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Independent Committee Against Corruption Standing Committee
c/o – NSW Legislative Council
52 Martin Place
Sydney NSW 2000

By E-mail: icaccommittee@parliament.nsw.gov.au

Dear Committee Members

We are writing to you on behalf of the shareholders of NuCoal Resources Limited (**NuCoal** or **Company**), a publicly listed company with approximately 3,000 shareholders, in relation to your enquiry into the reputational impact on an individual being adversely named in investigations by the Independent Commission Against Corruption (**ICAC**). We are not lawyers so our submission will not read as a legal submission. Our history is detailed in **Attachment 1**.

Our submission deals with your terms of reference based on our experience of the adverse impacts of ICAC pursuant to the Acacia enquiry (**Acacia**). Our Company has made numerous submissions regarding Acacia and its consequences over the past six and a half years. We have **attached** four of these for your reference (**Attachments 2, 3, 4** and **5**). We bring your attention in particular to our comments on the governance of ICAC in the cover letter of **Attachment 3**. These comments are in many instances still applicable to your current enquiry.

We further observe that:

1 ICAC has extraordinary powers to investigate corruption involving or affecting public authorities and public officials. The quid pro quo for having these powers is that ICAC should be required to both overtly and publicly recognise and demonstrate by its activities that it does not and will not abuse these powers, but rather it is a responsible party worthy of the peoples' trust. ICAC certainly has not acted in this fashion for lengthy periods in the last decade, as attested by one of its own Commissioners, who publicly said when ICAC interviewed people it was like *"pulling wings off butterflies"*. **ICAC's responsibility to act as a model investigator and litigant should be strengthened in its enabling legislation.**

Operation Acacia, which was held during this period, was a "show trial" which exhibited some of the worst aspects of ICAC's failure to recognise its responsibilities. Acacia caused significant reputational and financial damage to our Company, its shareholders and Directors, and to international relations between Australia and investor countries. The huge financial loss caused to NuCoal by ICAC's flawed Acacia investigation is unmatched in the history of ICAC.

2 It is a proven fact that ICAC makes mistakes.

ICAC should be required to admit to the bases AND the shortcomings of its conclusions when it writes its reports, so that the public can judge whether its investigations are at a suitable standard. ICAC's failures to use or disclose the existence of exculpatory evidence during the last decade are too numerous to all be noted within this submission. **The existence of all exculpatory information should be disclosed publicly.**

ICAC cannot be allowed to act illegally. The passing of the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (**Validation Act**) is the ultimate testament to this statement. This cynical piece of legislation retrospectively made illegal acts legal and had only one purpose - to avoid the actual and moral consequences of ICAC's mistakes. **There need to be consequences for persons in ICAC who acted illegally especially if the behaviour is deliberate. The Validation Act should be repealed.**

3 Courts make mistakes as well. The clear public difference between a court and ICAC is that when a court makes a mistake a person has a right and a process available to identify the mistake and seek natural justice. The mistake and the reasons for the mistake become matters of public knowledge. There is no similar right or process available for parties who are the subject of ICAC's mistakes. These need to be available. NuCoal had no right to a merits review and still has no such right even though the mistakes of ICAC in Acacia are clearly apparent. **The right to a merits review should be included in the ICAC Act.**

In this context a failure of ICAC to successfully prosecute someone it adversely names within a prescribed period must legally be made to mean that ICAC has made a mistake and that ICAC's "opinion" must be formally struck out. Reasons should be given publicly as to why ICAC's "opinion" cannot be legally sustained.

4 If we are to limit the damage done by ICAC's mistakes – mistakes which will continue under even an improved governance regime as happens with courts - the public and the press must be educated that ICAC is not a court, that any and all of its conclusions in respect of investigations it undertakes are actually nothing more than "opinion" and that it often makes mistakes. Many of the detrimental impacts caused by ICAC are a result of hasty judgemental actions by it and others after an ICAC report is tabled.

ICAC makes no attempt to temper or stop these impacts before or after they occur. **Legislation should be instituted to disallow any actions, subsequent to an ICAC hearing, which use the ICAC conclusions as a rationale for the actions.**

NuCoal, its shareholders and directors and the international reputations of NSW and Australia have all suffered enormously as a result of a flawed ICAC investigation when the NSW Parliament acted on an ICAC report which has subsequently been seen to be totally flawed.

Our observations are elaborated in this submission and in the attached previous submissions. The elaboration is not exhaustive and we would welcome the opportunity to further discuss this matter with the Committee.

Yours faithfully,

Gordon Galt
Chairman, NuCoal Resources Ltd

Contents

Attachments

1. NuCoal Overview

NuCoal Resources Ltd (**NuCoal** or **Company**) is a public company listed on the Australian Securities Exchange (ASX: NCR) and at this time has approximately 3,000 shareholders. The Company has been in existence for ten years, and broadly speaking, the ten years have comprised:

Feb 2010 – Jan 2014: NuCoal purchased the Doyles Creek Exploration Licence (**EL 7270** or **EL**) in the Hunter Valley of NSW then conducted on-ground exploration and development studies fully in accordance with the EL conditions, plus raised public capital from both institutional and retail (i.e. mum and dad) investors to fund this work

Nov 2011 – Jan 2014: The NSW Government instigated a report into the granting of EL 7270 in approximately August 2010 (Clayton Utz Report) and then referred the matter to ICAC in November 2011. ICAC conducted Operation Acacia to investigate whether the EL had been corruptly awarded back in December 2008, to the company from which NuCoal purchased the EL. ICAC concluded that five persons acted "corruptly" to obtain the EL and recommended that the EL should be cancelled *"because the EL was so tainted by corruption"*. The five persons comprised the Minister for Mines and four directors of Doyles Creek Mining Pty Limited who were not public officers. ICAC made a further recommendation that compensation be considered for innocent parties. This recommendation was ignored when The NSW Government very rapidly introduced the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014 (**Act**) which confiscated (cancelled) the EL but expressly denied compensation to innocent parties and indemnified the State against any recourse actions. The Act was introduced into Parliament without warning and many members could not possibly have had time to review its contents before being required to vote on it.

Feb 2014 – Present:

- NuCoal conducted all possible legal cases seeking compensation (High Court, Judicial review) and also pursued compensation for international investors from the Australian Government under the Australia US Free Trade Agreement (**AUSFTA**).

- None of the five persons named as corrupt by ICAC has been successfully prosecuted:

  - Two persons were convicted of related offences but the Appeal Court of NSW (**AC**) quashed their convictions unanimously. The AC identified the appropriate standard for deciding on such cases – a standard at which the prosecutor in the original trial admitted there would be no case to answer.
  - A third person was tried twice and acquitted both times.
  - A fourth person defended a civil case covering the facts considered by Operation Acacia. He won on every issue and has never been prosecuted.
  - The fifth person has never been prosecuted.

- **The only conclusion which can be reached from all of this is that ICAC made a <u>huge</u> mistake when it wrote its reports for Acacia.**

- ICAC has never acknowledged (or apologised for) this mistake and neither has the State of NSW.

- The Premier of NSW did apologise to NuCoal Directors for impugning their reputations, but only after they brought a defamation case against him.

- A Private members bill was tabled in the NSW Upper House in 2019 and subsequently examined by the Law and Justice Committee which recommended that the NSW Government should deal with the claims of "innocent shareholders". The current status is that the NSW Government has reserved its position on the matter.

A more detailed (but not exhaustive) timeline is given in **Attachment 1**.

2. Impacts of Operation Acacia

The impacts of ICAC's flawed Operation Acacia investigation can accurately be described as extreme in terms of their detrimental impacts on NuCoal as well as its shareholders, directors, and other stakeholders. These comprise monetary impacts, reputational impacts and damage to international relations.

2.1 Financial

As at the end of December 2013, NuCoal had expended approximately $65m almost solely into exploration, development studies and corporate costs associated with the running of the company with the aim of starting a mine, including a training mine, on the EL area fully in accordance with the conditions of the EL.

In February 2011, NuCoal had a peak market capitalisation of $365m. When the ICAC investigation was publicly announced in August 2012 the market cap was $161m. When ICAC's first Operation Acacia report was tabled in August 2013, the market cap was $69m and it is now $9m. It is undeniably true that the principal cause of the destruction of the value of NuCoal was the ICAC investigation, including its destructive methodology and its unsubstantiated and erroneous conclusions.

The huge financial loss suffered by NuCoal's shareholders which is demonstrated by these figures is very significant and was clearly caused by ICAC's flawed Acacia investigation. The financial loss is unmatched in the history of ICAC.

2.2 Reputational

Reputational damage was caused to former and current directors of NuCoal pursuant to the Acacia enquiry.

- Two of the five persons who ICAC directly named as corrupt in August 2013 were past directors of NuCoal. Despite ICAC's strident corruption statement, neither person has ever been prosecuted. In a relevant civil case which did progress, the judge showed clearly that the reasons given by ICAC for its corruption conclusion were baseless.

- ICAC's Acacia report made out that in February 2010 that the (six) Directors of NuCoal at the time were aware of corruption in the granting of the EL. The conclusion has also been shown to be baseless, but ICAC has never resiled from its statements. ICAC has clearly damaged the Directors' reputations.

The pattern is that ICAC does cause major reputational damage and the cause of the damage is clear – it is ICAC's flawed appraisal of the evidence available to it. It could be that ICAC reaches an "opinion" and then makes conclusions in favour of its opinion despite what the evidence actually says.

It is hard to believe that ICAC was not aware that it would cause reputational damage when it conducted its public Acacia enquiry and subsequently published its reports. These matters were widely reported in the press and remain on the internet to this day. ICAC has never said that its detrimental statements and accusations made about the named people are unproven, that its statements and conclusions are wrong and/or that ICAC unreservedly apologises for the harm it has caused. It appears that ICAC has no interest in doing this.

In contrast to the ICAC damage which has never been "righted", the ex-Premier of NSW, Barry O'Farrell has publicly apologised to the NuCoal directors impugned by ICAC, but only after he was threatened with defamation for statements he made pursuant to ICAC's Acacia report. The State of NSW paid the costs of the action. The ex-Premier had no evidence for his statements – the same as ICAC had no evidence for its statements – **but the rule of law meant that the directors had a course of action so he could not get away with it.**

There is no mechanism available to obtain just outcomes for damage that derives from ICAC's mistakes. The Judicial Review process certainly does not address this matter. **A merits review process must be introduced to allow natural justice to occur.**

2.3 International

NuCoal has a significant overseas shareholding even now – almost 20%. At the time of the confiscation of the EL in January 2014 the international shareholding was higher at over 30%. Most international shareholders are from the USA, but Germans and New Zealanders also had significant holdings.

NuCoal took a case to the High Court of Australia to challenge the right of the state of NSW to confiscate property without compensation but lost the case. This case has been widely read by investors.

After the High Court case US shareholders have pursued their rights under the Australia-US Free Trade Agreement which provides that assets are not confiscated without compensation. As a testament to this the US Trade representative, Mr Lighthizer, wrote to the Australian Government requesting an international arbitration process (**Attachment 6**). The Australian Government has resisted US shareholders' attempts to date.

The above pursuit is widely known. Investors are now aware that the State of NSW:

- does confiscate real property without compensation;
- does act hastily without justification; and
- continues to ignore its responsibilities for compensation - even when the reasons for the confiscation have been shown to be baseless.

From the above summary it is clear that ICAC's substandard work has caused lasting damage to the reputation of Australia's international investor base. Trust in the Governments of Australia and particularly NSW has been downgraded in the eyes of international investors.

3. Concerns with ICAC's Operations

3.1 ICAC is not independent

ICAC is supposed to be "Independent", but it is actually "owned" and funded by, and has an ongoing non-public relationship with, the Department of Premier and Cabinet (DPC). ICAC should not be a sub- department of the DPC. **ICAC should be forbidden to converse with any politicians, or with officers of the DPC, regarding any investigation and vice versa**.

A section of the DPP is separately funded by DPC (not AG) to pursue ICAC related prosecutions. This unit should not exist within the DPP if it remains funded by DPC.

Fundamentally ICAC should be under the Attorney General's Department - as are the Courts.

3.2 ICAC conducts illegal enquiries

It is a fact that the findings of corrupt conduct by the ICAC against the directors of DCM, and upon which Parliament acted to expunge EL 7270, only stand due to the Parliament passing the ICAC Validation Act which retrospectively validated the findings of the ICAC in May 2015.[1]

In 2011, at the time the Acacia inquiry commenced and at the date of the first Operation Acacia Report in August 2013, the ICAC had no power to conduct the Acacia investigation as it did and exceeded its jurisdiction.[2] The original findings of corrupt conduct against the directors of DCM were therefore not made according to law and were a nullity.

In early 2015, the directors of DCM commenced judicial review proceedings for a declaration that the findings they had engaged in corrupt conduct were not made according to law and were a nullity. This action did not proceed after the passing of the ICAC Validation Act.

3.3 ICAC's Public Disclosure is inadequate

ICAC has to tell the whole story – not just give people its "opinions". ICAC should state the limitations of its conclusions so that people can assess whether its verdicts are justified. If ICAC is unsure about some aspect, or can't obtain appropriate evidence even with its excess powers, or has relied on "evidence" that won't stand up in a court it should say so.

ICAC should not "conveniently" leave important information out of its reports. For example, as one of its recommendations in the Acacia report ICAC said that innocent parties should be

[1] *Independent Commission Against Corruption Amendment (Validation) Act 2015*
[2] *Independent Commission Against Corruption v Cunneen [2015] HCA 14*

considered for compensation. ICAC failed to clearly state who these innocent parties were – but readily admitted a year later in a Judicial Review that the parties were NuCoal's shareholders. When the Government went ahead with ICAC's recommendation to confiscate NuCoal's EL but failed to proceed with the compensation recommendation ICAC was completely silent on the matter. It did however take the time to justify the cancellation of the EL in public. Why didn't ICAC go into bat for the innocent shareholders when it wrote its Acacia report?

If ICAC has taken inadequate evidence on a matter – or no evidence - it should also say so. In its Acacia report, ICAC went to great lengths to suggest that Directors of NuCoal, some of whom ICAC didn't even interrogate, were somehow knowledgeable about the corruption of those it named and so deserved to lose their company's asset. One of the examples was a reference to statements made in the NuCoal prospectus which were nothing more than standard "boilerplate" inclusions for prospectuses of the NuCoal type which were prepared by the lawyers working on the prospectus document. ASIC and the ASX, which signed off on the prospectus, and NuCoal's lawyers were not examined by ICAC.

Seeing that the whole corruption conclusion by ICAC regarding the EL is factually wrong as shown later in this Submission it is of course logically impossible to make any assertion of prior knowledge. Yet ICAC still saw fit to publish its inexpert "opinions" in its Acacia report. Why did ICAC undertake this smear when it had taken no evidence from relevant parties?

3.4 ICAC hides exculpatory evidence

The conduct of the ICAC officers, who fail to put before the public inquiry all relevant documents and continue to withhold such documents until compelled to do so in criminal and civil proceedings, is a matter of grave concern for the Government and the wider public. ICAC has admitted that it does hide such evidence – with the latest we know about comprising hundreds of pages of information withheld from the current Spicer trial. To date we have not seen any consequences for ICAC's admissions. ICAC's conclusions in cases where exculpatory material has been withheld have been allowed to stand.

Non-disclosure of evidence happened in Acacia. Some of this was found out during the Poole hearing, when Mr. Poole became aware that there were documents of DCM which had not been put before the ICAC public inquiry and documents which should have fairly been put to him by Counsel Assisting, or properly been referred to by the Commissioner, which supported his belief that the EL Application was not deliberately misleading. The existence of these documents and their non-use by ICAC shows that it was ICAC that was doing the misleading and not properly executing its brief of investigation and reporting.

This non-disclosure was also discovered in the Ransley case and was demonstrated by the fact that many of the exculpatory documents relied upon by Judge Zahra were brought to the Crown and the Court's attention by Mr. Ransley and were not included in the original Crown tender bundle. Some crucially important documents were apparently never disclosed by the ICAC to the Crown and during Operation Acacia. For example, there were board minutes of the Hunter Region SLSA Helicopter Rescue Service Ltd which had been edited without its knowledge and included in the Crown bundle by the ICAC.

4. ICAC's Mistakes in Operation Acacia

4.1 Summary

The principal conclusions reached by ICAC's Acacia investigation are:

- The motive for the granting of the EL to DCM was that Minister Macdonald wanted to do a favour for his "mate" John Maitland.
- Misleading statements were made by Directors of DCM in their EL application.
- The EL was very valuable, containing a "dripping roast" of coal reserves.
- There was a "notorious public controversy" so anyone who invested in NuCoal had their eyes wide open to possibility that corruption was involved in the EL award.
- NuCoal Directors were aware, or should have been aware, that the EL was corruptly awarded.

On the basis of these conclusions, in January 2014, the Government of the day introduced legislation which confiscated the EL. Subsequently, over a period now extending to 6 and a half years, the State of NSW and ICAC have attempted on numerous occasions to prove that the conclusions of Acacia were justified.

The track record shows that:

- **no person named as corrupt by ICAC has been successfully prosecuted; and**
- the above five absolutely fundamental propositions - upon which ICAC drew its very damaging conclusions - have been established as being totally incorrect. Summary details are provided in the sections below. **ICAC didn't even get one out of five correct. It was 100% wrong.**

Acacia was a flawed investigation with a flawed result. ICAC clearly had the means to reach this conclusion but instead deliberately chose another narrative. The real question is – why?

Finally – and unfortunately - this could happen again unless sufficient governance is introduced to ICAC to protect the public.

4.2 The alleged "mateship" between Ian Macdonald and John Maitland was non-existent

The Commissioner formed an "opinion" that the relationship between Mr Macdonald and Mr Maitland was akin to a close professional relationship and that they therefore were "mates". This was obviously a very convenient opinion to provide a motive for corruption, but it was not a conclusion that could be verified from evidence that was taken or otherwise available to ICAC if it had conducted a thorough investigation.

Both Mr Macdonald and Mr Maitland provided evidence regarding their "relationship" during the public hearing. This unopposed evidence verified that neither individual attended social events together, neither party knew the name of each other's spouse and neither party had ever visited the other's home.

The relationship of Mr Macdonald and Mr Maitland was reviewed in the NSW Supreme Court in the matter of Poole v Chubb[3]. Justice Stephenson's judgement, under the heading Mr Maitland's "relationship" with the Minister [para 121], was *"Before me there was no direct evidence of any such "relationship", "connection" or "access"…."*

4.3 Misleading Statements? – there were no misleading statements

ICAC found that Mr. Ransley, a director of DCM, engaged in corrupt conduct[4]. Essential to the finding of corrupt conduct was whether Mr. Ransley was aware that a Submission put to the Department of Primary Industries on 18 March 2008 by DCM contained false and misleading statements.

The DPP commenced proceedings against Mr Ransley in the District Court of NSW *(R v Craig Ransley 2017/ 00024833)* and after an 8-week trial, on 27 November 2017, his Honour Zahra SC DCJ found Mr. Ransley not guilty in relation to the alleged offences in relation to the making and publishing false and misleading statements to the Department of Primary Industries.

On 19 December 2016, the DPP advised that the ICAC was going to press a charge against Mr. Ransley for giving false or misleading evidence to the ICAC. This had not been a recommendation in any ICAC Report.

After a 4-day trial, on 20 March 2018, Local Court Magistrate Farnan found Mr. Ransley not guilty of giving false or misleading evidence to the ICAC.

Others named as corrupt because ICAC said they gave misleading statements have never actually been charged with giving misleading statements.

Why should ICAC's "opinions" be allowed to stand when its conclusions have been proven incorrect or ICAC has not been willing to press the matter?

4.4 EL 7270 was a "dripping roast"

ICAC made out the case that EL 7270 was something of a "dripping roast", full of resources that everyone knew were there – to justify a conclusion which it needed to reach, which was that some very valuable property was awarded and because it was very valuable it must have been done corruptly. Proper independent technical witnesses were never called to test ICAC's belief.

The true position was that there was zero resource on the EL according to any code e.g. JORC, at the time of grant, and that finding a mineable reserve on the EL was highly speculative and risky. Conventional wisdom in the mining industry was that the area was faulted and affected by igneous intrusions, so it was a low probability for success. That is why it was never taken up by the many mining companies which had – over decades – considered it for appraisal.

[3] *Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832*
[4] *First Acacia Report p. 141*

As it turned out the resources eventually found, the most valuable part of which were completely unexpected, required extensive, intensive and expensive exploration over a three year period.

Why didn't ICAC call testimony from the independent Directors of NuCoal or other independent witnesses before it reached its "opinion" in this matter?

4.5 Notorious Public Controversy

The existence of ongoing and notorious controversy was fundamental to the ICAC recommendations in the second Acacia Report. It was the basis for the Commission's conclusion that NuCoal should have known that there was possible corruption in the EL grant. Proper examination of the facts in the first place should have led ICAC to a different conclusion, as happened when the matter was looked at in the Supreme Court.

Again, ICAC took no evidence from NuCoal's independent Directors about this matter.

When presented with the facts in the Poole case[5], His Honour Mr. Justice Stevenson held that there was no notorious controversy in relation to the circumstances of granting EL 7270. ICAC and the DPP have never prosecuted Poole or questioned or otherwise sought to overturn Justice Stevenson's judgement.

Was the "notorious public controversy" just another convenient conclusion to reinforce a prejudged outcome?

4.6 NuCoal directors were aware, or should have been aware, that the EL was corruptly awarded

Directors were never questioned by ICAC about this matter, either before or during Acacia.

There was no notorious public controversy – see above – so this couldn't have been a reason for awareness on the part of the Directors.

ICAC's assertions that DCM directors knew there was potential for the grant to be the subject of a (non-existent at the time, and impossible to anticipate) public inquiry by ICAC were also found by Justice Stevenson in Poole v Chubb[6] to be baseless. Justice Stevenson found, in relation to Mr. Poole's knowledge:

> *"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."*[7]

The award was made within power – see the undisputed O'Connor Marsden report. The title was checked and confirmed by NuCoal's lawyers when the due diligence was done for the prospectus.

ICAC's conclusions regarding the history of NuCoal, and especially the Prospectus and its comments on risk, are totally spurious and unsupported by the evidence. The Prospectus was

[5] *Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832*
[6] *Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832*
[7] *Poole v Chubb ibid [692 -696]*

developed by NuCoal's lawyers and the usual due diligence committee process and was reviewed by ASIC and the ASX in accordance with normal market practice. The prospectus did not once reference or infer that investors should be concerned about corrupt granting of the EL. ICAC took no evidence from officers of the ASX or ASIC, yet it saw fit to misconstrue and misjudge their work as if they and the work didn't exist. Had such a risk existed then the matter would never have been passed by these regulatory bodies. **ICAC's statements in this matter are just plain wrong. At best they are very lazy – and at worst deliberately self-serving. They are certainly not evidence based.**

Why did ICAC not pursue easily available evidence before it published its deliberate conclusions - which clearly damaged the reputations of NuCoal's Directors and led to the confiscation of NuCoal's EL?

4.7 The quashed conviction of MacDonald and Maitland

In February 2019 the NSW Court of Criminal Appeal handed down judgment in the case of Ian Macdonald and John Maitland[8], citing:

> *"The Court of Criminal Appeal has allowed an appeal against conviction, quashed the conviction and ordered a new trial in respect of both Mr Ian Macdonald and Mr John Maitland. Mr Macdonald and Mr Maitland were charged with offences arising out of a grant of consent to apply for an exploration licence and the subsequent grant of an exploration licence in the Doyles Creek area to Doyles Creek Mining Pty Ltd. At the time the offences occurred, Mr Macdonald was the Minister for Mineral Resources and Mr Maitland was the chairman of, and a shareholder in, Doyles Creek Mining Pty Ltd."*

The Court found that "… the trial judge had misdirected the jury as to the state of mind required to be found guilty of the offence of wilful misconduct in public office".

In his original trial for corrupt conduct (flowing from ICAC's Operation Acacia), Macdonald's defence team relied on a ruling from Justice Robert Beech-Jones, which the Judge made in an earlier corruption case involving the Obeid family trust. Justice Beech-Jones ruled that the 'mental element' required for a corruption conviction required the jury to find beyond reasonable doubt that the accused was 'solely motivated to benefit' the family's trust.

Justice Adamson, who presided at Macdonald's original corruption trial, instead adopted elements based upon a British case (R v Speechley) which lessened the 'solely motivated' element to 'substantially motivated to benefit' and 'not significantly motivated to benefit', in this instance, the State of NSW.

In the original trail of Macdonald and Maitland, the Crown argued that if Adamson agreed with the defence's use of Beech-Jones' ruling, there would be a 'no case to answer' application from the defence because of the clear evidence of the public good of the project.

[8] *Maitland v R; Macdonald v R [2019] NSWCCA 32*

The NSW Court of Criminal Appeal held (5-0) that the test applied by Justice Beech-Jones was the appropriate one, not Speechley. They said:

"... it seems to us that the direction as to the mental element of the offence should have been that Mr Macdonald could only be found to have committed the crime (subject to the other elements being made out) if the power would not have been exercised, except for the illegitimate purpose of conferring a benefit on Mr Maitland and DCM."

They overturned the conviction, and ordered that a retrial should take place. But the standard which the Court of Criminal Appeal agreed to, as the requisite mental element for the offence, is precisely the one which the original prosecutor stated, if accepted, would lead to Macdonald having 'no case to answer'.

Attachment 1: Timeline of Acacia related events

- On 5 February 2010, NuCoal acquired, as its primary asset, DCM for $94 million for the purpose of obtaining Exploration Licence EL 7270 (Licence, EL, EL7270). The Licence had been granted to DCM more than a year earlier, on 15 December 2008, by the then NSW Minister for Primary Industries and Mineral Resources, Mr Ian Macdonald.
- NuCoal did not exist in its current form at the date of the grant of the Licence. NuCoal therefore had no involvement in the NSW Government's grant of the Licence or knowledge of the circumstances surrounding the grant.
- Prior to the acquisition, NuCoal conducted appropriate due diligence and a Prospectus was issued to prospective investors describing NuCoal's central purpose as developing the Licence. The Prospectus was examined as required by the ASX and the Australian Securities and Investment Commission (ASIC). There were no unusual aspects to the Prospectus.
- On 23 August 2010, a probity report by O'Connor Marsden, 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…"*[9]. 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"*[10].
- Over a year later, on 23 November 2011, after the election of a new Government in NSW, the NSW Parliament referred allegations of misconduct and corruption over various issues, including the grant of the Licence to DCM, to ICAC. The referral to ICAC was driven by the Premier of the time despite his Minister's advice that a Parliamentary Enquiry was the appropriate course of further investigation.
- The ICAC initiated an investigation and public hearings into the grant of the Licence. NuCoal was never named as a party of interest in any part of the investigations and was not given a meaningful opportunity to participate in the ICAC proceedings.
- 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 and recommended cancellation of the Licence. ICAC made no findings about NuCoal.

[9] *Report by O'Connor Marsden dated 23 August 2010, at page 5.*
[10] *Report by O'Connor Marsden dated 23 August 2010, at page 5.*

- The ICAC also recommended that the NSW Government should compensate any innocent party. For reasons unknown, ICAC did not define who was an innocent party in its report, but admitted at a subsequent Judicial Review that *"NuCoal and those of its innocent 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")."*[11]

- In December 2013, the ICAC issued a further 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,"*[12] (emphasis added), and that the issue of procedural fairness *"will need to be taken into consideration by the relevant decision-makers"*[13]. The Commission considered that special legislation was the *"preferable method"* for expunging the relevant authorities.[14]

- Following the publication of the ICAC December 2013 Report, the NSW Government informed NuCoal, via correspondence dated 19 December 2013, that it could make written submissions as to why ICAC's recommendation in respect of the expunging of the Licence *"should not be implemented"*.

- Given the close timing to the Christmas holiday period the Company requested an extension of time to lodge the submission. This request was denied.

- 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 (if it did happen) occurred at a time before NuCoal (in its current form) was in existence; and
  - 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 regional media outlets over a two-day period in July 2009 and was thus not notorious (further confirmed subsequently by the NSW Supreme Court in *Poole v Chubb*[15]).

[11] *Item 18 of ICAC's response to NuCoal's judicial review case against ICAC.*
[12] *Operations Jasper and Acacia – ICAC Report, December 2013, p 20.*
[13] *Operations Jasper and Acacia – ICAC Report, December 2013, p 19.*
[14] *Operations Jasper and Acacia – ICAC Report, December 2013, p 20.*
[15] *Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832.*

- 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.

- 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.

- 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.

- Contrary to the suggestion of both ICAC and Brett Walker SC, the Mining Amendment Act expressly 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*, including any public hearing and/or any right of appeal;
  - it removed any right to compensation; and
  - 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 at NuCoal's cost.

- During the period of Licence tenure, NuCoal expended in excess of $40 million on exploration, development studies and land acquisitions. The expenditure was fruitful - it allowed NuCoal to establish the existence of coal resources of over 500Mt and progress the Doyles Creek project through the relevant approval processes with an aim of seeking a mining lease.

- NuCoal's efforts to develop the Doyles Creek project also resulted in in the entry into a joint venture between NuCoal and Mitsui Matsushima International Pty Limited (**MMI**). MMI's agreement valued the Licence in 2012 at $360 million based on the purchase by MMI of a minority interest. The third party valuation by MMI was contemporaneous with the ICAC investigation and would have completed if ICAC had not been investigating the Licence.

- Using market metrics, prior to the announcement of the ICAC inquiry NuCoal's market capitalisation on the ASX exceeded $300 million. Subsequent to the release of ICAC's findings, NuCoal's market capitalisation fell dramatically to $15 million.

- Clearly the loss by shareholders is real and substantial and has been caused by the actions of the NSW Government which were based on ICAC's flawed investigation.
- Ex-Premier O'Farrell unfortunately attempted to shift some blame for the cancellation of NuCoal's EL to its Directors at a Community Cabinet meeting in Maitland in 2014 soon after the NSW Government passed the Act. He was subsequently served with defamation proceedings in relation to his comments. Following the issuance of proceedings, Mr O'Farrell issued an apology and correction of the record to the

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

- NuCoal has pursued a number of legal challenges but all of 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.

- In 2015, 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 decision of the HCA focused on whether the NSW Parliament exercised judicial power or imposed a punishment and did not consider whether the NSW Parliament could exercise judicial power. The HCA concluded that the cancellation of EL 7270 and the Mining Amendment Act did not amount to a punishment of NuCoal or its shareholders. Specifically, Parliament creates and grants mining rights so Parliament can take them away without any compensation or recourse. "Legislative detriment cannot be equated with legislative punishment." 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 has the power to pass the Act it did.

- 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 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.

- In May 2017, Mr Macdonald was found guilty of wilful Misconduct in public office for the awarding of EL 7270 to DCM and Mr Maitland was found guilty of being an accessory before the fact to misconduct in public office. Both men appealed the convictions against them and in November 2018 a panel of five judges in the NSW Court of Criminal Appeal heard the appeal over a period of 3 days. On 25 February 2019 a unanimous decision was reached by the five-judge panel of the highest court in NSW, citing: *"The Court of Criminal Appeal has allowed an appeal against conviction, quashed the conviction and ordered a new trial in respect of both Mr Ian Macdonald and Mr John Maitland…".*

- Following the various legal challenges, NuCoal and its shareholders have continued to ask for the opportunity to be heard on the issue of compensation.

- 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.

- 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.

- The Standing Committee on Law and Justice (**Standing Committee**) considered a bill introduced by the Hon. Rev Fred Nile, the *Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019* (**Compensation Bill**), during the second half of 2019. Following a detailed process, the Standing Committee tabled its report with the Clerk of the Parliaments on 30 October 2019. The report was made publicly available via the Standing Committee website on the same day. The Committee provided the following recommendations:

  - **Recommendation 1** – That the *Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019* not proceed in its current form.
  - **Recommendation 2** – That the NSW Government address the outstanding matters raised during this inquiry, where appropriate, including the issue of compensation for innocent shareholders.

- As is standard protocol, the NSW Government was required to formally respond to Parliament within 6 months of the Standing Committee's report being published. On 30 April 2020, NuCoal received a copy of a letter from the NSW Attorney General, Mark Speakman, addressed to the Clerk of the Parliaments. The letter acknowledges the Standing Committee for their efforts, notes that the Government supports the Standing Committee with respect to Recommendation 1 (as noted above) and further notes that the position of the Government is reserved with respect to Recommendation 2 (also noted above).

- Since receiving the correspondence NuCoal has continued its representations to the NSW Government. A follow-up letter was sent to the NSW Attorney General, Mark Speakman, dated 8 May 2020 asking what the next steps will be in this matter and further letters and requests to relevant members of NSW Parliament have continued. All representations request an opportunity to meet and discuss the matter with a view to obtaining a mutually agreed compensation position.

- 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.

- We understand the Attorney General is waiting on advice from the Department of Premier and Cabinet, but the advice has been a long time coming.

