

**HEAD OFFICE**

Unit 8  
24 Garnett Road  
Greenhills NSW 2323

23 July 2019

PO Box 2155  
Greenhills NSW 2323

Law & Justice Standing Committee  
c/o – NSW Legislative Council  
52 Martin Place  
Sydney NSW 2000

**P** +61 2 4015 0500  
**F** +61 2 4015 0599

**W** [www.nucoal.com.au](http://www.nucoal.com.au)  
**E** [admin@nucoal.com.au](mailto:admin@nucoal.com.au)

**ABN** 29 060 352 990

By e-mail: [law@parliament.nsw.gov.au](mailto:law@parliament.nsw.gov.au)

Dear Members,

I am writing to you on behalf of the shareholders of NuCoal Resources Limited (**NuCoal**), a publicly listed company with approximately 3,000 shareholders. My correspondence encloses our submission (**Submission**) in response to an invitation received from the Committee Chair, the Hon Niall Blair, on 26 June 2019, regarding the Committee's inquiry into the *Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019* (the **Compensation Bill**).

We understand that the Committee is to inquire into and report on the Compensation Bill. The Compensation Bill's simple, straightforward objective is to amend the *Mining Act 1992* (NSW) to provide that persons financially affected by the cancellation of exploration licence 7270 (**Licence**) over certain land at Doyles Creek can apply to an independent arbitrator for assessment and determination of their claims for compensation.

NuCoal's submission aims to assist the Committee's consideration of the Compensation Bill by providing relevant details about:

- NuCoal and the Licence;
- the *Mining Amendment (ICAC Operations and Acacia) Act 2014* (NSW) (the **Mining Amendment Act**);
- the financial and emotional impacts on NuCoal's shareholders caused by the Mining Amendment Act;
- why the proposed Compensation Bill is appropriate; and
- why the Compensation Bill should be supported by the Parliament of NSW.

Briefly:

- The Licence was granted to Doyles Creek Mining Pty Ltd (DCM) in December 2008 before DCM was acquired by NuCoal, i.e. before NuCoal in its present form existed.
- NuCoal acquired DCM, and with it the Licence, in February 2010, in good faith, for valuable consideration and without notice of any corruption in respect of the grant of the Licence.

- ICAC's Operation Acacia enquired into the granting of the Licence in 2012/13. Operation Acacia did not enquire into NuCoal.
- The ICAC decided that the grant of the Licence was tainted by corruption and in December 2013, recommended that the Licence be expunged and compensation be considered for innocent parties.
- The Mining Amendment Act was passed in unusual circumstances in January 2014 to implement the ICAC's recommendation to cancel EL 7270. Specifically:
  - The Licence was cancelled without allowing the due process usually afforded under the *Mining Act 1992* (NSW), with no public hearing and no right of appeal;
  - The Mining Amendment Act denied any right to compensation for affected parties; and
  - The Mining Amendment Act required NuCoal to give all the confidential exploration data that the Company had paid for to the State of NSW at no cost to the State.
- The denial of compensation occurred notwithstanding that ICAC (and Bret Walker SC) suggested that compensation for innocent parties be considered.
- This was all done in circumstances where NuCoal as a legal entity, its directors and its shareholders were innocent of any wrongdoing:
  - NuCoal was never named as a party of interest in any part of the Acacia investigations and was not given a meaningful opportunity to participate in the proceedings;
  - ICAC has clearly stated its view that NuCoal and its shareholders are innocent parties; and
  - The then Premier of NSW, Mr. Barry O'Farrell, has apologised to NuCoal's Directors for any implication that they were not innocent parties.
- The cancellation of the Licence without compensation has had severe detrimental impacts on NuCoal's shareholders and on NSW as a destination for overseas investment:
  - Thousands of innocent mum and dad investors in Australia lost significant amounts;
  - Overseas investors also lost substantial amounts. US investors in particular were, and still are, extremely upset about the way their asset was taken. This has created a contentious debate about compensation between the Australian Federal and US Governments under the US Australia Free Trade Agreement;
  - Japanese investors who had committed to invest in the Doyles Creek Project were alarmed that assets could be removed without due process of law; and
  - The sovereign risk of NSW as a destination for investment has therefore substantially increased because of the cancellation of the Licence.
- The Compensation Bill is appropriate because it allows NuCoal and its shareholders to finally be heard in respect of their claims for compensation.
- The proposed Compensation Bill provides an appropriate process by appointing an independent arbiter to consider all relevant circumstances.

- The Compensation Bill will redress a past wrong and demonstrate, especially to overseas investors, that NSW is a safe place for investment operating under the Rule of Law.

NuCoal makes its representations on behalf of all shareholders. NuCoal has also encouraged individual shareholders to make separate submissions to your Committee on this matter.

Relevant persons from NuCoal are available to meet with the Committee to clarify any information regarding this submission.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Gordon Galt', with a stylized flourish at the end.

Gordon Galt  
Chairman, NuCoal Resources Ltd

**Note:** NuCoal has no concerns with this submission being made public.

**SUBMISSION TO THE STANDING COMMITTEE ON LAW AND JUSTICE of the  
LEGISLATIVE COUNCIL OF THE NSW PARLIAMENT**

**Regarding the**

*Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019* (the  
**Compensation Bill**)

**July 2019**

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# 1. NuCoal and the Licence

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## 1.1 About NuCoal

- 1.1.1 NuCoal Resources Ltd (**NuCoal**) is an ASX listed Company with approximately 3,000 shareholders, with the majority being mum and dad investors from NSW. NuCoal also has a substantial overseas shareholder base with the main country of origin being the USA.
- 1.1.2 NuCoal's wholly owned subsidiary Doyles Creek Mining Pty Ltd (**DCM**) was purchased in 2010 for \$94 million in conjunction with the ASX listing of NuCoal. At the time of its acquisition by NuCoal, DCM had legal tenure over Exploration Licence 7270 (**EL 7270** or **Licence**).
- 1.1.3 The Licence was cancelled in early 2014 by the NSW Parliament via the enactment of the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW) (the **Mining Amendment Act**).

