’s correct.

Mr Watson: and as you put it, you saw your duty as changing because you were now acting as a seller? That’s correct.

So, you owed the duty to yourself as a seller but not to the mums and dads of White Energy? – In the context of that transaction, yes.

Yes, exactly in the context of that transaction your duty was to protect your own interests not the shareholders of White Energy? – It was to protect the interests of Cascade and presumably, yes, as part of that my own interest, yes.”

As a director of White Energy, Mr Atkinson owed White Energy a fiduciary duty, the Commission is satisfied that despite this, Mr Atkinson deliberately concealed the Obeid involvement in the Mount Penny tenement from Mr Cubbin and the IBC [p 135].

13. ICAC’s ultimate findings concerning Mr Atkinson were expressed in the following terms:

Mr Atkinson

The Commission is satisfied that Mr Atkinson knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which Mr Atkinson was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

- a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement*

b) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement and that Mr Atkinson thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Atkinson's conduct as set out in a) and b) above with the intention in each case of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8(2) of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve company violations and therefore comes within s 8(2)(s) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found in relation to the deliberate failure to disclose information to the IBC were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Atkinson committed a criminal offence under s 184(1) of the Corporations Act 2001. This is because, as a director of White Energy, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of that company or for a proper purpose by withholding information about the Obeid family involvement so that the value of his holding in Cascade Coal would not be adversely affected.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Atkinson committed a criminal offence of obtain a financial advantage by deception contrary to s 192E(1)(b) of the Crimes Act 1900. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

The Commission therefore finds that Mr Atkinson engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement, and

b) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement [pp151-152].

14. Mr Atkinson (and others the subject of adverse findings in Operation Jasper) challenged those findings of the ICAC in the Supreme Court, first, before McDougall J ([2014] NSWSC 1018) and, then, on appeal to the Court of Appeal (Bathurst CJ, Beazley P & Basten JA): *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143. Bathurst CJ, in dissent, would have set aside the ICAC's findings of corrupt conduct against Mr Atkinson. The majority (Beazley P & Basten JA), however, while refusing to set aside the finding that Mr Atkinson had engaged in corrupt conduct, modified the basis for that finding. Basten JA (with whom Beazley P agreed on this point) expressed his reasoning in the following terms:

[640] There is no doubt that it was open to the Commission to conclude that those who deliberately misled the IBC were intentionally dishonest. Mr Atkinson, however, did not meet the IBC. His breach of his duties as a director lay in his failure to disclose what he knew, in the understanding that it was material to the decision of the IBC. He said that he preferred the interests of Cascade Coal and, as a consequence, his own interests. It was open to the Commission to conclude that to seek to obtain a price for one's own property (in this case shares in Cascade Coal) without disclosing to the purchaser a matter which he knew the purchaser would perceive as diminishing the value of the asset, in circumstances where there was a duty of disclosure, would, in ordinary parlance, constitute dishonesty. Such conduct being deliberate and with full knowledge of the relevant facts could be seen to be intentionally dishonest. It was therefore open to the Commission to conclude that such factors, if proved beyond reasonable doubt, would constitute an offence under s 184(1); that is, that there was an intentionally dishonest failure to make a disclosure required of a director acting in good faith and in the best interest of the corporation.

[641] That Mr Atkinson was not involved in active concealment may have been a good defence if the duty were limited to a duty not to mislead or conceal; it would not answer a breach of the pro-active duty to reveal what he knew. The section refers to a "failure" to act; it is not restricted to an active exercise of a power.

Mr Atkinson's Complaint

15. I have already quoted the passage from that letter that seems to me to set out the core of Mr Atkinson's complaint. I should also point out some other passages of that letter, if only because they seem to me to provide a useful illustration of the incorrect premise which underlies the complaint. At page 5 of the complaint, Mr Atkinson quotes an extract from a paper published by the Honourable David Ipp in 2008 entitled "*Maintaining the Tradition of Judicial Impartiality*". At that time, Mr Ipp

was a judge of the New South Wales Court of Appeal, he was not appointed Commissioner of the ICAC until 2010. His Honour (as he then was) is quoted as saying "*In Australia, there is no communication outside open court between government and judges concerning the result or the details of any decision a judge may be required to make*".

16. Mr Atkinson goes on to describe a (hypothetical) argument which he suggests might be made by Commissioner Ipp to the effect that there is a difference between the standard expected of a judge on the one hand and an ICAC Commissioner on the other. He describes the argument as "*brittle at best*".
17. I disagree and consider, for the reasons that follow Mr Atkinson's criticisms of Commissioner Ipp's dealings with government to be without substance.

Disposition

18. The ICAC is **not** a court but a specialist investigative agency exercising part of the executive power of the State of New South Wales. It has, and exercises, no judicial function. Seen this way, it is perfectly appropriate (subject to the general principles of administrative law which bind it) for one officer of the executive, that is, the Commissioner, to communicate with another, for example, the Premier or a Minister. It is no different from, say, the Commissioner of Police bringing a matter of concern to the attention of the Premier and is in no way of itself reprehensible, or liable to criticism.
19. The nature of the ICAC can be seen from the following provisions of its Act, the *Independent Commission Against Corruption Act 1988*. Section 2A sets out the principal objects of the Act, as follows:

The principal objects of this Act are:

(a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:

(i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and

(ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and

(b) to confer on the Commission special powers to inquire into allegations of corruption.

20. Section 4 provides:

(1) There is constituted by this Act a corporation with the corporate name of the Independent Commission Against Corruption.

(2) The Commission has the functions conferred or imposed on it by or under this or any other Act.

21. Section 13 deals with the principal functions of ICAC as follows:

(1) The principal functions of the Commission are as follows:

(a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

(i) corrupt conduct, or

(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

(iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,

(b) to investigate any matter referred to the Commission by both Houses of Parliament,

(c) to communicate to appropriate authorities the results of its investigations,

(d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,

(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated and the integrity and good repute of public administration promoted,

(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration,

(g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration,

(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct and to promote the integrity and good repute of public administration,

(i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity and good repute of public administration,

(j) to enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration,

(k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

(1A) Subsection (1) (d) and (f)-(h) do not extend to the conduct of police officers, Crime Commission officers or administrative employees within the meaning of the Law Enforcement Conduct Commission Act 2016 .

(2) The Commission is to conduct its investigations with a view to determining:

(a) whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and

(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and

(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

(2A) Subsection (2) (a) does not require the Commission to make a finding, on the basis of any investigation, that corrupt conduct, or other conduct, has occurred, is occurring or is about to occur.