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15 January 2014

Ms Kylie Hargreaves
Deputy Director General, Resources & Energy
NSW Trade and Investment
GPO Box 5477
SYDNEY NSW 2001

By Email: kylie.hargreaves@trade.nsw.gov.au

Dear Deputy Director General

I am writing to you on behalf of the shareholders of NuCoal Resources Limited (**NuCoal**), a publicly listed company with over 3400 shareholders. My correspondence encloses our submission (**Submission**) to the Government of NSW in response to the letter of 19 December 2013 from Mr Mark Paterson AO.

NuCoal expects that its Submission will be given the careful attention it warrants and that the Government will appreciate the need to consider NuCoal's circumstances separately to those of the other parties referred to by the ICAC. NuCoal's Submission must not be conflated with any other submission made by any party whose mining authority is also the subject of consideration by the NSW Government.

As you would be aware, NuCoal asked for an extension of time to prepare its submission and sought your Department's guidance as to what matters were to be addressed given that the Government is considering a matter of the most critical importance to NuCoal. Unfortunately no extension was granted and guidance was non-specific but was restricted to what has been written in various reports of the ICAC. On that basis the Submission may not deal adequately with issues which the Government may consider important. We therefore reserve all legal and other rights to make further and better submissions in the future.

Let me state at the outset that NuCoal was formed to explore and if appropriate build an underground mine to extract the coal resources within EL 7270. I take pains to point out that NuCoal's core business is minerals exploration and mining and it is committed to developing the Doyles Creek asset for the benefit of its shareholders (and thereby the State) - it was not formed to financially benefit a group of entrepreneurs and then disappear. The only payoff for the vast majority of the shareholders in NuCoal was and is a successful development of their assets. In many respects NuCoal shareholders are similar to investors in key infrastructure projects which allow the State's wealth to be achieved and distributed.

Over $70m cash has been raised towards achieving NuCoal's goal, which has been pursued honorably and professionally over the past four years in extremely difficult circumstances. Many significant Australian and international investors got on board with the intent of seeing a significant junior mining company succeed in NSW. No complaints were made while NuCoal invested its capital in the Doyles Creek project, thereby creating employment opportunities and generating tax revenue. In fact the NSW Government insisted that NuCoal incur expenses exploring the Doyles Creek area and comply with the onerous conditions imposed on EL 7270, or risk losing its tenement, and twice audited NuCoal to ensure it complied with those conditions. Having complied with everything the NSW Government required of it NuCoal is now faced with a recommendation that it lose the asset irrespective of compliance with the Government's requirements, a proposition which we find extremely difficult to comprehend and internalise.

Many would say that NuCoal has been extraordinarily successful as a result of its professionalism and some of the luck that attends all successful exploration companies, yet today we are at a crossroad which may see this success rendered useless and the benefits that may arise from a successful development at Doyles Creek stillborn. If NuCoal is not able to retain its ownership of EL 7270 and to pursue its goal as stated at its inception, then the efforts of the past four years will be for nothing and the citizens of NSW, along with the shareholders of NuCoal, will all bear significant loss. NSW will be regarded as a place that is permanently off investment horizons.

The matters addressed in the Submission are:

- The Commissioner's key findings about NuCoal in his December 2013 report, and upon which he solely bases his recommendations, are infected with error. In sharp contradiction to the findings of the Commissioner it is legally wrong that NuCoal is not a bona fide purchaser for value without notice, and it is factually wrong that NuCoal knew and acknowledged the risk that the grant of EL 7270 was tainted by corruption and yet still went ahead with the listing of the company and three capital raisings;
- The Commissioner's recommendations are unjustly inconsistent in that, with only a perfunctory analysis, he sees no problem with recommending the continuation of the Yarrawa licence while recommending against NuCoal. Like the Yarrawa investors, NuCoal's shareholders are entirely innocent of any wrongdoing and should not be punished for the alleged misconduct of others; and
- The public interest is best served by not following the recommendations of the ICAC to expunge EL 7270.

We acknowledge the difficult situation which attends the Government's consideration of the ICAC's reports and this Submission. The Government is in the position that it should respond to the findings of corruption but finds itself having only NuCoal to punish at this point. The ICAC has not made that task any easier by its superficial and incorrect justification of its recommendations, when thorough understanding was

required. The ICAC itself warned that its findings should be treated with care, having regard to the procedural limitations of its own investigative processes:

> *Opinion of Counsel Advising paragraph 70. "In our opinion, in proceeding to consider factual matters relevant to deciding whether or not to cancel or not renew exploration licences, or to grant assessment or mining leases … a minister is entitled to take into account the fact and content of the two Reports. The Reports contain, as they must under the Commission's statutory duties, conclusions or findings.* ***But they are not judicial, and should not be seen as rising further than the evidence and inferential reasoning upon which they are said to be based*** *(or, indeed, in light of which they may well be challenged). We think it would be inappropriate as a matter of the law for the Commission's findings to be regarded as dispensing the Minister from considering and reaching as appropriate whatever conclusions the Minister regards as justified in light of all the circumstances. …* ***[b]ut nonetheless the Commission's findings must not dictate the Minister's views.***" (emphasis added)

A win-win solution is available via proper consultation between NuCoal and the Government. The Government is capable of finding this win-win solution, and the ICAC itself even contemplated this when it suggested:

> "*… allowing the Mining Lease to go ahead but imposing a condition, imposing a condition relating to a sum of money to be paid by NuCoal to the Government representing the sum of money or representing a reasonable assessment of the sum of money that the Government would have obtained had there been an open tender.*"

We urge the Government to follow a consultative positive path - a path which would see any guilty persons pursued and prosecuted without selectively punishing the vast number of innocent NuCoal shareholders. It would also avoid protracted legal cases which would see the Doyles Creek asset rendered undevelopable while the cases continued.

We look forward to meeting with you to discuss the submission and any other aspects of this matter about which you may be unsure. As always, we intend to be cooperative and constructive in the best interest of our shareholders and other stakeholders.

Yours sincerely

Gordon Galt
Chairman - NuCoal Resources Limited

NuCoal Submission to New South Wales Government

Contents

1. Introduction

1.1 This submission responds to the letter issued by Mark Paterson AO, Director General of NSW Trade & Investment, on 19 December 2013. The letter notified NuCoal that it could, if it desired, make a submission to the Department on why the recommendations of the Independent Commission Against Corruption (**ICAC**) should not be implemented or on any other aspect of its report. The ICAC recommended that the NSW Government consider expunging or cancelling the Doyles Creek mining authority and refusing other relevant applications.[1]

1.2 NuCoal acknowledges that the ICAC has made findings of corruption.[2]

1.3 For the reasons detailed below, NuCoal submits that the NSW Government should not implement the ICAC's recommendations as presented for consideration in the December Report.

1.4 The ICAC's core finding, and the breadth and width of it, was encapsulated in its conclusion that the "*process leading to the giving of consent for application for, and granting of EL 7270 was tainted with corruption*".[3] Neither NuCoal nor its innocent shareholders were implicated in any act or fact leading to the giving of consent or the grant of the application. At all times, NuCoal has displayed exemplary corporate conduct since its acquisition of the Doyles Creek authority and in its execution of the functions conferred by the licence. NuCoal is an established, respected and reputable entity within the coal mining industry.

1.5 NuCoal submits that, in considering the recommendations of the ICAC, the improper conduct should be redressed by actions that are targeted and focussed only on the individuals the subject of specific findings of corruption by the ICAC, namely Ian Macdonald, John Maitland, Craig Ransley, Michael Chester and Andrew Poole. Such actions are endorsed by the ICAC in its outline of the civil and prosecutorial actions that ought to be referred to and considered by the relevant NSW and Commonwealth agencies including the Office of the Director of Public Prosecutions. Pursuant to this, the NSW Government should ensure, conformably with the answers given by the ICAC to Question 4 of the December Report, that only those individuals found to have profited corruptly should be required to disgorge the benefits they received to the State.

1.6 The ICAC's recommendation to consider expunging or cancelling the Doyles Creek authority pursues the wrong target. If implemented, the recommendation would result in unjustified pain and penalty for NuCoal and its investors, who are innocent of any finding of wrongdoing. Also, critically, it would have nil effect on those deserving of disapprobation. The irony and injustice of such an outcome is glaringly obvious.

1.7 In addition, implementing the ICAC's recommendation would retard the potential of NSW to reap the fruits of a highly valuable asset, namely the quality coal resource located at Doyles Creek. That resource has been the subject of extensive exploration and development funded and conducted solely by NuCoal over the past four years. NuCoal's efforts to develop the Doyles Creek project also resulted, in September 2012, in the entry into a joint venture between NuCoal and Mitsui Matsushima International Pty Limited (**Mitsui**). Mitsui is an existing investor in the

[1] ICAC report dated 18 December 2013, entitled "Operations Jasper and Acacia - Addressing Outstanding Questions" (**December Report**), p.6.

[2] ICAC report dated 30 August 2013, entitled "Investigation into the Conduct of Ian Macdonald, John Maitland and Others" (**August Report**), p.8.

[3] December Report, p.15.

NSW coal industry and is committed to the joint venture, despite the ICAC's findings. This demonstrates Mitsui's belief that NuCoal's hands are clean of any wrongdoing, and further that the expunging of EL 7270 was never in its contemplation.

1.8 NuCoal's ability to develop the Doyles Creek asset has advanced such that it is ready to seek approval from the relevant authorities for its proposed plan for the next iteration of the project. If the ICAC's recommendation were implemented, and NuCoal's interest in the Doyles Creek project were stripped, any new licence holder would lag far behind NuCoal's stage of development by at least four years.

1.9 There are additional powerful reasons why the NSW Government should not act on or implement the ICAC's recommendation, and thereby cause injury to NuCoal and its innocent shareholders. Those reasons are developed below and are repeated compendiously here:

(a) The ICAC's findings should be treated with caution - a fact recognised by the ICAC itself. The ICAC is not a judicial body, but is investigative only, and is subject to the limitations conferred on such a body.

(b) The ICAC report is infected with legal error. Chief among the errors is that NuCoal's reply submission, a critical document which answered all the points raised by Counsel Assisting, is not referred to by the ICAC in its report. NuCoal's submission was ignored. Additionally, the ICAC's evaluation of certain information (e.g. notorious public controversy), was misunderstood and the inferences or conclusions drawn were not reasonably open - indeed some of the conclusions and the inferences underpinning them are farfetched and ignore actual and commercial reality.

(c) The ICAC hearing process and evidence presentation procedures are very restricted. Those restrictions put NuCoal at a distinct disadvantage. But for those restrictions (which are not found in the Court system) NuCoal would have called and led expert and other evidence to disabuse the decision maker of certain misconceptions. In short NuCoal has not had a hearing *on the merits* of its case.

(d) Implementing the ICAC's recommendation would dispossess NuCoal of an asset for which it paid good and valuable consideration, without curial remedy, in circumstances where the factual underpinnings of the recommendation have not been the subject of any judicial pronouncement or orders.

(e) Implementing the ICAC's recommendation would effect a grave injustice. The inconsistency in approach to the investors in the Yarrawa tenement and NuCoal's investors is unfathomable. There is no material difference between the 2 sets of investors and indeed it is argued that the NuCoal investors are the more deserving.

(f) The State would open itself to litigation on potentially multiple causes of action, including a constitutional challenge, international arbitration, misfeasance in public office, breach of statutory duty, negligence, misrepresentation and breach of contract. NuCoal's claims for compensation would be in the order of $500 million.

1.10 NuCoal's proposed solution is for the NSW Government to enter into a dialogue with it, the purpose of which would be to reach the optimal outcome which achieves all of the following:

(a) The taint of corruption would be, and would be seen to be, removed from the Doyles Creek authority.

(b) The individuals the subject of the ICAC's findings of corruption would face the appropriate legal sanctions.

(c) The Doyles Creek asset would continue to be developed, and thus play an integral part in effecting the State's 2021 plan.

(d) The interests of those innocent of any wrongdoing would be preserved.

1.11 NuCoal welcomes the opportunity to further assist the NSW Government in determining the way forward. NuCoal would welcome the opportunity for a face to face meeting so that the matters of concern to it can be emphasised and a resolution to the issues can be explored.

1.12 NuCoal reserves the right to supplement these submissions if thought fit.

2. The ICAC's recommendations

2.1 On 18 December 2013, the Independent Commission Against Corruption (**ICAC**) released a report entitled "Operations Jasper and Acacia - Addressing Outstanding Questions" (**December Report**).

2.2 The December Report followed an earlier report dated 30 August 2013, entitled "Investigation into the Conduct of Ian Macdonald, John Maitland and Others" (**August Report**). The August Report addressed two of the five questions referred to the ICAC by the NSW Parliament.

2.3 The December Report addressed the remaining three questions. It was prepared with the assistance of an advice by Counsel Advising (Bret Walker SC and Perry Herzfeld of counsel).

2.4 The December Report deals with both Operations Jasper and Acacia. This submission addresses the December Report only insofar as it concerns Operation Acacia, that being the only operation of relevance to NuCoal. As such, the focus of the submission is on Chapter 5 of the December Report.

2.5 The ICAC's recommendations, as set out in the December Report, are as follows:

(a) Question 3:

(i) Exploration Licence 7270 (**EL 7270**) was so tainted by corruption that all grants under the *Mining Act 1992* (NSW) should be expunged and no pending applications should be granted.

(ii) The preferable method of expunging EL 7270 is to consider enacting special legislation, which could be accompanied by a power to compensate any innocent person affected by the expunging and, if deemed appropriate, any refusal to grant relevant pending applications.

(iii) If special legislation is not passed, a reasonable option is to consider cancelling EL 7270 and refusing the pending applications under s.380A of the *Mining Act* if the Minister were to form the view that it is in the public interest to do so. Alternatively, the power to cancel EL 7270 under s.125(1)(b2) of the *Mining Act* could be utilised.

(b) **Question 4:** Special legislation should be considered to confiscate the proceeds of the impugned conduct. Such legislation could be modelled on the *Criminal Assets Recovery Act 1990* (NSW). Alternatively, the NSW Government could contemplate taking action to recover any profits made or to recoup any losses caused by the impugned conduct.

(c) **Question 5:** Consideration should not be given to amending the *Mining Act*. However, consideration could be given to amending the *Environmental Planning and Assessment Act 1979* (NSW).

2.6 The ICAC's recommendation in respect of Question 3, namely to consider expunging or cancelling EL 7270, is premised on its findings in the August Report on Questions 1 and 2. Those questions concern the circumstances in which EL 7270 was granted. In essence, those findings were that, by granting EL 7270 directly to Doyles Creek Mining Pty Ltd (**DCM**) without a competitive tender process, the State was deprived of

the opportunity to receive a higher price for EL 7270, and DCM's then shareholders were conferred with a substantial monetary benefit.

2.7 Accordingly, a natural inference to draw from the ICAC's recommendation in respect of Question 3 is that the State should redress its foregone opportunity to obtain a higher purchase price for EL 7270, and to recoup the profits made by the persons found to have engaged in corrupt conduct.

2.8 Additionally, the ICAC's recommendations were predicated on a number of findings made in the December Report:[4]

(a) EL 7270 was granted to DCM and is not transferable.

(b) NuCoal's position is not comparable to a bona fide purchaser for value without notice for the following reasons:

(i) The impugned conduct and knowledge of Messrs Maitland, Ransley, Chester and Poole are attributable to DCM because each of them was either a director at the relevant time, or became a director with knowledge of the circumstances pertaining to the grant of EL 7270.

(ii) NuCoal acquired DCM, and hence its interest in EL 7270, with "*knowledge*" of the "*notorious public controversy*" surrounding the granting of EL 7270.

(iii) NuCoal acquired DCM with "*knowledge*" of the "*risky nature of the acquisition*". This was "*emphasised*" in NuCoal's prospectus dated 9 December 2009 (**NuCoal Prospectus**) by its reference to the speculative nature of the shares being offered, its indication that prospective investors should be aware that they may lose some or all of their investment and that they should make their own assessment of the risk of the investment. Additionally, the NuCoal Prospectus outlined a number of "*specific risks*", which included that DCM might lose title to EL 7270 if the conditions attached were changed or not complied with.

(iv) The change in shareholding of DCM could not have the effect of avoiding the consequences of improper transactions entered into by the company or the improper conduct of its directors.

(c) NuCoal expended money on exploration under EL 7270 with "eyes wide open to the uncertainties, risks and possibilities".

2.9 In making those findings, the ICAC expressly stated that it accepted the submissions of Counsel Assisting the ICAC (Peter Braham SC and Alan Shearer).[5] In fact, it all but copied and pasted those submissions into the December Report. However, the ICAC did not address any of the comprehensive and compelling arguments made by NuCoal in reply to those submissions. Wholly absent from the December Report is any recognition, let alone analysis, of the detailed and factually supported arguments contained in NuCoal's reply submission. The significance of this omission will be expounded below.

[4] December Report, pp.16-17.

[5] December Report, p.16.

3. The ICAC's findings are infected with error

3.1 The ICAC misunderstood the evidence and overstated the significance of Counsel Assisting's submissions. There was an innocent explanation and an entirely proper legal answer to each of the matters raised by Counsel Assisting and adopted, apparently without question, by the ICAC. The explanation and answers were comprehensively set out in NuCoal's reply submission dated 20 June 2013, which answers each of the points raised by Counsel Assisting. As noted above, the submission was not referred to at all in either the December Report or the written opinion of Counsel Advising annexed to it.

3.2 It is a fundamental and central tenet of law that the ICAC, in the exercise of its statutory powers, must consider the evidence and arguments relevant to the issues about which it opines and reports.[6] That power will remain constructively unexercised if evidence and arguments put to it have not been considered. The failure to deal with, let alone refer to, NuCoal's reply submission raises a strong inference that it was ignored or overlooked.[7]

3.3 NuCoal's reply submission was a critical document. The ICAC's failure to consider it calls into question the validity of its recommendations, insofar as they concern NuCoal, such that there can be no safe reliance on those recommendations.

3.4 The ICAC's failure to deal with NuCoal's arguments presents NuCoal with an opportunity to re-submit those arguments directly to the NSW Government in the expectant hope that they will reverberate with it. Those arguments should reverberate because there are sound legal and policy considerations underpinning each of them. The analysis to be undertaken and, with respect, adopted by the Government should not be by reference to fixed categories or formulas (for categories or formulas are servants rather than masters) but, rather, by reference to the substance of NuCoal's acquisition of DCM and EL 7270.

3.5 In that context, NuCoal addresses the arguments made by Counsel Assisting as follows:

(a) **Bona fide purchaser:** NuCoal's position is comparable to that of a bona fide purchaser for value and without notice. The impugned conduct and knowledge of the individuals found by the ICAC to have acted corruptly cannot be attributed to NuCoal.[8]

(b) **NuCoal Prospectus:** 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.[9]

(c) **Notorious public controversy:** It is not factual that, since July 2009, there was "*notorious*" public controversy that EL 7270 was granted by Mr Macdonald to his "*mate*", Mr Maitland. The alleged controversy was limited to speculation in regional media outlets over a period of only two days in July

[6] *Independent Commission Against Corruption Act 1988* (NSW) ss.8, 9, 13, 74A and 74B.

[7] *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [47] per French, Sackville and Hely JJ.

[8] December Report, p.16, points (a), (b) and (c).

[9] December Report, p.16, points (d), (e) and (g).

2009. Moreover, there was never any allegation of corrupt conduct capable of vitiating the grant of EL 7270.[10]

3.6 Each of these issues will be dealt with in turn.

NuCoal is a bona fide purchaser for value and without notice

3.7 It is not in dispute, and was never contested by the ICAC, that NuCoal was a bona fide purchaser of DCM and gave good and valuable consideration for the company. NuCoal purchased the shares of DCM for $94 million. DCM's valuable asset, which was valued in the prospectus, was EL 7270. That asset was not transferable. It was tied to its grantee, DCM.

3.8 But for the condition imposed on EL 7270 concerning non-transferability, NuCoal would have purchased the asset alone. It could not.

3.9 Although the asset was not transferable, there was at the relevant time no legislative prohibition or restriction on a change of control of the licence holder, nor was there any condition attached to the licence to that effect. Consequently, NuCoal acquired all of the shares in DCM and thereby gained ownership of the asset. The corporate entity, DCM, is valueless without its asset.

3.10 The genuine, clearly demonstrable and undisputed commercial purpose of NuCoal was to acquire the asset, EL 7270. The transaction by which it did so was a standard and orthodox commercial acquisition arrangement and was a perfectly legitimate and legally sanctioned course to have taken.

3.11 The ICAC found that, because EL 7270 is still held by DCM, NuCoal's position is not comparable to that of a bona fide purchaser; NuCoal being a mere shareholder. That view is a classic example of form over substance. NuCoal is not a mere shareholder. As a matter of substance, it is, and has been since the acquisition, the sole shareholder and owner of DCM and the holder of its sole valuable asset, EL 7270, for which it paid $94 million. The Equity Courts would intervene to assist NuCoal.[11]

3.12 In the course of its acquisition of DCM, NuCoal engaged specialist corporate lawyers, Price Sierakowski, to undertake due diligence and prepare a report. 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*".

3.13 The lawyers did not raise any caveat or warning about the validity of the licence. There was a good reason for that: none was evident. Even now, no question or requisition has ever been raised by any relevant NSW Government agency of any act of non-compliance with any condition imposed on EL 7270 (as to which, see further below at 3.25).

3.14 The debate seems to focus on the issue of notice and corporate structure. The corporate structure was highlighted by Counsel Assisting and adopted without any

[10] December Report, p.16, points (e), (f) and (h).

[11] See e.g. *Hotel Terrigal Pty Ltd (in liq) v Latec Investments Ltd (No 2)* [1969] 1 NSWR 676; *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679. See also *DHN Distributors v London Borough Council Tower Hamlets* [1976] 3 All ER 462 in which the Court treated a parent and two subsidiaries as one for the purpose of providing compensation.

proper, genuine or realistic consideration of the substance of the transaction by the ICAC.

3.15 The additional problem not examined, addressed or dealt with in any way by the ICAC is that the bona fide purchaser for value without notice doctrine is an equitable one. The doctrine acts as an exception and remedy to the fraud question. The question of where the better equity lies should be determined by the Court once it is proved (unless it is already accepted or conceded by the Government) that a Minister of the Crown has committed fraud. If this ever occurs, then it would be necessary to show that NuCoal actually knew or had constructive knowledge of all the essential elements of the alleged "fraud". Of course it did not.

3.16 This is so for very many reasons, but it is pertinent to nullify the claim in short form:

(a) The alleged corrupt conduct of Mr Macdonald found by the ICAC, pursuant to s.8 of the Independent Commission Against Corruption Ac 1988, was said to arise from "granting DCM consent to apply for EL 7270 in respect of land at Doyles Creek and by granting EL 7270 to DCM, both grants being substantially for the purpose of benefitting Mr Maitland. But for that purpose, he would not have made those grants" (emphasis added).[12]

(b) The last date on which consent to apply and grant of EL 7270 to DCM could have occurred is 15 December 2008.[13]

(c) At no time could it have been the position (and indeed it has never been suggested by the ICAC, or anyone else) that NuCoal was definitively aware of any act, fact, matter or circumstance on or prior to the ICAC inquiry that the consent to apply for the grant of what became EL 7270 was solely motivated by a desire on the part of Mr Macdonald to benefit Mr Maitland. Indeed, the ICAC itself considered that the decision made by Mr Macdonald to confer EL 7270 on DCM "*did not immediately stand out as unusual to an external observer*"[14], such as NuCoal.

3.17 The above analysis is crucial to understanding the ICAC's findings against Mr Macdonald and how they impact on NuCoal. In order for NuCoal to be deprived of any advantage it holds, it is necessary for the NSW Government to be positively satisfied that NuCoal knew, or constructively knew, Mr Macdonald's motivations at the time of the grant of EL 7270. It was never suggested by the ICAC that NuCoal was ever in that position. NuCoal could not sensibly have been in that position, given that its purchase of DCM and EL 7270 did not occur until more than a year later and the first time that the issue of what may have motivated the Minister became public was during the ICAC inquiry itself.

Attribution of knowledge

3.18 It is critical to note that the ICAC never gave any meaning or content to the particular notice attributed to NuCoal. This failure is reflected in the ICAC's recommendations.

3.19 The ICAC noted that Messrs Maitland, Ransley and Poole had been directors of DCM and found that their knowledge could be attributed to DCM. However, it is noteworthy

[12] August Report, pp.9 and 136.

[13] Mr Macdonald gave DCM consent to apply for an exploration licence 21 August 2008. EL 7270 was granted on 15 December 2008.

[14] ICAC report dated 30 October 2013, entitled "Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources" (**October Report**), p.13.

that none of those individuals is a current NuCoal director. Moreover, neither of Messrs Maitland or Ransley was ever a director of NuCoal.

3.20 Although Messrs Poole and Chester became NuCoal directors, the ICAC did not recommend that consideration be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Chester for any offence.[15] Consequently, his conduct can be disregarded.

3.21 It is significant that Mr Poole did not inform NuCoal about a statement made in March 2008, which ICAC found could be misleading. Mr Poole's evidence was that he was "*not aware*" that certain statements within the document were misleading and he did not inform NuCoal.[16] That evidence was uncontroverted. It must follow, as a matter of logic and law, that there can be no attribution of Mr Poole's knowledge to NuCoal.[17]

NuCoal Prospectus

3.22 The ICAC misunderstood the statements about risk in the NuCoal Prospectus. 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 of the prospectus.[18] 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*".

3.23 Plainly, 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 any appreciation of such a risk.

3.24 It is possible that the ICAC reasoned that, since all investments are inherently risky, it must have been within the contemplation of shareholders that they may lose their entire investment, in this case EL 7270. Such reasoning would be unjustified in the extreme. Whilst stock market volatility is a given for any investment, sovereign expropriation of assets is not a risk within the reasonable contemplation even of sophisticated investors who invest in a highly developed economy and an Australian publicly listed company. Extrapolating the risk identified in the NuCoal Prospectus to that ultimately found by the ICAC defies commercial realities.

3.25 In any case, the general risk identified in section 1 of the NuCoal Prospectus is generic and common to many company prospectuses.[19] Moreover, there has never been any allegation of any breach of the conditions imposed on EL 7270. Indeed, on 2 separate occasions, NuCoal was subjected to review of and audit check against those conditions. On each occasion, the results were findings of compliance.[20]

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[15] August Report, p.144.

[16] ICAC transcript, p.8282, line 3.

[17] Exceptions to the rule of attribution include fraud against and which does not benefit the company: *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 31 and *Southern Cross Commodities Pty Ltd (In liq) v Ewing* (1988) 14 ACLR 39; and fraud not reported: *Re Hampshire Land Co* [1896] 2 Ch 743 at 749 and *Green v Fletcher* (1887) 8 NSWLR (Eq) 58.

[18] NuCoal Prospectus, pp.2, 11 and 83.

[19] See e.g. the risk factors outlined at page 14 of the BHP Billiton prospectus dated 14 April 2003: http://www.bhpbilliton.com/home/investors/Documents/GB45978A.pdf.

[20] 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.

3.26 Given the results of the audits commissioned by the NSW Government, NuCoal's investors could not reasonably have contemplated the risk of loss of title to EL 7270. In advance of the audits, NuCoal monitored its compliance with the conditions attached to EL 7270 on a quarterly basis.

Public controversy

3.27 The major plank on which the ICAC's recommendation to consider expunging EL 7270 relies is what it called the "*notorious public controversy*" surrounding the grant of the licence.[21] 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.

3.28 At a number of levels, the ICAC's findings are farfetched, illogical and ignore reality. That reality includes the profile of NuCoal's investors, many of whom are large and sophisticated corporations with comprehensive risk identification resources.[22] To suggest that media murmurings of the type involved here, as detailed below, could have formed the basis of a decision not to invest in NuCoal, is absurd.

3.29 The controversy to which Counsel Assisting alluded in their submissions, which was adopted by the ICAC, is limited to a total of 11 news items on regional radio and television on 21 and 22 July 2009.[23] Those media items were 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. They provide no support for the ICAC's finding that NuCoal was aware of any controversy.

3.30 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, 6 of the 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*".

3.31 It is trite that allegations and denials of such allegations occur as part of the ordinary course of public and political debate. To the reasonably minded citizen, what, if anything, was to be made of the scuttlebutt? 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. Any reasonably-minded person confronted with this information would consider it neutral at worst.

3.32 In any case, hearsay, rumour and speculation are not in any way a sufficient basis on which to conclude a positive state of belief and knowledge on the part of NuCoal.[24] Hearsay, speculation and rumour can never amount to actual notice within the classic meaning of the expression in law.[25] The hearsay, rumour and speculation should not have been used, as the ICAC did, as knowledge of or an acceptance of a specific risk

[21] December Report, pp.16-17, points (d), (e), (f), (h) and (i).

[22] Examples of such investors include Morgans, Colonial Global and Investec.

[23] ICAC Exhibit A, vol.19, pp.5919ff.

[24] *Luxton v Vines* (1952) 85 CLR 352.

[25] *Williamson v Bors* (1900) 21 LR (NSW) Eq 302 at 307.

by NuCoal that its investment could be lost on the basis now contemplated. There is no logical connection between an alleged knowledge of unproven allegations aired by the media (which were denied by the relevant Government officials) and the risk now in issue.

3.33 The ICAC's treatment of the above news reports as creating notoriety is overstated and its use of the reports is misconceived. NuCoal and its investors certainly never contemplated that 5 years later Parliament would consider passing special legislation to expunge its licence. The risk of loss of EL 7270 that NuCoal investors would have had in mind was the specific risk adverted to in the NuCoal Prospectus, namely that the licence could be cancelled for failure to comply with the conditions imposed on it (which are some of the most extensive and onerous ever issued by the Department of Trade and Investment, Resources & Energy (**Department**)). The risk was assumed by NuCoal and its actions and the audit results demonstrate that it took the risk seriously.

3.34 It is not to be forgotten that an instrument such as a licence, upon issue by the relevant Minister, is valid and must be treated as valid. It could only be cancelled upon satisfaction of the requisite legal elements in s.125 of the *Mining Act*. A licence is not revocable at will. Those were the matters within the reasonable contemplation of NuCoal and its investors. As history has proved, there is not an iota of a complaint that NuCoal has not complied with conditions imposed on EL 7270.

3.35 The ICAC report replicates an extract from the ICAC hearing, during which evidence was elicited that "*investment from the time of the reverse acquisition onwards*" occurred "*under the shadow of [the] risk of something sinister being discovered in the course of this [the ICAC] investigation*".[26] The use of the word "*this*" is telling. The ICAC investigation into EL 7270 was not commenced until 23 November 2011, approximately 2 years after the commencement of the process by which NuCoal acquired its interest in EL 7270. It is therefore in no way credible that any "*shadow*" of investment risk associated with the ICAC investigation could have existed prior to 23 November 2011. As such, in light of the timing impossibility, the answer to the question posed of the witness could not be accurate. The ICAC should have recognised this and placed no weight on that evidence, but instead the ICAC placed significant weight on that evidence.

3.36 Of further relevance to any "*shadow*" of risk is the existence of the probity report dated 23 August 2010 from O'Connor Marsden (**O'Connor Marsden Report**). The report was commissioned by the NSW Government as it was then constituted and it is still published on the Department's website. [27] It concluded that the grant of EL 7270 was "*within power*"[28] and cleared it of any impropriety.

3.37 As to the impugned process, the direct allocation method of issuing exploration licences was neither new nor startling. It was entirely orthodox. There had been approximately 33 such direct allocations between 1988 and August 2009. That orthodoxy was confirmed by the O'Connor Marsden Report. It found "*a number of examples where direct allocations have been made by previous Ministers*".[29]

3.38 That this is so is acknowledged by the ICAC by its statement that:

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[26] December Report, p.17.

[27] http://www.resources.nsw.gov.au/__data/assets/pdf_file/0006/354651/Probity-review-doyles-creek-mining.pdf.

[28] O'Connor Marsden Report, p.5.

[29] O'Connor Marsden Report, p.5.

"*Despite the uncapped additional financial contribution approach to EOIs, direct allocations of smaller and adjacent areas remain, to this day, a common method by which coal ELs are allocated to mining companies. Decisions regarding direct allocations of ELs continue to be made by MRB officials assessing the work programs of companies against departmental criteria…*".[30]

3.39 The preceding matters demonstrate that the significance of media speculation prior to the reverse acquisition was limited to what it truly was: media speculation, the truth of which had not been, and has not been, established in any competent judicial forum. The ICAC's conclusions should have reflected this fact.

3.40 In addition, NuCoal's separate due diligence, undertaken by a professional firm of corporate lawyers, revealed that EL 7270 was granted directly in accordance with the powers of the Minister under the *Mining Act* in a regular manner, and consistently with the contemporaneous grant of other licences. On any objective viewing, NuCoal had no reason to suspect that its acquisition was any riskier than acquiring any other like asset.

3.41 NuCoal cautions against hindsight reasoning and historical revisionism. That is so for a very powerful reason. NuCoal could not have uncovered or been satisfied of the corruption found by the ICAC without conducting its own ICAC-style investigation. Self-evidently, NuCoal could not have completed such an investigation. In the absence of the ICAC's lengthy investigation, which engaged its coercive and extensive powers to adduce evidence, NuCoal could not possibly have known of the risk that its acquisition of EL 7270 was positively tainted by corruption.

