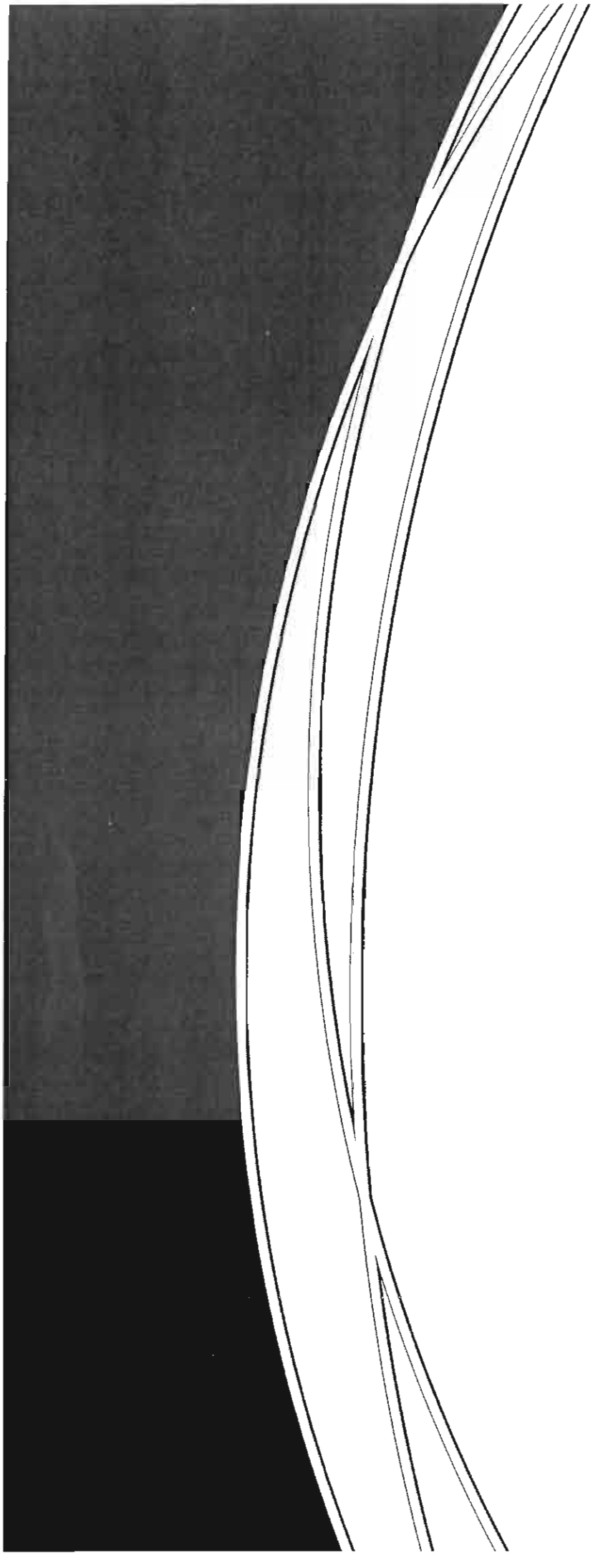
ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

INVESTIGATION INTO THE CONDUCT OF IAN MACDONALD, JOHN MAITLAND AND OTHERS

ICAC REPORT AUGUST 2013



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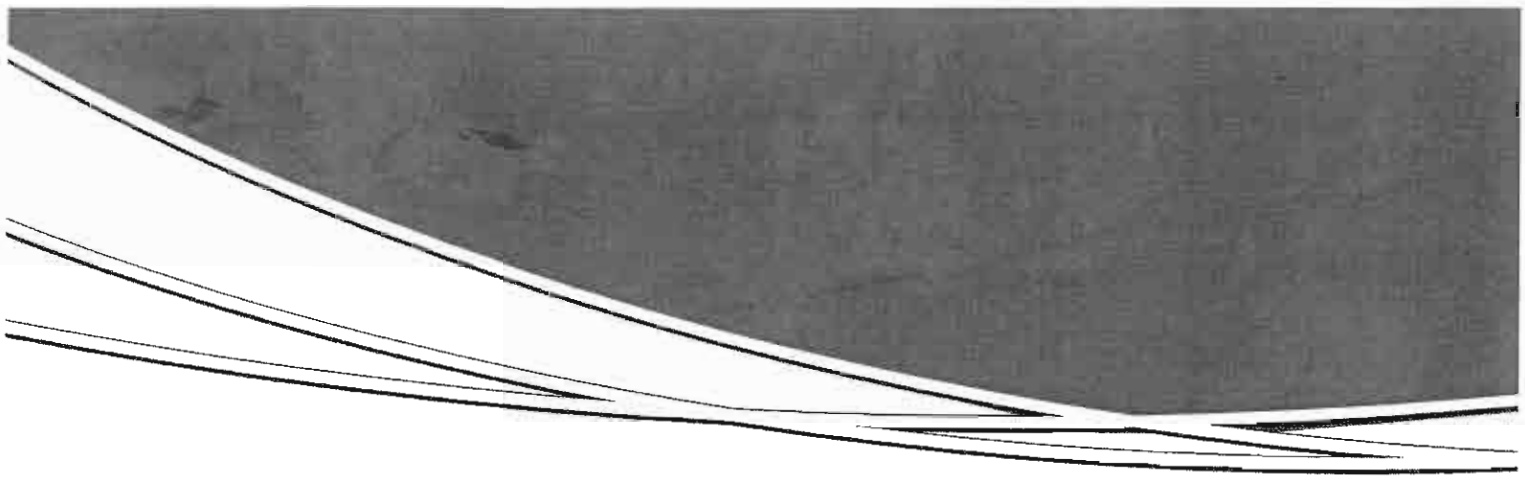

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INDEPENDENT COMMISSION
AGAINST CORRUPTION

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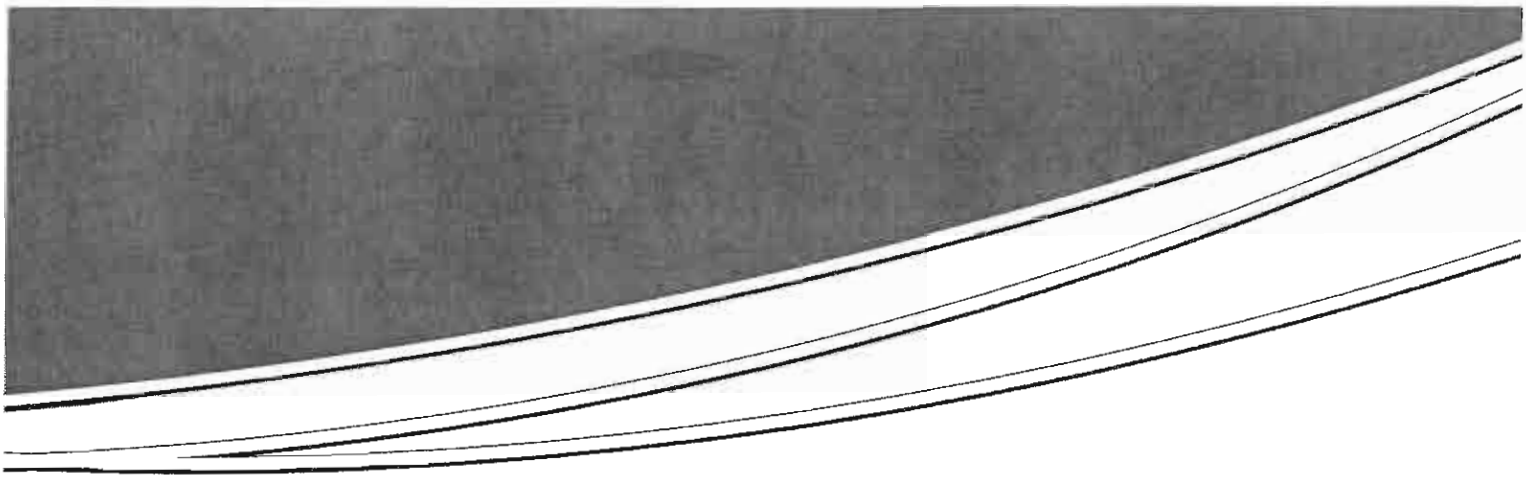

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INDEPENDENT COMMISSION
AGAINST CORRUPTION

NEW SOUTH WALES

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President
Legislative Council
Parliament House
Sydney NSW 2000

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

Mr President
Madam Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into the circumstances surrounding the application for and allocation to Doyles Creek Mining Pty Ltd of Exploration Licence No 7270.

I presided at the public inquiry held in aid of this investigation.

The Commission's findings and recommendations are contained in the report.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon David Ipp AO QC
Commissioner

Contents

Chapter 1: Summary of investigation and results

The NSW Independent Commission Against Corruption ("the Commission") has conducted a composite investigation, comprising three segments (Operation Indus, Operation Jasper and Operation Acacia). This report concerns the investigation into the Operation Acacia segment.

On 23 November 2011, both Houses of Parliament referred the following issues to the Commission by virtue of s 73 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"):

(a) That under s 73 of the Act the Commission investigate and report with respect to:

(1) The circumstances surrounding the application for and allocation to Doyles Creek Mining Pty Ltd (DCM) of Exploration Licence (EL) No 7270 under the *Mining Act 1992 (NSW)* ("the Mining Act"),

(2) The circumstances surrounding the making of profits, if any, by the shareholders of NuCoal Resources NL as proprietors of DCM,

(3) Any recommended action by the NSW Government with respect to licences or leases under the Mining Act over the Doyles Creek area,

(4) Any recommended action by the NSW Government with respect to amendment of the Mining Act, and

(5) Whether the NSW Government should commence legal proceedings, or take any other action, against any individual or company in relation to the circumstances surrounding the allocation of EL No 7270.

(b) That, as deemed necessary, the Commissioner may also inquire into any related matters.

Corrupt conduct findings

Chapter 37 of the report contains corrupt conduct findings against Ian Macdonald, John Maitland, Craig Ransley, Andrew Poole and Michael Chester.

The Commission finds that Mr Macdonald engaged in corrupt conduct by acting contrary to his duty as a minister of the Crown in granting DCM consent to apply for the EL in respect of land at Doyles Creek and by granting the EL to DCM, both grants being substantially for the purpose of benefiting Mr Maitland. The Commission finds that, but for that purpose, Mr Macdonald would not have made those grants.

The Commission finds that Mr Maitland engaged in corrupt conduct by making and publishing to the Department of Primary Industries (the DPI) the false or misleading statements identified as (a) to (k), (q) and (x) in chapter 37.

The Commission finds that Mr Ransley engaged in corrupt conduct by agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (f), (g) to (h) (insofar as the statements referred to ResCo and Coal Services), (i) to (q) and (x) in chapter 37 and by making the false or misleading statements identified as (s) to (w) in chapter 37 and agreeing to Mr Maitland publishing those statements to the DPI.

The Commission finds that Mr Poole engaged in corrupt conduct by agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (m) and (q) in chapter 37.

The Commission finds that Mr Chester engaged in corrupt conduct by making the false or misleading statements identified as (r) to (w) in chapter 37 and agreeing to Mr Maitland publishing those statements to the DPI.

Section 74A(2) statements

Chapter 37 of the report also contains statements pursuant to s 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the following people:

- Mr Macdonald for the common law offence of misconduct in public office in relation to his conduct in granting DCM consent to apply for the EL and granting the EL to DCM, both grants being substantially for the purpose of benefiting Mr Maitland.
- Mr Maitland for offences under s 178BB of the *Crimes Act 1900* in relation to his making and publishing to the DPI the false or misleading statements identified as (a) to (k), and (x) in chapter 37 and for offences under s 112(2) and s 87(1)(a) of the ICAC Act in relation to his conduct in discussing the evidence he gave at a compulsory examination with Archibald Tudehope and testifying at the public inquiry that he sought to comply with the obligation imposed on him to keep secret the evidence he gave at the compulsory examination.
- Mr Ransley for offences under s 178BB of the *Crimes Act 1900* in relation to his agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (k), (n) to (p) and (x) in chapter 37.
- Mr Poole for offences under s 178BB of the *Crimes Act 1900* in relation to his agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (k) in chapter 37.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Maitland, Mr Ransley and Mr Poole for offences under s 184(1) of the *Corporations Act 2001* in relation to their relevant conduct referred to in chapter 37 of this report.

Other matters

The *Criminal Assets Recovery Act 1990* provides that the NSW Crime Commission may apply to the Supreme Court of NSW for an assets forfeiture order. The Supreme Court of NSW may make such an order where it finds that a person has engaged in serious crime-related activity, even if the person has not been charged or convicted of any criminal offence.

There was evidence before the Commission of the financial benefits accrued by Mr Maitland, Mr Ransley and Mr Poole as a result of the corrupt conduct the Commission has found to have been engaged in by Mr Macdonald.

The Commission has provided relevant information to the NSW Crime Commission pursuant to s 16(3) of the ICAC Act for such action as the NSW Crime Commission considers appropriate.

Issues (3), (4) and (5)

For the reasons discussed in the following chapter, the Commission has decided to release a separate and later report about issues (3), (4) and (5) referred to the Commission by the NSW Parliament.

Corruption prevention

The Commission has not made corruption prevention recommendations in this report. The investigation does, however, raise the issue of the improper use of power by a minister. This issue also arises in other investigations in respect of which reports have been released and will be dealt with, along with other corruption prevention issues, in a separate report to be published at a later date.

Recommendation that this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

Chapter 2: Background

This chapter sets out some background information on how the investigation came about, how it was conducted and why the NSW Independent Commission Against Corruption ("the Commission") decided to conduct a public inquiry.

How the investigation came about

On 23 November 2011, by virtue of s 73 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), both Houses of Parliament referred certain issues to the Commission for investigation (these issues are set out in chapter 1).

On 15 December 2008, then minister for primary industries and minister for mineral resources, the Hon Ian Macdonald MLC, granted Doyles Creek Mining Pty Ltd (DCM) an exploration licence (EL). That EL was granted over an area of land adjacent to a small community township called Jerrys Plains. The EL extends over approximately 27 square kilometres from the south-western edge of Jerrys Plains and includes Doyles Creek, which is a tributary of the Hunter River.

Jerrys Plains is located in the greater Hunter Valley region. It is situated on the Golden Highway, 37 kilometres north-west of Singleton and almost directly south of Muswellbrook. It has a population of just under 700. It boasts a community hall and town meetings are sometimes held there. Other than a small school, police station, petrol station, bed and breakfast and a pub, it has very few facilities to support its small population. Some of the buildings there are regarded as historic sites. It has no supermarket, and no local medical services and, up until the present day, no training school for miners.

To the west and slightly south of the village is an area known as Apple Tree Flats and, a little further still, runs Doyles Creek. It is over this area that the EL the subject of this inquiry is located, just on the outskirts of the Jerrys Plains township itself. The southern boundary of the EL is delimited by the Wollemi National Park.

The EL covers land being used for various purposes. It includes agricultural and farming land. By far the single largest landowner in the area covered by the EL is the internationally renowned Coolmore horse-stud. Coolmore Australia forms part of the Coolmore group, which is one of the two largest international commercial thoroughbred breeding operations in the world. Coolmore Australia is situated on 8,500 acres of land near Jerrys Plains, which has been specially cultivated at the cost of many millions of dollars. It employs up to 150 people, about 90 of whom (with their families) live on the property full-time. It is an operation with which Mr Macdonald was very familiar as a result of his work during the equine influenza scare. Surprisingly, no one from Coolmore was consulted by anyone from the government as to the potential effect of mining on that operation prior to the granting of the EL.

Like many villages in the Hunter Valley, Jerrys Plains is surrounded by coal. The Wambo and United Collieries lie nearby. As a result of previous exploratory work undertaken, there was a body of limited geological information concerning the Doyles Creek area. Prior to 2007, various companies had expressed an interest in exploring the Doyles Creek tenement, but had been turned away.

In the 1970s, Bayswater Collieries explored an area to the north. In addition, for decades the various government departments then responsible for mineral resources had mapped the location of coal resources across NSW and estimated the quantities of coal available at particular sites. As part of that program, some boreholes had been drilled in the general Doyles Creek area. Part of the team that undertook that drilling program was a geologist, Dr Guy Palese. 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.

In total, there were six boreholes in the general Doyles Creek area, which provided initial information as to the nature of the coal measures in the area. Of course, estimates of the quantities of mineable coal in an area are difficult to make and subject to a number of variables. A lot more work by way of exploration and the drilling of boreholes had to be done to prove up the resource, but the previous boreholes provided a starting point.

Otherwise, there was a wealth of general information available about the coal measures in the general area, both from the broader exploration previously done and the surrounding mining operations. As a result, the measures and seams located in the general area and their basic characteristics were well-known. The area contained the Wittingham and Wollombi Coal Measures. The Wittingham Coal Measures contained a number of well-known seams referred to as the Whybrow, Redbank Creek, Wambo, Whynot and Blakefield seams, as well as a number of others.

Interest in the further exploration of the Doyles Creek area emerged in the early part of the last decade. Between October 2005 and April 2006, the department then responsible for mineral resources wrote to two companies, Independent Coal and Simatar Resources, in response to requests that each of those companies had made to be invited to apply for an EL over the Doyles Creek area. On each occasion, the department concerned declined the request, advising that there were limited unallocated reserves available and it had identified the Doyles Creek area as a possible competitive tender area. Two other companies, Excel and later Peabody, also sought access to the area in 2005 and 2006, and they too had their requests declined.

Where a company expresses interest in exploring an area that has not been released, its interest is recorded on a "register of interest", held for this specific purpose by the department responsible for mineral resources. In the ordinary course of events, should that area be released in the future, the companies that have expressed interest in it are notified. The companies that had previously expressed interest in Doyles Creek were recorded on the register. However, because of the direct allocation to DCM, they were never told about the intended release of the area. An issue in this public inquiry is why a competitive tender, such as was contemplated in the correspondence with these companies, was never held.

The allocation of the EL attracted public controversy almost immediately. Throughout 2009, critical comments were made in the media, including radio and newspapers. Questions were raised about the circumstances of the allocation and whether Mr Macdonald was influenced to grant the EL in favour of DCM by reason of his relationship with John Maitland, a former leader of the Construction, Forestry, Mining and Energy Union (CFMEU), Mining and Energy Division (usually referred to as "the Mining Division"), who was also a shareholder and the chairman of DCM at the time the EL was granted.

Following Mr Maitland's retirement from the CFMEU, he had been recruited to the role of chairman of DCM by Craig Ransley, who, along with Andrew Poole, co-founded ResCo Services Pty Ltd ("ResCo") in late 2006. In mid-2007, ResCo changed its name to DCM. Mr Ransley, a successful director of labour hire companies in the mining industry, and Mr Poole, a director of companies and a financial consultant, established ResCo with the intention of acquiring mining services and other businesses in the resources sector. Mr Poole had had a business association with Mr Ransley over some years.

In early 2010, DCM was listed on the Australian Securities Exchange (ASX) through its acquisition by NuCoal Resources NL. That listing valued the EL over the Doyles Creek area at approximately $100 million. Most of the original shareholders of DCM have since realised much of their investments for very large sums of money. Mr Maitland, for example, outlaid about $165,000 to acquire his shares. By December 2011, his investment was worth about $15 million. A table summarising the profits made by the original shareholders of DCM is set out in Appendix 4.

The public listing, and the large profits to Mr Maitland and other DCM shareholders, did nothing to quell the public controversy. In 2010, a probity report into the allocation of the EL was prepared at the request of the NSW Government. After a change of government in 2011, a report into the circumstances surrounding the allocation of the EL was prepared by law firm Clayton Utz. This was tabled in the NSW Parliament on 11 November 2011. On 23 November 2011, both Houses of Parliament referred the matter to the Commission for investigation.

Conduct of the investigation

The Commission commenced its investigation by reviewing the regulatory framework governing the allocation of coal ELs in 2008.

Under s 13 of the *Mining Act 1992* ("the Mining Act"), as it then stood, any person could apply for an EL. An application that related to land within what is known as a mineral allocation area could not be made, however, except with the minister's consent. In 2007, the whole of the state of NSW was constituted a mineral allocation area for coal. The effect of this was that ministerial consent was required before an application could be made for a coal EL anywhere in NSW. This was intended to allow for the controlled and rational allocation of potential coal development areas.

There are two ways in which a coal EL can be granted in NSW. One method is known as a direct allocation of an

EL and involves a minister granting an applicant consent to apply for a coal EL and then granting the EL to the applicant. Another method involves a public tender or an expression of interest (EOI) process, whereby interested parties compete with each other to obtain the minister's consent to apply for the EL.

The *Guidelines for Allocation of Future Coal Exploration Areas* had been promulgated in 2006 with the authorisation of Mr Macdonald. Those Guidelines were updated in January 2008, again by Mr Macdonald. The Guidelines lay down criteria for allocating coal ELs, set out the minimum financial contributions to be paid upon the granting of an EL, and allow for persons interested in obtaining an EL through a competitive process to make additional financial contributions over and above the minimum financial contribution.

As to the process of allocating ELs, the Guidelines defined four categories of coal allocation areas: (1) major stand-alone areas, (2) substantial additions to existing mines, (3) minor additions to existing mines and (4) small areas unrelated to existing mines. A "major stand-alone area" is an area with sufficient resources to justify the establishment of a substantial new mine and infrastructure.

The Guidelines provided that a major stand-alone area should be allocated by one of four methods, all of which required a competitive process – either an EOI or tender with a requirement to offer an additional financial contribution either at a fixed amount or at the discretion of the applicant. Paragraph 1 of the Guidelines, however, provided that there may be circumstances where coal allocations can be made directly.

Having reviewed the regulatory framework, the Commission obtained and examined the relevant files of the NSW Department of Primary Industries (DPI) (which by then had become the relevant department responsible for mineral resources) to determine what advice was provided to Mr Macdonald about the allocation of the Doyles Creek EL.

The DPI categorised the potential resource at Doyles Creek as a major stand-alone area and recommended to Mr Macdonald that he consider allocating the EL using a competitive process. Other DPI advice provided to Mr Macdonald spoke strongly against directly allocating the EL to DCM. Notwithstanding this advice, Mr Macdonald directly allocated the EL to DCM without undertaking any competitive allocation process. On 21 August 2008, Mr Macdonald granted DCM consent to apply for the EL without the DPI's involvement or knowledge. This was highly irregular as the minister normally determines an application for consent to apply for an EL based upon the DPI's written advice and recommendation. On 15 December 2008, Mr Macdonald granted the EL to DCM. Diary records show that, on the evening of 15 December 2008, Mr Macdonald and the principals of DCM dined at the Catalina Rose Bay Restaurant ("Catalina's"). This raised concerns about the extent to which Mr Macdonald kept at arm's length from the proponents during the course of the EL application.

Other features of the application process were unusual. DCM had sought the EL on the basis that it intended to build a training mine at Doyles Creek. The DPI advised Mr Macdonald early on in the application process that the Mines Safety Council, an expert body that advises on enhancing mine safety performance, had previously considered the merits of a training mine and rejected the idea in favour of other forms of training. The DPI recommended that Mr Macdonald obtain expert advice about the proposal. Mr Macdonald, however, sought no expert advice about the training mine proposal during the entire application process.

On 29 September 2008, DCM, having been invited to apply for the EL by Mr Macdonald, made a formal application to the DPI for the EL. Attached to the application were a number of letters of support for the proposal from individuals and businesses associated with the mining industry. Some of the letters were in identical terms, which raised questions about the circumstances in which they were prepared.

To further its investigation into these matters, the Commission:

- obtained documents, financial records and computer databases from a range of sources by issuing 139 notices under s 21 and s 22 of the ICAC Act
- conducted 54 compulsory examinations
- conducted 42 interviews with witnesses and obtained statements from 33 witnesses
- executed two search warrants
- obtained five warrants under the *Telecommunications (Interception and Access) Act 1979*.

As a result of conducting these enquiries, it became apparent that, at the time Mr Macdonald directly allocated the EL to DCM, he was aware that a number of other companies were interested in the EL and that a competitive process could attract substantial offers of additional financial contributions. Throughout the application process, the DPI was kept at arm's length by Mr Macdonald and his ministerial staff. Mr Maitland and Mr Ransley, however, were in regular contact with Mr Macdonald's ministerial staff concerning progress of the application and met with Mr Macdonald to discuss the proposal over lunch and dinner. On these occasions, Mr Ransley extended considerable hospitality to Mr Macdonald by paying the restaurant bills. Other evidence suggested that Mr Maitland and Mr Macdonald were

"mates" and shared a factional allegiance within the left faction of the Australian Labor Party (ALP). In 2006, Mr Macdonald appointed Mr Maitland to two statutory roles; namely, chairman of the Coal Competence Board and membership of the Coal Compensation Review Tribunal.

In the light of all these matters, the Commission focused its investigation on examining the possibility that Mr Macdonald granted DCM consent to apply for the EL and granted the EL in order to favour or advantage Mr Maitland and that Mr Maitland, Mr Ransley and Mr Poole had knowingly encouraged him to do so.

Questions also arose as to whether DCM had made false statements to the DPI in the course of applying to Mr Macdonald for consent to apply for the EL and applying for the EL. In March 2008, DCM submitted to the DPI its Training Mine Facility Submission ("the Submission") in support of its application for consent to apply for the EL. The Submission contained a confusing array of statements about the anticipated size of the coal resource, some of which appeared to be wrong. Claims were made in the Submission about the nature and viability of the proposed training mine, which, when carefully scrutinised, appeared to be false or misleading. The Submission contained statements that DCM and other organisations had entered into strategic partnerships in connection with the establishment of a training mine at Doyles Creek and that there existed signed memoranda of understanding (MOUs) reflecting these arrangements. In almost all cases, however, proof of the existence of signed MOUs could not be found. On 29 September 2008, DCM applied for the EL. Attached to its application was a letter prepared by Michael Chester, a shareholder of DCM and director of Paradigm Capital Pty Ltd (a financial advisory company), representing that $5 million had been raised on behalf of DCM to finance the cost of exploration. Other evidence indicated, however, that no such money had been raised.

The public inquiry

The Commission reviewed the information that had been gathered during the investigation and, after taking into account this material and each of the matters set out in s 31(2) of the ICAC Act, determined that it was in the public interest to hold a public inquiry. In making that determination, the Commission had regard to the following considerations:

- continuing public scrutiny within the NSW Parliament and the media of the circumstances surrounding the allocation of the Doyles Creek EL
- risk of undue prejudice to the reputations of Mr Macdonald, Mr Maitland, Mr Ransley, Mr Poole and Mr Chester
- seriousness of the allegations.

The Commission concluded that the public interest in identifying the facts of what had occurred and exposing any corrupt conduct outweighed the public interest in preserving the privacy of the persons concerned.

As there was some commonality between subject matter and persons involved in Operation Acacia and two other operations, the Commission determined that it was in the public interest to deal with all three operations in the same public inquiry, but by way of different segments. As mentioned in chapter 1, the other two operations were Operation Indus (reported as *Investigation into the conduct of Moses Obeid, Eric Roozendaal and others*) and Operation Jasper (reported as *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*).

Operation Indus concerned the circumstances in which, in June 2007, Moses Obeid or the Obeid family provided the Hon Eric Roozendaal MLC with a benefit by way of a reduction of $10,800 in the purchase price of a Honda CR-V motor vehicle. As this matter concerned the conduct of the Hon Edward Obeid MLC, Moses Obeid and some other people also relevant to the Operation Jasper investigation, it was appropriate and convenient that both matters be dealt with together. The Commission furnished its report to the NSW Parliament on Operation Indus on 31 July 2013.

Operation Jasper primarily concerned the circumstances surrounding a decision made in 2008 by Mr Macdonald to grant a coal EL, referred to as the Mount Penny tenement, in the Bylong Valley. The circumstances in question included whether that decision was not impartially made and was influenced by Edward Obeid Senior or members of his family. The Commission furnished its report to the NSW Parliament on Operation Jasper on 31 July 2013.

The Hon David Ipp AO QC, Commissioner, presided at the Operation Acacia segment of the public inquiry. Peter Braham SC and Alan Shearer acted as Counsel Assisting the Commission.

The Operation Acacia segment commenced on 18 March 2013 and concluded on 17 May 2013. During that time, it ran for 37 days. The Commission heard oral evidence from 52 witnesses. There were more than 3,500 pages of transcript produced. Several thousand documents were provided to persons potentially affected and tendered in evidence.

At the conclusion of the evidence in the Operation Acacia segment of the public inquiry, Counsel Assisting prepared submissions setting out the evidence and what findings and recommendations the Commission could make based on that evidence. These submissions were provided to Mr Macdonald, Mr Maitland, Mr Ransley, Mr Poole and Mr Chester and other relevant persons, and submissions were

invited in response. All such submissions received by the Commission have been taken into account in preparing this report.

In its report dealing with Operation Jasper, the Commission observed that there was a disturbing feature to the submissions received in response. The Commission referred to extravagant attacks that had been made on Counsel Assisting and observed that those attacks were dealt with in Appendix 3 to the report, where the Commission explained that those attacks were "without foundation or misconceived, and are rejected". The Commission said in the report:

> *The Commission is concerned about these unwarranted attacks on Counsel Assisting. Similar attacks on Counsel Assisting have been made in Operation Acacia, the report on which is yet to be published and in which different Counsel Assisting from those in Operation Jasper appeared. There seems to be a pattern emerging. It is as if some legal representatives regard Counsel Assisting as fair game in respect of whom they can make presumptuous and contumelious remarks with impunity. What lies behind this conduct? The Commission cannot answer this question with any certainty. But one thing is clear. It is not persuasive.*
>
> *The criticisms are made specifically of the way in which Counsel Assisting conducted the hearing of the inquiry. But, significantly, these criticisms were not made during the hearing. No explanation is given for this failure. The consequences of making criticisms that fall into this category are, first, Counsel Assisting were not given an opportunity of answering them face-to-face, in the hearing room, secondly, the Commissioner was not then asked to rule upon them, and thirdly, the Commission was not able to deal with them by calling evidence where evidence would have been appropriate. The Commission is now able to deal with the criticisms only in the report. It has done so, as mentioned above, in Appendix 3.*
>
> *The Commission hereby gives notice that, in future, if submissions make serious personal attacks on Counsel Assisting on unwarranted grounds – as has been done in Operation Jasper and Operation Acacia – the Commission will take whatever steps are available to it to have the authors of such submissions called to account.*

In the Commission's view, such unwarranted attacks are likely to constitute unprofessional conduct and, in future, if attacks of this kind are made the Commission will refer those who make them to the Bar Council.

The attacks made on Counsel Assisting in this inquiry are dealt with in Appendix 3. In addition, in that appendix, the Commission will deal with certain submissions on the law that counsel for affected parties have made.

The scope and purpose of the Operation Acacia inquiry

There are 11 matters that comprise the scope and purpose of the Operation Acacia segment of the public inquiry.

On the first day of the inquiry, the five specific matters referred to the Commission by the NSW Parliament were announced, as follows:

(1) The circumstances surrounding the allocation of EL 7270 to DCM.

(2) The circumstances surrounding the making of profits, if any, by the shareholders of NuCoal Resources NL, the latter being 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.

(4) Whether the NSW Government should commence legal proceedings, or take any other action, against any individual or company in relation to the circumstances surrounding the allocation of EL 7270.

(5) Whether to recommend that any action be taken by the NSW Government with respect to amending the Mining Act.

During the course of the public inquiry a challenge was mounted to the Commission's jurisdiction to examine issue (4) (referred to in the previous paragraph) of the scope and purpose of the inquiry. Various submissions have been received by the Commission to the effect that investigating and reporting on that issue is not within the Commission's powers under the ICAC Act.

The Commission has decided to report later on issues (3), (4) and (5) of the scope and purpose of the inquiry, including the challenge to the Commission's jurisdiction in relation to issue (4), in a separate report to the NSW Parliament. In the Commission's view, issues (3), (4) (assuming the Commission determines that it has power to consider issue (4)) and (5) should be considered together, and they should also be considered concurrently with, or after, the giving of advice on like issues that the Premier has sought in Operation Jasper. Whether the NSW Government should commence legal proceedings or take any other action against an individual or company may involve considerations relevant to formulating recommendations with respect to licences or leases over the Doyles Creek area. Any view that the Commission may form about issues (3) and (4) could potentially influence the nature of the recommendations the

Commission may wish to make with respect to amending the Mining Act (in dealing with these issues).

Other issues formed part of the scope and purpose of the Operation Acacia public inquiry, including:

(6) Whether to recommend action be taken by the NSW Government with respect to extending the *Ministerial Code of Conduct* and the *Code of Conduct for Members*.

Issue (6) will be dealt with in a separate report dealing with other corruption prevention issues, to be delivered later.

The Commissioner expanded the scope and purpose of the Operation Acacia public inquiry by adding the following issues for investigation:

(7) Whether in granting the Doyles Creek EL, Mr Macdonald intended to and did confer an improper favour or benefit upon Mr Maitland and his associates.

(8) Whether one or more of Mr Maitland, Mr Ransley and Mr Poole took steps to procure Mr Macdonald to confer that improper favour or benefit on Mr Maitland and his associates or to aid Mr Macdonald in effecting that conferral.

(9) Whether any one or more of Mr Maitland, Mr Ransley, Mr Poole and Mr Macdonald took steps to conceal or disguise, or intended to conceal or disguise, the impropriety of so conferring that favour or benefit.

(10) Whether Mr Macdonald took improper steps to overcome DPI opposition to the invitation to apply, or to the granting of, the Doyles Creek EL.

(11) Whether, in inviting DCM to apply for the EL, Mr Macdonald acted recklessly or negligently and in breach of, and without due regard, to his duties as a minister of the Crown.

(12) Whether one or more of Mr Maitland, Mr Ransley, Mr Poole and Mr Chester made misleading statements to DPI officers in connection with the application by DCM for consent to apply for an EL and the application for that EL.

Issue (11) was withdrawn and deleted during the course of the public inquiry. At the time, however, it was made clear that issues of possible improper conduct and breach of duties on the part of Mr Macdonald were likely to arise in the course of investigating issues (7), (8), (9) and (10), and that the Commission did not regard itself as being precluded from investigating and making findings in that context as to whether there has been corrupt or improper conduct on the part of Mr Macdonald or conduct connected with that corrupt conduct.

Insofar as Mr Macdonald was concerned, issues (7), (9) and (10) of the scope and purpose of the inquiry squarely raised the issue of whether Mr Macdonald had exercised his public official functions as a minister in a partial manner; that is, whether Mr Macdonald had misused his power by granting DCM consent to apply for the EL and by granting the EL to DCM so as to favour or advantage Mr Maitland.

If Mr Macdonald knowingly acted in this manner, such conduct would constitute corrupt conduct within the meaning of the ICAC Act. Such conduct on Mr Macdonald's part could constitute or involve the partial exercise of his official functions and would therefore come within s 8(1)(b) of the ICAC Act. It could also constitute a breach of public trust and therefore come within s 8(1)(c) of the ICAC Act. For the purposes of s 9(1)(a) of the ICAC Act, his conduct could involve the common law offence of misconduct in public office.

If it was established that Mr Macdonald acted in a partial manner, the question arose as to whether any or all of Mr Maitland, Mr Ransley and Mr Poole knew that Mr Macdonald was so acting and took steps to aid or encourage him in that regard or conspired with each other and Mr Macdonald to procure the conferral of an improper benefit on Mr Maitland. These matters were the substance of issues (8) and (9).

If Mr Maitland, Mr Ransley and Mr Poole so acted, such conduct could amount to corrupt conduct. Such conduct on their part could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by Mr Macdonald under s 8(1)(a) of the ICAC Act. For the purposes of s 9(1)(a) of the ICAC Act, their conduct could also involve criminal offences of aiding and abetting Mr Macdonald in the commission of the common law offence of misconduct in public office, or conspiring with each other and Mr Macdonald to defraud involving an agreement to use dishonest means to influence the exercise of a public duty (by Mr Macdonald). Alternatively, their conduct could involve a conspiracy involving each other and Mr Macdonald to commit the common law offence of misconduct in public office by Mr Macdonald.

Issue (12) is concerned with examining the nature of the representations made by the principals of DCM and Mr Chester to the DPI in the course of applying for consent to apply for the EL and applying for the EL. If any or all of Mr Maitland, Mr Ransley, Mr Poole and Mr Chester knowingly made false or misleading statements to the DPI, such conduct could amount to corrupt conduct. Such conduct on their part could have adversely affected, either directly or indirectly, the exercise of official functions by

DPI officers and could involve fraud under s 8(2)(e) and company violations under s 8(2)(s) of the ICAC Act. For the purposes of s 9(1)(a) of the ICAC Act, their conduct could also involve criminal offences under s 178BB of the *Crimes Act 1900* and s 374 of the Mining Act, and in the case of Mr Maitland, Mr Ransley and Mr Poole, offences under s 184(1) of the *Corporations Act 2001*.

Chapter 3: Credibility findings concerning Mr Macdonald and other witnesses

Mr Macdonald

The Commission accepts Counsel Assisting's submission that Mr Macdonald did not give his evidence truthfully and cannot be accepted as a credible witness.

Generally, Mr Macdonald attempted to avoid answering difficult questions. He did this by not answering the question, by giving long, discursive and irrelevant answers, by being argumentative and by saying that he could not remember, even when the issue concerned was so strikingly important that he could be expected to remember. From time to time, he gave evidence that was inconsistent with earlier evidence. Some of his evidence was inherently improbable. At times, he also appeared to be making up evidence as he went along.

Throughout this report, instances are recorded where evidence given by Mr Macdonald is recounted but not believed. In almost every instance, reasons are given for the view the Commission has formed.

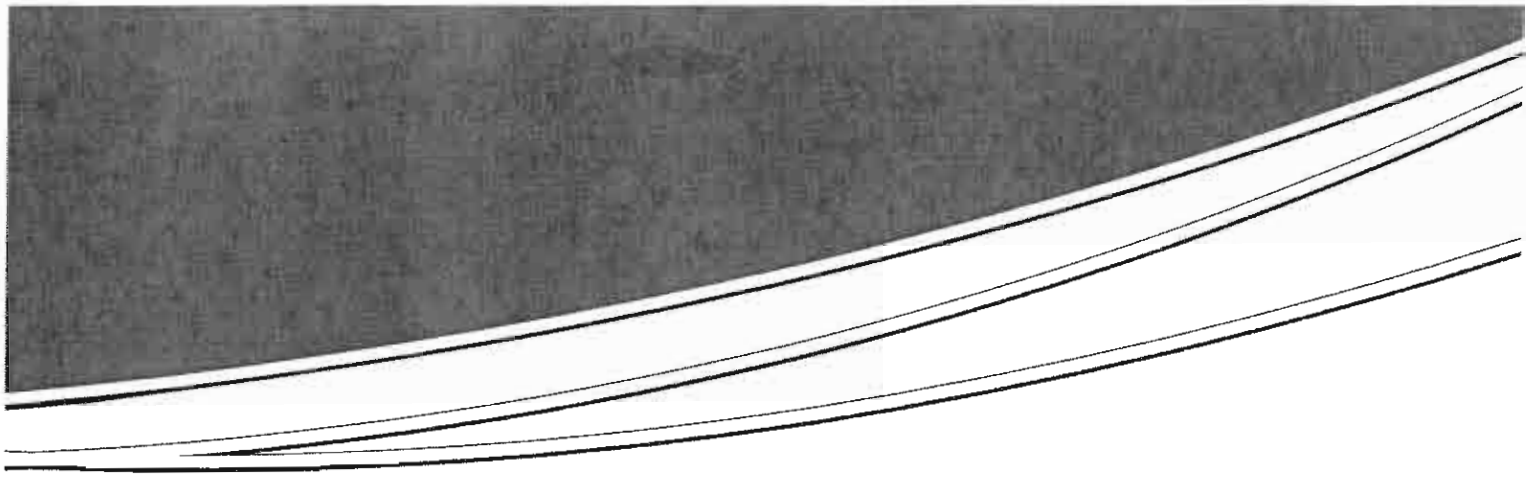
In many instances, Mr Macdonald's evidence is contrary to that given by his former political colleagues of high seniority and certain trade union associates, such as the Hon Luke Foley MLC, Anthony (Tony) Maher and Senator the Hon Doug Cameron (all of whom were impressive witnesses, not shown in any material respect to have given false or incorrect evidence). Mr Macdonald's evidence is also contrary to that of his own staff, such as Jamie Gibson, Sue-Ern Tan and Craig Munnings, and to evidence given by witnesses from the DPI who testified without animus towards Mr Macdonald. These witnesses gave evidence that was generally supported by the evidence of others, by documents, by longstanding routine practice or by common sense. They appeared to be reasonable persons who were doing their best to tell the truth and to give accurate evidence. Tim Hale SC, together with David Mackay, appeared for Mr Macdonald. Mr Hale submitted that Mr Gibson and Mr Munnings might be motivated to tell lies about Mr Macdonald. The Commission finds that Mr Gibson and Mr Munnings were not so motivated. There was nothing in the way they gave evidence that supported this submission. Mr Hale made a similar submission in regard to Mr Foley. For similar reasons, this submission is rejected.

As Counsel Assisting submitted, Mr Macdonald was repeatedly contradicted by what he had previously said in his compulsory examinations. Mr Hale sought to explain the inconsistencies between Mr Macdonald's evidence in his compulsory examination and the public inquiry on the grounds that at the compulsory examination he had not had access to documents. But most of the inconsistent evidence was not based on documents and, in any event, many of the issues were so important that the Commission would expect Mr Macdonald to be aware of the truth in regard to those issues and to tell the truth.

The Commission does not propose at this stage to give particular examples of the very many instances where Mr Macdonald's evidence was shown to be false. This report is long enough without that, and a reading of his testimony and this report will reveal them, anyway. It is sufficient to state that Mr Macdonald concluded his testimony with the Commission being left with the impression that little he said could be believed.

Mr Ransley

The Commission does not accept Mr Ransley as a truthful witness. Mr Ransley was reluctant to answer questions that he thought might prejudice him. He sought to avoid those questions by not answering them, by giving non-committal answers and by equivocating. Mr Ransley would make no concessions, even in circumstances when the state of the evidence on a particular issue was such as would compel an honest and candid witness to make a concession. At times, he would give answers that were demonstrably or obviously false. This occurred, for example, in his attempts to defend statements in the Submission about a rigorous assessment process to choose the tenement, and DCM's plans for a new board. Mr Ransley's evidence on many matters, some of considerable importance, was contrary to the contemporaneous notes of others (this is apparent from the contemporaneous



notes of other witnesses Lawrie Ireland, James Chisholm, James Stevenson, John Baxter and Peter Demura). His evidence at the public inquiry was at times inconsistent with his evidence given at a compulsory examination. His explanation in each instance that he had merely made a mistake was not convincing.

Mr Ransley appeared to be willing to make deliberately misleading statements in the course of his business dealings when his financial interests were at stake. Generally, he appeared determined, irrespective of the truth, to give no answer that could possibly reflect adversely on his position and he sought to tailor his evidence in ways that he thought would best promote his interests.

Mr Poole

Counsel Assisting submitted that Mr Poole's evidence can generally be accepted except where it is self-serving or against the weight of other evidence or the probabilities. The Commission accepts this submission.