## 1.2 History of the Licence

- 1.2.1 EL 7270 was granted to DCM on 15 December 2008 by the then NSW Minister for Primary Industries and Mineral Resources, Mr. Ian Macdonald.
- 1.2.2 NuCoal did not exist in its current form at the date of the grant of the Licence and was not involved in the NSW Government's grant of the Licence.
- 1.2.3 Prior to the acquisition of DCM in February 2010, NuCoal conducted appropriate due diligence and a Prospectus was issued to prospective investors describing NuCoal's central purpose as being to explore the Licence area and if suitable reserves were found, to develop an underground coal mine, including a training mine, on the Licence area.
- 1.2.4 NuCoal engaged specialist corporate lawyers, Price Sierakowski, to undertake due diligence and prepare a report.
- 1.2.5 The due diligence by Price Sierakowski revealed that EL 7270 was granted in accordance with the powers of the Minister under the *Mining Act 1992* (NSW) in a regular manner, and consistently with the contemporaneous grant of other licences.
- 1.2.6 In their report dated 19 November 2009, the lawyers confirmed that they "*conducted searches of the Tenement in registers maintained by the NSW Department of Primary Industries ("DPI") on 27 October 2009*". They concluded that "*[t]he searches that we have carried out in relation to the Tenement do not reveal any failure to comply with the conditions in respect of the Tenement*".
- 1.2.7 There was nothing in the due diligence report to suggest to NuCoal that the acquisition was any riskier than acquiring any other comparable asset.
- 1.2.8 NuCoal acquired EL 7270 via an arms-length transaction, for valuable consideration and in good faith. On 5 February 2010, the acquisition of DCM was formally completed and NuCoal was listed on the ASX. Immediately following the listing, NuCoal commenced investing in an exploration and

development program with respect to EL 7270, in accordance with the conditions attaching to the Licence.

- 1.2.9 On 23 August 2010, a probity report by O'Connor Marsden, which was commissioned by the NSW Government, confirmed the validity of EL 7270 and concluded that "...it would appear that the then Minister acted within the powers afforded to him under the legislation..."<sup>1</sup>. The report also clarified that the process for allocating the Licence was valid, finding "a number of examples where direct allocations have been previously made by previous Ministers"<sup>2</sup>.
- 1.2.10 Over a year later, on 23 November 2011, the NSW Parliament referred allegations of misconduct and corruption over various issues, including the grant of the Licence to DCM, to the NSW Independent Commission Against Corruption (**ICAC**).
- 1.2.11 The ICAC subsequently initiated an investigation and held public hearings into the grant of the Licence, known as Operation Acacia.
- 1.2.12 NuCoal was not named as a party of interest in any part of the investigations and was not invited to participate meaningfully in the ICAC proceedings.
- 1.2.13 In August 2013, the ICAC made findings of corruption against, among others, certain former Directors of DCM, for conduct in connection with the application for and granting of the Licence. On the basis of these findings, ICAC recommended the cancellation of the Licence.
- 1.2.14 In December 2013, the ICAC issued a further report (**ICAC December 2013 Report**) which raised the issue of "special legislation to expunge" the Licence be considered to be enacted, which "could be accompanied by a power to compensate any innocent person affected by the expunging,"<sup>3</sup> (emphasis added), and that the issue of procedural fairness "will need to be taken into consideration by the relevant decision-makers"<sup>4</sup>. The Commission considered that special legislation was the "preferable method" for expunging the relevant authorities.<sup>5</sup>

## **2. The Mining Amendment (ICAC Operations and Acacia) Act 2014 (NSW)**

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### **2.1 There was a clear expropriation of an asset**

- 2.1.1 Following the publication of the ICAC December 2013 Report, the NSW Government informed NuCoal, via correspondence dated 19 December 2013,

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<sup>1</sup> Report by O'Connor Marsden dated 23 August 2010, at page 5.

<sup>2</sup> Report by O'Connor Marsden dated 23 August 2010, at page 5.

<sup>3</sup> Operations Jasper and Acacia – ICAC Report, December 2013, p 20.

<sup>4</sup> Operations Jasper and Acacia – ICAC Report, December 2013, p 19.

<sup>5</sup> Operations Jasper and Acacia – ICAC Report, December 2013, p 20.

that it could make written submissions as to why ICAC's recommendation in respect of the expunging of the Licence "*should not be implemented*".

- 2.1.2 Given the close timing to the Christmas holiday period the Company requested an extension of time to lodge the submission. This request was denied.
- 2.1.3 On 15 January 2014 NuCoal submitted a 32-page submission. The document addressed ICAC's findings, including that:
- the risks identified in the NuCoal prospectus were typical statements for investments of this type, namely, a small miner with limited resources. The prospectus did not identify any risk to the effect that NuCoal might lose the Licence because of alleged corrupt conduct (and no such risk was within NuCoal's knowledge);
  - NuCoal was a bona fide purchaser for value without notice. It did not know of and was not a party to the alleged corrupt conduct of others, which occurred at a time before NuCoal (in its current form) was in existence;
  - although ICAC relied heavily on the "*notorious public controversy*" surrounding the grant of the Licence as a reason for expunging EL 7270, any public controversy regarding the grant of the Licence was limited to several news articles and discussion by the Minewatch group over a period of just over one week in July 2009, and was thus not notorious (see further *Poole v Chubb*<sup>6</sup>).
  - **Appendix A** clarifies some of the information above.
- 2.1.4 The submission also outlined NuCoal's alternative solution to the special legislation, which had been devised during the ICAC hearing after discussion with the ICAC.
- 2.1.5 Three business days after NuCoal lodged its substantive 32-page submission to the Government, Mr. Barry O'Farrell, the then-Premier of NSW, announced that the NSW Government would introduce special legislation to cancel NuCoal's major asset, EL 7270.
- 2.1.6 The Mining Amendment Act to cancel EL 7270, was introduced into Parliament on 31 January 2014 and passed through both houses on the same day.
- 2.1.7 Contrary to the suggestion of both ICAC and Brett Walker SC, the Mining Amendment Act did not allow for compensation to innocent parties and had a disproportionate effect on NuCoal and its shareholders because:
- The cancellation of the Licence denied the due process usually afforded under the *Mining Act 1992* (NSW), including any public hearing and/or any right of appeal;
  - It removed any right to compensation; and

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<sup>6</sup> *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832, 135 [533], 176 [728].