3.42 In short, the public controversy on which the ICAC placed great store is not directed to NuCoal's knowledge of any alleged corruption (for the ICAC did not find that NuCoal was in any way blameworthy), but an assessment of the risk of its investment in purchasing EL 7270. That is, with respect, an entirely insufficient basis to support or justify the recommendation now made that Parliament consider legislation to expunge EL 7270.

3.43 A fairer analysis of the reality of the situation existing in late 2009 and 2010, when NuCoal purchased the shares of DCM, is as follows:

(a) There was no referral to or actual investigation by the ICAC.

(b) There was no legal challenge to EL 7270 by any person, despite the grant having been made in December 2008.

(c) The due diligence undertaken for NuCoal by specialist corporate lawyers, and the independent accountant and independent mining expert reports available from BDO Kendalls and Palaris Mining in November 2009, did not uncover any impropriety.

(d) NuCoal paid genuine and valuable consideration for the asset.

3.44 Indeed, the quantum paid ($94 million) was endorsed by Palaris Mining in the independent expert report commissioned by BDO Kendalls in November 2009 to assist shareholders in respect of the proposed restructuring of NuCoal (then known as Supersorb Environmental NL). That report was compliant with the VALMIN Code used specifically to value resource projects and accepted by *inter alios* ASIC and the ASX.

[30] October Report, p.27.

The consideration paid and the endorsing report are sufficient to belie any claim that NuCoal and its shareholders overtly or in any other sense appreciated the uncertainty and risk of a total loss of their investment on the basis of the circumstances now being considered by the Government.

4. Procedural fairness limitations on the ICAC's processes

4.1 The ICAC's erroneous understanding of the evidence is largely attributable to the limited procedural fairness it afforded to the affected parties. Had NuCoal and those other parties been afforded the level of procedural fairness to which they would be entitled in a Court of law, the ICAC may have been able to correctly understand the facts, and its recommendations may therefore have been very different.

4.2 The ICAC has certain functions as prescribed by the *Independent Commission Against Corruption Act 1988*. Those functions, namely the investigation of allegations or complaints of corrupt conduct, are supported by evidence gathering, evaluation and hearing procedures that do not find favour in a judicial body. The ICAC is not bound by the rules of evidence and is statutorily obliged to exercise its functions with as little formality as possible.[31] The statutory formula of the ICAC's evidence evaluation and procedural powers is common to inquisitorial tribunals.

4.3 The ICAC is not a Court of law. Consequently, the procedural divide between inquisitorial tribunals, and judicial consideration and determination by a Court, must not be underestimated or confused in any consideration to be given by the NSW Government when assessing the ICAC's recommendations.

4.4 Indeed the ICAC referred expressly to this distinction, stating that *"[b]y giving advice and making recommendations to the NSW Government [ICAC] is not acting as an "adjudicative body"*."[32]

4.5 The fact that the ICAC is not a Court of law, and that its findings may be fallible and must not be treated as sacrosanct, but indeed with some caution, was the subject of comment by Counsel Advising. For Counsel Advising, the caution was issued in the context of administrative law review. That caution is also applicable to the Government's use of the recommendations in the December Report:

> "*Use of Commission's findings*
>
> *69. We believe that the most problematic aspect of statutory decision-making canvassed above…is the manner and extent to which the Minister in question (including those public servants advising the Minister) use the Commission's findings.*
>
> *70. In our opinion, in proceeding to consider factual matters relevant to deciding whether or not to cancel or not renew exploration licences, or to grant assessment or mining leases … a minister is entitled to take into account the fact and content of the two Reports. The Reports contain, as they must under the Commission's statutory duties, conclusions or findings.* ***But they are not judicial****, and should not be seen as rising further than the evidence and inferential reasoning upon which they are said to be based (or, indeed, in light of which they may well be challenged). We think it would be inappropriate as a matter of the law for the Commission's findings to be regarded as dispensing the Minister from considering and reaching as appropriate whatever conclusions the Minister regards as justified in light of all the circumstances. …* ***[b]ut nonetheless the Commission's findings must not dictate the Minister's views.***" (emphasis added)

[31] *Independent Commission Against Corruption Act 1988*, s.17.

[32] December Report, p.13.

4.6 The procedural divide is best explicated in the context of the relevant ICAC hearing in this case. The orders made and restrictions imposed on the parties in terms of evidence included:

(a) The following statements by the Commissioner on day 1 of the inquiry:[33]

(i) "*I and I alone…will decide what witnesses are to be called, it is also for me to decide what matters their evidence will be directed. I also have to determine how witnesses will be examined bearing in mind the inquisitorial rather than adversarial nature of the inquiry.*"

(ii) "*In an inquiry of this sort there is no legal right to cross-examination but I will to the extent that I consider it relevant and helpful to the forwarding of the inquiry allow cross-examination.*"

(iii) "*The basic principle I will apply is that I will ordinarily not allow cross-examination designed only to establish the credibility or lack of credibility where the cross-examiner does not have an affirmative case on the issue to which cross-examination is intended to be directed.*"

(b) Limiting the right of parties to cross-examine witnesses. Indeed, there was no automatic right to cross-examine any witness.

(c) Permitting cross-examination only in support of a positive case. In other words, NuCoal was denied an opportunity to test the accuracy or the reliability of most of the evidence given by the witnesses called by the ICAC.

(d) Requiring parties to obtain leave to appear before the ICAC.

(e) Requiring parties wishing to make written submissions to the ICAC to seek and be granted leave, despite their direct interest in the issues.

(f) Limiting the length of submissions for parties granted leave based on the Commissioner's assessment of how much each party may need to prepare submissions in reply to those of Counsel Assisting.

4.7 Allied to the above restrictions, no party was entitled to call, as of right, witnesses to give evidence or expert evidence to rebut the evidence of witnesses chosen and called by the ICAC. It is, however, a critical feature of Court procedure and the presentation of evidence in aid of a party's case, that the party is entitled to call all relevant witnesses to address issues in support of its case and to rebut an opponent's evidence.

4.8 Absent the right of a party to do that, and given the restrictions of the ICAC, it cannot be said that a real and meaningful opportunity to present a case in Court is consonant with the opportunity to present a case and evidence before the ICAC. It is not.

4.9 To exemplify how that opportunity would have been utilised by NuCoal in Court, it would have, led evidence, among other things:

(a) To qualify, clarify and/or rebut Dr Palese's evidence in relation to his opinions as to the coal resources in the Doyles Creek area.

[33] ICAC transcript, p.4859, lines 2-5, 12-14 and 20-24.

(b) About the NuCoal Prospectus and the context and meaning of its statements dealing with risk to investors.

(c) To clarify the ASX listing procedure and why that listing occurred.

(d) To explain the reasons for structuring the purchase of DCM's shares in the manner so undertaken.

(e) On the interpretation of the Department's own geological information being presented to it.

(f) In respect of Mr Macdonald's alleged partiality and Mr Maitland's "*close professional relationship with Mr Macdonald*".

(g) To support the proposition that NuCoal is a bona fide purchaser for value without notice.

(h) To dispute the finding regarding notorious public controversy, including contemporaneous documents.

(i) To dispute the position that shareholders' investments were made with knowledge of the risk that EL 7270 was granted corruptly.

(j) To verify that money spent by NuCoal was to ensure compliance with the stringent conditions of EL 7270 to avoid cancellation.

4.10 NuCoal's ability to lead the above evidence in a Court of law (but not the ICAC) would have demonstrated that the actions undertaken by it were innocent, had a genuine legal basis and were entirely divorced from any wrongdoing by others as found by the ICAC.

4.11 To return to the procedural divide between the ICAC and a Court of law, a number of additional points are made, if only to highlight and conclusively demonstrate the anomalies that would ensue if Parliament were to accede to the ICAC's recommendation to consider legislation to expunge EL 7270 and thereby disable any Court hearing on the merits:

(a) It would be an unprecedented undertaking by Parliament to expunge an exploration licence (being an "authority" within the meaning of the *Mining Act*) in circumstances where the affected party, NuCoal, has no real curial remedy except a constitutional challenge to the legislation.

(b) It is unprecedented for a valuable right, for which NuCoal paid $94 million, to be expunged through special legislation in the absence of any criminal conviction of any individual whose conduct is said to have been corrupt by the ICAC.

(c) It would be harsh and unjust to NuCoal to relieve it of its most valuable asset when the *Criminal Assets Recovery Act 1990* (NSW) already enables the recovery of assets from the individuals whom the ICAC found profited corruptly.

(d) The ICAC made various statements in the August Report to the effect that the advice of the Director of Public Prosecutions be obtained with respect to the prosecution of certain individuals for specified criminal and common law offences. It is significant that no such statement was made by the ICAC against NuCoal or DCM.

(e) Assuming that criminal or civil proceedings were instituted by the Crown, the affected individuals would have the benefit of a Court hearing on the merits. In contradistinction to the position of those individuals, the passing of legislation to expunge EL 7270 would deny NuCoal any such right of ever having the matter heard by a Court of competent jurisdiction on the merits. The unfairness is palpable.

(f) If no civil or criminal proceedings were instituted by the Crown and no action were taken under the *Criminal Assets Recovery Act 1990* (NSW) against the specified individuals, but legislation were passed to expunge EL 7270, then it would create the perverse outcome that the only parties to have been disadvantaged financially and disentitled procedurally would be NuCoal and its innocent shareholders.

4.12 The anomalies specified in the preceding paragraph are unique. They demonstrate the dire consequences that would ensue to NuCoal (and its innocent shareholders) and contrast it with the position of the individuals against whom the ICAC has made findings of corruption.

4.13 The disadvantage and injustice to NuCoal is so disproportionate that the NSW Government should not implement the ICAC's recommendation. Any such legislation would be extreme. That is because fundamental rights concerning property are being expropriated without proper Court adjudication. Indeed, it is apparently envisaged that the New South Wales Supreme Court would be disabled from hearing NuCoal's case on the merits.

5. NuCoal's shareholders are in no materially different position to the Yarrawa investors

5.1 The ICAC recommended that no action be taken with respect to the existing Yarrawa authority.[34] That was because of "*the vast number of innocent investors in the Yarrawa tenement*".[35] When the ICAC's findings concerning the grant of the Yarrawa and the Doyles Creek tenements are examined, it is evident that there is no material difference between the two which justifies the inconsistent recommendations made by the ICAC. The NuCoal and Yarrawa investors are in no relevantly different position. The ICAC's recommendations should have been consistent, accordingly.

5.2 The ICAC's findings in respect of the Yarrawa tenement are set out in its report dated 31 July 2013, entitled "Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others" (**Operation Jasper Report**). Relevantly, the ICAC found that Mr Macdonald, Edward Obeid Snr and Moses Obeid engaged in corrupt conduct by entering into an agreement whereby Mr Macdonald provided the Obeids with confidential information belonging to the State for the purpose of benefiting the Obeid family.[36]

5.3 That confidential information included the list of companies to whom invitations to tender for exploration licences over *inter alia* the Yarrawa, Mt Penny and Glendon Brook tenements were issued. The confidential information was provided to Moses Obeid, who provided it to Gardner Brook. Mr Brook in turn "*used that information as the critical base for the Obeid family investing in the mining tenement*", that is to "*successfully identify a potential medium for their introduction into coalmining - Monaro Mining*".[37] The confidential information enabled the Obeids to enter into an agreement with Monaro Mining "*which, as it turns out, became the key to the Obeid family receiving a massive payout*".[38]

5.4 The background and key facts concerning the Yarrawa tenement may be noted as follows:

(a) On 16 February 2009, Monaro Mining NL (Monaro Mining) was the successful bidder for the Yarrawa tenement.

(b) Prior to securing its bid, Monaro Mining had entered into an "extraordinarily lopsided arrangement" with Voope Pty Ltd (Voope), a company beneficially owned by the Obeid family.[39] The arrangement provided Voope with an option to acquire at no cost 80% of any interest acquired by Monaro Mining in respect of the bid for exploration licences.

(c) Although interests in the Yarrawa tenement have shifted since its grant, the Obeids retain an interest of 7.5% and became entitled to share options in Coalworks Ltd, the former majority interest holder in the tenement, which were subsequently sold for over $1.5 million.[40]

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[34] December Report, p.20.

[35] December Report, p.17.

[36] Operation Jasper Report, pp.9-10.

[37] Operation Jasper Report, p.88.

[38] Operation Jasper Report, p.92.

[39] Operation Jasper Report, p.91.

[40] December Report, Appendix 1 (Opinion of Counsel Advising) at [33].

5.5 The parallels between the innocent Yarrawa investors and the innocent Doyles Creek investors (namely, the vast majority of NuCoal investors) are telling. In both instances:

(a) The grant of each tenement is tainted by conduct found to be corrupt by the ICAC.

(b) Those found responsible for the corruption have stood to make significant windfall gains by reason of the impugned conduct (in the case of Yarrawa, the Obeid family and, in respect of Doyles Creek, Messrs Maitland, Ransley, Poole and Chester).

(c) The overwhelming majority of investors in the tenements are persons untainted by any findings of corrupt conduct. In the case of Yarrawa, by deducting the Obeid interest, this accounts for 92.5% of shareholders. In the case of Doyles Creek, the single shareholder is NuCoal. Of NuCoal's investors, 97.5% had and have no connection with any of the impugned conduct.

5.6 In NuCoal's submission, its shareholders are in a materially identical position to the investors in the Yarrawa tenement. NuCoal and its shareholders should be afforded the same treatment as the Yarrawa investors, accordingly.

6. What should now be done?

6.1 The ICAC has performed its statutory function and found that the grant of EL 7270 was affected by corruption. It goes without saying that such a conclusion is extremely serious and the NSW Government must respond appropriately. However, for the reasons set out above, the ICAC's findings should be considered by the NSW Government with caution and in recognition of the ambit of the ICAC's role and powers. If the NSW government seeks a concluded answer to the issues addressed by the ICAC, the appropriate forum is a Court of competent jurisdiction, which provides all interested parties with the procedural rights and curial remedies ingrained in our legal system.

6.2 NuCoal is not the subject of any ICAC finding of wrongdoing. NuCoal cooperated with and assisted the ICAC during all stages of the inquiry, a fact recognised by Counsel Assisting.

6.3 In any event, if the grant of EL 7270 was in fact infected by the corrupt conduct found by the ICAC, the practical result for the State is a foregone opportunity to realise a higher financial contribution for the licence. It is thus a monetary consequence for which the adequate recompense should be, equally, monetary. This was the subject of submissions by NuCoal during the ICAC inquiry. To act upon the ICAC's recommendations by implementing legislation which results in EL 7270 being expunged would be draconian and disproportionate to the actual ramifications and consequences of the alleged corrupt conduct.

6.4 Monetary recompense could be determined by way of a conciliated process between the State and NuCoal. It could be performed with the benefit of an expert determination or other appropriate adjudication of a fair purchase price or additional financial contribution. It could be imposed as a condition of a mining lease ultimately issued to NuCoal.

6.5 The monetary recompense must of necessity recognise and take into account the benefits conferred on the State and, by extension, the public by reason of the exploration works performed by NuCoal since acquiring its interest in EL 7270. Those benefits arise by reason of matters including the following, which are also addressed in Section 7 of this submission:

(a) At the relevant time there was no defined resource or reserve of coal on the EL 7270 area. The NSW Government's view, based on information concerning a proximate area and not in fact Doyles Creek, was that the Doyles Creek area contained approximately 60Mt of coal resources spread across a number of seams. This information was contained in the Ministerial briefing provided to Mr Macdonald. There was no certainty as to whether the land was resource-rich. The testimony of Brad Mullard of the Department at the ICAC inquiry confirmed that the resource estimate provided in the briefing paper was based on an open cut coal operation and for a different area.[41] The only way to define the extent of any resources was to perform mining exploration works. Indeed, that is the purpose for which exploration licences exist.

(b) NuCoal has expended in excess of $40 million on exploration, development studies and land acquisitions. The expenditure has been fruitful. It has allowed NuCoal to establish the existence of coal resources of over 500Mt,

[41] ICAC transcript, p.5081, lines 30-34.

being more than 8 times the magnitude of the Department's speculative and incorrect view.

(c) NuCoal has completed drilling 52 holes and a Pre-Feasibility Study. It is in a position to progress the Doyles Creek mining project through the relevant approval processes and to seek a mining lease. NuCoal's progress and standing is at least four years ahead of any putative competitor.

6.6 A conciliated outcome which results in the appropriate financial adjustment is the best outcome for the State, the citizens of NSW, NuCoal and its shareholders, all of whom stand to reap the benefits of the progression of the Doyles Creek mining project, if approved.

6.7 Achieving such a conciliated outcome would not preclude the State from pursuing any person guilty of corruption or who has improperly benefited from the corruption. This was recognised by Counsel Advising and the ICAC by its answer to Question 4. In NuCoal's view, the most appropriate way for the State to "*wipe the slate clean*" is by pursuing any wrongdoers and stripping any person who has unjustly benefited from the fruits of any wrongdoing, rather than removing the asset of the vast majority of innocent parties who constitute NuCoal's approximately 3,400 shareholders. In doing so, justice would be, and would be seen to be, done.

6.8 An alternative recompense to the sensible, pragmatic and fair solution above would be to confer on NuCoal one or more new tenements over the area covered by EL 7270, or a proportion of it. This could be done in a manner consistent with the recommendations in the October Report, and was foreshadowed in the December Report.[42] The result would be a different licence holder to DCM which is not associated in any way with any alleged wrongdoing, by either its directors or shareholders. The State would retain the benefit of the progress of the Doyles Creek project completed by NuCoal to date and NuCoal's innocent and long-patient shareholders would maximise their potential to receive a return on their investment.

6.9 In making the above submissions, and as referred to in the letter from Clayton Utz to Mr Paterson dated 24 December 2013, NuCoal understands that the Minister is not presently considering whether to act upon the ICAC's recommendation to consider cancelling EL 7270 or refusing the outstanding applications under either s.380A of the *Mining Act*, or cancelling EL 7270 under s.125(1)(b2) of the *Mining Act*. Should that position change, NuCoal must be afforded procedural fairness and assumes that a separate invitation to make submissions on those issues will be issued, to which it will respond. NuCoal reserves all of its rights in that regard.

[42] December Report, p.16

7. Public benefit to NSW

7.1 The economic development of the State of NSW is clearly a matter of significant public interest. Since the Doyles Creek project will be a major contributor to the economy of NSW, as demonstrated by the Pre-Feasibility study already concluded, it is in the public interest for the project to proceed through its assessment stages.

7.2 NuCoal should therefore be permitted to fully evaluate and present the project to the relevant planning and approvals authorities via the usual processes. The Government should confirm NuCoal's ownership of an appropriate tenure over the Doyles Creek area to allow it to progress these processes. The most appropriate tenement would be an assessment lease.

7.3 Full consultation between the Government and NuCoal is the best path towards facilitating outcomes acceptable to all stakeholders. NuCoal reiterates its position, canvassed by the Commissioner during the ICAC inquiry, regarding the potential for concluding a suitable arrangement to provide both NuCoal and the State with the opportunity to progress the Doyles Creek project.

The Doyles Creek coal resource

7.4 The vast majority of what is now known about the coal resources present in the Doyles Creek area was discovered through NuCoal's exploration program and efforts. In 2008, the Doyles Creek area was far from being a "*sure thing*". It would have been unsurprising if the area had turned out not to contain any economic coal resources.

7.5 The potential resource at Doyles Creek was entirely speculative and high risk. It lacked the known potential of large areas which went to formal tender, such as Caroona and Watermark. It was not in any sense a "*mature*" area. The area had very few boreholes and conventional wisdom was that it was likely to be intruded and structurally complex.

7.6 The Department's view at the time the area was being considered was that the area contained approximately 60Mt of coal resources spread across multiple seams. Evidence at the ICAC established that this "*view*" was erroneously held, as it was actually based on an open cut resource on a completely different (though proximate) area (see further at 6.5(a) above).

7.7 The speculative nature of the potential resource at Doyles Creek is reinforced by the fact that major mining companies had shown no interest in the area. There are two large underground mines nearby and both companies had the opportunity to consider the Doyles Creek area. It was only NuCoal's efforts and expenditure that identified the size and quality of the resources which have been found, especially those present in the Whynot seam. Had the true value of the resources been known earlier, then the Doyles Creek area would have been in production long ago. Similarly, had the Department thought that the resources found by NuCoal were present, it would have explored and sent the area to tender in preference to other areas.

7.8 The relevant facts are these:

(a) There was no Joint Ore Reserves Committee (**JORC**) standard resource for the tenement area when EL 7270 was granted in 2008. The only data available was from four historical government boreholes completed over previous decades.

(b) Conventional wisdom was that the area was not a good target for the establishment of a mine because:

(i) Large portions of the area were potentially intruded by igneous sills.

(ii) Known large structural features could also degrade any resources that may be present.

(iii) Splitting of seams and depth of potential resources were further reasons to downgrade the area.

(iv) The assumed dipping coal seams made mining problematic.

7.9 For the above reasons, the Doyles Creek area did not fit into any of the four categories of resource that were the basis for allocation of coal tenements in NSW at the time EL 7270 was granted.

7.10 As noted earlier in this submission, since 2010, NuCoal has spent in excess of $40 million on exploration, development studies and land acquisitions to progress the Doyles Creek Project. Exploration work carried out has established a resource of over 500Mt at depths between 150m and 590m from the surface.

7.11 Most significantly, the exploration carried out by NuCoal has established the existence of previously unknown resources in the area, the most important of which is the 85Mt 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 needed by the world's steel industry for the foreseeable future.

7.12 NuCoal's exploration at Doyles Creek has demonstrably and significantly added to the valuable assets of NSW. It is also worth noting that:

(a) Doyles Creek is an underground project which, compared to an open cut mine, will cause substantially fewer issues in relation to noise, dust, and surface disturbance.

(b) Doyles Creek is in an established mining area - it is not in a new mining domain.

(c) Whilst Doyles Creek is adjacent to a National Park and the town of Jerrys Plains, the proposed mine plan will have no impact on either of them from a subsidence point of view.

<u>The Doyles Creek project will help the Government to meet its NSW 2021 plan goals</u>

7.13 Improving the performance of the NSW economy is the primary goal of the NSW 2021 plan. One of the Government's key targets is to increase the value of primary industries and mining production in NSW by 30% over 2010 levels.

7.14 Much work must be done if this target is to be reached in the next seven years. Few, if any, projects currently discovered could be developed in any commodity other than coal in this timeframe. Moreover, by reason of the depletion and exhaustion of existing resources over the next seven years, new mines will need to commence operation just to maintain 2010 production levels, let alone exceed those levels by 30%. The Government will fail to achieve its goals unless the bulk of any increased value is provided by the State's coal mining industry.

7.15 The development of the Doyles Creek project will make a substantial contribution to the achievement of this target. If approved, the Doyles Creek project aims to deliver the following benefits to NSW:

(a) In the first 25 years of mining operations, over 100Mt of run-of-mine coal with over 85Mt saleable production of prime semi-soft coking coal and high quality thermal coal.

(b) Ongoing jobs for 350 workers.

(c) Over $2.6 billion to the Commonwealth and State via taxes and royalties.

7.16 Moreover, the development of the Doyles Creek project can complement many of the Government's other NSW 2021 goals. In particular:

Goal 3 Driving economic growth in regional NSW

Goal 4 Increasing the competitiveness of doing business in NSW

Goal 5 Placing downward pressure on the cost of living

Goal 6 Strengthening the NSW skill base

7.17 There is no State or Commonwealth program that can match the regional employment and export growth potential of a healthy, viable and respected mining sector. No other industry can provide greater revenue to fund new infrastructure and essential state services, such as health and education. Government revenues rely heavily on the continued successful and sustainable growth and development of the mining industry.

7.18 According to the NSW Mineral Council:[43]

> "*NSW is a resources state. We create jobs and spur the NSW economy, with over 90,000 people employed in our industry. The mining industry doesn't just create jobs for the thousands of men and women who work at mine sites. We support local businesses like grocers, cafes, schools, electricians and service industries - where our workers spend their wages, and that supply our industry to help us operate.*
>
> *We return $1.3 billion a year in royalties to the state. That's enough to fund 11,000 teachers in our schools or to construct two new hospitals and redevelop another every single year.*
>
> *We also invest in major state-building infrastructure like ports and railways that will deliver benefits for the people of NSW and other industries for many years to come.*
>
> *These investments go far beyond the mine sites, flowing throughout the economy. Last year alone our mines contributed $12.8 billion to NSW, as quantified in our Economic Impacts study.*"

7.19 This view is consistent with the Government's recently restated commitment:[44]

[43] http://www.nswmining.com.au/industry/economic-contribution.

[44] http://www.resources.nsw.gov.au/__data/assets/pdf_file/0009/471708/Improving-certainty-for-community-and-investors-in-mine-proposals.pdf.

"*Resources Minister Chris Hartcher said the resources sector has long been the backbone of the State's economy, and the NSW Government is determined to ensure it continues to have a strong future.*

"Our vision is for a vibrant and prosperous mining industry that continues to deliver jobs and investment to rural and regional NSW, whilst ensuring the protection of our valuable agricultural land and water resources," Mr Hartcher said. …

"The sector's key role in the NSW economy and its broad benefits to regional NSW and the State-at-large must be given important consideration in any decision-making process.

"In NSW alone, more than 35,000 people are directly employed in the mining and minerals industries, along with 90,000 workers whose jobs are indirectly supported through mine and non-mine related services.

"The NSW Government is working to ensure the resources sector continues to expand and supports regional employment growth, recognising that mining operations require investment certainty."

7.20 This is a very challenging time for the mining industry in NSW and significant job losses have occurred recently. Rising to the challenge will require new, high quality projects like Doyles Creek to be progressed. As such, Doyles Creek is distinguished from most other potential projects because it can have low operating costs and command a price premium. Most other projects will not achieve the required returns in the current climate.

7.21 Exploration undertaken by NuCoal on EL 7270 has added considerable value to NSW by identifying and defining a significant JORC coal resource unknown at the time EL 7270 was granted in December 2008. The coal quality NuCoal has discovered at the Doyles Creek site is in the top group of projects that should be developed in NSW to refresh the future production profile of the coal industry.

<u>NuCoal can provide a significant quantity of coal to the Bayswater power station</u>

7.22 The Doyles Creek project will support the case for the co-development of NuCoal's two other exploration licences (Savoy Hill and Dellworth) and the Plashett exploration licence, which is currently under contract by NuCoal. These four tenements will allow the presentation of an integrated development plan which can provide high quality semi-soft coking and thermal coal for export, plus a significant quantity of domestic thermal coal to the Bayswater power station.

7.23 NuCoal is therefore well placed to assist NSW to secure a significant part of its long term fuel supply. This will ensure that NSW has more certainty around long term power for the State from low risk sources which are within a 5km radius of Bayswater. Ultimately, this will place downward pressure on consumer electricity bills for households and businesses alike.

<u>Restoring investor confidence in NSW</u>

7.24 One of the Government's targets in the NSW 2021 plan is to grow business investment by an average of 4% per year to 2020. This target cannot be met if the State's investment reputation is damaged. The Government should adhere to its promise of ensuring that NSW is open for business.

7.25 The Fraser Institute's Survey of Mining Companies ranks the attractiveness of global mining jurisdictions to investors. The 2012-13 Fraser Institute Survey found that the overall attractiveness of investing in Australia had declined. While some jurisdictions ranked higher than in the previous 12 months (including Western Australia), NSW's ranking dropped from 32 of 93 jurisdictions in 2011-12, to 44 of 96 jurisdictions in 2012-13.[45] In a world of scarce capital and many investment opportunities, this is a worrying trend that threatens the attainment of the Government's economic goals.

7.26 The current Government now has an opportunity to regain the confidence of the investment community.

7.27 An increase in 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 will all be adversely affected.

7.28 As the ICAC noted in its October Report, resources companies in particular are increasingly factoring in sovereign risk considerations for investment in NSW.[46] The investment community is closely monitoring the Government's decision on the Doyles Creek project.

7.29 NuCoal's shareholders, who include many individuals, superannuation funds and overseas investors, all want to see NuCoal given a fair chance with the Doyles Creek project. They are watching the situation closely and their opinions about the sovereign risk of investing are key for the future of NSW. NuCoal's joint venture partner, Mitsui Matsushima International Pty Limited (**Mitsui**), is also watching closely.

7.30 Stability, consistency, transparency, fairness and equity, demonstrated over time, are required to encourage investment and to rebuild the State's reputation. Confirmation of NuCoal's ownership of the Doyles Creek project would be seen in a very positive light by investors. It would signal that the Government and industry can successfully negotiate through difficult situations and emerge with clear intentions. The individual investors in NuCoal would also be likely to further support NSW in other investments.

<u>NuCoal is best placed to deliver the Doyles Creek project</u>

7.31 NuCoal can deliver the Doyles Creek project years earlier than any other proponent. This will fast track economic returns for the Government.

7.32 As noted at 6.5(c) above, NuCoal has completed drilling 52 holes and has completed a Pre-Feasibility Study. Based on delays due to the ICAC, the earliest NuCoal could now expect approval of the Doyles Creek Project to allow construction is late 2015. If this were to happen, first coal could occur during 2016-17 and longwall coal in 2018.

7.33 Any new developers of the Doyles Creek project would have to go through a tender or auction process, which would take around 12 months, and then start from scratch to prepare their own Concept Study, Pre-Feasibility Study and Bankable Feasibility Study (based on NuCoal's drilling results), in addition to all of the required environmental monitoring and associated reports that NuCoal already owns. As a result, any new owner of EL 7270 would be at least four years behind NuCoal's current status.

[45] Fraser Institute, Survey of Mining Companies 2012-13, http://www.fraserinstitute.org/.

[46] October Report, p.25.

7.34 Further delays caused by pursuing a new allocation process in the current difficult market may see losses to Treasury in the range of $200 million to $300 million or more. This is in addition to compensation payable to NuCoal. The significance of further delay was referred to by the Treasurer in August 2013:[47]

> "*Noting that the Independent Commission Against Corruption was not an economic body but was an investigative body, I did ask that Treasury and the Department of Minerals Resources and Energy have a look at what the costs were for those actions that were taken. …*
>
> *It also does not take into account the impact of the revenues. There are long delays that are going to follow. There is $50 million in ongoing royalties on an annual basis that would come to the State on the back of these resources that have been delayed. So whether it be seven new schools or 900 teachers as an example, the State has been short-changed.*"

7.35 In addition, NuCoal has initiated the Plashett acquisition, which improves the prospects of the Doyles Creek project (and vice versa), and the land required for the Doyles Creek project surface infrastructure is controlled under freehold title by NuCoal. NuCoal's four tenement strategy (Doyles Creek, Savoy Hill, Dellworth and Plashett) cannot be replicated by any other coal mining company.

NuCoal is a good corporate citizen

7.36 NuCoal has conducted itself as a good corporate citizen at all times. Its integrity has not been called into question by the ICAC or anyone else. The NSW Government's confidence in NuCoal's propriety is demonstrated by the grants to it of exploration licences for the Savoy Hill and Dellworth tenements.

7.37 NuCoal ensured that there was no breach of any of the onerous conditions of EL 7270 during the tenure of the licence. It has diligently carried out the obligations of EL 7270 in a professional way to best practice standards, as noted in two audits by the NSW Government.

7.38 NuCoal has cooperated expeditiously with the Government in relation to several landholder access issues within the tenement area. It has spent in excess of $40 million on exploration, development studies and land acquisitions to progress the Doyles Creek project in good faith.

7.39 NuCoal has also cooperated completely with all requests by the NSW Government and the ICAC over the past two years, despite suffering significant costs and losses. NuCoal's cooperation was commended by Counsel Assisting.

[47] Legislative Council General Purpose Standing Committee No. 1, Thursday 15 August 2013, Examination of proposed expenditure for the portfolio area, Treasury Industrial Relations, p.10.

8. Litigation risk to NSW

8.1 As noted above, for the NSW Parliament to destroy the value of NuCoal's investment without providing fair compensation would damage the State's reputation, increase perceptions of sovereign risk of investing in NSW and would significantly undermine the NSW Government's message that NSW is open for business.

8.2 In addition, expunging EL 7270 through legislative intervention, especially if done without providing adequate compensation to NuCoal, would expose the State to expensive litigation for the next several years. Such litigation would further delay the State's receipt of the benefits of the Doyles Creek project and cause further damage to investor perceptions of State risk.

8.3 Potential causes of action would include the following.

Constitutional litigation

8.4 Legislative intervention to expunge EL 7270 without fair compensation would be unprecedented and may lead to a constitutional challenge.

8.5 It is true that, on current authority, the constitutional power of the State legislature permits the expropriation of property other than on just terms. However, as Counsel Advising points out, that power is not unlimited. The doctrine established in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, and recently applied in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, provides an important limitation on that power.

8.6 Moreover, the existence of further limitations on State legislative power remains an open question. In *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399, relied on by Counsel Advising, Kirby J suggested that additional protections against extreme State laws may arise from the Commonwealth Constitution (at [70]-[77]). Such a law may fall outside the legislative power of the State on the basis that it is not in fact a "*law of a State*", as contemplated in sections 107 to 109 to the Commonwealth Constitution.