Mr Maitland

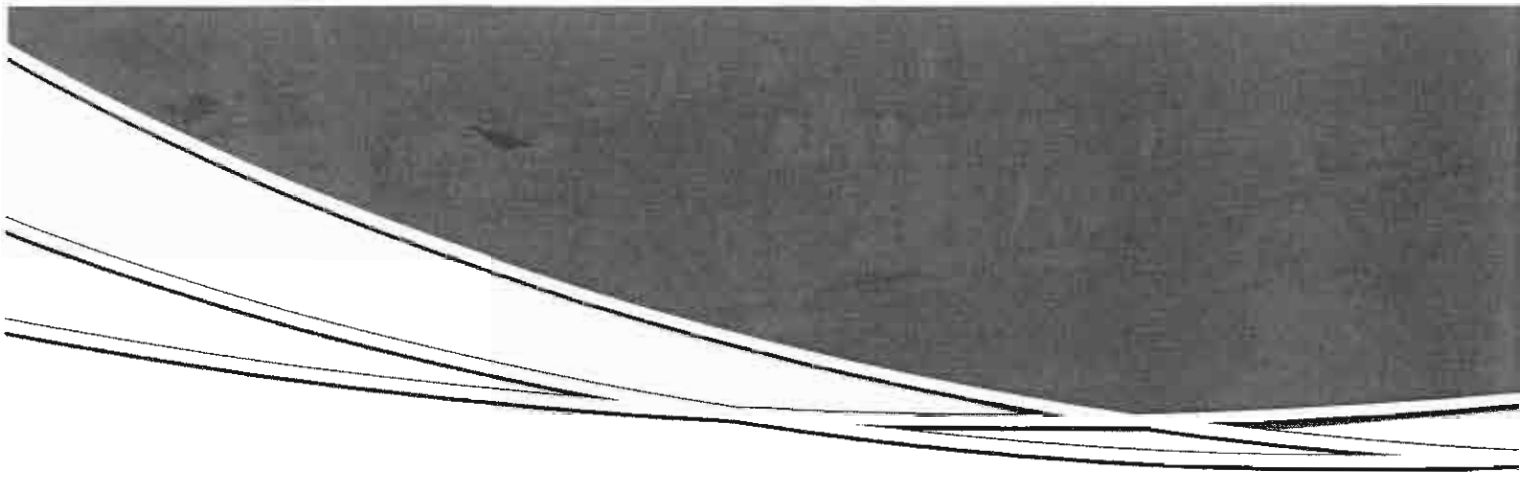
The Commission agrees with the submission of Counsel Assisting that many aspects of Mr Maitland's conduct – in particular the various misleading statements he made in documents submitted to the DPI, to trade union branches and to the local community – indicate a lack of honesty on his part. The same may be said about the way in which he obtained letters of support from unsuspecting friends and former colleagues and associates without making due disclosure of important matters. These matters are dealt with below. In addition, on occasion, Mr Maitland's evidence was inconsistent with the positive case previously stated by Jeremy Kirk SC (who appeared with Matthew Darke and Simon Fitzpatrick) on his behalf.

Mr Maitland's evidence commenced with an acknowledgement that he spoke to his friend, Archibald Tudehope, about the evidence he gave at a compulsory examination held by the Commission prior to the public inquiry. At the commencement of the compulsory examination, the Commissioner directed that the evidence given by Mr Maitland and the fact that he had given evidence at the compulsory examination should not be published or otherwise communicated to anyone except by Commission officers for statutory purposes or pursuant to further order of the Commission. After the direction was made, Mr Maitland agreed that he understood the effect of the direction. At the public inquiry, Mr Maitland acknowledged, however, that he breached the direction by discussing his evidence with Archibald Tudehope, and acknowledged that he lied when he said, at the public inquiry, that he sought to comply with the obligation imposed on him to keep secret the evidence he gave at the compulsory examination. Mr Kirk's submission treats Mr Maitland's breach of the ICAC Act and his lie about that breach as trivial. They were not. They were deliberate and flagrant. His readiness to tell this untruth does not fill the Commission with confidence about his evidence, generally.

Mr Kirk pointed to the fact that Mr Maitland has devoted much of his career to protecting the health and safety of mine workers and had, for many years, advocated the establishment of a training mine. The Commission accepts this. These matters, however, do not preclude any finding that Mr Maitland was motivated, at least partly, by financial acquisitiveness in acting on behalf of DCM to persuade Mr Macdonald to allocate the EL directly to it.

Mr Kirk submitted that Mr Maitland "did not act to maximise his personal gain from the Doyles Creek project". It is true that Mr Maitland did not always participate in capital raisings. This conduct can readily be interpreted as Mr Maitland making personal financial decisions based on his financial circumstances at the time. There is no acceptable evidence that Mr Maitland acted altruistically in not acting to maximise his personal gain from DCM. Indeed, his conduct in this respect says nothing about his motivation for investing in DCM.

Sometime after the EL had been granted to DCM, Mr Maitland ended his association with the Doyles Creek "Centre of Excellence", a subsidiary of DCM. He did



so on condition that DCM would make a donation to a community trust and not on the basis that DCM would make a payment to him personally. There was a real dispute between Mr Maitland and Glen Lewis as to whether Mr Maitland had any entitlement to a payment and it may be that he had no entitlement at all. At the time the payment to the community trust was made, allegations of corruption were being publicly raised against him. By the time DCM had made a payment to the trust, he had made a large fortune for himself. In all these circumstances, the Commission does not infer that the payment to the community trust has any relevance to Mr Maitland's motivation in pursuing the granting of the EL to DCM.

Mr Kirk submitted that Mr Maitland acknowledged errors in the Submission that were against his interest. Those errors, however, were obvious and undeniable.

In consequence, the Commission accepts Counsel Assisting's submission that, on critical aspects affecting Mr Maitland's interests, his evidence must be treated with caution.

Mr Chester

Mr Chester did make some frank concessions but, as has been submitted by Counsel Assisting, on other occasions he sought to justify and explain aspects of the Submission in ways that were inherently incredible and, in some respects, clearly dishonest. Towards the end of his evidence, he described earlier evidence that was plainly false as testimony he had "improvised". He is another witness whose evidence the Commission treats with caution.

Mr Stevenson

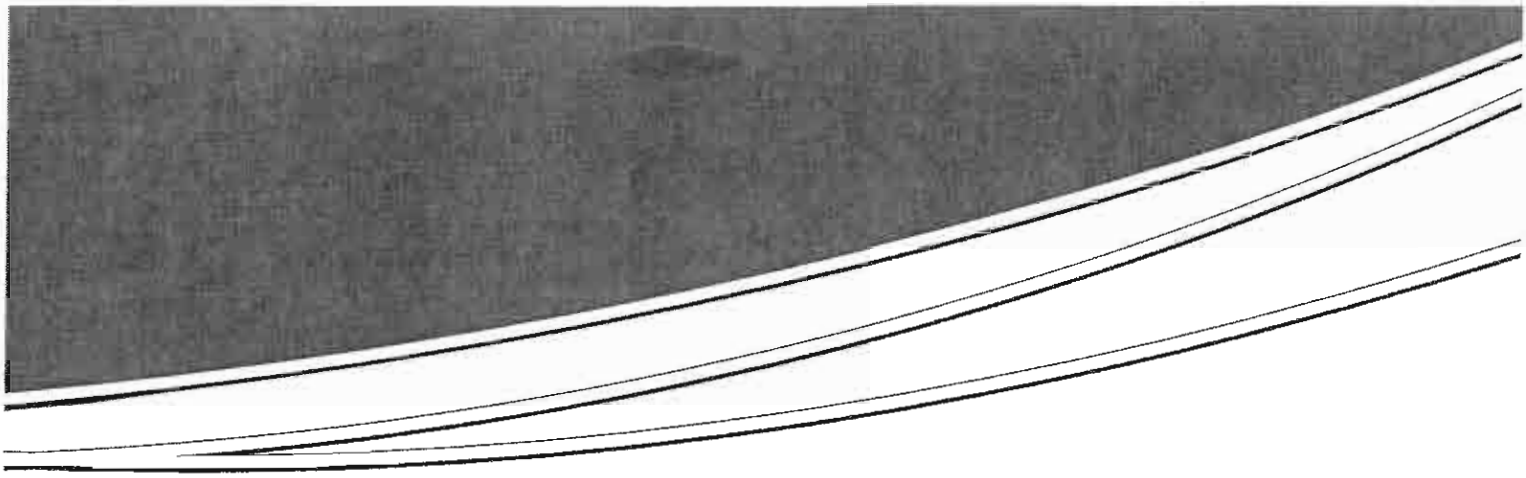
Mr Stevenson failed to reveal to the pro bono committee of Sparke Helmore (his firm) that he had an indirect financial interest in the Doyles Creek Community Trust, when he proposed that his firm act for that entity on a pro bono basis. That was misleading. In September 2008, Mr Stevenson asked Geoffrey Pike, then chairman of Sparke Helmore, for a letter of support for the training mine without revealing his interest in the project. He accepted he should have told Mr Pike of his interest, but not that his failure to do so exhibited a lack of candour, which, as Counsel Assisting submitted, it plainly did. On several occasions, Mr Stevenson claimed to have a lack of recollection of significant issues. This inability to recollect those issues was surprising. Nevertheless, Mr Stevenson appeared to be telling the truth, generally. Subject to his poor recollection, his evidence is accepted.

Mr Chisholm

The Commission accepts Mr Chisholm as a truthful witness. It was plain that Mr Chisholm and Mr Ransley had a falling-out. Nevertheless, at no stage in the course of his evidence did Mr Chisholm display animosity towards Mr Ransley, and he did not appear to give prejudicial evidence against Mr Ransley merely for the sake of causing him harm. There were instances where this could have been done, but Mr Chisholm refrained from giving that kind of evidence. The Commission rejects Kate Williams' submission (on behalf of Mr Ransley) that Mr Chisholm's evidence was motivated by animus towards Mr Ransley.

Overall, Mr Chisholm gave his evidence carefully and appeared to be attempting to be precise and accurate in his descriptions of what occurred. Generally, the Commission accepts Mr Chisholm's evidence.

Counsel Assisting pointed out correctly that much of Mr Chisholm's evidence was supported by file notes and, where there was no supporting note, his evidence appeared to be inherently probable. In those instances where Mr Ransley disagrees with Mr Chisholm, the Commission prefers the evidence of Mr Chisholm.



Chapter 4: A "hot period" for coal and its effect on the Doyles Creek exploration area

This chapter provides an overview of some of the more important facts established in the public inquiry. Some of the matters set out in this chapter are discussed in greater detail later in the report.

A "hot" period for coal

In the period from 2006 to 2008, high prices were realised by the state government for coal tenements in NSW. This led to the NSW Government realising large amounts of money from the granting of coal ELs in that period. There are two well-known examples of this, namely, the Caroona and Watermark ELs. The Commission recognises that, although the size of the coal resources within the Doyles Creek tenement is not directly comparable to the size of the resources within the Caroona and Watermark tenements, the Doyles Creek tenement was generally affected by the market's enthusiasm for coal tenements in the Hunter Valley. The prices that the Caroona and Watermark ELs commanded alerted Mr Macdonald and the DPI to the possibility that large sums of money could be obtained by the government on the granting of ELs, generally.

In August 2005, Mr Macdonald called for an EOI for an EL in respect of the Caroona coal exploration area near Gunnedah. Four companies expressed interest in the EL. In January 2006, on the DPI's recommendation, Mr Macdonald decided to grant the licence to BHP Billiton. A critical factor in BHP Billiton's successful bid was that it had offered to pay the government $91 million on the grant of the EL, and another $130 million on the grant of a mining lease. The $91 million offered by BHP Billiton was a sum additional to the statutory amounts that a successful tenderer would ordinarily have been required to pay for the Caroona EL. This sum was (and is) understood in the coal industry as an "additional financial contribution". The concept of an additional financial contribution is discussed more fully below.

In the words of Alan Coutts, former deputy director-general of mineral resources, Caroona was a "game changer". That was so because the inclusion of the $91 million in BHP Billiton's successful bid altered the market's perception of what might, in future, be required to win a competitive tender for an EL over a tenement with sufficient resources to justify the establishment of a large new mine. The result of the Caroona tender process led the market to realise that tenderers for such tenements might have to offer substantial sums, over and above any statutory amounts required to be paid (that is, additional financial contributions), to win tenders for such tenements.

Guidelines came into force in 2006 (with the authorisation of Mr Macdonald) indicating the process of allocation that should be adopted. The 2006 Guidelines responded to the potential for very large payments to be made to the government for exploration. Previously, the Guidelines had not allowed for competition in financial contributions.

In October 2007, Mr Macdonald called for EOIs for an EL in respect of the Watermark coal exploration area, also in the Gunnedah coalfield. EOIs closed on 4 February 2008. Seven companies declared their interest in the licence. On 1 May 2008, Mr Coutts recommended to Mr Macdonald that he grant the licence in favour of the China Shenhua Energy Company Limited. A critical factor in this recommendation was the company's offer to pay $276 million by way of additional financial contribution to the government upon the granting of the EL. Mr Macdonald accepted the recommendation. On 14 August 2008, Mr Macdonald publicly announced his decision to grant the EL to China Shenhua Energy Company Limited.

Mr Macdonald recognised that there was a hot market for ELs in NSW in the 2006–2008 period. He claimed that the market had changed by September 2008. The Commission does not accept that. After all, the Watermark EL was issued in October 2008. In any event, the invitation to DCM was issued in August 2008, that is – even on Mr Macdonald's evidence – during the hot market.

In consequence of the hot market, Mr Macdonald was keen to identify other coal tenements that could be the

subject of an EOI process. He believed that, because of the state of the market, coal ELs that could be allocated competitively had the potential to provide significant revenue to the government. He urged the DPI to release coal areas for exploration.

The whole of NSW is designated a "mineral allocation area" in respect of coal

As mentioned, in December 2007 Mr Macdonald caused the whole of NSW to be designated a mineral allocation area in respect of coal. This had two relevant, practical consequences.

The first was that the permission of the minister was needed before a person would be entitled to apply for a coal EL anywhere in NSW. In practice, an invitation from the minister was required. This meant that the minister acquired control of the allocation of potential coal development areas.

The second practical consequence was that the minister was given the power to lay down tender procedures for the granting of an EL over a particular area. In practice, a number of procedures were recognised. One method was by a direct allocation to a favoured party, specially invited by the minister to apply. Another method involved a public tender process. Yet another method was an EOI process, whereby interested parties competed for an invitation to apply.

New Guidelines are issued

The Guidelines were updated in January 2008 (again with Mr Macdonald's authority). The Guidelines defined four categories of coal allocation areas: (1) major stand-alone areas, (2) substantial additions to existing mines, (3) minor additions to existing mines and (4) small areas unrelated to existing mines.

The Guidelines defined a major stand-alone area as an area with sufficient resources to justify the establishment of a large new mine and infrastructure. At all relevant times, the Doyles Creek tenement was considered by all relevant parties to have coal resources sufficient to justify a major stand-alone mine.

The Guidelines relevantly provided that a major stand-alone area should be allocated by one of four kinds of competitive processes. All four were tender or EOI processes but each had a different formula of financial contribution attached.

Nevertheless, paragraph 1 of the Guidelines provided that, "Normally, allocations are made on a competitive basis, however, there may be circumstances where coal allocations are made subject to certain conditions and including a financial contribution".

Whether paragraph 1 applied to major stand-alone mines was in dispute. Mr Macdonald said that he relied on this provision to make a direct allocation of the Doyles Creek tenement, which was large enough to support a major stand-alone mine, to DCM. Mr Macdonald's view of the Guidelines on this issue was contrary to that of the DPI at the time. Mr Coutts and Brad Mullard of the DPI believed that every option for the allocation of a major stand-alone resource required a competitive process of some sort.

The importance of additional financial contributions

Mr Macdonald's view of the market led to him, generally, pressing the DPI to release areas for EOI or tender in the early months of 2008, and particularly around May 2008, when he agreed that the identification of further areas for competitive allocation was urgent from his perspective.

The Guidelines set out indicative financial contributions for coal allocation areas. For a resource of 100 million tonnes, the minimum contribution was 10 cents per tonne for open cut. For export coal in an underground resource of 100 million tonnes, the minimum contribution was 15 cents per tonne, and for domestic coal it was 7.5 cents per tonne.

Ms Williams submitted that the indicative financial contribution applicable to the Doyles Creek tenement would have been the only possible sum payable by the successful bidder, had the process for the acquisition of the tenement been a competitive process. That submission is not accepted. It is inconsistent with the Guidelines, themselves, and with what occurred in practice.

An appendix to the Guidelines contains tables setting out indicative financial contributions for coal allocation areas. The contributions are based on the type of deposit (open cut or underground), quality (export or domestic) and size. Those tables set out fixed amounts of contributions that are "indicative" to the extent that they are dependent on the type of deposit, quality and size.

Paragraph 3(i) of the Guidelines provides that:

> *Stand-alone areas will be allocated by:*
>
> *(a) Tender or expressions of interest with open-ended financial contribution.*
>
> *(b) Tender or expressions of interest with minimum financial contribution but open-ended maximum contribution.*

(c) *Tender or expressions of interests with a fixed financial contribution and a requirement to develop specific infrastructure or utilisation technologies or value adding processes.*

(d) *Tender or expressions of interest to supply a specific end use such as a domestic power station with a financial contribution negotiated in advance of the tender or expression of interest.*

The references in paragraph 3(i)(a) of the Guidelines to "open-ended financial contribution" and in paragraph 3(i)(b) to "minimum financial contribution" and "open-ended maximum contribution" make it clear that, in some instances, financial contributions additional to the minimum contributions might be paid and, in other circumstances, the financial contributions were "open-ended".

One of the reasons why the financial contributions under the Guidelines are "indicative" is that, under certain competitive tender processes, it is open to a tenderer to offer more than the indicative contributions reflected in the Guidelines, in the hope that that would make its tender more attractive. Hence the term "additional" financial contributions. "Additional" in this sense means additional to the indicative financial contributions laid down by the Guidelines or otherwise.

A good example of what would occur in practice is the approach adopted with regard to the 11 exploration areas the subject of the EOI process considered in Operation Jasper.

The evidence in Operation Jasper can be taken into account in Operation Acacia as, before the hearing of evidence in operations Indus, Jasper and Acacia, a directions hearing was held in which an order was made that the evidence in any one of the three operations would be taken to be evidence in the other two. That the evidence on this issue in Operation Jasper was relevant in Operation Acacia was emphasised in the course of the Operation Acacia public inquiry. While Ms Williams was cross-examining Dr Richard Sheldrake, director general of the DPI, the issue of the meaning of the term "additional financial contributions" arose and the Commissioner observed:

> *This is a matter for argument and investigation in the light of all the evidence including the evidence in Jasper...*

In Operation Jasper, paragraph 7 of the invitation letter (addressed to the invitees to the EOI process for the 11 exploration areas in the Hunter Valley) provided that, "Additional financial contributions may be included as part of an applicant's Expression of Interest". Paragraph 8 of the invitation letter stated that successful bidders would be required to pay financial contributions for coal allocation areas "as per" the Guidelines. That was taken by those involved in the EOI process to mean contributions in accordance with the "indicative" amounts set out in the Guidelines. Paragraph 7 of that letter, however, referred to other financial obligations imposed on successful bidders. That was taken by those involved to mean additional financial obligations; that is, financial obligations additional to the indicative financial obligations payable as per the Guidelines. Such additional financial obligations (over and above the indicative financial obligations) could be undertaken by any bidder who wished to do so.

What, in fact, occurred with the Mount Penny tenement is another illustration of the practice. Monaro Mining NL ("Monaro Mining") offered $25 million as an additional financial contribution. Because of this very substantial offer, Monaro Mining – while its bid stood – ranked first amongst the bidders. But Monaro Mining withdrew and the second-ranked bidder, Cascade Coal Pty Ltd ("Cascade"), was awarded the EL. Cascade had offered nothing by way of an additional financial contribution. All it was required to pay was the sum calculated in terms of the Guidelines for indicative financial contributions and other statutory amounts.

In his evidence in Operation Jasper, Mr Mullard discussed three large areas that the DPI had contemplated putting out to tender. He said that, based on the DPI's experience with previous tenders, he expected that the large areas "would be expected to generate substantial returns to the Government". He agreed that, when he was describing "substantial returns to the Government", he meant "additional financial contributions". Mr Mullard was referring to voluntary amounts, additional to the amounts payable under the Guidelines, which would be paid by the parties who acquired the resources.

Mr Coutts explained that "additional financial contribution" had a technical meaning; namely, "over and above". He agreed that an additional financial contribution is a contribution that is made "when there is a competitive tender where people put in the highest amount they can afford in the ... hope that that is how they will win the tender". He agreed that in a direct allocation there is no additional financial contribution.

Examples of this occurring can be seen in the competitive tender processes relating to Watermark and Caroona (referred to above). In those tender processes, the winning tenderers paid tens of millions of dollars more than the indicative financial contributions.

In relation to Caroona, Mr Mullard said that, while the Doyles Creek area did not have an underground coal resource comparable to Caroona's, it was potentially

more attractive because the infrastructure costs in developing a mine could be lower. In addition, such a process could include the condition that bidders offer to establish a training mine, with sufficient detail in their bids to satisfy the minister's requirements. To any objective minister, this must have made the DPI's second option (contained in the 27 May 2008 draft briefing note, which is discussed later in this report) extraordinarily attractive. But Mr Macdonald rejected that option.

Thus, according to the terms of the Guidelines and the practice adopted by the DPI, an important advantage to the state of a competitive process was the possibility of an additional financial contribution being offered.

A further financial benefit would accrue to the state through a competitive process. Under a competitive process, an additional financial contribution was payable by the successful tenderer at the granting of the EL. Under a direct allocation, financial contributions (under the Guidelines or otherwise) were payable only when coal was eventually mined (that is, after the granting of a mining lease).

DCM applies for a direct allocation and the consequences of granting its application

In the early months of 2008, and particularly around May 2008, Mr Macdonald's view of the market led to him pressing the DPI to release areas for EOI or tender. Mr Macdonald testified that, by May: "Anything they can put on the market that was worth something was what I wanted to get out". His understanding was that there would be a number of companies interested in competing for "every potential EL in the State", including Doyles Creek.

In this period, those who stood behind DCM were very interested in obtaining an EL over the Doyles Creek area. They believed, however, that, were the Doyles Creek area to be put out to open tender, larger miners would become interested in the tenement being offered. Those larger miners would participate in the tender process, and would offer additional financial contributions in such substantial amounts that DCM would be unable to compete. Accordingly, DCM set about attempting to persuade Mr Macdonald to allocate the Doyles Creek EL directly to it, thereby avoiding an open, public tender process. Eventually, it applied to the DPI for an invitation to apply for such a direct allocation. The Commission sets out the events that led to this application in greater detail below.

On 27 May 2008, the minister's office received the DPI's draft written advice, in the form of a draft briefing note about DCM's proposal. For the reasons stated below, the Commission is satisfied that Mr Macdonald read the draft briefing note. In that draft briefing note, the DPI enumerated several concerns about DCM's training proposal. The DPI advised Mr Macdonald that other persons had expressed interest in exploring the Doyles Creek area and that a competitive allocation process could result in the government obtaining an additional financial contribution. The DPI enumerated a number of difficulties and problems that were inherent in DCM's proposal. These are dealt with in detail below. Moreover, the DPI recommended that Mr Macdonald consider a competitive process to allocate the EL with a requirement to establish a training facility or an industry training fund. Mr Macdonald rejected the DPI's recommendation.

In the light of the DPI's advice and Mr Macdonald's stated desire to take advantage of the hot period in the coal industry, the question arises as to why he directly allocated the EL to DCM and passed up the opportunity to obtain additional revenue from a competitive allocation of the EL.

Mr Macdonald gave various reasons for his decision, including that he was "looking at the public good of having a training mine established", and was satisfied that the granting of the EL in DCM's favour would achieve that outcome.

In the Commission's view, however, the events that unfolded after Mr Macdonald became aware of the DPI's opposition to the direct allocation of the EL to DCM on 27 May 2008 tell a different story about Mr Macdonald's reasons for awarding the EL to DCM. Those events are set out below.

When Mr Macdonald made a direct allocation of the Doyles Creek EL, he caused the state to forego any chance it had of obtaining an additional financial contribution from the winning tenderer in a competitive tender process. He also caused the state to forego the accelerated benefits that would have arisen had the tenderers' financial obligations been paid on the granting of the EL (as would have been the case had there been a competitive tender process).

Submissions were made to the Commission to the effect that results from other tender processes undertaken after the direct allocation of the Doyles Creek tenement show that the market at that time was such that no additional financial contribution would have been paid had the Doyles Creek tenement been put out to tender at the time it was directly allocated. Those submissions, however, are not persuasive.

First, there was cogent evidence (from his own mouth) that Mr Ransley had decided that, were there to be a competitive tender, DCM could not participate in the tender process. He believed that the larger miners would bid for the tenement and DCM could never match their bids. What Mr Ransley had in mind in this context was the additional financial contributions that the larger miners might offer (over and above the fixed indicative

contributions under the Guidelines). Had no additional financial contributions been allowed, all tenderers would have had to make the same (indicative) financial contribution and there would have been no reason for DCM not to have take part in a competitive process. But this, plainly, was not the regime that applied to a competitive process. It is implicit from the decision of DCM and Mr Ransley not to take part in a competitive tender that they accepted, in such event, that larger miners would offer additional financial contributions that DCM would not be able to meet.

Secondly, the results of tender processes after Mr Macdonald's decision to make a direct allocation to DCM demonstrate little about the market at that time. More needs to be known about the particular idiosyncrasies of each tenement and each such tender process before there can be any understanding of what the results of a particular tender reveal about the state of the market. The point is that there was no evidence establishing that those tenements (the subject of competitive processes) on which reliance was placed were comparable to the Doyles Creek tenement.

Thirdly, as already mentioned, Mr Macdonald conceded that there was a hot market for ELs in NSW from 2006 to, at least, August 2008.

Fourthly, reference must be made to the Ridgelands EL, on which Mr Macdonald placed reliance. Mr Macdonald suggested that, at the time of the Doyles Creek grant, the market had shifted such that additional financial contributions were not being paid, and that this shift was demonstrated by the Ridgelands EL. This EL had been granted in 2013 without an additional financial contribution but subject to a condition that any financial contribution payable upon a later JORC (Joint Ore Reserves Committee) would be paid on assessment. As Counsel Assisting submitted, none of that speaks to August 2008, when Mr Macdonald granted DCM consent to apply. But, in any event, Mr Macdonald was mistaken in his evidence concerning what occurred with Ridgelands.

The record shows that, in June 2009, the Ridgelands EOI process was launched. The EOI document indicated that the exploration area was 80 square kilometres and was estimated to contain 500 million tonnes of in situ coal resources – that estimate was not JORC-compliant and was based on 11 drill holes. By way of comparison, that was relatively fewer drill holes per square kilometre than there were at the Doyles Creek site (that is, six drill holes over 31 square kilometres, producing a non-JORC compliant in situ estimate of 308 million tonnes).

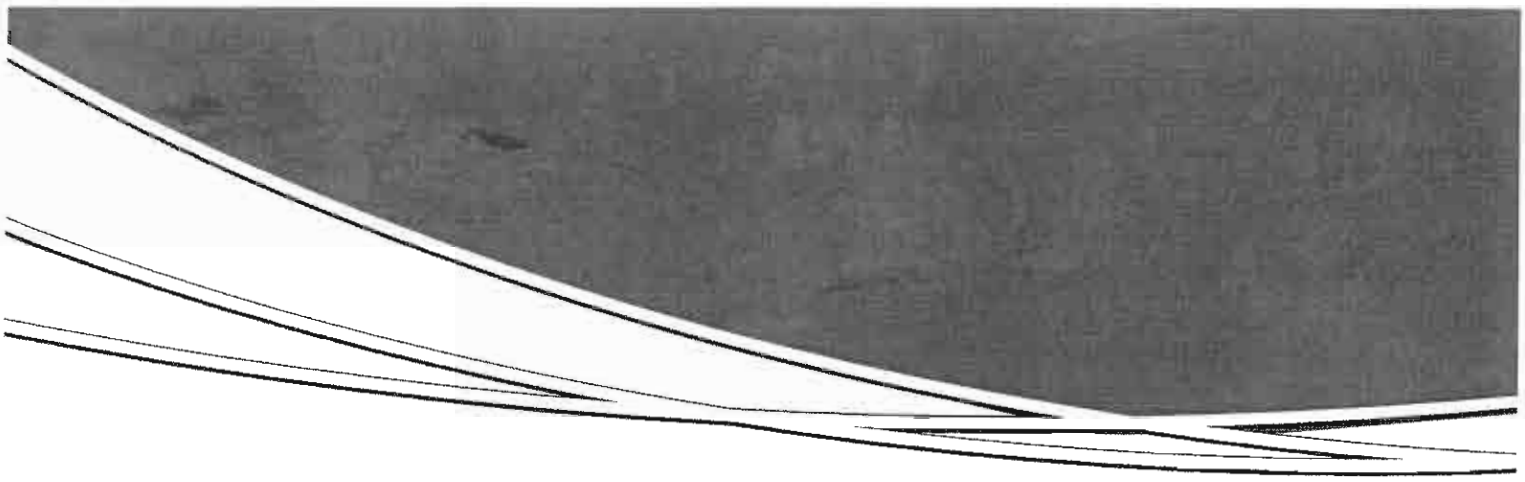
On 16 October 2009, Botai Consortium (the EL was ultimately pursued through its subsidiary Ridgelands Coal Resources Pty Ltd (RCR)) submitted its EOI. It offered certain minimum financial contributions (in excess of $20 million), additional financial contributions and coal development fund contributions (totalling $20 million on granting of a mining lease and JORC resource assessment). The additional financial contributions involved the payment of $95 million at the time of consent to apply for a new EL or to transfer to the existing EL, and further payments totalling $155 million based on successful exploration and the outline of JORC reserves in excess of specified quantities of mineable coal in particular coal measures.

On 16 April 2010, consent was given to RCR to apply for the EL with payment of the relevant additional financial contribution and other payments due in 30 days totalling $122.1 million (that is, by 16 May 2010). On 14 May 2010, RCR sought an extension for paying the additional financial contribution. That extension was granted on 31 May 2010, such that $40 million was to be paid in 10 days and $82.1 million was to be paid by 31 October 2010. On 22 June 2010, RCR paid $40 million and, on 29 October 2010, it paid the further $82.1 million. At the same time, RCR prepared to lodge the EL application – that is, after it had paid $122.1 million for the consent to apply.

On 8 November 2010, a new consent was given (as the previous consent had lapsed), which was current for six months. On 6 May 2011, within that time period, RCR lodged its EL application. An advertising and public comment process involving 10 submissions, and responses to those submissions, followed. On 1 November 2012, approval was given to make the offer of the EL. On or about 14 January 2013, a briefing note endorsing the grant was signed by the DPI. That briefing note was endorsed by the minister on 22 February 2013 and, five days later, the EL was executed. The EL included conditions for the payment of further additional financial contributions upon the grant of a mining lease and JORC reports, as contemplated in RCR's EOI.

Mr Macdonald sought to have tendered only the Ridgelands EL and then, in his evidence, pointed to the conditions for payment of a financial contribution upon the granting of a mining lease and the production of JORC reports. He then sought to refer to those conditions in the EL in support for his position, saying he tried to do the same thing with Doyles Creek. As Counsel Assisting submitted:

> *That was a desperate grab for a crutch from the witness box. What Macdonald either did not know (or thought that the Commission did not know such that he could get away with it) is that $122.1 million had been paid well before the grant of the EL for the giving of consent to apply, $95 million of which was additional financial contribution. In this regard, Ridgelands was no different to Caroona and Watermark in that they all involved a large additional*



financial contribution for the giving of consent or the grant of the EL and the payment of another large amount upon the later grant of a mining lease. And that is what the State missed out on with the grant of Dayles Creek.

Contrary to Mr Macdonald's evidence, as regards the Ridgelands EL, a very large additional financial contribution was paid – upfront – for the consent, well before the EL was granted (with the first payment made two months after consent was first given). The additional financial contribution payable upfront was not reduced simply to a condition for payment well down the track on preparation of a JORC report, as Mr Macdonald suggested. The documents tendered in evidence show that, in October 2009, entities were prepared to bid large amounts merely for consent to apply for an EL and, in mid-2010, they were prepared to pay large amounts for that consent.

The facts relating to Ridgelands are a further illustration of how extraordinary Mr Macdonald's decision was in relation to DCM.

To summarise, by allocating the Doyles Creek tenement directly to DCM, Mr Macdonald, first, deprived the state of the chance of receiving far more for the tenement (by way of additional financial contribution) than it might have received under a competitive process. Secondly, he deprived the state of the opportunity of receiving the payments to be made by the successful tenderer, in a competitive process, immediately upon the granting of the EL. Thirdly, he deprived the state of the opportunity of receiving bids, on a competitive basis, to construct and operate a training mine. Fourthly, by allocating the tenement directly to DCM, Mr Macdonald conferred a substantial benefit on DCM's shareholders – a benefit involving many millions of dollars.

Chapter 5: The role of the DPI

The role of the DPI is to assist the minister with responsibility for the minerals portfolio in the discharge of his or her duties. The DPI is responsible to that minister.

The DPI, on the one hand, and the minister and his staff, on the other, are separate entities. The DPI is made up of public servants, including public servants skilled and experienced in the particular area. As Mr Macdonald acknowledged – they are the experts.

From time to time, the DPI gives the minister advice on particular matters and proposals. The usual practice is, when there is a particular proposal to be considered in the minerals area, it is referred to the DPI for consideration and advice. That advice is usually given in a briefing note. In giving that advice, the DPI is expected to draw on its expertise and to act frankly and fearlessly.

Of course, it is the right and prerogative of the minister as the relevant decision-maker to disagree with the DPI's advice. The usual way this is communicated is for the minister to note his views on the briefing note (where advice has been given by briefing note), which would then be returned to the DPI or, otherwise, discuss his views directly with the DPI.

Within the DPI, Mr Coutts and Mr Mullard had particular knowledge, skill and experience in dealing with minerals issues, including issues regarding coal. As Mr Macdonald accepted, their views carried the weight of that knowledge, skill and experience. And while Mr Macdonald was free to disagree with them, he would, at the very least, want the DPI's advice, to understand its views and to consider seriously the arguments of its senior officers before making a decision.

Until the minister makes a decision, it is the expectation within the DPI that he or she be given frank advice. But, once the minister makes his or her decision, the DPI must then comply with and implement that decision (even if the department disagrees with that decision). That was Mr Macdonald's expectation of the DPI and, once he made up his mind, he expected the DPI to implement and support his decision.

Relevantly to the issues in this public inquiry, there was no question that, at least throughout 2007 and until May 2008, the DPI was steadfastly opposed to the direct allocation of the Doyles Creek tenement. No witness made any other suggestion. The period after May 2008 is discussed in detail later in this report.

Chapter 6: The relationship between Mr Macdonald and Mr Maitland

"They were mates"

Mr Macdonald became a Cabinet minister in April 2003 and the minister for mineral resources on 3 August 2005. Mr Maitland was then the national secretary of the CFMEU.

Mr Macdonald denied any significant relationship with Mr Maitland (albeit, recognising a professional association). He asserted that he and Mr Maitland had had a falling-out that lasted several years. Mr Maitland, after some prevarication, said that he and Mr Macdonald had a close and friendly professional relationship. Other evidence supported that evidence by Mr Maitland.

The professional relationship between the two men arose by reason of their membership of the ALP. Through attending ALP functions and occasions, and other contacts with each other, a longstanding professional friendship and association arose between them.

Mr Coutts testified as to this relationship. He was the director-general of mineral resources from 1997 to 2004. In 2004, the DPI was formed and Mr Coutts became the deputy director-general for mineral resources. He remained in that position until the latter part of 2008. In that capacity, Mr Coutts worked closely with Mr Macdonald. Now retired, Mr Coutts was a respected and knowledgeable civil servant. He was an impressive witness and the Commission accepts his evidence, generally. Mr Coutts had known Mr Maitland professionally since 1997. According to him, Mr Maitland was for many years a key player in the union movement, generally, and in the CFMEU, in particular. Mr Coutts said that Mr Maitland was a very influential figure within the Labor government and was often called upon by the mining unions to help them to gain access to ministers within the government over particular issues. It is particularly in that context that Mr Maitland and Mr Macdonald met.

During the relevant period, Mr Foley was the assistant secretary to the ALP in NSW. One of his duties was to deal with left factional matters. To do that job properly, he needed to know which persons in particular factions were friends or mates with other persons of influence, and who had fallen out with whom. He was well-qualified to give evidence as to these matters. Mr Foley gave evidence carefully and candidly. He displayed no signs of bias against Mr Macdonald (or anyone else). The Commission regards him as a reliable witness and accepts his evidence.

Mr Foley has been a member of the ALP since 1988. He first met Mr Maitland "by the early 1990's *[sic]*, if not before". He had an "awareness" of the relationship between Mr Macdonald and Mr Maitland. He said:

> *I had mixed with both of them and observed both of them at many, many party and factional events over many years. It was obvious to me that Ian Macdonald and John Maitland enjoyed a close and friendly relationship.*

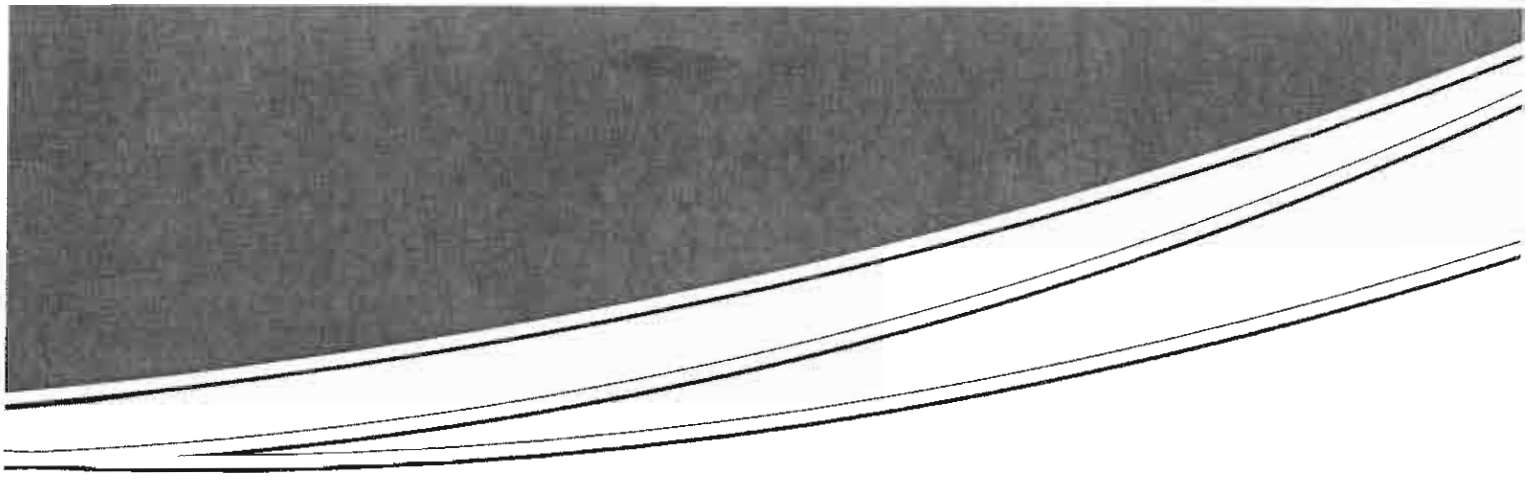
Under cross-examination by Mr Kirk, Mr Foley said:

> *My observation was that there was a personal friendship between Ian Macdonald and John Maitland as well as a professional relationship...*

Mr Cameron, a senator in the Australian Parliament, had been for many years and – at the relevant time, was – the national secretary of the Australian Manufacturing Workers Union (AMWU). From his observations over time, he thought that Mr Macdonald and Mr Maitland were "good mates". He was not aware of a falling-out ever occurring between them.

Mr Maher, the present head of the Mining and Energy Division of the CFMEU, also described Mr Macdonald and Mr Maitland as mates.

Peter Murray, who – at the relevant time – was a senior trade union official of vast experience, said that there was certainly a relationship between Mr Macdonald and Mr



Maitland. They had had a few fall-outs over time but, generally, there was a good relationship between them, which he observed.

Peter Murray's brother, Ian Murray, who – at the relevant time – was also a senior trade union official of great experience, said: "It was well known to nearly everybody I think that John had a comfortable relationship with Macdonald".

Kerry Hickey, who was the Labor minister for mineral resources in NSW between 2003 and 2005, said that Mr Maitland and Mr Macdonald were "tight" but he didn't know how tight.

Mr Gibson said that, on occasion, Mr Macdonald discussed with him the nature of his relationship with Mr Maitland. Mr Macdonald emphasised on at least two or three occasions that he and Mr Maitland were not friends. He told Mr Gibson that Mr Maitland had, in his previous role with the CFMEU, sought to block Mr Macdonald's pre-selection for the ALP. Mr Gibson formed the impression that Mr Macdonald was "really trying hard I think to convince me that there was nothing but a professional relationship there and that there was no, an[d] even the professional relationship was potentially strained because of these previous events". He described these remarks by Mr Macdonald as "odd"; in the sense, the Commission perceived, of being unnaturally forced, as if Mr Macdonald was unnecessarily going out of his way to make the point to Mr Gibson that he and Mr Maitland did not have a good relationship.

Mr Munnings was employed at the relevant time as a DPI liaison officer, part of Mr Macdonald's staff. He had been an active member of the ALP and his appointment to Mr Macdonald's office was a "political" one. He said that it was relatively common knowledge that Mr Maitland was a very keen supporter of Mr Macdonald.

Ms Tan was another DPI liaison officer in Mr Macdonald's office, for at least part of the relevant time. She thought that Mr Macdonald and Mr Maitland were "friends".

Mr Maitland, himself, said that he had a close, friendly, professional relationship with Mr Macdonald from the time he became the minister responsible for mining matters.

There were other indications of a close relationship; for example, Mr Macdonald conducted business with Mr Maitland over meals at restaurants and allowed his name to be used so that Mr Maitland could obtain the venue he desired for his retirement dinner.

Mr Hale submitted that the relationship between Mr Macdonald and Mr Maitland was purely professional. He submitted that they were not friends and had no social relationship. He referred to the paucity of telephone contact between them and submitted that, on the evidence, they had not met often and had not visited each other's homes. He submitted that the evidence of a close relationship was based on "impression" and was, therefore, unreliable.

Mr Macdonald denied having a close relationship with Mr Maitland and said that they had had a serious falling-out over a broken promise by Mr Maitland, which led to them not speaking to each other for nearly seven years. No witness supported Mr Macdonald in this regard. Tellingly, Mr Maitland denied making the promise and denied any falling-out. The Commission finds that Mr Macdonald lied on this issue.

The Commission accepts that the relationship between Mr Macdonald and Mr Maitland was not a social one but professional relationships can be close indeed, and the Commission finds that their relationship was particularly close. Professional relationships between colleagues, over time, can strengthen to the degree that the colleagues may be regarded as "mates" in the colloquial sense. The significance of the term "mates" is that it connotes a close

and enduring friendship of a comradely kind. The term further connotes qualities in the relationship such as trust, reliance and the provision of support, when needed. Those qualities may arise solely through a professional relationship; their existence is not automatically dependent on one person inviting another home for dinner or other facets of a social relationship (such as meeting members of the respective families, meeting each other socially, drinking together and going to sporting events together – all matters on which Mr Hale and Mr Kirk, the latter acting for Mr Maitland, relied). The Commission is satisfied that the relationship between Mr Macdonald and Mr Maitland was such that it justified the description, in everyday parlance, of "mateship" – they were "mates".

In making this finding, the Commission accepts that the evidence about their relationship was based substantially on observation and impression, but that does not make it less reliable or cogent. In any event, Mr Maitland, himself, conceded that he and Mr Macdonald had "a friendly and close relationship, a good professional relationship".

As Counsel Assisting submitted:

> *The weight of the evidence from factional operators, union colleagues, porty colleagues and party officials is all to similar effect. The accumulation of evidence, by people from the same walks of life, presenting the same picture is overwhelming.*

Factional associations

What follows in this section is taken largely from the submissions of Counsel Assisting. It is not controversial, except for the finding that the Mining Division and Mr Maitland were independent and not aligned to a particular faction.

At the relevant time, Mr Foley was the assistant secretary to the ALP in NSW. He had the task of dealing with left factional matters. For this reason, he paid close attention to factional issues and the people involved in them. Mr Foley's evidence in regard to factional matters was supported substantially by Mr Cameron, and is accepted by the Commission.

There are two factions within the ALP – the left and the right. Unions and members tend to affiliate with either faction. There are further sub-groupings within the left faction, sometimes referred to as sub-factions. It would be wrong, however, to refer to the sub-groupings as factions, and members of the ALP would not, as a matter of practice, refer to them as such. Although these are terms that not all adopt, the sub-groupings in the left are often referred to as "hard left" and "soft left", even though the division between them is more historical than ideological. These sub-groupings are not as formally organised as the factions themselves, and identification with the hard left or soft left could be fluid. As a result, while some unions aligned with the left might identify with either the hard left or the soft left, others did not. The AMWU tended to identify with the hard left, while the Miscellaneous Workers Union tended to identify with the soft left. There were other left-affiliated unions that did not identify with either sub-grouping as a universal proposition. They might identify with either the hard left or the soft left, depending on the particular circumstances.

Mr Foley testified that the divisions of the CFMEU each separately affiliated with the ALP. Each of those separate divisions affiliated with the left and, specifically, the "miners were affiliated to the Left faction". The Mining Division, however, did not formally align with either the soft left or the hard left but "were proudly independent of, of the two tribes". On some occasions, they would support the soft left and, on other occasions, they would support the hard left. The evidence of Mr Maher was to similar effect, as was that of Mr Maitland.