(3) The principal functions of the Commission also include:

(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and

(b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

(3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

(4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B or 74BA prevents the Commission from including in a report, but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

(5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:

(a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,

(b) opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether consideration should or should not be given to the taking of other action against particular persons,

(c) findings of fact.

22. Attention should also be paid to Divisions 2 and 3 of Part 4 of the ICAC Act which respectively deal with Investigations and Compulsory Examinations and Public Inquiries.
23. These references make abundantly clear that the ICAC is not a court and norms, such as those which Mr Atkinson suggests apply to it by his quotation of Justice Ipp's 2008 paper, do not do so.
24. This issue was considered by the New South Wales Court of Appeal in *Duncan v Ipp* [2013] NSWCA 189 where that Court rejected criticism of the same contacts between the ICAC and the New South Wales Government of which Mr Atkinson now complains. The following comments of Bathurst CJ should be particularly noted:

[153] I have set out the relevant provisions of the Act and their effect above. The Commission is an investigatory body charged with investigating and reporting on corrupt conduct and advising on its prevention and elimination. Although it is required to act on a reference from both Houses of Parliament it can conduct inquiries of its own motion and in relation thereto hold both public and private inquiries.

[154] It would seem to me that although a fair-minded observer would not have detailed knowledge of the Act, he or she would at least have knowledge of the matters referred to in par [155]-[156] below.

[155] It would follow in my opinion that a fair-minded observer would be aware that in performing its functions the Commissioner and the Commission may from time to time form preliminary or tentative views as to the existence of corruption. It is inevitable that a body charged with investigations of the nature of those undertaken by the Commission will from time to time form such tentative views. Indeed, the formation of such views would in some circumstances be a necessary part of the Commissioner's functions in determining whether particular matters did or did not require further investigation.

[156] Further, the fair-minded observer in my opinion would have no expectation that all communications between the Commission and public officers or for that matter all facets of any investigation would be disclosed. In particular the fair-minded observer would not find it surprising that the advisory functions contained in s 13(1)(e) and (f) would be performed in private. [my emphasis]

25. The following remarks of McDougall J in *McCloy v Latham* [2015] NSWSC 1879 are apposite to Mr Atkinson's approach:

20. Again, the articulation of Mr McCloy's case, as it is done in the summons, makes no real attempt to come to grips with the essential differences between an inquisitorial body such as the Commission, and an adjudicative tribunal, such as this Court, charged with determining the outcome of adversarial litigation. Thus, in many cases, the submissions for Mr McCloy relied on statements of principle relevant to adversarial litigation, without considering the extent to which those statements might be capable of application, with or without modification, to an inquisitorial investigation conducted by the

Commission. Further, in many cases, the submissions failed to take account of the statutory framework regulating the Commission's activities.

In such circumstances, Mr Atkinson's criticisms seem to me to have no substance, as the Court of Appeal found in *Duncan v Ipp* supra.

Two final matters

26. At the core of Mr Atkinson's complaint is the circumstances in which Parliament came to pass the legislation to which I have referred to in [5] and which had the effect of cancelling the mining tenements in question and validating ICAC actions which might otherwise have been invalid. But those were actions of Parliament which resulted in valid legislation as the High Court has held: *Duncan v the State of New South Wales; Nucoal Resources Limited v State Of New South Wales; Cascade Coal Pty Limited & Ors v the State Of New South Wales* [2015] HCA 3. It would be both inappropriate and beyond the powers granted to me as Inspector by the ICAC Act to enquire into the basis upon which, or the reasons why, Parliament passed such legislation.
27. Underlying Mr Atkinson's complaint, is a failure to understand that the ICAC is not a court and actions which would be inappropriate for a court may well be both lawful and appropriate for a specialist investigative agency such as the ICAC. This misperception has bedevilled public views of the ICAC for many years and I took steps to address it in the 2005 report *Independent Review into the Independent Commission against Corruption Act 1988*. It remained a problem at the time of the 2015 Joint Report *Review of the Jurisdiction of the Independent Commission Against Corruption*. Be that as it may and accepting that steps to correct the public misunderstanding may have failed, the nature of the ICAC remains as stated in the legislation, not as some members of the public may wrongly perceive it.

Conclusion

28. Mr Atkinson's complaint will be dismissed.
29. Pursuant to 78(1A) of the ICAC Act I recommend that this Report be made public forthwith.



Bruce R McClintock

Inspector

Independent Commission Against Corruption

12 April 2018

Supplementary Report to Special Report 18/01

1. After I wrote the *Report concerning a Complaint by Mr John Atkinson about the conduct of the Independent Commission Against Corruption in Operation Jasper (Special Report 18/01)*, I provided a copy to Mr Atkinson, the complainant, for his comments. I did not believe I had any obligation to do so under section 79A of the ICAC Act because I did not (and do not) believe that I have made any adverse findings against Mr Atkinson. Such a finding is necessary to trigger the obligations that section imposes on me. Nevertheless, I thought it fair to give him an opportunity to comment.
2. On 9 March 2018 I received a response from Mr Atkinson which is attached to this Supplementary Report so that it is brought to the attention of Parliament. I reject each of the four criticisms Mr Atkinson makes of my Report, as follows:

A. Failure to Review Documentary Evidence

3. I decided not to review this evidence because it could not rationally lead to a finding that the Commissioner or the ICAC had engaged in “abuse of power, impropriety or misconduct” or “maladministration”, the only matters with which I can deal under the functions provided to me by Parliament by section 57B of the ICAC Act. For brevity, I will refer to these concepts as “abuse of power”. This is because, as a matter of principle, for the reasons stated in my Report contact between the ICAC and other parts of the Executive of the sort Mr Atkinson describes cannot amount to abuse of power.

B. Failure to Deal Adequately with Substance of Complaint

4. The assertion Mr Atkinson makes in support of this second proposition is wrong as a matter of law. This can be seen from the fallacious proposition he makes that “the ICAC is not a part of the executive arm of government”. It is. Further, none of the interactions he mentions between the Commissioner Ipp and the then Premier, based on supposed conversations between Mr O’Farrell and Mr Hartcher or Mr O’Farrell, Mr Hazzard and Mr Hartcher could conceivably amount to abuse of power on the part of the ICAC or any officer of the body, even if they occurred. In addition, in so far as these are allegations against the ICAC, they are based on second hand hearsay coming from Mr Hartcher. I do not believe that is something upon which I should act.