8.7 The conclusion in *Durham Holdings* that the law in issue was not extreme rested on the particular facts of that case. Coal was expropriated from a mining company and vested in the State, for which the company received compensation in the order of $27 million. The company sought compensation in the amount of the full market value of the coal, alleged to be in the order of $93 million. The legislative cap on the amount of compensation available was found to be discriminatory and unjust (at [35]), but not extreme.

8.8 In the present case, NuCoal's joint venture partner in the Doyles Creek project, Mitsui, valued EL 7270 at September 2012 in the amount of $360 million for a minority interest.[48] That 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. (Of course, that is its value consequent upon NuCoal's exploration and development activities, and not its value when EL 7270 was granted in December 2008.) As a minimum, fair compensation to NuCoal for the expunging of EL 7270 would need to reflect that amount.

8.9 The Court in *Durham Holdings* also rejected a submission that the law in issue was punitive in nature (at [8]). That finding provided a further basis for the conclusion that

[48] NuCoal ASX Announcement dated 17 September 2012, entitled "Finalisation of Contractual Documents for the Development of the Doyles Creek Coal Project".

the law was not extreme. An Act to expunge EL 7270, on the other hand, could also be construed as punitive of DCM in respect of the (unproven) conduct on which the ICAC's findings were based. For a State legislature to intrude upon the province of the judiciary in such a fashion would lend considerable support to an argument that such an Act would be so extreme as to fall outside the State's constitutional powers.

International investment treaty arbitration

8.10 Australia is a signatory to in excess of 25 bilateral investment treaties and free trade agreements. While each of them is different, they all impose rights that attach to and protect foreign investments.

8.11 The term "foreign investment" is very broad. It generally captures assets of any kind. It certainly includes shares in a listed Australian company such as NuCoal. The protection afforded to the investment includes "fair market value" compensation in the event that a nation party takes measures (whether directly or indirectly), the effect of which effectively destroys the investment.

8.12 By the fact of entry into such treaties, Australia has undertaken that foreign investors will receive treatment of a certain standard within its territory. These obligations are not toothless. Under most treaties, breach of this standard of treatment by a government (including by the State) entitles the foreign investor to commence proceedings before an international arbitral tribunal or other international dispute resolution body to recover compensation. There are foreign investors in NuCoal who will seek to rely on such treaties.

Misfeasance in public office

8.13 If EL 7270 were to be legislatively expunged on the basis of the ICAC's findings, this would effectively concede that the facts on which an action in tort against the State would rest are well founded. In particular, the passage of such legislation would expose the State to an action for misfeasance in public office.

8.14 The NSW Parliament could not expunge EL 7270 without justifying its actions on the basis that Mr Macdonald acted corruptly when he granted consent to DCM to apply for an exploration licence and when he granted the licence. The State could not, consistently with its obligation to act as a model litigant, deny those same facts in litigation against NuCoal. Specifically, the State would have to admit that the former Minister's actions satisfied each of the elements of the common law offence of misconduct in public office.[49]

8.15 The elements of the tort of misfeasance in public office are closely related to those of misconduct in public office. In addition, the loss which NuCoal would suffer, were EL 7270 to be expunged, was clearly within Mr Macdonald's reasonable contemplation at the relevant time. It was plain in 2008 that DCM could not comply with all of the onerous conditions of EL 7270, let alone deliver the Doyles Creek project, without a substantial injection of capital. In the circumstances, it was reasonably foreseeable that investors such as NuCoal would be needed to deliver the project. It was equally foreseeable that such investors would proceed on the basis that EL 7270 would remain in force and be renewed so long as all of its conditions were met, and that they would lose the value of their investment should that cease to be the case.

8.16 The State would be vicariously liable to compensate NuCoal for the loss of its investment by reason of Mr Macdonald's misfeasance.

[49] August Report, pp.136-137.

Other actions

8.17 Those same facts would be relevant to various other actions against the State in tort, contract, under statute and in reliance on equitable and restitutionary principles. Actions founded on breaches of statutory duties under the *Mining Act* and other legislation, negligence and misrepresentation are all available. In addition, actions founded on breach of the deed dated 15 August 2008 between the State and DCM, by which EL 7270 was granted, would be available. The success of such actions would depend upon the evidence led at trial, much of which would be gathered through wide-reaching discovery orders.

9. Conclusion

9.1 For the reasons outlined above, NuCoal entreats the NSW Government not to implement the ICAC's recommendation to expunge or cancel EL 7270. If implemented, the measure would cause undue hardship to NuCoal and its investors, would harm the economic interests of NSW, and would have no impact on any person responsible for wrongdoing.

9.2 NuCoal submits that an alternative solution is available which responds to the ICAC's findings, imposes appropriate sanctions for the wrongdoers, protects the innocent and permits the advancement of an asset which will stand to benefit the State significantly. NuCoal welcomes the opportunity to engage in a discourse with the NSW Government at an appropriate time with a view to settling on the most balanced, fair and productive solution.

Attachment 3

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6 July 2015

Mr Murray Gleeson QC
Chairperson, ICAC Independent Review Panel
c/o –
Department of Premier & Cabinet
52 Martin Place
Sydney NSW 2000

Dear Mr Gleeson,

We are writing to you on behalf of the shareholders of NuCoal Resources Limited (**NuCoal or Company**), a publicly listed company with over 3400 shareholders. This Submission addresses NuCoal's significant concerns in relation to the investigation by the Independent Commission Against Corruption (**ICAC**) entitled Operation Acacia. NuCoal believes that the matters within this Submission are relevant to the Independent Panel in forming its view to the Parliament on ICAC's scope, conduct and powers.

NuCoal believes that the conclusions reached by the ICAC in Operation Acacia were not based on appropriate investigations or evidence. For this reason, NuCoal has lodged a detailed Submission (Inspector Submission) with the current ICAC Inspector, the Honourable David Levine AO RFD QC. The Inspector Submission, which highlights various examples of how ICAC conducted itself poorly in carrying out its investigation, is provided as Annexure A.

We also provide, to assist in your review, our "Submission of the Plaintiff" to the Supreme Court of NSW in Proceedings 2014/78434, as per Annexure B.

In our view what has happened in Operation Acacia shows that the arrangements regarding ICAC should be substantially overhauled. We base our view on the requirements of the Rule of Law and Natural Justice, on the principle that a body which receives greater than normal powers should be required to transparently demonstrate that it has used those powers to a very high, and greater than normal, level of responsibility and that a person is actually innocent until proven guilty.

Based on these principles, our experience and our observations of ICAC, we believe that

- Persons who are interviewed in secret by ICAC should be allowed the same degree of legal representation as if they were undergoing any ordinary police investigation, and they should have a right to be given a copy of the transcript of their interviews.
- Persons interviewed in secret should not be barred from consulting others. The isolation of these persons via this draconian arrangement is not consistent with natural justice.

- The ability of the ICAC to compel persons to answer questions should be curtailed.
- ICAC investigators should be barred from using stand over and threatening tactics and deal making in secret in return for “evidence” that is sympathetic to ICAC’s desired outcome in any investigation.
- Where ICAC makes findings or recommends actions against persons or entities that those entities should have a non-removable right to challenge the findings in a proper Court, i.e. an appeal on the merits of the case, and not have to wait, for sometimes years, for the DPP to decide whether there is actually a case to answer. In addition there should be a time-out provision, i.e. if the DPP doesn’t prosecute within a reasonable time, e.g. two years that the findings of the ICAC are withdrawn and declared publicly to be baseless.
- If ICAC holds a public hearing it should be required to explain what it intends to prove via its investigations so that those affected have every chance to prove otherwise.
- The normal rules of evidence should apply to ICAC hearings, and ICAC should not be allowed to limit the calling of witnesses by others at its enquiries or limit cross examination any more than would be allowed in a normal Court.
- Persons and organisations should be entitled to sue ICAC for costs and damages when it does not undertake its brief properly.
- ICAC must follow its legal mandate and not be able to make deals with others such as the DPP to, for example, issue Court attendance notices.
- ICAC officers should not be allowed to bring personal cases against individuals such as occurred recently in the Local Court hearings against McDonald and Maitland.
- Officers of ICAC who exceed ICAC’s mandates should be individually liable for criminal prosecution.
- ICAC should not be able to exonerate persons who have admitted guilt as occurred in the case of ex-Premier O’Farrell in the “bottle of wine” case. In this instance Counsel Assisting ICAC declared that the self-confessed guilty person (O’Farrell) would not be recommended for prosecution as “he had suffered enough”. Surely in such cases the ICAC is duty bound to recommend prosecution and then leave the case to the DPP and if prosecuted, the Courts.
- There should be a stronger and active oversight function over ICAC. The ICAC should have to obtain permission to run Public Hearings from the Inspector before they are run, so that the Inspector can be satisfied that the reasons for the Public Hearing are bona fide. This goes to the whole matter of the indiscriminate destruction of reputations and causation of immense legal costs without foundation.
- ICAC should not be allowed to consult with Executive Government during an enquiry, and any necessary correspondence with Executive Government should be via the Inspector.
- ICAC should not be recommending that special legislation be enacted by Parliament to strip away normal rights of natural justice.
- ICAC should take extreme care to protect the reputations of innocent parties and change its current stated view that causing harm to the reputation of innocent parties is a necessary outcome of ICAC processes.
- ICAC's inquisitional processes should not be used to present only one side of a matter - ICAC should be bound to present a balanced view of a matter and not conduct hearings on the basis of picking wings off a butterfly.

- In matters where ICAC does not have expertise it should call qualified expert witnesses and in matters requiring technical or commercial judgement, people with the requisite technical or commercial expertise should give opinions on the matter, for example in Project Acacia what constitutes the normal content of prospectuses and resource identification and measurement.
- ICAC investigations should not be dictated by resource availability. For example in Project Acacia the Commissioner chose not to examine NuCoal shareholders as to their position because of a stated lack of time.
- Parties should not have adverse consequences recommended by ICAC without the opportunity to put their position. For example in Operation Acacia ICAC recommended adverse consequences against NuCoal and its shareholders, expunging the rights to a valuable asset, without giving NuCoal the opportunity to put its position.
- ICAC's reports should give reasoned justification of its recommendations. For example in Project Jasper the Commission stated it agreed that by reason of the vast number of innocent investors in the Yarrawa tenement it was not appropriate to make recommendations disrupting activities on that tenement. There is no explanation from ICAC why it chose to take this position for this tenement but came to a diametrically different conclusion in respect of the Doyles Creek tenement where it is suggested the circumstances were similar.

We do not believe that the above list is exhaustive.

We note that your Terms of Reference includes targeted consultation. We are available for consultation in respect of this Submission at your convenience if you so desire.

Yours faithfully,

Gordon Galt
Chairman, NuCoal Resources Ltd

ANNEXURE A

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15 June 2015

The Honourable David Levine AO RFD QC
Inspector of the ICAC
PO Box 5341
Sydney NSW 2001

By e-mail: babara.rogers@oipic.nsw.gov.au

Dear Inspector,

We are writing to you on behalf of the shareholders of NuCoal Resources Limited (**NuCoal or Company**), a publicly listed company with over 3400 shareholders. As foreshadowed in our letter of 1 May 2015, this Submission addresses NuCoal's significant concerns in relation to the investigation by the Independent Commission Against Corruption (**ICAC**) entitled Operation Acacia.

In our view ICAC did not conduct its enquiry into Operation Acacia properly, to the extent that we believe that the conduct of the Commission amounts to serious maladministration under the Independent Commission Against Corruption Act 1988 (the **ICAC Act**). We believe that the Parliament has been misled into passing the Mining Amendment Act 2014 because it predominantly relied on the unjustified conclusions reached by ICAC in Operation Acacia. This is a serious matter for ICAC because ICAC knew that the Parliament would rely on its findings when it recommended that special legislation be used to expunge NuCoal's asset. The Parliament should be entitled to rely on the methodology, efficacy and truthfulness of ICAC's investigations, but ICAC has badly let the Parliament down in this instance. The Parliament is entitled to understand why ICAC performed its work so poorly and did not act honestly and in good faith.

We have not been able to determine precisely why the maladministration occurred because NuCoal had no standing in Operation Acacia. The Company was not investigated and NuCoal's independent directors were not called as witnesses. We have been trying to obtain relevant information via Freedom Of Information (GIPA), but to date our requests have been largely refused so have not produced any meaningful information. These refusals, in conjunction with the clear maladministration, leave us with the belief that the conclusions of Operation Acacia were politically driven and predetermined. We believe that the conclusions were not arrived at independently by the ICAC.

We are appealing to you now, as the oversight body on ICAC, to review the matter in this submission. As it is a complex matter which is not easy to understand via submission alone, NuCoal would also appreciate the opportunity to discuss the subject matter with you in the near future.

Kind Regards,

Gordon Galt
Chairman, NuCoal Resources Ltd

1. Overview

ICAC conducted investigations in relation to Operation Acacia during 2012 and 13 and then wrote two reports that affected NuCoal (August 2013 and December 2013). NuCoal was not a party to any aspect of the investigation and none of NuCoal's independent non-executive directors were interviewed or called as witnesses at Operation Acacia's public hearings. NuCoal provided two submissions to Acacia but they are not referenced in the reports and we believe that the submissions were not considered.

After Operation Acacia, the NSW Parliament passed special legislation that cancelled NuCoal's Doyles Creek Exploration Licence 7270 (EL or EL 7270), without compensation, and legislated away NuCoal's right to use the court system for redress.

We believe there were major flaws in the processes and logic that resulted in the conclusions that were made in both reports. We were particularly disappointed with the deliberate inaccuracies of the second report and that the report contained the recommendation that NuCoal's primary asset, EL 7270 (Doyles Creek), should be expunged.

The justifications used by ICAC for the expungement were

- NuCoal was not a bona fide third party purchaser for value without notice, so it did not have the right to retain the EL on that ground, and
- NuCoal knew what it was getting itself into when it purchased Doyles Creek Mining (DCM) so it shouldn't be surprised that it was losing its asset, because
  - there was "notorious public controversy" before NuCoal bought DCM, and
  - NuCoal acknowledged the risk that the EL might be improperly awarded in its prospectus.

In sharp contradiction to these justifications,

- it is legally wrong that NuCoal is not a bona fide third party purchaser for value without notice. Case law does not support ICAC's "opinion" and the Commission knew or should have known that its finding was not correct;
- It is factually wrong that there was a notorious public controversy or that NuCoal knew and acknowledged in its prospectus that there was a risk that the grant of EL 7270 was tainted by corruption.

We believe that these incorrect "findings" were made so that the cancellation of EL 7270 would be justifiable. These findings were part of the misleading information considered by the Parliament when it passed the Mining Amendment Act 2014.

The Commissioner's recommendation to cancel EL 7270 was also unjustly inconsistent in that, with only a perfunctory analysis, it saw no problem with recommending the continuation of the Yarrawa licence (in Operation Jasper) because of the *"thousands of innocent investors involved in the ownership of Yarrawa"* while recommending against the continuation of EL 7270. Like the Yarrawa investors, NuCoal's thousands of shareholders are entirely innocent of any wrongdoing and should not have been punished.

2. Background

2.1 Purchase of DCM by NuCoal

The first key event in NuCoal's history was the purchase by NuCoal of all the shares in Doyles Creek Mining Pty Ltd (DCM) on 10 February 2010 following due diligence and the issue of a prospectus within the normal channels of the Australian public company listing process. The due diligence and prospectus preparation minutes are all available, but none of the persons involved in these activities was called as a witness by ICAC. These persons should have been called as witnesses and this material should have been disclosed at the public hearing. The prospectus was lodged with ASIC and ASX. No one from the ASX or ASIC was called as a witness. These persons should have been called as witnesses at the public hearing. Had they been called the statement regarding risk disclosure which the ICAC relied on could not have been made.

What NuCoal did not and could not know from any possible due diligence process was whether there were any issues of corruption associated with the grant of the EL. NuCoal could not, for example, question the Minister about whether he was corrupt. NuCoal could not be privy to the discussions of Departmental officers. NuCoal could only ever discover what it did discover - that the EL instrument contained an extensive set of conditions designed to make sure that a training mine would be developed if exploration results justified it, that the instrument was properly signed and that it was within the Minister's power to approve and sign the instrument.

What is certain is that NuCoal purchased the shares in DCM as a bona fide third party purchaser for value without notice. The way in which NuCoal undertook the purchase was a standard arrangement used in numerous cases throughout Australian and international corporate history.

2.2 Purpose of the DCM Acquisition

NuCoal's purchase clearly had one goal – the exploration and development of a profitable coal mining operation based on resources within the EL and in accordance with an extensive list of conditions laid down in the EL instrument. It was recognised that there were many risks associated with the pursuit of this goal, including a successful exploration program followed by satisfying all the other requirements of a mining development, including permitting and financing. It was clear to NuCoal that all this would take a significant amount of time and money.

2.3 Performance under the EL

NuCoal undertook its task dutifully and thoroughly, in accordance with the EL conditions, over the initial four year tenure of the EL. Compliance was regularly internally tested by ongoing quarterly checks done by the company's lawyers and externally by two Departmental audits. The audits revealed that DCM was rated as one of the best companies in NSW in respect of compliance with its EL conditions.

NuCoal was well aware that it would be responsible for the establishment of a training mine should a mining lease ever be granted. Shareholders "bought into" this and Directors made significant progress with preparing for training, to the extent that classrooms were built on

the site and training courses were offered well in advance of what was required under the conditions set out in the initial four year EL tenure. The training mine was in no way whatsoever a “sham” and the documented actions of NuCoal demonstrate it was to become a reality as part of the overall project development. No evidence of these activities was taken by the ICAC.

At the appropriate time prior to the expiry of the first term of the EL, in December 2012, DCM submitted an application for renewal of EL 7270. This renewal was never granted as the EL was cancelled by an Act of Parliament on 31 January 2014. By that time NuCoal had expended in excess of $40m complying with its obligations under the EL and progressing the project under the supervision and encouragement of the Mines Department.

2.4 Operation Acacia

Operation Acacia was initiated after a report was commissioned from legal firm Clayton Utz following the 2011 election when the Liberals formed Government. Acacia commenced on 18 March 2013, held public hearings until 17 May 2013 and delivered two reports in August and December 2013. NuCoal provided documents for ICAC investigators but was never formally questioned by the investigators. NuCoal was not granted access to any information from the private hearings held by ICAC. After the public hearing NuCoal made two submissions to the ICAC dated 29 May 2013 and 20 June 2013.

NuCoal was not ever regarded as a “person of interest” at the ICAC, but did participate in the public hearings to the very limited extent allowed after requesting access from the Commissioner. NuCoal was not granted the ability to call witnesses and had only limited rights to cross examine witnesses at the public hearing.

At one stage of the enquiry NuCoal was asked by the Commission if it would consider making a further payment to the NSW Government if the EL was left in place. NuCoal basically agreed to this proposition, but the proposition was not referenced in any report.

In the first of its reports ICAC dealt with matters surrounding the granting of EL 7270 in December 2008. ICAC found that the EL was granted corruptly and found Minister McDonald and Messrs Maitland, Ransley, Poole and Chester to have been corrupt.

In the second report ICAC found, because of its findings in its first report, that the EL was so tainted by corruption that the EL should be “expunged”. As part of its justification for expungement, the ICAC report made several totally erroneous statements about NuCoal which were aimed at establishing a degree of culpability by NuCoal. In summary these alleged that NuCoal had no status as a third party purchaser for value without notice, that NuCoal shareholders knew that there was something wrong with the EL because of a “notorious public controversy” and that Directors had even acknowledged a risk that the EL was defective in the NuCoal prospectus. All these contentions are false.

The ICAC discussed methods by which the NSW Government might go about expunging the tenement and recommended that the Government should enact specific legislation rather than go through an administrative process. This recommendation meant that the ICAC knew that its investigations and findings would be used by the Parliament as its primary source of information if the Parliament considered legislation. It also recommended that the Government consider compensation for any innocent parties.

2.6 The Mining Amendment Act

After receiving the report the NSW Government called for a "show cause" submission from NuCoal which was completed and lodged on 15 January 2014. A copy of this detailed submission is attached to this document as Appendix "A".

Only days later (on 20 January 2014) the NSW Government announced it would enact legislation to cancel EL 7270 and subsequently passed the Mining Amendment Act which cancelled the EL without compensation. The Act also indemnified the Government and officers from responsibility and liability, denied compensation to NuCoal shareholders, and made NuCoal give the government its copyright exploration information.

The fact that this law was passed within only a few days of our submission shows that the drafting was being done contemporaneously with the submission. We do not believe that the submission was ever considered.

2.7 Subsequent Events

Subsequent to the passing of the Mining Amendment Act NuCoal has been pursuing what legal means are left to it after the Act removed all normal means of recourse through the judicial system, with the objective of achieving compensation for its shareholders. Our efforts include

- A High Court Challenge to the constitutionality of the Act
- A Judicial Review (JR) of the ICAC findings,
- A claim under the AUSFTA aimed at allowing NuCoal's US based Investors to sue the Australian Government for compensation, and now
- This Submission

NuCoal is awaiting the results of the JR and is vigorously pursuing the AUSFTA initiative. If we are successful, a case will be brought under AUSFTA by NuCoal's US based shareholders against the Commonwealth Government for compensation. US based shareholders represent approximately 30% of the shares in NuCoal. The compensation claim will be for well in excess of $100m based on the project valuation (in an arm's length commercial arrangement) which was agreed with Mitsui Matshushima in 2013.

A very noteworthy subsequent event has also been the hearing in the Supreme Court of NSW in Poole v Chubb in August to October 2014. In his judgement following the hearing that lasted 16 days and considered independently the same "evidence" that was considered by the ICAC, Justice Stephenson stated that

- Maitland and McDonald were not corrupt
- There was no notorious public controversy
- Maitland was not a "mate" of McDonald
- Poole was not corrupt

These conclusions are strikingly at odds with the "findings" of the ICAC. A copy of the judgment is appended as Appendix "B".

2.8 Where to from here?

We believe that the appropriate process from here should be the convening of a Parliamentary or Judicial Enquiry with wide ranging investigative powers to establish, amongst other things

- Who commissioned the Clayton Utz (CU) report and what interactions were there between Government and Clayton Utz in formulating the recommendations in that report
- Why were matters raised by CU referred to ICAC rather than the Special Commission as recommended by CU
- Why did the ICAC not call expert and professional witnesses to explain important aspects relating to the coal industry, especially in the field of resource determination and project development logic
- How could ICAC find that there was a notorious public controversy or that NuCoal's prospectus actually contemplated the possibility that the EL might have been granted corruptly when a Supreme Court judge could not make these findings
- Why were independent non-executive directors of NuCoal not called as witnesses
- Why were the writers of NuCoal's prospectus or the ASX/ASIC persons who reviewed the prospectus not called as witnesses
- Why were NuCoal's submissions not considered
- Why was the Yarrawa tenement not expunged while NuCoal's tenement was
- Why was the "compromise" position of leaving the EL in force after payment of additional funds, as canvassed by the Commission, not pursued or recommended
- What interactions did the ICAC have with Government before, during and after the ICAC hearings process
- What interactions did the Government have with the horse breeding industry in relation to NuCoal

NuCoal made a call for such an enquiry at the Sydney Mining Club on 4 June 2015. A copy of that presentation is included as Appendix "C".

3. The First Report of ICAC

3.1 Procedural fairness

The ICAC's erroneous understanding of the evidence gathered to generate its first report is largely attributable to the limited procedural fairness it afforded to affected parties. The orders made and restrictions imposed on the parties in terms of evidence included:

a) The following statements by the Commissioner on day 1 of the inquiry:[1]

   "I and I alone…will decide what witnesses are to be called, it is also for me to decide what matters their evidence will be directed. I also have to determine how witnesses will be examined bearing in mind the inquisitorial rather than adversarial nature of the inquiry."

   "In an inquiry of this sort there is no legal right to cross-examination but I will to the extent that I consider it relevant and helpful to the forwarding of the inquiry allow cross-examination."

   "The basic principle I will apply is that I will ordinarily not allow cross-examination designed only to establish the credibility or lack of credibility where the cross-examiner does not have an affirmative case on the issue to which cross-examination is intended to be directed."

b) Limiting the right of parties to cross-examine witnesses. Indeed, there was no automatic right to cross-examine any witness.
c) Permitting cross-examination only in support of a positive case. In other words, NuCoal was denied an opportunity to test the accuracy or the reliability of most of the evidence given by the witnesses called by the ICAC.
d) Requiring parties to obtain leave to appear before the ICAC.
e) Requiring parties wishing to make written submissions to the ICAC to seek and be granted leave, despite their direct interest in the issues.
f) Limiting the length of submissions for parties granted leave based on the Commissioner's assessment of how much each party may need to prepare submissions in reply to those of Counsel Assisting.
g) These restrictions put NuCoal at a distinct disadvantage. But for those restrictions (which are not found in the Court system) NuCoal would have called and led expert and other evidence to disabuse the decision maker of certain misconceptions. In short NuCoal has not had a hearing on the merits of its case.

Although the ICAC provided an opportunity for parties to provide written submissions and address items which had not been considered, as outlined below, there is no evidence that submissions lodged by NuCoal were not taken into account.

[1] ICAC transcript, p.4859, lines 2-5, 12-14 and 20-24.

3.2 The ICAC's findings are infected with error, generally as set out below.

3.2.1 Mining Information

a) The ICAC did not engage technical experts to assist the Commission in understanding specific data and/or information in respect of mining including mining investment and mining development. Mining is a specialised field and phrases were incorrectly referenced by ICAC throughout the entire public hearing. The following phrases were used interchangeably by the Commission, despite there being very distinct differences in the meaning of the terms:

- Mining resources / reserves
- Insitu / mineable
- Saleable / Run of Mine (ROM) coal

b) ICAC relied on its understanding of specific mining terms in forming its findings and recommendations which were ill conceived. It even made up its own classification of coal unbeknown to the industry- "terminal coal". If a technical expert had been engaged to assist the Commission it is unlikely that ICAC would have been able to state that information contained within the original EL application and submission was false and misleading, and therefore that it was a basis to form its conclusion of corrupt conduct. If a tribunal was acting honestly and in good faith experts in these technical areas would have been called as witnesses.

c) A major part of the allegedly false and misleading information was in respect of geological information and the quantum of coal resources. The only information available at the time of DCM's application was the department's historical drill hole information - 4 drill holes, 3 of which were on EL 7270. That is the misleading information presented to the department, and the Minister, which was an interpretation of the information already held by the department.

It is somewhat trite to comment that it is logically impossible for someone who has the same information you have, and at least as high a level of expertise in the field, to be misled. Yet this is what the Commissioner, who was completely inexperienced in the field of resource evaluation, found to be the case.

The department even admitted in the public hearings that it was NOT misled. Alan Coutts, the most senior departmental officer responsible for mining (apart from a Director General who had no background in mining) said at page 5057 of the transcript *"I'm happy to accept that so far as this submission is concerned the Department did not have a view that there was anything misleading in this submission or that we were been trying, someone was trying to lead us up the garden path".* The Commission rejected this position on the basis that as they were misled they did not realise the material was misleading. This reasoning is preposterous. That the Commission then used this as a major plank in its finding of corruption against the applicants is amazing.

The fact is that there was no resource or reserve quantity in the EL when it was granted according to the Australian JORC code or any other standard of measurement and everyone involved knew that to be the case. This is undisputed. The best category that coal in the measures in Doyles Creek could be called was an exploration target.

Part of the Department's problem – which it admitted in the hearing - was that it had gotten its own information wrong in its advice to the Minister (page 45 of the August

Report) - *"This figure had been erroneously arrived at by the DPI in reliance on incorrect data".* That is if the Minister was relying on the Department's advised numbers in respect of the critical issue of coal resources he would have been misled by his own Department.

Dr Guy Palese was the only geologist from whom the Commission took evidence. Dr Palese, quite proudly, in his evidence said that he took a contrarian view to all the others that had looked at this area (page 36 of the August Report) *"Dr Palese said that, whilst others had thought the area was heavily faulted and therefore less desirable for exploitation, he (Dr Palese) had a different view."* (and page 11) - *"While earlier boreholes had led some to believe that the coal measures may have been affected by igneous intrusions, when stratigraphic drilling was undertaken at a deeper level as part of this program Dr Palese recognised that this was not so in respect of the lower seams, which are typically the target of mining activity."*

Again Dr Palese's evidence was based on 4 drill holes. It was a contrarian view and could have been completely wrong.

No other geologist gave evidence and there was minimal opportunity to cross examine Dr Palese. If a tribunal was acting honestly and in good faith other experts, and NuCoal expert technical witnesses, would have been called to the public enquiry to advise on their views on the extent of exploitable and non-exploitable coal measures.

Notwithstanding Dr Palese's view of the lower seams, which is the view of a geologist not a mining engineer, it is actually not true that lower seams are typically the target of mining activity - the lower the seam the more depth and distance it is to access, the greater the cost to cover this distance and the greater the presence of gas in the seam.

We believe that the Commissioner, who was completely inexperienced in respect of the coal mining industry, did not understand any of the issues or evidence on resources. He did not call witnesses who could have helped because of his desire to prove that the coal resource at Doyles Creek was deliberately misquoted by the Doyles Creek applicants so he could use this belief as a basis for his corruption findings. His (inexperienced and badly researched) conclusions were then absorbed by the public and Government and the Parliament – all of whom also had little or no appreciation of this technical matter and were misled by the erroneous and ill (or better still non) considered findings of the Commission.

d) Another part of the false and misleading information was the availability of finance for EL 7270. The very existence of NuCoal proves that sufficient funds to explore the EL could be raised in a reasonable time. Normal industry practice is to secure a tenement then raise the funds – not the other way around as no one would ever subscribe to a proposition without title. The Mines Department clearly understood this.

   There were suggestions that there were commitments to fund the development of a mine - this was not required by the Act and would have been a nonsense - no one would commit to finance a mine development in an unexplored exploration area. At page 57 of the August Report there is talk of feasibility studies, but exploration had to be done – and done successfully - prior to commencing feasibility studies.

   Again the calling of relevant industry witnesses would have established the way the applicants went about business was normal rather than corrupt. Both the department

and the applicants knew that if the funds had not been raised then the EL conditions would be breached and the EL would go back to the State. All parties involved in exploration fundamentally understand these requirements, which have existed for a very long time. This was not a basis for fraud by the applicants.

e) There was discussion that there were many other interested parties who had sought access to the area and would therefore have been interested in a competitive tender. Page 12 quotes two - Excel and later Peabody. Excel owned the Wambo mine next door to EL 7270, and Excel was taken over by Peabody - so these are not two separate companies but one entity. The other companies identified as interested erroneously included one who actually wanted access to a different area north of EL 7270 for 6 months to test a coal liquefaction process (Atlas), one associated with Palese, who said that they were no longer interested in the area when DCM was awarded the EL (Independent Coal) and one that no one knew anything about and could no longer be located (Simitar).

   Wambo was a mine nearly adjacent to EL 7270. The interest Excel/Peabody had was to extend the coal resources available to Wambo - they were interested in an area between their current lease and EL 7270. They were awarded this area by direct allocation as an EL at a similar time - September 2008. There were public objections to the Peabody award at around the time that the EL was granted to DCM - particularly as this area went right into the township of Jerrys Plains. The ministerial advisory paper justifies the Wambo grant as no other party would be interested and because of its locality adjacent to the Wollomi National Park and the village of Jerrys Plains - arguments used against DCM. It discusses a potential resource of 70MT but the further consent advice brings that down to 45 MT and describes the area as being a *"minor addition to an existing mine".* The magical number in the Guidelines is 50 MT. The initial advice *was "not supported due to previous expressions of interest"* by Brad Mullard, the then Director Coal & Petroleum Developments NSW Department of Primary Industries, in 2007 but signed off by the Department in February 2008. No evidence as to this comparable direct allocation with very similar controversial issues was brought up in ICAC. If a tribunal was acting honestly and in good faith this material would have been disclosed at the public hearing as evidence.

f) The Commission did not call any of the non executive directors of NuCoal to ascertain their motivations and actions in respect of Doyles Creek Mining. This is a major miscarriage of justice because those persons would have been able to put critical matters into context.

3.2.2 Mateship between Macdonald and Maitland

a) The Commissioner formed an “opinion” that the relationship between Mr Macdonald and Mr Maitland was akin to a close professional relationship and that they therefore were "mates". Being an opinion, the Commission did not rely on factual evidence or testimony, rather it took a subjective position based on judgement and interpretation.

   The so called “relationship” between Maitland and Macdonald formed the main basis of the finding by the Commission of corrupt conduct. Given the significant implications of this finding – it was within reasonable expectation that ICAC substantiate its finding based on fact, and not just opinion.

b) Both Mr Macdonald and Mr Maitland provided evidence regarding their so called “relationship” during the public hearing. This evidence verified the following:

   - Neither individual attended social events together;

- Neither party knew the name of each other's spouse;
- Neither party had ever visited the other's home.