Mr Foley said that he saw Mr Maitland as "independent of the two tribes, the Hard Left and the Soft Left". Mr Maitland, himself, ultimately accepted that he had "always been proudly independent of those sub-groupings". The Mining Division of the CFMEU itself considered that to be its position.

Mr Macdonald was a member of the hard left. He asserted (seemingly to advance his own position), contrary to Mr Maitland's evidence, that the Mining Division and Mr Maitland were aligned to the soft left. That testimony is rejected.

The way in which the ALP ticket was generally made up in practice was that each of the left faction and the right faction would determine the candidates from their respective factions to fill a number of winnable spots. Unions could have significant influence as to which candidates should be nominated. If it came to a factional vote, affiliated unions had delegates with voting numbers and, typically, a union's delegates would vote as a block. Otherwise, they could exercise their influence less formally by making their position known. As a result, having the support of a given union could be important.

Mr Macdonald believes he obtained support from Mr Maitland

Within the left faction, it was common that members would form alliances or allegiances with key union figures. Such alliances or allegiances would become generally known within the faction or party.

Mr Macdonald had a good working relationship with Mr Maitland, Mr Maher and Peter Murray, who were the senior leaders of the Mining Division (or "Miners Union", as it was referred to by Mr Foley). That relationship was important for Mr Macdonald, as the key figures within the union would often determine the position that the union would adopt. In that way, key figures within the union could have significant influence in ALP affairs. It is, therefore, unsurprising that politicians form alliances or allegiances with key union figures, which become generally known within the faction.

In his evidence during the public inquiry, Mr Macdonald initially denied that Mr Maitland was a key to the votes of the Mining Division. But, in his evidence in a compulsory examination tendered in the public inquiry he accepted that, as at 2006, Mr Maitland was the "key" to the votes of the Mining Division and Mr Maitland controlled those delegates. The Commission considers that Mr Macdonald's compulsory examination evidence on this issue is more likely to be correct.

Counsel Assisting rightly submitted that Mr Macdonald's contradiction in this regard was one of the many indications of his propensity to tailor his evidence to distance himself from Mr Maitland.

Mr Macdonald's initial evidence as to Mr Maitland being the key is not surprising. Mr Maitland was active in ALP politics and he operated in the political decision-making of the left faction. The Commission repeats Mr Coutts' observation that Mr Maitland was "a very influential figure in the Labor Government and was often brought in by the ... mining unions ... to help them when they were having difficulties ... getting access to Ministers". Mr Maitland, despite initially resisting the suggestion, eventually accepted that he "hoped" his voice would carry weight with faction members and that he "expected" he retained a degree of influence as to the matters that concerned the Mining Division even after he took on his role with the overarching CFMEU. He accepted that others could have reasonably held the view that he continued to have influence.

Plainly, Mr Maitland was a person of considerable influence in factional affairs, and in the ALP generally. Not only was he an influential figure in those respects, he was perceived by persons involved in factional politics (for example, Mr Foley) to have influence, particularly with the Miners Union. He was certainly held in high regard by those in the Miners Union – both Murray brothers agreed that they continued to respect him and, at his retirement dinner, Mr Maher described succeeding him at the Miners Union as being like "going into bat after Bradman" and also said that "wherever he goes he's hailed as a long lost brother and treated as a king". Even allowing for the hyperbole that such an occasion permits, it is clear from those comments that Mr Maitland continued to have substantial goodwill and influence in the Miners Union long after he had moved to the CFMEU. As noted, Mr Maitland himself hoped and expected he had influence, and Mr Macdonald said that Mr Maitland, "certainly would have influence". During his compulsory examination, Mr Macdonald said in regard to Mr Maitland: "Well ... to my perception he ran those delegates, he was the key to those delegates".

In early 2006, the ALP ticket was being worked out for the Legislative Council in anticipation of the election in 2007. In that connection, Mr Foley organised a lunch at the Noble House restaurant in Sydney on 20 February 2006, at which various personalities from the hard left were present to discuss Mr Macdonald's future.

Mr Foley testified that, prior to the Noble House lunch, he put to Mr Macdonald "directly" that he should resign, but Mr Macdonald said he wanted some further time. Mr Macdonald denied any such communication, and when asked if he had long conversations with Mr Foley prior to the lunch, said "never". Telephone records, however, reveal that Mr Foley called Mr Macdonald the day before the lunch and spoke to him for around 10 minutes. When confronted with that evidence, Mr Macdonald was unable to explain what they discussed. Mr Foley's evidence is consistent with the evidence of the telephone records, and is accepted.

At the lunch, differing views were expressed as to whether Mr Macdonald should be re-nominated for the ticket. Mr Foley's evidence was that Mr Macdonald said that he had the support of the Miners Union. None of the other persons at the lunch contradicted that evidence. They generally acknowledged that it was possible it was said, or likely to be the kind of thing said, and that it would have been Mr Foley's role to pay attention to what support Mr Macdonald possessed. Mr Macdonald accepted that he stated at the lunch that he had the support of the Mining Division. Mr Foley took that as an indication that Mr Macdonald had the support of the key people in the Mining Division (being, he believed, Mr Maitland, Mr Maher and Peter Murray).

Ultimately, Mr Macdonald gave the following evidence as to events after the meeting:

> *You just assumed you had Mr Maitland's support?---Yeah, absolutely. Oh, and the rest of the Union.*
>
> *Did you speak to Mr Maitland about that support after the lunch?---I can't recall whether I did or not, I may have.*
>
> *Just to tell him that he might get a fall [sic] from Mr Foley or someone?---Well, I would have said that there, that there's a move on to remove me.*
>
> *And I, and I'm looking for your support?---As I said, amongst, amongst, you know, a number of people I would have endeavoured to get support from.*

Including - and by that you mean including Mr Maitland?---It would have included the Miners Union, yes.

Including Mr Maitland?---It would have included Mr Maitland potentially, yeah. ..."

In part of his evidence, Mr Macdonald sought to explain his belief that it was resolved at the lunch that he had the support of Mr Maitland. But that is contradicted by the evidence of other witnesses. Moreover, the fact that Mr Macdonald endeavoured to get support from people after the lunch would make no sense if the matter had already been resolved.

Mr Foley's evidence, initially, was that, after the lunch, he checked Mr Macdonald's claimed support. He said, "it was very clear that John Maitland was a supporter of Ian Macdonald's continued pre-selection". Ultimately, Mr Foley accepted he could not recall whether this was before or after the lunch, but again asserted that Mr Maitland had made known his support for Mr Macdonald, and it was more likely that Mr Maitland did so in direct communication with him (that is, Mr Foley). Telephone records, which were subsequently produced in the course of the public inquiry, indicated that Mr Maitland and Mr Foley had spoken after the lunch and the probabilities are that in that post-lunch conversation Mr Maitland informed Mr Foley of his support for Mr Macdonald.

Mr Foley was questioned by Mr Kirk on the basis that Mr Maitland did not indicate support after the lunch. The positive case was then put that Mr Maitland could not recall any such conversation or any such support. When he came to give evidence, Mr Maitland initially denied that it was even possible that he had had such contact. He suggested that he had no reason to be speaking to Mr Foley at all. Mr Maitland was then confronted with the fact that telephone records revealed that a few days after the Noble House lunch he had called Mr Foley, contrary to the recollection presented as his positive case.

While still maintaining an absence of recollection as to the call, Mr Maitland accepted that the topic of conversation was likely to have been Mr Macdonald's continued pre-selection and that Mr Maitland calling Mr Foley would possibly be a way of Mr Maitland exercising his influence. Mr Maitland accepted further that, if the point had been put to him, he would have indicated his support for Mr Macdonald's continued pre-selection. Mr Maitland could not think of any other credible reason as to why he would have been contacting Mr Foley. The Commission infers that Mr Maitland did indeed contact Mr Foley, after the lunch, to tell Mr Foley that he supported Mr Macdonald.

Mr Hale submitted that the threat to Mr Macdonald's pre-selection was settled during the Noble House lunch and that Mr Maitland was irrelevant to that threat. Those submissions are rejected. The Commission does not believe Mr Macdonald's evidence on this issue. It prefers the evidence of Mr Foley and, indeed, Mr Maitland (to the extent noted above).

Mr Hale submitted that Mr Macdonald had the support of the Miscellaneous Workers Union at the Noble House lunch, and did not need Mr Maitland. The Commission, however, accepts the evidence to the effect that Mr Macdonald believed he needed the support of the Miners Union and canvassed Mr Maitland for that support. On this issue, Mr Macdonald's state of mind (as evidenced by what he did and said) is determinative, not the reality.

Mr Hale made other submissions; all based on the proposition that Mr Macdonald owed nothing to Mr Maitland, by reason of what he submitted were objective facts tending to show that Mr Macdonald would have been elected irrespective of the support of Mr Maitland and the Miners Union. The answer to these submissions is, again, that, on this issue, Mr Macdonald's state of mind is determinative. It is this state of mind that is relevant, not the "objective facts".

Mr Kirk's submissions were, first, based on the fact that a number of persons at the lunch did not recall Mr Macdonald saying that he was supported by the Miners Union. That is true, but Mr Foley had good reason to remember what Mr Macdonald said (having regard to his particular duties as assistant secretary to the ALP in NSW) and his evidence was clear. Mr Foley said that, at the lunch, Mr Macdonald "cited that he had the support of the Miners Union. As stated above, the Commission accepts that evidence.

Mr Kirk submitted that Mr Foley's evidence to the effect that, at the Noble House lunch, Mr Macdonald had invoked the support of the Miners Union, was not corroborated by any other evidence. That is wrong. It was corroborated by Mr Macdonald himself; he admitted that invocation.

Mr Kirk submitted that there was "no proper basis" for Counsel Assisting's submission that Mr Maitland indicated his support for Mr Macdonald and that, as a result, Mr Macdonald was in debt to Mr Maitland. The Commission, however, is of the view that the evidence of Mr Foley, and of Mr Macdonald and Mr Maitland, themselves, and the relevant telephone records, constitute a strong basis not only for Counsel Assisting's submissions, but for accepting those submissions.

Mr Kirk made like submissions based on different passages in the transcript. It is sufficient to say, first, that the Commission considers that those submissions do not always accurately portray the evidence of the witnesses concerned. Secondly, the Commission considers that, when all the relevant evidence is considered as a whole

(and particularly the evidence referred to above), the passages Mr Kirk relied on do not justify the findings he sought. Thirdly, the evidence contrary to the existence of a close political friendship between Mr Macdonald and Mr Maitland is the evidence of Mr Macdonald and part of the evidence of Mr Maitland. Their denials of a political connection are entirely self-serving on this issue and contrary to the weight of other evidence that supports the existence of a close political allegiance and friendship.

The Commission finds that, at a time when Mr Macdonald's future lay in the balance:

(a) Mr Macdonald said, and believed, at the Noble House lunch, that he had the support of the Mining Division (an entity over which Mr Maitland had considerable influence) for his continued pre-selection

(b) shortly after the lunch, Mr Macdonald contacted Mr Maitland requesting his support; this request was to firm-up the support from the Mining Division, which he thought he already had

(c) Mr Macdonald made this request in the belief that Mr Maitland was the key to the votes of the Mining Division

(d) Mr Maitland then telephoned Mr Foley and expressed his support for Mr Macdonald

(e) the support Mr Maitland provided to Mr Macdonald was known to Mr Macdonald

(f) as a result, Mr Macdonald was indebted to Mr Maitland – a debt to a man who was a close professional colleague and who could fairly be described as a "mate".

Chapter 7: The need to focus on DCM's specific training mine proposal

During the course of the public inquiry, the Commissioner said:

> [T]*he idea that a training mine could be a meritorious project is accepted. It's just the particular proposal that is the subject of the inquiry and the subject of the allegation that it was unmeritorious and indeed a sham but ... that allegation is not based on the proposition that a training mine in general terms could never be a meritorious project.*

Two points arise out of these remarks. First, the Commission accepts that, at the relevant time, a respectable body of opinion was of the view that, in general terms, a coal training mine would be of benefit to the state. There was also a respectable body of opinion diametrically opposed to that view. Nevertheless, because the issue is genuinely controversial, the Commission concludes that no person could be criticised for holding the view that a training mine, in general terms, would be beneficial to the state.

Secondly, the Commissioner made clear that the particular proposal submitted by DCM was an important topic in the public inquiry. The questions concerning the particular proposal were whether it was a genuine proposal, whether it had any merit, and whether it justified, on any proper ground, a direct allocation by Mr Macdonald of the EL to DCM.

Ms Williams, who appeared for Mr Ransley, argued in her closing submissions that Counsel Assisting and the Commissioner had indicated in the course of the public inquiry that the merits of the training mine were not a relevant issue. The passages in the transcript to which she referred were not entirely clear, but very shortly after the remarks Ms Williams relied on, the Commissioner made the statement referred to above and clarified the matter. The way in which the inquiry was then conducted could not have led anyone to believe that the merits of the specific DCM proposal were not being investigated.

Chapter 8: The intentions of Mr Ransley and Mr Poole with regard to their shareholding in DCM

The aspirations and activities of Mr Ransley and Mr Poole are relevant to the events investigated by the Commission. Both could fairly be described as "entrepreneurs". The Commission is not using this term pejoratively. Mr Ransley sought to downgrade his business and financial acumen by saying that he was "not a Harvard graduate" but "a fitter". At the time of the events recounted in this report, however, he was a successful and sophisticated businessman, well able to understand and participate in the various transactions involving DCM.

In about 2005, Mr Ransley retained Mr Poole, then a financial consultant, to assist with the listing (and possible sale) of a Ransley-owned labour-hire business known as TESA. In November 2006, Mr Ransley and Mr Poole incorporated ResCo Services Pty Ltd ("ResCo") and Rosa Pty Ltd ("Rosa"). In May 2007, ResCo changed its name to Doyles Creek Mining Pty Ltd and Rosa changed its name to ResCo. Initially, Mr Poole was the sole director and shareholder of ResCo.

Mr Ransley and Mr Poole set up ResCo and Rosa with the intent of acquiring mining services and other businesses in the resources sector. Mr Ransley denied that at the commencement of ResCo's business he had the intention to sell the business, but Mr Poole testified that that had been his (Mr Poole's) intention from the outset.

Mr Poole's hope was that he and Mr Ransley would build up the worth of DCM (previously ResCo) and that, at an appropriate time, he would sell his shares in DCM or otherwise dispose of its business so that he could make a substantial capital profit. His evidence was that, to his understanding, Mr Ransley had the same intention. Mr Poole agreed that he "expected an exit within say five years" and agreed that that was a view shared by the board of Rosa or ResCo and discussed between him and Mr Ransley. Mr Poole's evidence on this issue relating to Mr Ransley's state of mind has a sound basis. On Mr Poole's evidence, he had discussed with Mr Ransley the question of exiting from DCM and was aware from those discussions that Mr Ransley shared his hope (and expectation) that, after increasing the value of DCM, they would exit from the business and make a capital profit.

Mr Poole explained that his intention was to get the assets of DCM to a state where they might be worth something – perhaps by proving up a resource – and then either floating the company or having a trade sale. In either case, the sale would occur before any mine (and, by extension, any training facility) existed. He said that he had no intention of "hanging around" to run a training mine. He acknowledged that it was an approach that was consistent with the way he and Mr Ransley had done business previously, and also subsequently – it was a recognised modus operandi that they employed.

Early in 2008, DCM made an approach to Westpac bank for funding to enable it to acquire land that would be needed should DCM obtain the EL. Mr Baxter was the manager of the Westpac branch with whom DCM dealt. In March 2008, Mr Poole had a meeting or telephone call with Mr Baxter as a result of which Mr Baxter made a file note. The content of the note recorded, significantly, a statement that the resource was anticipated to be 140 million tonnes of "terminal coal" and that, "the principals ... have however no long term intention of operating a coal mine and it is likely the land and exploration licence and training status would be sold to a large operator for a significant financial gain". Mr Ransley may also have spoken to Mr Baxter about the matter, and he may have contributed some of the information that Mr Baxter then recorded. Although Mr Ransley denied having a recollection of speaking to Mr Baxter about the loan arranged in March 2008, telephone records demonstrate that they spoke on 5 March 2008, which is within the period that Mr Baxter described as being when he gathered information for the note.

Having regard to the credibility findings made by the Commission regarding Mr Ransley and Mr Poole, Mr Poole's evidence, the note made by Mr Baxter, and the fact that, prior and subsequent to late 2006, Mr Ransley's business activities included starting up businesses, effecting acquisitions and roll ups, and then selling them, the Commission concludes that Mr Ransley had the same intention with regard to ResCo's business as Mr Poole. Mr Ransley did, in fact, sell out his entire shareholding at the first available opportunity after listing.

Chapter 9: Mr Maitland becomes chairman of ResCo and a training mine is mooted

In late 2006, Mr Ransley began the search for a chairman for DCM. In the course of that search, he made enquiries with Peter Murray about a suitable candidate for the position. Peter Murray recommended Mr Maitland. In the course of that conversation, Peter Murray gained the impression that Mr Ransley was looking for a chairman who could "open doors", including government "doors". Mr Ransley hoped to engage as chairman a person who "knew his way around the corridors of power" and who "would be able to interact with various senior people within the industry, unions, politics and the like". Peter Murray mentioned that Mr Maitland had a relationship with Mr Macdonald, the latter obviously being an influential member of the Cabinet.

Mr Ransley proceeded to ask Mr Maitland whether he knew Mr Macdonald, and Mr Maitland told him that he did. Mr Ransley then engaged Mr Maitland as the chairman of ResCo (DCM) on terms that included a 5% shareholding in the company and a salary. Mr Ransley thought that Mr Maitland's connection with Mr Macdonald could be useful to the business of the new company, and, in fact, that transpired.

On 28 February 2007, ResCo conducted its inaugural board meeting. By resolution, Mr Maitland was formally confirmed as chairman, Mr Ransley was confirmed as non-executive managing director, and Mr Poole was confirmed as a director and acting chief financial officer.

A training mine is discussed

Vince Martin owned a company known as Eastern Mining and Construction Company (EMC) Pty Ltd, which was purchased by the ResCo group in 2007. EMC was a small contracting company in the underground mining industry providing specialised services to underground mines.

Mr Martin knew that Mr Ransley was looking to acquire a coal tenement. Mr Ransley had earlier told Mr Martin that he was looking for an area to operate an "underground training facility". Mr Martin said that he had previously spoken with Mr Ransley about the possibility of developing underground training facilities within parts of operating mine sites that were not being utilised for coal production.

Mr Maitland had long been interested and involved in mine training and safety. He had been advocating for a training mine since the 1990s and had proposed the idea to various ministers for mineral resources who had preceded Mr Macdonald.

In late 2006, Mr Martin discussed coal tenements in NSW with Dr Palese, a geologist. Dr Palese told Mr Martin about the Doyles Creek area. 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.

Mr Martin passed this information on to Mr Ransley, who expressed an interest in meeting Dr Palese. A meeting between them was held in late 2006 or very early 2007, at which a general discussion about the tenement occurred. On about 15 January 2007, another meeting was held, involving others as well.

Chapter 10: The first application is made and the groundwork begins

On 15 January 2007, at a meeting between ResCo representatives and other interested parties, there was a discussion about ResCo's prospects of being granted an EL by way of direct allocation as opposed to going through a tender process. Dr Palese and his business partner, Colin Randall, wished the ResCo people "good luck" because "...we had direct experience of how hard it was to get an area allocated to you directly". Dr Palese explained that this was said because most areas with good economic potential were released subject to tender. Dr Palese recalled that either Mr Ransley or Mr Maitland responded that they intended to establish a training mine. The training mine was perceived at that early stage as being the "open sesame" to the direct allocation of an Aladdin's cave.

That receiving a direct allocation of an EL was not dissimilar to being given access to Aladdin's cave can be seen from Mr Mullard's statement that granting a direct allocation of the DCM tenement was like "handing over a $100 million cheque".

Mr Chisholm attended the meeting on 15 January 2007. He made notes of the meeting, which he produced at the inquiry. His notes make no reference to training issues but do record a discussion about coal resources and regulatory matters relevant to establishing a commercial mine. He conceded, however, that a training mine could have been discussed at the meeting, as Dr Palese testified. The evidence establishes, however, that the commercial aspects of the project took centre stage at the meeting.

Mr Randall attended a meeting at Rathmines with Mr Maitland and Mr Ransley on 3 April 2007. His evidence was to the effect that, at that meeting, the major thrust of the discussion was the creation of a commercial mine – he offered to prepare an exploration programme for the establishment of a major mine. He said that the training mine was an "adjunct to the commercial mine".

Dr Palese had prepared a document entitled "Information Memorandum", which he distributed and explained at the meeting held on 15 January 2007. The document identified two alternative exploration opportunities in the Doyles Creek area. The first area, which he described as ELA (exploration licence area) 1, was the one on which the ResCo application for an EL was ultimately based and for which, subject to some minor differences, the EL was granted. In the memorandum, Dr Palese estimated that the Whybrow and Redbank Creek seams in this area contained a total inferred resource of 308.6 million tonnes and an inferred in situ mineable resource of 125.3 million tonnes. An "inferred in situ mineable resource" is the amount of coal that can be mined with current technology. The second area, ELA 2, was smaller and estimated to contain a total resource of 183.5 million tonnes in the Whybrow and Redbank Creek seams.

The memorandum expressed the view that the igneous intrusions in the first area did not affect the target seams; namely, the Whybrow and Redbank Creek seams. Dr Palese noted that that area appeared to be very suitable for development within the inferred faults. The memorandum noted that the advantages of the project included that it was one of "the very few areas still with vacant title, with sufficient coal resources to enable a medium to large size mining operation", that it had good quality coal resources that were easy to market, and that it was close to coal mining infrastructure and services. Generally, those present at the meeting accepted Dr Palese's opinion about the size of the coal resource within ELA 1.

Immediately after the 15 January 2007 meeting, Mr Ransley, Mr Poole and Mr Maitland decided that ResCo would pursue a direct allocation by Mr Macdonald of ELA 1. Mr Ransley explained that obtaining an EL, as the first step in establishing a "training mine", was "always part of our thinking". He believed that Mr Maitland's relationship with Mr Macdonald would generally assist in that regard. Indeed, Mr Ransley's perception was that Mr Maitland's job in connection with the training mine was to "manage the process politically", by which he meant steer the process

with the minister. The others involved in DCM had the same understanding, and that, indeed, is what Mr Maitland proceeded to do.

On 16 January 2007, Mr Maitland wrote to Mr Ransley. He referred to his intention "in my meeting with Minister Ian Macdonald ... [to] make a presentation in support of RESCO being granted an exploration licence over ELA 1 and/or ELA 2 as the case may be". Mr Maitland then listed "arguments in support" of that proposition, including "RESCO wants to establish a training mine" and "RESCO needs a new lease to establish a training mine".

On Friday, 19 January 2007, four days after the meeting with Dr Palese, Mr Maitland met with Mr Macdonald to discuss the training mine proposal. The meeting was originally arranged so that a discussion could take place about Mr Maitland's role as chairman of the Coal Competence Board to which he had been recently appointed by Mr Macdonald. Present were Mr Macdonald, Mr Maitland, Tony Hewson and Ms Tan. Mr Hewson was Mr Macdonald's chief of staff. No one was present from the DPI because, on 15 January 2007, Mr Maitland had requested that no DPI officer be present. The request was a strange one to make. After all, it was obvious that DPI involvement in discussions about the Coal Competence Board would be critical. Mr Maitland was unable to explain why he made that request. The Commission infers that he did so to avoid having a DPI officer present when he made his initial pitch to Mr Macdonald in support of the training mine concept. No other reasonable explanation exists. Mr Kirk submits that, because the exact time of the meeting with Dr Palese and the request that no DPI officer be present cannot now be established, this inference cannot be drawn. The point, however, is that, as is stated, no other explanation exists (or is suggested) for Mr Maitland's request.

At his meeting with Mr Macdonald, Mr Maitland promoted ResCo's application for the direct allocation of an EL in respect of the area identified by Dr Palese as ELA 1. In doing so, Mr Maitland raised the concept of a training mine as a justification for the direct allocation. Mr Macdonald was immediately receptive and supportive of the proposal.

The following Monday, 22 January 2007, Mr Maitland sent Mr Hewson and Ms Tan a briefing note conveying the training mine proposal in more, but still brief, detail. According to the briefing note, the training mine was intended to meet a skills shortage and so constitute a public good. Doyles Creek was identified as ideal for the proposed training mine.

On 30 January 2007, Mr Coutts asked Mr Maitland for more detail. In response, Mr Maitland sent Mr Coutts another short summary but with no significant additional details.

During February 2007, Mr Coutts gave the ministerial office advice in several stages. On 1 February 2007, he passed on to Ms Tan a short summary of the DPI's view of the training mine proposal, which recited the outcome of a study in 2000, when the former Mines Safety Council had considered and rejected a proposal for a training mine after a feasibility study. On that occasion, the Mines Safety Council, with the support of the CFMEU, decided that an underground training facility would not be pursued, in favour of the use of simulator training facilities. In a subsequent email to Ms Tan, Mr Coutts referred to the training mine idea as "a bit old hat" in light of the new simulator technology. From the commencement of his involvement with it, Mr Coutts was openly opposed to the training mine proposal.

Mr Coutts' opinion coincided with the view of Barry Buffier, then director-general of the DPI. Barry Buffier said that he discussed the proposal with Mr Coutts and formed the impression at the time that the training mine was "not much more than a thought bubble from John Maitland".

On 15 February 2007, Mr Maitland signed a formal letter of application addressed to Mr Macdonald seeking the direct allocation of ELA 1. The letter asserted that, if granted the EL, ResCo would build a training mine on the tenement.

At about the same time, the board of ResCo identified the desirability of pursuing a direct allocation and avoiding, if possible, the tenement being put out to an open tender or an EOI process. They recognised that a competitive process might result in large sums being offered by major players – and ResCo could not hope to compete in such a process. Thus, the board of ResCo acknowledged the likelihood that, were the Doyles Creek tenement to be put out to competitive tender, it was likely to attract considerable interest from larger mining companies.

At Ms Tan's specific request, Mr Coutts prepared a formal briefing note, which was provided to the ministerial office on 22 February 2007. The recommendation was to refer the ResCo proposal to the Mines Safety Advisory Council (MSAC), the successor to the body that had considered a training mine in 2000. The briefing clearly conveyed the DPI's view that the ResCo proposal did not justify a direct allocation and that the coal resource in question was the subject of interest from other parties.

During the public inquiry, questions asked on behalf of Mr Macdonald sought to throw doubt on whether he had read the briefing note. Initially, the positive case was put that Mr Macdonald had no recollection of reading it. This is an example of a positive case that was inconsistent with Mr Macdonald's own evidence. The Commission is satisfied that Mr Macdonald read the briefing note. Ms Tan said that, consistent with her normal practice, she would

have provided it to Mr Macdonald. He agreed that it was likely that he read it. Mr Macdonald did not dispute that the briefing note alerted him to the fact that the DPI was against the proposal to allocate the EL to ResCo directly, and that the Doyles Creek site had the potential to attract a number of interested parties to any tender process. This knowledge on the part of Mr Macdonald is an important factor when assessing his conduct in ignoring the advice of the DPI and in allocating the Doyles Creek tenement directly to DCM.

Significantly, the briefing note provided that there would be major policy difficulties, potential probity issues and environmental sensitivities involved in considering a proposed direct resource allocation for this purpose.

The phrase "probity issues" was very strong language to include in the briefing note. Mr Mullard had never used that phrase before or since or been so blunt in a briefing note, but, as he testified, he wanted to provide clear advice about what he and the DPI thought was an extremely risky undertaking in respect of a direct allocation. Because the use of the phrase was so strong and unusual he thought he should discuss his intention to insert it in the briefing note with certain of his colleagues. He proceeded to talk to Mr Coutts and Patricia Madden. Ms Madden advised Mr Mullard that to use the phrase might have career consequences for him. Despite that advice, he felt so strongly about the matter he thought it was important to take a strong view that made it very clear that the proposal was not supported.

Ms Madden had never seen any other briefing note prepared by Mullard include such language. Ms Tan had never seen probity concerns raised in a briefing note before or since. Barry Buffier agreed that the reference to a probity issue was a significant warning to put in a briefing note to the minister.

Counsel Assisting submitted the following about the reference to probity issues:

> *This was a clear red flag to the Minister. Despite the plain clarity of the language as a warning sign as to the inappropriateness of the direct allocation, Macdonald gave evidence that he did not understand what it meant and did not follow up on it ... The suggestion thot he did not understand what the reference to "probity issues" meant should not be believed.*

The Commission accepts these submissions.

Mr Macdonald rejected the DPI's recommendation to refer the proposal to the MSAC for its consideration and advice. Mr Macdonald also ignored other highly appropriate sources of advice about the proposal, including the Minerals Ministerial Advisory Council (MMAC). The MMAC, like the MSAC, was a tripartite body made up of representatives from the minerals industry, the Mining Division of the CFMEU, and senior officers from the DPI who had expertise in the minerals portfolio. These bodies were well qualified to give Mr Macdonald advice on the desirability of DCM's proposal.

Mr Macdonald had good reason to refer the training mine proposal to the MMAC. In 2005, the MMAC had identified "training and skills" within the minerals industry as one of the key issues for its consideration. In 2006, the MMAC formed a subcommittee, which consulted with the NSW Department of Education and Training (DET) as part of its inquiry into the level and diversity of training programs within the industry. Mr Macdonald did not dispute that, in February 2007, he was aware of the work done by the MMAC in this area.

Mr Macdonald also demonstrated a willingness to refer matters related to industry training to the MMAC for its consideration prior to receipt of ResCo's application for an EL. In June 2006, Margaret MacDonald-Hill, executive officer of the Association of Mining Related Councils, wrote to Mr Macdonald advising him of a potential link between mine planning approvals and training initiatives. On 8 December 2006, Mr Macdonald advised Ms MacDonald-Hill that the MMAC had been closely examining the issue of training and skills and was participating in a task force with the DET to define what mining-related skills shortages existed in NSW. Mr Macdonald also said that he had referred Ms MacDonald-Hill's letter to the MMAC for its consideration.

Notwithstanding these matters, Mr Macdonald told the Commission that he did not refer the training mine proposal to the MSAC or the MMAC because he believed that the issue would divide council members and cause controversy, which he wished to avoid. Mr Macdonald explained that council members who were representatives of larger mining interests were against the concept of a training mine, whereas council members from the union supported the proposal.

Mr Macdonald's evidence about this issue is unconvincing. What was the point of establishing advisory councils with representatives from different interests if that would mean that Mr Macdonald would be loathe to consult them and to obtain their advice? Mr Macdonald's failure to obtain advice from these councils is made even more surprising in the light of his agreement that he had high regard for the people appointed to them and that he relied on the advice of the councils from time to time.

Mr Macdonald told the Commission that he believed that he had other sources of information available to him about the proposal. He was unable, however, to identify who he may have spoken to about the proposal other than Dr Nicole Williams, the CEO of the NSW Minerals Council, a peak body representing the interests of the mining industry

in NSW. As discussed later in this report, the Commission is satisfied that Mr Macdonald approached Dr Williams in mid-2008, not for the purpose of obtaining information about the merits of the proposal but for the purpose of persuading Dr Williams and the NSW Minerals Council to support the idea publically. Dr Williams declined to provide her support.

Counsel Assisting submitted that Mr Macdonald did not want to hear what the MMAC or MSAC thought about the proposal because he did not want to risk exposing the proposal to external scrutiny only to receive further negative feedback. The Commission accepts this submission. In the Commission's view, Mr Macdonald did not want to obtain objective technical advice about the merits of the proposal because he realised that, in doing so, he might create further opposition to the direct allocation of the EL to ResCo. Opposition from the bodies concerned would make a direct allocation more difficult. He did not want this to happen.

Those working with Mr Macdonald thought that he was strongly supportive of the ResCo proposal from the outset. Nevertheless, for some months, at least, there was no further consideration of the proposal. Mr Macdonald did not respond to the application of 15 February 2007 or to the DPI briefing note. This lack of interest and activity on the part of Mr Macdonald does not sit well with his evidence that he decided against a competitive tender because the process involved would take too long for him to gain political capital from the training mine for the 2011 election.

The DPI records continued to show Mr Maitland's application for the Doyles Creek area as carrying the notation "Ministerial", a reference to the fact that, from the DPI's position, the matter was being dealt with by the minister, and was attended by some uncertainty.

On 8 March 2007, Ms Tan and Mr Hewson met with Mr Maitland and discussed the DPI's position. Based on that meeting, Mr Maitland was able to report to the ResCo board the DPI's position and the challenges to be overcome to get approval for a direct allocation.

In May 2007, ResCo changed its name to DCM, and Rosa changed its name to ResCo. Various reasons were advanced for the changes of name. Whatever the principal motivation, it indicated a continuing intention to pursue a direct allocation of the Doyles Creek tenement, and some degree of optimism as to that process, notwithstanding that, by May 2007, the proponents were aware that the DPI's advice had been entirely negative. That impression is reinforced by the terms of the board papers and minutes from a meeting of the directors on 3 April 2007. At that meeting, it was decided that a direct allocation would be pursued notwithstanding the DPI's position that there should be a competitive tender process for the tenement.

In the period from May to August 2007, Mr Maitland sought to develop relationships with potential alliance partners. He initiated contact with people from the University of Newcastle, Coal Services, and the CFMEU to garner support for the Doyles Creek proposal. As will be seen, those contacts and their support became an important plank of the proposal.

In late July 2007, Mr Macdonald had lunch with Ms Tan, Mr Ransley and Mr Maitland at the Prime Restaurant in Sydney. Mr Ransley paid. All agreed that there were limited details of the training proposal at that stage, and that the lunch did not turn to the detail of the proposal. Mr Macdonald described the notion of a training mine at that stage as being "very unformed". That was clearly accurate, as Mr Maitland conceded. At the time of the lunch, there had as yet been no decision by the proponents about any of the specifics of the proposal, such as numbers of trainees, cost or courses.

A key matter discussed at the Prime Restaurant lunch was the procurement of letters that would serve as an indication of a need for additional training facilities in the Hunter Valley. Mr Macdonald indicated that he wanted those letters and, after the meeting, had his staff follow up Mr Maitland in relation to them. Following the Prime Restaurant lunch, Mr Maitland sought and obtained letters of support from the University of Newcastle, the Hunter Valley Training Company (HVTC), the Westpac Rescue Helicopter Service (WRHS, also referred to as the Hunter Regional SLSA Helicopter Rescue Service) and the CFMEU's Peter Murray.

Mr Maitland's negotiations with the WRHS are, to a substantial degree, typical of his negotiations concerning the obtaining of the letters. Mr Maitland first approached the WRHS in about August 2007. Mr Maitland asked Richard Jones and Cliff Marsh of the WRHS for a letter to the minister that would address the need for a training facility in the Hunter Valley, but that would not mention the training mine or DCM. Mr Jones said that Mr Maitland "would have come up with the guts of the letter" to be sent by the WRHS. The letter refers to "a number of new training initiatives which we hope to make public in the near future". Mr Jones could not explain why the letter did not mention the training mine. He accepted that this was strange and, ultimately, agreed that the omission was part of a "strategy" outlined to him by Mr Maitland.

The HVTC produced the draft of a letter to Mr Macdonald dated 12 September 2007. Again, the letter makes no reference to the training mine but refers to a skills shortage affecting the minerals industry, and advises that the HVTC is "looking at exciting new initiatives"

to improve training in the industry. Kay Sharp, HVTC's executive director, said the letter was drafted to support the concept of a training mine.

Mr Maitland asked Dr Andrew Johnson, on behalf of the University of Newcastle, to draft a letter in support of the proposal. On 21 September 2007, Dr Johnson sent a draft letter Mr Maitland. The letter stated that there was a serious skills shortage in the full range of engineering disciplines and, in particular, those serving the mining industry and "more general training opportunities are also required at levels outside tertiary training, especially in safe mining practices and other crucial occupational health and safety areas". Dr Johnson told the Commission that the reference to the need for training outside the tertiary sector did not "seem to fit in with the University of Newcastle's business". He agreed that it was possible that Mr Maitland had requested that the sentence be included in the letter.

Mr Maitland also obtained a letter from Peter Murray, general secretary of the CFMEU's Mining and Energy Division. The letter was obtained in unusual circumstances. At a meeting on 16 July 2007 between Mr Maitland, Mr Maher and others, Mr Maher indicated to Mr Maitland that the Central Committee of the CFMEU would not publically support ResCo's proposal. Mr Maher was against any such statement of support and his opposition was based, in part, on his concerns about the appearance of impropriety.

On 8 August 2007, however, Peter Murray wrote a letter to Mr Macdonald in his capacity as general secretary. The letter stated that there was an "ever-increasing number of poorly skilled" workers in the mining industry, and suggested that the industry needed to develop an appropriate strategy to improve skills and safety. Again, the letter made no reference to the training mine proposal. Peter Murray accepted that he wrote the letter without telling Mr Maher or anyone else within the CFMEU that he was doing so. He denied that he wrote the letter at the request of Mr Maitland. Counsel Assisting submitted, however, that the letter was written at Mr Maitland's request. The Commission accepts this submission. The letter is dated soon after the Prime Restaurant lunch, and a copy of the letter, and the original of Mr Macdonald's response, was placed in the file of Mr Stevenson, DCM's lawyer. No copy of Mr Macdonald's response was produced by the CFMEU. In addition, Mr Maitland testified that the letter was intended to validate the position that training was required in the industry.

As noted above, Mr Jones agreed that the omission of any mention of a training mine in the letter he drafted on behalf of the WRHS was a "strategy". The strategy was apparently to create an impression that disinterested non-government organisations (NGOs) perceived there to be a need that would, in due course, be met by the training mine. The strategy appears to have been based on the notion that, to have mentioned the training mine expressly at that stage would have been too obvious, and might have led the DPI or the public to believe that the letters in support were merely a ploy to justify the direct allocation.

A number of submissions were made that there was no strategy, as mentioned by Mr Jones. Mr Maitland, however, admitted that, for the purpose of meeting a specific request by Mr Macdonald, he drafted letters of support. Mr Jones had reported to his board that, "the strategy is that all NGO's *[sic]* will provide similar letters and when the Minister receives an application for a new mine with a specific purpose he will already have letters which support the concept".

It was put to Mr Maitland that this statement in Mr Jones' report reflected his description to Mr Jones of what "the strategy was". Mr Maitland replied, "I think that's a pretty fair assessment". Mr Maitland went on to say that the strategy was "to demonstrate that there was a skills shortage and that they [the NGOs] would benefit from some sort of commitment to skills". It was then to put to Mr Maitland that the strategy was that the letters would set out the training need of each one of the NGOs and say nothing about the mine, but would create a background that would make it easier for the minister to progress the application for a direct allocation. That is because the minister would already have all of the letters establishing the need. Mr Maitland agreed that this was the strategy. There is also a corroborative reference to this in notes made by Peter Demura of PwC, and there is the fact that, once the letters were obtained, they were brought to a meeting with the minister's staff.

Mr Macdonald appeared, also, to be personally engaged in the "Prime strategy". A few days after the Prime Restaurant lunch, Ms Tan sent Graham Hawkes of the DPI a request for a briefing note addressing "the status of training/skills in the mining industries in NSW". Significantly, the request did not mention Mr Maitland, Doyles Creek or the training mine concept. Ms Tan's evidence was that the minister would have sought the briefing, and that the minister's request was connected to the meeting with Mr Maitland at the Prime Restaurant.

In response, on 13 August 2007, the DPI provided Mr Macdonald with a briefing note about the subject that canvassed, in general terms, the work done by the DET and the MMAC in addressing the issue of skills shortages and identifying training priorities. Mr Macdonald, however, made no enquiries with the DET to gain further information about the training priorities. Mr Macdonald was asked to explain why and gave the following evidence:

> *But you never followed up with the Department of Education and Training to find out what those training priorities were, did you?---No, I didn't.*

Why not?---Well, I, I was considering the issue within the ambit of, of, of whether the, the industry supported it and whether the proponents were able to get the support.

Yes. So it's really consistent with the general approach you had which was considering it on your own, having the occasional discussion with Mr Maitland but refusing to contemplate any outside input into your thinking process?---That's not right.

Well, why didn't you- - -?---There was lots of outside input.

You've gone to the effort of getting a briefing nate from your Department which tells you that there's a Government organ considering precisely the question that Mr Maitland's brought to you, specific training proposals in the mining industry in 2007 and 2008. Now, why didn't you follow that up?---I, I had another pathway and as you know, I had another pathway.

The other "pathway" must have been the letters Mr Maitland procured after the Prime Restaurant lunch. These letters helped to pave the way for the training mine without mentioning the DCM proposal. Mr Macdonald denied instructing Mr Maitland to obtain letters that made no mention of a training mine. It is difficult to accept, however, that Mr Maitland would have behaved in the way he did without first discussing it with Mr Macdonald. After all, Mr Macdonald, himself, engaged in a like exercise when he sought DPI advice about the state of training and skills in the mining industry without referring to the fact that the advice related to the training mine proposal.

On 26 September 2007, Mr Maitland met with the minister's staff. The purpose of the meeting was to discuss the letters from the University of Newcastle, HVTC and WRHS, which had, by then, been sent. That meeting probably occurred under Mr Macdonald's imprimatur.

On 30 October 2007, Mr Maitland met with Ms Tan and Mr Coutts. There is no direct record or recollection of that meeting, but notes taken of subsequent meetings by Mr Stevenson and Mr Demura indicate that Mr Coutts continued to express "scepticism" about the training mine idea and that the need for a formal business plan (or feasibility study or submission) originated at that meeting.

On 5 November 2007, Mr Maitland attended a meeting with Mr Macdonald at his ministerial offices in Sydney. Also present were Dr Johnson and Ms Tan. Mr Maitland's attendance at the meeting requires some comment. By mid-2007, Mr Macdonald was keen to establish a chair of geology at the University of Newcastle and for Professor Ian Plimer to be involved in that initiative. In October 2007, arrangements were made for a meeting to be held to discuss the proposal. At Mr Macdonald's request, Mr Maitland was invited to the meeting and Mr Maitland was asked to invite Dr Johnson and senior academics from the University of Newcastle to the meeting.

Mr Macdonald said the purpose of the meeting was to look at the idea of carbon sequestration and of enhancing "geological work" in the Hunter and in NSW. He said that he invited Mr Maitland to the meeting so that he could contribute to those discussions. The Commission does not accept this evidence.

Dr Johnson recorded the matters discussed at the meeting in an email he wrote on 6 November 2007. It is apparent from that email that the focus of the meeting was the problem of skills shortages in the university discipline of geoscience and the means by which a chair of geology could be established and funded at the University of Newcastle to alleviate those shortages. Dr Johnson noted that Mr Macdonald indicated a willingness to support the proposal at the meeting and expected that 25% of the funding for the chair should come from industry. The issue of carbon sequestration is not referred to in Dr Johnson's record of the meeting.

During his evidence Mr Maitland resisted the notion that Mr Macdonald invited him to the meeting on the basis that, once DCM obtained the EL, it could contribute to the cost of establishing a chair in mining geology at the university. Mr Maitland suggested that he was invited to the meeting to help convince the university to accept Professor Plimer and to galvanise support for the university within the mining industry. But, later in his evidence, Mr Maitland was taken to notes of a meeting conducted on 21 November 2007 involving the principals of DCM. Mr Maitland was recorded as saying that the "Minister wants assistance to establish a Chair of Mining at Newcastle University". In the course of interpreting the note, Mr Maitland told the Commission that Mr Macdonald wanted DCM to provide financial assistance to the university and that such assistance could be given only if an EL was granted in DCM's favour.

The Commission is satisfied that Mr Macdonald invited Mr Maitland in order to position DCM so that it could offer funds to the university to support the establishment of the chair of geology at an appropriate time. No one else from the industry was invited who may have been able to offer funding to the university. It is also important to note that such an arrangement presupposed the grant of the EL to DCM. Mr Maitland accepted that DCM could offer financial support to the university only in circumstances where it was granted the EL in respect of Doyles Creek.

The Commission accepts the submission of Counsel Assisting that this was an act of favouritism on the part of Mr Macdonald towards Mr Maitland, providing him with an opportunity to further advance the notion that there

was a public benefit associated with a direct allocation of the EL to DCM.

In the course of the meeting, Professor Plimer said the training mine proposal was "absolute madness". Mr Macdonald was present when this was said.