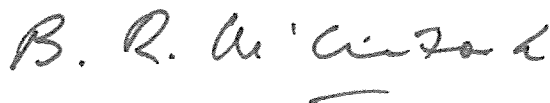
C. No Legislative Support

5. The propositions stated here by Mr Atkinson are wrong. For example, section 13 (1) (c) cannot be read, as he seems to wish, to mean that the ICAC has to wait until the conclusion of an investigation to communicate the results to the appropriate authorities. The assertion that because the Act does not grant authority to the ICAC to liaise with the authorities and, therefore, it cannot do so is equally without merit

D. Factual Misrepresentations

6. Other than bringing Mr Atkinson's assertion to the attention of Parliament by annexing his 9 March 2018 response, I do not propose to change my Report. I do not accept that there are relevantly any inaccuracies.

Pursuant to s78(1A) of the ICAC Act I recommend that this Supplementary Report also be made public forwith.



Bruce R McClintock

Inspector

Independent Commission against Corruption

John Atkinson
36 Victoria Road
Bellevue Hill, NSW 2023

9 March 2018

Mr. Bruce McClintock QC
Inspector of the ICAC
GPO Box 5341
SYDNEY NSW 2001

BY EMAIL: icac_executive@oiiicac.nsw.gov.au

Dear Sir,

I refer to your email dated 23 February attaching your draft Report (**draft Report**) in response to my Complaint dated 30 November 2017 (**Complaint**). I am responding to your invitation to raise any concerns arising out of your draft Report.

Failure To Review Documentary Evidence Referenced in my Complaint

I am extremely disappointed by your decision to dismiss my Complaint without reviewing any of the documents that I particularised in my Complaint (**Documentary Evidence**). In justification of this approach, you make the critical, but incorrect, assumption that the Documentary Evidence referenced in my Complaint are the 'same contacts' reviewed by the NSW Court of Appeal in an apprehended bias action against Commissioner Ipp in 2013. This is not the case.

You correctly state that my Complaint is encapsulated by the following statement: "*Commissioner Ipp actively interfered with the executive arm of Government with the objective of influencing government actions which ultimately led to Cascade Coal's lawfully acquired assets (coal licenses) being confiscated and retrospective legislation introduced to protect ICAC's unlawful activity from challenge*".

However, rather than seeking to review the Documentary Evidence to establish whether my Complaint has merit, you have chosen to make your determination to dismiss my Complaint based on your assessment of my 'so called' misunderstanding of the ICAC's status as an investigative body as opposed to a court of law.

To this end you sum up your reasons for dismissing my Complaint by stating: "*Underlying Mr Atkinson's complaint, is a failure to understand that ICAC is not a court and actions which would be inappropriate for a court may well be both lawful and appropriate for a specialized investigative agency such as the ICAC.*"

In my Complaint I thought I had made it obvious that that I appreciated that the ICAC is not a Court. Perhaps I was not as clear I could have been. In any event I understand the difference between the two. However, notwithstanding that obvious difference, I would assume that you would agree that the Judiciary should never act as a political tool of the Executive arm of the Government and blatantly interfere with

John Atkinson
36 Victoria Road
Bellevue Hill, NSW 2023

Government process. If you agree with that proposition, I am surprised that, given similar circumstances, the Commissioner of the ICAC should be held to a lesser standard and be permitted to actively interact with the Executive arm of Government, prior to or during an Inquiry in respect of a particular matter under review.

To be clear, I do not and did not in my Complaint suggest that the ICAC is a court. As you understand better than most, it is a creature of statute and an administrative body that performs investigative functions and, in certain circumstances, makes reports. The ICAC is, as its name suggests, an **independent** statutory body vested with specific powers to conduct inquiries and make determinations as to whether conduct is corrupt and to make recommendations with respect to persons it finds to have acted corruptly.

As was stated in the Greiner decision, given the extremely far reaching and damaging consequences of its determination, the ICAC is obliged to conduct its inquiries with proper regard to the consequences of its decisions. Moreover adverse determinations should be made by reference to objective and clearly defined criteria.

Very specifically, as detailed in my Complaint, it is my view that in the Jasper Inquiry, Commissioner Ipp failed to adhere to or comply with the basic legal requirements and principles which are fundamental to the conduct of an **independent** inquiry. Hence, my assertion that Commissioner Ipp should be investigated for Misconduct in Public Office.

Your Decision Fails To Adequately Deal With The Substance of My Complaint - Interference With the Executive Arm of Government

Importantly, in my Complaint I point out that the ICAC is not a part of the Executive arm of Government and therefore should not act in concert with the Premier or its Ministers or seek to influence, prior to or mid Inquiry, the manner in which they exercise their executive or legislative powers. You appear to disagree with this proposition.

On page 7 of your draft Report you state: "*it is perfectly appropriate (subject to the general principles of administrative law which bind it) for one officer of the executive, that is, the Commissioner, to communicate with another, for example, the Premier or a Minister.*" However, in making this statement, I assume you are not suggesting that active communication between a Commissioner and the Premier (or Ministers) in relation to a specific Inquiry, as was the case in the Jasper Inquiry, is appropriate prior to or during that Inquiry?

The logical conclusion of that argument is that there is no restriction on the Commissioner interacting with the Executive arm of the government prior to or during an Inquiry about that specific event. That position obviously leaves the ICAC open to be seen as a political tool, or worse, be used as a political tool and not necessarily act in the independent interests of the public.

A relevant example, as referenced in my Complaint, is the statement from a cabinet colleague of Premier O'Farrell, Mr Chris Hartcher. In a conversation related to the Mt Penny and Doyle's Creek coal licenses, Mr Hartcher states that Mr O'Farrell said to

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him: *"You are underestimating David Ipp. He knows what he is doing. He will really go after them."* According to Mr Hartcher's statement, this conversation took place almost **twelve months** before the ICAC inquiries into coal licenses Commenced and long before both Houses of Parliament made the decision to refer the matters to the ICAC.

As you know the resultant Inquiries targeted decisions made by the State bureaucracy when the Labor Party was in control of Government. Given Mr O'Farrell's statement and its timing, (as recalled by Mr Hartcher) an inference could be drawn that the ICAC wittingly or unwittingly was used as a political tool. The consequential behavior of Commissioner Ipp in proactively engaging with Mr O'Farrell during the Jasper Inquiry only adds support to this possibility.