How ICAC could then form an opinion in direct contrast to evidence given by both persons the subject of the actual relationship? The view is ill conceived and questions the conduct and appropriateness of the process which ICAC followed to form its finding.

c) The Commission's finding that McDonald and Maitland had a close professional relationship was partly based on the fact that McDonald booked a venue at Parliament House for Maitland's retirement function as a union official. It did not take into account that McDonald did not attend that function (unclear whether he was invited), that only a parliamentarian could book that Parliament House venue and that it was natural that the Minister for Mines book it for the mining union. If a tribunal was acting honestly and in good faith this material would have been disclosed at the public hearing.

d) The Commission found that McDonald obtained support from Maitland for further parliamentary preselection and that this support was influential in him gaining preselection. It ignored that at a previous preselection a number of years prior Maitland had actively campaigned for Jeff Shaw against McDonald but Maitland's influence did not get Shaw the preselection over McDonald.

e) The relationship of Mr Macdonald and Mr Maitland was recently reviewed in the NSW Supreme Court in the matter of Poole v Chubb. Justice Stephenson made the following conclusion in his judgment under the heading Mr Maitland's "relationship" with the Minister [para 121] "Before me there was no direct evidence of any such "relationship", "connection" or "access"…."

4. The Second Report

4.1 The ICAC's findings are infected with error in respect of NuCoal.

a) The ICAC misunderstood the evidence and overstated the significance of Counsel Assisting's submissions. In respect of NuCoal, there was an innocent explanation and an entirely proper legal answer to each of the matters raised by Counsel Assisting and adopted, apparently without examination, by the ICAC.

b) The explanation and answers were comprehensively set out in NuCoal's reply submission dated 20 June 2013, which answers each of the points raised by Counsel Assisting. NuCoal's submission was not referred to at all in either the December Report or the written opinion of Counsel Advising annexed to it.

c) It is a fundamental and central tenet of law that the ICAC, in the exercise of its statutory powers, must consider the evidence and arguments relevant to the issues about which it opines and reports.[2] That power will remain constructively unexercised if evidence and arguments put to it have not been considered. The failure to deal with, let alone refer to, NuCoal's reply submission raises a strong inference that it was ignored or overlooked.[3]

d) NuCoal's reply submission was a critical document. The ICAC's failure to consider it at all calls into question the validity of its recommendations, insofar as they concern NuCoal. NuCoal addressed the arguments made by Counsel Assisting as follows:

- Bona fide purchaser: NuCoal's position is comparable to that of a bona fide purchaser for value and without notice. The impugned conduct and knowledge of the individuals found by the ICAC to have acted corruptly cannot be attributed to NuCoal.[4]
- NuCoal Prospectus: 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.[5]
- Notorious public controversy: It is not factual that, since July 2009, there was "notorious" public controversy that EL 7270 was granted by Mr Macdonald to his "mate", Mr Maitland. The alleged controversy was limited to speculation in regional media outlets over a period of only two days in July 2009. Moreover, there was never any allegation of corrupt conduct capable of vitiating the grant of EL 7270.[6]

Each of these issues is considered in further detail below.

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[2] *Independent Commission Against Corruption Act 1988* (NSW) ss.8, 9, 13, 74A and 74B.

[3] *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [47] per French, Sackville and Hely JJ.

[4] December Report, p.16, points (a), (b) and (c).

[5] December Report, p.16, points (d), (e) and (g).

[6] December Report, p.16, points (e), (f) and (h).

4.2 NuCoal is a bona fide purchaser for value and without notice.

a) It is not in dispute, and was never contested by the ICAC, that NuCoal was a bona fide purchaser of DCM and gave good and valuable consideration for the company. NuCoal purchased the shares of DCM for $94 million. DCM's valuable asset, which was valued in the prospectus, was EL 7270. That asset was not transferable. It was tied to its grantee, DCM.

   But for the condition imposed on EL 7270 concerning non-transferability, NuCoal would have purchased the asset alone. It could not.

b) Although the asset was not transferable, there was at the relevant time no legislative prohibition or restriction on a change of control of the licence holder, nor was there any condition attached to the licence to that effect. Consequently, NuCoal acquired all of the shares in DCM and thereby gained ownership of the asset. The corporate entity, DCM, is valueless without its asset.

c) The genuine, clearly demonstrable and undisputed commercial purpose of NuCoal was to acquire the asset, EL 7270. The transaction by which it did so was a standard and orthodox commercial acquisition arrangement and was a perfectly legitimate and legally sanctioned course to have taken.

d) The ICAC found that, because EL 7270 is still held by DCM, NuCoal's position is not comparable to that of a bona fide purchaser; NuCoal being a mere shareholder. That view is a classic example of form over substance. NuCoal is not a mere shareholder. As a matter of substance, it is, and has been since the acquisition, the sole shareholder and owner of DCM and the holder of its sole valuable asset, EL 7270, for which it paid $94 million. The Equity Courts would clearly intervene to assist NuCoal.[7]

e) In the course of its acquisition of DCM, NuCoal engaged specialist corporate lawyers, Price Sierakowski, to undertake due diligence and prepare a report. 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". If a tribunal was acting honestly and in good faith this material would have been disclosed at the public hearing and these persons would have been called as witnesses.

f) The debate seems to focus on the issue of notice and corporate structure. The corporate structure was highlighted by Counsel Assisting and adopted without any proper, genuine or realistic consideration of the substance of the transaction by the ICAC.

g) The additional problem not examined, addressed or dealt with in any way by the ICAC, undoubtedly because it would have caused the ICAC's proposition to fall away, is that the bona fide purchaser for value without notice doctrine is an equitable one. The doctrine acts as an exception and remedy to the fraud question. The question of where the better equity lies should be determined by the Court once it is proved (unless it is already accepted or conceded by the Government) that a Minister

[7] See e.g. *Hotel Terrigal Pty Ltd (in liq) v Latec Investments Ltd (No 2)* [1969] 1 NSWR 676; *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679. See also *DHN Distributors v London Borough Council Tower Hamlets* [1976] 3 All ER 462 in which the Court treated a parent and two subsidiaries as one for the purpose of providing compensation.

of the Crown has committed fraud. If this ever occurs, then it would be necessary to show that NuCoal actually knew or had constructive knowledge of all the essential elements of the alleged "fraud". Of course it did not.

4.3 NuCoal Prospectus

a) The ICAC completely misunderstood/misinterpreted the statements about risk in the NuCoal Prospectus. 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 of the prospectus.[8] 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".

b) Plainly, 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 any appreciation of such a risk. If a tribunal was acting honestly and in good faith experts in this field would have been called as witnesses on content of prospectuses and standard disclosure of risk.

c) It is possible that the ICAC reasoned that, since all investments are inherently risky, it must have been within the contemplation of shareholders that they may lose their entire investment, in this case EL 7270. Such reasoning would be unjustified in the extreme. Whilst stock market volatility is a given for any investment, sovereign expropriation of assets is not a risk within reasonable contemplation, even of sophisticated investors, who invest in a highly developed economy and an Australian publicly listed company. Extrapolating the risk identified in the NuCoal Prospectus to that ultimately found by the ICAC defies commercial realities.

d) In any case, the general risk identified in section 1 of the NuCoal Prospectus is generic and common to many company prospectuses.[9] Moreover, there was never any allegation of any breach of the conditions imposed on EL 7270. Indeed, on 2 separate occasions, NuCoal was subjected to review of and detailed audits against those conditions. On each occasion, the results were findings of compliance.[10]

e) The ICAC made its own conclusions about the NuCoal Prospectus without verifying its understanding with an Independent Person. For example, why didn't the Commission call one of the persons involved in the preparation or review of the prospectus to give evidence on this matter? If a tribunal was acting honestly and in good faith this material would have been disclosed at the public hearing and these persons would have been called as witnesses.

f) Subsequent to this enquiry prospectus language has had to be changed to deal with new risks – corrupt award and state expropriation.

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[8] NuCoal Prospectus, pp.2, 11 and 83.

[9] See e.g. the risk factors outlined at page 14 of the BHP Billiton prospectus dated 14 April 2003: http://www.bhpbilliton.com/home/investors/Documents/GB45978A.pdf.

[10] 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.

4.4 Public controversy

a) A major plank on which the ICAC's recommendation to consider expunging EL 7270 relies was made is what it called the "notorious public controversy" surrounding the grant of the licence.[11] The use of the adjective "notorious" is unwarranted. The ICAC's analysis is one of historical revisionism rather than a correct recounting of the actual events.

b) At a number of levels, the ICAC's findings are farfetched, illogical and ignore reality. That reality includes the profile of NuCoal's investors, many of whom were large and sophisticated corporations with comprehensive risk identification resources.[12] To suggest that media murmurings of the type involved here, as detailed below, could have formed the basis of a decision not to invest in NuCoal, is absurd.

c) The controversy to which Counsel Assisting alluded in their submissions, which was adopted by the ICAC, is limited to a total of 11 news items on regional radio and television on only two days - 21 and 22 July 2009.[13] Those media items were 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 even a slight degree of “notoriety”. They provide no support for the ICAC's finding that NuCoal should have been or was aware of any controversy of any materiality.

d) Hearsay, rumour and speculation are not in any way a sufficient basis on which to conclude a positive state of belief and knowledge on the part of NuCoal.[14] Hearsay, speculation and rumour can never amount to actual notice within the classic meaning of the expression in law.[15] The hearsay, rumour and speculation should not have been used, as the ICAC did, as knowledge of or an acceptance of a specific risk by NuCoal that its investment could be lost on the basis now contemplated. There is no logical connection between an alleged knowledge of unproven allegations aired by the media (which were denied by the relevant Government officials) and the risk in issue.

e) The ICAC's treatment of news reports as creating notoriety is overstated and its use of the reports is misconceived. NuCoal and its investors certainly never contemplated that four years later Parliament would consider passing special legislation to expunge its licence. The risk of loss of EL 7270 that NuCoal investors would have had in mind was the specific risk adverted to in the NuCoal Prospectus, namely that the licence could be cancelled for failure to comply with the conditions imposed on it (which are some of the most extensive and onerous ever issued by the Department of Trade and Investment, Resources & Energy). The risk was assumed by NuCoal and its actions and the audit results demonstrate that it took the risk seriously.

f) The ICAC report replicates an extract from the ICAC hearing, during which evidence was elicited that "investment from the time of the reverse acquisition onwards" occurred "under the shadow of [the] risk of something sinister being discovered in the course of this [the ICAC] investigation".[16] The use of the word "this" is telling. The

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[11] December Report, pp.16-17, points (d), (e), (f), (h) and (i).

[12] Examples of such investors include Morgans, Colonial Global and Investec.

[13] ICAC Exhibit A, vol.19, pp.5919ff.

[14] *Luxton v Vines* (1952) 85 CLR 352.

[15] *Williamson v Bors* (1900) 21 LR (NSW) Eq 302 at 307.

[16] December Report, p.17.

ICAC investigation into EL 7270 was not commenced until 23 November 2011, approximately 2 years after the commencement of the process by which NuCoal acquired its interest in EL 7270. It is therefore in no way credible that any "shadow" of investment risk associated with the ICAC investigation could have existed prior to 23 November 2011. As such, in light of the timing impossibility, the answer to the question posed of the witness could not be accurate. The ICAC should have recognised this and placed no weight on that evidence, but instead the ICAC placed significant weight on that evidence.

g) Of further relevance to any "shadow" of risk is the existence of the probity report dated 23 August 2010 from O'Connor Marsden (O'Connor Marsden Report). The report was commissioned by the NSW Government as it was then constituted and it is still published on the Department's website.[17] It concluded that the grant of EL 7270 was "within power"[18] and cleared it of any impropriety. If a tribunal was acting honestly and in good faith this independent probity auditor would have been called as witnesses.

h) The ex-Premier, Barry O'Farrell, also publicly stated that NuCoal was an innocent party which questions how notorious the controversy was if the Premier of NSW did not know about it.

i) The so called "public controversy" found by ICAC and relied upon in forming the findings and recommendations have been further tested via the administrative process in the case of Poole v Chubb.[19] In respect of the so called public controversy, Justice Stephenson found [para 80] "So far as concerns the "EL Grant Controversy", Mr Poole accepted that he knew the facts relied on by Chubb as constituting that "Controversy" but that he did not believe there was any prospect of those facts giving rise to any form of public inquiry; and that no reasonable person in his position would have come to a different conclusion"

j) Taurus Resources Fund in September 2009 produced a 21 page Investment Application Paper to support its proposed investment in DCM. There is a 3 page Risk Analysis section. In respect of Permitting Risk it states *"Doyles is the rightful owner of the Exploration Licence covering the Project area. However prior to the Company being able to commence development of the Project and the mining of coal a number of other permits will be required. This process will require a significant period of time, though it is believed that the permitting will be able to be achieved in the proposed timetable for the mine development put forward in this paper."* The Paper canvassed sovereign risk which would have included the potential for Government to cancel the EL and simply stated *"The Company's operations are all in Australia."* No mention of notorious controversy was included. This is a contemporaneous analysis of the risks in respect of investment in DCM. If a tribunal was acting honestly and in good faith this material, which the Commission had in its possession, would have been disclosed at the public hearing and the persons involved in writing it would have been called as witnesses.

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[17] http://www.resources.nsw.gov.au/__data/assets/pdf_file/0006/354651/Probity-review-doyles-creek-mining.pdf.

[18] O'Connor Marsden Report, p.5.

[19] Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832

4.5 Yarrawa

NuCoal's shareholders are in no materially different position to the Yarrawa investors.

The ICAC simply recommended in a one paragraph statement that no action be taken with respect to the existing Yarrawa authority.[20] That was stated to be because of "the vast number of innocent investors in the Yarrawa tenement".[21] No other reason was given. When the ICAC's findings concerning the grant of the Yarrawa and the Doyles Creek tenements are examined, it is evident that there is no material difference between the two that could justify the inconsistent recommendations made by the ICAC. The NuCoal and Yarrawa investors are in no relevantly different position. The ICAC's recommendations should have been consistent, accordingly.

Although interests in the Yarrawa tenement have shifted since its grant, the Obeids retain an interest of 7.5% and became entitled to share options in Coalworks Ltd, the former majority interest holder in the tenement, which were subsequently sold for over $1.5 million.

The parallels between the innocent Yarrawa investors and the innocent Doyles Creek investors (namely, the vast majority of NuCoal investors) are telling. In both instances:

- The grant of each tenement is tainted by conduct found to be corrupt by the ICAC.
- Those found responsible for the corruption have stood to make significant windfall gains by reason of the impugned conduct (in the case of Yarrawa, the Obeid family and, in respect of Doyles Creek, Messrs Maitland, Ransley, Poole and Chester).

The overwhelming majority of investors in the tenements are persons untainted by any findings of corrupt conduct. In the case of Yarrawa, by deducting the Obeid interest, this accounts for 92.5% of shareholders. In the case of Doyles Creek, the single shareholder is NuCoal. Of NuCoal's investors, 97.5% had no connection with any of the impugned conduct at the time the December Report was issued.

In NuCoal's submission, its shareholders are in a materially identical position to the investors in the Yarrawa tenement. It is almost inconceivable that ICAC should not treat NuCoal and its shareholders in the same way that it treated the Yarrawa investors.

[20] December Report, p.20.

[21] December Report, p.17.

5. Conclusions

NuCoal believes that the ICAC Operation Acacia process was fatally flawed to the extent that there was serious maladministration under the ICAC Act, that NuCoal was denied procedural fairness, that material that did not support the case that ICAC was mounting was not brought before the public hearing by ICAC, that ICAC did not call relevant witnesses that would have given testimony not consistent with the case ICAC was mounting, and therefore that the ICAC in Operation Acacia did not act honestly and in good faith. The Parliament was later misled into passing the Mining Amendment Act because it relied on this flawed ICAC process.

We therefore ask that you include in your report to the Independent Panel that, in respect of Operation Acacia, ICAC's exercise of powers was not consistent with principles of justice and fairness and that its findings were based (variously) on incorrect, biased or unsubstantiated “evidence”.

Appendix A

NuCoal Submission to the NSW Government (15 January 2014)

NOTE: THIS DOCUMENT IS PROVIDED AS ATTACHMENT 2 TO THIS SUBMISSION

Appendix B

Judgment - Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832

NOTE: THIS JUDGEMENT IS AVAILABLE AT

http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=176444

Appendix C

NuCoal Sydney Mining Club Presentation (4 June 2015)




NUCOAL
RESOURCES LTD

ASX code NCR

The NuCoal Story

Is there a Rule of Law in NSW?`

Sydney Mining Club
June 2015

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The NuCoal Story

Why are we here??

- NuCoal had its major asset expropriated by an Act of Parliament in Jan 2014 after Operation Acacia
- NuCoal doesn't know, didn't know and couldn't have known if there was any corrupt activity associated with the grant of EL 7270
- NuCoal deserves to be compensated for this loss.

The History of EL 7270

EL 7270 Doyles Creek

In December 2008, Doyles Creek Mining (DCM) was awarded a four year exploration licence (EL 7270).

- Awarded without tender after 2 years of lobbying by DCM
- Department advised the Minister that this was one of 3 options open to him; EL conditions included the unavoidable requirement to establish a training mine.
- Other payments/commitments included $1.1m to Government and $1m to The University of Newcastle
- Only data available on EL 7270 was on the Department's data base - 4 boreholes, zero JORC Resource
- Department advised the Minister that they “thought” the area contained 60Mt of open cut material and was possibly intruded, faulted and folded
  - It was apparent at the time, including to the Department, that any company would need to get very lucky with exploration to have a chance of developing a long-term mine, with such a small starting resource base.

Listing of NuCoal

In February 2010, Supersorb (renamed NuCoal)

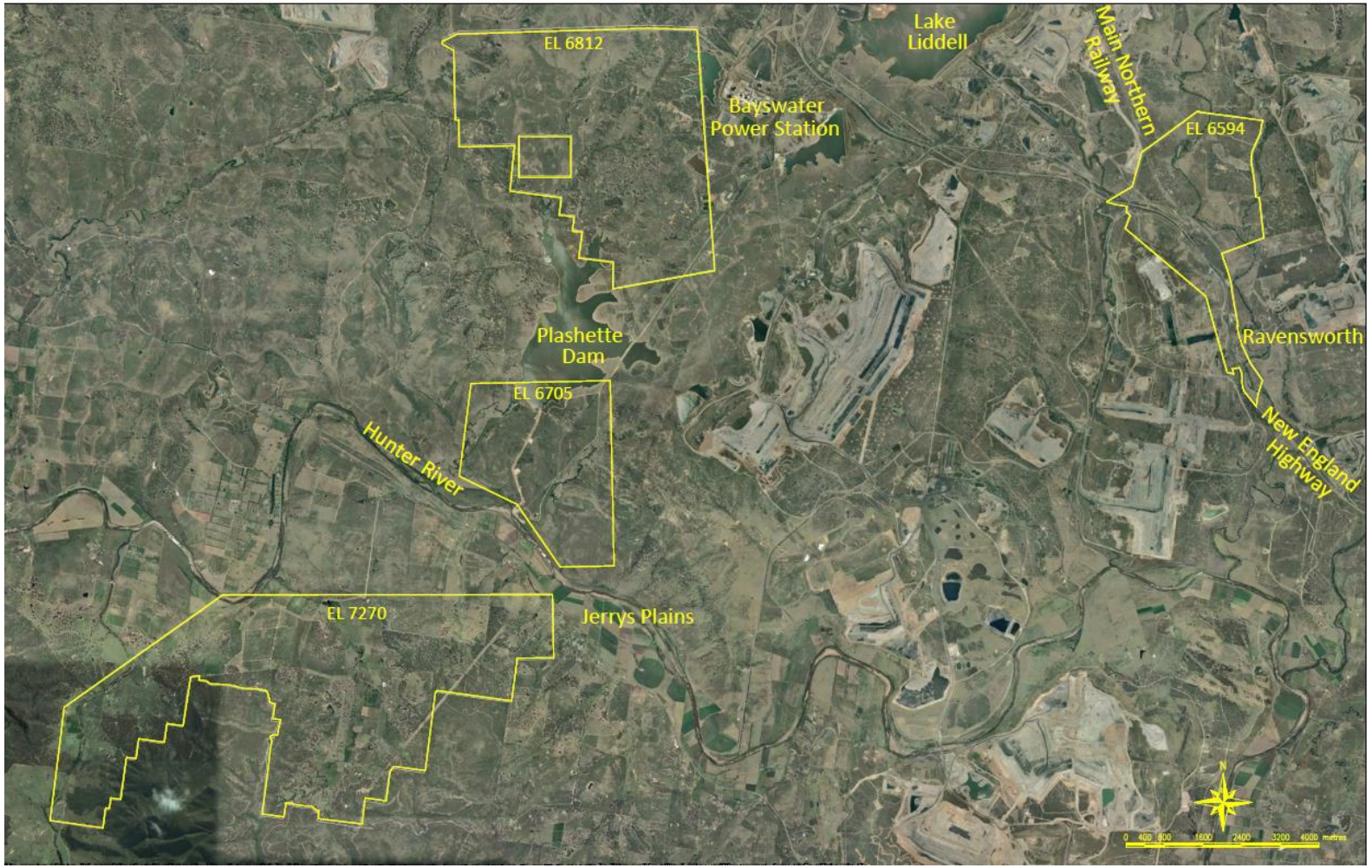
- purchased Doyles Creek Mining (DCM) from existing shareholders by issuing new shares worth $94m (just like IGO recently announced that they will buy Sirius – absolutely no difference)
- Raised $10m from issuing new shares at 20 cents per share
- Relisted on the ASX pursuant to a prospectus lodged with ASIC and ASX containing relevant legal, investigating accountants, independent geologists reports – none questioned the validity of the EL grant
- The prospectus elaborated the usual risks of a listing of this type, but certainly did not include the risk that the EL might have been improperly granted (would ASIC and ASX let such a prospectus through? But ICAC never called a witness from these bodies to the Public Inquiry)
- Significant escrow periods placed on some of the original DCM shareholders.

NuCoal Achievements

- NuCoal fully executed the requirements of the EL and achieved 100% compliance in a detailed compliance review of EL 7270
- Spent $40m on the project by
  - Drilling 52 holes; establishing a JORC resource of 512Mt in 5 seams, purchasing all required land, Completing Concept and Pre Feasibility Studies
- Project Overview document submitted to NSW Department of Planning and Infrastructure for the Doyles Creek Project. Director Generals Requirements were received in May 2012
- Executed Joint Venture documents with Mitsui Matsushima for them to earn up to 10% of the Doyles Creek Project Joint Venture by spending $40m
- Strategic Plashett acquisition Share Sale & Purchase Agreement executed
- Recruited Director of Doyles Creek Training School and completed construction of Stage 1 Training School Facilities

Does this sound like a company involved in some sort of "get rich quick" scheme?

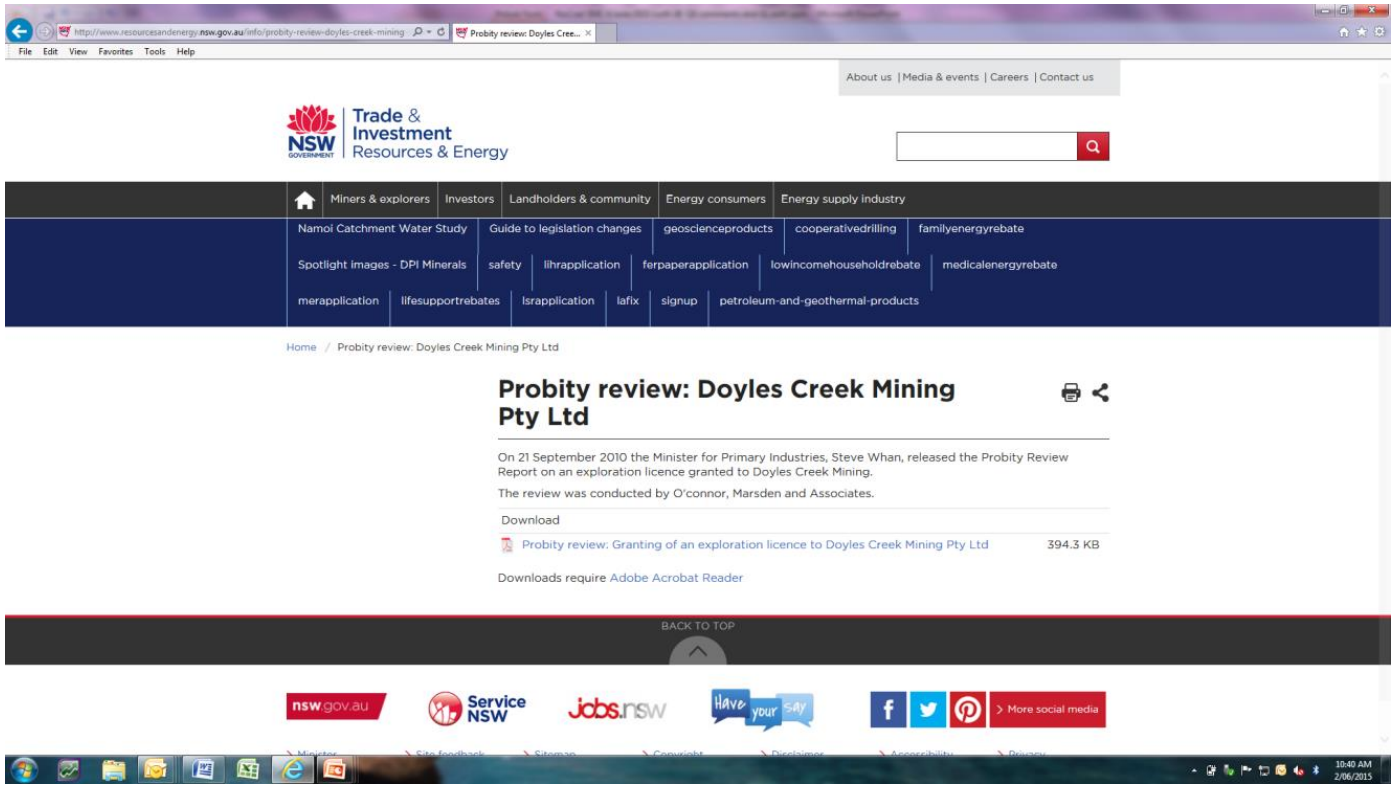
Strategic Development Approach



Probity Report

In August 2010 in response to questions raised by the Opposition, NSW (Labor) Government commissioned a probity report into the EL award that stated the Minister acted within his powers

— still on Trade and Investment website 2/6/15



Clayton Utz Report

- In November 2011 the newly elected O'Farrell Government tabled a report by Clayton Utz into the award of EL 7270
- This report recommended the establishment of a Special Commission to investigate the matter fully rather than ICAC noting….. "only a Special Commission can properly investigate"
- The O'Farrell Government ignored the recommendation and led the Parliament to refer the matter to the ICAC
  - Why did Government ignore the recommendation?

Acacia Reports

ICAC Operation Acacia produced two reports

1. June 2013
   - McDonald corrupt for awarding EL7270 to his "mate" Maitland
   - Maitland, Ransley, Poole, Chester corrupt for offering misleading information (eg a fraud) – but Department actually said in evidence they were not misled!
   - During the hearings ICAC explored the possibility of not cancelling the licence if NuCoal paid some more money. NuCoal agreed but that idea disappeared without a trace!
   - No NuCoal independent directors questioned or called as witnesses!

2. December 2013
   - EL7270 to be expunged by special legislation as the Government might lose if they attempted to expunge through normal court processes (eg Metgasco)
   - ICAC couldn't find NuCoal guilty of anything, still needed to demonise NuCoal, so it found
     - not a third party purchaser for value without notice (surely a decision for a real court?)
     - there was "notorious public controversy" so investors acquired shares with awareness of risks re validity of the licence (evidence shows exact opposite; contemporaneously Barry O'Farrell not aware of notoriety stating on Channel 9 that NuCoal shareholders were "innocent parties")
     - NuCoal deliberately relisted in WA to avoid investors getting to know about the "controversy"- (seriously?)
     - Prospectus anticipated the EL award could be faulty- (seriously?)
   - ICAC said "consideration should be given to paying compensation to innocent parties" (Pontius Pilate recommendation)

Compensation?

- ICAC recommended that the NSW Government consider compensation for innocent parties – rejected by the Parliament
- It also recommended that the Yarrawa EL (mostly Whitehaven) remain in force because it had a vast number of “innocent investors” (total of one short paragraph in the report!) - accepted by Government
- To this day Yarrawa is still reputedly part owned by Obeid interests
- NuCoal only has 3,400+ shareholders…obviously not vast enough!

Mining Amendment Act 2014

- Government asked NuCoal to “show cause” why the EL shouldn’t be cancelled
- NuCoal filed a detailed submission (on time) in Jan 2014, but one week later the NSW Parliament passed an amazing law, which
  - Cancelled EL7270
  - Indemnified the State against any legal actions
  - Indemnified NSW officers against legal action
  - Took ownership of all Exploration data and studies from Doyles Creek Mining
  - Denied any compensation for these actions
- Clearly the law was already being drafted when the show cause notice was issued!
- Politicians from all sides in both houses voted for the Law (how many had read the ICAC transcripts? How many read NuCoal’s submission?)
  - One has subsequently said he did the wrong thing
- Barry O’Farrell defended it at a Community Cabinet in Maitland on 10 February 2014 - said he would have given compensation but the State didn’t have any money!
- NuCoal Directors complained that Barry O’Farrell made defamatory remarks after this meeting. Barry O’Farrell subsequently publicly apologised, corrected the record and paid significant legal costs, but only after a year of being pursued by NuCoal Directors.

What does all this mean?

- NuCoal has been unjustly treated by the NSW Government acting on the “results” of a flawed ICAC process
- What should have been done?
- What will happen from here?

Unjustly treated

- NuCoal didn't know and couldn't have known there was anything wrong with the grant of the licence (even if there was). Due Diligence during the listing raised no concerns
- NuCoal truly is a third party purchaser for value without notice. If this is an issue it is one for a real court to determine- not an ICAC. Lots of case law supports our position
- Rationalisations made by the ICAC concerning NuCoal having itself to blame are unsupportable on the evidence
  - But you can see why ICAC said these things
  - It had to make NuCoal out to be guilty of something!

Flawed process

- The ICAC failed to do its job. It didn't allow any evidence or opinions contrary to its own beliefs to be put forward in the Public Inquiry. No independent expert witnesses, no right to call witnesses, minimal cross examination, no defensible logic…

> **"This inquiry is to be conducted by myself as Commissioner, this means that it is I and I alone who will decide what witnesses are to be called, it is also for me to decide to what matters their evidence will be directed. I also have to determine how witnesses will be examined bearing in mind the inquisitorial rather than the adversarial nature of the inquiry."**
>
> (Commissioner Ipp quote)

- The Parliament was given minimal time to consider the proposed new Law. The Amendment Law was clearly being drafted while NuCoal's "show cause" submission was supposed to be under consideration
- Commissioner Latham has publicly stated the ICAC process is .."like picking wings off butterflies", and a "lot of fun"…..

Poole vs Chubb

- Even though NuCoal's case is independent of whether there was or wasn't a problem with the EL award, what if there actually wasn't any corruption?
- This proposition was tested in Poole vs Chubb in Feb 2015
  - Poole sued Chubb for his D&O costs. After an exhaustive 16 day Supreme Court hearing the judgement was (based on real "evidence" before the Court)
  - Minister not corrupt; Maitland not corrupt; Poole not corrupt
  - No proof that Maitland was a mate of McDonald
  - There was no "notorious public controversy"
  - Poole awarded D&O and all legal costs. Chubb didn't appeal

This "inconvenient decision" has been completely ignored by ICAC and NSW politicians

What should have been done?

- On many occasions NuCoal implored the O'Farrell Government to sit down and discuss the matter; this was absolutely and completely rejected
- The Government had a large number of alternatives
  - Let a real court determine the facts, including NuCoal's third party status
  - Continue the EL while pursuing allegedly corrupt participants
  - Ask for more money
  - Pay compensation as suggested by ICAC
- Barry O'Farrell even said he supported paying compensation but that NSW "had no money".

What will happen now?