- It required NuCoal to provide the Government with all its confidential exploration data that the Company had purchased at no cost to the State of NSW. This included physical drill core and core trays which had to be transported to a nominated storage location all at a cost to NuCoal.

## **2.2 Parliament did not have sufficient time to consider the Mining Amendment Act**

- 2.2.1 The Mining Amendment Act was passed by both houses of Parliament on one day - 31 January 2014.
- 2.2.2 This date was not a scheduled sitting day. Members were called back from the summer recess to deal with emergency “*one punch*” legislation, and the Mining Amendment Act was unexpectedly placed in front of them at the same time.
- 2.2.3 Members who voted on the Mining Amendment Act were given less than three hours to consider its contents. In these circumstances, it is conceivable that not all members were aware of the submission made by NuCoal or had enough opportunity to consider its contents or the detailed findings made by ICAC insofar as the findings considered NuCoal and its shareholders, especially in respect of ICAC’s recommendation regarding compensation.
- 2.2.4 The circumstances in which the Mining Amendment Act was passed and the Licence was cancelled has left NuCoal and its shareholders conscious that they have been denied natural justice. NuCoal and its shareholders view the Compensation Bill as providing an opportunity to address this.

## **3. Impacts caused by the Mining Amendment Act**

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### **3.1 The impact of the Mining Amendment Act on NuCoal and its shareholders**

- 3.1.1 NuCoal and its shareholders were adversely impacted by the passing of the Mining Amendment Act in January 2014.
- 3.1.2 The economic value of NuCoal shareholders’ investment was effectively destroyed by the passing of the Mining Amendment Act.
- 3.1.3 Using market metrics - prior to the announcement of the ICAC inquiry, NuCoal’s market capitalisation on the ASX exceeded \$300 million. Immediately after the Mining Amendment Act was passed on 30 January 2014, NuCoal’s market capitalisation had fallen dramatically to a mere \$16 million.
- 3.1.4 There is a minimum expectation that mum and dad investors in Australia, more specifically NSW, and those investors in overseas jurisdictions should receive basic “rule of law” protections when investing in a company such as NuCoal.

- 3.1.5 Whilst NuCoal pursued a number of legal challenges, including an appeal to the High Court, these actions were administrative in nature and if successful, could have only ever assisted NuCoal and its shareholders with seeking an opportunity to state their case for compensation.
- 3.1.6 Since the enactment of the Mining Amendment Act, NuCoal and its shareholders have asked for the opportunity to be heard on the issue of compensation.
- 3.1.7 In December 2017 NuCoal provided a submission to Premier Gladys Berejiklian, following advice from the Attorney General, The Hon Mark Speakman. The submission asked the Premier to consider initiating discussions with NuCoal with a view to considering compensation for NuCoal and its shareholders because of the cancellation of the Licence. The request followed a number of developments during 2017, which NuCoal considered justified a substantive review of the matter by the Government.
- 3.1.8 In mid-2018, NuCoal wrote to all State and Federal MP's outlining NuCoal's position and proposed that a retired senior judge be engaged to consider the facts and circumstances of shareholders and to assess and recommend appropriate compensation.
- 3.1.9 NuCoal has so far been unsuccessful in each of the above attempts to establish a forum in which shareholder compensation claims can be heard and determined.
- 3.2 There has been a clear and verifiable loss to NuCoal and its innocent shareholders**
- 3.2.1 When EL 7270 was granted to DCM in December 2008, the data available was from four historical government boreholes completed over previous decades, three of which were on EL 7270.
- 3.2.2 There was no resource or reserve quantity in EL 7270 when it was granted, according to the Australian Joint Ore Reserves Committee (**JORC**) code or any other standard of measurement. The area was far from being a "*sure thing*" and it would have been unsurprising if the area had turned out not to contain any economic coal resources.
- 3.2.3 Conventional wisdom was that the area was not a good target for the establishment of a mine because:
- large portions of the area were potentially intruded by igneous sills;
  - known large structural features could also degrade any resources that may be present;
  - splitting of seams and depth of potential resources were further reasons to downgrade the area; and
  - the assumed dipping coal seams made mining problematic.
- 3.2.4 Given the above considerations, exploration aimed at confirming a potential resource at Doyles Creek was speculative.

- 3.2.5 After purchasing the Licence area in February 2010 for \$94 million, NuCoal spent significant time, effort and funds to develop the project area over the proceeding 4-year period.
- 3.2.6 The Company raised over \$70 million from the market with Australian and international investors investing with the intent of seeing a significant junior mining company succeed in NSW.
- 3.2.7 NuCoal invested its capital in the Doyles Creek project, creating employment opportunities and generating tax revenue.
- 3.2.8 To comply with the conditions of the Licence, NuCoal was required to incur expenses exploring the Doyles Creek area and between 2010 and 2014 NuCoal expended more than \$40 million on exploration, development studies and land acquisitions.
- 3.2.9 The expenditure was fruitful and allowed NuCoal to establish the existence of coal resources of over 500Mt and progress the Doyles Creek project through the relevant approval processes with the aim of seeking a mining lease.
- 3.2.10 Most significantly, the exploration carried out by NuCoal clarified the geological structure of the area and established the existence of previously unknown resources, with the most important being the 85Mt coking coal resource in the Whynot seam. This resource is one of the most valuable undeveloped coal resources in NSW. It is a low ash, semi-soft coking coal and is a prime example of the type of coal that will be required by the global steel industry for the foreseeable future.
- 3.2.11 The Company also undertook feasibility studies into the establishment of an underground mine, including planning the training mine for underground workers as was required under the conditions of the Licence. Stage 1 of the surface training facility was constructed at the project site and construction drawings of Stage 2 of the surface training facility had been prepared and an application lodged with Singleton Council seeking construction approval.
- 3.2.12 NuCoal's efforts to develop the Doyles Creek Project resulted in an agreement to establish a joint venture between NuCoal and Mitsui Matsushima International Pty Limited (**MMI**) to develop the Doyles Creek mine.
- 3.2.13 In September 2012, MMI's agreement valued the Licence at \$360 million based on the purchase by MMI of a minority interest<sup>7</sup>. This value is equivalent to approximately \$500 million for a controlling interest at the prevailing rate of a 30% premium and accounting for the funds expended by NuCoal in good faith on the Doyles Creek Project.
- 3.2.14 Completion of MMI's investment in the Doyles Creek Project was only contingent on the then Minister for Resources signing an approval for MMI to be included on the title. Under normal circumstances this was a standard step, but given the ongoing ICAC investigation the then Minister for Resources was