On 5 November 2007, the three directors of DCM and Mr Martin met with Mr Stevenson. This meeting included a report by Mr Maitland about his recent dealings with Mr Coutts on 30 October 2007. At the meeting it was decided to prepare the Submission. The Submission was referred to in Mr Stevenson's file notes as a "feasibility study - bankable". Both Mr Poole and Mr Ransley denied that those words were used at the meeting (just as they denied the use of the words "bankable document" at the meeting on 21 November 2007, dealt with in the next chapter). Mr Stevenson, however, recorded that phrase as having been used at the meeting, and the Commission finds that the need for a feasibility study that was "bankable" was indeed discussed at the meeting. Various persons associated with DCM were assigned roles in connection with the preparation of the Submission.

Following that meeting, there must have been some discussion with mine manager, Lawrie Ireland, who, in late 2007, began working for EMC, which was later acquired by ResCo. Shortly after 5 November 2007, Mr Ireland prepared a plan for longwall mining at the Doyles Creek site. Mr Ireland's mine plan provided a means to approximate the amount of coal that could be removed from the site, assuming the readily-available presence of coal. This is the amount of coal that actually comes out of the mine gate and is known as the run of mine (ROM) coal. Annual coal production figures can be derived from these calculations.

This information was intended for Mr Chester, who was responsible for forecasting the costs associated with establishing and operating the commercial mine and training facilities, the income that could be derived from coal production, and the project finance requirements. In preparing the mine plan, Mr Ireland estimated the number of longwalls that would fit into the proposed mine site, the average length of those walls throughout the site, and the height of the seam that was to be mined at each longwall.

On 9 November 2007, Mr Ireland sent Mr Ransley and Mr Martin a spreadsheet showing some preliminary ROM calculations based on 50 longwalls. Those figures showed a ROM of between 150 and 174 million tonnes over the life of the mine.

Mr Ransley forwarded the figures to Mr Poole. Mr Ireland said that his estimate of between 150 and 174 million tonnes related to one seam only and took into account an area of land outside the proposed EL boundaries. Mr Martin corroborated Mr Ireland's evidence in relation to the latter point. The Commission, however, does not accept either witness on this point. Mr Ireland separately identified on his spreadsheet the additional coal that was situated outside the lease boundary. The 50 longwalls that make up the ROM estimate are those within the lease boundary. And, as the proposal to explore Doyles Creek focused on the Whybrow and Redbank Creek seams, it is unlikely that Mr Ireland would have restricted his calculations to one seam only. In the Commission's view, Mr Ireland's calculations were based on the Whybrow and Redbank Creek seams.

Chapter 11: The Submission and the training mine "spin"

In March 2008, DCM made its second application to the DPI for a direct allocation of the Doyles Creek tenement. That application was supported by the Submission, a document on which various persons, on behalf of DCM, had worked.

Mr Chester was largely responsible for the writing of the Submission. He was retained by DCM to prepare the document. He understood that it was intended to advance the training facility (and, the Commission finds, on the basis that it would justify a direct allocation of the EL – although Mr Chester claimed not to be aware that a direct allocation was intended). Initially, he retained PwC to prepare the Submission. In early January 2008, he took over direct responsibility for putting it together.

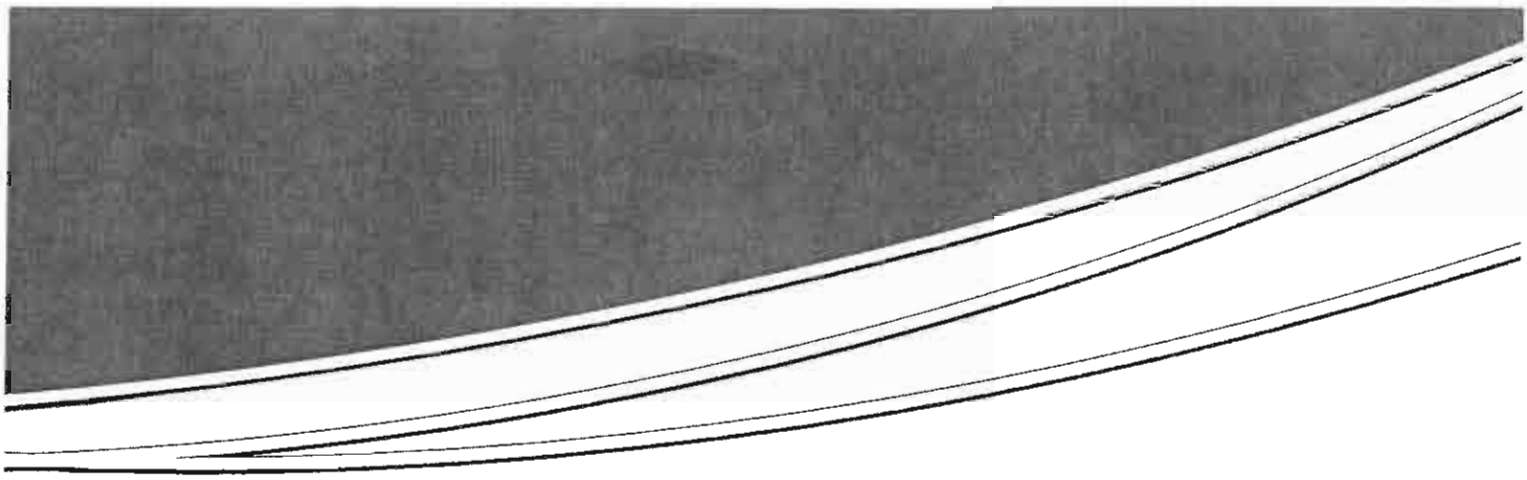
Mr Chester collected information from DCM – principally from Mr Ireland as to anything connected with the mining operation, and Mr Martin for the training elements – and from this information prepared drafts which, throughout the process, he circulated amongst the directors of DCM and to Mr Martin, Mr Ireland and Mr Stevenson.

A second meeting reflected in Mr Stevenson's notes occurred on 21 November 2007. It is common ground that Mr Ransley, Mr Poole, Mr Maitland, Mr Martin, Mr Ireland and Mr Stevenson attended the meeting. There is a question whether Mr Chester was present. Mr Stevenson's notes record that Mr Chester was present. Mr Chester did not recall attending the meeting. While it is possible that Mr Chester may have participated in the meeting by telephone, Mr Stevenson said that he would normally make some notation to that effect and, in the absence of any note to the contrary, he agreed that it was likely that Mr Chester was present. The Commission so finds.

Both Mr Ransley and Mr Maitland addressed the meeting. According to Mr Stevenson's notes, Mr Ransley reported that DCM intended to prepare a Submission including a mine plan, that Mr Chester would "pull it together" and "structure finance", that DCM wanted to avoid a competitive tender, and that it would be a "prefeasibility study with spin for training mine". Mr Stevenson placed the words "prefeasibility" and "spin" in inverted commas in his notes. The Commission is satisfied that he did so in order to signify that Mr Ransley had used those words during the meeting. Mr Ransley denied that this was so. But he had no actual recollection of the meeting and the next entry in Mr Stevenson's note records Mr Ransley saying that "we sell as a benefit to state". The Commission accepts the submission of Counsel Assisting that the idea of selling a benefit conveys a sense consistent with the use of the word "spin". Mr Stevenson was an experienced solicitor who was well practised at note-taking. The Commission is satisfied that Mr Ransley used the word "spin" to describe the use that could be made in the Submission of the training mine idea to secure the EL.

Mr Maitland was next to address the meeting. Mr Stevenson's notes attribute the following statement to him: "Tonnage – 60M ?? [but we think 140M]". Then, underneath these words, symbols and square brackets, appears the well-known symbol for "therefore". Next to the "therefore" symbol, the following is set out: "model on 60 M".

The Commission accepts Counsel Assisting's submission that this part of Mr Stevenson's notes should be construed as meaning that Mr Maitland said words to the effect that "we think that there is 140 million tonnes mineable coal in the tenement, but we are going to model on 60 million tonnes". Mr Maitland agreed that he made reference to 60 million tonnes at the meeting but said that it reflected his view that around half of Mr Palese's estimate of 125 million tonnes in situ mineable coal could be recovered from any proposed mine at Doyles Creek using the method of coal extraction known as bord and pillar. His explanation for using the figure of 60 million tonnes is not accepted. Mr Poole told the Commission that he had not heard of Mr



Maitland's explanation before the public inquiry, and Mr Ransley said that he did not understand that the figure of 60 million tonnes was Mr Maitland's idea.

The Commission is satisfied that the figure of 60 million tonnes was based on the estimate of 62 million tonnes contained in the DPI's 22 February 2007 briefing note, which was shown to Mr Maitland by Mr Macdonald's ministerial staff in March 2007. This figure had been erroneously arrived at by the DPI in reliance on incorrect data. In 2007 and 2008, Mr Maitland used the DPI's figure of 62 million tonnes rather than the estimate of 125 million tonnes used by Dr Palese during presentations he conducted about the training mine proposal. Mr Maitland's presentation to Mr Maher and other senior officials of the CFMEU on 16 July 2007 was one such occasion when Mr Maitland told the meeting that there was an estimated coal reserve of 60 million tonnes at Doyles Creek. In the Commission's view, Mr Maitland downplayed the size of the coal resource on occasions such as these so as not to jeopardise support for the proposal. He did not wish it to be known that the estimated size of the resource had the potential to generate large profits for DCM and its shareholders.

Mr Maitland initially said that he could not explain the figure of 140 million tonnes appearing in Mr Stevenson's notes. The Commission notes, however, that the figure had gained currency among the principals of DCM not long after the meeting on 21 November 2007. In March 2008, Mr Poole used the figure of 140 million tonnes to describe the size of the coal resource at Doyles Creek in the course of applying to Mr Baxter for finance to purchase land at Doyles Creek on behalf of DCM. During his evidence, Mr Maitland's attention was drawn to the fact that, in 2008, he included the figure of 140 million tonnes in submissions to Chinese investors in the hope of securing finance for the venture. Mr Maitland, thereafter, agreed that he may have said at the meeting on 21 November 2007 that DCM should model on 60 million tonnes notwithstanding that the principals of DCM had discussed a figure of 140 million tonnes. In the Commission's view, Mr Stevenson's note is difficult to explain in any other way. On or shortly before 12 December 2007, Mr Ireland prepared a new mine plan based on the Whybrow seam only and containing 28 longwalls. On the basis of this plan, Mr Ireland arrived at a ROM coal estimate of 66.9 million tonnes. The Commission is satisfied that, as submitted by Counsel Assisting, Mr Ireland took heed of the statement of Mr Maitland's at the meeting on 21 November 2007 and produced a mine plan and ROM figures in accordance with Mr Maitland's desire to "model on 60".

Around the time that Mr Ireland developed his new mine plan with a revised estimate of 66.9 million tonnes, Mr Chester instructed Mr Demura to prepare an initial draft of the Submission. On 19 December 2007, an arrangement was made for PwC advisors to be briefed on the project. Mr Demura and Ruth Ahchow from PwC attended this meeting. Also present were Mr Maitland, Mr Ransley, Mr Ireland, Brian McCowan, Mr Stevenson and two persons from the HVTC. Both Mr Stevenson and Mr Demura took notes. The purpose of the meeting was to inform Mr Demura and Ms Ahchow, who had been retained to assist in the drafting of the Submission, of the intent and purpose of the Submission.

Two aspects of the meeting are significant. First, it would have become apparent to anyone present that the modelling done by Mr Ireland was for one seam only. Mr Ireland was present at the meeting, and his new mine plan, modelled on the Whybrow seam only, showing a lifetime ROM of 68 million tonnes, was discussed (this is recorded in Mr Stevenson's notes). It is likely that Mr Ireland was involved in that part of the discussion. There is no mention in either Mr Stevenson's or Mr Demura's notes of any tonnage connected with the Redbank Creek seam (which Mr Ireland had not modelled).

Secondly, there were a number of references made during this meeting that tend to support the notion that the Submission was intended to be "spin"; that is, to create an impression rather than constitute a substantive and genuine proposal. So, for example, Mr Demura's notes of the meeting record the following comments: "need to demonstrate benefits and not a goldmine for entrepreneurs", and "shouldn't be seen as a privilege [for] entrepreneurs", and, under "minister's risk", the words, "need for a compelling argument".

This collection of phrases, combined with Mr Stevenson's recording of the word "spin" to describe the same document, permit of only one conclusion; namely, that it was recognised by all of those present at those meetings that the intent was that the document should create an impression, namely, that the direct allocation of the EL would be in the public interest. The focus was on the impression, rather than the substance of that part of the proposal.

That the need to exaggerate the benefit to the public, and to create political cover for Mr Macdonald, were significant factors to the DCM proponents is apparent from the note, which records under the heading, "minister's risk", the words, "need for a compelling argument". The Commission finds that "minister's risk" means, according to the plain meaning of the phrase, "the risk to the minister". A "compelling argument" was needed to reduce that risk so that Mr Macdonald would be comfortable about directly allocating the Doyles Creek tenement to DCM.

The relevant intent was to create an illusion that the proposal was principally for a training mine, and not a large commercial mine. The illusion would be designed to:

- exaggerate the public benefit that would arise by the direct allotment of the tenement to DCM
- remove any public perception that the direct allocation would result in "a goldmine for entrepreneurs"; indeed what was required was a proposal that would not be seen as "a privilege [for] entrepreneurs", which, in truth, would be the consequence of the proposed direct allocation
- persuade the DPI to support the direct allocation (Mr Macdonald, it seems, was from the beginning an enthusiastic supporter of the proposal, and there was no need to create an illusion for him)
- provide political cover for Mr Macdonald to enable him to answer any criticism that might result from a direct allocation of the Doyles Creek EL to DCM, a company with which his friend and political ally, Mr Maitland, was known to be connected.

Much less attention was given by the proponents to ensuring that the proposed training facility would *actually* perform any significant public benefit. It is a telling feature of the process that those who expressed most enthusiasm for the training facility – that is to say, Mr Maitland and Mr Ransley – played no role whatsoever in its design or conception. Very little was said to Mr Demura in December 2007 about the detail of the proposed mine and his first drafts contained no training detail at all. In due course, Mr Chester took over the production of the Submission document, and he realised that a detailed training plan was required.

The training program was designed entirely by Mr Martin. He consulted with some of the people who reported to him at EMC, but there was no input from Mr Ransley, Mr Maitland or any of the others associated with DCM. Mr Martin was asked to provide details for the training program by Mr Chester – it is not even clear that Mr Ransley or Mr Maitland turned their minds to who was going to put the training program together. Mr Martin did not speak to Mr Ransley, Mr Maitland or Mr Poole about it. He considered what was feasible with a single shift on a single training panel. He made his own assumptions about the equipment that would be required, the units of training that were needed, and the numbers of trainers that might be employed to do training. But he was not asked to deal with or discuss those matters with anyone else, and those matters did not form any part of the Submission. No one asked Mr Martin how large the training mine should be, over what period it should operate, what equipment or how many trainers the training facility would require, what provision should be made for maintenance or other costs, or, indeed, how many trainees it would qualify annually and what standing the qualification would be designed to achieve.

The Commission refers below to Mr Martin's evidence that, through the proposed training mine, 25 miners would achieve qualification each year, and the fact that this was the number of newly-qualified miners that would have been absorbed into the ResCo underground business. The effect of what he designed was a very small training program, well-suited to meeting, solely, the needs of ResCo.

Mr Martin also intended that the training mine would train apprentices on the basis that an intended 18 trainees would start each year. He was unaware of the intended involvement of HVTC, and did not anticipate its involvement. The training of fitters was something he had some experience with, but he had not previously been involved with training electricians and had no detailed understanding how that would be done. He planned for five deputies and two under-managers to undertake multi-year courses, but it was clear from his evidence that no careful planning went into those proposed numbers. He said only that they "sounded about the right number".

Once Mr Martin provided the numbers to Mr Chester, no one ever asked him about them again. The numbers he provided became the numbers put in the conceptual mine plan, which was attached to, and formed part of, the Submission.

Even after Mr Martin's input, not all of the matters identified by Mr Chester as necessary for a proper training program had been addressed. Thus, for example, there was no specification of the skills or certifications that would be taught nor were the courses identified, which Mr Chester agreed was a fundamental aspect of a genuine training proposal.

Drafts of the Submission were circulated in mid-January 2008, and again in early and mid-February 2008. The principals and Mr Stevenson all reviewed the drafts and provided comments. A draft Submission was circulated by Mr Chester on 20 February 2008. Mr Poole responded with some minor comments. Mr Ransley's response included the following:

> *the financials need to establish that the Mine shows a solid financial return without huge profits.*

This suggestion is consistent with Mr Demura's note of 19 December 2007 that the Submission should not reflect "a goldmine for entrepreneurs".

Mr Chester accepted that the instruction was to look at the inputs into the financial figures and work out if a particular result could be achieved. He was willing to do this "as long as it was realistic". In subsequent emails, Mr Chester asked the principals to "review the financial outcomes to ensure they are appropriate as we will need to fine tune if not". He was responding to the requirement Mr Ransley had expressed; namely, to ensure that a particular outcome was achieved. This aspect of Mr Ransley's contribution is entirely consistent with, and corroborative of, the evidence that he was describing the document as "spin".

In response to the same draft of the Submission, Mr Stevenson told Mr Chester that a letter of financial support would be required. Mr Chester responded by preparing a letter to come from Opes Prime. Mr Poole received a draft of this letter and, on 25 February 2008, sent an email of his own. In that email he noted that, "it is all about the assumptions on $/t and AUD at revenue line ... my only comment would be that we need to be able to demonstrate that our costs reflect the fact we are running a training mine, whether in the shape of full funding from participants or a reduced profit or both".

In response to that email, the financials were amended to show the training mine as cost-neutral – it was to have revenue and cost of $2.4 million per annum, an arbitrary and problematic figure. There was no evidence of how the figure of $2.4 million was arrived at. It seems to have been a number inserted by Mr Chester to reflect a notional cost of a notional training mine. No thought or consideration went into calculating how the matching revenue of $2.4 million would be raised.

Chapter 12: The true purpose of the training mine concept

During the public inquiry, although there was constant discussion about issues concerning a "training mine" and a "commercial mine" on the DCM tenement, it is important to appreciate that, to the knowledge of all concerned, there would always be only one mine. That single mine would be capable of being exploited solely as a training mine, or solely as a commercial mine, or partly as a training mine and partly as a commercial mine.

Until the end of Mr Ransley's evidence, it appeared to be common ground that part of the mine (a very large part) would be used for commercial mining and part of the mine (a very small part) would be used as a training mine. On this basis, profits from coal mined commercially would be used to pay for the training mine; the balance of the profits (unless reinvested in the mine) would be for the benefit of shareholders. In a series of exchanges towards the end of his testimony, however, Mr Ransley testified that he intended the mine to be a training mine, alone. That evidence, for the reasons set out below (when the evidence in question is discussed more fully), is rejected.

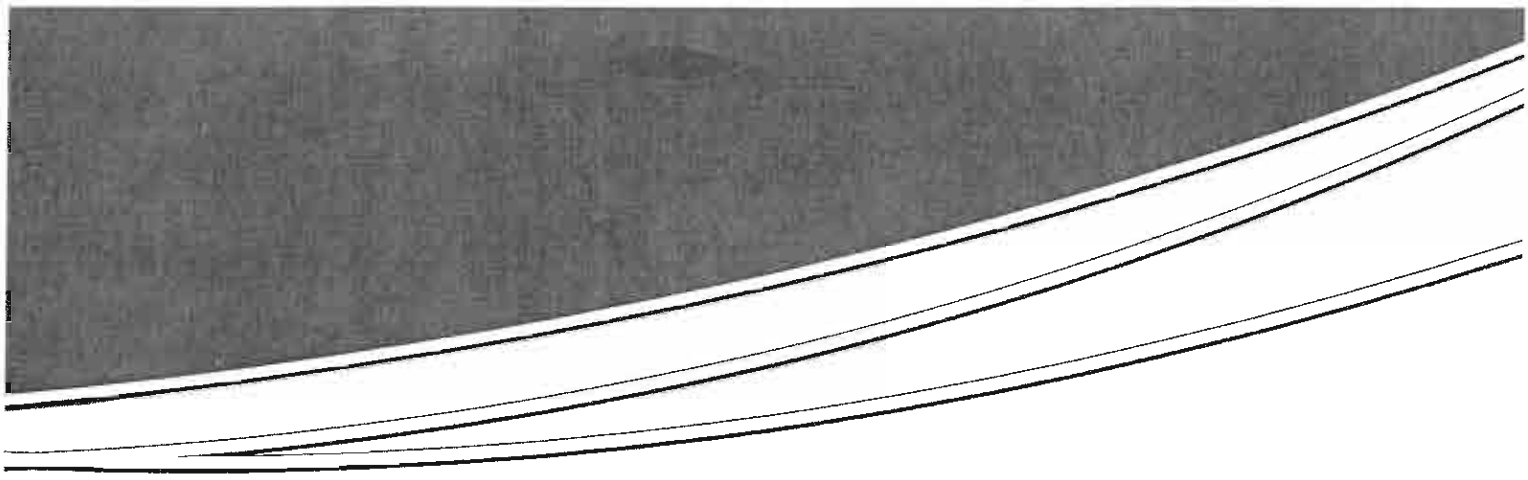
A conceptual mine plan was attached to the Submission. The conceptual mine plan was a drawing by Mr Martin showing the proposed training panel and the longwalls. A note on the conceptual mine plan indicated an intention on the part of DCM to mine 150,000 tonnes of coal from the training panel. The Submission itself gave details of the training mine that DCM was intending to construct and operate. Thus, the Submission (coupled with the conceptual mine plan) was an important document, as it revealed DCM's intentions in respect of the training part of its mine plans to the DPI and the minister. At the time of the Submission, there was no other document or piece of information given by DCM to the DPI or Mr Macdonald that dealt with the detail of the proposed training mine. The application had to be assessed and judged by reference to the Submission and the conceptual mine plan attached thereto. Throughout the subsequent period, until Mr Macdonald granted DCM the EL, DCM made no change of any kind to the Submission and the conceptual mine plan.

Mr Chester, the person retained by DCM to do its financial modelling for the proposal, accepted himself, that, having regard to the Submission and the conceptual mine plan, "by any proper business measure the training mine was anticipated to be a miniscule part of this operation". A number of factors made it obvious that Mr Chester's opinion was correct.

First, the number of proposed trainees would have no significant impact on the number of "cleanskins" (trainees without prior mining experience) coming into the industry. That is because the Submission indicated that the training mine was intended to produce only 25 qualified miners annually.

Mr Martin, who determined this number on behalf of DCM, explained that 25 miners was the number of miners that would have been welcome in what was then known as the ResCo underground business (RUS). So the effect of what he designed was a very small training program, well-suited to meeting, solely, the needs of ResCo. He was not told that the aim was to provide a public benefit for the state, and he did not seek to do that. His concept was that the mine would do the training to meet the requirements of RUS.

Secondly, the 25 miners per annum should be compared with the 774 trainees who did the cleanskin induction at Coal Services in 2007–08. That comparison shows that 25 is an insignificant number in relation to the numbers coming into the industry every year (and apparently finding employers, and training, at other mines or institutions). Another medium-sized coal mining company, Donaldson Coal, for example, was training 30 cleanskins per annum purely to meet its own needs. Michael Buffier, chief operating officer of Xstrata Coal, said that Xstrata Coal had trained 270 people in its training mine at Baal Bone over two years.



Thirdly, the quantity of coal dedicated to training, according to DCM's proposal, was tiny – less than one-sixth of 1% of the available coal – a training panel of a mere 150,000 tonnes of coal. Mr McCowan's estimate was that trainees would take out 300 tonnes of coal a shift, so that the training panel would be gone after 500 shifts (about 80 weeks).

Thus, even if Mr Ransley, Mr Poole and Mr Maitland intended to build a training mine, the training mine portion of the mine would be tiny.

The Commission finds that Mr Ransley, Mr Poole and Mr Maitland intended that the part of the mine that was not to be used for training purposes would be mined on a commercial basis with the intent of making as much profit as possible.

The Commission now turns to the testimony that Mr Ransley gave towards the end of his evidence. Mr Ransley asserted that the intent of DCM was to apply all of the income received from the commercial mine to expanding the teaching facility – so that "the more coal, the more trainees that the mine would produce". He went so far as to indicate that he did not have in mind the making of a profit from the commercial mine. He made it clear that DCM's intention was that the mine would exist solely to finance the training program. He accepted the proposition that his evidence was to be understood as being to the effect that:

> [T]*he more coal that would be produced, the bigger the training mine ond the more trainees you would, would train.*

That is to say, on a continuous basis, all profits would be ploughed back into the training mine and no profits would be dealt with as being the normal fruits of a commercial mine. All profits would be used to improve and expand the training mine.

Ms Williams was obviously disconcerted by this evidence on the part of Mr Ransley. She rose to say that she was "very troubled" by it and that "he must have misunderstood the question". She said, rightly, that this evidence was "inconsistent with the whole of the evidence and the whole of the case". She asked that he be recalled to clarify what he meant. The Commissioner refused her application, saying that he did not get the impression that Mr Ransley had misunderstood the question. The Commissioner said: "[H]e took time to answer it, he was clearly thinking about it and he gave an answer".

As Counsel Assisting submitted, this was a position carefully and consistently maintained over a series of questions and some elaborate answers and, at the time he was giving these answers, Mr Ransley's demeanour was careful, composed and considered. In her written submissions, Ms Williams argued that Mr Ransely was at cross-purposes with the Commissioner when he gave the evidence to the effect that the intent of DCM was to apply all of the income received from the commercial mine to expanding the teaching facility and that he did not have in mind the making of a profit from the commercial mine. The Commission's understanding at the time Mr Ransley gave this evidence was that he fully understood the questions he was asked and he did his best to respond directly to them. In the light of Ms Williams' submission, the Commission has carefully re-read the evidence on this issue several times and remains convinced that the Commissioner and Mr Ransley were not at cross-purposes. Mr Ransley understood perfectly well what questions he was answering and what he was intending to convey by his answers. Ms Williams' submissions are rejected.

Mr Ransley's answers (to which Ms Williams was referring when she applied for him to be recalled) were completely at odds with the testimony of the other witnesses who gave evidence on this topic. For example, Mr Poole said that he aimed for the biggest possible profit, coupled with the establishment of a training mine (and this explained

why profits of $50 million a year were shown in a financial model prepared on DCM's behalf). As Counsel Assisting submitted, it was "an absurd and dishonest position to adopt, but consistent with Mr Ransley's attitude to giving evidence generally".

Ms Williams then submitted that the conceptual mine plan does not form part of the Submission "and wrongly elevates a notation on the conceptual mine plan to a definitive statement". Presumably, Ms Williams was intending to submit that the argument of Counsel Assisting "wrongly elevates a notation on the conceptual mine plan to a definitive statement". The notation in question is the indication on the conceptual mine plan that the training panel would produce 150,000 tonnes of coal. The following exchange in Mr Poole's evidence is relevant:

> *When plans or proposals were developed, they were developed because they were actually intended?---Yes.*
>
> *Not just as place holders for some other plan that might be developed at some later time in the future?---That wasn't my understanding, no.*

Mr Poole testified further that, as far as he knew, DCM's intention "was exactly in the document [that is, the Submission]". The Commission accepts Mr Poole's evidence in this regard.

The Commission rejects the argument that the conceptual mine plan did not form part of the Submission. It was attached to it and, to all intents and purposes, formed part of the Submission and, hence, the application. It was obviously intended to form part of the Submission and the application, and to be read by the DPI in that light. The notation of 150,000 tonnes was a clear statement of intention.

Ms Williams submitted further:

> *Neither Ransley nor the other proponents expected that training would be limited to the 150,000t noted on the conceptual mine plan. Even putting to one side the fact that this mine plan would inevitably change and the location and size of the training panel would be revisited after exploration, they expected that any EL would be subject to conditions requiring the site to be used as a training mine and it is inconceivable that they would have thought training could cease for any reason without breaching those conditions and risking forfeiting the title to the tenement*

It may be that the location and size of the training panel would be revisited after exploration, but that does not detract from the intention expressed in the conceptual mine plan.

Ms Williams' argument that conditions would be imposed requiring the training mine to be bigger and better, and a contributor to the public good, is an argument that relies on anticipated vigilance on the part of the DPI – not on any bona fide intention on the part of the proponents. It does not answer the fact that the application stated an intention to conduct only a derisory amount of training. One may ask, if the proponents had an intention to train a substantial number of trainees over the life of the mine, why did the Submission not say this? Ms Williams' submissions ask the Commission to ignore the stated intention of the proponents of the Submission and find that they had some other intention. There is little justification for such an approach. It is not persuasive.

The Commission finds that the argument raised on behalf of Mr Ransley does not explain the terms of the Submission and the conceptual mine plan. Those terms are simply not consistent with a genuine intent to construct and operate a training mine that would be sufficiently large, efficient and productive of adequate numbers of appropriately qualified trainee miners so as to produce a tangible benefit to the public good. The Commission finds that those standing behind DCM did not have such an intention.

The submissions filed on behalf of Mr Macdonald do not directly address the inadequacy of DCM's training mine proposal. Rather, they seek to rely on the conditions attached to the EL by arguing that, first, they limit DCM's rights to the operation of a training mine and not a commercial mine, secondly, they require DCM to develop a training mine "for the proposed activities within one year of the grant for licence" and, thirdly, they afford the minister power to cancel the EL should the holder not meet its commitments under the EL.

The submissions filed on behalf of Mr Maitland address the issue briefly and appear merely to support Mr Macdonald's argument that the EL conditions "could ensure that the training mine established at Doyles Creek could exceed the modest training mine proposal put to government many months earlier". They contend that the conditions confer a discretion on the minister (or the DPI) to reject an inadequate plan. The Commission will deal with these arguments when addressing, below, the conditions incorporated in the EL.

The Commission has accepted the evidence of Mr Poole that he and Mr Ransley "expected an exit within say five years". In other words, they intended to build up the value of their shareholding in DCM over a period of about five years and, then, sell their shares to make a capital profit. Such an intention on their part is fundamentally inconsistent with a bona fide intention on their part as directors and shareholders of DCM to operate a training mine. That is because a training mine would be fully operational only some years after the granting of a mining lease. At the time DCM was lobbying Mr Macdonald for a direct allocation of the EL, the intention of Mr Ransley and Mr Poole was

to sell their shares at a date that would have preceded the granting of a mining lease. Were DCM to complete the construction of a training mine and operate a training mine, that was likely to occur at a time when Mr Ransley and Mr Poole were not shareholders and directors.

Regard should also be had to the evidence of Mr Chisholm, which establishes that the focus of the meeting of 15 January 2007 was the commercial aspects of the mine that ResCo hoped to be able to build and operate on the Doyles Creek tenement. The significance of this evidence is that it shows the true intention of Mr Ransley and Mr Maitland, as from the virtual inception of the plan, to acquire the Doyles Creek EL by way of direct allocation. And note must be taken of Mr Randall's evidence that, at a later meeting, the focus was the same.

Mr Poole's evidence on this issue was unequivocal. He said that an EL was a valuable asset with market value. He was interested in making money out of the EL. He did not dispute that it was the desire of the ResCo and DCM board to obtain the EL without having to engage in a competitive process. Mr Poole said that, "our plan was always that we would try and get a direct allocation from the Government and in return we would build the training aspects of the mine that no one else had done before".

Mr Poole accepted that the training mine was "a means to an end". It was "the quid pro quo to get the allocation". In other words, Mr Poole saw the cost of establishing a training facility as the price to pay for securing the EL. Mr Poole accepted that the EL was a valuable asset with a market value. In December 2008, Mr Chester advised him that a value of $1 per anticipated tonne could be supported. and he accepted that advice.

Mr Coates' evidence was that, in early 2008, Mr Maitland described to him a "strategy" by which the training mine would "enable the Minister to issue a lease under Ministerial discretion" and that "the concept of the training mine was for no other reason than to allow the Minister to issue the lease". He said, "the training mine would be a cost, that would be the price you would pay for getting the lease". That evidence is consistent with Mr Poole's evidence and the records of Mr Baxter.

Other objective observers concluded that the training mine proposal was intended to provide a justification for the granting of an EL. Brendan McPherson, CEO of Donaldson Coal, wrote a letter of support for the training mine proposal. Mr McPherson expressed the view that, "this is entirely a front for them to get a coal mine on the cheap".

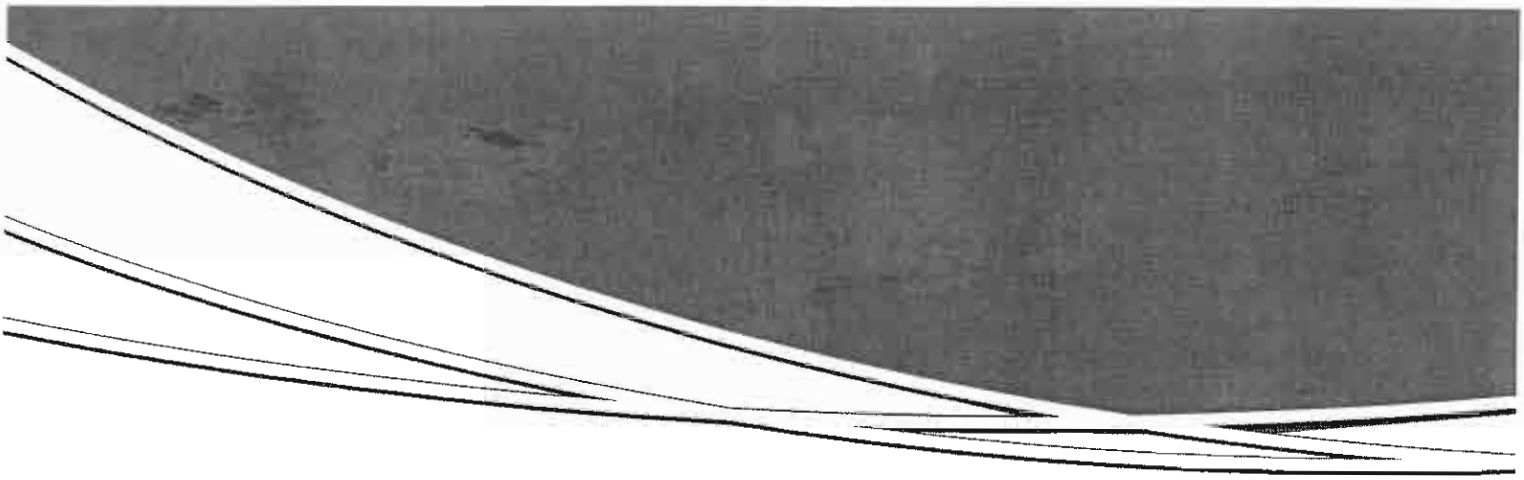
Michael Buffier was approached by Mr Ransley for a letter of support in 2008. Michael Buffier said that it was "obvious ... that Mr Ransley was trying to put, put a case together around the concept of a training mine to gain access to an Exploration Licence ...for a commercial mine." Mr Maher said that "it was the pitch so far as I understand. It was the rationale for obtaining an Exploration Licence". Within two minutes of being told about it, Alexander Cramb, senior media adviser at the premier's office, had decided it was "like scientific research on whales" – that is, a masquerade.

The problem that DCM had to solve was that direct allocations of areas that could support major stand-alone mines were rare and, were the EL to be put out to public tender, DCM would not even compete. It did not have the resources to match bids with the larger miners in the industry. Mr Ransley and the DCM board had made a decision to this effect. As far as DCM was concerned, it was either a direct allocation of the Doyles Creek tenement or nothing. The training mine was conceived as a solution to this problem. It just happened to coincide with what Mr Ransley had investigated some time before, and what Mr Maitland had been proposing for years.

The Commission finds that Mr Ransley, Mr Poole and Mr Maitland advanced the training mine proposal for the principal purpose of persuading the minister to grant DCM a direct allocation. If this idea worked, it would produce a very substantial benefit to DCM. That this was known and understood by those behind DCM can be seen from a financial model prepared on DCM's behalf on the assumption that an EL would be granted to it. That model showed profits of $50 million a year from a commercial mine. The fact is that, when DCM made its application for a direct allocation of the EL, an EL in the area concerned was hot property – a very valuable right that could potentially allow the holder to make many millions of dollars (as actually happened in the case of the Doyles Creek EL).

Mr Maitland was aware that the EL would be a very valuable asset. He told his friend, Mr Tudehope, that the EL possibly would be worth $20 million. Mr Maitland prepared documents for the purpose of interesting investors in DCM, which placed a much higher value on the EL. He prepared documents for Chinese investors towards the end of 2008, which placed a value of $150 million on the tenement. He accepted that the granting of the EL, if it occurred, would transform his life.

According to a note made by Mr Ireland on 25 August 2008, Mr Ransley told him that he had "been given a letter of invitation to apply for ELA1 by Minister, therefore, Invitation to ResCo only!! – $50m ?". Mr Ireland said that Mr Ransley estimated that $50 million was the potential value of the invitation to apply for the EL. Ms Williams submitted that the "note indicates uncertainty". But Mr Ireland resisted the suggestion that he was mistaken in attributing to Mr Ransley the comment that the invitation to apply for the EL was worth $50 million.



The Commission accepts that, in principle, both Mr Ransley and Mr Maitland had a genuine interest in building a training mine. But their intention, from the inception of the project, was to use the training mine proposal to get a direct allocation of the EL and to avoid a competitive tender process. That is what was discussed at the first meeting with Dr Palese on 15 January 2007. They intended and proposed that DCM would eventually build a training mine. But their main purpose, as Mr Poole frankly stated, was to obtain an EL without having to tender against the big mining companies and without having to pay an inordinate sum of money for the tenement. The training idea was indeed important to them, but only as the hook that was going to catch the commercial mine. The Commission rejects the evidence of Mr Ransley and Mr Maitland to the contrary.

Chapter 13: The DPI receives the Submission

The Submission was provided to Mr Coutts by letter dated 18 March 2008. A copy went to the minister's office, although it is not clear whether anyone in the minister's office read it. Ten days later, Opes Prime collapsed. No steps were taken to tell the DPI that the letter of financial comfort could no longer be called upon.

Mr Coutts considered that there were serious problems with the Submission. He explained that, according to the Submission, once an EL was granted, a feasibility study would be carried out and the training mine would only go ahead "on the basis" of the feasibility study. Mr Coutts said that there were a number of unanswered questions about how this would actually work. For example, the DPI was concerned about what would occur if a feasibility study unacceptable to the DPI was produced. Did that mean, for example, that the training mine would not go ahead?

According to Mr Coutts, there were other serious problems with the Submission. For example, there was little detail about how the training panels would operate. It seemed to Mr Coutts from the Submission that a coalition of training operators was simply being gathered together to run training operations from the Doyles Creek site, rather than from areas where they already existed.

Mr Coutts was not convinced that, "the proposal stood up and stood up in such a rigorous fashion that we would be handing over a fairly significant resource that could have been worth you know north of $50 million to the State".

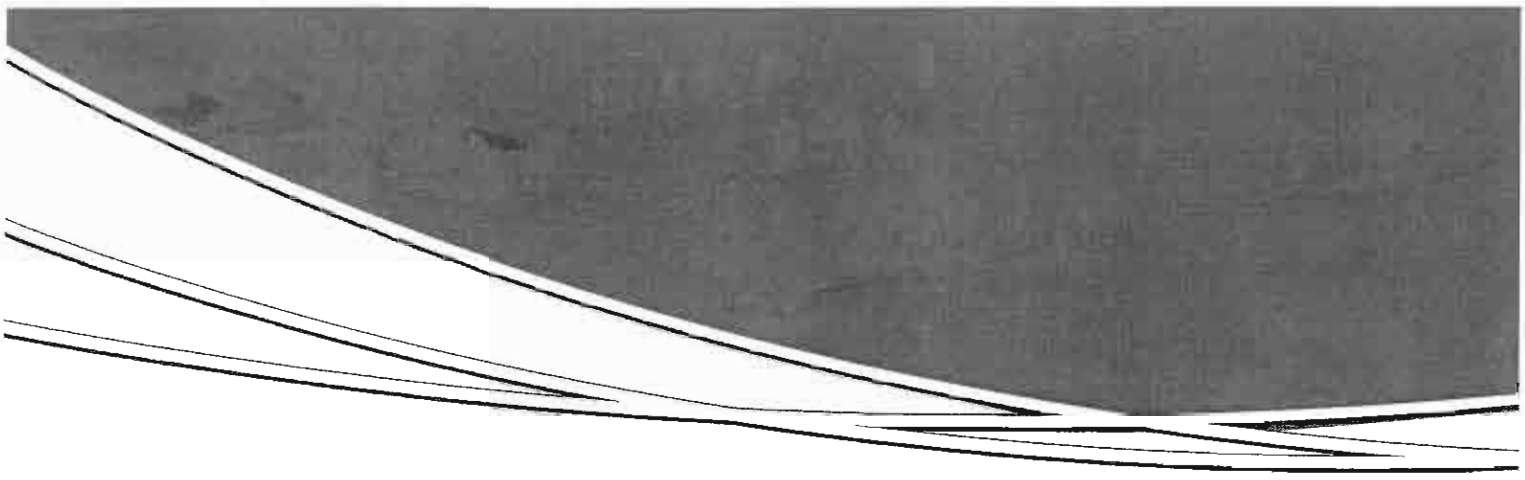
Mr Coutts' fears were prescient. The questions Mr Coutts had asked were never answered. The consequence was that, once the EL was granted, the training mine proceeded on the basis of DCM's application and the Submission. It is true that conditions were imposed by the EL. But, as will be seen from the discussion below, the conditions did not provide a satisfactory answer to the questions Mr Coutts had asked.

Mr Coutts explained that the DPI's advice was that, if the minister was keen to pursue the notion of a training mine, then, first, he should seek some guidance from those bodies set up to help him make decisions of that kind. Secondly, if "an area like Doyles Creek" was to be released for exploration, the very least that should be done was to arrange for the training mine to be subject to a "competitive interest process" so that the release of the area would be balanced by a "public interest test".

Mr Coutts gave a copy of the Submission to Mr Mullard for his advice. Mr Mullard, in turn, gave the Submission to Ms Madden, operations manager within the DPI's Coal and Development Branch, with instructions to review it and produce a briefing note.

Mr Macdonald's ministerial office also received a copy of DCM's Submission. Mr Gibson said that he provided a copy of it to Mr Macdonald. Mr Macdonald was ambivalent as to whether he had read the Submission. The following are statements he made at a compulsory examination and at the public inquiry concerning the issue of whether he read the Submission. He said he "could have skipped through it", "I don't recall reading that, no", "I don't think I did read it, but I'm not 100 per cent certain", "No, no, I can't be totally certain of that [namely, being informed of the Submission]", and "I don't recall specifically reading that".

At one point during the public inquiry, Mr Macdonald gave inconsistent evidence as to what he had previously said. He asserted that he had a recollection that he did read the Submission. This change appeared to be driven by his recognition, while in the witness box, that for him to say that he had given the Submission such brief attention (if he gave it any attention at all) was damaging to his argument that, at all times, he behaved properly. It seemed that, initially, he had taken the view that it was best for him to profess ignorance of the detail of the Submission so that he would not have to answer for his failure to react to it. Later, he changed his mind.



There can be no doubt that, if Mr Macdonald read the Submission, he did so only in an entirely cursory and superficial manner.

Mr Macdonald accepted that the Submission was an important document. He accepted that it was the document that contained the detail of the training mine proposal. He accepted that, as the Submission contained all the detail as to DCM's mine plans, generally, and the training mine, in particular, it needed to be looked at very carefully to make sure the proposal was worthwhile. He accepted that it was important that either he or a well-qualified person in the DPI look at the Submission very carefully to see whether it was of public benefit.

In the light of his recognition that the Submission was such an important document, the scant attention Mr Macdonald paid to it is extraordinary. As he had spent so little time on the document, he was clearly dependent on the advice of the DPI as to its merits. But he ignored that advice. His conduct, in this regard, does not bear any reasonable explanation consistent with impartial behaviour on his part.

Chapter 14: Early 2008 – Actions taken by DCM: sundry communications

In early 2008, DCM was so confident of being awarded the EL that it proceeded to purchase land to assist in providing a site for the training facility. In March 2008, in the course of that acquisition, the approach was made to Westpac bank for funding and Mr Baxter of Westpac made the file note referred to earlier.

In April 2008, Mr Maitland arranged another dinner with Mr Macdonald at the Prime Restaurant. Whatever the intent of the meeting, it did not occur as planned. Mr Macdonald could not attend, and withdrew at the last minute. Mr Munnings attended the dinner alone on behalf of the minister. Mr Ransley and Mr Maitland also attended. None of the participants had a good recollection of the evening. At the dinner, Mr Munnings probably conveyed the minister's generally positive attitude towards the application. In his words, he would have sought to reassure them that the minister was still supportive. It seems that it was a friendly affair, and mobile telephone numbers were exchanged.