- HCA challenge defeated – “legislative detriment should not be equated with legislative punishment”
  - State’s rights to expropriate without compensation are upheld
  - All States except Tas supported this right – so expect they will use it when it suits their political causes in the future
- JR verdict pending- Strategy will depend on the outcome
- AUSFTA action being pursued
- Complaint to ICAC Inspector being submitted, copy also to be sent to Gleeson/McClintock review of ICAC
- Today NuCoal is calling for a full Parliamentary Enquiry
- NuCoal will continue to highlight the incredible sovereign risk that is now over NSW as a result of this debacle
  - Submission made to poles and wires investigation
  - Prospectuses now need to include the specific risk that Government can expropriate without compensation by simply legislating away your rights

The NuCoal Story

- NuCoal has no intention of “going away”
- Today NuCoal is calling for a full scale Parliamentary Enquiry into the process and independence of ICAC during Operation Acacia so that the real truth about how ICAC went about its task, including specific reference to the interactions it had with the Government, can be made public

“Justice will be done in the end – because if it isn’t……. its not the end”

(Howarth, 2014)

Thank you

ASX code NCR

ANNEXURE B

NUCOAL RESOURCES LIMITED v THE INDEPENDENT COMMISSION AGAINST CORRUPTION

SUPREME COURT OF NEW SOUTH WALES: PROCEEDINGS 2014/78434

FILED

17 JUN 2014

SUBMISSIONS OF THE PLAINTIFF

NL

Part A: Background

1. On 23 November 2011, pursuant to s.73 of the *Independent Commission Against Corruption Act* 1988 ("**ICAC Act**" or "**Act**"), the Parliament of New South Wales ("**NSW Parliament**") referred five questions to the defendant, the Independent Commission Against Corruption ("**ICAC**" or "**Commission**"), about the conduct of Mr Ian Macdonald in 2007 and 2008, as the relevant Government Minister,[1] in approving the grant of Exploration Licence 7270 ("**EL 7270**") to Doyles Creek Mining Pty Ltd ("**DCM**"). The questions relevantly included:

> *"(1) What were the circumstances surrounding the application for and allocation of EL 7270 to DCM?*
>
> *(2) What were the circumstances surrounding the making of profits, if any, by the shareholders of NuCoal Resources NL (the proprietor of DCM)?*
>
> *(3) **Whether recommendations should be made to the NSW Government with respect to licences or leases under the Mining Act over the Doyles Creek Area?**"* (emphasis added)

2. It was alleged that Mr Macdonald had improperly approved the allocation of EL 7270 to DCM as a result of his relationship with Mr John Maitland, Mr Andrew Poole and Mr Craig Ransley. Each of those individuals was a shareholder or officer of DCM or both.

3. The plaintiff, NuCoal Resources Limited ("**NuCoal**"), purchased all of the shares in DCM in early 2010, some 14 months after EL 7270 was granted to DCM.[2] DCM became a wholly-owned subsidiary of NuCoal. As part of the same transaction, shares in NuCoal were offered to the public. Since that time, some 3,500 people have invested in NuCoal, including Taurus Resources Limited Partnership ("**Taurus**").[3] NuCoal was not the subject of investigation by ICAC but its interests, as the owner of DCM and therefore, in substance, the holder of the licence, were potentially seriously affected by Question 3 of ICAC's terms of reference.[4]

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[1] Mr Macdonald was the Minister for Primary Industries and for Mining Resources

[2] The purchase was effected by means of a back-door listing on the ASX. This involved the use of an existing shelf company, Supersorb Resources NL Ltd ("**Supersorb**"), purchasing DCM and, in turn, making a public offering of shares to raise capital. Supersorb was re-named NuCoal Resources as part of the transaction.

[3] Taurus is an independent, global fund manager whose clients include US Investors who hold 18.92% of NuCoal's shares.

[4] Question 3 only became relevant if there were findings of corrupt conduct in relation to one or more of Messrs Maitland, Ransley or Poole.

4. ICAC conducted public hearings at which NuCoal appeared. NuCoal was represented by solicitors and junior and senior counsel. The hearings comprised examinations by Counsel Assisting and cross-examination with leave by interested parties, including NuCoal. NuCoal provided evidence to the Commission and provided documents pursuant to notices to produce from the Commission. At the end of the oral hearings, Counsel Assisting, NuCoal and other parties provided written submissions.

5. In August 2013, pursuant to s.74 of the Act, the Commissioner of ICAC, provided the NSW Parliament with a Report dealing with Questions 1 and 2 ("**First Report**"). It made findings of corrupt conduct in respect of Messrs MacDonald, Maitland, Poole, Ransley and Chester but no findings of any sort in respect of DCM.[5] In December 2013, the Commissioner provided the NSW Parliament with a Report dealing with Questions 3, 4 and 5 ("**Second Report**").[6]

6. In the Second Report, ICAC found that the process leading to the approval and granting of EL7270 was so "*tainted by corruption*" that the licence should be expunged or revoked. ICAC made a number of other findings affecting NuCoal, set out at pages 16 to 17 of the Second Report, which were the apparent basis for the conclusion that EL7270 be revoked or expunged.

7. ICAC recommended that the NSW Government consider enacting legislation to expunge EL7270 as the "*preferable method of expunging or cancelling the relevant authorities*". On 31 January 2014, the NSW Parliament enacted the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* ("**Expunging Act**"). The Expunging Act made amendments to the *Mining Act 1992* ("**Mining Act**") such that EL7270 was cancelled, no compensation was payable by the State of New South Wales, and the State absolved itself from vicarious liability for the acts of its Minister.[7]

8. The effect on NuCoal of ICAC's findings and opinions (and consequent recommendations), and the Expunging Legislation, was profound. The only valuable asset held by DCM was taken by the State. That asset was valuable and no compensation was provided by the State, either in respect of the licence itself or the large sums expended (in excess of $25 million) by NuCoal in exploration and related activities in reliance on the licence.

9. In these proceedings, NuCoal challenges the findings made by ICAC in respect of the revocation or expunging of EL7270. NuCoal's case is that ICAC had a duty "*to fully investigate*" the matter that was referred by Parliament: s.73 ICAC Act. It was obliged to furnish a report to Parliament: s.74. It was expressly

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[5] It should be noted that nothing in these submissions should be taken as implying or otherwise suggesting that NuCoal accepts that the findings made in the First Report were correct or made in proper discharge of the Commission's statutory functions. NuCoal reserves its position as to the correctness of the findings in the First Report and the question of whether the Commission made errors (jurisdictional or non-jurisdictional error of law on the face of the record) in respect of the findings in the First Report.

[6] In fact there were three reports. The first report was about Operation Jasper, which dealt with Mr Macdonald's association with Mr Eddie Obeid and others and their role in the granting of mining licences to other entities such as Cascade Coal Pty Ltd in which Mr Obeid had an interest.

[7] Schedule 6A of the *Mining Act 1992* as amended: s.6; s.7. It was noted that the Act was passed in light of the findings of the Commission in relation to corrupt conduct.

authorised, and impliedly obliged,[8] to provide reasons for its findings, opinions and recommendations. It was a necessary element of the statutory duty to fully investigate and to report that the Commission address, consider and engage with the arguments and issues raised by NuCoal (as a person directly affected by the Commission's recommendation) where those arguments and issues were relevant to the question identified by the Commission as dispositive and went to meeting or otherwise refuting the findings made by the Commission.

10. The Commission's reasons adopted almost *verbatim* the submissions of counsel assisting. They did so without any reference to the plaintiff's submissions and the issues raised by them. The Commission did not give any reasons for the rejection of the plaintiff's submissions.[9] In providing its reasons in the manner it did, the Commission failed:

    a. to provide adequate reasons;

    b. to address matters put by the plaintiff that were centrally relevant to the Commission's view and which went to the core duty of the Commission under the Act;

    c. to address a "*substantial, clearly articulated argument relying upon established facts*";[10]

    d. to address any integer of the plaintiff's claims;[11]

    e. to take into account a mandatory consideration, being cogent submissions, made on behalf of NuCoal going directly to the matters on which its finding, opinions and recommendations were based.

    By virtue of (a) to (e) above, the Commission failed to discharge its statutory function to fully investigate and report on the matters referred to it by the NSW Parliament in Question 3. Further, the Commission breached its duty of procedural fairness to the plaintiff.

Part B: ICAC's duty to investigate and report

11. ICAC is a statutory corporation whose constitution is referrable to the objects of the ICAC Act, including the constitution of ICAC as an independent and accountable body "*to investigate, expose and prevent corruption*": s.2A(a)(i). ICAC's functions are set out in Part 4 of the ICAC Act. Part 4 identifies in s.13 the principal functions of ICAC under the Act. Relevantly, those functions include (emphasis added):

    a. "*to* ***investigate any matter referred to the Commission*** *by both Houses of Parliament*: s.13(1)(b);

    b. "*the power to* ***make findings and form opinions, on the basis of results of its investigations****, in respect of any conduct, circumstances or events with which its*

[8] *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242.
[9] Apart from stating that the Commisssion's views were "*largely based on the following points made counsel assisting, which the Commission accepts*".
[10] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2004) 77 ALJR 1088; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No.2)* (2003) 144 FCR 1.
[11] *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244.

investigations are concerned, whether or not the findings or opinions relate to corrupt conduct": s.13(3)(a);

c. "*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***": s.13(3)(b).

12. Part 8 of the Act deals with the power of the NSW Parliament to refer matters to ICAC. That power relates to "*any matter as referred to in section 13*"; the power of referral extends only so far as those matters provided for in respect of ICAC's principal functions as set out in s.13 of the Act: s.73(1). Section 73(2) provides:

> "*It is the* ***duty*** *of the Commission* ***to fully investigate a matter so referred*** *to it for* ***investigation***" (emphasis added).

13. Further, the Commission, pursuant to s.74:

> "***shall prepare reports*** *in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses*" s.74(2) (emphasis added);
>
> "***shall furnish reports*** *prepared as soon as possible after the Commission has concluded its involvement in the matter*": s.74(4) (emphasis added).

14. In respect of the reports provided by ICAC under s.74, ICAC is authorised to include statements as to any of its findings, opinions and recommendations as well as the Commission's reasons for any of its findings, opinions and recommendations: s.74A(1)(a); s.74A(1)(b).

15. Central to ICAC's statutory functions under the Act is the requirement "*to investigate*" and "*to report*". ICAC's principal functions are investigative; its other functions, as delineated in s.13 and in Part 4 more generally, are referrable to those investigative functions, including the power to make findings, reach conclusions or make recommendations.

16. An "*investigation*" is defined as an investigation under the Act: s.3(1); to "*investigate*" is stated to include "*examine*" but is not otherwise defined: s.3(1). The use of the term "*examine*" is consistent with the natural meaning of the term "*investigate*". In the Macquarie Dictionary the verb "*investigate*" is stated to mean "*to search or inquire into; search or examine; examine in detail*"; the Oxford English Dictionary has a similar meaning including "*to examine systematically or in detail*". The noun "*investigation*" is stated to mean "*a searching inquiry in order to ascertain facts; a detailed or careful examination*".

17. Thus, in its natural meaning, the terms "*investigate*" or "*investigation*" focus on the activity or process of examining or enquiring into a matter or circumstance, systematically and in detail, in order to establish a fact or conclusion.[12] The process of examination has the connotation of something looked at closely and analytically assessed; similarly, the notion of enquiry conveys a process of questioning in order to gain knowledge about a thing or circumstance.

18. Where the investigative power is engaged by Parliamentary referral, then ICAC has a "*duty*" to "*fully investigate*" the matter. Where ICAC's function is stated to

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[12] Where that conclusion takes the form of a finding, opinion or recommendation.

be "*to investigate*" (by virtue of s.13(2)) it may be readily concluded that the inclusion of the adverb "*fully*" was an important legislative addition. The adverb "fully" has a number of meanings: "*completely; entirely; to the fullest degree*" (Macquarie Dictionary); and "*in a full manner or degree; without deficiency; thoroughly* ("Oxford English Dictionary).

19. The use of the word "*duty*" is a clear indication that the process is mandatory. The mandatory nature of the requirement operates in two ways in the statutory scheme. First, ICAC is not permitted to decline to act or to discontinue its investigation as it may otherwise do pursuant to s.20. Secondly, ICAC must "*fully investigate*" the referred matter.

20. The Commission has a related mandatory requirement. Upon the completion of its investigation, it must prepare a report and furnish that report to the Parliament, pursuant to s.74. The requirement to prepare a report is one that relates to "*a matter referred to the Commission by both Houses of Parliament, as directed by those Houses*".

21. ICAC is, pursuant to s.74(1), authorised to include in any report not only statements of its "*findings, opinions and recommendations*" but also reasons for those findings, opinions and recommendations. Read in the statutory context, including the purpose of any report to be made to Parliament, the Commission is under an obligation to provide reasons in respect of its findings, opinions and recommendations: *per* Basten JA in *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 at [214].

Part C: The Commission's findings in relation to Question 3

22. Counsel Assisting identified a number of matters to be considered in relation to Question 3, specifically whether EL7270 could "*be impugned or revoked by administrative, legislative or curial intervention*".[13] Both the Commissioner and the parties appearing before the Commissioner referred to the issues in Question 3 in these terms. The Commissioner identified NuCoal's "*innocence of any wrong doing*" and Senior Counsel for NuCoal referred to "*law reform and what the recommendation*[s] *to Government are going to be*".[14] The specific aspects of the question of the future treatment of EL7270 were identified by the Commissioner later in the hearings where he noted that:[15]

> "*..if corrupt conduct is found there are two obvious courses the Commission may take in relation to item three of the scope. One is to recommend to the Government that there should be no mining lease, two is that the Commission should recommend to the Government that the Mining Lease should stand and with no conditions*".

It may be readily inferred that in respect of the option of "*no mining lease*" that this impliedly referred to what Counsel Assisting described as the impugning or revoking of EL7270. It was thus apparent to the Commission, Counsel Assisting and NuCoal that the central matter going to a determination of the answer to Question 3 was whether EL7270 should be expunged or revoked.[16]

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[13] At 4888T (18/03/2013).
[14] At 4913T (20/03/2013).
[15] At 6940T (22/04/2013).
[16] In this respect, it should be noted that the second option was merely one of the consequences of not accepting the first option: that is, if the Commission were not to recommend the expunging

23. The Commissioner identified one specific issue that he considered to be relevant to Question 3. Initially, this was identified as the question of:

> *"whether the acquisition of the shares by the new shareholders and the direction undertaken by the new NuCoal was,..undertaken without any knowledge of any risk – if that's what your case is, but the issue of risk would have to be something relevant to the second leg of the enquiry"*[17].

Later, the Commissioner returned to the issue of risk. He confirmed that the options he had identified were of relevance to Question 3 but without foreclosing other matters raised by the submissions of the relevant parties.[18] The Commissioner then stated:[19]

> *"I anticipate that one argument against such recommendation that may be made by NuCoal at least at the level of policy would be that new investors have since bought ino the company and they should not be saddled with the consequences of misdeeds of others should such misdeeds be established. In assessing such an argument it may potentially be relevant to consider whether or not the subsequent investors bought into NuCoal with notice of risk....I do not consider it sensible or desirable for this Commission to investigate the individual knowledge of each and every shareholder of NuCoal as at the time they invested in the company. The material presented by NuCoal indicates it has some 3,500 shareholders and investigation into the state of mind of particular or selected numbers of shareholders would be an impractical task and I do not consider it to be in the public interest to prolong the inquiry....I regard it as being open to the Commission to accept the general overarching material concerning the risk issue that has so far been* [adduced]".

24. It is clear that the Commission's statutory task was undertaken in the following context:

a. central to the determination of matters arising under Question 3 was the issue of whether EL7270 should be expunged or revoked;

b. NuCoal was fundamentally affected by the consideration of that issue specifically and the other matters examined under Question 3;

c. the relevant matters, as identified by the Commissioner himself, included questions of NuCoal's standing as a party "innocent" of wrong-doing and the extent to which NuCoal shareholders invested with notice of the risk.

25. Following the close of evidence in the public hearings, the relevant parties made written submissions to the Commissioner on Question 3.[20] NuCoal provided

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or revocation of the licence then it would necessarily follow that, subject to other statutory requirements under the Mining Act, NuCoal and DCM would have either kept the licence or been permitted to keep the licence with certain conditions. These were, in fact, the options that were identified by the Commission.

[17] At 6195T (11/04/2013). It should be noted that the issue of risk was also canvassed by Darley in exchanges with the Commissioner at 7035T-7036T.

[18] At 7196T at lines 38-50 (30/04/2013).

[19] At 7170 at lines 10-34 (30/04/2013).

[20] Those parties were NuCoal, Darley Australia Pty Ltd ("**Darley**"), Coolmore Australia Pty Ltd ("**Coolmore**"), the Department of Trade and Investment ("**DTI**"), the Department of Planning and Infrastructure ("**DPI**") and Counsel Assisting.

submissions in reply to all of the submissions provided by the other parties. NuCoal made initial submissions to the Commission on 31 May 2013 (and four days later on 3 June, Darley, Coolmore and the DTI also made submissions); the submissions made by Counsel Assisting were provided on 15 June 2013 and were referrable to the material placed before the Commission and the initial submissions. However, NuCoal made further detailed submissions in reply to those of Counsel Assisting (and Darley and Coolmore) on 20 June 2013.

26. The Commissioner made his critical finding in a somewhat unusual way. The Commission had appointed senior and junior counsel as what it described as "Counsel Advising" in order to advise the Commission on various matters arising in relation to Question 3. He noted in the Second Report that in instructing Counsel Advising he had informed Counsel Advising that the Commission:[21]

> "*accepted the submission of Counsel Assisting to the effect that, given that the* ***whole process*** *leading to the giving of consent for application for, and granting of, EL7270* ***was tainted with corruption, all grants under the Mining Act should be revoked or expunged and no pending applications should be granted***" (emphasis added).

27. It is important to note that, notwithstanding its irregular form, this constituted a finding of the Commission that EL7270 should be revoked or expunged. The recommendations that were made in relation to legislative and other approaches to the problem were merely different methods by which the expunging or revocation could be brought about.[22] It is the finding that the licence should be expunged or revoked that is the central conclusion reached by the Commission. That is entirely consistent with how Question 3 had been addressed from the beginning of the public hearings.

28. The Commission's "view" was that:

> "*the slate should be* ***wiped clean by revoking or expunging all instruments granted under the Mining Act in respect of the Doyles Creek area*** *(to the extent that it is necessary to do so) and* ***by not granting further instruments in respect of the pending applications***" (emphasis added).

29. The Commission went on to identify – in nine sub-paragraphs, a number of other findings that formed the basis for the Commission's opinion. A detailed analysis of these findings is set out in Appendix A to these submissions. As the analysis in Appendix A demonstrates, the findings that the Commission made in respect of NuCoal were, apart from some minor editing, taken *verbatim* from the submissions of Counsel Assisting. A textual comparison between the Commission's reasons and the submissions of Counsel Assisting is set out in Appendix B to these submissions. The reasons make no reference at all to the submissions made by NuCoal or any of the issues or claims articulated in those submissions. No reasons were given by the Commission for the rejection of those submissions other than a brief statement accepting the points made by Counsel Assisting.

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[21] The ICAC Second Report dated December 2013, at page 15.

[22] Save for the pertinent difference that the legislative option ultimately preferred by the Commission left NuCoal with effectively no avenues for legal recourse by comparison with other possible methods.

Part D: Applicable principles

30. ICAC is subject to judicial review in the court's supervisory jurisdiction; ICAC must perform its statutory functions according to law: *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 130; *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 at 27. The importance of supervisory curial review is underlined by ICAC's statutory mandate to investigate, report and expose corruption, or matters incidental to or connected with corrupt conduct: *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207; *Greiner* at 130; *Chaffey* at 27. The task is of great public importance but one without any right of appeal; its investigations can have "*devastating consequences for individuals*" and significant reputational impact: *per* Gleeson CJ in *Greiner* at 131; *per* Gleeson CJ in *Chaffey* at 27.

31. The scope of judicial review in respect of the Commission is wide; it covers both jurisdictional error and non-jurisdictional error of law on the face of the record: *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [204]. The "record" includes the reasons expressed by the tribunal: s.69(4) *Supreme Court Act* 1970. ICAC has a duty of procedural fairness: *per* Gleeson CJ in *Chaffey* at 27; *Duncan v Ipp* [2013] NSWCA 314 at [78]. ICAC has, subject to the relevant terms of the statute, a duty to have regard to a mandatory relevant consideration as that concept was understood and discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 38.

32. The Commission is required to follow a particular process of reasoning, referable to the statutory context: *per* Gleeson CJ in *Greiner* at 130. The Commission has an implied duty to give reasons for its findings or opinions: *per* Beazley P in *D'Amore* at [100]; *per* Basten JA in *D'Amore* at [214] (Bathurst CJ agreeing). In *D'Amore* the Court stated that the reasoning of Hayne J in *Waterways Authority v Fitzgibbon* [2005] 79 ALJR 1816 was applicable to ICAC.[23]; where no reasons are given for accepting the evidence of a particular witness or for its rejection then the task of fact-finding miscarries: *per* Beazley P at [100]-[104]. Her Honour noted:

> "*The expressed reasons of an administrative decision maker should, in my opinion, make it apparent that this reasoning process has been undertaken. This is particularly so in the case where the administrative process involves a formal public hearing, by a Tribunal conducted in a way that is essentially adversarial in nature and where the consequences, if adverse findings are made, are potentially very grave for the individual concerned.*"

33. ICAC's reasoning should inform and be consistent with the reasoning process that ICAC is required to engage in in coming to its ultimate finding: *per* Beazley P at [104] citing *Minister for Immigration and Multicultural Affairs v Wu Shan Liang* (1986) 185 CLR 259 at 272; *Greiner* at 136. Where there is a "patent error" by ICAC which involves a sufficiently serious failure to deal with part of an applicant's claim such that it constitutes a failure to exercise jurisdiction then it may be vulnerable to review: *per* Basten JA at [230] citing *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [46].

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[23] "*...the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact finding, it is revealed as* ***a failure to examine all of the material relevant to the particular issue***" (emphasis added): per Hayne J at 79.

34. The drawing of inferences from a failure to expressly make findings, express reasons or refer to submissions or issues is referable to the statutory framework under which the tribunal operates: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. In this case, given the important statutory function that the report fulfils, it is implicit that the reasons in the report must identify the "*actual path of reasoning*" used by the Commission in order to arrive at the opinion that it did.[24] In doing so, given the duty in s.73, the reasons must also reflect the process of full investigation that ICAC is required to carry out. That means that, at least in respect of the reasons identified in any report that underpin the relevant finding or opinion, the Commission must have fully evaluated (that is, examined) all of the matters relevant to the finding and the reasons supporting that finding. The reasons must sufficiently expose the matters it considered, and the matters it considered material, in order to allow the parties to understand the basis of its recommendations and a court to conduct any review: *per* McHugh, Gummow and Hayne JJ in *Yusuf* at 330, 346; [5], [69]. In this context, the considerations advanced by the parties have a role in establishing what is or is not a relevant consideration: *per* McHugh, Gummow and Hayne JJ in *Yusuf* at 348, [74].

35. Further, the written reasons must be adequate bearing in mind the statutory task that has to be discharged.[25] It has been said that a court does not adequately engage with the cases presented by each party "*by setting out the evidence adduced by one side, setting out the evidence on the other side, and saying that the judge prefers one body of evidence to another*": *Keith v Gal* [2013] NSWCA 339 at [113]. It is submitted that, in the context of the Commission's statutory duties, such an approach is at least equally impermissible.[26]

36. The Full Court of the Federal Court in *Soliman v University of Technology, Sydney* [2012] FCAFC 146 noted that, in the appropriate context (of an obligation to give reasons) a failure to mention a matter may support a conclusion that the matter was not in fact considered. Further, it may justify an inference being drawn that the matter was not taken into account.[27] It went on to note that even in the absence of a statutory requirement to give reasons or make findings:

> "*a failure to address a submission centrally relevant to the decision being made may similarly found a basis for concluding that the submission has not been taken into account*" (at [55])[28].

37. The Full Court noted that despite the well-established principle that an administrative decision should not be read with eye keenly attuned to discovering error (in the words of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259) that principle must not be

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[24] *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 at [48].

[25] Note that "*if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason*": *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 663-4 (Gibbs CJ); *SZGUR* [69]-[70] (Gummow J) (Heydon J agreeing at [91]) (Crennan J agreeing at [92]).

[26] It is "*not appropriate...to set out the evidence of both sides and say 'I believe Mr X and not Mr Y' and judgment follows accordingly*": *per* Ipp JA in *Goodrich Aerospace Pty Ltd v Arsic* [2006] NSWCA 187.

[27] See *Sullivan v Department of Transport* (1978) 20 ALR 323; *Alexander v Australian Community Pharmacy Authority* [2010] FCA 189. It should be noted that this discussion was in the context of an express statutory requirement to give reasons. However, the principle is applicable in the present case by extension, where the relevant duty is implied.

[28] Citing *WAFP v Minister for Immigration and Multicultural & Indigenous Affairs* [2003] FCAFC 319 at [21].

applied in such a way as to "*avoid discerning an absence of reasons or reasons devoid of any consideration of a submission central to a party's case*": (at [57]). In that regard, the Full Court went on to note that three significant factors in assessing whether such a case was made out were:

a. that the decision was provided by an experienced senior person with legal qualifications;

b. that the person had the benefit of submissions filed by experienced legal practitioners; and

c. that any reading of the findings and reasons "*disclose no real attempt to engage with the submissions being advanced*".[29]

38. This analysis was taken up by a differently constituted Full Court in *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157. The Court went on to find that although there was no unqualified and universally applicable legal requirement to refer to every submission advanced:

> "*Much depends upon the importance of the submission to the claims being made. A failure to address a submission which is 'significant' and which touches upon the 'core duty' being discharged or which is 'centrally relevant' to the decision being made may in some circumstances found a conclusion that it has not been taken into account and may thereby expose jurisdictional error*" (at [47])[30].

39. In this context, and in the context of the particular factual circumstances of the present case, a number of authorities have dealt with the difficulties that may arise from a court or tribunal copying the submissions of a particular party. These authorities were discussed in some detail by the Full Court of the Federal Court in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 (***LVR***).[31] The situation in *LVR* was conceptually similar to the position in the current case (albeit that in *LVR* the copying of material from counsel's submissions was not acknowledged). The Court in LVR found that the nature and extent of the copying, and the inference that could be drawn from that copying about the decision-maker's assessment of critical evidence, was such that the tribunal failed to discharge its statutory role.

40. In *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2004) 77 ALJR 1088 the High Court noted that a failure to respond to a "*substantial, clearly articulated argument relying upon established facts*" would constitute a failure to accord natural justice (*per* Gummow and Callinan JJ at 1092; Hayne J agreeing at 1102); *NABE v Minister for Immigration and Multicultural and Indigenous Affairs*

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[29] See also, *SZSHK v Minister for Immigration and Border Protection* [2013] FCAFC 125 at [37].

[30] Citations omitted. The authorities relied upon were: *Fox v Australian Industrial Relations Commission* [2007] FCAFC 150 at [39]; *WAFP v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 319 at [21]; *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [55].

[31] Notably, *Huluba v Minister for Immigration & Anor* (1995) 59 FCR 518 (use of same language on critical aspects of the decision-making process made it more probable than not that the relevant decision-maker did not apply an independent mind)'; *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107 at [6] (the dangers of copying material); *Pollard v Wilson* [2010] NSWCA 68 at [166] (adoption of submissions of counsel by a judge where submissions contained various assertions and the judge did not indicate by reasons how the assertions had been assessed or whether they were justified by the evidence.

(No.2) (2003) 144 FCR 1.[32] A conceptually similar failure occurs where a tribunal fails to deal with the integers of a claim: *per* Allsop J in *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at [42]. In this context, it was noted in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [46]-[47] (***WAEE***) that:

> *"Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked."*

41. A failure to respond to or engage with a particular argument finds its rationale from, amongst other things, a breach of a duty to have regard to certain considerations and a failure to perform a particular statutory function: *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [375], [377] (Flick J)); *per* North, Logan and Robertson JJ in *LVR* at [91]. The failure is also sometimes described as a failure "*to address a claim or an integer of the claim*": *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 at [143]; *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114 at [64]. In *Tickner v Chapman* (1995) 57 FCR 451, 462 it was observed that consideration "*involves an active intellectual process directed at*" the relevant submission.[33]

Part E: Error on the part of the Commission

42. The nature of the statutory task given to the Commission in this case is plain from the terms of the Act: to fully investigate and prepare and furnish a report to Parliament on Question 3.

43. The Commission has a duty to fully investigate; it is a mandatory consideration, in the sense understood in *Peko-Wallsend*. The concept of "*fully investigate*" is given content by reference to both its ordinary meaning and its statutory context. The phrase, on its ordinary meaning, contemplates a process whereby the Commission examines in detail and considers all issues relevant to any opinion it may form in answering a question referred to it.

44. The Commission's over-arching purpose is to investigate corruption. That purpose, it may be inferred, carries with it a requirement on the Commission to carry out its functions in conformity with the public interest in exposing, controlling and deterring corruption. Its investigative function is central to that public purpose and the nature of the investigations it undertakes must be read conformably with meeting the scope, object and purpose of the Act. Given this, the requirement to fully investigate cannot be read narrowly. Indeed, it should be read beneficially - that is in a manner broad enough to meet the evident public interest that it is designed to serve. It may be inferred that the Commission is not only obliged to examine in detail each question put before the Commission but

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[32] In *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 Gummow J in the Federal Court stated that in considering relevant material placed before him, the Minister's delegate was required to "*give proper, genuine and realistic consideration to the merits of the case*": (at 292). See also *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [26]-[30].

[33] See also *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 180 LGERA 99 at [44]-[45]. *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 at [67]-[68]; *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 at [47] (Dowsett, Flick and Griffiths JJ).

also to provide an adequate indication of why it has come to a particular conclusion that it has. With that comes an attendant requirement to consider fully and properly submissions and claims put to it that are relevant to the Commission's ultimate disposition of the question referred to it.

45. That construction is amplified by the related requirement on the Commission to provide a report on the referred matter. There is an obligation on the Commission to provide reasons. In this context, it is submitted that those reasons must reflect the investigation undertaken (and the matters put in the course of that investigation) so as to meet the requirement that the finding, opinion or recommendation has a "basis" pursuant to s.13(3)(a). The reasons must also be adequate insofar as they must address the path of reasoning that leads the Commission to a particular conclusion or opinion. That requirement is consistent with the nature of the investigative and reporting function and the statutory purpose it is designed to address – namely, the illumination, in the public interest, of what the Commission has learned and the conclusions it has come to about the referred matter. These requirements are underlined in circumstances such as the present case where the Commission's findings, opinions and recommendations have a highly adverse impact on the interests of affected parties as well as a reputational impact.

46. That public interest would clearly not be served – and the broader functions of the Act not be met - were the Commission simply to report on its investigation by providing an answer to the particular question posed. Neither would it be served by the Commission failing to address, engage or give genuine consideration to all matters relevant to the conclusion it reaches (and thereby failing to investigate them). To do so would be inconsistent with the Act's purpose and the nature of the investigation the Commission has a duty to undertake. It would also be inconsistent with the requirement in s.13(3)(a) to identify the basis of any finding or opinion in light of the Commission's investigation.

47. The starting point, in this statutory setting, is the opinion or recommendation that the Commission arrives at in answering the matters referred to it. It is that opinion or recommendation that is the subject of any report and, in turn, must be the subject of both proper investigation and adequate reasons so as allow a proper assessment of the basis upon which the Commission has come to its opinion. The statutory duty to investigate and report engages with the opinion and the reasons provided for that opinion. In addition, it also engages with any issue that the Commission itself identifies as relevant to the referred matter. In either case, the Commission's statutory function requires it to investigate those issues fully in the manner analysed above.

48. In that context, and in the light of the authorities discussed in the previous section, it is submitted that the mandatory requirement to fully investigate and report must, as one of its components, require the Commission to consider and respond to issues put to it that bear on the question or matter referred to it. The scope of that obligation will be framed by reference to the issues that the Commission identifies as relevant or the issues identified by the Commission as forming the basis of its opinion or recommendation (as part of its obligation to give reasons).

49. In light of the above, it is submitted that the Commission was obliged to address, consider or otherwise meaningfully engage with:

a. every submission made by NuCoal which was capable of bearing on the issues identified by the Commission as relevant to the matters referred to it; and

b. every submission made by NuCoal which was capable of bearing on, was relevant to, or which could have refuted, a finding made by the Commission.

50. It is obvious that the findings, opinions or recommendations of the Commission affected the Commission's ultimate recommendation made in the exercise of its statutory functions; namely, the finding that EL7270 should be expunged or revoked. The duty to consider is linked with findings which affected the Commission's performance of its statutory power to fully investigate and prepare reports in respect of the matters referred to it by Parliament. The Commission's findings – as apparently identified in its instructions to Counsel Advising and referred to at pages 16 to 17 of the Second Report - are properly seen as the fruits of its investigative process and the ultimate findings which support the opinion made in the exercise of its statutory function.

51. In that regard, it is worth noting that the matters identified by Counsel Assisting and accepted by the Commission as a critical issue relevant to any opinion or recommendation given in respect of Question 3 were of the highest importance, both as a matter of public interest and the manner in which they affected a particular individual or individuals (NuCoal and its shareholders): namely, whether EL7270 should be expunged or revoked. The seriousness of that issue, and the significant matters of public interest that would bear upon it, were evident, given that were the Commission to form the opinion that the licence should be expunged or revoked such a course would involve, in effect, a taking or expropriation of the asset held by DCM and, by extension, NuCoal.

52. It was evident that the Commissioner, based on his exchanges with Senior Counsel for NuCoal, was aware of the seriousness of the issue. Further, it was evident that the Commissioner understood that, in the broadest terms, NuCoal claimed that it should be treated as the "innocent party" given the particular circumstances in which DCM was purchased and what had occurred since DCM had been purchased and that those matters went directly to the question of whether the licence should be expunged or revoked.

53. NuCoal's arguments, as they were developed over the course of various exchanges between the Commission and its counsel, its evidence and its written submissions, were substantial. For the reasons identified in Appendix A to these submissions they addressed matters that were directly relevant both to the broader issue identified by the Commission and by Counsel Assisting (whether the Commission ought to recommend that EL7270 be expunged or revoked) and they were directly relevant to, and if accepted would have refuted, the findings or reasons relied upon by the Commission in the Second Report as the basis for its final opinion. In that latter respect, it may properly be said that NuCoal's submissions went directly to, and affected, the disposition of the Commission's ultimate statutory function: namely, the decision of the Commission in providing its opinion on Question 3 in the Second Report.