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<sup>7</sup> NuCoal ASX Announcement dated 17 September 2012, entitled "*Finalisation of Contractual Documents for the Development of the Doyles Creek Coal Project*".

not prepared to authorise the title transfer, and this resulted in the joint venture not proceeding.

3.2.15 The milestones NuCoal achieved with respect to EL 7270 were significant. Once fully developed, the project was set to deliver the following benefits to the people of NSW:

- In the first 25 years of mining operations, over 100Mt of run-of-mine coal with over 85Mt of saleable production of predominately prime quality semi-soft coking coal and with some high-quality thermal coal as a by-product;
- Ongoing long-term jobs for at least 350 workers; and
- Over \$2.6 billion to the Commonwealth and State via taxes and royalties.

3.2.16 NuCoal always conducted itself as a good corporate citizen and its integrity was never called into question by the ICAC or any other party.

3.2.17 NuCoal ensured that there was no breach of any of the onerous conditions of EL 7270 during the tenure of the Licence. NuCoal diligently and in good faith carried out the obligations of EL 7270 in a professional way to best practice standards, as noted in two audits by the NSW Government<sup>8</sup>.

3.2.18 The losses to NuCoal and its shareholders as a result of the Mining Amendment Act are real and substantial. Hundreds of millions of dollars were wiped from NuCoal's market capitalisation as a direct result of the cancellation of EL 7270, and this loss hit the pockets of NuCoal's innocent investors.

3.2.19 Not only had NuCoal invested millions of dollars directly on EL 7270, but the Licence was the cornerstone to the Company's long-term strategic plan, with NuCoal investing funds into acquiring neighboring tenement areas with the aim of developing a major complex in the area in the future. This plan was shared with the Government.

3.2.20 The NuCoal journey is outlined further in **Appendix B**.

### **3.3 NuCoal's shareholders are innocent**

3.3.1 In Judicial Review Proceedings<sup>9</sup> in the Supreme Court of NSW, the ICAC clarified its position in respect of the identities of the innocent parties to whom it referred within its December 2013 Report.

3.3.2 Item 18 of the ICAC's response to NuCoal's judicial review application stated:

*"...ICAC expressly held out the possibility that any innocent party affected by the expunging might be compensated to the extent that was considered appropriate, in its formal recommendation (December report, page 20). Given the attention given to NuCoal in the section of the report*

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<sup>8</sup> Trade & Investment Resources Energy Audit of Coal and Petroleum Exploration Licences in NSW – Phase 1 and 2 (April 2012). Phase 1 involved a desktop audit of all Exploration Licences (ELs) for coal and Petroleum Exploration Licences (PELs) to identify areas or specific licences warranting more detailed audits against all conditions. Phase 2 involved a detailed independent audit to identify licence holder compliance with all conditions of ELs and PELs. The aim was to measure compliance with conditions and from that recommend changes to process or conditions where considered appropriate.

<sup>9</sup> *NuCoal Resources Limited v Independent Commission Against Corruption* [2015] NSWSC 1400.

*on referred question 3, it can be inferred from the face of the report that NuCoal and those of its shareholders not involved in the corrupt conduct were contemplated within “any innocent party” (indeed, it is not evident who else was meant by “any innocent party”). As NuCoal acknowledges at PS [22], the Commissioner specifically identified NuCoal’s “innocence of wrongdoing” on 20 March 2013 at T4913. Nothing in the December report suggests that ICAC resiled from that position.”*

3.3.3 Justice Rothman also recorded in his reasons the following acknowledgements of the ICAC’s position’s in respect of NuCoal:

- a) *“...the Commission also took the view that the plaintiff, as an entity, was involved in no wrongdoing and none of the Commission’s findings were based on any suggestion of the plaintiff being involved in wrongdoing.”* at [57];
- b) *“The plaintiff’s submission was that its conduct was wholly innocent. The Commission accepted that view....”* at [62];
- c) *“Ultimately the Commission came to the view that the plaintiff, as an entity, was not involved in any wrong doing....”* at [65]; and
- d) *ICAC “ did not come to the view that the plaintiff acted corruptly. On the contrary, the Commission accepted that the plaintiff acted innocently...”* at [80].

3.3.4 NuCoal and its shareholders were adversely and disproportionately impacted by the introduction of the Mining Amendment Act. **Despite acting in good faith and without wrongdoing**, NuCoal’s shareholders lost their entire investment and to date have received no compensation or opportunity to be heard on the issue of compensation. NuCoal and its shareholders welcome the prospect of pleading their case for compensation before an independently appointed arbitrator, as contemplated by the Compensation Bill.

### **3.4 The people behind the financial and emotional loss**

3.4.1 At the time EL 7270 was cancelled, the Company had approximately 3,400 shareholders.

3.4.2 Every shareholder in the Company invested their own hard-earned money into buying shares and effectively, the assets of the Company. EL 7270 was the major and only core asset.

3.4.3 The loss incurred by individual shareholders varies. The stories outlined below are just a snapshot of the financial and emotional devastation caused to innocent people because of the cancellation of the Licence. There are many more similar stories.