Thereafter, both Mr Ransley and Mr Maitland called Mr Munnings from time to time, and he called them. A regular communication channel was opened up directly between Mr Macdonald's office and Mr Maitland.

At about the same time, DCM opened discussions with Xstrata Coal about a possible joint venture between it and DCM in connection with the proposed mine. Meetings commenced in March 2008 and continued throughout the year, overlapping with other attempts made by the proponents to arrange finance or equity partners. Those other attempts started in May 2008, with communications between Mr Maitland and various potential investors in China, whom he visited for that purpose in July 2008.

During May 2008, the DPI prepared its response to the Submission. The evidence suggests that there was some pressure for the DPI to respond during May. The Commission is satisfied that, in early May 2008, the DPI's timetable for the delivery of advice to Mr Macdonald was communicated to Mr Ransley. According to Mr Ireland, on 5 May 2008, Mr Ransley told him that Mr Coutts had "three weeks to get back to the Minister". Mr Ireland's evidence is supported by the fact that, on either 5 May 2008 or the day after, he made a diary note of the conversation that suggests that Mr Ransley told him on 5 May that Mr Coutts had three weeks to get back to the minister. Mr Ransley denied any such discussion, but his denial is not accepted. The Commission prefers the evidence of Mr Ireland.

Mr Macdonald travelled to China on 15 May 2008, and returned on 27 May 2008. On the day of Mr Macdonald's return, Mr Coutts emailed Mr Gibson a draft briefing note setting out the DPI's position concerning the proposal. It is likely that the DPI was requested to provide advice to Mr Macdonald about DCM's proposal by the time he returned from China. It is likely that Mr Maitland was told immediately that the draft briefing note had arrived and was told of its contents (there is a telephone call between Mr Munnings and Mr Maitland 30 minutes after the email).

Mr Macdonald generally encouraged his ministerial staff, including Mr Gibson and Mr Munnings, to provide the principals of DCM with information about the progress of their application. Mr Gibson told the Commission that, following a dinner involving Mr Macdonald, Mr Ransley and Mr Maitland at the Strangers' Dining Room at Parliament House on 17 June 2008, Mr Macdonald directed him "to continue to liaise with them [the DCM principals] and I guess give service to, to these proponents as, as was legally required".

Mr Munnings also kept Mr Maitland and Mr Ransley up to date about the progress of their application. As previously discussed, Mr Ransley and Mr Maitland had dinner with Mr Munnings on 8 April 2008. Mr Munnings remained in contact with Mr Maitland and Mr Ransley after the meeting on 8 April 2008. He gave the following evidence about the nature of that contact:

Did you stay in contact with Mr Ransley and Mr Maitland one way or another from the 8 April as their application progressed?---More Mr Maitland than Mr Ransley.

Well can you describe the nature of that contact, please?---I would receive the occasional telephone call from Mr Maitland just inquiring as to how things were going and I think I was asked on a number of occasions to phone Mr Maitland to pass on information to him.

Who asked you to do that?---It would be either Mr Badenoch or Mr Gibson.

Acting on behalf of the Minister?---Indeed.

What sort of information were you passing on?---Again I don't specifically recall but I'm assuming it would be things like updates or perhaps request for information that sort of thing.

And as you've said contact also from Mr Maitland from time to time following things up?---Yes.

Mr Ransley was in telephone contact with Mr Munnings on 28 and 29 April 2008 and again on 2 May 2008. Mr Munnings said that he could not recall telephone calls with Mr Ransley but the Commission is satisfied that any such calls would have been about DCM's application. Mr Ransley denied that he must have been discussing DCM's application with Mr Munnings – he claimed the calls could be explained because he "thought Mr Munnings was ... not a bad bloke". During the period between April and October 2008, Mr Ransley and Mr Munnings made mobile telephone contact, or attempted to do so, on around 44 occasions. The inescapable conclusion is that the purpose of the calls was to discuss the progress of the application. The Commission accepts Counsel Assisting's submission that Mr Ransley's evidence on this aspect should be treated as a lie – consistent with his position on other occasions when confronted with evidence he considered unfavourable.

Mr Maitland also had telephone contact with Mr Munnings during the course of the application process. On 2 May 2008, Mr Munnings telephoned Mr Maitland and they spoke for around four minutes. On the same day, Mr Maitland drafted a letter to Edwin Chen of the Taiwan Power Corporation inviting him to visit Australia to discuss investment opportunities in the coal industry as "we are certain to have a project of interest for you by the end of next month". Mr Maitland initially said that he was unsure whether "the project" was a reference to the proposed training facility at Doyles Creek but then agreed that he had no other project on foot at the time. Mr Maitland said the comment in the letter may have been an "overstatement" but reflected his confident view that the application for consent to apply for the EL would succeed. Mr Maitland did not recall whether information provided to him by Mr Munnings was the source of his confidence. He said, however, that that was possible.

The Commission finds that Mr Maitland's confidence was derived from information given to him by Mr Macdonald or Mr Munnings, on behalf of Mr Macdonald. There was no other source that could possibly have given Mr Maitland the confidence he expressed to Mr Chen. The degree of communication (and the matters communicated) between the DCM proponents and the ministerial staff during this period is highly unusual and bespeaks a favoured relationship of privilege that DCM had with the ministerial staff.

Chapter 15: The DPI provides Mr Macdonald with advice about the Submission

On 13 May 2008, Ms Madden completed her review of DCM's Submission and prepared a draft briefing note, in consultation with Mr Mullard, setting out the DPI's view of the proposal. After amending the note, Mr Mullard emailed it to Mr Coutts, who emailed it to Mr Gibson on 27 May 2008.

Mr Gibson said that it was his normal practice to make such draft briefing notes available to Mr Macdonald and this would have been no exception. Mr Macdonald initially said that, in the absence of his signature on the draft briefing note, he could not be sure that he read it. Later in his evidence, he said that he had a recollection of reading parts of the document.

In the Commission's view, it is likely that Mr Macdonald read the draft briefing note in its entirety. Unlike DCM's Submission, it was a relatively short document consisting of three pages of text. It would take a brief time to read. According to Mr Gibson, Mr Macdonald was anxious to obtain advice from the DPI about the Submission. The Commission accepts Mr Gibson's evidence. The draft briefing note concerned matters that were of interest to Mr Macdonald. Throughout his evidence, Mr Macdonald displayed familiarity with its contents and at one point said that, "he knew all of their [the DPI's] points".

The draft briefing note is a critical document and reference will be made to the more important matters discussed in it.

The DPI advised Mr Macdonald (in the draft briefing note) that interest in the area, the subject of the proposal, had been expressed by other mining companies. This fact was relevant to the desirability of holding a competitive process and to the prospects of thereby obtaining an additional financial contribution to the state in consequence of the competitive process.

The DPI reported to Mr Macdonald that, according to the Submission, "a total of 91Mt of coal would be removed from the mine, or 3.3 Mtpa, of which only 150,000 tonnes would be from the 'training panel' portion of the mine". This piece of information speaks for itself. Mr Macdonald was thereby expressly informed that the training mine would be miniscule, both generally and when compared with the commercial part of DCM's mine.

The DPI enumerated to Mr Macdonald several other concerns about DCM's Submission. The other concerns were as follows:

1. The area was attractive and a number of companies apart from DCM had expressed an interest in the area.
2. The "current policy", a reference by the DPI to the *Guidelines for Allocation of Future Coal Exploration Areas* ("the Guidelines"), warranted consideration of a competitive process to allocate the resource.
3. DCM had provided only very limited information on the proposal and had not demonstrated that it was feasible or viable.
4. DCM had indicated in its Submission that it would conduct feasibility studies only once the resource had been allocated – this did not provide certainty to government that the allocation of the resource would achieve the outcomes suggested by DCM.
5. The proposal did not demonstrate broad industry acceptance regarding the suitability for employment of the mining trainees and this was an important matter if the training component was to be successful.
6. Other mines had training programs in place and it was not clear how the proposal would link in to such existing programs, including virtual mine training facilities.
7. Skills obtained at the proposed training facility might not be transferable to other mines, as the nature of

the training at the mine tended to be specific to the type of mining conditions and equipment being used in this particular area of the Hunter Valley.

8. A major mining operation was being proposed with a small training component. This raised the possibility that, once the mine had been established, the training component could be downgraded or not considered feasible in the long-term.

9. The time required to develop the mine was five to six years, a fact that would defer any significant benefit from the training mine for at least five to six years into the future. Any impact the training facilities had on the skills shortages facing the industry would necessarily be delayed by, at least, that period.

10. The subject area of the application was close to the township of Jerrys Plains, and there was considerable community opposition to the expansion of mining in the region.

11. Under the Guidelines, the minimum financial contribution required for the allocation of the area would be in the order of $15 million but a competitive allocation could result in a higher return (that is, by way of additional financial contributions).

12. It was entirely unclear whether the proposed training provided at the mine would equip the trainees with skills that could be employed in other mines.

13. No review had been undertaken to examine the extent to which the training activities proposed by DCM intersected with other training programs available in the industry to avoid unnecessary overlaps or produce possible advantages.

Each of these 13 reasons militates against a direct allocation of the Doyles Creek mining tenement. They constitute the reasons the DPI gave to Mr Macdonald for not allocating the Doyles Creek mining tenement by way of a direct allocation to DCM. The DPI's concerns and comments were serious and persuasive. It is difficult to believe that a bona fide consideration of them could result in their being brushed aside or dealt with superficially. How Mr Macdonald dealt with them is discussed below.

Further details about the training proposal, based on DCM's Submission, were set out in an annexure to the draft briefing note. Some of these were false statements made in reliance on information from the proponents. For example, Mr Macdonald was advised that DCM "had established a strategic alliance under a memorandum of understanding [MOU] with ResCo Services, Coal Services, the University of Newcastle, Hunter Valley Training Company and the Hunter Region SLSA Helicopter Rescue Service to undertake the venture". In fact, DCM had not entered into any arrangement with Coal Services, and, with the possible exception of the HVTC, had not signed a MOU with the other entities referred to in the draft briefing note. The DPI noted that it appeared from the Submission that Sharp Training would deliver training to 25 trainee mine workers, five deputy mine managers and two mine under-managers. No such arrangement had been entered into with Sharp Training. The DPI had been misled. These misleading statements are dealt with more fully below when dealing specifically with the conduct of the proponents.

In the Submission, the DPI outlined three options available to Mr Macdonald for the allocation of the EL, namely:

1. a direct allocation to DCM with strong conditions on the title regarding the requirement to establish and maintain a training mine component with penalty provisions, should the company not achieve the stated outcomes

2. an allocation of the area on a competitive basis with a requirement to establish a training program as part of any allocation

3. an allocation of the area on a competitive basis with requirements for a cash payment (in the order of $5 million per annum) either as an upfront payment or as an annual fee over the life of the mine being directed towards the establishment of broader industry training programs.

The draft briefing note made it plain that Mr Mullard and Mr Coutts did not support the first option (a direct allocation to DCM). That was clear from the commentary in the draft briefing note and the express terms of the DPI's recommendation that followed the three options. Mr Mullard and Mr Coutts told the Commission that option (1) was included merely to reflect the fact that the Minister had a legal entitlement under the *Mining Act* to allocate the EL directly. It was an option that was obvious – one Mr Macdonald always knew that he had. It was listed merely as a matter of form.

The DPI expressly recommended that, "given the level of industry interest in the area, the Minister considers a competitive allocation process with a requirement to either establish a training facility or establish a broader industry training fund".

Mr Mullard explained the rationale for framing the recommendation as follows:

> *Now the recommended option is a competitive allocation with a requirement to establish a training facility or establish a broader industry training fund. Why was that recommended?---We had previously put up – I suppose that, that was an option because of the fact*

that we were aware that the Minister was attracted to the concept. We didn't necessarily have a strong view about the generality of a training mine meaning that we, we, we did recognise that training was an issue for the industry or, or generating skilled people was a,[sic] *was an issue for the industry. So the broad general concept wasn't something that we particularly had a view on. We weren't necessarily the best place to form that view which is why we were in previous briefs suggesting that it should be referred to experts to give advice on but if you were going to proceed with an allocation for a training mine we did have a view that the current praposal wasn't necessarily the best proposal and that it should be put out for a competitive process.*

And if there was a competitive allocation process that included a requirement of the nature you've described then the various Expressions of Interest or tenders would come with competing money amounts and competing proposals for training facilities?---Yeah, that's exactly right and that, that was our view. Then the Government could form a view about in the best interest of the State which generated the, the maximum value in terms of return to the State and also the training component. Without a competitive process in my view there was no real way to evaluate John Maitland's process, John Maitland's proposal. I suppose the only other way was to refer it to experts for consideration but, but we felt that a competitive process would at least generate a comparison that you could make between return to the state as well as the various training options and training benefits that would result from that competitive process.

Mr Mullard's concern that the Submission should be referred to experts for advice is significant. The DPI had recommended that the advisory councils Mr Macdonald had created, specifically to advise on questions such as the training mine proposal, be consulted. But as discussed above, Mr Macdonald did not refer the issue to those bodies. The Commission has found that the reasons given by Mr Macdonald in his evidence in the public inquiry for not doing so were disingenuous. The real reason was his desire not to receive advice unfavourable to a direct allocation.

Chapter 16: Mr Macdonald's reaction to the DPI's advice about the Submission

In mid-2008, the prospect of coal explorers making substantial additional financial contributions in order to secure an EL over Doyles Creek was an important factor to consider in assessing whether to proceed by way of tender or EOI. At one point in his evidence, Mr Macdonald said that he believed the market was "hot" when he received the DPI's draft briefing note at the end of May 2008. It was around this time that he directed the DPI to release potential coal tenements for competitive allocation so as to take advantage of these conditions.

At another point in his testimony, however, Mr Macdonald said that he did not regard Doyles Creek as hot property and a tender process would not be a desirable means to allocate an EL in relation to it. He said that he was unconvinced that Doyles Creek was an attractive proposition for explorers because "it's an underground mine and so there are more difficulties associated with an underground mine". As to those "difficulties", Mr Macdonald explained that, "all of the indications that I've received over time was *[sic]* that there was a number of structural problems with the, with the site and it would – it was perfect for a training mine because of those structural problems".

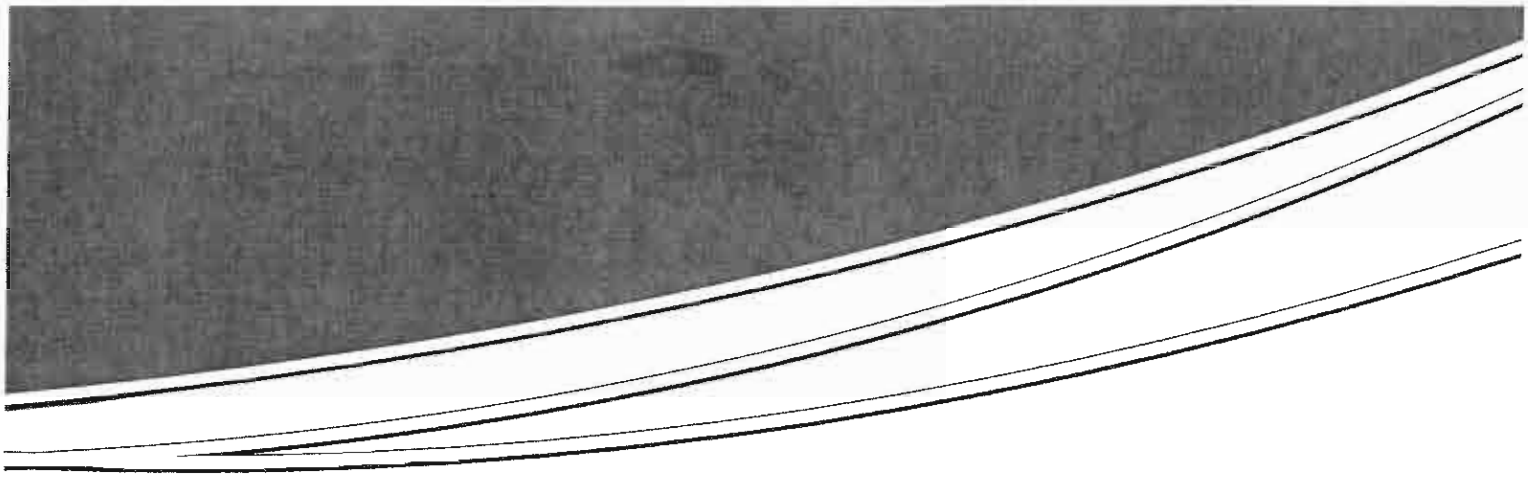
Mr Macdonald said that he discussed these "structural problems" with Mr Coutts. But, Mr Hale, on behalf of Mr Macdonald, did not put this to Mr Coutts (who testified before Mr Macdonald was called). Karen McGlinchey, who appeared for Mr Coutts at the public inquiry, suggested to Mr Macdonald that Mr Coutts never engaged in such a discussion with him. Mr Macdonald acknowledged the possibility that he may have obtained that information from someone else.

The Commission does not accept that Mr Coutts or anyone else from the DPI provided information of this kind to Mr Macdonald. Nor does it accept the proposition that a number of structural problems rendered the site unfit for a competitive process. The suitability of the site was not mentioned in the briefing notes prepared by the DPI. That, itself, suggests that the DPI did not regard structural problems as a difficulty. Mr Mullard was plainly of the view that the Doyles Creek site would be an attractive prospect as a competitive tender. The Commission has mentioned that Mr Mullard said that, while the Doyles Creek area did not have a comparable underground coal resource as existed at Caroona, it was potentially more attractive by reason of the fact that the infrastructure costs in developing a mine there could be lower. The Commission has previously mentioned Mr Coutts' testimony that he regarded the Doyles Creek tenement as a "fairly significant resource that could have been worth you know north of $50 million to the State". These views culminated in the DPI's express recommendation that, "given the level of industry interest in the area, the Minister considers a competitive allocation process with a requirement to either establish a training facility or establish a broader industry training fund".

The Commission regards as significant Mr Hale's failure to put to the DPI witnesses that structural problems rendered the site unfit for a competitive process. There is no evidence to suggest that Mr Mullard or Mr Coutts believed that the geology of the Doyles Creek site meant that it would be unattractive to coal explorers but "perfect for a training mine". This was an important issue to canvass with the experts and senior officers from the DPI, but there was silence from Mr Hale in this regard when they gave evidence.

In any event, on being pressed, Mr Macdonald told the Commission that he accepted the DPI's advice that the area was attractive:

> *And did you read or consider what the Department had put under the heading of "Comment"?---Comment, yes, I knew of all of their, all of their points.*
>
> *The first point puts you on plain notice in May 2008 that the area in question is quite attractive, correct?---Well yes, I agree they said that, yes.*



Yeah. And you believed it didn't you? These were the people you relied on to tell you these things?---Well, well, I didn't - - -

Of course you had Mr Maitland who was telling you other things. Is that what, what you're about to say?---No, no, no, not saying that at all.

If Mr Coutts told you one thing and Mr Maitland told you it wasn't such a great piece of cool who would you rely on to tell you accurately?---I believe Mr Mullard who wrote this I think.

So you accepted that the area in question was quite attractive?---Yes.

And that a number of companies apart from ResCo had expressed their interest - - -?---Yes.

- - - in the area?---Yes.

This is right at the time when you've come back from China isn't it, almost to the day - - -?---Yes.

- - - and you're pressing the Department to give you more hot property to put out - - -?---Correct.

- - - onto the market?---Correct.

In the light of the foregoing, Mr Macdonald's evidence that he thought that Doyles Creek was not a suitable site for a competitive tender by reason of its geological "structural problems" is rejected. The Commission does not accept that Mr Macdonald was telling the truth when giving that evidence. Put simply, in his own words, Mr Macdonald accepted Mr Mullard's advice that the Doyles Creek area was "quite attractive" to prospective tenderers.

Mr Macdonald gave two other reasons for allocating the EL directly to DCM. First, he said that, at the relevant time, he ruled out using a competitive tender to allocate the EL because he wanted to make political mileage out of the training mine proposal at the 2011 NSW election and was concerned that a lengthy tender process would deprive him of that opportunity. Secondly, he told the Commission that he granted the EL to DCM because he was satisfied that the proposal had a public benefit. He said that he was focusing on the public good associated with establishing a training mine and believed that including appropriate conditions in the EL would achieve that outcome.

As to the first reason, Mr Macdonald said that he believed a training mine was likely to be popular in the Hunter Valley electorates. He said that, by the 2011 NSW election campaign, he hoped the proposal for a training mine would have developed to a point where it could be a "very useful political tool" for the campaign.

At the public inquiry, there was general acceptance that the training mine could be built and completed only after commercial mining commenced. That is, after the granting of a mining lease. A mining lease would probably not be granted until at least about five years after the granting of an EL. At that stage, initial exploration would have been completed and an assessment could then be made as to the size of the mine, its potential productivity and profitability, and how much could be spent on a training mine. Indeed, considerations of this kind were used as an excuse by the proponents of DCM for the paucity of detail in the Submission and the tiny training mine put forward, thereby. It is virtually impossible that, by 2011, meaningful progress in the construction of the mine would have been demonstrable to the voters in the Hunter Valley, let alone meaningful training of miners. Moreover, the conditions in the EL relating to the training mine had not been drafted so as to oblige DCM to commence constructing a training mine at any particular date or to oblige DCM to construct the training aspect of its mine in accordance with any detail whatever. Mr Macdonald indicated that he was of the opinion that a decision in regard to the commencernent date, the amount of money that would be spent on the training mine, what the make-up of the training mine would be, and other details concerning the training mine, could be made only when sufficient exploration had been carried

out to enable DCM to decide whether it was worthwhile for it to construct a mine at Doyles Creek and, if so, to decide how much it would spend on a training mine. Such a point would be reached only several years after the commencement of exploration. The idea that, by 2011, the training mine would have developed to a degree that Mr Macdonald could have made political capital out of it borders on the absurd.

As an essential part of his argument that a direct allocation would have enabled him to make political capital out of the training mine, Mr Macdonald testified that allocating the EL by a competitive tender would have delayed the project for up to two years and would thereby have compromised his ability to make political mileage out of the training mine during the election campaign. He gave the following evidence about this:

> *So why wouldn't you put it out to tender if it was- - -?- --Well, we're talking, Commissioner, we're talking mid 2008 here.*
>
> *Yes?---I was very aware of the slow processes that are involved in the public tendering of licences, and this one would be even far more complicated because it involved the training component and would take a considerable period of time to do. I was keen to try and have some milestones relevant to this before the election so that we could take in the Hunter particularly some political advantage of a training mine which we believed it would have had. But if I had have, if I had have said in mid, mid um, mid 2008 to put it to some form of public tender it would have probably taken three or four months at least to work out what even the questions were or whatever the points you would put in a tender, it would have then taken some time to evaluate and then by the licence being granted I think it would have taken another year or so after that. I would then not have had any opportunity in a realistic sense to make any use of it in the, in, in the campaign.*

The Commission does not accept Mr Macdonald's testimony in this regard. There were no reasonable grounds upon which Mr Macdonald could have formed the view that a competitive process to allocate an EL for Doyles Creek would have taken up to two years.

In the case of Caroona and Watermark, it took less than eight months from the publication of requests for EOIs to receipt of the DPI's recommendation about the successful party. There were competitive tenders in both instances.

In regard to the 11 areas that were the subject of a competitive EOI process considered in Operation Jasper, the relevant time periods are as follows.

- In July 2008, the 11 areas to be the subject of a competitive EOI process were identified.
- On 9 September 2008, the DPI sent out information packages to the companies invited to participate in that process. The invitees were given until 24 November 2008 to respond. For the medium coal allocation areas, such as Mount Penny, the DPI documents provided for a four-week EOI assessment period.
- In November 2008, the EOI Evaluation Committee was appointed.
- In January 2009, before the EOI Evaluation Committee could evaluate the bids, the minister reopened the EOI process on the basis that the second round of bids had to be received by the DPI by 16 February 2009. Had the tender process not been reopened, the period from identification of the tender areas to announcement of the winning bids would almost certainly have been less than a year (and that would have applied to as many as 11 EOI processes).
- On 19 June 2009, the director-general of the DPI accepted the recommendations of the EOI Evaluation Committee and accordingly letters were dispatched to the successful bidders.

That is, it took approximately six months from the reopening of the tender for ELs to be granted, by way of competitive processes, in respect of 11 areas. This encompassed the receipt of fresh bids, consideration thereof, the granting of invitations to apply, receipt of the applications and the granting of ELs.

Mr Macdonald's consideration of DCM's applications (included under this description is the application made by ResCo) for consent to apply for the EL was not conducted with any expedition consistent with Mr Macdonald's claim that he was hoping to secure a political advantage from the proposal in 2011. On 15 February 2007, ResCo applied for a direct allocation of the Doyles Creek tenement. On 22 February 2007, the DPI provided Mr Macdonald with a briefing note referring to this application. There was no formal response at any time from Mr Macdonald or the DPI. On 18 March 2008 (more than a year later), DCM applied, again, for a direct allocation. Mr Macdonald, who seems to have been very much in favour of the application from its inception, only granted the invitation to DCM to apply on 21 August 2008 (that is, some 18 months after the application had first been made). He granted DCM the EL on 15 December 2008. That is, some 22 months after ResCo's first application and some nine months after the second application.

Mr Macdonald did not suggest that, at the relevant time, he obtained any DPI advice to support his view that a competitive process in connection with Doyles Creek would be a protracted affair. The notion that putting Doyles Creek out to competitive tender would be a slow process

was not put to any DPI witness, and Mr Macdonald testified after the evidence of all the DPI witnesses had been concluded.

During his evidence at a compulsory examination conducted prior to the public inquiry, the relevant parts of which were tendered at the public inquiry, Mr Macdonald did not suggest that his decision to reject a competitive process to allocate the EL was influenced by the fact that a competitive process would take a long time. He gave the following evidence:

> *Did you consider a competitive tender for this invitation?---Ah, no, I didn't.*
>
> *Why not?---Well, I believed that the proposition had a public good, that it had ah, ah, a lot of merits because it involved, from what I could see, the University, Hunter Valley Training, Westpac Rescue, and, and you know, a number of the big, big and small mining companies as well as the political support.*
>
> *How did you, is that everything that you took into account?---Oh, they're the sorts of issues that I thought made it a meritorious, a meritorious submission.*

Mr Hale submitted that, as Counsel Assisting did not challenge Mr Macdonald's evidence about the potential political benefits of developing a training mine in the Hunter Valley, the Commission should accept Mr Macdonald's evidence on this issue.

The Commission does not accept this submission. Counsel Assisting made it clear to Mr Macdonald that the reasons he advanced for directly allocating the EL to DCM were under challenge. Counsel Assisting suggested to Mr Macdonald, in specific terms, that he had granted DCM the EL as a favour for Mr Maitland and that was the only reasonable explanation for his conduct. Further, the general tenor of Counsel Assisting's examination of Mr Macdonald made it abundantly clear that it was being alleged that Mr Macdonald, in granting DCM the EL, sought to benefit Mr Maitland, and that the explanations Mr Macdonald advanced to the contrary for granting the EL should be rejected by the Commission.

Furthermore, Mr Macdonald did not testify that he had canvassed those alleged benefits with any of the local members in the Hunter Valley. One would expect Mr Macdonald to have told ALP members that he had made a decision that would assist them in getting re-elected.

The Commission does not accept that the hope of obtaining a political advantage in 2011 was a factor in Mr Macdonald's decision to allocate the EL directly to DCM.

The Commission finds that Mr Macdonald gave false evidence in testifying that he did not put Doyles Creek out to tender because of structural geological problems with the area, because of the delay that a competitive tender process would cause, and because he wanted to make political mileage out of the training mine for the purposes of the 2011 state election.

The question of whether the direct allocation to DCM was for the "good" of the public, is dealt with in detail below. But, at this stage, the Commission points out that there is one fact that, alone, defeats this argument entirely. The second option suggested by the DPI in its draft briefing note of 27 May 2008 was "[a]n allocation of the area on a competitive basis with a requirement to establish a training program as part of any allocation". This option would have allowed Mr Macdonald to have had his way as regards the establishment of a training mine, but with the difference that there would be a public tender for the tenement on the basis that the successful tenderer would have to construct a training mine. In such a process, the issue of the establishment of the training mine would have been part of the tender, and competition would probably have resulted in bigger and better training mines being proposed than the tiny training mine that formed part of the Submission. The benefit to the public under option (2) was patently likely to be far greater than any benefit that might accrue under a direct allocation.

Mr Macdonald recognises that the Submission is defective

Mr Hale submitted that, to find corrupt conduct against Mr Macdonald, it had to be proved that Mr Macdonald did not genuinely believe in the concept of a training mine and did not grant the EL to DCM in furtherance of that belief. The Commission rejects this submission. The proposition that Mr Macdonald believed in the concept of a training mine does not foreclose a corrupt conduct finding against him for directly allocating the Doyles Creek EL to DCM other than on an impartial basis. The question is whether, by taking into account all the relevant circumstances, Mr Macdonald truly believed that the direct allocation to DCM was to the benefit of the public and granted the EL to DCM for that reason, or whether he made the allocation for partial reasons. The fact that Mr Macdonald generally favoured the establishment of a training mine is relevant to this question, but it is by no means conclusive.

Mr Macdonald accepted that he had to make his decision concerning the Doyles Creek EL by a careful consideration of the merits of the Submission and its particular features. The following exchange is relevant:

> *And it was, it was important for you to consider wasn't it the possible benefit of a training proposal?---Yes.*
>
> *And you did consider it?---Well it was raised with me and two - - -*

Did you consider it?---Absolutely.

Thank you. You had to determine didn't, didn't you whether the benefit would outweigh the benefit from a tender?---Yes.

In, order to - - -?---Or the, or the length of time of that tender.

In order to satisfy your obligation to make decisions in the best interests of the State?---Yes.

And not of private individuals?---Yes.

You needed didn't you some expert advice or opinion on what the public good associated by a training mine would be?---Well not, not necessarily.

Didn't you want some input from experts into that matter?---I, I don't know who would be an actual expert on that matter.

We might come to that. But wouldn't you want to know matters such as how many trainees could be expected to go through a training proposal?

---Oh, right the scope of the, the scope of the thing, yes. But - And the size of the school?---The - they're all issues of importance.

And what would be taught there?---Yes.

And whether it was actually needed by the industry?---Yes.

And whether it was wanted by the industry?---Yes.

And whether there was a, there was - it was going to be put in a place that was convenient for industry access, that was - - -?---A place of convenience?

It was well located?---Well you're not going to get a - dig up a mine in the middle of Newcastle to make it conveniently located.

And you had to weigh all of these things?---Had to go where the resource was.

You had to weigh all of those things in the balance didn't you?---Yeah, all of those things were factors in my consideration of it, yes.

Significantly, Mr Macdonald accepted that, as at 27 May 2008, the Submission was defective. He said that DCM's training proposal was "not up to scratch" and it "needed to be more sufficient". He also entertained doubts as to whether it had wide industry acceptance. Those doubts were highly relevant to Mr Macdonald's decision. As Mr Coutts testified, if it was Mr Macdonald's intent to improve training generally, it would be important to establish whether the industry saw any value in the training offered otherwise "they're not going to take the people being trained".

Mr Macdonald said that, in the light of these concerns, he did not believe that the project was at a stage where he could allocate the EL. Again, significantly, he accepted that it would have been "irresponsible" of him then to do so. The question arises: what happened after the Submission that led to the direct allocation to DCM becoming a responsible decision? One thing is clear: nothing happened after May 2008 to address the concerns raised by the DPI.

Mr Macdonald's answer was that the defects in the Submission, identified by the DPI, could be remedied by the inclusion of conditions into the EL. He gave the following evidence about the significance of the EL conditions:

So in the weighing up that you described yesterday that the Department had to do and you had to do to make a decision on this topic, there was not much public good in Mr Maitland's proposal and the potential was for more money if you put it out to tender?---It was clear there was a lot more work to do on that proposal.

As it was, it couldn't responsibly be granted. Correct?---I don't think they say that at all.

That was your view though reading it, wasn't it?---Well, I thought at that point, at that point, the, the, the, the, the, the, the project wasn't at a point where I could sign a licence, that's for sure.

On the proposal that had been presented it would be irresponsible given this advice to directly allocate the resource to Doyles Creek?---At that point. Yeah.

You're agreeing with me?---At that point.

Then you – well, I just – I know – I accept your qualification but I want to make sure the- - -?---Well, it's an important qualification.

I want to make sure that the transcript reveals that you're agreeing with me subject to a qualification?---Yeah, that's fine.

Then you saw the options that were presented?---Yes.

And you understood – and you've pointed this out – that the first one was a direct allocation?---Yes.

But you understood as I think you've agreed that at this point that would be an irresponsible thing to do?---Until you developed the strong conditions.

Mr Macdonald said that any determination about the merits of the proposal could not be finalised until the Doyles Creek site had been explored and the resource size identified in definitive terms. He gave the following evidence about this issue:

THE COMMISSIONER: For it, for it to have merit – do you have – for you to consider whether it had merit would have required you to undertake a very close

analysis of the business plan, wouldn't it?---Well. I, I, I took the view, and I still do, that um, in terms of the training component, the only point at which it can be really finalised is at the point where you actually know the resource and therefore you know what potentially
- - -

I see?--- - - -income you've got available to devote to it.

So that means you didn't really have to look at the business plan at all, it was sufficient just to have an idea because the details of the plan could be worked out in the future. Is that right?---No, no, that's not correct.

Well, I thought that's what you were saying?---No, no, I'm saying- - -

Well, what are you saying?---You, you can, you can evaluate that but you don't have to see that as the, as, as the plan set in concrete. And that's why the conditions are devised to make sure that once they know what they're getting, that then the Department is in the position to be able to negotiate and that's quite clear and the Minister can accept or reject and if he doesn't accept it he can then, or she can in fact take the licence off them. And that's embedded within the conditians.

There is no evidence to suggest that Mr Macdonald communicated to any DPI or ministerial officer after 27 May 2008 that he shared the DPI's concerns about the inadequacy of DCM's proposal and believed that those concerns should be addressed by the formulation and inclusion of conditions in the EL.

Mr Mullard did not suggest in his evidence that Mr Macdonald ever told him that the inclusion of conditions in the EL could ensure that the direct allocation of an EL to DCM would deliver a public benefit, and Mr Hale did not put to Mr Mullard that Mr Macdonald had expressed such a view.

Mr Coutts said that he could not recall having any conversation with Mr Macdonald about DCM's proposal between May 2008 and August 2008. He said that he became aware of Mr Macdonald's opposition to the recommendation in the DPI's draft briefing note only during the course of a conversation with Mr Gibson. He gave the following evidence about the conversation:

MR BRAHAM: Did Mr Gibson communicate with you the Minister's view of the Department's position towards a direct allocation after receiving the briefing note?---My recollection of a conversation I had with Jamie post the submission was that this, this, this was not the submission that the Minister was hoping to receive, that the Minister was hoping to get support from the Department for a direct allocation and could we, could we reconsider our position. Now, that's a conversation I had with Jamie Gibson, not the Minister, and my response to that was, look, Jamie, if you want us to have a another look at it you're going to have to give me something in writing saying the Minister wants us to do A, B or C.

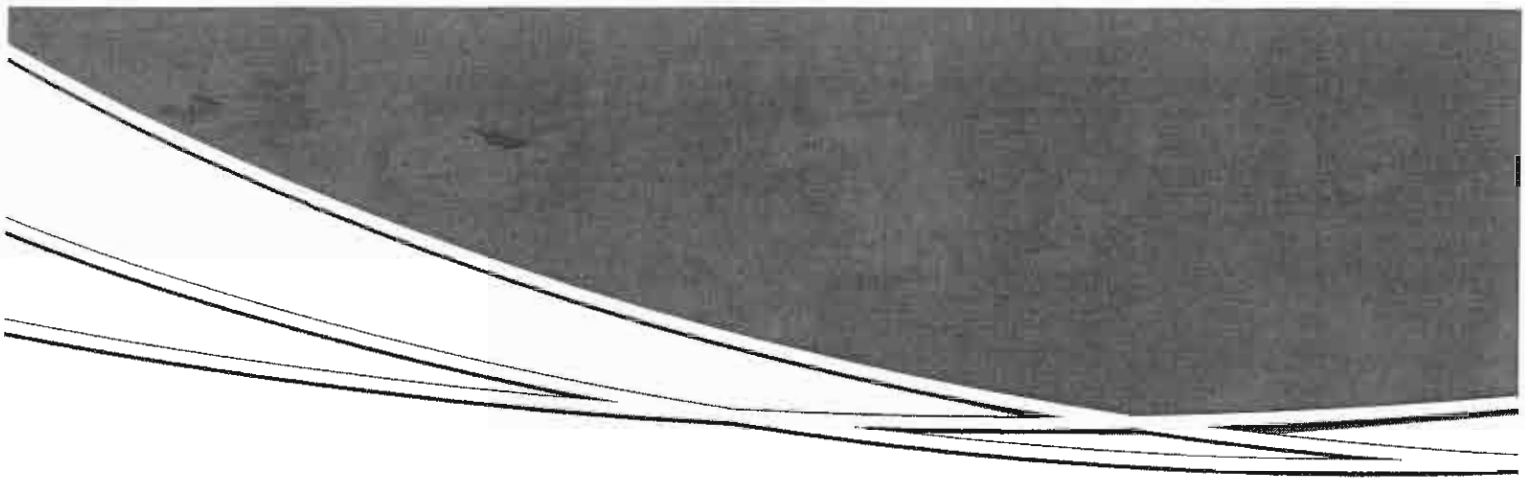
Further, Mr Coutts said that he had an expectation that, if Mr Macdonald did not agree with the DPI's recommendation, he "would have come back to us with some notation on the file to do something different". Mr Coutts conveyed that view to Mr Gibson during their conversation about the draft briefing note. But Mr Macdonald provided no response to the draft briefing note. Mr Macdonald did not ask for a formal brief nor did he instruct the DPI to write to DCM about its application.

The Commission is satisfied that the only view Mr Macdonald caused to be communicated to Mr Coutts was one consistent with a desire to allocate the EL directly to DCM. And this was at a time when there was no proper basis upon which a decision to allocate the EL directly to DCM could responsibly be made.

Mr Gibson recalled talking to "the Minister about the fact that he did not want to, you know, accept the Department's advice at that time". Mr Macdonald said that he did not know whether he actually instructed Mr Gibson to speak to Mr Coutts in these terms, but said that he may have suggested to Mr Gibson that "we get to a position where we can comfortably issue the licence".

The Commission accepts the evidence given by Mr Mullard, Mr Gibson and Mr Coutts. Mr Macdonald's failure to inform any DPI officer that he agreed with the DPI that the Submission was defective, and his failure to inform the DPI of his belief that conditions would remedy the difficulties, militate against finding that Mr Macdonald genuinely believed that appropriate conditions in the EL would deliver a public benefit in consequence of a direct allocation to DCM. After all, the only view that Mr Macdonald conveyed to his staff and to the DPI, throughout the process leading to the direct allocation, was that he desired the direct allocation to occur.

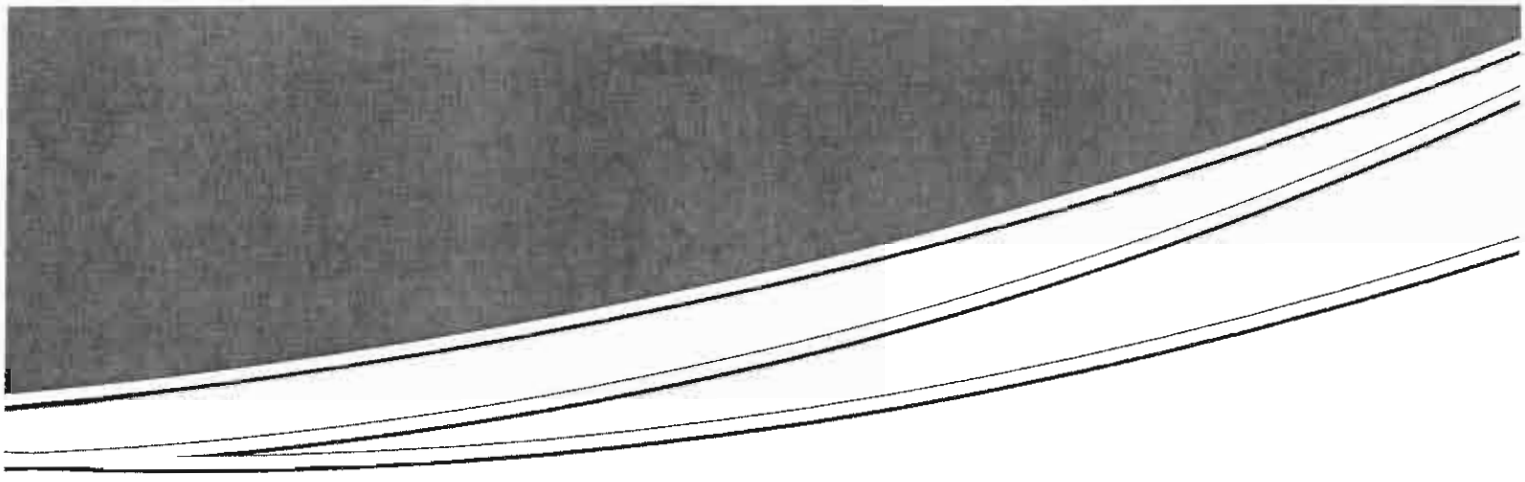
In all the negotiations, discussions and correspondence that did, in fact, occur, it is extraordinary that Mr Macdonald did not give consideration to option (2) suggested by the DPI in the draft briefing note of 27 May 2008, namely, "[a]n allocation of the area on a competitive basis with a requirement to establish a training program as part of any allocation". Common sense must have led Mr Macdonald to realise that adopting this option would probably have resulted in a training mine being proposed in terms far better for the state than the manifestly defective and virtually useless training mine proposal that was part of the Submission. Common sense must have made him realise that adopting option (2) would also lead to the likelihood of a significant amount of money being paid to the state,



and would give the DPI far greater control over the project so as to enable it to address with the successful bidder the many concerns it had expressed.

But Mr Macdonald never said a word to the DPI or his staff about option (2). He stayed silent about it. He never took advice on it and never had it investigated. His explanations in regard to his failure to take up option (2) have been addressed above and rejected.

The Commission reiterates that Mr Macdonald admitted that it would have been irresponsible for him to grant the EL simply in response to the Submission, and he conceded that more work on the Submission was needed. In fact, no more work was done on the Submission and, as is discussed below, Mr Macdonald did not ask the DPI to incorporate conditions in the EL (the conditions were incorporated at the independent initiative of the DPI). As regards the conditions that were included in the EL, of the many problems that the DPI listed on 27 May 2008 (in response to the Submission) only one was arguably covered by the conditions. This, too, is dealt with below when the conditions are discussed in detail.



Chapter 17: DCM meets the Jerrys Plains community, and the meeting at the Strangers' Dining Room

In February 2008, Mr Ransley, on behalf of DCM, entered into a contract to purchase land in the area of Jerrys Plains. This land eventually fell within the Doyles Creek EL. Mr Ransley did not dispute that he bought this land in his name so members of the local community would not find out that the real purchaser was a mining-related company. Members of the community, however, became suspicious that land was being purchased for the purpose of supporting the establishment of a mine. Mr Maitland said that DCM was compelled to meet with members of the community to address their concerns about the application.

The meeting was held at a community hall in Jerrys Plains. Approximately 60 members of the local community were present. Mr Maitland attended with Mr Ransley and Mr Poole. Mr Maitland and Mr Ransley gave presentations. Mr Maitland agreed that a "carrot and stick approach" was adopted at the meeting.

As for the "carrot", the project was identified as a "$200 million mining school". This statement is not possible to support. Such a figure was never agreed upon by the directors of DCM and there is good reason to believe that no director, including Mr Maitland, had any belief that DCM would spend $200 million on a training school.

Mr Maitland enumerated the potential benefits of establishing a mine in the area, including the possibility of building a supermarket, increasing medical services and improving public transport. He told the community that a helicopter simulator might be built in the area so that pilots would not have to train overseas, that money would be injected into the community through a trust, and that water would be recycled and returned to the community. These proposals, at best for Mr Maitland, were mere puffs. No concrete plans to provide any of the benefits Mr Maitland had mentioned had been put in place.

As for the "stick", Mr Maitland told the meeting that, if DCM did not get the EL, the government would give it to the "highest bidder" who would not provide the benefits that DCM promised.

Mr Maitland's approach was unsuccessful. Peter Reynolds, a journalist who was present at the meeting and published a report about it in the *Singleton Argus*, testified that no one who attended the meeting could reasonably have formed the view that the community supported the project. Mr Maitland, himself, shared in this assessment of the meeting. He said, candidly, that it was "a pretty hostile meeting" and the community was against the mine.