Further, Mr Hartcher's statement goes on to state that in December 2012 (in the early stages of the Jasper Inquiry public hearings), Mr Hartcher met with Premier O'Farrell and Mr Brad Hazzard in the Premier's office on a number of matters. At the conclusion of the meeting Mr O'Farrell made specific reference to the issues under review in Operation Jasper confirming that he (or his Office) and Commissioner Ipp were in discussion at that time about the Jasper Inquiry, namely:

Mr O'Farrell: *'Brad, Ipp doesn't think it would be helpful if the mining lease (Mt Penny EL) was approved prior to his report.'*

Mr Hazzard: *'Well it's nothing to do with me. It is a matter for PAC.'*

Mr O'Farrell: *'But my Director-General needs to make a recommendation to PAC.'*

Mr Hartcher (to Hazzard): *'I think the Premier wants it at the bottom of the pile. Allow bureaucratic inertia.'*

Mr O'Farrell: *'That is right. I wasn't going to set it out that clearly.'*

Mr Hartcher then concludes: "From this conversation, I got the distinct impression that Mr O'Farrell had discussed the Jasper inquiry with Commissioner Ipp. On reflection, it is my view that Mr O'Farrell may have been informed that corruption findings would be made as at the time of this discussion." (Emphasis added)

Putting aside the obvious concerns arising from the above statement in relation to Mr O'Farrell's actions, I believe the Inspector of the ICAC should at the very least want to review such damning documentary evidence suggesting blatant interference with government process by Commissioner Ipp. Again, I confirm that this statement and all the Documentary Evidence are available for your review if you require.

No Legislative Support For the ICAC Commissioner to Interact With the Executive Arm of Government Prior to or During an Inquiry

There is no legislative support for the proposition the ICAC Commissioner can interact with the Premier or Ministers prior to or during an Inquiry about that Inquiry. In fact, the relevant legislation, not surprisingly, supports a completely counter view. A view consistent with the position that Commissioner Ipp should not have acted in

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concert with the Premier or its Ministers or seek to influence before and during the Jasper Inquiry the manner in which they should exercise their executive or legislative powers. For this reason alone I believe Commissioner Ipp should be investigated for Misconduct in Public Office.

The ICAC Act makes it clear that the Commission's mandate is to report to both Houses of Parliament. The Commission is not empowered by any relevant legislation to give ad hoc advice or interfere with the Executive arm of the government as to how it should discharge its functions. Nowhere in its mandate is the Commissioner of the ICAC empowered to correspond with the Executive Government on matters it is investigating prior to or during furnishing its Report and seek to influence the way in which the Executive arm makes its decisions. In fact, s. 74(7) of the ICAC Act expressly states that the Commission's Reports are to be lodged after it has concluded its investigation. The subsection states: '74(7) A report required under this section shall be furnished as soon as possible **after** the Commission has concluded its involvement in the matter.'

On pages 8,9 and 10 of your draft Report you quote liberally from s.13 of the *Independent Commission against Corruption Act 1988 (Act)*. As you note, s.13 details the principal functions of the ICAC. Two subsections are worth repeating: s.13(1)(b) "**to investigate any matter referred to the Commission by both Houses of Parliament**"; and s.13(1)(c) "**to communicate to appropriate authorities the results of its investigations**".

Nowhere in s.13 does it authorize the Commissioner of the ICAC to liaise with the Premier or Ministers directly. Nowhere in that section or anywhere else in the Act is the Commissioner of the ICAC authorised to take instructions from or collude with the Premier or Ministers. The ICAC reports to both Houses of Parliament, not to the Executive arm of Government. Commissioner Ipp acted in concert with the Executive arm of Government and should be held to account accordingly.

Factual Misrepresentations and Inaccuracies

I am also deeply concerned by the factual inaccuracies contained in your draft Report. I understand that your Office may be time and resource poor and that you are dealing with a complex set of facts, however it is obviously important for all involved that your Office get the facts right.

Two glaring examples of factual inaccuracies in your draft Report are:

1. On page 10 of your draft Report you state: "*The issue was considered by the New South Wales Court of Appeal in Duncan v Ipp [2013] NSWCA 189 where the court rejected criticism of the **same contacts** between the ICAC and the New South Wales Government of which Mr Atkinson now complains.*"

The documents that I reference in my Complaint go beyond those that were presented to the Court of Appeal. They are not the 'same contacts'.

For example, the statement from Mr Hartcher (referenced in my Complaint and partially represented above) was not available to the NSW Court of Appeal when reviewing the apprehended bias case brought against Mr Ipp by Mr Duncan. Perhaps the Court of Appeal would have come to a different

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conclusion if they had the benefit of the context provided by Mr Hartcher's statement.

Also, the *Duncan* Court of Appeal action took place in 2013. Since then copious amounts of relevant documents have been made public in various forums. In addition, witnesses have come out and confirmed various matters in the numerous court actions that have followed. I think you would find an examination of the Documentary Evidence and the volumes of other documents now available for review illuminating; and


2. On page 2 of your draft Report you state that: "*Those negotiating on behalf of Cascade Coal, including Messrs McGuigan, Poole and Atkinson knew that the Obeids were the party with whom they are entering into a joint venture.*" This is simply not true. There is no credible evidence anywhere to support this view. On the contrary: (a) there is no finding in the Operation Jasper Report that I had any knowledge that Cascade was entering a mining venture with an entity backed by the Obeid family (Buffalo Resources); and (b) the evidence shows my concern with the Obeid connection only commenced around May 2010 (as per Atkinson transcript 1860) or as per the Commission's dating of the Duncan "direction" being around about March or April 2010.

Next Steps

I hope that on receipt of this letter, you reconsider your position, delay the issue of your Report and decide to review and investigate the Documentary Evidence I particularised in my Complaint. Again I advise that I am available at your convenience to meet and sort out a methodology for getting you access to these documents for your review.

In the event you decide you continue to have no interest in reviewing the Documentary Evidence and do not want to meet with me, I would hope that you would at least deal with the factual inaccuracies in your Report. Also, I would respectfully request that in the interests of transparency and fairness, you also attach a copy of this letter (as well as my Complaint) to your Report when issuing it to Parliament.

Yours Sincerely,



John Atkinson

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Bellevue Hill, NSW 2023

PRIVATE & CONFIDENTIAL: FOR ADDRESSEES EYES ONLY

30 November 2017

Mr. Bruce McClintock SC
Inspector of the ICAC
GPO Box 5341
SYDNEY NSW 2001

BY EMAIL: icac_executive@oicac.nsw.gov.au

Dear Mr McClintock,

I refer to your letter dated 21 August 2017.

Thank you for taking the time to detail the reasons behind your decision to 'close my file' in the context of the information provided in my correspondence. I also appreciate your invitation to revisit that decision *"If any other matters do come to light concerning the ICAC and which fall within my statutory remit"*.