3.4.4 Darrell and Michelle Lantry

- The Lantry family are small investors from Newcastle.
- During 2011 and 2012 they had a young son and invested in NuCoal as they liked the Company’s story and the fact that the head office of the company was around the corner from their house.

- Before buying NuCoal shares they did their homework. They looked at broker reports, company information on the ASX and ASIC information. They sought financial advice and researched third party information, including the Government-commissioned O'Connor Marsden Report published in 2010.
- They invested approximately [REDACTED] to buy shares and in early 2014, their lives were turned upside down when they were left devastated by the impact of the Mining Amendment Act and the cancellation of the Licence. Their loss amounted to approximately [REDACTED].
- Darrell and Michelle have suffered severe mental stress over the significant financial loss they have incurred, and have since tried to rebuild their financial position.
- Darrell and Michelle are not criminals and they are not wealthy investors. They are an average family from Newcastle which has been devastated by the consequences of the Mining Amendment Act.

#### 3.4.5 Peter Harvey and family

- Peter Harvey is a family man – he lives with his wife Jane and their four children in Newcastle.
- Peter is a small investor who has been investing in the Australian share market for nearly 20 years.
- Peter does his research before investing, makes informed choices about a number of variables and has a clear understanding of risk and reward.
- Peter invested approximately [REDACTED] in NuCoal shares in September 2012.
- He bought the shares with the aim of being able to build a group home for his severely disabled daughter, Eliza.
- When the Licence was cancelled, Peter lost almost [REDACTED].
- Peter works hard for his family and the NSW community to assist those in need.

3.4.6 Over the last number of years, NuCoal shareholders have made direct representations to both their State and Federal MP's and have not been able to achieve progress.

### 3.5 Barry O'Farrell apology to NuCoal Directors

3.5.1 After being served with defamation proceedings for comments made at the Community Cabinet meeting soon after the State Parliament passed the Mining Amendment Act, former Premier Mr. Barry O'Farrell issued an apology and correction of the record to the Directors of NuCoal.

3.5.2 In addition to the apology, Mr. O'Farrell also agreed to pay significant costs incurred by the Directors during their pursuit of the matter.

### 3.5.3 Mr. O'Farrell's public apology and correction is set out below:

**To: Gordon Galt, Glen Lewis, James Beecher and Michael Davies**

#### **Correction**

During my time as Premier, on 10 February 2014, I conducted a community Cabinet meeting in Maitland. At that meeting, in response to a question, I stated that ICAC had made adverse comments about the directors of Nucoal Resources. I also stated that the directors of NuCoal Resources were attempting to distract shareholders from their responsibilities as directors. I accept that those remarks may have suggested that the current directors of Nucoal (Messrs Galt, Lewis, Beecher and Davies) had been the subject of such comments. I accept that ICAC did not make adverse comments about those current directors of Nucoal. I did not intend to suggest that it had. I also accept that those directors were not attempting to distract shareholders from their responsibilities to them. I regret my comments and apologise to the four gentlemen in question.



**Barry O'Farrell MP**

### 3.6 Sovereign and business risk issues

- 3.6.1 Australia is considered by foreign investors to be a safe jurisdiction for investment. It has not suffered civil unrest, crippling inflation or despotic rule (and the usual attendant instability in central banks' decision-making) - circumstances that frequently give rise to sovereign risk concerns in other countries.
- 3.6.2 Under the Commonwealth Constitution, the Australian Government may only expropriate property on "just terms" (s 51(xxxi)). For the Australian States, however, there are no constitutional prohibitions or limitations on expropriation at all. It is predominantly the purview of the States to own land, grant leases, administer mining rights and commission infrastructure projects. As such, domestic and foreign investment is subject to the whims of the States and, in particular, to changes of government. Investors in any project that is subject to state government approval, administration or legislation can find their assets impaired or wholly expropriated without compensation by State Governments or Parliaments.
- 3.6.3 This was confirmed by the High Court in the appeal brought by NuCoal<sup>10</sup>. The outcome of this case highlighted the sovereign risk associated with investments in Australian States.
- 3.6.4 Investment in NSW relies on stable property rights and if the Government starts to interfere with such rights, then compensation must be paid.

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<sup>10</sup> *Duncan v New South Wales* (2015) 255 CLR 388.

3.6.5 Increased negative perceptions of sovereign risk should concern not only potential and current investors, but also the Government and the community – especially the regional community. If the Government makes decisions which reinforce negative perceptions about NSW, revenue, exports and regional job opportunities are all at risk of being adversely affected. Australia has always been, and still is, an importer of capital and needs to be, and be seen to be, a low risk investment environment.

3.6.6 The Compensation Bill can help restore foreign and domestic investor's confidence in investing in projects in the State of NSW, since it affords affected shareholders and investors the opportunity to have their claims for compensation heard and determined.

### **3.7 NuCoal's US Investors**

3.7.1 Approximately 20% of NuCoal's investors are from the United States, which is by far the largest foreign investor into Australia. The cancellation of the Licence without compensation to NuCoal is likely to have highlighted to the US Government and US investors the ability of Australian States, particularly NSW, to confiscate property without compensation or natural justice safeguards.

3.7.2 NuCoal, on behalf of its US investors, has been pursuing justice via the US-Australia Free Trade Agreement (**AUSFTA**) for over five years, citing a key breach of the AUSFTA. The matter is ongoing.

3.7.3 NuCoal's US Investors have requested that the Federal Government and the US Government enter consultations, pursuant to Article 11.16 of the AUSFTA, with a view towards allowing US Investors to bring a claim for compensation against the Federal Government in respect of the expropriation of EL 7270.

3.7.4 The Federal Government has been notified of this alleged breach on numerous occasions, most notably via a letter from the US Trade Representative (**USTR**), Robert Lighthizer, to the then Minister for Trade, Steven Ciobo, on 26 October 2017 – see **Appendix C**.