Mr Ransley said that only four voices expressed opposition to DCM's proposal and that, generally, the community members were open to the mine. Mr Ransley's evidence about this stands alone, and the Commission does not accept it.

Shortly after the meeting with the community at Jerrys Plains, Mr Maitland arranged a meeting with Mr Macdonald. The meeting took place on 17 June 2008 at the Strangers' Dining Room within Parliament House.

Mr Maitland, Mr Ransley, Mr Macdonald, Mr Gibson and Mr Munnings attended the dinner. Mr Macdonald told the Commission that he indicated to those present at the meeting that the DPI was not satisfied with aspects of the application and that, "some of these things needed to be addressed". He said that he expressed the view at the meeting that, "if the proposal was to go any further" there needed to be "a lot of work done to meet what the DPI saw as weaknesses". Mr Macdonald said that, during the meeting, he stipulated eight conditions that had to be met before he considered whether or not to directly allocate the EL to Doyles Creek.

The eight conditions as to which Mr Macdonald testified were:

1. DCM needed to be in "a strong partnership" with the University of Newcastle.

2. DCM needed to be in a "definite" partnership with the HVTC to "operate jointly on the training concept".
3. There had to be evidence of "community support" and "community consultation".
4. There had to be indications of support from the union.
5. There had to be indications of support from local members of Parliament.
6. There had to be "strict conditions" attached to the EL to ensure it was a training mine.
7. There had to be DPI support for the proposal.
8. There had to be indications of "industry support".

None of the shortcomings in, or criticisms of, the Submission that the DPI had identified in the draft briefing note provided to Mr Gibson on 27 May 2008 (and read by Mr Macdonald) was covered by the eight conditions about which Mr Macdonald testified.

For ease of reference, the Commission will repeat the more important shortcomings and criticisms that were not addressed by Mr Macdonald's eight conditions. They are:

a) Only very limited information on the proposal had been provided and the proposal failed to demonstrate that it was feasible or viable.

b) DCM had indicated in its Submission that it would conduct feasibility studies only once the resource had been allocated, and this did not provide certainty to government that the allocation of the resource would achieve the outcomes DCM suggested.

c) The proposal did not demonstrate broad industry acceptance regarding the suitability for employment of the mining trainees (Mr Macdonald's alleged condition requiring "indications of "industry support" fell far short of what the DPI had suggested was needed).

d) It was not clear how the proposal would link in to existing training programs operated by other mines, including virtual mine training facilities.

e) Skills obtained at the proposed training facility might not be transferable to other mines, as the nature of the training at a mine tended to be specific to the type of mining conditions and equipment being used in that particular area.

f) A major mining operation was being proposed with a small training component. This raised the possibility that, once the mine had been established, the training component could be downgraded or not considered feasible in the long-term.

g) The time required to develop the mine was five to six years, a fact that would defer any significant benefit from the training mine for at least five to six years into the future. Any impact the training facilities had on the skills shortages facing the industry would necessarily be delayed by, at least, that period.

h) The subject area of the application was close to the township of Jerrys Plains, and there was considerable community opposition to the expansion of mining in the region (Mr Macdonald's alleged condition requiring "evidence" of community support and community consultation fell far short of meeting what the DPI had suggested was a problem).

i) Under the Guidelines the minimum financial contribution required for the allocation of the area would be in the order of $15 million but a competitive allocation could result in a higher return (that is, from additional financial contributions).

j) It was unclear whether the proposed training provided at the mine equipped the trainees with skills that could be employed in other mines.

k) No review had been undertaken to examine the extent to which the training activities proposed by DCM intersected with other training programs available in the industry to avoid unnecessary overlaps or produce possible advantages.

The absence of any realistic coincidence between the DPI's list of shortcomings and criticisms, on the one hand, and Mr Macdonald's eight conditions on the other, falsifies Mr Macdonald's evidence that his eight conditions were intended to meet some of the DPI's concerns (this intention on his part allegedly leading to his statement to the meeting that those concerns "needed to be addressed" and that "if the proposal was to go any further" there needed to be "a lot of work done to meet what the DPI saw as weaknesses").

Of the 11 criticisms and shortcomings, only one (that listed above as (f)), could possibly be ameliorated by the imposition of conditions in the EL. This demonstrates that, although Mr Macdonald accepted that it would be "irresponsible" to grant an EL without the criticisms and shortcomings identified by the DPI being substantially met, he never gave instructions to the DPI to ensure that something appropriate was done by DCM to remedy the difficulties noted by the DPI.

Other evidence is inconsistent with Mr Macdonald's claims that he had stated these eight conditions at the meeting at

the Strangers' Dining Room, that the eight conditions were designed to meet the DPI's concerns expressed in the draft briefing note of 27 May 2008, and that satisfaction of these conditions was critical to his decision to allocate the EL directly to DCM.

One of the many extraordinary features of the entire process was Mr Macdonald's failure to inform the DPI about the dinner at the Strangers' Dining Room. Mr Macdonald agreed that he never told the DPI that he intended to impose any conditions on DCM, nor did he seek the DPI's input into the formulation of the conditions. This conduct was contrary to accepted practice. Conditions of the kind that Mr Macdonald said he announced at the restaurant are not usually formulated by ministers without any discussion or consultation with, or documentary or other assistance from, their departments. Further, the natural thing for a minister in Mr Macdonald's position to have done would have been to check with the DPI that it was satisfied with the conditions he intended to impose or had imposed. But Mr Macdonald did not do this.

Furthermore, the Commission does not believe that Mr Macdonald could honestly recall the meeting with such a high degree of clarity, when the evidence he gave about other meetings and relevant events was marked by a distinct lack of recollection on his part.

During his evidence, Mr Macdonald repeated his reference to the "eight conditions" as if to make clear that they represented his determination, at the time, to lay down a business-like set of conditions that had to be met before he would consider making a direct allocation. Were that to have been true, one would expect that he would have had a note of the eight conditions, or that Mr Gibson or Mr Munnings (members of his staff who were present) would have taken a note or that those of the proponents who were present would have taken a note (seeing that, according to Mr Macdonald, compliance with these eight conditions was in effect a condition precedent to his granting a direct allocation). But no one present made a note.

From the evidence that Mr Macdonald has given in two of the three segments that make up this public inquiry (namely, Operation Jasper and Operation Acacia), it appears that he is not a person particularly concerned with detail. He is not meticulous about reading briefing papers and other documents, there is no evidence of him personally drafting documents (no document drafted by him has been produced in any of the two segments with which he has been involved). Yet, he says he personally compiled a list of eight conditions to meet the concerns expressed in a document drafted by the DPI some months earlier. That evidence is improbable, particularly having regard to the fact that Mr Macdonald never produced a written list of those conditions.

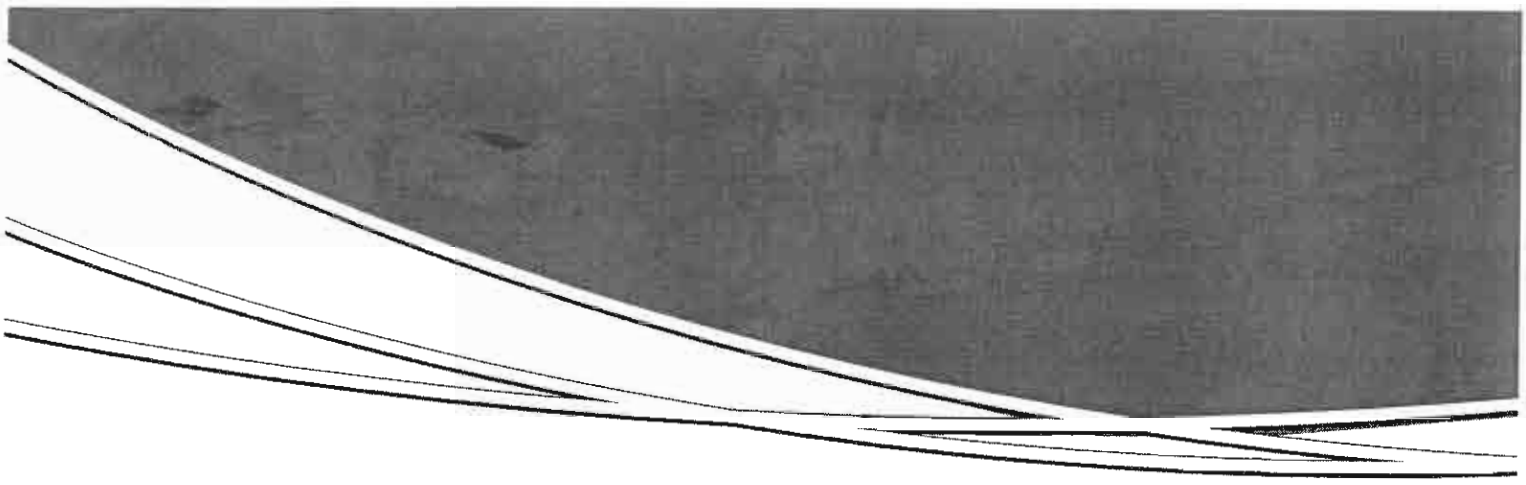
Mr Macdonald's evidence is uncorroborated by the evidence of the other persons at the meeting. Mr Hale submitted that the evidence of all those persons, taken as a whole, establishes that Mr Macdonald mentioned seven of the eight conditions at the meeting. The Commission has carefully considered the evidence relied upon by Mr Hale but is not satisfied that it bears out the submission. Certainly, no witness testified that Mr Macdonald made a statement to the effect that a set of conditions, which he enumerated, had to be complied with, and that the direct allocation to DCM was conditional on such compliance.

Mr Maitland said that he did not have a specific recollection of the matters discussed at the meeting. Later, when asked leading questions by Mr Hale on behalf of Mr Macdonald, Mr Maitland agreed that DCM's partnership with the University of Newcastle and the HVTC, and the need for community, political and union support were matters that generally featured in his discussions with Mr Macdonald. He said that they could have been discussed at the meeting. Mr Maitland did not say, however, that Mr Macdonald identified these matters as conditions to be met by DCM before he would consider the application any further.

Mr Munnings said that he did not recall the "specifics of the dinner". But, when prompted by Mr Hale, said that he recalled Mr Macdonald requiring evidence of community support and a partnership with the University of Newcastle at the meeting.

Mr Gibson said that he could not recall Mr Macdonald imposing a requirement on DCM to satisfy eight conditions at the meeting. He said, however, that Mr Macdonald made reference to the need for DCM to have a partnership with the University of Newcastle and talked "generally about the connectivity between training organisations and Newcastle University". He said that he could not recall Mr Macdonald requiring DCM to furnish evidence of political support from members of Parliament or union support at the meeting.

Mr Ransley said that Mr Macdonald asked for evidence of industry support at the meeting. He said that was the only thing he recalled being discussed at the meeting. Immediately after giving that evidence, he agreed with Mr Hale that Mr Macdonald had mentioned a number of the eight conditions at the meeting. But, in the light of his previous statement, the Commission does not attach any weight to the answers he gave to Mr Hale. In addition, on 24 June 2008, Mr Ransley sent an email to Xstrata Coal (dealt with more fully below) in which he stated that "some letters of support from the industry" was the "final hurdle" that had to be overcome before Mr Macdonald issued DCM an invitation to apply for the EL.



The Commission is satisfied that the eight conditions are a figment of Mr Macdonald's imagination; his evidence on this issue has been manufactured to accommodate the perceived demands of the argument against him.

The truth of the matter is that Mr Macdonald came nowhere near an attempt to satisfy the criticisms by the DPI of DCM's Submission. He did not even try to accommodate them. But, he was ready to press on regardless, to allocate the EL to DCM, and not to bother about the opportunities to the state that he was foregoing on its behalf.

Chapter 18: Mr Macdonald says he will grant consent and seeks letters of support

The Commission is satisfied that Mr Macdonald told Mr Maitland and Mr Ransley at the 17 June 2008 meeting at the Strangers' Dining Room that, subject to receipt of demonstrations of support for the proposal, he intended to grant DCM consent to apply for the EL. This finding is based on an email Mr Ransley sent to Michael Buffier of Xstrata Coal on 24 June 2008. In the email, Mr Ransley told Mr Buffier that, "we should have an invitation within the next two-three weeks from the Minister. I have had to submit some letters of support from the industry as the final hurdle".

Mr Ransley said that he was unable to explain why he believed that he would have the invitation letter within two to three weeks. But it is clear from the email that it was based on his belief that the provision of the "letters of support" to Mr Macdonald was the "final hurdle" that, once overcome, would trigger the issuing of the invitation to apply for the EL. In the Commission's opinion, Mr Ransley's belief could have arisen only from Mr Macdonald giving him such an assurance at the meeting.

Mr Macdonald agreed that he gave Mr Maitland and Mr Ransley considerable encouragement at the meeting "provided a number of things were done". Mr Macdonald testified that he had in mind the satisfaction of his eight conditions when he gave this evidence. As previously noted, his evidence about these eight conditions is rejected. The Commission is satisfied that Mr Macdonald encouraged Mr Maitland and Mr Ransley to believe that he would grant consent to apply for the EL once they furnished him with evidence of industry support for the training mine.

But how could evidence of industry support for the proposal justify Mr Macdonald directly allocating the EL to DCM? Mr Macdonald said that he "wanted to see that the project had the merit and it had the support out there". Mr Macdonald said that obtaining demonstrations of industry support was one of the ways he sought to address the DPI's concerns about the proposal. This claim requires consideration.

Mr Gibson said that there was a discussion at the meeting about the lack of broad industry support for the proposal and the need to obtain evidence of such support. He gave the following evidence about the purpose of gathering such support:

> *Was there a discussion about industry support?---Yes.*
>
> *What do you remember about that?---That at this stage, or that stage I should say, that it didn't have or it didn't seem to have broader industry support.*
>
> *And wos there a discussion about what should be done about that?---Yes, I think there was.*
>
> *What – do you have a recollection of it?---Yes, there was that wherever possible, there should be third party industry endorsement sough* [sic] *from other, other relevant bodies.*
>
> *Do you remember whose idea that was?---I can't specifically say whether it was the Minister's or the proponents.*
>
> *Was it anticipated that the Minister's office or you in particular were going to have some role in relation to the letters of support?---Yes, it was, the Minister made me the contact point for the third party endorsements.*
>
> *What does that mean?---So in essence the proponents would go away and talk to other mining related businesses and industries that may support this and then they would write to the Minister's office or the Department or both in this case, suggesting that it was a good idea and because of the benefits of the training and income stream for the University et cetera, that it should go ahead.*
>
> *And you were to be the addressee of those letters?---Yes, I was. I seem to think that the Minister may have advocated this idea, actually.*
>
> *The idea of getting them or extending them to you?---Yes, I think, it was the Minister's idea.*
>
> *Did you have an understanding at the time as to why letters were going to be obtained and dealt with in that*

way?---In the absence of broader industry support or peak industry body support, any additional third party endorsements that are positive are certainly helpful in advancing any project of this kind.

How are they helpful?---They're helpful in that you are able to then sell an idea that may be largely unpopular with section [sic] of the public or the community by pointing to other well respected community and/or industry bodies that do support it.

So in that sense, they have a political significance?---Yes, absolutely.

Apart from the political significance that they had, which you've described, did you have an understanding that they had any other purpose?---Not really, other than the benefit of being able to, it's like a long term I guess political players on both sides use this but it's an idea that gives you some insurance for a policy decision that might not be popular.

It allows the decision maker to point to support?---Yes, that's right.

And as far as you were then aware, it had, the letters of support served no other purpose that you could see?---That's right, just to support this proposal.

Mr Macdonald did not dispute that he asked Mr Maitland and Mr Ransley to obtain indications of industry support for the proposal. He denied he was seeking political cover in the manner characterised by Mr Gibson.

Mr Maitland, however, appeared to understand the true purpose of the letters of support he obtained for Mr Macdonald. In obtaining those letters, Mr Maitland was not interested in obtaining evidence reflective of the true levels of industry support for the proposal. He said that, "he wasn't going to ask companies that didn't offer support" or "ask people to write letters of opposition". He was not intending to undertake a limited market survey. He was setting about collecting letters of support, only. He was not interested in letters that reflected disapproval of the project. He wanted to accumulate a body of letters, preferably from prominent individuals, all of whom were prepared to indicate support in some form or another, for the training mine. The Commission accepts Mr Gibson's evidence as to the purpose for which these letters were to be garnered. They were to constitute political cover or a political shield to enable Mr Macdonald to protect himself from the criticism that (it must have been foreseen) would inevitably result from his direct allocation of a lucrative and valuable EL to DCM, a company of which his mate and political ally, Mr Maitland, was chairman.

The situation was appropriately summed up by Mr Mullard. When he reviewed DCM's application for the EL, including the letters of support that were attached, he said that he did not give the letters "a whole lot of value" as "you wouldn't include people who didn't support the project".

In the Commission's view, Mr Mullard's assessment of the significance of the letters is correct. The Commission does not accept that Mr Macdonald, a senior and experienced politician and minister, genuinely believed that, by encouraging the principals of DCM to obtain expressions of industry support, he was employing an effective means to gauge the true level of industry support for the proposal. He was seeking "third party endorsements", as described by Mr Gibson, for the purpose of defending his decision to grant DCM consent to apply for the EL. After all, Mr Macdonald was well aware that mining companies were opposed to the training mine idea – that was his suggested reason for not obtaining advice from MMAC.

The day after the meeting in the Strangers' Dining Room, Mr Gibson sent an email to Mr Ransley in which he provided him with a mailing address for the minister's office. Mr Gibson told the Commission that the letters of support were to be directed to the Minister's office. He gave the following evidence about the reason for this:

Did you have an understanding as to why the letters were to be directed to the Minister's office rather than to for example the DPI?---It was my understanding that because the Department were not agreeable at least at this stage or, you know, at this point in time to the proposal, that it was the Minister's view that if they came to the Minister's office, we could collate them, assess what we had and with a view to using them in the future if so required.

At no stage in the application process was the DPI agreeable to the direct allocation of the EL to DCM. Mr Macdonald knew that the DPI was so opposed as at 17 June 2008, and by directing that the letters of support be sent to the ministerial office, sought to conceal from the DPI the fact that DCM was obtaining selective letters of support for the purpose of providing Mr Macdonald with political cover.

Chapter 19: Mr Maitland and Mr Ransley obtain letters of support for Mr Macdonald

Following the meeting at the Strangers' Dining Room, Mr Maitland and Mr Ransley set about obtaining letters of support for DCM's training mine proposal. Some letters were provided to Mr Gibson prior to 21 August 2008, the date upon which Mr Macdonald granted DCM consent to apply for the EL. The remaining letters were provided after this decision was made.

Mr Maitland said that some of the industry people who provided letters in support were friends and "old comrades" from the union. A number of those people claimed they were not informed about significant aspects of the proposal or the nature of Mr Maitland's involvement. Indeed, none was provided with substantive information as to what was proposed. In some cases, the organisations providing the letters potentially stood to gain financially or in some other way from the project, but that fact was not disclosed in the letters.

The circumstances in which each of the letters came to be written prior to 21 August 2008 are set out below. The letters written after 21 August 2008 are discussed later in this report.

In 2008, Michael Buffier was chief operating officer of Xstrata Coal and a member of the Executive Committee of the NSW Minerals Council. In early 2008, he received a phone call from Mr Ransley, who was looking for a larger player to be involved in a project to develop a mine. Michael Buffier understood Mr Ransley was proposing that Xstrata Coal enter into a joint venture with DCM, and that Xstrata Coal should provide access to its infrastructure and help run the proposed commercial mine, part of which would be set aside for training. Mr Ransley mentioned DCM's need to obtain an EL.

In his email to Michael Buffier of 24 June 2008, Mr Ransley asked for a letter in support of the proposal and said that, "five other mining companies such as yourselves are sending in letters of support for a "Training Mine" directly to Ian's office via his Deputy Chief of Staff". This statement was untrue. As at 24 June 2008, no mining company had indicated that it would send letters of support as described in Mr Ransley's email. Eventually, prior to 21 August 2008, four mining companies provided letters in support of the training mine, but this did not cure the falsity of the email. The email was a deliberately misleading statement by Mr Ransley, which reflected the importance he attached to obtaining letters in support of the proposal. Upon receipt of Michael Buffier's letter on 26 June 2008, Mr Ransley sent an email to Mr Maitland and Mr Poole in which he exclaimed, "Am I fuckin good or what".

Michael Buffier's letter to Mr Macdonald noted that, although the NSW coal industry was experiencing excellent growth, there was a skills shortage in a number of areas "impeaching upon the industry's growth and operations" and that having a training mine "whereby personnel can gain first-hand experience as part of their training would greatly assist in ensuring a steady flow of experienced personnel for the industry". The letter did not go beyond this level of generality. At the public inquiry, Michael Buffier agreed that, at the time he wrote the letter, he did not know how many people were to be trained.

Before the letter was signed by Michael Buffier, there had been further discussions about the proposed joint venture in which Michael Buffier had told Mr Ransley that Xstrata Coal would become involved in operating the mine only if it had more than 50% of the equity. Michael Buffier agreed with the propositions that his interest was in Xstrata Coal making profits from the commercial mine and that an EL was required to make the joint venture possible. Michael Buffier did not disclose in the letter to Mr Macdonald that Xstrata Coal anticipated having equity in the proposed mine.

On 27 June 2008, Mr Maitland emailed Brian Flannery, the managing director of Felix Resources Ltd, and attached some information on the training mine and a draft letter in support. Mr Flannery signed the letter. It consisted of three paragraphs and contained a statement that the training mine would help address the skills shortage in the mining industry. Mr Flannery said that he provided the letter because he thought the "idea of a training mine was a good idea". He agreed that the letter was intended to convey his general support for a training mine and nothing more. He did not know in any detail what training was proposed to be provided or how many people would be trained but believed that Mr Maitland and DCM would know what would be needed. He said that he was not aware, at the time, that Mr Maitland was a shareholder of the company applying for the EL.

On 8 August 2008, Brendan McPherson, the CEO of Donaldson Coal, wrote a letter in support of DCM's

proposal to establish a training mine. The letter noted that, while Donaldson Coal had its own training programs, which would be ongoing, it supported the proposal.

Mr McPherson became aware of DCM's proposal concerning a training mine in mid-2008, after receiving a copy of an email from Mr Maitland to Margaret Fisher, the government relations manager for Donaldson Coal and an associate of Mr Maitland. Ms Fisher advised him that Mr Maitland wanted a letter from Donaldson Coal in support of the proposal. Mr Maitland's email attached a presentation outlining a proposal "for a commercially sustainable mine and a centre for educational, training and research excellence". The presentation document lacked detailed information about the project, such as the size of the mining operation, the number of people to be trained or the courses that would be offered.

The proposal was considered by Stephanie Reynolds who was in charge of training for Donaldson Coal. In an email of 14 July 2008 to Mr McPherson, she noted a number of concerns and concluded that the proposal "lacks sufficient depth to really allow detailed consideration". Mr McPherson emailed a response to her the next day noting he shared her concerns and, while he thought Mr Maitland's objectives "are probably honourable", went on to say, "I think this is entirely a front for them to get a coal mine on the cheap". He also noted that he had no intention of outsourcing Donaldson Coal's training but concluded that "the politics may mean we support [the proposal] in principle".

At the public inquiry, Mr McPherson was asked to explain his comment about getting a coal mine "on the cheap". He told the Commission that he was aware at the time that DCM was trying to get the minister to grant an EL without there being a tender. He said that he was aware at the time that "there had been some fairly significant prices paid for coal assets in New South Wales for exploration licences and it seemed to me that it would have been more appropriate ... to tender the concept [of a training mine] instead of giving it to one person".

Mr McPherson also explained his statement about supporting the proposal because of "the politics". He said this was a reference to keeping Mr Maitland, the union and Mr Macdonald happy. He said that he understood from what Ms Fisher had conveyed to him of her discussion with Mr Maitland that Mr Maitland needed letters of support because of something he had been told by Mr Macdonald.

Peter Murray was the general secretary of the Mining and Energy Division of the CFMEU from 2003 to December 2008. In 2008, he was also the chairman of the United Joint Venture Operating Committee, a body which oversaw a joint venture between Xstrata Coal and the CFMEU relating to a coalmine in the Hunter Valley known as United Collieries. Peter Murray had had a close and cooperative relationship with Mr Maitland over many years and was a strong and longstanding supporter, in principle, of the establishment of a training mine. He said that he was approached by Mr Maitland in early July 2008 and he (Peter Murray) volunteered to provide a letter in support of the training mine on his own behalf. The letter was prepared on CFMEU letterhead. Peter Murray said that this was an inadvertent mistake made by his secretary when preparing the letter for his signature. The signature block records Peter Murray as "Chairman United Collieries". Peter Murray said this was also a mistake, as he intended to sign the letter in his capacity as the chairman of the joint venture operating committee.

Peter Murray initially said that he drafted the letter. But the letter had been drafted by Mr Maitland, including the contents of the signature block. On 29 June 2008, Mr Maitland emailed the draft to Peter Murray, who signed the letter without making any alterations. The letter contained the statement that United Collieries had been briefed on the proposal. Peter Murray conceded that there had been no such briefing and the statement was false. The letter also contained the statement that "United supports the establishment of the training mine" but there was no evidence to suggest that this was true.

A letter was written on behalf of the Australian Council of Trade Unions (ACTU) by Sharan Burrow, a longstanding union colleague and comrade of Mr Maitland. Mr Maitland had a very friendly relationship with Ms Burrow. Ms Burrow now resides in Europe and could not be called at the public inquiry, despite attempts to contact her for this purpose. Her letter follows a similar pro forma model provided by Mr Maitland to other letter writers. There is no evidence to suggest that she was provided with any information concerning the fundamental commercial aspects of the proposal.

A letter was written by Mr Randall on behalf of a company known as Hydromining Coal. At the time, Mr Randall, through his company, Comet Coal & Coke, was expecting a financial reward as a "finder's fee" for the Doyles Creek site, on the basis of promises made by Mr Ransley. Mr Maitland knew the letter was written against that background. Mr Randall largely adopted a pro forma letter drafted by Maitland. Mr Randall supported the concept of a training mine in principle, but had not been provided with information concerning the training proposal so as to be able to come to an informed view as to its merits.

The letters of support for the training mine had a high level of generality and superficiality. None supports DCM's proposal. Moreover, the letters so provided were not indicative of the general position of the industry. Mr Maitland acknowledged that, "there was some mining companies that didn't agree". The NSW Minerals Council did not support the proposal. Mr Coutts testified that

when the union had raised the training idea previously, industry had been "quite negative", as they had their own training programs. They preferred these to a central training program with union involvement. Mr Macdonald knew that there was industry opposition from important mining companies.

As Counsel Assisting submitted:

> *In summary, on no view could the letters provided even on their face be taken to represent industry support. The few letters provided by industry participants do not represent any significant subset of the industry. The letters on their face do not represent support for the particular proposal. Even taking the letters on face value, on no reasonable view could any condition as to widespread industry support have been regarded as satisfied on the basis of those letters and the same applies as to wider support.*

Chapter 20: Mr Macdonald and Mr Maitland approach the NSW Minerals Council

On 22 July 2008, Mr Maitland met with Dr Williams, the CEO of the NSW Minerals Council, a peak body that represents coal and mineral producers in NSW. The purpose of the meeting was for Mr Maitland to try to obtain the NSW Minerals Council's support for the training mine proposal. Mr Maitland emailed Mr Ransley the following day and advised him that, while Dr Williams told him it seemed like a good project, the Executive Committee of the NSW Minerals Council would need to consider the proposal before granting approval. Mr Maitland indicated in the email his belief that the NSW Minerals Council was unlikely to offer support.

Dr Williams said that, after she was approached by Mr Maitland, Mr Macdonald directly raised the proposal with her. The evidence adduced at the public inquiry does not allow the Commission to find whether Mr Macdonald approached Dr Williams before or after he granted DCM consent to apply for the EL. It is convenient, however, to deal with the circumstances of that approach at this point in the report.

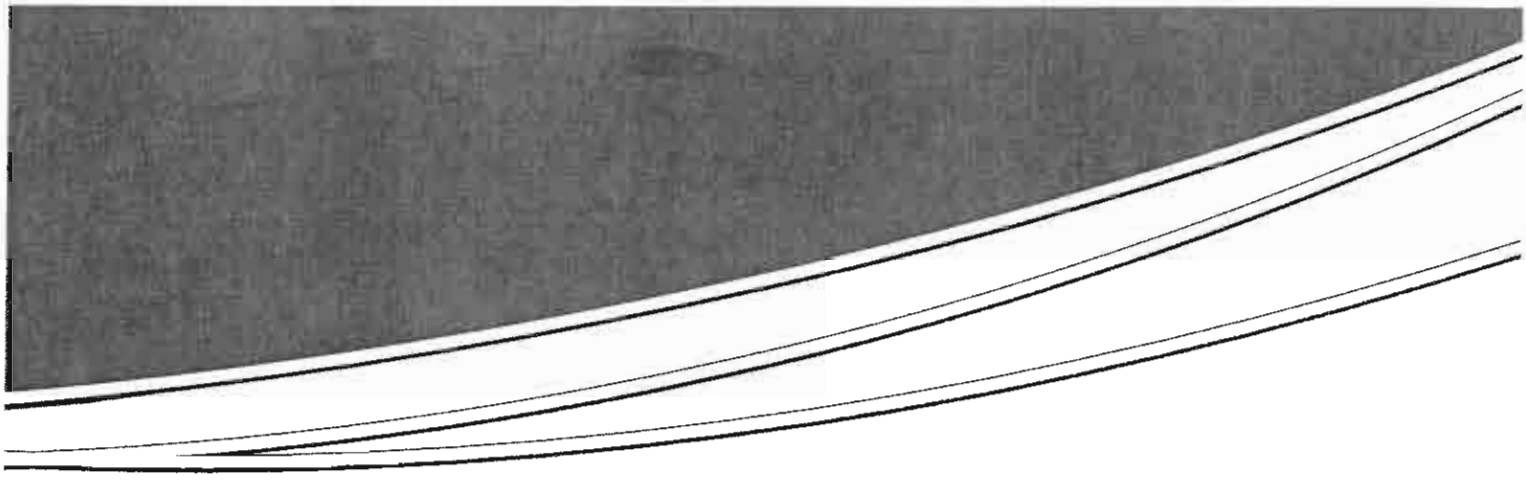
Dr Williams told the Commission that Mr Macdonald raised the issue of DCM's proposal during two telephone calls, one of which was received in the early morning, and during the course of three meetings that had been arranged for the purpose of discussing other matters. Dr Williams said that Mr Macdonald told her that he wanted the project to go ahead and for the Minerals Council to make some form of "public statement of affirmation of the project". Dr Williams testified "that the Minister wanted that broad [industry] support because he wanted to issue the licence and allow the training mine to, to go ahead".

Dr Williams described the nature of Mr Macdonald's approaches in the following terms:

> *How did you feel as a result of those requests?---I felt under pressure, I mean, I had never been asked to provide support for something by a Minister in that, in that way and certainly not on a repetitive basis.*
>
> *So this was an unusual request, is that fair?---It was in my experience, yes.*
>
> *Well, a key part of your job was to lobby the Minister and the Government on particular issues, is that fair?---That's correct.*
>
> *And that's because the Minister and the Government has the decisionmaking power in respect of the issues which you lobbied them about?---That's correct.*
>
> *And here you were being in effect lobbied by the Minister to support something, is that fair?---That reversal of role is a good description, yes.*
>
> *And you were being lobbied to support something which the Minister had indicated to you he was enthusiastic about?---That's correct.*
>
> *And supported himself?---That's correct.*
>
> *And in respect of which he ultimately had the decision-making power?*
>
> *---That's correct.*
>
> *Did that strike you as wholly bizarre at the time you were being asked?*
>
> *---I don't know whether I would have used the word bizarre but it struck me as extremely unusual and it was very - it felt very intense pressure to support.*

Mr Macdonald denied that he lobbied Dr Williams or placed her under any pressure to support the training mine proposal. He said that he wanted the NSW Minerals Council to indicate its position with regard to the proposal and doubted whether he even went so far as to ask the NSW Minerals Council to support it.

The Commission rejects this evidence. Dr Williams presented as a truthful witness who gave careful evidence. Her testimony that Mr Macdonald applied pressure on her to obtain the NSW Minerals Council's support for the proposal is borne out by the minutes of the NSW Minerals



Council Executive Committee meeting on 11 September 2008. The minutes make reference to the fact that "there is a lot of political pressure that is being applied". Dr Williams said, and the Commission accepts, that the reference to "political pressure" was the pressure being exerted upon her by Mr Macdonald to support the proposal.

Mr Macdonald's conduct in lobbying the NSW Minerals Council was contrary to his own perception of his role. In his compulsory examination he accepted that it was not part of his role to assist in the garnering of industry support, political support or community support. He asserted then that he did not do any of that. But Dr Williams' evidence proves to the Commission's satisfaction that he did.

On 11 September 2008, the Executive Committee of the Minerals Council determined not to support the training mine concept. As Counsel Assisting submitted:

> *The briefing note to the Executive Committee detailed the proposal, noting that the "minister is keen to issue the exploration licence, but only if there is broad industry support". The note also referred to the proposal as "politically sensitive" and "a ministerial pet project". The Committee resolved to decline to support the proposal, and the action item called for a draft response (to the Minister) to be circulated. It would seem that the response, whilst it was drafted, was never sent. Mr Macdonald, however, became aware of the Minerals Council's position at least through Mr Gibson who discussed it with him. Not only did Macdonald know that he failed to elicit a public statement of support from the Minerals Council, but he knew the Minerals Council resolved not to support it as this was a topic of discussion in his office. Macdonald conceded as much in his evidence when he suggested that he had hoped "that the Minerals Council might reconsider their position".*

Chapter 21: The meeting on 14 August 2008

By mid-August 2008, Mr Maitland and Mr Ransley had obtained a number of letters in support of the training mine. Arrangements were then made to meet with Mr Macdonald and his staff to discuss DCM's application.

A ministerial diary record and Mr Maitland's DCM expenses claim form suggest that the meeting took place on 14 August 2008 at Governor Macquarie Tower in Sydney and that Mr Maitland, Mr Gibson, Mr Munnings and Mr Macdonald were present. Mr Ransley also attended the meeting. Mr Macdonald said, however, that he was not sure whether he attended the meeting. For the following reasons, the Commission is satisfied that he did attend the meeting and that he told Mr Maitland and Mr Ransley that he would grant DCM consent to apply for the EL within the week.

No one who attended the meeting had a good recollection of the matters discussed. The best evidence of what occurred at the meeting is to be found in two emails that were sent by Mr Stevenson and Mr Ransley after the meeting.

On 15 August 2008, Mr Stevenson, who was not at the meeting, sent an email to Mr Maitland, Mr Ransley and MrPoole and noted that:

> [F]*ollowing my discussion with John* [Maitland] *this morning, I assume that the letter from the Minister will be a formal invitation to apply for an EL under section 13 Mining Act ... What this means is that he will not go to tender but will seek exclusively from us our formal application for the EL which will involve a detailed submission (but which we have effectively already done in the previous 'informal' submission). So the indications are that we will be the only party invited to apply and assuming we can tick all the procedural boxes which are required then we should get the EL.*

Mr Maitland said that he could not recall the meeting. He told the Commission, however, that, based on the contents of the email, he believed that Mr Macdonald told him at the meeting that he was going to grant DCM consent to apply for the EL or that he intended to make a decision about that issue. In the Commission's view, the references in the email to "the letter from the Minister" and "the indications" that DCM would be the "only party invited to apply" are a strong indication that, at the previous day's meeting, Mr Macdonald had conveyed to Mr Maitland that he would grant consent for DCM to apply for the EL.

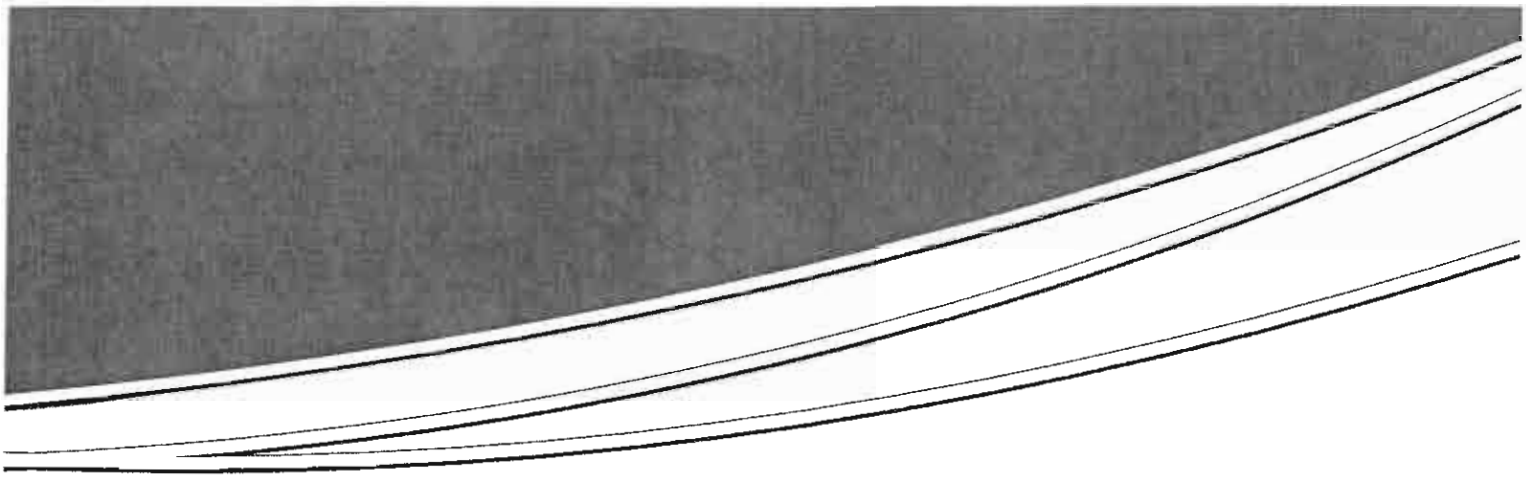
On 16 August 2008, Mr Ransley emailed Michael Buffier and said, "Good meeting with Ian, with all things being equal we should have the letter this week". Mr Ransley agreed that, while he had no recollection of the meeting held on 14 August 2008, the reference in his email to "Ian" was to Mr Macdonald and the reference to the "meeting" was to the meeting held on 14 August 2008.

Mr Hale submitted that the content of Mr Ransley's email does not support a finding that Mr Macdonald told Mr Maitland and Mr Ransley that he would issue the invitation to apply for an EL within a week. This submission, however, ignores Mr Gibson's evidence relevant to this issue.

Mr Gibson testified that, after the meeting on 14 August 2008, Mr Macdonald gave him a clear direction that he wanted to issue DCM with an invitation to apply for the EL. Mr Gibson told Mr Macdonald that the DPI opposed this course. Notwithstanding this advice, Mr Macdonald indicated to Mr Gibson that he wanted to proceed to invite DCM to apply for the EL but did not want to involve the DPI in the process of granting DCM consent to apply for the EL.

Mr Gibson explained Mr Macdonald's reasons for this attitude in the following exchange with Counsel Assisting:

> *What you haven't done is asked the Department to provide a briefing?*
>
> *---That's right.*
>
> *Why didn't you osk for that?---At this stage the Minister was very keen to issue the invitation only. He was aware*



of the Department's position in relation to this. Requesting them to prepare the appropriate documentation he would have been met with resistance and taken time even though the Minister could lawfully direct them to do that so it was the Minister's view to expedite that by having the paperwork prepared in-house as it were.

Is that, is your evidence, the evidence you've just given reflects a discussion you had with the Minister?---Yes.

In which he expressed a preference for doing the invitation in the Ministerial office?---Yes, he wanted it done quickly.

He didn't just want it done quickly on your evidence he wanted it done in the Ministerial office?---He did, he wanted it done quickly and he wanted it done in-house. If the Department didn't support this proposition and they hadn't up until this point then it would be done from the Minister by the Minister.

Mr Gibson said that, after being directed by Mr Macdonald to arrange the invitation letter, he instructed Mr Munnings to obtain the necessary documentation. On 19 August 2008, Mr Munnings obtained a copy of a pro forma invitation letter from the DPI. In the Commission's view, Mr Gibson would not have set these events in motion unless directed to do so by Mr Macdonald. Mr Gibson's evidence, in any event, was to this effect. That evidence is accepted.

Mr Macdonald's conduct in this regard was fundamentally contrary to accepted practice. To instruct his staff, as it were, to go behind the back of the DPI to obtain a pro forma document to enable his staff (without the knowledge of the DPI) to prepare and send a letter inviting a party to apply for a direct allocation of a valuable and potentially lucrative EL (when that task was understood to fall properly within the province of the DPI), was conduct that was unique in the experience of all the senior bureaucrats in the DPI who were responsible for mining matters.

Shortly after obtaining the pro forma letter, Mr Munnings prepared an initial draft of the invitation letter, which included the statement that DCM's proposal was supported by, amongst others, the University of Newcastle. Mr Munnings relied upon the letter that Mr Maitland had obtained from the University of Newcastle in 2007 as justification for including the statement in the draft invitation letter that the university supported the proposal. On 16 August 2008, Mr Maitland emailed a copy of the university's 2007 letter to Mr Munnings. Mr Maitland could offer no explanation for providing Mr Munnings with a copy of that letter on that date. The Commission infers that Mr Maitland did so in response to a request from Mr Munnings or Mr Gibson for assistance in drafting the letter of invitation.

In the light of all the evidence canvassed above, the Commission is satisfied that Mr Macdonald told Mr Ransley and Mr Maitland at the meeting on 14 August 2008 that he intended, within a short period of time, to invite DCM to apply for the EL. After that meeting, consistently with the advice he had so given, Mr Macdonald instructed Mr Gibson to prepare the necessary paperwork, and to go behind the backs of his DPI officers, so as to ensure that the invitation would be issued to DCM.

Chapter 22: The invitation letter is prepared and sent to DCM

There was considerable contact between Mr Maitland and Mr Munnings around this time. Mr Maitland and Mr Munnings went out to dinner on the evening of 19 August 2008. While they both said they were unable to recall the dinner, it is likely that the progress of DCM's application and the steps that were being taken by Mr Munnings to prepare the invitation letter were discussed between them. Telephone records indicate that Mr Maitland and Mr Munnings were in regular contact on 19, 20 and 21 August 2008.

Mr Gibson settled the invitation letter on 21 August 2008. He said that, before doing so, he sought Mr Macdonald's input into the letter on two occasions, and spoke to Mr Maitland about the terms of the letter. Mr Gibson said that Mr Macdonald suggested he should talk to Mr Maitland about the letter because he (Mr Macdonald) was concerned that he (Mr Gibson) should check with Mr Maitland as to "where things were up to".

Telephone records indicate that there was contact between Mr Gibson and Mr Maitland around 1 pm on 21 August 2008, and between Mr Maitland and Mr Macdonald earlier that day. Mr Maitland said that he could not recall the matters discussed with Mr Gibson during their phone call, although, in the Commission's view, it is likely that they discussed the drafting of the invitation letter. Mr Macdonald could not recall receiving a telephone call from Mr Maitland on 21 August 2008.

Mr Macdonald signed the invitation letter later that day. In the letter, Mr Macdonald invited DCM to apply for an EL in respect of land at Doyles Creek, subject to the provision of a supplementary submission outlining in detail the "industry and wider community support for such a proposal".

The conduct of Mr Macdonald, as minister, and his staff in preparing the invitation letter themselves, without any input from the DPI, and sending it out, was again unique in the experience of the senior DPI bureaucrats.

Mr Macdonald had a different recollection of the events surrounding the issuing of the invitation letter, although he agreed that the circumstances were unique.

He said that he thought that Mr Munnings came in to his office with the draft letter and indicated to him "that the DPI may be a bit more comfortable about this, and this is the instrument that will get the matter rolling for resolution as the matter can then be fully considered". Mr Macdonald explained that, prior to signing the invitation letter, he thought that the DPI was "softening" in its opposition to the proposal and that there "could be a way through".

The Commission rejects this evidence in its entirety. Mr Gibson and Mr Munnings denied engaging in such a conversation with Mr Macdonald on 21 August 2008. The Commission accepts their evidence. There was no evidence adduced at the public inquiry to suggest that DPI officers had expressed to Mr Munnings and Mr Gibson opinions about DCM's proposal different from those expressed in the draft briefing note. The Commission can see no reason why Mr Munnings and Mr Gibson would represent, falsely, to Mr Macdonald that they had. This is yet another example of Mr Macdonald giving false evidence.