I do indeed have further information that I believe will convince you to re-open my file and hopefully lead to some justice coming out of what appears to be serious misconduct by Commissioner Ipp in the Operation Jasper Inquiry.

In summary, I have documentary evidence of interaction between Commissioner Ipp and Premier Barry O'Farrell concerning the possible suspension or termination of exploration of the Mt Penny mining tenement or cancellation of its exploration licence (EL7406). These interactions began **months before** the Jasper Inquiry was formally called by Parliament. This interference by Commissioner Ipp in the executive government gives rise to the clear inference that the Jasper Inquiry was not free and independent from politics giving rise to serious questions as to its efficacy and probity.

Also, the documentary evidence I have shows that Commissioner Ipp disregarded the legal doctrine of Procedural Fairness in order to achieve, what appears to be, a pre-determined objective of persuading Parliament to confiscate Cascade Coal's coal licences.

What motivated him to pursue this path is not clear.

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Background

Over the last six months, I have spent considerable time examining thousands of documents in an attempt to understand the motivations behind the corruption findings made by Commissioner Ipp against me.

The results of my research are extremely disconcerting.

However, before I detail my call for you to investigate Commissioner Ipp for Misconduct in Public Office, some background is important.

Prior to getting involved in business, I was a lawyer. Most of my time practicing as a lawyer was with Baker & McKenzie. I had the good fortune to have been made an international partner and enjoyed numerous roles within Bakers, including: Managing Partner of its Hong Kong and China offices; Global Chair of its Major Projects practice; and a member of the Firms International Finance Committee. This experience provided me with a core belief that central to the sustainability of a free society are the rule of law and a reliance and trust in due process.

This perspective seems to be shared by The Hon. Dr Peter Phelps who made a statement to Parliament recently about the fact that he held grave concerns about the actions taken by Parliament on the advice of ICAC which led them to unanimously and expeditiously pass legislation to strip Cascade Coal of its lawfully acquired assets. Dr Phelps said: *'I am concerned that we as a party and as a Parliament may have been misled into enacting three different Acts of Parliament on the basis of misinformation, deliberate deception and perhaps even gross maladministration by the ICAC.'*

Of equal importance to me is that the actions that Dr Phelps references, taken by Commissioner Ipp and others, gave rise to the passing of retrospective legislation that effectively makes lawful ICAC decisions that the High Court determined to be an abuse of power. This specific legislative act effectively rendered me corrupt for life - notwithstanding that ICAC itself had offered to withdraw its corruption findings against me and others by consent on the basis of the High Courts decision in *Independent Commission Against Corruption v Cunneen [2015]*.

In his statement, Dr Phelps directly addressed some of the wrongs that were inflicted on my colleagues and me by Commissioner Ipp. In so doing, he raised fundamental concerns around the abuse of the legal process and the consequential manipulation of Parliament arising from Operation Jasper. He concluded his remarks by saying: *'What we have here appears to me to be gross maladministration by ICAC. Even more importantly, I believe we may have been misled by the then Premier into introducing and passing three bills that have expropriated a property right completely unjustifiably.'*

Unfortunately for all members of the public, it appears that the concerns raised by Dr Phelps are real. I have seen the evidence that proves it. Dr Phelps statement has had a profound impact on me. Having read his statement, I decided I have a duty to do everything I can to expose the abuse of power to which Dr Phelps referred. I need to do my part to ensure that what happened to me cannot happen to others.

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Formal Complaint – Maladministration or Misconduct in Public Office Against By Commissioner Ipp

Commissioner Ipp abused his privileged position as the ICAC Commissioner. He undermined the long held tradition of 'Separation of Powers' that underpins our legal and political systems. He acted beyond his statutory remit and interfered in the executive arm of Government with the effect of causing ICAC to operate as a parallel system of justice.

In this regard, I confirm I have documentary evidence to prove that there was a clear abuse of power amounting to misconduct by Commissioner Ipp in his conduct of Operation Jasper. As regards your specific statutory remit as Inspector of the ICAC, I have documentary evidence that proves that Commissioner Ipp:

- was a public official;
- was acting in connection with the duties of his office;
- breached the standard of responsibility demanded by him by the nature of the office;
- his conduct represented a marked departure from the standards expected of an individual in the position of public trust required by the Office of Commissioner of ICAC; and
- he acted with the intention of using his public office for a purpose other than the public good - being for a partial purpose.

Accordingly, I hereby make a formal complaint against Commissioner Ipp under s57B(2) of the Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act) and request that you instigate an investigation as per your powers under that Act.

My Corruption Finding – Unrelated to the Grant of the Licence

It is important that you understand that neither I, nor any other Director or Shareholder of Cascade Coal or the Company itself, was found to be corrupt in the context of the creation or the grant of the relevant coal licences fairly won by Cascade in a legitimate public tender process.

Albeit blurred by Commissioner Ipp's running of the Jasper Inquiry and the resultant media coverage that ICAC encouraged, ICAC itself was forced to acknowledge this fact in the various legal proceedings that followed. For instance, the position was affirmed in *Cascade Coal Pty Limited & Ors v the State of NSW* [2015] HCA 13) where the Solicitor General for NSW, Mr Sexton SC, stated at T79.3508 – 3511:

'In fact, the ICAC did not make findings of corrupt conduct against any of the licence holders in these proceedings. There was a finding of corrupt conduct made against one of the plaintiffs – against Mr Duncan – but that did not relate to the grant of one of the licences.'

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Commissioner Ipp Acted Beyond Power In Operation Jasper

Commissioner Ipp acted beyond power in my case. As mentioned, this point was clearly acknowledged by ICAC itself in the shadow of the High Courts decision in *Cunneen* where they formally agreed to overturn their corruption findings against others and me on the basis they had acted beyond power in finding us corrupt.

Albeit in the context of the notoriously difficult judicial review process, this point also seemed to be recognized by Bathurst CJ in the Court Of Appeal proceedings where I, along with others, challenged Commissioner Ipp's findings.

In that Appeal, I was successful in overturning one of the two adverse findings made against me. As for the other, the majority of the Court found against me with Bathurst CJ dissenting. That said, his remarks are instructive in the context of Commissioner Ipp's tendency to stretch the facts to suit a position:

Bathurst CJ stated (at paragraph 450):

'I do not think it was open, on the facts found by the Commission, to find that Mr Atkinson was intentionally dishonest. Although he did not disclose the true position, there was no evidence to suggest that he actively took steps to conceal it from White Energy. Further, he took no part in any discussions with the IBC in relation to the transaction. On these facts, I do not think it was open to the Commission to conclude he was intentionally dishonest and acting in contravention of s 184(1). Nor do I think it would be open to a jury to convict him of this offence on the findings made by the Commission.'