3.7.5 NuCoal continues to be in regular contact with representatives of the USTR. We understand that the matter continues to be pressed by the US Government and that most recently, representatives of the USTR pressed the Department of Foreign Affairs and Trade for action at a Joint Committee Meeting held in May 2019.

## **4. Why the proposed Compensation Bill is appropriate**

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### **4.1 There is no other meaningful recourse for NuCoal investors**

4.1.1 The Mining Amendment Act did not afford investors, especially mum and dad investors, with the opportunity to seek any remedy in relation to the losses caused by the cancellation of the Licence.

4.1.2 NuCoal has pursued a number of legal challenges through the Australian judicial system, all of which have now been exhausted without redress for NuCoal's shareholders.

#### 4.1.3 Judicial Review

- NuCoal instituted judicial review proceedings against ICAC to challenge the process by which ICAC made its findings. The Court could only narrowly review and comment on whether the Commission acted in accordance with its statutory duties. A merits review was (and is) not available.
- The Judicial Review Judgment was handed down by Justice Stephen Rothman on 24 September 2015. The Court found that ICAC had acted within its powers.

#### 4.1.4 Constitutional Challenge

- NuCoal brought proceedings in the High Court of Australia (**HCA**) against NSW, challenging the constitutional validity of the Mining Amendment Act. The proceedings were heard in February 2015 and NuCoal did not prevail.
- The HCA did not decide or comment on whether corruption had occurred, whether NuCoal was innocent of any misconduct, or whether the cancellation was warranted. It simply confirmed that the NSW Parliament had the power to pass the Mining Amendment Act<sup>11</sup>.
- The Constitution of Australia provides that the Federal Government may only compulsorily acquire (or expropriate) property "on just terms" – i.e., with fair compensation. The State Governments, however, are not bound by that provision – they are free to expropriate property without offering any compensation.

4.1.5 Having now exhausted all domestic legal avenues for redress, the Compensation Bill is considered by NuCoal to be the only effective and fair way of providing affected shareholders with the opportunity to plead their case for compensation.

4.1.6 The Compensation Bill does not grant any entitlement to compensation but allows NuCoal and its shareholders the opportunity to participate in a formal process whereby a case for compensation can be put forward for assessment by an independent arbitrator.

## 4.2 **Precedents for compensation exist in NSW**

4.2.1 NuCoal is aware that the NSW Government has previously paid compensation to two major international corporations to buy back NSW coal mining licences.

4.2.2 Compensation paid to Shenua in respect of Watermark and to BHP for Caroon are two precedent cases where compensation has been paid for removal of whole or part of an exploration licence.

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<sup>11</sup> *Duncan v New South Wales* [2015] 255 CLR 388 at 396, 411.

### **4.3 The Compensation Bill is appropriate**

- 4.3.1 NuCoal and its shareholders have been denied the ability to plead their case for compensation for financial losses incurred because of the cancellation of the Licence.
- 4.3.2 The Compensation Bill is appropriate because it provides NuCoal and its shareholders with such an opportunity.
- 4.3.3 The proposed Compensation Bill provides an appropriate process to achieve this by appointing an independent arbiter with the ability to consider all relevant circumstances.

## **5. Why the Compensation Bill should be supported by the Parliament of NSW**

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- 5.1.1 The Compensation Bill will have the effect of redressing a past wrong by providing affected shareholders with the opportunity to have their claims for compensation heard, and to demonstrate to investors, particularly overseas investors, that NSW is a safe and appropriate place for them to invest.
- 5.1.2 Over the last five years NuCoal has spent a considerable amount of time and effort meeting and engaging with MP's to tell the NuCoal story of injustice. To date, no MP, once presented with the facts of the case, has not been supportive of a process to allow for NuCoal and its innocent shareholders an opportunity to be given fair hearing, and the Compensation Bill will provide that.

## APPENDIX A

### The NuCoal Prospectus

The due diligence undertaken in respect of NuCoal's acquisition of DCM included the engagement of the following specialists:

- Corporate Lawyers – Price Sierakowski
- Investigating Accountants – PKF Corporate Advisory Services (WA) Pty Ltd
- Auditor – PKF Chartered Accountants & Advisors
- Independent Geologist – Geoperformance Pty Ltd
- Corporate Advisor – Trident Capital
- Independent Experts – BDO Kendalls

All the above specialists issued reports which formed part of NuCoal's Prospectus document issued to investors. None of the reports identified or suggested any impropriety with respect to the Licence or its grant.

NuCoal's shareholders purchased their securities without any appreciation of any risk that EL 7270 might be expunged by reason of allegedly corrupt conduct. It is self-evident that the NuCoal Prospectus did not contemplate any such risk. In 2009 there was no referral to or actual investigation by the ICAC. There was also no legal challenge to EL 7270 by any party, despite the grant having been made in December 2008.

Consistent with Chapter 6D of the *Corporations Act 2001* (Cth), NuCoal set out the risks associated with any proposed investment in sections 1 and 8 its prospectus:<sup>12</sup>

- Section 1.12 is directed to the general risk "*as with any share investment*".
- Section 8.4 is directed to the risk of loss of title to the tenements "*if conditions attached to the licences are changed or not complied with*".

The NuCoal Prospectus made no reference to any risk to EL 7270 associated with the circumstances in which it was granted. Nothing in the prospectus provides any support for the ICAC's finding that NuCoal's shareholders made their investments with appreciation of such a risk.

The general risk identified in section 1 of the NuCoal Prospectus is generic and common to many company prospectuses. See, for example the risk factors outlined by BHP Billiton in their Prospectus dated 14 April 2003 → <http://www.bhpbilliton.com/home/investors/Documents/GB45978A.pdf>.

The NuCoal Prospectus was developed and reviewed by ASIC and the ASX in accordance with normal market practice, and did not once reference or infer that investors should be concerned about corrupt granting of the EL. Had such a risk existed then the matter would never have been passed these regulatory bodies. In truth, they saw nothing wrong and neither should the ICAC have seen any wrong – as there was nothing to be concerned about.

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<sup>12</sup> NuCoal Prospectus, pp. 2, 11 and 83.