Mr Hale submitted that the Commission should not accept Mr Munnngs' denials about the conversation with Mr Macdonald on 21 August 2008. He submitted that Mr Munnings had a close association with Mr Maitland and Mr Ransley and may have been acting in their interests on 21 August 2008. Mr Hale complained that he was prevented from questioning Mr Munnings about this at the public inquiry, and it would be unfair to accept Mr Munnings' denials and disbelieve Mr Macdonald. The decision about which Mr Hale complains is set out below in the following exchange:

> *MR HALE: Mr Munning* [sic], *my name is Hale and I appear for Mr Macdonald. You were asked a number of questions about your, the curriculum vitae and qualifications that you sent to Mr Ransley. Perhaps you might be provided with volume 27 page 8119.*

THE COMMISSIONER: Sorry, what are you going to ask about, Mr Hale?

MR HALE: About [h]is curriculum vitae and sending it to Mr - - -

THE COMMISSIONER: What has that got to do with you?

MR HALE: It does, might we suggest, to the nature of the relationship he might have had with Mr Maitland and also Mr Ransley.

THE COMMISSIONER: I will not allow that, Ms Williams is perfectly entitled to question about that and I will allow her to question but not you.

MR HALE: It does go to the reliability of some of the evidence that he might have given.

THE COMMISSIONER: Mr Hale, you have been appearing in these inquiries for a long time. I will not allow cross-examination on the basis of general reliability without counsel telling me what their interest is in the sense of whether their client has an affirmative case in regard to the issues on which questions are directed. I connot see that you have any interest in asking questions about the relationship between Mr Munnings and Mr Ransley.

MR HALE: And Mr Maitland.

THE COMMISSIONER: And Mr Maitland and if there are questions to be asked about the relationship between Mr Munnings and Mr Maitland of course I will allow Mr Kirk to question on those but not you. Do you get the point, Mr Hale?

MR HALE: I do but - - -

THE COMMISSIONER: Thank you.

It was made clear to Mr Hale that it was not readily apparent what interest he had in questioning Mr Munnings about the nature of his relationship with Mr Maitland and Mr Ransley. In the Commission's view, as Mr Hale failed to explain what affirmative case he had in regard to the relationship between Mr Munnings and Mr Maitland, and that between Mr Munnings and Mr Ransley, the Commissioner was entitled to implement the directions he had given on this topic before the public inquiry commenced, and to refuse to allow Mr Hale to question Mr Munnings on these issues. Mr Hale had no affirmative case to put to Mr Munnings on these issues and wished merely to indulge in exploratory cross-examination. This is precisely what the Commissioner explained, before the inquiry commenced, would not be allowed.

During the Operation Acacia segment of the public inquiry, the Commission heard evidence from 52 witnesses, the vast majority of whom were represented by counsel. The inquiry would have expanded infinitely, and out of control of the Commission, were all counsel involved to be allowed to put exploratory questions to witnesses in respect of issues on which they did not intend to adduce an affirmative case. The Commission was conducting an investigation by way of an inquisitorial inquiry. It was not conducting a criminal or civil trial in accordance with the established rules of the adversarial system.

The directions that were made as to the questioning of witnesses were based on directions made in the Royal Commission into the building and construction industry (albeit that the Commission's directions were not as stringent). On this particular issue, these directions were upheld by Heerey J in *Kingham v Cole* [2002] FCA 45. They also have the support of s 34(1) of the ICAC Act, which entitles a legal practitioner, with the Commission's leave, to examine or cross-examine witnesses "on any matter that the Commission considers relevant". Unlike the position with regard to a trial conducted in accord with the adversarial system, a practitioner needs leave to cross-examine a witness.

The Commissioner held that, without any statement by Mr Hale as to an affirmative case that he wished to advance

on behalf of Mr Macdonald, the cross-examination that Mr Hale wished to undertake did not concern a matter that the Commissioner considered relevant.

In any event, the Commission is satisfied that the evidence establishes that, on 14 August 2008, Mr Macdonald conveyed to Mr Maitland and Mr Ransley his intention to grant DCM consent to apply for the EL. The Commission is not persuaded that, in coming to that decision, Mr Macdonald was influenced by a belief that the DPI had softened its opposition to DCM's proposal. As mentioned, there was no softening whatever, and no grounds existed for any such belief on Mr Macdonald's part. He was simply not telling the truth on this issue.

In the Commission's opinion, Mr Macdonald's evidence about the DPI softening its opposition to the direct allocation was an unconvincing attempt to deal with the fact that he granted DCM consent to apply for the EL in the face of the DPI's unequivocal and strong negative advice about DCM's proposal. Nothing had changed from the date upon which Mr Macdonald received that advice and the date of his decision to grant DCM consent to apply for the EL. Mr Macdonald knew that in these circumstances it was irresponsible for him so to proceed, but he did so.

Mr Macdonald also sought to justify his conduct by testifying that the circumstances had changed because "there was more support coming in". By "support", Mr Macdonald was referring to the letters in support of the proposal that had been provided by Xstrata Coal, Donaldson Coal, Felix Resources Ltd, Peter Murray, Hydromining Coal and the ACTU. Mr Macdonald said that he read the letters and regarded it as particularly significant that Xstrata Coal supported the concept of a training mine. He said that the support of the ACTU was "vital and very informative for me in terms of considering the matter".

The letters, on their face, demonstrated that others were prepared to endorse the idea of a "training mine", but they did so at a high level of generality. Xstrata Coal, Felix Resources Ltd and Donaldson Coal did not state any intention to consider the possibility of employing any persons trained at a training mine. Donaldson Coal indicated that it intended to continue to use its own mine training programs. Hydromining Coal stated that it was seeking to develop a mine in the Hunter Valley. It was, therefore, in no position to contemplate the possibility of employing any trainee coal miners until such time as it obtained a mining lease and established a mine. In truth, Mr Macdonald was none the wiser about the true level of industry acceptance of the proposal.

Nevertheless, Mr Macdonald gave evidence that the letters were critical documents:

What, what had changed between May and August?---May and August?

Yeah. Have you just done a - - -?---There was more support coming in.

So the letters of support?---Were, were critical.

Yeah. Well you had a view, you had, do you know how many letters you had between May and August?---I wouldn't, I wouldn't be able to put a number on it.

Could be five?---Could be more, could be less, I'm not sure but there were some substantial letters of support at that point.

Is that all that had changed?---Well that I can recall at this point.

Because nothing about the proposed training facility had changed had it between May and August?---But see - - -

- - how many trainees and how much coal?---No, that's correct.

None of that had changed?---Yes.

So the public benefit that was going to be delivered to the State of New South Wales hadn't changed had it?---This was subject to the conditions. When I signed that document - - -

The Commission is satisfied that Mr Gibson correctly characterised the letters as "third party endorsements". They were "critical" to Mr Macdonald but not for any purpose connected with addressing the DPI's concerns about the adequacy of DCM's particular proposal. The letters were critical to the political cover that Mr Macdonald expected that he would need by reason of his decision to grant DCM consent to apply for the EL.

The fact remains that DCM had done nothing to alleviate the DPI's concerns expressed in the draft briefing note of 27 May 2008. The Commission draws attention to this as Mr Macdonald accepted that it would be irresponsible for him to grant the EL without addressing the DPI's concerns.

Mr Maitland collected the invitation letter from Mr Gibson on the afternoon of 21 August 2008. The DPI was unaware that Mr Macdonald had granted DCM consent to apply for the EL. On 2 September 2008, Ian Kirkwood, a journalist from the *Newcastle Herald*, sought confirmation from the DPI that Mr Maitland had been granted consent to apply for the EL. Mr Mullard said that he first became aware of Mr Macdonald's decision when Mr Kirkwood's enquiry was brought to his attention.

There was no dispute that the process by which Mr Macdonald granted DCM consent to apply for the EL was entirely unprecedented. It was also highly irregular. A minister may direct officers of his or her department in writing to take administrative action in the face of departmental opposition. Subject to the direction being lawful, departmental officers are normally obliged to obey such a direction. But Mr Macdonald chose to avoid confronting his own department about a step that he knew it fundamentally opposed. He went to the lengths of instructing Mr Gibson to obtain a pro forma document secretly, so as to enable Mr Gibson and Mr Munnings to prepare and send the letter of invitation to DCM without the DPI knowing what was happening. Then, without informing the DPI, he took the administrative action (which in the past had always been undertaken by the DPI) himself, to achieve his desired ends.

Mr Macdonald agreed that he did not inform the DPI that it was his intention to depart from the well-understood and well-established practice whereby the DPI would prepare all documents required to invite an applicant to submit an application for a direct allocation of an EL, and to effect the granting of the EL.

Mr Macdonald's conduct in bypassing the DPI and causing the invitation to issue to DCM to apply for a direct allocation of the EL was aberrant. Mr Macdonald, thereby, intended to limit the opportunity for the DPI to voice opposition to the proposal, and to create a false impression that there was an absence of DPI objection to the proposal.

After August 2008, Mr Maitland obtained further letters of support for the training mine from representatives of various entities. These are dealt with more fully below. In regard to Mr Macdonald, however, the Commission makes the following comments.

The letters indicate expressions of support for the general concept of a training mine; they say nothing about the particular training mine that DCM proposed (none of the authors was given any meaningful detail about the proposed mine – and, indeed, many of the authors were given misleading information as to what DCM intended to do with the general concept of the training mine that they proposed).

Accordingly, Mr Macdonald could not obtain any comfort from those letters for his alleged search for support for DCM's training mine (his alleged desire for such comfort being manifest from the eight conditions he allegedly announced at the Strangers' Dining Room).

Chapter 23: The significance of Mr Macdonald's decision to invite DCM to apply for the EL

There was a powerful body of cogent evidence from Mr Coutts, Mr Mullard and others that, for all practical purposes, the minister's decision to invite DCM to apply for an EL was the critical exercise of ministerial discretion in the EL application process relating to the Doyle's Creek tenement. Here, the phrase, "practical purposes", needs to be stressed. That is because s 22 of the Mining Act provides that the decision-maker's power to grant an EL can be exercised only after consideration of the application for the EL, while s 13 of the Mining Act sets out the kind of information that must be included in an EL application.

The point is that, while the Mining Act reserves to the decision-maker the power to exercise the conferred discretion *after* the application for an EL is made, a practice to the contrary has grown up in the DPI.

According to this practice, in cases where a direct allocation of an EL is sought, the applicant first provides the DPI with material intended to persuade the decision-maker (usually the minister) to issue an invitation to the applicant to apply for a direct allocation. The DPI then, after considering this material, makes a recommendation to the minister either to invite the applicant to apply or to reject any application for a direct allocation that the applicant might make. The minister proceeds to consider the material submitted by the applicant and the DPI's reasons for its recommendation. It is at this point that the minister exercises his or her discretion to make the crucial decision to invite or not to invite the applicant to apply for a direct allocation. In practice, the minister does not again reconsider the merits of the application. The invitation to apply is accepted by the DPI and the minister as being the minister's final decision. Once the minister decides that the applicant should be invited to apply, the DPI sends the applicant an invitation. After the applicant responds to that invitation, the applicant is asked to meet certain formal requirements. Once this has been done, an EL is issued without the minister reconsidering the merits of the direct allocation. This practice is well-known and well-established. There was no suggestion that any instruction had been given that it was to be changed.

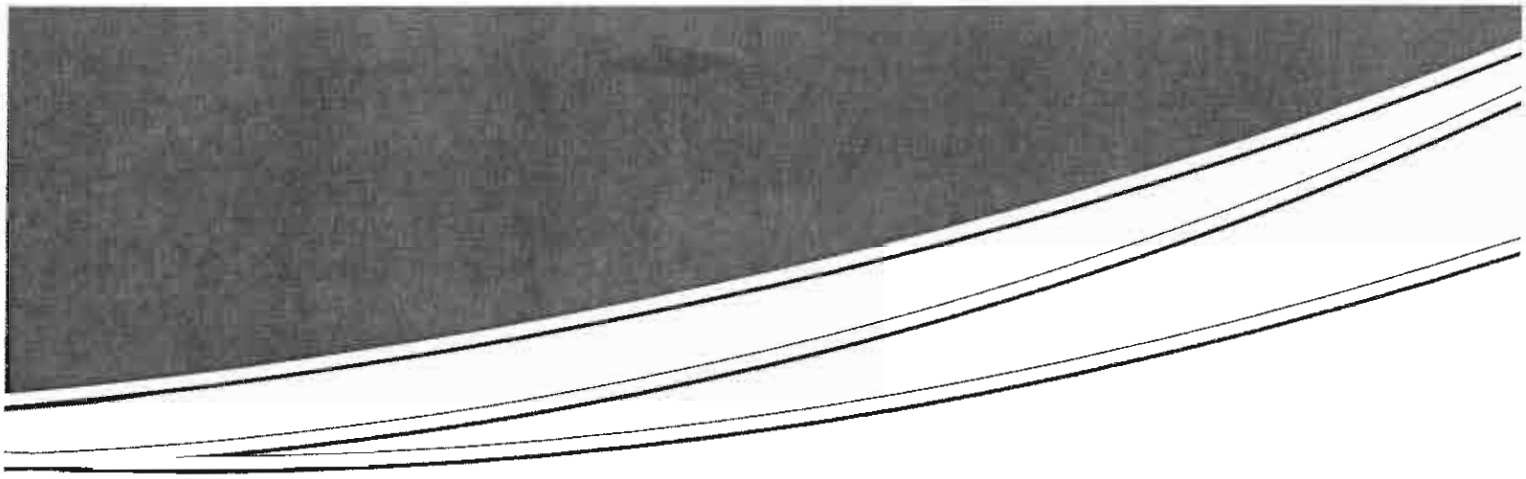
Thus, according to this practice, the minister's decision that a particular applicant should be invited to apply for a direct allocation eliminated all competitors from the field. In accordance with standard DPI practice, in order to obtain the EL after being invited to apply, the successful applicant is required only to lodge an EL application and, as it was put in evidence, "tick" a number of procedural "boxes". Once the DPI is satisfied that those boxes have been ticked, the EL is granted.

Mr Mullard described the practice in the following exchange:

> *What hurdles remained for a person interested in an Exploration Licence once it had been granted the Minister's consent to apply?---They were largely administrative, effectively all they had to do was actually lodge the appropriate fees, security deposits and demonstrate that they had access to appropriate technical and financial, financial ability. It was, it was largely an administrative process it was not, if provided - - -*
>
> *THE COMMISSIONER: It's not discretionary?---No, it wasn't. And provided they met the requirements as defined in the Act they would be granted the title.*

In other words, by issuing an invitation to apply, the minister was deciding finally to open up the area for exploration and to proceed by way of a direct allocation rather than a competitive process. A strange aspect of Mr Macdonald's conduct is that he issued the invitation to apply (when, as explained, this was in effect a final decision) at a time when he recognised that the application was defective and it would be irresponsible for him to grant it.

At the relevant time, delegations allowed specified DPI officers to execute an EL. According to Mr Mullard, this was how an EL was generally executed. At the relevant time, there was no delegation of the power to consent



to apply. Therefore, the invitation to apply was generally the only time the minister was directly involved in the process and it was then that the minister would exercise his discretion.

In 2008, once an applicant had been given consent to apply for an EL, the DPI was responsible for ensuring that the EL application contained evidence of requisite technical expertise and financial resources available to the applicant, an exploration work program, and a statement about the amount of money that was to be spent on prospecting.

The mechanical nature of the application process was clearly understood by Mr Maitland and others within DCM. This is borne out by Mr Stevenson's email of 15 August 2008, as referred to above. For ease of reference, the Commission again quotes the relevant parts of that email:

> [F]*ollowing my discussion with John* [Maitland] *this morning, I assume that the letter from the Minister will be a formal invitation to apply for an EL under section 13 Mining Act ... What this means is that he will not go to tender but will seek exclusively from us our formal application for the EL which will involve a detailed submission (but which we have effectively already done in the previous 'informal' submission). So the indications are that we will be the only party invited to apply and assuming we can tick all the procedural boxes which are required then we should get the EL.*

Mr Maitland agreed that he shared this understanding.

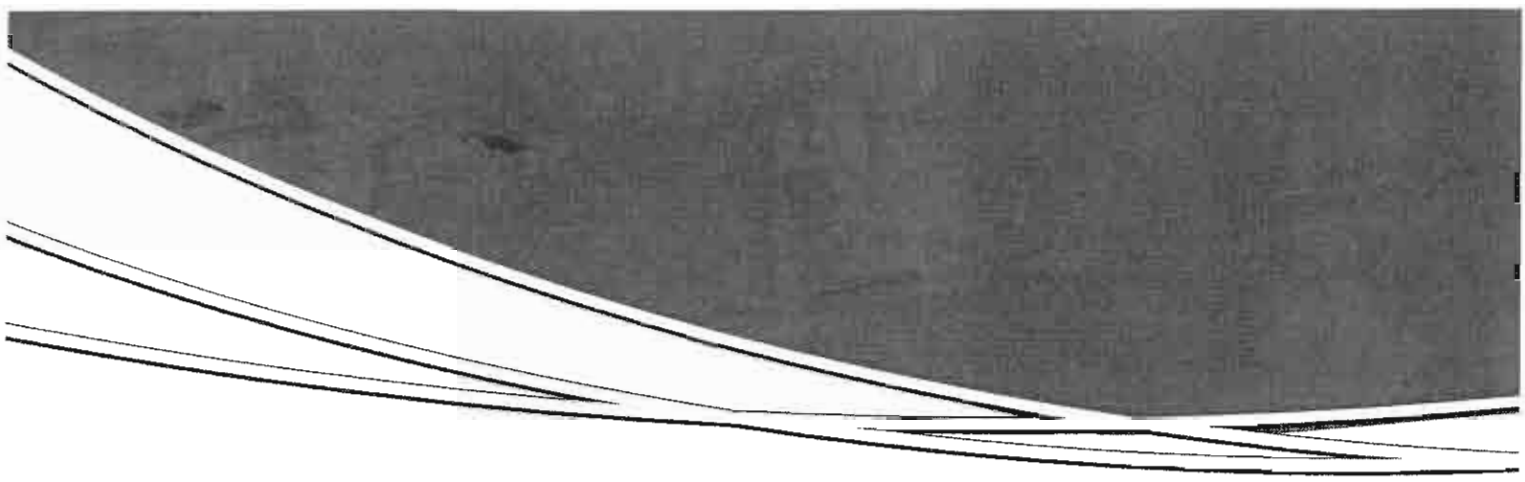
Mr Macdonald generally agreed with Mr Mullard's description of the process but sought to distinguish DCM's application from past cases. He said that he believed that, once he granted DCM consent to apply for the EL, the DPI would negotiate with DCM to develop a number of special conditions for inclusion in the EL that would ensure that DCM established a training mine as well as the "shape of that training mine". Mr Macdonald said that he did not make a final decision to grant the EL until he was satisfied that the EL conditions had been settled and that the DPI was recommending the granting of the EL to DCM.

The Commission rejects this evidence. When Mr Macdonald granted DCM consent to apply on 21 August 2008, he had had no discussions with DPI officers about the possible content of conditions to be inserted into the EL that could relate to the training mine and the detail of its operation. In fact, Mr Macdonald had no discussions with DPI officers as to the extent to which, if at all, any conditions in the EL could legally require DCM to build a training mine.

There was a need to understand if conditions could and should deal meaningfully with a myriad of details. These details included the date by which the construction of the training mine was to commence and was to be completed, the size of the training mine, the size of the resource to be allocated to it, the amount of money to be expended upon it, the number of trained miners that it should be capable of producing, the size of the teaching staff, and the kind of qualifications it was to confer. These are amongst the very many important matters that spring to mind. Indeed, at no stage whatsoever in the process, up to and including the grant of the EL to DCM, did Mr Macdonald have any discussions of this kind with any DPI official. Mr Macdonald, himself, said in evidence that he did not give Mr Mullard any specific instructions about the content of the conditions.

Moreover, neither before nor after 21 August 2008 did Mr Macdonald direct the DPI to undertake any further consideration of the merits of DCM's training mine proposal or the training mine concept.

In his testimony, the furthest that Mr Macdonald went towards saying that he gave instructions to the DPI to prepare appropriate conditions for incorporation into the EL (designed to ensure that DCM would construct and operate a training mine of such a kind that so as to provide



a real benefit to the state of NSW) was the following assertion by him. He stated that, after granting DCM consent to apply for the EL, he told Mr Mullard that "it had to be a training mine and you work it out". This statement is capable of meaning that Mr Macdonald told Mr Mullard, impliedly, that he was leaving it to Mr Mullard to arrange for suitable conditions to be inserted in the EL.

Mr Mullard gave evidence prior to Mr Macdonald testifying. At that stage, the Commission was not aware that Mr Macdonald would allude to giving instructions to Mr Mullard about conditions in the EL in the way described. Mr Hale asked Mr Mullard no questions about this important issue. If this were Mr Macdonald's genuine affirmative case, the Commission would have expected Mr Hale to ask Mr Mullard appropriate questions consistent with that case. The Commission had issued express directions as to the consequences that could follow if counsel omitted to put important questions to witnesses.

Counsel Assisting questioned Mr Mullard about the conditions in the following exchange:

> *If you turn to page 3921, you'll see the beginning of an early draft of the proposed conditions. Who was responsible for the early drafts of these conditions, do you remember?---Oh, there's, there's two sets of conditions, there's standard conditions that are incorporated in every title and those are drafted or held by the, the Titles staff. The special conditions that really related to the proposal that related to the training mine I actually asked Trish Madden to develop those conditions.*
>
> *And was there any discussion with the Minister's office about the conditions?---Yes, there was.*
>
> *Who had those discussions?---Well we were, we did send them through and there was discussions with Jamie Gibson.*
>
> *THE COMMISSIONER: And who else, and from the Department?---Sorry?*
>
> *And who from the Department?---Oh, well I believe it was myself and possibly Trish Madden.*
>
> *MR BRAHAM: And do you have any recollection of any input the Minister's office had to the draft conditions or the special conditions?---Only, only to the extent that they were happy with the proposed conditions.*
>
> *But you don't remember them suggesting any amendments?---I don't remember specifically, no, but it doesn't mean that they didn't.*

The discussions that Mr Mullard had with the minister's office and, in particular, Mr Gibson, about the conditions occurred at least three months after Mr Macdonald had invited DCM to apply for a direct allocation. There is no suggestion in Mr Mullard's evidence that Mr Gibson or anyone else from the minister's office gave any direction whatsoever as to the need for conditions (stringent or otherwise) or the content of conditions, and Mr Mullard did not refer to any discussion with Mr Macdonald along the lines the latter suggested.

The Commission does not believe that Mr Macdonald said to Mr Mullard, "it had to be a training mine and you work it out". The Commission finds that Mr Macdonald did not say these words or anything like them to Mr Mullard.

The Commission is satisfied that, before 21 August 2008, Mr Macdonald was indifferent to the content of any conditions to be inserted in the EL. He showed no interest in the extent to which they were capable of addressing DPI concerns about the proposal.

The Commission is satisfied that, on 21 August 2008, Mr Macdonald was fully aware that, in the face of the unanswered questions raised by the DPI in its draft briefing note, it was entirely unknown whether the inclusion of conditions in the EL requiring DCM to establish a training mine could achieve any public good, including improvements in training and mine safety. He displayed no interest, however, in matters of that kind.

Chapter 24: Mr Maitland courts Chinese investors, work on the conditions begins, and a meeting is held at the Nippon Club

Following the granting of consent to apply for the EL, Mr Maitland continued to court overseas investors. By 27 August 2008, a modified version of the March 2008 Submission had been prepared. This time, the resource had been increased to an estimate of 200 million tonnes, out of which 140 million tonnes was estimated to be recoverable. These figures were used to interest Chinese investors in the project.

Nothing had occurred by way of exploration that justified the increase in the estimated size of the resource beyond that stated in the Submission documents. Mr Maitland said that these figures, which were within the range of Dr Palese's resource estimate of 306.8 million tonnes, were used to attract investors and were a "teaser for the Chinese". By "teaser", Mr Maitland apparently meant a false high estimate designed to stimulate investor interest. He seemed to be of the view that to represent falsely the size of the resource in attempts to interest foreign investors was a legitimate exercise. Mr Maitland went to China in October 2008 and promoted these figures with Chinese investors during his visit.

In consequence of a discussion between Mr Coutts and Mr Mullard, the DPI began working on conditions for incorporation in the EL. When Mr Coutts found out that Mr Macdonald had granted DCM consent to apply for the EL, he spoke to Mr Mullard and they agreed that the DPI would have to ensure that the "exploration conditions were pretty tight around the training mine facilities". Mr Mullard said that he directed Ms Madden to undertake this task. The initiative and impetus for drafting special conditions for inclusion in the EL came from the DPI and not from Mr Macdonald, who provided nothing in this respect.

On 10 November 2008, Ms Madden circulated a draft set of special conditions for inclusion in the EL to other DPI staff for their consideration and comment.

The meeting at the Nippon Club on 25 November 2008

Around the time that Ms Madden began drafting the special conditions for inclusion in the EL, arrangements were made for a further meeting between Mr Macdonald and Mr Maitland. A reference to these arrangements is found in a note of a conversation made on 10 November 2008 between Dr Johnson of the University of Newcastle and Professor Barney Glover. The note referred to a meeting held on 25 November 2008 between Mr Maitland and Mr Macdonald for a "decision on DC mine".

An email sent on 21 November 2008 from Ms Madden to another DPI officer establishes that, prior to the meeting, Mr Macdonald asked Mr Mullard about draft conditions. In the email, Ms Madden noted:

> *Brad* [Mullard] *just told me that the Minister asked him about the draft conditions when they met this week. As a result I am hoping you can give me on answer soon. I realise that it is a big ask but we are being pushed from on high.*

Ms Madden recalled that Mr Mullard told her that Mr Macdonald was keen to grant the licence and that, "we needed to get it [the conditions] moving as expeditiously as possible".

At the public inquiry, Mr Mullard was referred to Ms Madden's email and gave the following evidence:

> *And was there a – did you have a feeling or did you communicate with your Department that you were being pushed from on high in relation to the preparation of the offer document?---Only that there was a lot of, well, yes, I was being pushed, there was a lot of urgency about the offer document.*
>
> *And how was that communicated to you?---By the Minister's office, yeah, and basically they were pushing, I believe that there was at the time my memory it was that*

there were meetings with the Minister and Mr Maitland and there was a lot of pressure or urgency associated with granting the title.

Mr Hale relied upon Ms Madden's email to submit that the conditions were developed by the DPI in discussion with the minister. This submission ignores Mr Macdonald's own evidence on this point. He said that he had no input into the drafting of the conditions. In the Commission's opinion, Mr Macdonald's conversation with Mr Mullard was not motivated by any interest in the content of the conditions. At no time did Mr Macdonald call for the conditions and he admitted that, at the time of the meeting on 25 November 2008 at the Nippon Club in Sydney, he had not seen them. There was no other way in which he could have apprised himself of their contents. He did not say that any DPI officer had told him about the terms of the conditions, and Mr Hale did not put to any DPI officer that he or she had.

The Commission accepts Counsel Assisting's submission that Mr Macdonald spoke to Mr Mullard about the conditions because he wanted to be able to give assurances to Mr Maitland in relation to the completion of the grant of the EL at the meeting on 25 November 2008. He had no genuine interest in the content of the conditions. The fact that he had not seen the conditions and did not know their terms did not stop him from assuring Mr Maitland at this meeting that he had decided to grant the EL to DCM.

The meeting took place at the Nippon Club on 25 November 2008. Mr Maitland and Mr Ransley attended from DCM, and Mr Macdonald attended with Mr Gibson and at least one other ministerial officer. Those persons who attended the meeting appeared to have the barest recollection of it. Again, to determine what occurred at the meeting, it is useful to have regard to email correspondence that occurred after the meeting. In the Commission's opinion, such correspondence is likely to reflect, genuinely, each author's belief as to what was said at the meeting.

The Commission is satisfied that, at the Nippon Club meeting, Mr Macdonald told Mr Maitland that he would have a letter of offer for the EL on 5 December 2008. This is borne out by the following:

On 26 November 2008, Mr Maitland emailed Mr Tudehope, a close personal friend, and told him that he had "had a dinner meeting with the Minister for Mines last night and he informed me that I will have the letter of approval for the exploration licence in my hands on Friday 5th December".

Mr Maitland accepted that he sent this email to Mr Tudehope because Mr Macdonald told him on 25 November 2008 that he would have the letter offering DCM the EL on 5 December 2008.

On 26 November 2008, Mr Gibson sent an email to Mr Maitland, in which he referred to the meeting on 25 November 2008, and said, "As discussed the 15th is locked in for dinner and we have also set aside time on Friday week to meet with you/your media team. Please let me know how you go with Shougang and again the offer stands to provide them with a tour".

In the Commission's opinion, this email is consistent with arrangements having been made at the meeting on 25 November 2008 to award the EL to DCM on 15 December 2008.

At 5.42 pm on 2 December 2008, Mr Hawkes of the DPI emailed Mr Gibson. In the email, Mr Hawkes informed Mr Gibson that he had contacted people in Mr Mullard's area, who were working on the training mine documents, to let them know that Mr Gibson required the documents by Thursday, 4 December 2008.

A few minutes after Mr Hawkes had sent the email to Mr Gibson, Mr Gibson emailed Mr Maitland and advised him that "the letter is on its way" and "that's great about the 15th – we're locked in".

Mr Macdonald initially denied telling Mr Maitland at the Nippon Club meeting that Mr Maitland would have a letter of offer in his hands on 5 December 2008. He agreed that it would be an unusual thing to say when he had not seen the conditions. He then said that anything he had said to Mr Maitland would have been predicated upon the DPI recommending the granting of the EL. After Counsel Assisting had drawn Mr Macdonald's attention to the email sent by Mr Maitland to Mr Tudehope on 26 November 2008 and Mr Gibson's email to Mr Maitland on the same day, Mr Macdonald said, "I can't deny it, I don't recall it".

The language used by Mr Maitland and Mr Gibson in the emails does not suggest that they had any expectation that the decision to issue the letter of offer depended upon Mr Macdonald receiving DPI advice recommending that he should do so. Moreover, Mr Gibson, on Mr Macdonald's instructions, had told Mr Maitland he would receive the letter on 5 December 2008. There was nothing conditional about that advice.

The Commission finds that Mr Macdonald told Mr Maitland at the meeting on 25 November 2008 that he would grant the EL on 15 December 2008 and he would arrange for a letter offering the licence to DCM to be provided to Mr Maitland on 5 December 2008. Mr Macdonald had a plan to award the EL to DCM at a dinner on 15 December.

Significantly, Mr Macdonald gave Mr Maitland the undertaking that he would grant the EL before the conditions had even been provided to his ministerial office, at a time when he had not read them, and when he knew nothing about their contents.

Therefore, when undertaking to grant the EL to DCM, Mr Macdonald was in no position to determine whether the special conditions were capable of securing the "public good". Furthermore, Mr Macdonald was not waiting on any advice from the DPI before informing the proponents that they would be awarded the EL. It was, as all involved recognised, a fait accompli.

Mr Macdonald's protestations that he was relying on the conditions to establish a regime whereby DCM would be obliged to construct and operate a training mine on a basis that would redound to the public good are not believed. His actions bespeak a different intent; an intent to which the public good was irrelevant. As will be developed below, the intent was to grant the EL to DCM so as to benefit Mr Maitland.

Chapter 25: The letter of offer and the DPI's briefing note of 5 December 2008

As at the time the EL was granted (and unlike the power to issue consent to apply), delegations were in place that delegated the power to grant an EL to officers of the DPI. It was open to Mr Mullard and David Agnew of the DPI to exercise that delegated power. Mr Mullard, however, testified that, given the way the invitation had been issued by Mr Macdonald without the support of the DPI, he formed the view that it was not appropriate for him or any member of his staff with the appropriate delegation to exercise the delegation and grant the EL.

Mr Mullard decided that a briefing note together with a draft letter should be created for Mr Macdonald's signature. The briefing note was drafted on 3 December 2008 and provided to Mr Mullard for his approval. Mr Mullard was not satisfied with it. He caused the following words to be deleted from the document, "the DPI is now satisfied with the supplementary submissions". Mr Mullard said that he did so because the DPI was not so satisfied.

Ms Madden, who was present with Mr Mullard when he reviewed the draft briefing note, said that Mr Mullard "wished to be very clear that the DPI was not satisfied and was not in itself recommending the submission". She said that the briefing note was "being put up to satisfy the Minister's request".

The draft briefing note also recommended that the minister consent to DCM lodging an EL application. This was obviously inappropriate as Mr Macdonald had already invited DCM to apply for the licence. Mr Mullard caused this recommendation to be deleted from the document. He said that was clearly not the DPI's recommendation. As a result, the briefing note contained only a recommendation that the "Minister sign the attached letter of offer in accordance with the previous consent given to apply for an exploration licence".

The DPI, therefore, had made it clear to Mr Macdonald that he should sign the letter offering DCM the grant of the EL, in accordance with his previous decision to invite DCM to apply for the licence.

There was no basis in the briefing note, and the circumstances leading up to its preparation, upon which Mr Macdonald could form the view that the DPI had considered the merits of the proposal and supported it. Mr Macdonald did not dispute this. He said, however, that that did not mean that the DPI had not reconsidered the matter. In the Commission's view, this is an absurd assertion. Mr Macdonald had no basis upon which to think that the DPI had reconsidered this matter. He knew that the DPI had always unequivocally opposed a direct allocation. It was for this reason that he had broken the rules of long-established practice and had, without informing the DPI, gone behind its back to invite DCM to apply for a direct allocation. By Mr Macdonald's own admission, he had failed to ask the DPI to review the application. There was no reason for the DPI, of its own volition, to do so. There was nothing in the briefing note to give the impression to Mr Macdonald that the DPI had given its imprimatur to the decision to issue the letter offering the grant of the EL.

The course adopted by Mr Macdonald had not been recommended to him by the DPI. The DPI was simply doing what it had been directed to do by Mr Macdonald. This was made clear by Mr Mullard. Mr Macdonald knew this at the time.

The briefing note that went to the minister was no more than half a page of typed text. Reference was made to the fact that special conditions had been included in the EL to cover "particular aspects pertaining to the training mine and area". No other reference was made to the special conditions. The only comment made by the DPI was that any future mining developments following exploration would be subject to financial contributions under the Guidelines.

Mr Macdonald claimed not to recall signing the letter of offer. Nevertheless, it was signed by him. Once shown a copy of the signed letter, Mr Macdonald had no doubt that had seen the briefing note.

Chapter 26: The failure to refer the direct allocation to Cabinet

The Hon Nathan Rees was NSW premier from 5 September 2008 to 4 December 2009. Prior to that, as from March 2007, he was a member of the Cabinet. He explained that, immediately after he was sworn in as premier, he was made aware that "State Government revenues were down in the order of $100M per month with no apparent reason for that". Ten days later, Lehman Brothers collapsed and the global financial crisis was precipitated. Mr Rees stated that, in that period, his government and the Cabinet was on a search for "all possible sources of revenue that were politically sustainable".

Mr Rees said during the last quarter of 2008 the government was looking for "those areas where we could increase revenues", that that period "was all about getting the budget in order", and that budget questions were "a first order priority".

Mr Rees was asked whether, at that time, Mr Macdonald could have believed that he had the authority of Cabinet to forego revenue to acquire a possible public benefit such as a training proposal as part of a commercial operation. Mr Rees replied, "Absolutely not".

Mr Rees accepted that a potential ministerial decision involving the award of an EL for coal by direct allocation, which award could otherwise lead to revenue of millions of dollars being generated in a tender process, is something that should have been raised with the Cabinet or the Cabinet Budget Sub-committee. He said that the foregoing of as little as $1 million would be sufficient to warrant "collective consideration".

Mr Rees was an impressive witness. The Commission accepts his evidence. He gave evidence to similar effect in Operation Jasper, as did former premier the Hon Morris Iemma.

Mr Macdonald did not refer to the Cabinet or the Cabinet Budget Sub-committee his decision to allocate the Doyles Creek tenement directly to DCM.

Mr Macdonald argued that there had been other comparable direct allocations. He referred to the Coborra, Oaklands and Ridgelands ELs.

The Coborra EL was submitted to Cabinet. Mr Macdonald first, in effect, denied that Cabinet had ever considered whether or not to grant an EL. When confronted with the proposition that the Coborra EL had been submitted to Cabinet, he denied that Cabinet considered the licence. He suggested that Cabinet considered the Coborra EL only as part of a package. But the Cabinet minute shows that, on 9 March 2009, Cabinet considered the EL alone, and endorsed a "proposed decision" of the minister to grant consent to apply for an EL. This was only months after the Doyles Creek EL had been granted. The Commission accepts Counsel Assisting's submission that, in this respect, Mr Macdonald was telling lies to try to create a precedent "comparator" to justify his decision.

The Ridgelands EL was granted in consequence of an EOI process and additional financial contributions involving the payment of $95 million were paid at the time of consent to apply, as is explained earlier. The Ridgeland EL is, therefore, not comparable to the Doyles Creek EL.

The direct allocation of the Oaklands EL was supported by the DPI by reason of special circumstances, which distinguished it from the Doyles Creek EL.

Chapter 27: The special conditions in the draft EL

The conditions are drafted and sent to Mr Gibson

At 1.47 pm, on 4 December 2008, a DPI liaison officer in the minister's office sent an email to Mr Mullard requesting that a brief and letter relating to the "John Maitland training mine" be sent to the minister's office "as it is urgent that the Minister sign it today".

Ms Madden finalised the conditions on 5 December 2008. They had been settled by Mr Mullard (a copy of the special conditions is available in this report as Appendix 7). At 10.18 am, Ms Madden emailed the conditions to Mr Mullard. He emailed a copy to Dr Sheldrake. At 10.53 am, Ms Madden emailed all the necessary paperwork, including the draft conditions, to Mr Gibson.

Mr Macdonald said that he saw the conditions on the evening of 15 December 2008, and read them before he signed the documents. He disagreed with the proposition that that was his first recollection of seeing the conditions. He said that, when what was in the conditions was conveyed to him, he was "pretty happy". He was unable to identify who conveyed the content of the conditions to him other than to suggest it was one of his staff members.

Earlier in his evidence, Mr Macdonald had relied heavily on the conditions in explaining why he adopted option (1) presented in the DPI's draft briefing note of 27 May 2008. The following exchange is revealing:

> *THE COMMISSIONER: Why would you have wanted their recommendation to be I* [sic] *in the light of what they had told you about all the weaknesses in the proposal?---Well, the weaknesses had to be addressed, Commissioner, and I see that they are, are in a – the way the conditions were constructed I read I* [sic] *as if you construct the conditions you can get over, overcome the above problems and if you go through those dot points it addresses most of those dot points, what you embed in the conditions for the future in terms of how that training mine would eventually, when you knew the resource, would be able to be, you would be able to force an agreement because you hold the whip hand on the licence and on the, on the licence that you would be able to negotiate with them under the various terms of the conditions. If you look at the conditions they're the most clear conditions that you could ever imagine in terms of forcing that company to honour its commitments.*

The terms of the conditions

Condition 49 provides that the EL "is granted solely to allow determination of resource capacity to support a training mine" and provides further that "should the licence holder not meet the commitments outlined in the conditions with respect to a training program and subsequent development of a training mine the licence will be cancelled". The quoted words establish the purpose for the EL. The operative part of the conditions concerns the terms under which the licence would be cancelled. But the meaning and operation of these terms depend on the conditions that follow.

If exploration did not demonstrate the existence of a resource large enough to establish a commercial mine, DCM could simply walk away from the site, not having built a training mine, and having incurred no obligation to the state to do so.

Conditions 50, 51, 53 and 56 do not impose obligations on DCM to build or operate a training mine and are not presently relevant.

Condition 52 requires DCM to develop a training program for its proposed activities within one year of the granting of the licence. The condition goes on to refer to "aspects" that the program must include. These are relevant, but completely open-ended. In other words, the training program is left entirely to DCM to "develop" or to achieve any particular level of public benefit. Condition 52 imposes no concrete obligation on DCM to build or operate a training mine.

Condition 54 requires DCM to provide the DPI with an annual report, "which substantiates that all commitments and studies as outlined in its application to the DPI are being met along with all licence conditions related to training". The reference to DCM's "application to the DPI" can only be a reference to the Submission. Condition 54 requires nothing to be done beyond what is in the Submission or other licence conditions.

Condition 55 makes the seeking by DCM of approval for the development of a training mine subject to achieving satisfactory results in each stage of the exploration program. This makes it clear that any obligation on DCM to construct and operate a training mine is conditional on satisfactory results being obtained during the exploration stage. In other words, DCM has no obligation to spend amounts on constructing and operating a training mine unless exploration results show that constructing and operating a mine would be profitable. Accordingly, the risk to DCM in exploring for sufficient coal to justify the expense of constructing and operating a training mine is minimal. This condition does not create any minimum standard for the training mine and does not operate to address any deficiency in the Submission.

Condition 57(a) provides that, if DCM does not substantially meet its financial and other commitments relating to the awarding of the EL, and to the conditions in the EL, then the minister, subject to certain conditions, may cancel any title in place at that time. This does not impose an obligation on DCM to construct or operate a training mine to any particular specification, except perhaps, in accordance with the Submission.

Condition 57(b) provides that, if DCM fails to commence substantial development of a training mine within three years of the awarding of the EL, the minister, subject to certain conditions, may cancel any title in place at that time. This, also, does not impose an obligation on DCM to construct or operate a training mine to any particular specification, except as set out in the Submission.

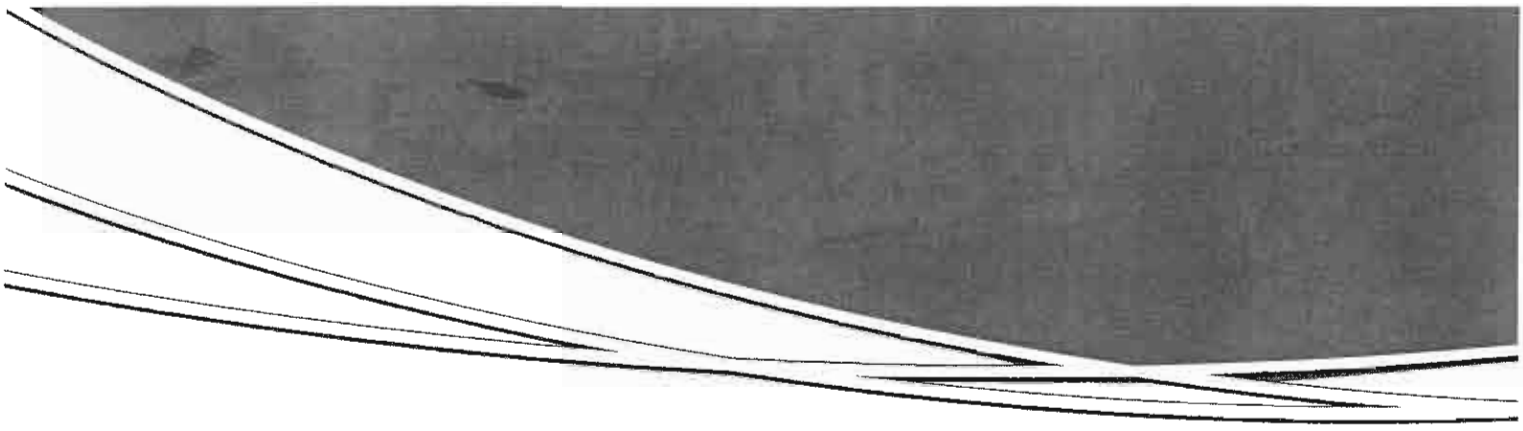
General comments regarding the conditions

The conditions are vague in their terms and are capable of being satisfied by the licence holder submitting a training program to the DPI containing the level of detail that was set out in the Submission. The conditions do not go anywhere near ensuring that DCM develops an adequate training program and do not deal adequately with the criticisms identified by the DPI in its 27 May 2008 briefing note.

The conditions are open-ended and non-specific. Neither the minister nor the proponents have considered the conditions impinge on DCM's ability to build a large commercial mine at Doyles Creek.

The conditions, as incorporated in the EL, omitted a condition that Ms Madden had originally drafted. This condition had remained as part of the set of conditions Ms Madden had drafted until 3 December 2008. The Commission was unable to determine the specific date that it was removed, except that it was removed between 3 and 5 December 2008. The condition in question reads as follows: "The licence holder shall ensure that a minimum of 10% of funds in the exploration programme are expended in the provision of training to personnel in the mining industry". This was the only condition that imposed a specific obligation on DCM to expend a determinable amount of money on training or on the training mine. Mr Mullard testified that this condition had been inserted to ensure that the state would obtain some early benefits from the training mine. Mr Mullard said that DCM indicated it was not prepared to accept the condition and its removal was agreed upon by DCM and the minister's office.