As previously mentioned, in *Cunneen* the High Court effectively found that ICAC had been acting unlawfully and beyond power. This unlawful activity was also prevalent during Commissioner Ipp's period as Commissioner. This was evidenced by ICAC's agreement to acknowledge their corruption findings against me and others were beyond power which led to the extraordinary enactment of the Independent Commission Against Corruption Amendment (Validation) Act 2015 - designed to legally cover up of all of ICAC's unlawful activities prior to 15 April 2015.

Interference With the Executive Arm of Government

Contrary to the ordinary rules applicable to the proper conduct of independent inquiries, Commissioner Ipp took it upon himself to actively intervene with the executive arm of government to influence Government policy resulting in legislative action to confiscate Cascade Coal's exploration licences.

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Commissioner Ipp's active intervention with the executive arm of government even runs counter to his own publically stated views on the matter. In a 2008 article published in The Southern Cross University Law Review entitled "Maintaining The Tradition Of Judicial Impartiality", Commissioner Ipp wrote:

"In Australia, there is no communication outside open court between government and judges concerning the result or the details of any decision a judge may be required to make. Government does not attempt to influence judicial decisions, as is the case in many other countries. Judges do not telephone the Prime Minister or members of the Cabinet, or senior government officials, to ascertain whether a proposed judgment is politically acceptable, and government does not privately communicate to judges the nature of the decisions they require the judge to hand down. We know that conduct of this kind has happened in many countries throughout the world and still happens. But Australia is immune from that. We take that for granted, but judicial independence of this kind is a fragile thing. If it is to continue to last, it must be buttressed and reinforced."

Commissioner Ipp might attempt to argue that his interaction with the executive arm of government in Operation Jasper and the comments made by him in his 2008 article can be reconciled on the basis that there is a difference between the standards expected of a Judge and that of a Commissioner of the ICAC. However, that argument is brittle at best.

It certainly sits uncomfortably with the use of the word 'Independent' in the Commissions own name. Further, it would clearly fail the 'pub test'. The public would rightfully expect complete independence. They would see any argument to the contrary as fundamentally wrong - a difference without distinction. If we are to maintain the tradition of judicial impartiality to which Commissioner Ipp refers and not give rise to concerns about ICAC being used by the government of the day as a political tool then there can be no interference with or collusion between the Commissioner and the executive arm of government.

Even ICAC's Counsel Assisting has acknowledged that if there was any such interference or collusion by Commissioner Ipp with the executive arm of government then this would raise real concerns over the efficacy and probity of the Jasper Inquiry.

In fact, in correspondence I have, Mr Watson QC comments on this specific allegation against Commissioner Ipp and states that in his view: *"interference in the Executive Government (by ICAC) would be corruption."*

Particulars Of My Complaint

For ease of reference, I have set out the particulars of my complaint in chronological order. I have documents or witness statements to support everything outlined.

From the evidence I have gathered, it is clear that Commissioner Ipp actively interfered with the executive arm of Government with the objective of influencing government actions which ultimately led to Cascade Coal's lawfully acquired assets (coal licences) being confiscated and retrospective legislation being introduced to protect ICAC's unlawful activity from challenge.

The relevant particulars are:

3 April 2011 – Mr Christopher Hartcher was appointed by Premier Barry O'Farrell to the Cabinet and sworn in as Minister for Resources and Energy and Special Minister of State [Documentary Evidence to Support]

3 April 2011 - After the swearing in ceremony Mr Hartcher was returning to Parliament House when he bumped into Mr Nathan Rees (leader of the NSW Labor Party 5/9/08 – 3/12/09). Mr Rees said: *'Chris I have some confidential information for you. I think you will find it very interesting. I can't discuss it here, so let's meet up somewhere else soon.'* [Witness Statement to Support]

10 April 2011 - Mr Hartcher and Mr Rees met. Mr Rees said words to the effect: *'Chris – you need to look into Ian Macdonald and mining licences he awarded at Doyle's Creek and the Obeld one. I tried to get Macdonald but I couldn't. The Unions wouldn't let me. But if you go after him and send them to ICAC, I think ICAC will get them.'* [Witness Statement to Support]

4 November 2011 - Clayton Utz delivered two Preliminary Reports to Mr Hartcher. Clayton Utz recommended that the NSW Government set up a Special Commission of Inquiry into the allocation of the Doyle's Creek EL. **As regards Mt Penny, Clayton Utz concluded that there was nothing untoward in the allocation of the area to Cascade Coal.** [Documentary Evidence to Support]

4 November 2011 - Mr Hartcher provided the Clayton Utz reports to Mr Peter McConnell, Chief of Staff to Premier O'Farrell. Mr Hartcher said to Mr McConnell: *'Peter can you please let Barry know that I support a Special Commission of Inquiry.'* [Witness Statement to Support]

4 November 2011 - Later that same day Mr McConnell telephoned Mr Hartcher and said words to the effect: *'Chris I have spoken to Barry. He wants to send it to ICAC.'* [Witness Statement to Support]

4 November 2011 - After a Strategy Meeting at Parliament House, Mr Hartcher went

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to the Premier's office, asked Mr McConnell whether the Premier was available, and then spoke to Premier O'Farrell and said:

Hartcher: *'Barry, I want to set up a Special Commission of Inquiry into this EL, and will fund it.'*

O'Farrell: *'You are underestimating David Ipp. He knows what he is doing. He will really go after them. I will let you table it in Parliament this afternoon and move on it.'* [Witness Statement to Support]

11 November 2011 - Mr Hartcher tabled the Clayton Utz report regarding the Doyle's Creek exploration licence in Parliament and moved that it be referred to ICAC for investigation [Documentary Evidence to Support]

July—August 2012 Operation Jasper — ICAC compulsory private examinations

27 August 2012 - Crown Solicitor's letter of advice to Department of Primary Industries (client ref: Christine Hanson and Thomas Kwok) entitled *'Mt Penny Coal project and ICAC Inquiry — whether Minister can or must cease assessment.'* The advice stated in part:

[at 1.3] *'It was not legally permissible for the Planning Minister to cease assessment of the Mt Penny project application in order to await the outcome of Operation Jasper'; and*

[at 5.9] *'advised that a finding by ICAC of corrupt conduct in the creation or grant of the exploration licence is a finding under the Mining Act. The advice continued "even if the ICAC concludes that EL 7406 was obtained fraudulently and the validity of the grant of EL 7406 is subsequently impugned, there is no legal interdependence between the grant EL 7406 and the approval of a project application under Pt 3A of the EPA Act.'* [Documentary Evidence to Support]