## The 'Notorious Public Controversy'

A major plank on which the ICAC relied to recommend expunging of EL 7270 was the so-called "*notorious public controversy*" surrounding the grant of the Licence.<sup>13</sup>

The use of the adjective "*notorious*" is unwarranted. The ICAC's analysis was one of historical revisionism rather than a correct recounting of the actual events.

There was no ICAC investigation on foot or mooted in 2009 so nothing was or could have been occurring under the shadow of an ICAC hearing.

The controversy was limited to a total of 14 news items of regional radio and television over a two-day period, 20 and 21 July 2009. The media was confined to the regional sphere and there is no suggestion that they were elevated to a State-wide, national or international concern such as to gain notoriety.

The media items were generally to the effect that there was a "*conflict of interest*" in granting EL 7270 because "*mining union boss John Maitland was one of the proponents*".

The allegation, as reported in the ABC Upper Hunter, was put by the then Opposition. In answer to the allegation – a total of six of the 14 news items refer to Mr. Macdonald having:

- "*denied the allegations*";
- "*refuted allegations*"; and
- "*defended the process of granting an exploration licence*".

In that context, Mr. Macdonald made statements that "*no corners were cut in the granting of the licence for a training mine*" and that there had been "*extensive public consultation over the proposal in the six months before the exploration licence was issued*".

It is trite that allegations and denials of such allegations occur as part of the ordinary course of public and political debate. Public criticism of political decisions and rejoinder by politicians is ordinary discourse. Six of the news items related to denials by a Minister of the Crown, while others said that the NSW Government defended the process leading to the grant of the Licence.

The following table summarises the media aired on 20 and 21 July 2019.

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<sup>13</sup> December Report, pp.16-17, points (d), (e), (f), (h) and (i).

Media surrounding 'notorious public controversy'					
Media outlet	Date	Duration (sec)	Audience	Approx. listeners	Time Aired
2RE (Taree)	20/07/2009	0.41	Taree, Wingham, Old Bar, Nabriac, Halliday's Point, Blackhead, Forster, Tuncurry, Pacific Palms, Smiths Lake, Coopernook, Harrington, Crowdy Head, Kendall, Laurieton, Kew, Port Macquarie, Gloucester, Barrington Tops, Krambach and Wootton	approx. 80,000	12:00 News - 12:03pm
2SM (Sydney)	20/07/2009	0.38	Sydney and surrounding areas	approx. 400,000	12:00 News - 12:03pm
ABC 702 Sydney	20/07/2009	0.55	Sydney and surrounding areas	approx. 120,000	12:00 News - 12:06pm
2NM Muswellbrook	20/07/2009	0.38	Muswellbrook, Singleton, Scone, Aberdeen, Merriwa, Murrurundi and surrounding areas	less than 30,000	12:08 News - 12:10pm
ABC 702 Sydney	20/07/2009	0.49	Sydney and surrounding areas	approx. 120,000	13:00 News - 1:02pm
ABC Newcastle	20/07/2009	0.47	Newcastle Maitland Port Stephens Cessnock Central Coast	approx. 40,000	13:00 News - 1:02pm
ABC Newcastle	20/07/2009	0.55	Newcastle Maitland Port Stephens Cessnock Central Coast	approx. 40,000	15:00 News - 3:02pm
ABC Newcastle	20/07/2009	1.1	Newcastle Maitland Port Stephens Cessnock Central Coast	approx. 40,000	Three to Six - 3:31pm
2SM (Sydney)	20/07/2009	0.36	Sydney and surrounding areas	approx. 400,000	16:00 News - 4:01pm
ABC Newcastle	20/07/2009	0.5	Newcastle Maitland Port Stephens Cessnock Central Coast	approx. 40,000	16:00 News - 4:02pm
ABC Riverina (Wagga Wagga)	20/07/2009	2.1	Wagga Wagga, Griffith, Goulburn, Leeton and Hay	less than 20,000	NSW Statewide Drive - 4:57pm
2UE (Sydney)	20/07/2009	0.17	Sydney and surrounding areas	approx. 400,000	23:00 News - 11:03pm
ABC Upper Hunter (Muswellbrook)	21/07/2009	0.23	Upper Hunter incl Muswellbrook, Scone, Aberdeen, Singleton, Merriwa and Murrurundi	less than 30,000	Rural Report - 6:59am
2CS FM (Coffs Harbour)	21/07/2009	0.12	Coffs Harbour, south to Urunga west to Ebor and north to Woolgoolga	approx. 80,000	7am News - 7:06am
2CS FM (Coffs Harbour)	21/07/2009	0.27	Coffs Harbour, south to Urunga west to Ebor and north to Woolgoolga	approx. 80,000	7:30am News - 7:33am

The public controversy matter has been considered post ICAC in the Supreme Court of NSW.