54. The Commission stated that its opinion that the licence should be expunged or revoked was largely based on the "*following points made by Counsel Assisting, which*

the Commission accepts". What followed were a number of points made by Counsel Assisting in their written submissions on Question 3. These points were, for the most part, ones that went to matters relating to NuCoal's knowledge and the risk that shareholders took on. In respect of those findings, certain critical matters must be noted:

a. the findings (based on an "acceptance" of Counsel Assisting's submissions) were an almost *verbatim* "cut and paste" from the words used by Counsel Assisting in the relevant sections of their written submissions;

b. the NuCoal submissions, advanced both orally on occasions and in writing by both senior and junior counsel, were not referred to in any way (whether by way of reasons for rejecting them or even reference to the Commission preferring the arguments advanced by Counsel Assisting);

c. the matters advanced by NuCoal in its submissions (both written and oral) directly met the matters advanced by Counsel Assisting which the Commission then adopted as its reasons;

d. the issues identified by NuCoal in its submissions were directly relevant both to the issues identified by Counsel Assisting and the Commission and those that the Commission had set itself to investigate and resolve: namely, whether EL7270 should be expunged or revoked;

e. the Commissioner was a former judge of the NSW Court of Appeal and therefore in a position to weigh and assess legal and factual submissions and had the professional capacity to identify issues being advanced by the interested parties in relation to Question 3; and

f. the submissions of Counsel Assisting necessarily could not be responsive to the matters addressed by NuCoal in its reply submissions yet the Commission was content to adopt them in their entirety, in an almost identical form, and without reference to the many competing considerations set out in NuCoal's submissions.

55. In those circumstances, it should be inferred that the Commission failed to address, consider or otherwise properly engage with the case made by NuCoal. The duty to address, consider and engage with matters raised by an affected party under the Act arises as a necessary element of the Commission's statutory duty to fully investigate and to report. There was a failure to address, consider or engage with relevant arguments or issues raised by NuCoal. The Commission thereby failed:

a. to provide adequate reasons;

b. to address matters put by the plaintiff that were centrally relevant to the Commission's view and which went to the core duty of the Commission under the Act;

c. to address a "*substantial, clearly articulated argument relying upon established facts*";

d. to address an integer of the plaintiff's claims;

e. to take into account a mandatory consideration, being the cogent submissions made on behalf of NuCoal going directly to the matters on which its findings, opinions and recommendations were based.

56. The Commission failed to discharge its statutory function. The Second Report was prepared in a manner that did not conform to the requirements of the Commission's duty under the Act. The Commission also breached its duty of procedural fairness.

Part F: conclusion and relief sought

57. For the reasons set out above, the Commission failed to address or consider the critical arguments (and issues) advanced by NuCoal in relation to the matters relevant to the Commission's findings, opinions and recommendations and which went directly to the matters on which the Commission's findings, opinions and recommendations were based. That failure was a jurisdictional error. The plaintiff is entitled to:

a. the declaratory orders in the terms set out in its summons: *per* Gleeson CJ at 148 and Mahoney JA at 193 in *Greiner*;

b. alternatively to (a) above, a declaration that the Defendant, in making its finding that EL7270 should be expunged or revoked in its report dated December 2013 entitled "*Operations Jasper and Acacia – Addressing Outstanding Questions*" did not act in accordance with law.

c. such other relief as the court considers appropriate, including an order in the nature of *certiorari.*

d. costs.

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Date: 27 June 2014

NUCOAL RESOURCES LIMITED v THE INDEPENDENT COMMISSION AGAINST CORRUPTION

SUPREME COURT OF NEW SOUTH WALES: PROCEEDINGS 2014/78434

APPENDIX A TO THE SUBMISSIONS OF THE PLAINTIFF

The Commission's findings, apart from some minor editing, were taken *verbatim* from the submissions of Counsel Assisting. For the purposes of comparison, Table 1 sets out in full the relevant findings of the Commission and the submissions of Counsel Assisting and Darley on which these findings were based.

DCM was the owner of EL7270

1. In sub-paragraph (a) of the Commission's findings it found as follows:[1]

> *"EL7270 was obtained by DCM and is still held by it. The EL is not transferable. The position of NuCoal is not comparable to that of a bona fide purchaser for value and without notice. NuCoal is merely a shareholder of DCM"*

2. Save for some minor stylistic amendments and the removal of references, this passage is identical to the one dealing with the same topic in the submissions of Counsel Assisting.[2] In turn, Counsel Assisting adopted, with some additions of its own, the submission of Darley Australia Pty Ltd on the same topic.[3] Nothing further is referred to in respect of this issue in the Commission's findings.

3. It was, and is, correct that EL7270 was obtained by DCM, was held by DCM (up to the time of the Expunging Act), and is was not transferable. NuCoal did not dispute that before the Commission. Rather, it advanced a somewhat broader set of submissions going to the position of NuCoal and its shareholders: namely, the circumstances in which DCM, and the licence which it held, was purchased by NuCoal, the nature of the shareholders who bought into DCM and the manner in which exploration and development work was undertaken in relation to EL7270.

4. It was in that broader context that NuCoal also advanced the argument that NuCoal should properly be seen as a *bona fide* purchaser for value without notice. The Darley submission, from which Counsel Assisting took their position, was in response to this much broader issue.[4] Darley sought to characterise NuCoal's

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[1] The Second Report at page 16, sub-paragraph (a) .
[2] Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(a).
[3] Submissions of Darley Australia Pty Ltd dated 3 June at paragraph 60. This adoption is expressly referred to by Counsel Assisting in their submissions, also at paragraph 21(a).
[4] The argument, seemingly without reference to any submissions, as identified by Darley, not NuCoal, was as follows: *"the majority of the current shareholders were not involved in any corrupt or unlawful conduct associated with procuring the EL"*. That was a reasonably accurate, if incomplete, summation of NuCoal's broader argument as to its "*innocence*" (to use the word used by the Commissioner).

position as one regarding its status as a *bona fide* purchaser; that was part of NuCoal's argument but not the entirety of it.

5. The nature of the issue as framed by NuCoal can be seen by reading paragraphs [6], [9], [10] and [12] of its initial submissions and paragraphs [21] to [24] and [57] to [61] of its reply submissions.[5] These were supplemented by both evidence and oral submissions (in the form of exchanges between counsel and the Commissioner during the public hearings) in which the issue of NuCoal's "innocence" (where that is read as both the company itself and the shareholders who bought into the company) was elaborated upon.[6] Reading those submissions and evidence together, it would (or should) have been apparent that NuCoal's case included the following elements:

   a. NuCoal held all of the shares in DCM and DCM was therefore a wholly owned subsidiary of NuCoal.[7] DCM's only asset was EL7270;

   b. as a matter of substance NuCoal purchased EL7270;

   c. in purchasing DCM (and, by extension, EL7270), NuCoal conducted due diligence in respect of DCM and was provided with a solicitor's report addressing the validity and compliance of EL7270. This was attached to the prospectus in respect of the public offering seeking funding for NuCoal;[8]

   d. a probity report prepared by O'Connor Marsden, and commissioned by the NSW Government, considered that there was nothing improper in the allocation of EL7270 (including in respect of the issue of direct allocation without a tender);[9]

   e. there was speculation about the circumstances in which EL7270 was approved and granted from mid-2009 but it rose no higher than speculation (and had to be weighed against the evidence of regularity that was available, both in 2009 but also throughout 2010).[10] Such speculation could not have involved anything to do with the ICAC inquiry or the risk that EL7270 would be expunged or revoked as a result of such an inquiry;

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[5] NuCoal submissions dated 31 May 2013 (as amended on 3 June 2013); NuCoal submissions in reply dated 20 June 2013.

[6] 4913T at lines 0-29 (identification of the issue by the Commissioner); 5169T-5171T (the circumstances in which the O'Connor probity report was provided); 5866T-5879T (the true nature of the reserves after exploration conducted by NuCoal); 6193T (funds expended by NuCoal on exploration establishing viability of seams); 6441T-6442T (knowledge of Chester); 6553T-6556T (due diligence and notice of controversy); 6563T-6564T (prospectus and notice; different project developed from scratch); 6604T (nature of subscribers to Taurus fund); 7169T-7171T (risk and notice for NuCoal shareholders); 8281T-8282T (knowledge of Poole).

[7] NuCoal Prospectus [Public Brief 21/6299 (at 6306)].

[8] NuCoal Prospectus [Public Brief 21/6299 (at 6349-6361)].

[9] O'Connor Marsden Probity Review Report [Public Brief 22/6803]

[10] This is even the case with the media coverage referred to by Counsel Assisting in submissions adopted by the Commission: 19/5919ff at 5922-5, 5931, 5934 cited in Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(e).

f. even if it could be said that there was knowledge of the relevant circumstances to the directors of DCM, that knowledge did not relevantly engage in circumstances where the directors were fraudulent;

g. given the facts and circumstances outlined in (a) to (f) above, there was no reason why the doctrine of the *bona fide* purchaser should not apply. For the doctrine not to apply in these circumstances would have raised significant issues about sovereign risk and the presumption of regularity.

6. The submissions of Counsel Assisting did not (and, necessarily could not, given the time when they were provided) address many of the matters raised by NuCoal, at least to the extent that they were matters first raised or first elaborated upon, in the reply submissions. That is reflected in the submission itself. It states two facts that were never in dispute (the status of EL7270 and the non-transferability of the licence) and mischaracterises a third fact: NuCoal was not merely "*a shareholder*" in DCM; it was the only shareholder in a company with only one asset. In this context, the statement that NuCoal was not a *bona fide* purchaser rose no higher than assertion and was clearly meant to replicate the Darley submission. The Darley submission, in turn, sought to characterise the fact that DCM was the holder of EL7270 as sufficient to displace the many matters relied upon by NuCoal – in particular, the submission that one should look to the substance of what had occurred not its ostensible legal form. The Darley submission also did not respond directly to the arguments put in either of NuCoal's submissions (and it was provided before NuCoal's reply submissions).

Knowledge of DCM and certain NuCoal directors

7. In sub-paragraph (b) of the Commission's findings, it found as follows:[11]

> "*Moreover, at the relevant times each of Mr Maitland, Craig Ransley and Andrew Poole were directors of DCM. Their conduct and knowledge are to be attributed to it. In addition, at the time of the acquisition by NuCoal, both Mr Chester and Andrew Poole became directors of NuCoal. They were aware of significant circumstances pertaining to the improper grant.*"

8. This finding is an amalgam of two separate submissions made by Counsel Assisting: the first in relation to the attribution of knowledge to DCM; the second in relation to Mr Chester and Mr Poole being "aware" of certain circumstances pertaining to the grant. They are run together in the Commission's findings by use of the words "in addition" at the beginning of the second sentence. Save for this, the passages are identical to the wording used by Counsel Assisting in their submissions.[12] Nothing further is referred to in respect of this issue.

9. The assertion of attribution of knowledge to DCM is problematic for two reasons. First, it asserts such attribution but points to no material to make good such an assertion. There was, in fact, no material before the Commission going directly to that issue. Clearly, there was material that disclosed a basis to make inferences about the knowledge of Mr Maitland, Mr Poole and Mr Ransley; however, the proper basis for drawing an inference of attribution to the company was missing. Mr Maitland, Mr Poole and Mr Ransley had different information at different times and apparently acting in different capacities; no evidence was

[11] The Second Report at page 16, sub-paragraph (b).
[12] Submissions of Counsel Assisting dated 15 June 2013, at paragraphs 21(c) and 21(d).

provided of decisions taken in the context of the board of DCM. That omission is significant because NuCoal made a submission that went directly to that issue – namely, that, at least in the context of agent and principal, knowledge of fraud in the agent could not be imputed to the principal.[13] Secondly, DCM's knowledge did not address the issue of what should be done with the EL7270 into the future. DCM's knowledge (whatever it may have been), could not be imputed to NuCoal. In other words, it didn't address the issue identified by NuCoal: whether the circumstances in which NuCoal purchased DCM (and therefore the licence), and what had occurred since the time of the purchase, justified retention of the licence.

10. The submission by Counsel Assisting in relation to Mr Chester and Mr Poole is subtly misleading. Its premise is the fact that Mr Chester and Mr Poole had certain knowledge; its further premise is that both Mr Chester and Mr Poole were directors of NuCoal. However, no conclusion is drawn about NuCoal's knowledge. The knowledge of Mr Chester and Mr Poole about matters they became aware of as directors of DCM could not, as a matter of law, lead to the conclusion that such knowledge could be attributed to the board of the company that bought DCM (simply by virtue of their presence on that board). Further, the submission adopted by the Commission failed to grapple with the explicit evidence of Mr Chester and Mr Poole that at no time, and on no occasion, did they ever communicate any knowledge of the circumstances in which DCM sought and received approval for EL7270 to the NuCoal board[14]. That evidence was unchallenged.

Change in shareholding

11. In sub-paragraph (c) of the Commission's findings, it found as follows:[15]

> *"A change in shareholding in a company should* ***not immunise the company from the consequences of its improper conduct*** *or that of its directors. The consequences of* ***improper transactions entered into by a company*** *cannot be avoided merely because its shares have been subsequently traded".*

12. Save for some minor stylistic amendments (specifically, the removal of the words "*as a matter of principle and policy*" at the beginning of the paragraph and the somewhat argumentative words "*this cannot be so*" at the end of the passage), this passage is identical to the one dealing with the same topic in the submissions of Counsel Assisting.[16] Nothing further is referred to in respect of this issue.

13. The submission assumes that the company in question (DCM) could be said to have engaged in "*improper conduct*"; however, as noted above, no finding was made in relation to DCM and the question of whether knowledge could be attributed to DCM was, at best, left unexplored.

14. As the Commission would have been well aware, the description of DCM's shares as having been "*subsequently traded*" sat uneasily with the fact that NuCoal had bought the entirety of DCM's shares in order to purchase the company and the single asset that it held. It was not DCM's shares that were being traded; it was NuCoal's shares. That was an entirely different matter. NuCoal's

[13] Submissions in Reply of NuCoal dated 20 June 2013, at paragraph [23].
[14] T6442.44-48 (Chester) and T8281.42 (Poole).
[15] The Second Report at page 16, sub-paragraph (c).
[16] Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(b).

submissions squarely raised for consideration the issue of what had occurred after the alleged "*improper transaction*" and the many reasons why it should properly be seen as a purchaser starting afresh without knowledge. The very point of the submission about NuCoal's status as a *bona fide* purchaser was that it **did** "immunise" the company in respect of whatever may have occurred prior to that time when DCM was owned and run by others.

Controversy about EL7270 and widespread community unrest

15. In sub-paragraph (d) of the Commission's findings, it found as follows:

> "*The prospectus issued for the purposes of the reverse acquisition of DCM by NuCoal was lodged with the Australian Securities and Investments Commission on 2 December 2009. There was a notorious public controversy from at least mid-2009 in relation to the circumstances of the granting of EL7270 – in particular, having regard to the relationship between Mr Maitland and Mr MacDonald which was reflected in media coverage at the time. A Jerrys Plains community meeting was also held on 28 July 2009, for which DCM prepared sample questions and responses for delivery by Glen Lewis (managing director of NuCoal) and others in NuCoal. The document containing this sample included reference to the "ICAC" issues. Those issues were dealt with at the meeting. Thus, before the backdoor listing, there was widespread controversy calling into question the circumstances of the granting of EL7270, including that it may have been granted by Mr Macdonald to his "mate" Mr Maitland. Indeed, a concerted effort was made to publicly position the company so that it was removed from Mr Maitland in an effort to improve perception issues.*"

16. Save for some minor stylistic amendments and the removal of references, this passage is identical to the one dealing with the same topic in the submissions of Counsel Assisting.[17] Nothing further is referred to in respect of this issue.

17. A number of the Commission's findings (this sub-paragraph and sub-paragraphs (e) to (i)) deal with issues that might be broadly described as relating to notice and risk. The Commissioner identified this as a relevant issue to the determination of the answers to Question 3.

18. The Commission relied upon evidence given by Mr Lewis about press reports dealing with the circumstances surrounding the securing of approval for EL7270 and the discussion of those matters at a Jerrys Plains community meeting on 28 July 2009. It would have been plain to the Commission that such discussions, to the extent that they were referrable to anything of substance, could **not** have been references to the ICAC investigation; that investigation was only commenced some two years later and the apparent confusion of the Commissioner in this respect was clearly dispelled in an exchange with Senior Counsel for NuCoal.[18] On any view, the possibility of the expunging or revocation of the licence could only have arisen at some point well after the Parliamentary terms of reference were conveyed to ICAC.

19. NuCoal never disputed that EL7270 was the subject of controversy but, critically, its case was that such controversy – at the relevant times – constituted little more than speculation and could not have had an impact on the "*presumed regularity of government instruments apparently made within power*".[19] Nor could it have had any meaningful impact on due diligence that was based on information at the time,

[17] Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(e).
[18] 6562T-6564T.
[19] Submissions of NuCoal dated 20 June 2013 at paragraph 58.

not information subsequently unearthed with the benefit of the coercive powers of the Commission.[20] In this respect, NuCoal drew specific attention to the probity report commissioned by the NSW Government which stated, in terms, that Mr Macdonald acted within power in making a direct allocation of EL 7270.[21] That report would have reinforced the conclusions reached as a result of due diligence.[22]

NuCoal's knowledge of the controversy

20. In sub-paragraphs (e) and (f) of the Commission's findings, by reference to the findings in the previous section[23] it further found as follows:

> "*NuCoal acquired DCM with knowledge of the detail of the public controversy referred to in (d) above and the risky nature of the acquisition. For the reasons set out in (d), the investors in NuCoal must have acquired their shares in that company with an awareness of those risks. Those risks must have been reflected in the share price of NuCoal such that the price at which investors purchased their shares took account of the uncertainties.*
>
> *Mr Lewis agreed that, from mid-2009 on, he dealt constantly with the public controversy concerning the circumstances of the granting of EL7270, including throughout 2010 and beyond. Mr Lewis agreed that by the time of the reverse acquisition there was widespread public controversy. He dealt with potential investors at the time of the reverse acquisition and they raised questions with him about the controversy concerning the circumstances in which EL7270 had been granted*"

21. The first sentence is wording supplied by the Commission. The rest of the first paragraph is a précis of first sentence of sub-paragraph (f) of the submissions of Counsel Assisting. Save for some minor stylistic amendments and the removal of references, the rest of this passage is identical to the relevant portion of the submissions of Counsel Assisting.[24] Nothing further is referred to in respect of this issue.

22. This finding builds on the material relied upon in sub-paragraph (d). Whilst there was evidence of a public controversy, and that public controversy was not denied by NuCoal, the nature of that controversy was directly in issue. As noted above, whatever NuCoal's "knowledge" involved, it could not possibly have been knowledge of the "ICAC risk" as the Commissioner described it or even the possibility of an ICAC hearing. The case put by NuCoal was that whatever controversy there was about EL7270 it could not have gone as far as being knowledge about even the possibility of the licence being expunged or revoked or the validity of the licence (bearing in mind the nature of the due diligence it could undertake) or that the licence had been granted in corrupt circumstances, (bearing in mind the material it had available to it). To that extent, the evidence of Mr Lewis – going as it did to knowledge of speculation and controversy – did not take matters further for the simple reason that he gave evidence about matters that did not go to the issues that NuCoal addressed.

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[20] Submissions of NuCoal dated 20 June 2013 at paragraph 58.
[21] O'Connor Marsden Probity Review Report [Public Brief 22/6803 (at 6805)].
[22] Submissions of NuCoal dated 20 June 2013 at paragraphs 59 and 60.

[23] In sub-paragraph (d) of the Commission's findings

[24] Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(a).

23. The Commission identified the awareness of "risks" that investors in NuCoal had. That presupposed that one properly identified exactly what type of risk was contemplated. The evidence before the Commission, and the submissions of Counsel Assisting, went no further than identifying risk relating to matters unproved and entirely speculative, albeit controversial; the risk identified by NuCoal in its submissions was a risk that the licence would be rendered void in some way by reason of corrupt conduct, following an ICAC inquiry (or, more generally, that corrupt conduct had occurred in relation to the approval of EL7270). NuCoal's case was that the investors could not have been aware of that risk.

24. However, there is a further difficulty. According to Counsel Assisting, the "risks", "*must have been reflected in the share price of NuCoal such that the price at which investors purchased their shares took account of the uncertainties*". There was no evidence led by Counsel Assisting as to how the share price of NuCoal was priced to reflect the "uncertainty" surrounding EL7270.

Uncertainties in the prospectus

25. In sub-paragraph (g) of the Commission's findings, it found as follows:

> "*The reverse acquisition prospectus also emphasised the uncertainties associated with investing in NuCoal. It emphasised that the shares offered under the prospectus should be regarded as speculative, that investors should be aware that they may lose some or all of their investment and that prospective investors should make their own assessment of the likely risks. A number of specific risks were outlined, which included that DCM might not be able to acquire or might lose title to EL7270 if conditions attached to licences were changed or not complied with*"

26. Save for the removal of references, this passage is identical to the one dealing with the same topic in the submissions of Counsel Assisting.[25] Nothing further is referred to in respect of this issue.

27. The issue of the prospectus was a discrete finding in respect of notice and risk. It conflated two different ideas of risk. It was unilluminating to point out that the prospectus identified the investment in NuCoal as speculative and risky: the risk identified was that common to any investment in a mining company that held nothing more than an exploration licence, something that the NuCoal submissions dealt with expressly where it stated that "*there was no guarantee of any viable resource being found or any mining lease being granted*". NuCoal's case, and the issue that it identified, was the risk that the licence would be rendered void as the result of a finding of corruption in respect of it. The issue was identified at some length and with significant detail in NuCoal's reply submissions.[26] It went directly to the matters identified in the Second Report and the issues as identified by the Commission. The Commission did not engage with or address the arguments put to it by NuCoal

The shadow of the controversy

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[25] Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(g). A portion of the paragraph in the submissions was not reproduced by the Commission in its findings.

[26] Submissions of NuCoal dated 20 June 2013 at paragraphs 59 to 62; Submissions of NuCoal dated 31 May 2013 at paragraph 13.

28. Seemingly as an extension of the points set out in the sub-paragraphs up to sub-paragraph (e), the Commissioner identified a particular portion of transcript. This transcript, came from the evidence Mr Glen Lewis, who worked for DCM and then became managing director of NuCoal.[27] The transcript, in an identical but edited form (that is, with certain parts of Mr Lewis's evidence removed), was set out in sub-paragraph 21(i) of the submissions of Counsel Assisting, albeit with a sentence identifying the apparent basis for reliance on the portion of transcript used. The Commission appears to have considered that the finding implicit in the evidence was self-evident: that the investment at the time of the reverse acquisition onwards was made in the "*shadow of the controversy*" concerning E7270.

29. As noted above, the controversy identified was the speculation in the press about the allocation of EL7270 and the apparent risk arising from that speculation. For the reasons outlined above, that did not engage with the submission made by NuCoal went directly to the matters identified in the Second Report and the issues as identified by the Commission.

Investment made by NuCoal in activities connected with EL7270

30. In sub-paragraph (i) of the Commission's findings, it found as follows:

> "*The same is true of any moneys that NuCoal has expended on exploration and other activities associated with Doyles Creek. These moneys have* ***been expended with eyes wide open to the uncertainties, risks and possibilities***" (emphasis added)

31. Save for some minor stylistic amendments and the removal of references, this passage is identical to the one dealing with the same topic in the submissions of Counsel Assisting.[28]

32. There was evidence before the Commission that NuCoal had expended considerable sums (approximately $25,000,000) in carrying out exploration in the area covered by EL7270. That exploration activity went, in part, to identifying the true extent of the coal that was available and that could be marketed, a matter that counsel for NuCoal asked questions about extensively. That expenditure was identified by NuCoal in the context of its other submissions about what knowledge it had of the activities of Messrs Maitland, Ransley and Poole (none), the nature of what was known about the controversy concerning EL7270 (at best, speculative) and the degree of notice or risk that investors took in respect of the investment in DCM (no notice of the ICAC risk and reliance upon the proper processes of due diligence and probity reporting referred to above). The Commission's conclusion that NuCoal's eyes were "wide open" to the uncertainties, risks and possibilities is so broad and so vague that it could cover many states of knowledge or risk. However, such a broad statement could not possibly reflect consideration of the specific matters identified by NuCoal as relevant to its status as an "innocent" third party that did not have requisite degree of notice, knowledge or risk in relation to the circumstances in which EL7270 was approved or the possibility that EL7270 would be taken by the State as a result of an ICAC inquiry.

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[27] At 6554T at line 40 to 6556T at line 2.
[28] Submissions of Counsel Assisting dated 15 June 2013 at paragraph 21(j).

Table 1

Para App. A	ICAC Report	Counsel Assisting	Other
1	**December Report – p. 16(a)** EL 7270 was obtained by DCM and is still held by it. The EL is not transferrable. The position of NuCoal is not comparable to that of a bona fide purchaser for value and without notice. NuCoal is merely a shareholder of DCM.	**15 June 2013 Submissions – [21](a)** *First*, as a threshold matter, EL 7270 was obtained by DCM. It is still held by the same owner – DCM. The exploration licence is not transferrable (cl 49 at A.186). This is not a case that can be likened to a bona fide purchaser for value and without notice. The same entity continues to hold the relevant item of property. We endorse Darley's submission in this regard at [60].	**Darley – 3 June 2013 Submissions - [60]** Second, it is said that majority of the current shareholders of NuCoal were not involved in the corrupt or unlawful conduct associated with procuring the EL. If this is an attempt to invoke the bona fide purchaser for value without notice exception to the rule that fraud unravels all, it fails. DCM, now a wholly owned subsidiary of NuCoal, remains the '*holder*' of the purported EL. There has been no relevant "purchase" of the purported EL in order to activate the exception. For the reasons described above the EL is, in law, no decision at all.
7	**December Report – p. 16(b)** Moreover, at the relevant times each of Mr Maitland, Craig Ransley and Andrew Poole were directors of DCM. Their conduct and knowledge are to be attributed to it. In addition, at the time of the acquisition by NuCoal, both Mr Chester and Andrew Poole became directors of NuCoal. They were aware of significant circumstances pertaining to the improper grant.	**15 June 2013 Submissions – [21](c) & (d)** (c) *Thirdly*, at the relevant times each of Maitland, Ransley and Poole was a director of DCM. Their conduct and knowledge are attributed to it. (d) *Fourthly,* at the time of the reverse acquisition Chester and Poole became directors of NuCoal. They were aware of certain of the circumstances pertaining to the improper grant.	

11	**December Report – p. 16(c)** A change in shareholding in a company should not immunise the company from the consequences of its improper conduct or that of its directors. The consequences of improper transactions entered into by a company cannot be avoided merely because its shares have been subsequently traded.	**15 June 2013 Submissions – [21](b)** *Secondly*, as a matter of principle and policy, it cannot be that a change in shareholding in a company can or should immunise the company from the consequences of its improper conduct or that of its directors. Taken to its logical extreme, any publicly listed company could resist the avoidance of improper transactions it had entered into because its shares have been subsequently traded. This cannot be so.	
15	**December Report – p. 16(c)** The prospectus issued for the purposes of the reverse acquisition of DCM by NuCoal was lodged with the Australian Securities and Investments Commission on 2 December 2009. There was a notorious public controversy from at least mid-2009 in relation to the circumstances of the granting of EL7270 – in particular, having regard to the relationship between Mr Maitland and Mr MacDonald which was reflected in media coverage at the time. A Jerrys Plains community meeting was also held on 28 July 2009, for which DCM prepared sample questions and responses for delivery by Glen Lewis (managing director of NuCoal) and others in NuCoal. The document containing this sample included reference to the "ICAC" issues. Those issues were dealt with at	**15 June 2013 Submissions – [21](e)** *Fifthly*, there was notorious public controversy from at least mid-2009 in relation to the circumstances of the grant of EL 7270 – in particular having regard to the relationship between Maitland and Macdonald. This was reflected in media coverage at the time (e.g. 19/5919ff, e.g. at 5922-5, 5931, 5934). A Jerry Plains community meeting was also held on 28 July 2009 (9/5946) and DCM prepared sample questions and responses for delivery by Lewis et al which included reference to "ICAC" issues (MFI 77 (at 79)). The minutes of the meeting indicate those issues were dealt with at the meeting (20/6097 at 6101, Lewis agreed T 6552). The upshot is that before the backdoor listing, there was widespread controversy calling into question the circumstances of the	

	the meeting. Thus, before the backdoor listing, there was widespread controversy calling into question the circumstances of the granting of EL7270, including that it may have been granted by Mr Macdonald to his "mate" Mr Maitland. Indeed, a concerted effort was made to publicly position the company so that it was removed from Mr Maitland in an effort to improve perception issues.	grant of EL 7270, including that it may have been granted by Macdonald to Maitland as a "mate". Indeed, a concerted effort was made to publicly position the company so that it was removed from Maitland in an effort to improve perception issues (T 6543).	
	December Report – p. 16(e) & (f) NuCoal acquired DCM with knowledge of the detail of the public controversy referred to in (d) above and the risky nature of the acquisition. For the reasons set out in (d), the investors in NuCoal must have acquired their shares in that company with an awareness of those risks. Those risks must have been reflected in the share price of NuCoal such that the price at which investors purchased their shares took account of the uncertainties. Mr Lewis agreed that, from mid-2009 on, he dealt constantly with the public controversy concerning the circumstances of the granting of EL7270, including throughout 2010 and beyond. Mr Lewis agreed that by the time of the reverse acquisition there was widespread public controversy. He dealt with potential investors at the time of the reverse acquisition and they raised questions with him about the controversy concerning the circumstances in	**15 June 2013 Submissions – [21](f)** *Sixthly*, further to the previous point, the record shows that investors bought into the company with an awareness of the risks, and the risks were reflected in the share price of NuCoal such that the price they bought at took account of the uncertainties. Lewis agreed that from mid-2009 on, he dealt constantly with the public controversy concerning the circumstances of the grant of EL 7270, including throughout 2010 and beyond (T 6552). Lewis agreed that by the time of the reverse acquisition there was widespread public controversy (T 6552). He dealt with potential investors at the time of the reverse acquisition and they raised with him questions about the controversy concerning the circumstances in which EL 7270 had been granted — in particular, the fact that it had been granted to a group of people including Maitland and as to the involvement of Maitland in that grant (T 6553). That caused the investors unease and	

	which EL7270 had been granted.	they raised it with Lewis, because they were concerned as to how it might affect the investment that they were about to make into a company whose only substantial asset was EL 7270 (T6553). Taurus, who was the largest investor as at the time of the reverse acquisition, was concerned enough to do some due diligence on the topic (T 6553). Lewis continued to deal constantly throughout 2010 and beyond with media inquiries concerning the controversy (e.g. 22/6886ff). After the reverse acquisition took place, Lewis continued to deal with investors and they have also raised concerns about the circumstances in which EL 7270 was granted before making their investments — they "have always asked what John Maitland's involvement was" (T 6553). One potential investor, Mitsui, was concerned enough to seek a condition precedent relating to the outcome of the Commission's inquiry before making any investment (T 6553-4).	
26	**December Report – p. 16(g)** The reverse acquisition prospectus also emphasised the uncertainties associated with investing in NuCoal. It emphasised that the shares offered under the prospectus should be regarded as speculative, that investors should be aware that they may lose some or all of their investment and that prospective investors should make their own assessment of the likely	**15 June 2013 Submissions – [21](g)** *Seventhly*, the Prospectus (21/6299) issued for the purposes of the reverse acquisition also emphasised the uncertainties associated with investing in NuCoal." It emphasised that the shares offered under the Prospectus should be regarded as speculative investors should be aware that they may lose some or all of their investment (21/6382). A number of specific	

	risks. A number of specific risks were outlined, which in that DCM might not be able to acquire or might lose title to EL7270 if conditions attached to licences were changed or not complied with.	risks were outlined, but it was noted that they were not exhaustive (21/6382). The specific risks included that DCM may not be able to acquire or may lose title to EL 7270 if conditions attached to licences are changed or not complied with (21/6382 at §8.4). Further risks were identified in relation to resources and reserves as well as exploration and evaluation risks (21/6383 at §8.8-8.9). In this regard, it was stated (21/6383): *"The Company's exploration and appraisal activities are dependent upon the grant and maintenance of appropriate licences, permits, resource consents, access arrangements and regulatory authorities (authorisations) which may not be granted or may be withdrawn or made subject to /imitations. Although the authorisations may be renewed following expiry or granting (as the case may be), there can be no assurance that such authorisations will be renewed or granted on the same terms."* The Prospectus further emphasised that the shares issued pursuant to it should be considered speculative, that they carry no guarantee as to payment of dividends, return of capital or the market value of the shares such that prospective investors must make their own assessment of the likely risks (21/6385).	
29	**December Report – p. 16(h)**	**15 June 2013 Submissions – [21](i)**	

	The following exchange took place with Mr Lewis at the public inquiry: *MR SHEARER [junior Counsel Assisting the Commission]: So given what we've just been discussing, Mr Lewis, I take it you'd accept that investment from the time of the reverse acquisition onwards has occurred under the shadow of the controversy concerning the circumstance of the grant of the Exploration Licence?---Correct.* *THE COMMISSIONER: Sorry, can I just ask one question on that please, Mr Shearer? Mr Lewis, I take the shadow was the risk of something sinister being discovered in the course of this investigation?---That'd be correct, yes.* *And the reason why there has been an effect on the share price of NuCoal is that by reason of the, of the Commission's investigation there is a risk of this – there is a risk of corruption being exposed?---By the nature of ICAC yes, I, I agree, yes.* *I'm not suggesting that corruption occurred I just want to make it clear,*	*Ninthly*, in view of the above, investment in NuCoal has from the beginning taken place in the shadow of the controversy and investors have bought knowing that. Thus, ultimately, the following exchange took place with Lewis (T 6554-6): *MR SHEARER: So given what we've just been discussing, Mr Lewis, I take it you'd accept that investment from the time of the reverse acquisition onwards has occurred under the shadow of the controversy concerning the circumstance of the grant of the Exploration Licence ?---Correct.* *THE COMMISSIONER: Sorry, can l just ask one question on that please, Mr Shearer? Mr Lewis, I take the shadow was the risk of something sinister being discovered in the course of this investigation ?---That'd be correct, yes.* *And the reason why there has been an effect on the share price of NuCoal is that by reason of the, of the Commission's investigation there is a risk of this there is a risk of corruption being exposed?---By the nature of ICAC yes, I, I agree, yes.* *I'm not suggesting that corruption*	

	I'm suggesting that the shadow involved the risk that the Commission might uncover corruption?---Correct, it certainly creates uncertainty in the market. *And that has occurred since the float?---My best recollection, and I'll be fairly sure it's accurate, is around March 2010.* ... *Mr Lewis, the questions about the way in which the Exploration Licence was granted to Doyles Creek had already been raised in the press before the float or is that right?---They, they had, correct. Almost, I'd be fairly confident January 2009 fairly much straight after the announcement of the EL award.* ... *MR SHEARER: And I've shown you references where that was taking place as from July 2009?---Correct.* *And you were dealing with the community on the topic in about July 2009 too?---Correct.*	*occurred I just want to make it clear, I'm suggesting that the shadow involved the risk that the Commission might uncover corruption ?---Correct, it certainly creates uncertainty in the market.* *And that has occurred since the float?---My best recollection, and I'll be fairly sure it's accurate, is around March 2010.* ... *Mr Lewis, the questions about the way in which the Exploration Licence was granted to Doyles Creek had already been raised in the press before the float or is that right?---They, they had, correct. Almost, I'd be fairly confident January 2009 fairly much straight after the announcement of the EL award.* ... *MR SHEARER: And I've shown you references where that was taking place as from July 2009 ?---Correct.* *And you were dealing with the community on the topic in about July 2009 too ?---Correct.*	

31	**December Report – p. 16(i)** The same is true of any moneys that NuCoal has expended on exploration and other activities associated with Doyles Creek. These moneys have been expended with eyes wide open to the uncertainties, risks and possibilities.	**15 June 2013 Submissions – [21](j)** *Tenthly*, the same is true of any moneys that NuCoal has expended on exploration and other activities associated with Doyles Creek. Those moneys have been expended with eyes wide open to the uncertainties, risks and possibilities.	