[Note: At this time Cascade Coal was in the midst of obtaining from the Department of Primary Industries the necessary environmental and other approvals required in relation to the grant of a mining lease]

7 September 2012 - Memorandum of Opinion by Adrian Galasso SC advising and commenting on the two advices provided by the Crown Solicitor's Office and agreeing with their conclusions that the normal processes related to the award of a mining lease could not be interfered with [Documentary Evidence to Support]

1 November 2012 - Commencement of Operation Jasper public Inquiry

Early December 2012 - Mr Hartcher met with Premier O'Farrell and Mr Brad Hazzard in the Premier's office on a number of matters. At the conclusion of the meeting Mr O'Farrell indicated that he wanted to raise a different matter:

Mr O'Farrell: *'Brad, Ipp doesn't think it would be helpful if the mining lease (Mt Penny EL) was approved prior to his report.'*

Mr Hazzard: *'Well it/s nothing to do with me. It is a matter for PAC.'*

Mr O'Farrell: *'But my Director-General needs to make a recommendation to PAC.'*

Mr Hartcher (to Mr Hazzard): *'I think the Premier wants it at the bottom of the pile. Allow bureaucratic inertia.'*

Mr O'Farrell: *'That is right. I wasn't going to set it out that clearly.'*

Mr Hartcher then concludes: "From this conversation, I got the distinct impression that Mr O'Farrell had discussed the Jasper inquiry with Commissioner Ipp. On reflection, it is my view that Mr O'Farrell may have been informed that corruption findings would be made as at the time of this discussion." (Emphasis added)

[Witness Statement to Support]

15 January 2013 – Mr Paul Miller of the Department of Premier and Cabinet prepared a briefing note to Premier O'Farrell. The note **references a meeting between Commissioner Ipp and the Director General** whereby Commissioner Ipp made the suggestion that: *'the Premier may wish to confirm in writing that the NSW Government would welcome, in due course, recommendations from the Commission along the lines referred to in paragraphs (c) to (e) of the resolution above, in respect of those other licences and not just Doyle's Creek.'*

The Briefing note went on to observe at 4.2 *'...The ICAC's jurisdiction cannot be expanded by either a resolution of Parliament or by a request from the Premier.'*

And then at paragraph 4.3: *'It appears that the Commission has suggested that the letter be...sent as a 'diplomatic' matter, given that recommendations of the type proposed are somewhat unusual, in so far as they would constitute an opinion as to appropriate executive Government action, rather than merely factual findings as to the presence (or absence of) corrupt conduct and recommendations as to whether (or not) matters should be referred for prosecution.'*

[Documentary Evidence to Support]

29 January 2013 – Mr John McGuigan's evidence at Operation Jasper public hearings commenced. [Documentary Evidence to Support]

30 January 2013 – In direct response to Commissioner Ipp's request made at his meeting with Mr Miller on or before 15 January 2013, Premier O'Farrell wrote to Commissioner Ipp stating: *'Accordingly, I am writing to you now to indicate that the*

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New South Wales Government would welcome any findings and recommendations the Commission may think to make along the lines of the matters referred to in paragraphs (c) to (e) above in relation to any other exploration licences or leases that may be relevant to your investigations.'

Paragraphs (c) to (e) of the applicable resolutions are identical to those noted by Mr Miller in his file note detailing his meeting with Commissioner Ipp held on or before 15 January 2013.

It appears that this exchange, which resulted in effectively expanding the terms of the Operation Jasper Inquiry, was done so in contravention of s73 of the ICAC Act. It was not up to Commissioner Ipp and Premier O'Farrell to unilaterally expand the scope of a referral purportedly made under s73 of that statute. Quite rightly, the Act requires consultation with or a resolution passed by the respective Houses of the New South Wales Parliament in order to expand the scope of an ICAC inquiry.
[Documentary Evidence to Support]

30 January 2013 - Mr McGuigan was in his second day of examination at the public hearing. Commissioner Ipp was in communication with Premier O'Farrell and either had received or knew that he would receive the letter dated 30 January 2013 from Premier O'Farrell referred to above.

Commissioner Ipp was aware that Cascade Coal and its subsidiaries had not been forewarned that the Commission might make a recommendation to cancel their exploration licences – given that evidence was still being adduced.

This lack of procedural fairness was apparently realised by Commissioner Ipp during the examination of Mr McGuigan. Accordingly, just after midday on 30 January 2013, Commissioner Ipp interjected:

Commissioner: *'Well, let me put to you a scenario, Mr McGuigan. Perhaps this might also relate to what Mr Hale said to you. Should the Inquiry establish that the Exploration Licence was granted in circumstances which involved an abuse of powers by the Minister are you suggesting that that wouldn't affect the validity of the Exploration Licence or the Mining Lease?'*

Commissioner: *'And if the investigation discovered, notionally I'm talking about, that the Exploration Licence was granted say in consequence of a misuse of powers by the Minister or a conspiracy involving others, wouldn't that be a real question raised as to the validity of the grant of the Exploration Licence itself?'*

Mr McGuigan: *'It's a complex question ... I viewed then and I view now that, Cascade in its dealings that it, in, responding to the Expression of Interest and its communications, was acting essentially as a bona fide purchase for value and if there was something going on behind the scenes that we were not aware of and I find it difficult to believe that that activity which we manifestly are not part of should*

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adversely impact our title.'

Commissioner: *'Well, I'm not going to debate that with you, Mr McGuigan, but that is — I'm simply asking you whether that's not an issue which was pretty obvious once you learned that there was the potential for an investigation of the circumstances under which the Exploration Licence was granted?'*

Mr McGuigan: *'Commissioner, I'm ... sorry to take issue but as I understood and do understand that that inquiry was not directed to the matters that you've just referred to, it was directed to compliance by companies with the conditions of their Exploration Licences.'*

Once the chronology of the events which were unfolding is considered, this was a very revealing exchange between Commissioner Ipp and Mr McGuigan. With the benefit of hindsight it appears the Commissioner recognized that he may have erred in not eliciting sufficient 'evidence' to support the outcome he was simultaneously recommending to the Premier. [Documentary Evidence to Support]

31 January 2013 – Mr Chris Eccles, Director General of the Department of Premier and Cabinet, received a call from Commissioner Ipp which he detailed in a file memo:

'I received a phone call from Commissioner Ipp this morning in relation to the issue of exploration licences and mining leases at Mt Penny. The Commissioner advised that Minister Hazzard had spoken to him with the advice that (the Minister) could not take matters before the current ICAC inquiry into account when considering whether to grant a development application (DA). This would have the practical effect of preventing ICAC related matters being taken into account in the decision to issue a mining lease as such a lease is for all intents and purposes automatically granted once a DA is provided.....'