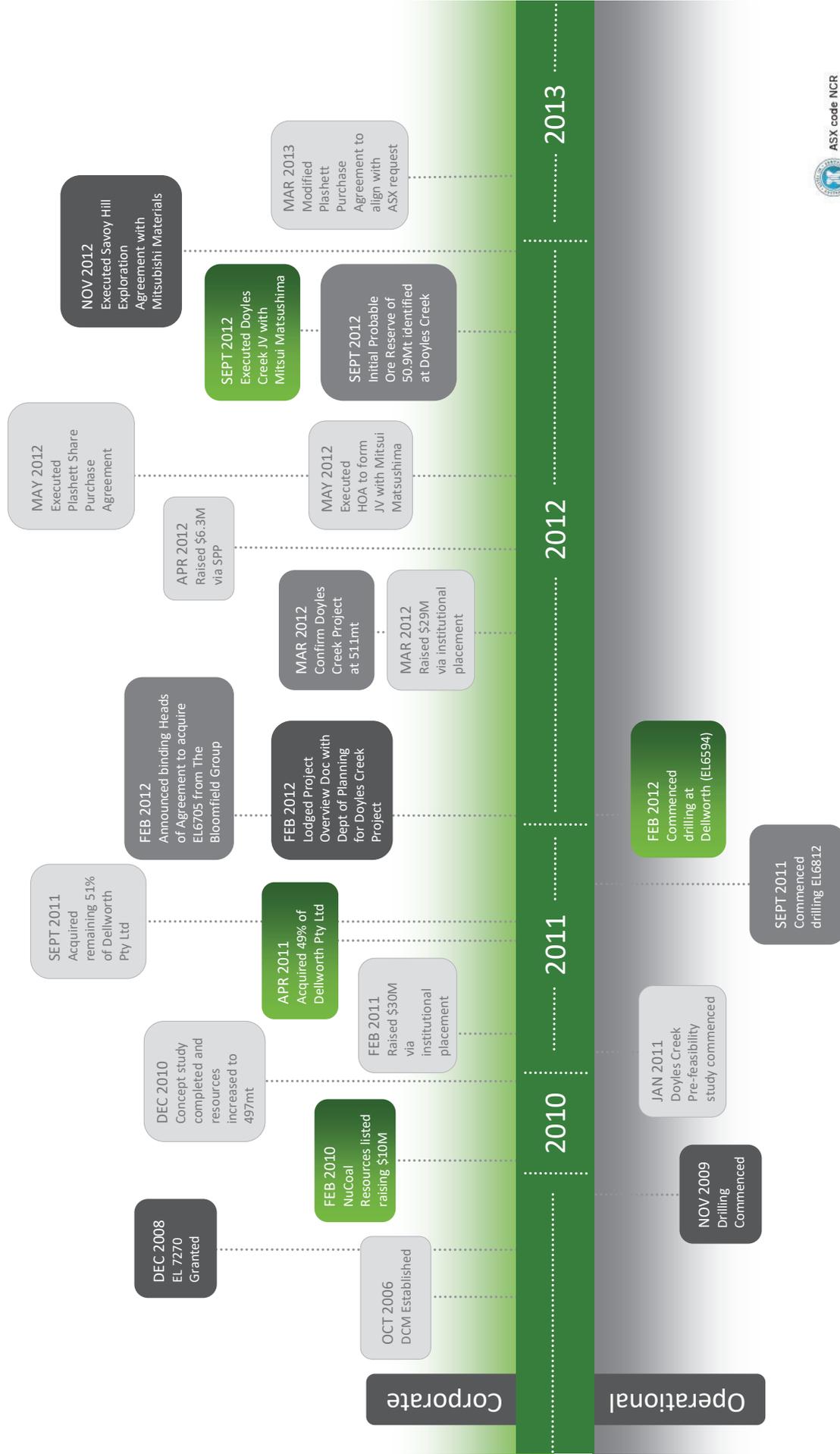
In *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832 – the Hon Justice Stevenson reviewed all the same media material presented by ICAC and found:

1. that a fully informed Director of Doyles Creek Mining should not or could not have known about a few articles reported citing: *“The Court was also not persuaded that Mr. Poole knew, or that a reasonable person in his position could be expected to know, that there was “emerging public controversy”.*”
2. that ICAC’s assertions that DCM directors knew there was potential for the grant to be the subject of a non-existent public inquiry were baseless. In respect of Poole’s knowledge, Justice Stevenson concluded: *“Nor do I think that a reasonable person in Mr. Poole's position could be expected to know that there was a real possibility of there being a public inquiry”.*<sup>14</sup>
3. that on the evidence, the controversy disappeared in just over one week concluding: *“The question concerning “ICAC?” in the Minewatch Q&A, was not pursued at the meeting and, after the meeting, on the evidence before me, there was no further controversy, whether in the press, or by the Minewatch group concerning DCM or the grant of the Exploration Licence...”*<sup>15</sup>

<sup>14</sup> *Poole v Chubb Insurance Company of Australia Limited* [2014] NSWSC 1832, 171 [692] – [696]

<sup>15</sup> *Poole v Chubb Insurance Company of Australia Limited* [2014] NSWSC 1832, 176 [728]

# APPENDIX B - NuCoal Journey



# APPENDIX C



THE UNITED STATES TRADE REPRESENTATIVE  
EXECUTIVE OFFICE OF THE PRESIDENT  
WASHINGTON, D.C. 20508

October 26, 2017

The Honorable Steven Ciobo  
Minister for Trade, Tourism and Investment  
Department of Foreign Affairs and Trade  
Canberra, Australia

Dear Minister Ciobo:

Pursuant to Article 11.16 of the United States-Australia Free Trade Agreement, the United States hereby requests consultations with the Government of Australia with a view towards allowing the U.S. investors in NuCoal Resources Ltd. to submit to arbitration claims related to the New South Wales Parliament's cancellation of exploration license number 7270 by means of its enactment of the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 on January 30, 2014. Article 11.16 of the Australia-United States Free Trade Agreement (FTA) states in relevant part:

If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

As we have discussed, the U.S. investors in NuCoal Resources Ltd. allege that the cancellation of the license was inconsistent with Australia's obligations in the Investment chapter of the FTA. While the United States does not take a view on the merits of these allegations, the United States believes that the enactment of legislation by an Australian state government cancelling a hydrocarbons exploration license and denying U.S. investors the opportunity to seek compensation in Australia's domestic courts constitutes a change in circumstances affecting the settlement of investment disputes meriting consultations under Article 11.16. Further, the United States is compelled to request consultations with a view towards allowing the U.S. investors to arbitrate their claims due to the longstanding lack of resolution of this matter, notwithstanding several years of engagement between the U.S. investors and state and federal officials in Australia, and also between our governments.

As you know, this is the first time that the United States has requested consultations under Article 11.16 since the FTA entered into force in 2005, which reflects the seriousness of our concerns regarding this matter.

I look forward to your reply and to fixing a mutually convenient date to hold consultations. The United States reserves all rights under the FTA to seek an expeditious resolution of this matter. Thank you for your attention to this request for consultations.

Sincerely yours,



Ambassador Robert E. Lighthizer  
United States Trade Representative