Attachment 4

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18 December 2017

The Hon. Gladys Berejiklian MP
Premier
GPO Box 5341
Sydney NSW 2001

To the Hon. Gladys Berejiklian,

We are writing to you on behalf of the near 3000 shareholders of NuCoal Resources Ltd (**NuCoal**) to ask you to consider initiating in the new year confidential discussions between the NSW Government and NuCoal with a view to considering the appropriateness of compensation for NuCoal due to the actions of the NSW Parliament in January 2014. There have been a number of developments in the last 2 years which we have outlined in this Submission and we have also held declared meetings with a number of your Cabinet Ministers and Government MPs where we believe a sympathetic view has been formed as to the denial of natural justice that has occurred in this case. Indeed, the then Minister for Resources, Anthony Roberts insisted that we meet with as many of his Cabinet colleagues as possible and in a meeting on 5 December this year, the Attorney General - having been appraised of the facts, suggested that we consider putting a Submission to your office copying some senior Cabinet Ministers.

The timing of this request follows a number of developments during 2017 which, we believe, mean that NuCoal's position is deserving of substantive review by the NSW Government. These include, but are not limited to, the matters below:

- to the best of our knowledge, we are aware that a letter has been sent by the US Trade Representative to the Australian Minister for Trade (Mr Steve Ciobo). Whilst we do not have a copy of the letter and thus its actual content – we believe a request has been made to initiate arbitration of NuCoal's case pursuant to the Australia US Free Trade Agreement;

- the acquittal of Mr Craig Ransley, former Founder and Director of Doyles Creek Mining Limited (**DCM**), on allegations related to the granting of EL 7270, the evidence tabled and conclusions drawn in this case and the failure to bring any charges against Mr Andrew Poole and Mr Michael Chester, both also former Directors of DCM;

- it is a fact that some MPs from either side of Parliament have publicly stated that the NSW Parliament may have been misled when it passed the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 (**Amendment Act** or **Special Legislation**). It is also known that a number of MPs privately believe that there has been a denial of natural justice afforded to NuCoal which should be redressed; and

- the compensation paid to Shenhua in respect of Watermark and to BHP for Caroona to buy back NSW coal mining licences.

We believe that you would be aware of the circumstances of the cancellation of the Company's Doyles Creek Exploration Licence (**EL 7270** or **Licence**) resulting from the passing of the Amendment Act by the NSW Parliament on 30 January 2014 but outline the following key facts – all of which are more fully pursued in **Attachment 1** to this letter:

1. NuCoal owned EL 7270, via its subsidiary company DCM.

2. Whatever concerns there were or may have been about the creation of EL 7270, there were zero concerns about the awarding of the Licence.

3. The ICAC initiated an investigation and public hearings into the grant of the Licence. NuCoal was **never** named as a party of interest in any part of the investigations and was not given a meaningful opportunity to participate in the ICAC proceedings.

4. In August 2013, the ICAC made "findings" of corruption against former Directors of DCM, **not NuCoal**, and recommended cancellation of the Licence. The ICAC also **recommended that the Government compensate innocent parties** and that "*NuCoal and those of its innocent 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").*"[1]

5. The Government asked NuCoal to submit a "show cause" document to explain why the ICAC's recommendation to cancel the Licence should not be enacted. **Only 3 business days** after NuCoal lodged its submission, Barry O'Farrell, the then-Premier of NSW, announced that the NSW Government would introduce special legislation to cancel EL 7270, with no compensation to NuCoal and its innocent shareholders.

6. The special legislation required no proof of wrongdoing by NuCoal and was unprecedented. It:

    - cancelled the Licence without the due process afforded under the *Mining Act 1992,* without any public hearing and/or any right of appeal, without recourse to normal rule of law measures including the legal system and courts and without just compensation;

    - removed any right to compensation NuCoal would otherwise have had;

    - absolved the Government of liability for the corrupt conduct of its ministers; and

    - required NuCoal to provide the Government with all of its confidential exploration data that NuCoal had spent over $40 million obtaining – when it was the Government of NSW itself that insisted that NuCoal spend these funds to comply with the conditions of the Exploration Licence.

7. NuCoal's near 3,000 shareholders are innocent parties and have lost a considerable value of their investment as a result of the Government's actions.

[1] Item 18 of ICAC's response to NuCoal's judicial review case against ICAC.

8. The rights of NuCoal and its innocent shareholders to seek compensation, or have any curial remedy via the Australian Courts, were legislated away by the Amendment Act.

9. NuCoal's shareholders have been, inexplicably, very badly treated.

There is a minimum expectation that mum and dad investors in Australia, and more specifically NSW, should receive basic "rule of law" protections when investing in a company like NuCoal. In NuCoal's circumstances, this basic rule of law right has not been afforded. NuCoal's innocent shareholders had the economic value of their investment destroyed by Government action, unprecedented in Australia's history, through no fault of their own. Whilst the NuCoal issue is not only concerning to local Australian businesses, it creates significant sovereign risk issues for any international investor wishing to invest in Australia.

We believe that this request warrants your careful attention and consideration and the NuCoal Board will be available to meet with you at your earliest convenience to discuss any aspects in more detail. As always, NuCoal hopes to resolve this matter in a professional manner in the best interests of its shareholders and other stakeholders.

We look forward to hearing from you and receiving a response.

Yours sincerely,

Gordon Galt
Chairman, NuCoal Resources Ltd

Copy to:

The Hon Dominic Perrottet MP, Treasurer

The Hon Mark Speakman SC MP, Attorney General

The Hon. Anthony John Roberts MP, Minister for Planning, Minister for Housing, and Special Minister of State, Leader of the House

The Hon. (Don) Donald Thomas Harwin MP, Minister for Resources, Minister for Energy and Utilities

The Hon. (John) Giovanni Domenic Barilaro MP, Deputy Premier

Attachment 1

1 Overview

NuCoal Resources Ltd (**NuCoal**) is a public company with near 3,000 shareholders listed on the Australian Stock Exchange (ASX: NCR). NuCoal was formed in February 2010 with one purpose, which was to acquire and explore the Doyles Creek Exploration Licence EL 7270 (**EL** or **Licence**), and, if suitable resources were found, to seek to develop a coal mining business based on that site.

The acquisition was made by issuing NuCoal shares to shareholders of Doyles Creek Mining Limited (**DCM**), and at the same time $10 million was raised from the public to fund exploration as was required by the conditions of the EL. At the time of acquisition there were 4 boreholes in total on the EL area and the EL had no coal resources or reserves according to any standard or code.

We point out that the acquisition was truly a high risk venture by any measure. At no stage could anyone argue that there was any resource at all in the EL, let alone a resource worth mining. This point has been completely misrepresented in the press and various investigations since that time which the facts will support.

NuCoal undertook all the requirements of the EL fully and diligently until 2012, and was judged to be an exemplary EL holder - according to several audits undertaken by the DMR. In the process of three years of extensive exploration (2010 – 2012), the Company found and delineated valuable coal resources that were almost completely unknown at the time of the acquisition. Some $40 million was spent in this process. *This process added a very significant value to the people of NSW at no expense to them.*

The Company also undertook feasibility studies to establish an underground mine, including planning a training mine for underground workers as was required under the conditions of the EL. Negotiations were concluded to bring a major Japanese company (Mitsui Matsushima) into a joint venture to develop the mine and the permitting process was commenced.

In 2013 the granting of the EL became the subject of an ICAC Investigation known as Operation Acacia. A key issue during that enquiry was the possible payment of an upfront amount on granting of a mining lease. *NuCoal was approached by the ICAC Commissioner on this matter and reluctantly agreed to the making of an appropriate payment.*

The ICAC investigation report was handed down in August 2013 and concluded that the Minister who issued the EL in December 2008, and four of the former Directors of DCM, were corrupt. Notwithstanding that NuCoal had agreed to the ICAC Commissioner's proposal for an upfront payment, the report (completely unexpectedly) recommended cancellation of the EL. *Significantly even ICAC recognised that there would be a significant value loss as a result of this recommendation, so it also recommended payment of compensation to innocent parties (i.e. NuCoal) by the NSW Government.*

The Government of the day requested, on 19 December 2013, that NuCoal make a submission as to why the EL should not be cancelled. The Submission was made on 15 January 2014 but was undoubtedly ignored, because without any discussion of the Submission, only 3 business days after lodgement, 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, with no compensation to NuCoal and its shareholders. A bill to cancel the licence, *without compensation*, was introduced into Parliament on 31 January 2014 and passed through both houses on the same day. Members who voted on the bill were given less than three hours to consider the bill's contents, so it is certain that most of them did not know that a Submission to not cancel had been made by NuCoal, let alone seen its contents – or even that the ICAC Commissioner had, contrary to the intent of the bill, actually recommended compensation.

Since that time NuCoal has been pursuing all possible avenues to achieve compensation.

One of these avenues is an arbitration of the case by the International Courts, pursuant to the Australia US Free Trade Agreement, on behalf of NuCoal's US shareholders, who comprise some 25% of NuCoal's shareholder register. *The matter has been thoroughly researched and to the best of our knowledge, the US Government has decided recently to formally pursue it by reportedly writing to the Australian Government to commence resolution.*

Other notable outcomes since the passing of the Amendment Act have been:

- NuCoal's shareholders have been declared to be completely innocent parties by ICAC in the Supreme Court of NSW.
- Ex-Premier O'Farrell has publicly apologised to NuCoal's Directors for suggesting that they were anything other than honest men looking after the interests of their shareholders.
- Former Directors of DCM have been found to be innocent or not charged due to their being insufficient evidence to support a case.

NuCoal believes that it is now timely and appropriate for the NSW Government to pursue a compensation settlement with NuCoal.

Further detailed discussion is included below:

2 History

2.1 On 5 February 2010, NuCoal acquired, as its primary asset, DCM for $94 million for the purpose of obtaining the Licence. The Licence was granted to DCM more than a year earlier, on 15 December 2008, by the then NSW Minister for Primary Industries and Mineral Resources, Mr Ian Macdonald.

2.2 NuCoal did not exist in its current form at the date of the grant of the Licence and therefore had no involvement in the NSW Government's grant of the Licence or knowledge of the circumstances surrounding the grant.

2.3 Prior to the acquisition, NuCoal conducted appropriate due diligence and a Prospectus was issued to prospective investors describing NuCoal's central purpose as developing the Licence. The Prospectus was examined as

required by the ASX and the Australian Securities and Investment Commission (**ASIC**). There were no unusual aspects to the Prospectus.

2.4 In August 2010, a probity report by O'Connor Marsden commissioned by the NSW Government and confirmed the validity of EL 7270 and concluded that its grant was "within power" and that there was no evidence of any impropriety.

2.5 Over a year later, on 23 November 2011, after the election of a new Government in NSW, both Houses of 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**).

2.6 The ICAC subsequently initiated an investigation and public hearings into the grant of the Licence. NuCoal was never named as a party of interest in any part of the investigations and was not given a meaningful opportunity to participate in the ICAC proceedings.

2.7 In August 2013, the ICAC made "findings" of corruption against former Directors of DCM, not NuCoal, and recommended cancellation of the Licence.

2.8 The ICAC also recommended that the NSW Government should compensate innocent parties and that *"NuCoal and those of its innocent 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")."*[1]

3 There was a clear expropriation of an asset

3.1 On 30 January 2014, following a recommendation from ICAC, the New South Wales Parliament introduced and passed the Amendment Act which expropriated NuCoal's major asset, EL 7270.

3.2 The Special Legislation required no proof of wrongdoing by NuCoal and was truly extraordinary. It:

1. cancelled EL 7270 without the due process afforded under the *Mining Act 1992* and without any public hearing and/or any right of appeal;
2. removed any right to compensation NuCoal would otherwise have had;
3. absolved the Government of liability for the conduct of its ministers and employees, including Mr Macdonald; and
4. required NuCoal to provide the Government with all of its confidential exploration data that NuCoal paid for – when it was the Government of NSW itself that insisted that NuCoal spend these funds in accordance with the conditions of the Licence.

3.3 Most recently, the Hon. Dr Peter Phelps, highlighted the injustice in respect of the introduction of the Amendment Act, publicly stating in Parliament - *"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*

[1] Item 18 of ICAC's response to NuCoal's judicial review case against ICAC.

introducing and passing three bills that have expropriated a property right completely unjustifiably."

4 Misconduct in Public Office

4.1 Ian Macdonald, in his capacity as Minister for Minerals and Resources, awarded the Licence to DCM in December 2008.

4.2 Mr Macdonald has now been found guilty, by a jury, of Misconduct in Public Office for the awarding of EL 7270 to DCM.

4.3 On 2 June 2017 Justice Adamson delivered the following sentence in respect of the criminal charges against Mr Macdonald:

Extract from *[R v Macdonald; R v Maitland [2017] NSWSC 638]*

Ian Macdonald

- Convicted of counts 1 and 3 on the indictment.
- Impose an aggregate sentence of 10 years commencing on 26 May 2017 and expiring on 25 May 2027 with a non-parole period of 7 years commencing on 26 May 2017 and expiring on 25 May 2024.

4.4 Under normal circumstances – if a Government Officer is found guilty of Misconduct in Public Office, the State of NSW has an **obligation** to indemnify any person or company who has suffered loss as a result of the actions of that Officer.

4.5 NuCoal relied on Mr Macdonald acting within the powers afforded to him as a Government Officer and should, at a minimum, be afforded the standard compensatory rights of any other person, or company.

5 There has been a clear and verifiable loss to NuCoal

5.1 During the period of Licence tenure, NuCoal expended in excess of $40 million on exploration, development studies and land acquisitions. The expenditure was fruitful - it allowed NuCoal to establish the existence of coal resources of over 500Mt and progress the Doyles Creek project through the relevant approval processes with an aim of seeking a mining lease.

5.2 NuCoal's efforts to develop the Doyles Creek project also resulted in in the entry into a joint venture between NuCoal and Mitsui Matsushima International Pty Limited (**MMI**).

5.3 MMI's agreement valued the Licence in 2012 at $360 million based on the purchase by MMI of a minority interest.

5.4 The third party valuation by MMI was contemporaneous with the ICAC investigation and would have completed if ICAC had not been investigating the Licence.

5.5 Using market metrics, prior to the announcement of the ICAC inquiry NuCoal's market capitalisation on the ASX exceeded $300 million. Subsequent to the release of ICAC's findings, NuCoal's market capitalisation fell dramatically to $15 million.

5.6 As at 14 December 2017, the market capitalisation of NuCoal was approximately $6.5 million (768,612,354 ordinary shares multiplied by the daily stock price of $0.009 per share, as traded on the ASX on that date).

5.7 Clearly the loss by shareholders is real and substantial and has been caused by the actions of the NSW Government.

5.8 NuCoal's shareholders were unjustly punished when the legislation was introduced and are now being further punished by not being able to seek compensation from the NSW Government for the guilty actions of Ian Macdonald, a Government Officer.

5.9 The special legislation enacted by the NSW State Government was unprecedented and draconian.

5.10 NuCoal's innocent investors have effectively lost their investment despite acting in good faith and lawfully, which is grossly unfair.

6 NuCoal's shareholders are innocent

ICAC's position on NuCoal's innocence

6.1 In its December 2013 Report, the ICAC's core finding, and the breadth and width of it, was encapsulated in its conclusion that the *"process leading to the giving of consent for application for, and granting of EL 7270 was tainted with corruption"* [2] Neither NuCoal nor its innocent shareholders were implicated in any act or fact leading to the giving of consent or the grant of the application.

6.2 Also within its December 2013 Report, the ICAC recommended that: *"special legislation to expunge"* the Licence be considered to be enacted, which *"could be accompanied by a power to compensate* ***any innocent person*** [emphasis added] *affected by the expunging,"* and that the *"relevant decision-makers take into account issues of procedural fairness."*

6.3 This statement was clarified by the ICAC in the Judicial Review Proceedings[3] bought against the ICAC by NuCoal in the Supreme Court of NSW whereby the ICAC admitted that NuCoal and all of NuCoal's investors, save for two investors who had been named as corrupt by the ICAC, were innocent parties.

6.4 Item 18 of the ICAC's response to NuCoal's judicial review case against it states:

"Relevantly ICAC's recommendation that EL 7270 be cancelled was not based on any wrongdoing by NuCoal.... ICAC expressly held out the possibility that any innocent party affected by the expunging might be compensated to the extent that was considered appropriate..... 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."

6.5 In the proceedings Justice Rothman assessed the innocence of relevant parties and in his judgement included clear statements confirming that ICAC clearly acknowledged the following:

[2] ICAC's December 2013 Report, p.15.

[3] NuCoal Resources Limited v Independent Commission Against Corruption [2015] NSWCS 1400

- *"…the Commission also took the view that the plaintiff [i.e., NuCoal], 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." [57]*
- *"The plaintiff's submission was that its conduct was wholly innocent. The Commission accepted that view." [62]*
- *"Ultimately the Commission came to the view that the plaintiff, as an entity, was not involved in any wrongdoing." [65]*

6.6 There was never even a suggestion by ICAC that NuCoal or its investors were anything other than innocent parties.

7 Former DCM Directors have been found innocent or not charged

7.1 In August 2013, the ICAC made "findings" of corruption against former Directors of DCM and subsequently prepared cases for the Director of Public Prosecutions (**DPP**) against Andrew Poole and Craig Ransley.

7.2 No proceedings have ever been commenced against Andrew Poole.

7.3 The DPP commenced proceedings against Mr Ransley in the District Court of NSW *(R v Craig Ransley 2017/ 00024833)*. This case was determined in November 2017 with Judge Zhara finding Mr Ransley "Not Guilty" of all three charges brought against him.

8 NuCoal's conduct and position

<u>NuCoal is a bona fide purchaser for value and without notice</u>

8.1 It is not in dispute, that NuCoal was a bona fide purchaser of DCM and gave good and valuable consideration for the company. NuCoal purchased the shares of DCM for $94 million. DCM's valuable asset, which was valued in the prospectus, was EL 7270. That asset was not transferable. It was tied to its grantee, DCM.

8.2 But for the condition imposed on EL 7270 concerning non-transferability, NuCoal would have purchased the asset alone. It could not.

8.3 Although the asset was not transferable, there was at the relevant time no legislative prohibition or restriction on a change of control of the licence holder, nor was there any condition attached to the licence to that effect. Consequently, NuCoal acquired all of the shares in DCM and thereby gained ownership of the asset. The corporate entity, DCM, was valueless without its asset.

8.4 The genuine, clearly demonstrable and undisputed commercial purpose of NuCoal was to acquire the asset, EL 7270. The transaction by which it did so was a standard and orthodox commercial acquisition arrangement and was a perfectly legitimate and legally sanctioned course to have taken.

8.5 In the course of its acquisition of DCM, NuCoal engaged specialist corporate lawyers, Price Sierakowski, to undertake due diligence and prepare a report. 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"*.

8.6 The lawyers did not raise any caveat or warning about the validity of the licence. There was a good reason for that: none was evident.

NuCoal's exemplary conduct with respect to EL 7270

8.7 NuCoal is an established, respected and reputable entity within the coal mining industry.

8.8 At all times, NuCoal displayed exemplary corporate conduct since the acquisition of the Doyles Creek authority and in its execution of the functions conferred by the Licence.

8.9 There was never any question or requisition raised by any relevant NSW Government agency of any act of non-compliance with any condition imposed on EL 7270.

8.10 Indeed, on 2 separate occasions, NuCoal was subjected to review of and audit check against those conditions. On each occasion, the results were findings of compliance.[4]

8.11 Given the results of the audits commissioned by the NSW Government, NuCoal's investors could not reasonably have contemplated the risk of loss of title to EL 7270. In advance of the audits, NuCoal monitored its compliance with the conditions attached to EL 7270 on a quarterly basis.

NuCoal's "show cause" submission to the NSW Government regarding impending cancellation of its major asset

8.12 On 15 January 2014, at the Government's invitation, NuCoal submitted a 32 page "show cause" document explaining why the ICAC's recommendation to cancel the Licence should not be enacted (refer **Appendix A**).

8.13 The document addressed ICAC's findings, including that:

- any public controversy regarding the grant of the Licence was limited to regional media outlets over a two day period in July 2009 and thus not notorious (further confirmed subsequently in Poole v Chubb[5]);
- the risks identified in the NuCoal prospectus were entirely normal statements about ordinary investment risks associated with any small miner with limited resources. The prospectus did not identify any risk at all which might be construed to the effect that NuCoal might lose the Licence because of alleged corrupt conduct (and no such risk was within NuCoal's contemplation); and

[4] 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.

[5] Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832

- NuCoal was a bona fide purchaser for value without notice; it did not know of and was not a party to the alleged and unproven corrupt conduct of others. Within its submission, NuCoal provided the Government with a workable and fair alternative to the special legislation, but this alternative was never explored by the Government which instead, and without explanation, refused to meet with NuCoal to evaluate it.

8.14 Only 3 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, with no compensation to NuCoal and its shareholders.

9 DCM Other avenues for redress

Judicial Review

9.1 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 is not available.

9.2 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.

Constitutional Challenge

9.3 NuCoal brought proceedings in the High Court of Australia (**HCA**) against NSW, challenging the constitutional validity of the Amendment Act. The proceedings were heard in February 2015 and NuCoal did not prevail.

9.4 The decision of the HCA focused on whether the NSW Parliament exercised judicial power or imposed a punishment and did not consider whether the NSW Parliament could exercise judicial power. The HCA concluded that the cancellation of EL 7270 and the Act did not amount to a punishment of NuCoal or its shareholders. Specifically, Parliament creates and grants mining rights so Parliament can take them away without any compensation or recourse. "Legislative detriment cannot be equated with legislative punishment."

9.5 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 has the power to pass the Act it did.

9.6 The Constitution of Australia provides that the Federal Government may only compulsorily acquire (or expropriate) property "on just terms" – i.e., with fair compensation. However, the State Governments are not bound by that provision – they are free to expropriate property without offering any compensation whatsoever. This has come as a major surprise to internal and external investors in Australia, who considered Australia to be a safe haven for investments, governed by the rule of law.

Other Australian legal avenues

9.7 NuCoal, and its Investors, have recourse to none of the normal other remedies to recover compensation in relation to the loss caused by the cancellation of the Licence. The Amendment Act removes any such claim and the right to judicially try any such claim, absolving the NSW Government from liability for the State's conduct before the cancellation of the Licence.

International avenues

9.8 Internationally, our goal is to commence an action for compensation pursuant to the existing Free Trade Agreement between Australia and the USA (**AUSFTA**) for NuCoal's US shareholders.

9.9 Following the cancellation of the Licence – NuCoal, via its legal team, established that Australian States' have the right to expropriate without compensation which has left NuCoal and its U.S. Investors with no legal avenues within Australia to pursue justice.

9.10 This issue is obviously not only concerning to local Australian businesses, but creates significant sovereign risk issues for any U.S. Investor wishing to invest internationally in Australia.

9.11 NuCoal's U.S. investors' continued plight illustrates the extreme real risk that U.S. (and other International) investors face with international investment in Australia.

9.12 To the best of our knowledge, we are aware that a letter has sent by the US Trade Representative to the Australian Minister for Trade (Mr Steve Ciobo). Whilst we do not have a copy of the letter and thus its actual content – we believe a request has been made to initiate arbitration of NuCoal's case pursuant to the Australia us Free Trade Agreement;

10 The question of compensation

10.1 At a Community Cabinet meeting at Maitland on 10 February 2014 Ex-Premier Barry O'Farrell was asked by a NuCoal shareholder why NuCoal was not receiving any compensation for the cancellation of its Licence. His response to this question was:

"…if I had the money, we would. But, if you hadn't noticed, state governments, like local councils, and indeed the federal government, don't have a lot of spare cash sitting around. The mint in Macquarie Street closed a helluva long time ago."

10.2 Justice is not served when innocent shareholders are denied fair compensation simply because the Government feels it would be too costly.

10.3 Given the recent publications around the NSW Government delivering a $5.7 billion surplus this financial year - NuCoal and its shareholders are not aware of any reason which would now restrict the Government from providing appropriate compensation.

APPENDIX A

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APPENDIX A is NuCoal's Submission to the NSW Government (15 January 2014)

NOTE: THIS DOCUMENT IS PROVIDED AS ATTACHMENT 2 TO THIS SUBMISSION

Attachment 5

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23 July 2019

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

By e-mail: 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,

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

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…"* [1]. 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"* [2].

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,"*[3] (emphasis added), and that the issue of procedural fairness *"will need to be taken into consideration by the relevant decision-makers"* [4]. The Commission considered that special legislation was the *"preferable method"* for expunging the relevant authorities.[5]

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

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,

[1] Report by O'Connor Marsden dated 23 August 2010, at page 5.
[2] Report by O'Connor Marsden dated 23 August 2010, at page 5.
[3] Operations Jasper and Acacia – ICAC Report, December 2013, p 20.
[4] Operations Jasper and Acacia – ICAC Report, December 2013, p 19.
[5] 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*[6]).
- **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

[6] *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

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[7]. 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

[7] 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[8].

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[9] 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*

[8] 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.

[9] *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 $340,000 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 $290,000.
- 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 $115,000 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 $100,000.
- 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[10]. 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.

[10] *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

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[11].
- 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 Caroona are two precedent cases where compensation has been paid for removal of whole or part of an exploration licence.

[11] *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

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:[12]

- 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.

[12] 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.[13]

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.

[13] 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, Nabiac, 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

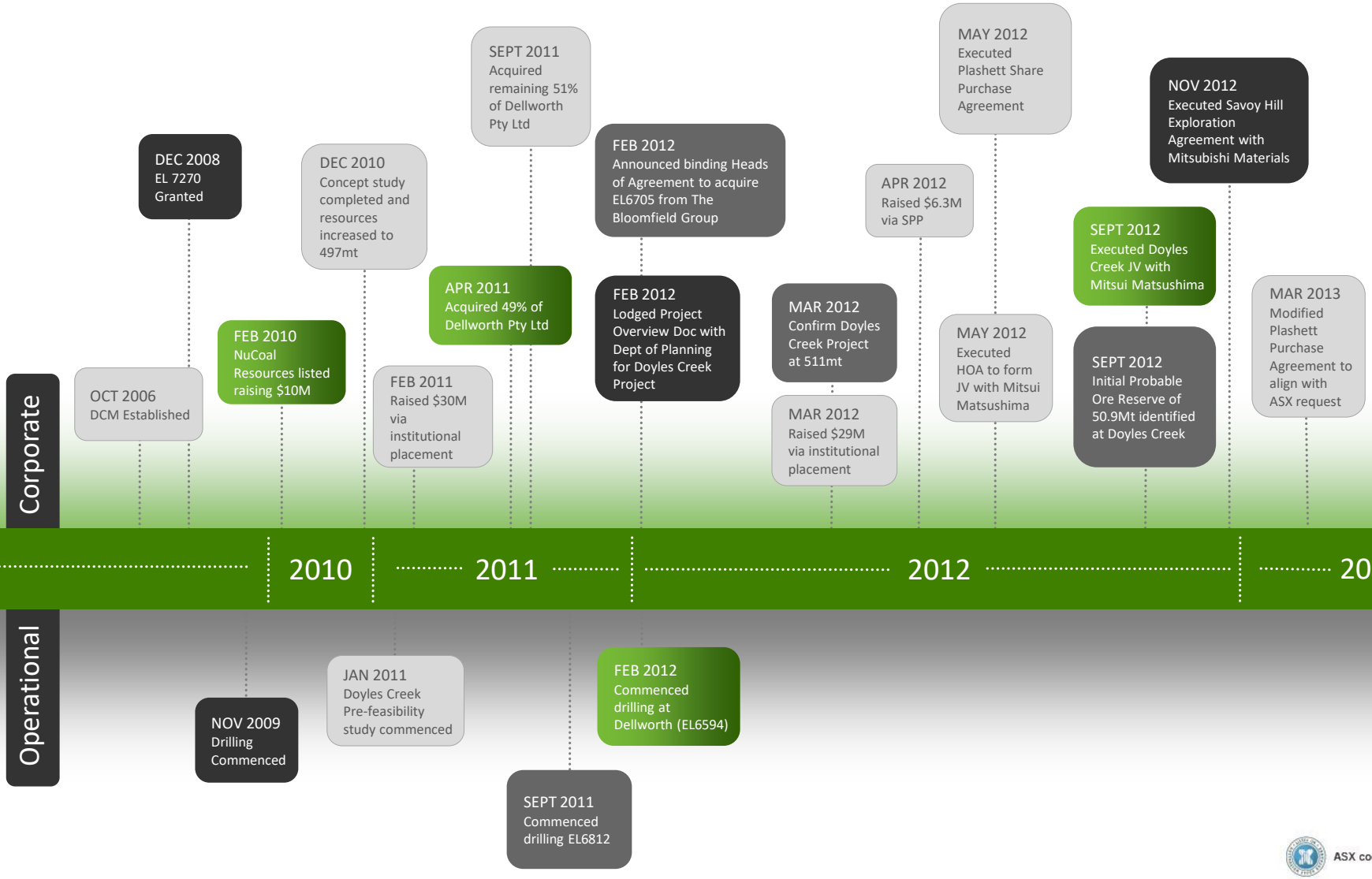
<u>The public controversy matter has been considered post ICAC in the Supreme Court of NSW.</u>

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".*[14]
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...".*[15]

[14] *Poole v Chubb Insurance Company of Australia Limited [2014] NSWSC 1832, 171 [692] – [696]*
[15] *Poole v Chubb Insurance Company of Australia Limited [2014] NSWSC 1832, 176 [728]*

APPENDIX B - NuCoal Journey



ASX code NCR

www.nucoal.com.au

APPENDIX C

NOTE: THIS DOCUMENT IS PROVIDED AS ATTACHMENT 6 TO THIS SUBMISSION

Attachment 6

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