Mr Eccles file memo went on to point out that Commissioner Ipp volunteered a solution for Government to follow:

'The Commissioner then described the following legislative pathway.....'

[Documentary Evidence to Support]

31 January 2013 - Commissioner Ipp wrote to Mr Eccles following up on his telephone conversation with Mr Eccles earlier that day and outlined in detail the legislative pathway that he wanted the Government to follow. The letter details the prevailing legal barriers to the Government unlawfully expropriating Cascade's coal licences but then goes on to volunteer:

'There is an alternative approach...'

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In his letter, Commissioner Ipp outlines a legislative pathway he believes could be implemented to enable the Government to confiscate Cascade's coal licences. The approach suggested by Commissioner Ipp relied on the relevant Minister taking into account 'evidence' adduced by him at the Jasper Inquiry to provide the ammunition required for the relevant Minister to expropriate Cascade's coal licences on the basis of a 'public interest' test.

Commissioner Ipp's letter to Mr Eccles failed to disclose that the 'evidence' to which he referred and wanted the executive arm of Government to rely on to expropriate Cascade's assets was not probative evidence obtained in accordance with normal legal principles.

With the benefit of hindsight and access to the documentary evidence I have reviewed, I believe that Commissioner Ipp managed the Jasper Inquiry to ensure that the transcripts of the public hearings contained the 'evidence' he needed to satisfy the 'public interest' test he essentially created and then volunteered to Mr Eccles as part of his proposed legislative reform package to effect the confiscation of Cascade Coals assets – his so called '*...alternative approach*'.

[Documentary Evidence to Support]

5 February 2013 - ICAC sought advice from Mr Bret Walker SC on two issues, namely:

- (i) whether, in order to attract the public interest criteria under Section 79C of the *EPA Act*, the Minister for Planning & Infrastructure could declare the Mt Penny tenement a development of State significance; and
- (ii) whether, in considering the public interest under Section 79C of the *EPA Act*, the Minister is entitled to take into account the circumstances in which the tenement was created and the exploration licence was granted;

6 February 2013 - Commissioner Ipp made a statement during the public inquiry in Operation Jasper advising that he had received the Premier's letter which was marked Exhibit J122 and indicating that the Commission was considering responding to that letter and providing advice within 10 days. Commissioner Ipp failed to mention that it was he who had suggested that the Premier write to him along these lines.

19 February 2013 – Mr Bret Walker SC provided advice to ICAC. His opinion essentially follows and affirms what ICAC requested. However his advice was far from definitive. In fact it contained a number of caveats that were ultimately ignored by Commissioner Ipp and/or the executive arm of government who used this advice

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as the central justification for taking the legislative action to expropriate Cascade Coals exploration licences.

On the key issue of whether the Minister for Planning and Infrastructure could take into account public interest considerations when considering a Part 3A approval, even if those considerations were not identified in the Director General's report, Mr Walker SC emphasised that *'there was a very respectable argument that the Minister should not take into account any matter not raised by the Director General.'* (Emphasis added)

[Document Evidence to Support]

20 February 2013 – In response to the Premier's letter, Commissioner Ipp wrote to Premier O'Farrell, attaching the advice from Mr Bret Walker SC dated 19 February 2013, and expressing the following opinion:

'Irrespective of any factual findings of the Commission, it is now open to the NSW Government to consider public interest criteria to be applied to any decision affecting the Mt Penny exploration licence and any grant or refusal of any development application or application for a mining lease, having regard to the 'substantial media publicity' and the 'general notoriety of the issues which are the subject to evidence before the Inquiry.'

Albeit self-evident, it is important to note that the ICAC itself, through its actions and the manner in which Commissioner Ipp chose to conduct Operation Jasper, created the 'substantial media publicity' on which Mr Walker relies in formulating his advice.

In his letter, interestingly, Commissioner Ipp went on to add: *'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 interdependence between the granting of an exploration licence and the approval of the development application. The Commission disagrees with that advice.'*

[Documentary Evidence to Support]

21 February 2013 - Premier O'Farrell responded to a question in the Legislative Assembly by informing Parliament that the NSW Cabinet had met after receipt of Commissioner Ipp's letter and agreed:

(a) first, that for the purpose of the Mt Penny major project application, public interest will be interpreted as including but not being limited to consideration of matters raised in evidence before ICAC, and those matters included allegations

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of corrupt conduct associated with the grant of the exploration licence;

(b) secondly, Cabinet agreed that it would consider the most suitable immediate administrative or legislative mechanism to achieve that outcome; and

(c) thirdly, Cabinet agreed to consider whether legislative change was required to protect the public interest in ensuring probity and propriety in future grants of mining and exploration and project application approvals!

[Documentary Evidence to Support]

What Followed

Following the release of Commissioner Ipp's three reports relating to the Jasper Inquiry, the NSW Parliament enacted three key pieces of legislation (listed below) targeted directly at Cascade Coal and its directors and shareholders (including me). All of this arose directly from Commissioner Ipp's actions – whose statutory remit under the ICAC Act certainly did not extend to making findings of criminality or to impose penalties.

Those pieces of legislation are:

- The *Mining Amendment (Operations Jasper and Acacia) Amendment Act 2013* (NSW), which cancelled the Mt Penny and Glendon Brook exploration licences;
- section 380A of the Mining Act which was inserted by the *Mining and Petroleum Legislation Amendment Act 2014* (NSW), which effectively brands me and others as being not fit and proper persons to be engaged in mining in NSW because we were directors of companies which had their exploration licences cancelled; and
- The *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW) which was enacted by parliament two days prior to myself and others obtaining consent declarations from the NSW Court of Appeal on 8 May 2015, declaring that ICAC had acted beyond jurisdiction and contrary to section 8(2) of the ICAC Act [Documentary Evidence to Support]. The result was that the Court of Appeal was not able to make that previously agreed declaration.

Next Steps

For reasons you can no doubt understand, my experience has left me feeling wary of Government reach and process. Accordingly, I have decided not to attach the numerous documents and witness statements referred to herein that support my complaint.

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Instead, I would appreciate the opportunity of meeting with you in person so I can explain first hand the documents I reference. Based on that discussion, you can then advise me whether you have any interest in reviewing the documents. If so, we can then agree a suitable protocol for me to provide you with access.

I look forward to your response.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'John Atkinson', written over a vertical line.

John Atkinson