

Court quashes coal corruption case

The New South Wales Supreme Court has done Australia's mining industry a big favour in re-defining official corruption.

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On February 25, the Supreme Court of New South Wales quashed the corruption conviction of a former state mines minister in an emphatic 5-0 decision.

Former minister Ian Macdonald had been serving a prison term of up to 10 years for granting the Doyles Creek coal exploration licence in 2008 to a group headed by John Maitland, a former leader of the miners union and an Australian Labor Party (ALP) powerbroker.

Macdonald's case gained legal prominence even before going to trial because the state's Independent Commission Against Corruption (ICAC), equipped with extraordinary powers to investigate official misconduct, had held a series of public hearings implicating several ALP members of parliament, including Macdonald, in official misdeeds.

The ICAC hearings led to the Doyles Creek exploration licence and accumulated geological information being confiscated by the government through an act of the state parliament in 2014. The act had controversially declared the licence was "tainted by serious corruption" well before Macdonald had been found guilty of any crime in 2017.

By the time the parliament acted, the licence had been transferred to ASX-listed Nucoal Resources. Elimination of the company's primary asset effectively rendered worthless efforts over several years conducted in good faith and overseen by the relevant government regulators.

More ominously and beyond the direct effect on Nucoal, the grounds subsequently cited for Macdonald's criminality put any future minister taking a decision about ownership of assets at risk of imprisonment.

ICAC had found Macdonald did not receive any discernible benefit in return for the exploration licence.



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There were no brown paper bags, secret bank accounts or lavish trips. Without any evident quid pro quo, jurors at Macdonald's trial were encouraged to infer their own motives for his behaviour, if they were inclined to find him guilty of misconduct.

Macdonald clearly had discretion under the law to grant licences on the terms and conditions he thought fit. Moreover, he had viewed the Doyles Creek application favourably, he asserted,

because the proponents of the licence had committed to operate a training mine, at a time of skilled labour shortages, as part of the business plan for a larger development. No-one else would have been prepared to underwrite this wider community benefit about which he felt strongly.

The trial judge instructed the jurors to draw their own conclusions about "why did he do it?". She told the jurors that, to find Macdonald guilty, they must conclude that the former minister was "substantially motivated" by the desire to confer a benefit on Maitland and "not motivated to any significant degree" by furthering the interests of New South Wales.

The onus was placed squarely on the jurors to decide for themselves where the demarcation line lay between acting in the best interests of the state and favouring private interest to such an extent that it constituted misconduct.

This was a highly problematic course to set. On these subjective and nebulous criteria, any ministerial decision conferring a benefit would be open to second guessing.

Disgruntled losers are not uncommon. Sometimes, governments face adverse political consequences from their decisions but the Macdonald case opened the door to ministers being jailed if they failed to get the balance right in the eyes of a jury panel.

A fight over a coal exploration licence would not have the same intensity today as in 2008 but the Macdonald case raised the chance that, in more buoyant investment markets with more at stake, litigation over ministerial decisions could become more commonplace.

Where licence renewals were being sought, third parties were being given an incentive to intervene with a superior financial offer. A minister would face an awkward choice between fairness to an incumbent licence holder and the threat of imprisonment if he or she did not act in the best financial interests of the government.

The appeal judges concluded the Macdonald jury had been poorly advised. The appeals court found that, despite collaborating in several attempts, the judge herself, counsel for the defence and the crown prosecutor had all misconstrued the primary legal issue.

Having been invited "to speculate as to the significance of the competing motives", according to the appellant judges, "the jury was not properly directed on the mental element of the offence".

After considering legal precedents, including relevant judgements from Canada and Hong Kong, the appeal judges defined what they considered "the proper question", of "whether but for the improper purpose the consent and licence would not have been granted".

On this measure, if the same decision could have been expected in the event another party had been involved, the corruption test fails. Prison only looms if the ministerial decision would never have been made but for the illegitimate motivation of conferring a benefit on a selected party.

Macdonald and Maitland could still be found guilty in a retrial if jurors decide that no other party could have acquired the licence on the same terms as Macdonald granted Maitland. The critical element of a retrial will be whether a training mine made sense.

The good news for Nucoal, contributing to a 90% share price rise, is that the odds have narrowed in favour of Macdonald and Maitland. A not guilty verdict would open the possibility of Nucoal recovering its lost property rights.

The bad news for Nucoal, in a world radically changed since 2008 for coal mine developers, is that it could get its coal mine back.

More importantly, government ministers everywhere - not just in New South Wales - now have clarity about their roles stemming from a unanimous superior court judgement and a reaffirmed incentive to fearlessly take soundly-based decisions. The legitimate purpose of ministerial decisions, the court has ruled, will supersede in importance even an illegitimate motivation.

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