The evidence does not allow the Commission to draw any specific conclusion as to how this condition came to be excluded. But the absence of any such condition in the conditions that apply to the EL is consistent with there being no direction from Mr Macdonald to the DPI to



ensure that the conditions imposed appropriate obligations on DCM and required a proper training mine regime.

Mr Macdonald said that the "shape" of the training mine would be established once the size of the coal resource was identified by exploration. But, whatever "shape" comprises, it would have to be determined through a process of negotiation conducted against the background of DCM owing no concrete obligation to construct and operate a training mine in a manner that would provide the public with a real benefit. If exploration results were to be mediocre, DCM could justify building a training mine in accordance with the specifications (such as they are) in the Submission. If exploration results were to be entirely negative, DCM could simply walk away from the site without having done anything towards the establishment of a training mine.

The conditions, therefore, provided no comfort that the direct allocation of the EL to DCM would provide a public benefit. All the DPI's concerns, identified in its 27 May 2008 briefing note, continued to weigh overwhelmingly against the direct allocation that occurred.

The DPI had told Mr Macdonald that, were he to put the Doyles Creek tenement out to public tender, an additional financial contribution could be expected from the successful tenderer. The direct allocation, on the other hand, meant that there would be no additional financial contribution and, indeed, if DCM were to walk away from the site because of poor exploration results, the state would receive virtually nothing.

There is nothing in the conditions, or anything else, that explains Mr Macdonald's failure to choose the option suggested by the DPI; namely, an open tender process that required tenderers to provide in their bids for the construction and operation of a training mine according to reasonable standards.

Chapter 28: The DPI's briefing note of 15 December 2008

On 15 December 2008, the DPI provided the briefing note to Mr Macdonald. The briefing note was a short document, no longer than half a page of typed text. Under a section entitled "background" it noted that arrangements had been made for DCM representatives to meet with Mr Macdonald on 15 December 2008 for the purpose of returning the signed documentation offering an EL. The note contained two recommendations. First, that, in accordance with s 22(1)(a) of the Mining Act, the minister grant an EL to DCM. Secondly, that the licence be signed and returned to the Maitland Minerals Titles office for completion.

By the time Mr Macdonald received the 15 December 2008 briefing note, he had been made aware on several occasions, since the inception of the proposal, of the DPI's strong opposition to the direct allocation. At one point, Mr Macdonald's counsel indicated that Mr Macdonald would contend that he was not affirmatively told that the DPI was against the proposal. This stance is contrary to the overwhelming weight of the evidence. Ultimately, Mr Macdonald retreated to reliance on the 15 December 2008 briefing note.

He said that the briefing note, containing as it did a recommendation to grant the EL, was the document upon which he based his decision to grant the EL. He asserted that the grant was based on a recommendation by Dr Sheldrake. This statement cannot be, and is not, believed by the Commission.

First, to Mr Macdonald's knowledge, the briefing note was dealing with purely mechanical steps that implemented the decision he had already made. Those mechanical steps were to take place (as the document itself noted) at a pre-arranged meeting for that purpose. There was nothing more to be done that required the DPI to exercise any discretion. The time for advice was over.

Secondly, Mr Macdonald (himself) acknowledged that, by the time he received the briefing note, there was nothing that remained for the DPI to advise him on, except to confirm that certain formal steps had been taken. Mr Macdonald's appreciation of this appears from the following exchange:

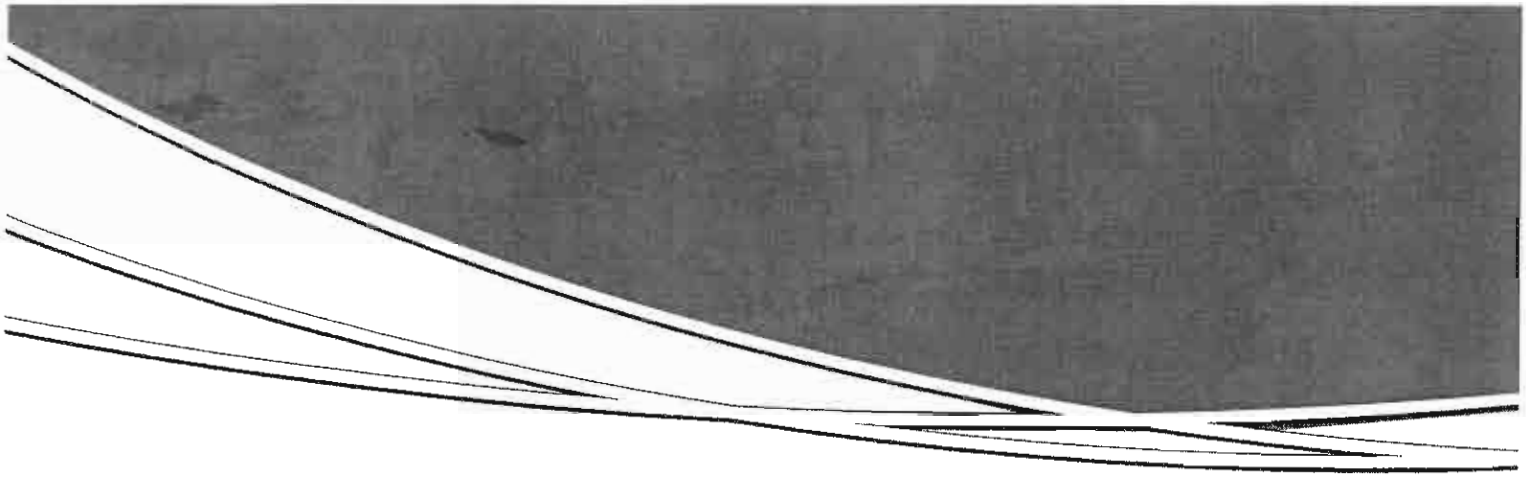
> *...there was nothing to advise you on. Every - all the policy decisions had been taken by the time you got this briefing note?---Well let's hope so this is the 12 December.*

Thirdly, there was nothing in the briefing note that could have led Mr Macdonald to believe that the DPI was approving the policy reasons for taking the course of directly allocating the EL.

Fourthly, by the time the briefing note arrived, Mr Macdonald had made arrangements for a dinner at which the signing would take place. The idea that Mr Macdonald had not yet made up his mind about the proposal on receipt of the briefing note is absurd.

Given Mr Macdonald's understanding of the practices and procedures of the DPI, and his knowledge of the facts that had led to the DPI providing the briefing note, he must have known that all the DPI was doing was implementing the decision he had already made, contrary to previous DPI advice. Mr Macdonald gave the following evidence about his understanding of the task the DPI was required to undertake after he had invited DCM to submit an offer:

> *Their task - do you, do you dispute that it was their task to do everything practically possible to cause your decision to invite Doyles Creek to submit an offer, an application for a licence, to do everything necessary to effect a grant of the licence?---I think - - -*
>
> *Do you dispute that or not?---No, I think that that, that is the practicality in most circumstances but I was never going to direct in writing the Department to recommend it to me.*
>
> *You never would. I'm sure you weren't going to direct the Department in writing to do that but you knew that because of the existing practice the effect of your invitation was that the Department was now required to do, to*



draw up whatever documents were necessary to effect the grant of the licence?---I think to, to, to - in most cases that would be the case but there was [sic] *areas of this that had to be finalised and so - - -*

Did you explain this to the Department?---No, I didn't explain it.

At the time the briefing note was received, Mr Macdonald had already made arrangements for a celebratory dinner to be held on 15 December 2008, a date that had been set as far back as 26 November 2008. He had, on 5 December 2008, made an offer to DCM. Up to that stage, he had received very strongly worded, consistent and unanimous advice from the DPI that a direct allocation was not preferred. Notwithstanding that advice, he had issued an invitation to DCM, and made the other arrangements for the granting of the EL to occur. It is impossible to accept that, as at 15 December 2008, Mr Macdonald was still waiting to hear whether the DPI had changed its longstanding opposition to the direct allocation, before deciding finally whether or not to sign the EL. That position is absurd, and is rejected.

The briefing note was signed by Dr Sheldrake. He was not asked by Mr Macdonald for any advice on the merits of a direct allocation to DCM. Dr Sheldrake first became aware of the impending grant of the EL in November 2008 and knew almost nothing about the proposal. He was told by Mr Mullard that the minister had determined to make a direct allocation to DCM. He had not seen any of the previous briefing notes and was not himself in a position to offer any advice. So far as he was concerned, the decision had already been made, and all that remained were mechanical steps. Dr Sheldrake never discussed any briefing note with Mr Macdonald or anything to do with DCM, more generally. There was no challenge to any of this evidence and no suggestion that Dr Sheldrake ever offered any advice to Mr Macdonald.

Mr Macdonald's evidence, that he would directly allocate the EL to DCM only with the support of the DPI, is false. That support was never provided but the EL was granted. Mr Macdonald's attempt to associate the DPI with his decision is disingenuous. The fact is, to Mr Macdonald's knowledge, the DPI's opposition was so strong that he had to, secretly, go behind the back of the DPI to issue the invitation to DCM to apply – even though this, to the knowledge of the senior DPI officers, had never been done before.

Chapter 29: The meeting at Catalina's Rose Bay restaurant on 15 December 2008

Mr Macdonald asserted that the dinner on 15 December 2008 at Catalina's was arranged for the purpose of signing the EL deed in front of Chinese businessmen. He said that Catalina's was chosen specifically for the purpose of impressing the Chinese businessmen.

On 12 December 2008, Mr Maitland sent an email to Mr Gibson advising him that the Chinese businessmen would no longer be available to attend the dinner on 15 December 2008. Regardless of this, Mr Maitland confirmed with Mr Gibson that the venue would be the Prime Restaurant, which had previously been mooted as the venue.

The venue, however, was changed to Catalina's, and a booking in Mr Macdonald's name for eight people was made by Mr Macdonald's private secretary. Mr Gibson said that Mr Macdonald chose the venue.

Mr Macdonald attended the meeting along with Mr Maitland, Mr Ransley, Sasha Macdonald (Mr Macdonald's daughter), Mr Gibson and Jason Bartlett (Mr Macdonald's senior media officer). Mr Gibson said that Mr Macdonald "was very intent on, on going there and he wanted to meet them there and he was almost, he was insistent upon it". Mr Gibson agreed that Mr Macdonald wanted to make an occasion of the signing of the EL deed. He agreed that, ordinarily, such documents are signed in the minister's office.

Mr Macdonald denied that the reason he signed the EL deed at the restaurant was because he liked to be wined and dined. He said, in effect, that he would be working at the restaurant. It is difficult to see what work Mr Macdonald engaged in at the restaurant, other than applying his signature to a document.

Mr Macdonald said that he did not consider it inappropriate that Mr Ransley, who benefited from his decision to grant the EL, should pay for the meal. The meal, itself, was costly and included very expensive wine.

Despite Mr Macdonald's denial, the Commission finds that the dinner at Catalina's was a celebratory dinner.

Mr Macdonald was celebrating his conduct in directly allocating the Doyles Creek EL to DCM. Mr Macdonald explained this by saying, "a lot of people had wanted a training mine for 20 years and it was finally being delivered". It seemed from Mr Macdonald's attitude that he had achieved a triumph, implicitly against opposition. But, in truth, all he had done was to exercise his discretion in favour of DCM and his mate, Mr Maitland, contrary to the continuous, unwavering and direct opposition of the DPI, and he had achieved the ends he desired in ways that were fundamentally contrary to accepted practice. The only opposition that he had confronted was that of the DPI, and he had achieved his ends by going behind its back.

Immediately after the grant of the EL, Mr Lewis, who became a director of DCM on 26 September 2009, was asked by Mr Ransley to prepare a revised assessment of the tenement reserves, for the purpose of investor discussions. Mr Lewis's email of 24 December 2008 stated, "our original tonnage estimate was based on 2 target seams and we were conservative on the overall tonnage as we only wanted to indicate that we had sufficient resource to justify the mine".

A media release about the EL was issued by the minister's office on Christmas Eve in 2008. The timing of the release, and the fact that it was initially intended to be released only to the *Financial Review* and *Newcastle Herald*, together with a contemporaneous email from Mr Bartlett, suggests that there was a formed intention within the ministerial office to avoid the announcement getting significant public attention. Mr Macdonald was "putting out the garbage", a media term for releasing information in a way that is likely to garner little attention.

Chapter 30: Mr Maitland obtains further letters in support of the "training mine"

Prior to applying for the EL, Mr Maitland continued to gather letters in support of the proposal.

Mr Maitland attempted to obtain a letter from a member of the Jerrys Plains Minewatch Committee (an informal group of local community members who were gathering information about the expansion of coal mines in the area) to the effect that the community was in favour of the establishment of a mine at Doyles Creek. The facts and circumstances relating to this unsuccessful attempt are dealt with in detail in chapter 36.

The WRHS provided a letter of support dated 24 September 2008, which was signed by Richard Jones, (general manager) and Cliff Marsh (chairman). Mr Jones said that the letter was written at Mr Maitland's request and agreed that he was, to a significant degree, motivated by the possibility of a financial return to the WHRS and the possibility that a helicopter flight simulator might be built. The letter made no mention that the WRHS contemplated receiving any share in the profits of any mining project.

The University of Newcastle provided a letter of support dated 29 September 2008. While it was signed by Professor Nick Saunders (vice chancellor), Dr Johnson drafted the letter. Dr Johnson agreed that parts of the letter overstated the nature of the collaboration between DCM and the university. He told the Commission that one of the reasons for the university's support was an expectation of financial assistance from DCM for bursaries. This expectation was not referred to in the letter, and Dr Johnson agreed that it should have been.

The Retired Mineworkers Association (RMA) provided a letter of support dated 5 September 2008, signed by its president, Merv Mahon. The RMA allows people formerly employed in the mining industry to keep in touch and work on community projects. Mr Mahon had known Mr Maitland since 1998 and had asked for his assistance from time to time concerning issues affecting the RMA. He recalled having a conversation with Mr Maitland on a social occasion with Mr Maitland about the project and this was the "briefing" referred to in his letter. Mr Mahon agreed that he was not given any substantive details about the project, including its commercial and training aspects.

The Hon Greg Combet AM MP, the federal member of Parliament for Charlton, wrote a letter of support to Mr Macdonald dated 24 September 2008. Prior to entering Federal Parliament in 2007, Mr Combet had a close association with Mr Maitland over an extended period of time through their shared history as union officials. Mr Combet recollected that, on one or two occasions, Mr Maitland spoke to him about ResCo developing an underground training mine in the Hunter Valley for the purpose of alleviating skills shortages in the mining industry. He said that he agreed to send a letter as he was a supporter of vocational education and training. Mr Combet gave evidence to the effect that, in his dealings with Mr Maitland, there was no discussion about the detail of the intended project, including as to its commercial and training aspects. Mr Combet told the Commission that, from what he now understood, the nature of the project was completely different from what he had been told by Mr Maitland.

The legal firm Slater & Gordon provided a letter of support dated 26 September 2008, signed by Stuart Barnett, who is a solicitor employed at its Newcastle office. A major part of the work performed by the Newcastle office related to the coal mining industry. Mr Barnett recalled receiving a telephone call from Mr Maitland in 2008 during which Mr Maitland told him about the training mine proposal. He, too, was not given any substantive details about the project. Mr Barnett told the Commission that, although he had not been provided with details about how the training facility would operate, he inferred from what he had been told that the training facility would increase safety. He assumed that most of the profit would go to pay for the training facility. Mr Maitland wanted him to write a letter and he agreed to do so.

The Hon Kerry Hickey also provided a letter of support. He was the state member of Parliament for Cessnock

between 1999 and March 2011 and minister for mineral resources between April 2003 and August 2005. Mr Hickey told the Commission that, on his way to a meeting, he was "buttonholed" by one of Mr Macdonald's staffers, whom he identified as John Graham. Mr Graham asked him to see Mr Macdonald. Mr Macdonald then asked him for a letter of support, which Mr Hickey agreed to provide.

Submissions on behalf of Mr Macdonald maintained that Mr Hickey's version of events should be rejected. One of these being that, at the relevant time, Mr Graham had ceased to work for Mr Macdonald. Mr Macdonald's own evidence on the topic was somewhat equivocal. While the Commission considers that Mr Hickey was an honest witness who was trying to give evidence to the best of his ability, in light of the confusion as to Mr Graham's presence and the state of the evidence it is unable to form any conclusion as to the circumstances in which Mr Hickey's letter came to be written.

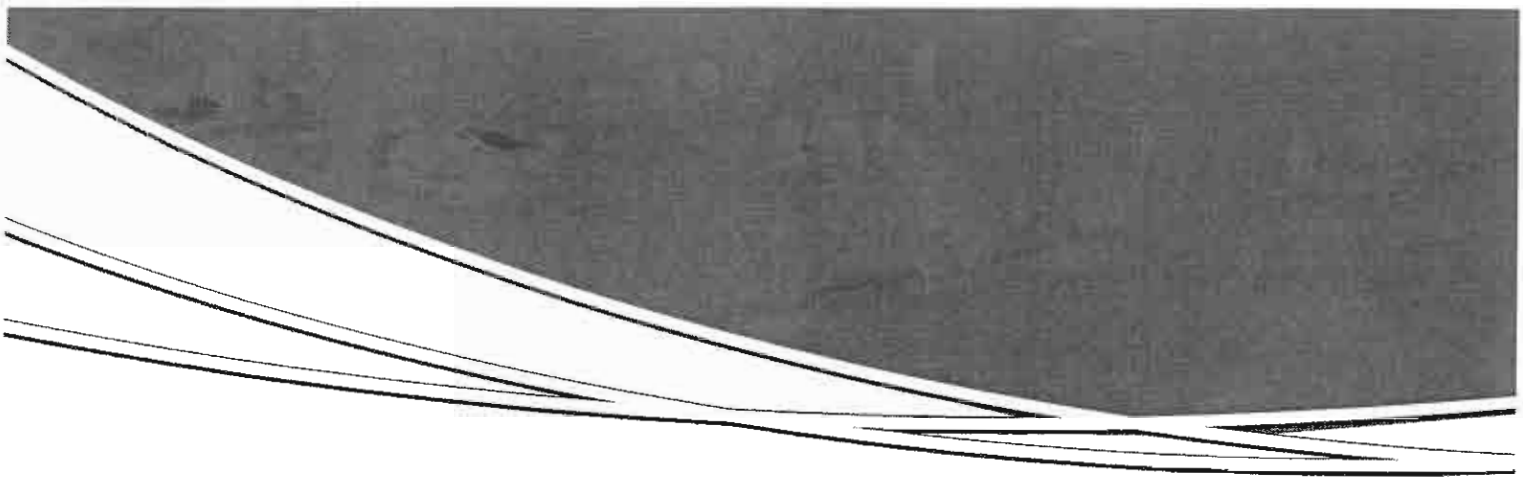
Robert Coombs provided a letter of support. He was, at the time, the state member of Parliament for Swansea. Prior to entering Parliament, Mr Coombs had been a union official and had come to know Mr Maitland as a fellow senior union official. Mr Coombs told the Commission that Mr Maitland said that, although it was intended the mine would operate on a commercial basis, its emphasis would be on training new miners. He was also told that there was community support for the project. Mr Coombs was not given any details as to the proposed project, either as to the training or commercial aspects. At the public inquiry, Mr Coombs agreed that Mr Maitland had misled him as to the true nature of the project and told the Commission that, if he had known that training miners was only a minor part of the proposed project, he would not have written the letter.

Skills DMC (one of 11 skills councils established by the Federal Government) provided a letter of support dated 29 September 2008. The signatory of the letter was Ray Barker who had been involved with the trade union movement since 1965, had been involved with the CFMEU and had known Mr Maitland since 1980. Mr Barker had asked Mr Maitland to speak at a Skills DMC conference held in August 2007. On that occasion, Mr Maitland asked Mr Barker if Skills DMC would support the establishment of a training mine in the Hunter Valley. He forgot about that conversation until Mr Maitland phoned him the following year to renew his request for a letter of support.

Mr Barker explained that he thought the letter was being sought for the purpose of obtaining funding from the NSW Government and he did not understand it was to be used to support an application for an EL. He told the Commission that, had he known the letter was required for such a purpose, he would not have written it as it was not within the remit of Skills DMC. An email received by him contained a fact sheet referring to such an application, but he did not recall reading it. In any event, he, too, was not provided with any substantive details about the project by Mr Maitland either in conversation or in the materials he was emailed. His letter was based on the template emailed him by Mr Maitland.

The Newcastle Trades Hall Council (NTHC) wrote an undated letter of support signed by Gary Kennedy (secretary). Mr Kennedy told the Commission that he was approached by Mr Maitland, who he knew as a colleague in the union movement, in mid-2008. Mr Maitland gave a presentation and asked for the support of the NTHC. Mr Kennedy did not ask Mr Maitland many questions about the project because he "trusted him implicitly based on his history". From what he was told by Mr Maitland, Mr Kennedy believed that the training facility would be fairly large and only a small amount of coal would be produced to fund the training facility. Although challenged on that aspect of his evidence, he was steadfast in his position. He told the Commission that, if he had known Mr Maitland held a financial interest and the proposal involved a large commercial mine, he would not have written the letter.

A letter of support was requested by Mr Stevenson from Mr Pike, the chairman of Sparke Helmore, a firm of solicitors of which Mr Stevenson was a partner. Mr



Stevenson provided Mr Pike with a pro forma letter settled by Mr Ransley. Mr Stevenson did not disclose his significant financial interest in the venture to Mr Pike and did not provide Mr Pike with any details of the commercial aspects of the project. Had Mr Stevenson disclosed his interest, Mr Pike may not have written the letter. In any event, the views of Sparke Helmore could not have been thought to be material.

Kay Sharp signed a letter of support on behalf of the HVTC. A significant motivation for Ms Sharp (and the HVTC) in so doing was the understanding that Ms Sharp had formed that, should a mine be established at Doyles Creek, HTVC would be able to relocate its existing operation from a heritage-listed building in Maitland to the Doyles Creek site. It is not clear how she came by that understanding, which does not seem to have formed part of any document produced to the Commission. She was also aware of, and motivated by, the fact that financial support was offered to HVTC for its participation in the project. Thus, the support of HVTC can be seen to be motivated by a direct financial interest in the project, and an apparent misunderstanding on Ms Sharp's part as to its ability to relocate its operations to a new facility.

The letters of support were requested solely from persons whom Mr Maitland knew would be likely to have a positive view about the general idea of establishing a training mine. None of the signatories was given details of the particular mine (or project) contemplated by DCM and none of the letters can be taken to support the establishment of the particular mine that DCM had in mind (in particular, as set out in the Submission). Most of the letters were obtained in circumstances where the true purpose of the mine was concealed from the signatories, or where false statements about the mine were made to the signatories to induce them to sign, or where the signatories had ulterior motives in signing. The letters cannot be regarded as coming anywhere near establishing that the coal mining industry supported even the general idea of establishing a new training mine at Doyles Creek, let alone the particular mine that DCM intended to construct. The true purpose of the letters was to provide further political cover to Mr Macdonald.

Chapter 31: Events in 2009

Early in 2009, Mr Maitland, Mr Chester and Mr Poole went to China to seek investors. For that purpose, during January 2009, Dr Palese was asked to prepare a new report as to the reserves. He had no more information available to him than had been available in January 2007. In 2009, however, he modelled other seams, not just the Whybrow and Redbank Creek seams. On this occasion, he was able to derive a total resource of 358.5 million tonnes and total inferred coal resources of 287.6 million tonnes. And, in April 2009, he prepared a JORC-compliant report for the resource, again without any additional data, which showed total inferred coal resources of 247.1 million tonnes.

Throughout 2009, various potential investors were courted by DCM. Ultimately, in late 2009 and early 2010, a backdoor listing was pursued through a reverse acquisition of a listed shelf-company, known as Supersorb Environmental NL, which was renamed NuCoal Resources NL. Under that process, NuCoal Resources NL acquired all of the shares in DCM, in exchange for which all existing shareholders were issued with 470 million shares in NuCoal Resources NL. A further 50 million shares were offered to the public at a price of 20 cents, so as to raise $10 million in working capital. The pro forma balance sheet in the prospectus valued DCM at $94 million, close to Mr Mullard's off-the-cuff estimate of the value of the EL.

The persons whose actions are discussed in this report made substantial profits through their investment in DCM, as can be seen from Appendix 4.

Chapter 32: Did Mr Macdonald allocate the EL to DCM for the public good and political benefit?

Mr Hale submitted that, "Mr Macdonald's reasons for making the decision were the public good and the political benefit".

Political benefit

Mr Hale submits that, "Mr Macdonald saw the political benefit of a training mine in winning seats at the next election in 2011". The Commission has dealt with this argument above, and has rejected it for the reasons stated.

The Commission reiterates that, during Mr Macdonald's evidence at a compulsory examination conducted before the public inquiry (the relevant parts of which were put into evidence at the public inquiry), he was asked why he had not adopted a competitive process for the allocation of the EL. The sole reason he gave was that he believed "that the proposition had a public good". He did not testify that his reasons included some political benefit to him or his party in the 2011 election or at all.

Mr Macdonald asserted in the public inquiry that a competitive process would have taken too long to enable him to make political capital out of the training mine at the 2011 election. As the Commission explains elsewhere in the report, there was no significant time difference between allocating the EL through a competitive tender process and the time, in fact, taken to allocate the EL directly. Further, Mr Macdonald's assertion that he needed the allocation to take place quickly, is quite at odds with his conduct. From the time that DCM first applied for the EL, he allowed the process to proceed at a leisurely pace. In addition, irrespective of the method by which the EL was granted, the training mine will not be in operation to any meaningful extent until long after a mining lease is granted (should that occur). It was always known that this would be well past the 2011 election. In addition, at his compulsory examination (all relevant parts of which are in evidence), Mr Macdonald did not testify that his decision was influenced by the fact that a competitive process would take too long a time.

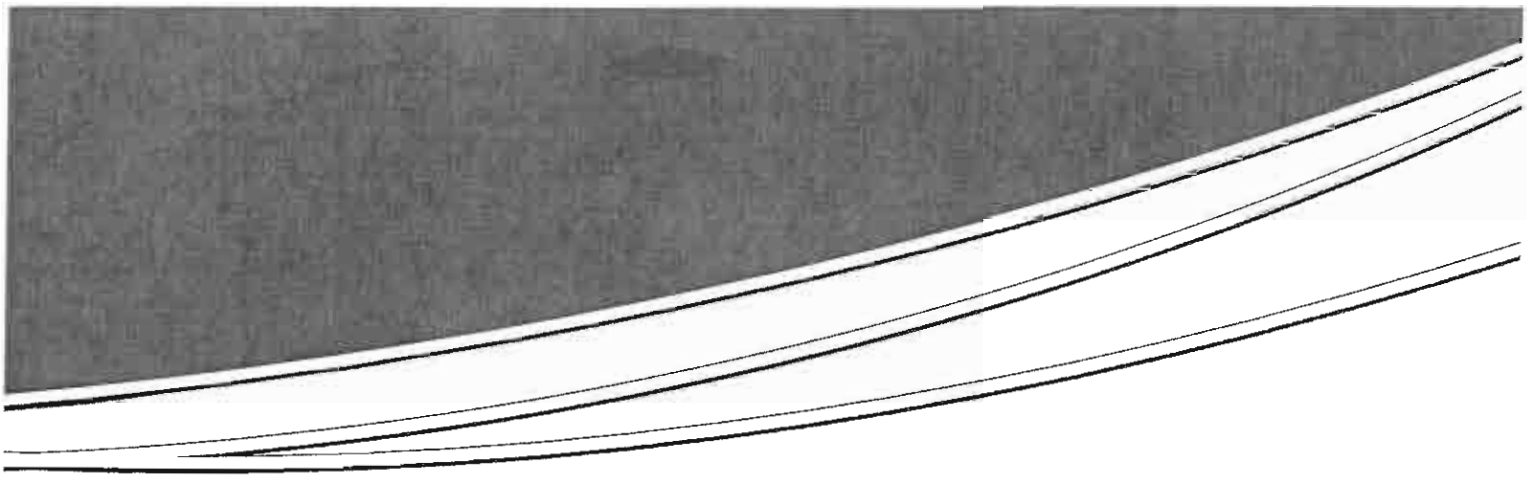
The Commission finds that the political benefit of a training mine in winning seats at the election in 2011 was not a reason that Mr Macdonald had in mind when he rejected the option of allocating the EL through a competitive tender process. The Commission does not accept Mr Macdonald's testimony at the public inquiry that a perceived political benefit at the 2011 election was a factor that influenced him.

Public good

The Commission has pointed out elsewhere in the report that the availability of option (2), alone, as suggested by the DPI in its draft briefing note of 27 May 2008, defeats Mr Macdonald's "public good" argument. That option was "[a]n allocation of the area on a competitive basis with a requirement to establish a training program as part of any allocation".

The adoption of option (2) would have brought significant benefits to the state. Had Mr Macdonald adopted this option, he would have achieved his aim as regards the establishment of a training mine, but with the difference that there would have been a public tender for the tenement on the basis that the successful tenderer would have to construct a training mine. Competition for the tenement on the basis that each tenderer would have had to undertake, in its bid, to construct and operate a training mine, and to provide, in its bid, details of such a training mine, would probably have resulted in a better training mine being proposed than the tiny training mine described in the Submission by DCM.

Moreover, option (2) would have brought with it substantial benefits that were lost by the direct allocation. The first is the additional financial contribution that would have been attracted by a competitive process. Mr Macdonald said that the climate had changed by August 2008, and he did not think that any additional financial contribution would have been produced. But the Commission does not accept that answer. There is no contemporaneous support



for the notion that Mr Macdonald believed or took into account a possible future decline in the value of ELs. He certainly took no advice from the DPI on the topic. And the evidence in the public inquiry raises a real question as to whether there was any such decline in late 2008 or subsequently. The experience in respect of the Ridgelands EL, upon which Mr Macdonald placed some considerable reliance, does not support his theory. That tenement was tendered in late 2009 for an additional financial contribution of $95 million at the time of consent, and further payments totaling $155 million at later stages.

Under a competitive process, the state is assured of a financial contribution under the Guidelines when the EL is granted. On a direct allocation, it can claim that contribution only if a mining lease is granted, a process not likely to occur within five years. In the case of the Doyles Creek EL, Mr Macdonald, when he decided on a direct allocation was, at the very least, foregoing certainty in regard to payment of any additional financial contribution that might be offered.

Mr Rees' evidence in regard to the government's need for funds at the time of the direct allocation is highly pertinent to this issue. He testified that, at the time in question, the government was searching for "all possible sources of revenue that were politically sustainable" and "those areas where we could increase revenues". He said that budget questions were "a first order priority". The Commission has accepted Mr Rees' evidence.

The matters enumerated in this chapter weigh heavily against Mr Macdonald having a genuine belief that the direct allocation was for the public good. Other factors pertinent to this issue are outlined in the next chapter.

Chapter 33: Aberrant conduct by Mr Macdonald

Mr Macdonald accepted that, as at 27 May 2008, the Submission was defective. He said it was "not up to scratch" and it "needed to be more sufficient". He also doubted whether it had wide industry acceptance. Mr Macdonald said that, in the light of these concerns, he did not believe that the project was at a stage where he could allocate the EL. He accepted that it would have been "irresponsible" of him to do so, but added the proviso, "until you developed the strong conditions".

So, Mr Macdonald sought to explain his direct allocation, in spite of a Submission so poor that it would have been irresponsible of him to have relied on it, by reference to the subsequent insertion of "strong conditions" in the EL.

Leaving aside the fact that, whatever adjective one attributed to the conditions, "strong" would not be one of them, Mr Macdonald's passivity and omissions in regard to the conditions are striking.

Mr Macdonald did not communicate to any DPI or ministerial officer after 27 May 2008 that he shared the DPI's concerns about the inadequacy of DCM's proposal, and he did not tell any such officer that he believed that those concerns should be addressed by the formulation and inclusion of conditions in the EL. Indeed, by 21 August 2008, when he granted DCM consent to apply for the EL, he had had no discussions with DPI officers about the possible content of the conditions. In fact, Mr Macdonald never had discussions with DPI officers about the extent to which, if at all, any conditions in the EL could legally require DCM to build a training mine. Indeed, at no stage whatsoever in the process up to, and including, the granting of the EL to DCM did Mr Macdonald give specific instructions about the content of the conditions.

Taking at face value Mr Macdonald's assertion that it would be irresponsible for him to allocate the EL directly without "strong conditions", his failure to give instructions, whether at an early stage or at all, for the drafting of conditions, is impossible to comprehend. This conduct is made even more bizzare by his promise to grant the EL before even seeing the conditions.

The strong inference that arises from this conduct, coupled with his failure even to consider a grant under the DPI's option (2), is that Mr Macdonald desired and intended to grant the EL to Mr Maitland's company, come what may.

There are other facts that support such an inference.

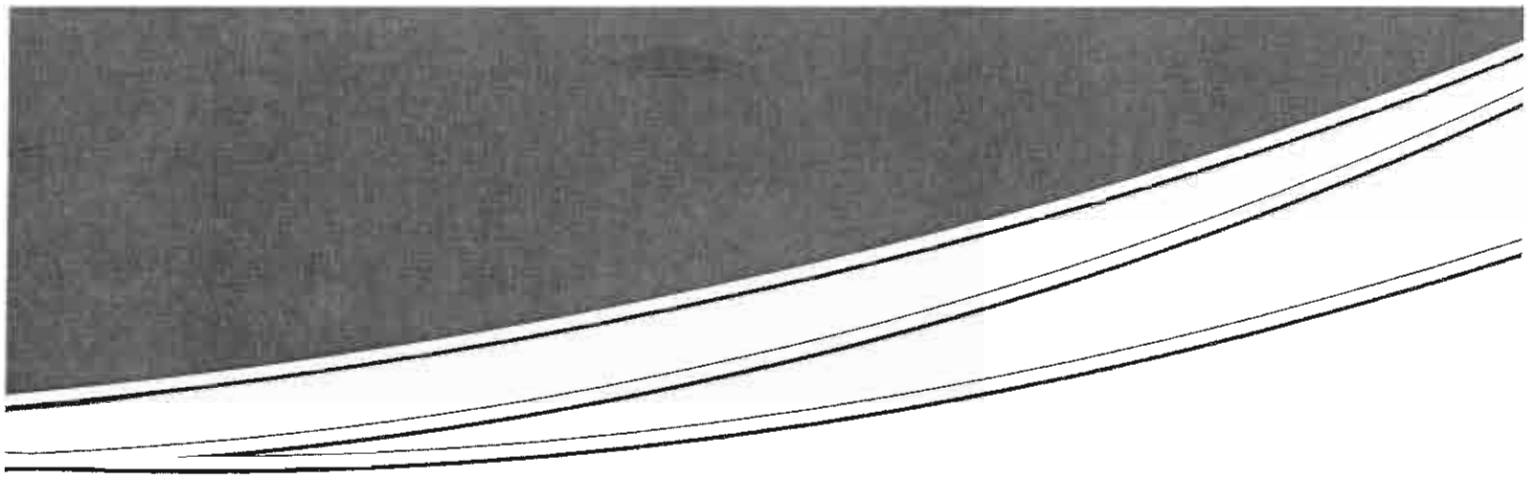
First, there is Mr Macdonald's curious evidence about announcing eight conditions at the Strangers' Dining Room. As outlined previously, none of the DPI's criticisms of the Submission in the draft briefing note of 27 May 2008 was covered by the alleged eight conditions. The Commission has found that it does not believe Mr Macdonald's evidence about the eight conditions, but one must ask: why did Mr Macdonald give this false evidence? The Commission infers that he was attempting to give legitimacy to a decision that he knew was partial.

Then, there is the considerable body of evidence that is consistent with a blinkered, determined intention on Mr Macdonald's part to give the EL to DCM, no matter what, and, at times, to conceal what he was doing from the DPI. The following evidence falls under this umbrella:

a) Mr Macdonald's failure to take advice from bodies he, himself, had set up for that very purpose – even when the DPI was urging him to do so.

b) Mr Macdonald's participation in the strategy to prepare the ground for the granting of an EL; that is, the procuring of the letters, as well as advice from the DPI, all with similar content, none referring to the training mine, but all referring to a skills shortage.

c) Mr Macdonald's willingness to rely on the letters of support that were obtained from a particular segment of the community – those who supported the training mine – even though no attempt had been made to



canvass the views of those who might have had a different view.

d) Mr Macdonald's failure to take any account of (and apparent lack of concern about) the DPI's report to him concerning DCM's proposed minuscule training mine and coal resources to be used for the training mine, and the plain intent on the part of DCM to operate a commercial mine and exploit profitably the balance of the coal found on the tenement.

e) Mr Macdonald's failure to take any account of (and apparent lack of concern about) the DPI's draft briefing note listing the serious problems it had with the Submission (none of which was directly addressed in the eventual conditions incorporated in the EL).

f) Mr Macdonald's positioning of DCM as a provider of funds to the University of Newcastle, the likelihood of which depended upon Mr Macdonald granting DCM the EL.

g) Mr Macdonald's extraordinary conduct in surreptitiously obtaining from the DPI a pro forma letter of invitation to apply for an EL, when this was fundamentally contrary to long-established practice.

h) Mr Macdonald's extraordinary conduct in issuing the letter of invitation without the knowledge of the DPI, again fundamentally contrary to long-established practice.

i) Mr Macdonald's conduct in ignoring the budgetary needs and expectations of the government, as explained by Mr Rees.

j) Mr Macdonald's conduct in failing to refer the application to the Cabinet or the Cabinet Budget Sub-committee.

k) Mr Macdonald's conduct in holding the media release until it could be put out on Christmas Eve, so as to minimise the amount of media and public attention.

l) Mr Macdonald's conduct in carrying out the allocation contrary to the DPI's recommendation, which was continuously expressed throughout the process (this is the only time Mr Macdonald allocated a tenement contrary to the DPI's advice – leaving aside the process adopted in those allocations that are the subject of Operation Jasper).

m) Mr Macdonald's conduct after May 2008, in keeping the DPI almost entirely in the dark as to what he was doing, specifically:

- it was unaware of the dinner at the Strangers' Dining Room in June 2008,
- it was not informed about the conditions that Mr Macdonald had purportedly designed and imposed on that occasion,
- it was not involved in, or aware of, the campaign for industry and community support, which was conducted by the proponents at Mr Macdonald's suggestion, with his office as the point of communication,
- it was not invited to or told about the extraordinary events between 14 and 21 August 2008,
- it was not informed about the consent letter until it was produced by the applicants,
- it did not become aware of the proposed delivery of the letter of offer in December 2008 until very shortly before it occurred, when it was required to have the conditions concluded.

n) Mr Macdonald's conduct in participating in lunches and dinners, paid for by directors of DCM.

o) Mr Macdonald's conduct in arranging the dinner at Catalina's to celebrate the direct allocation by him to DCM of the EL against the recommendations of the DPI.

The Commission also has regard to the following:

a) At the time, coal ELs were "hot property".

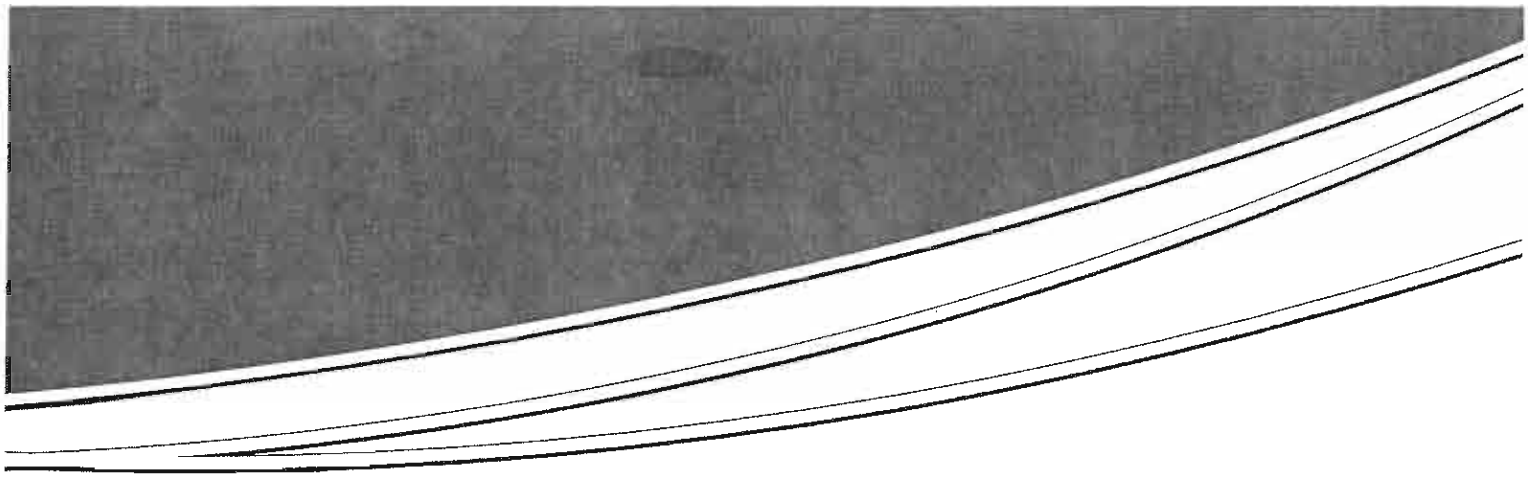
b) Mr Macdonald knew that ELs were valuable assets, which were potentially enormously profitable to the holders of them.

c) Mr Macdonald also knew that there was significant revenue to be earned by the government through inviting someone to apply for an EL.

d) At the very time of the events in question, Mr Macdonald was pushing the DPI to find areas for coal exploration of all different sizes in order to raise additional sums of money. That is, additional sums of money for the state as a means to try to meet budget shortfalls and also to retain some money by the DPI to avoid budget cuts and job losses. He was pressing the DPI, in this regard, right at the very time he got a briefing note indicating that Doyles Creek might be considered for a competitive process.

Given the above, a direct allocation of a potentially significant EL was an extraordinary step to take. The Commission rejects the explanations that Mr Macdonald has sought to give for his conduct in directly allocating the EL to DCM. The Commission finds that they are false.

Accordingly, the Commission finds that Mr Macdonald desired and intended to grant the EL to DCM, and nothing that he did in that regard had to do with his conception of the public good.



Chapter: 34 Partiality

Why, then, did Mr Macdonald confer this enormous benefit on DCM? The Commission finds that he did so to benefit Mr Maitland, a man with whom he had a close professional relationship, to whom he was closely politically aligned, to whom he was indebted and who was a "mate".

Mr Ransley gave Mr Maitland the job of using his relationship with Mr Macdonald to influence him to allocate the EL directly to DCM. The facts demonstrate that Mr Maitland performed the task he had been given.

The Commission recognises that, to the dispassionate observer ignorant of the relevant facts, the benefit that Mr Maitland obtained (extremely large as it was) might be thought to be out of proportion to someone merely wishing to do his mate a favour.

The Commission has taken this into account in making its findings. The Commission is persuaded by the strength of the inferences that arise from the matters recounted above, and also by the character and personality of Mr Macdonald, as it has manifested itself in the Operation Jasper and Operation Acacia segments of the public inquiry.

Mr Kirk submitted that, "if friendship or loyalty had been Mr Macdonald's motivation, it would not amount to corrupt conduct". This submission is fundamentally wrong. If a Cabinet minister makes a decision to benefit an individual, being motivated by friendship or loyalty, he is doing so partially and not in discharge of his duty to the state to act impartially. Mr Kirk's submission implies that a Cabinet minister can make decisions to benefit his personal friends merely because he likes them. This is an absurd proposition. Mr Kirk submitted that political considerations are not legally prohibited. That may be accepted. But Mr Macdonald did not allocate the EL to DCM for political considerations. He did so to benefit his friend, Mr Maitland. That is an entirely different kettle of fish.

Mr Macdonald was a person who liked to use the power and authority of his position to help people he liked, people who were his friends. This is what he did with members of the Obeid family, particularly Edward Obeid Senior and Moses Obeid. What he did in Operation Jasper was a blatant misuse of power, power that was abused to confer tens of millions of dollars of benefits on the Obeid family. This is set out in the Commission's report on Operation Jasper. There is little, if any, difference in principle between that conduct and what the Commission finds Mr Macdonald has done in the events investigated in Operation Acacia. He has used the power and authority of his position to help his friend and mate, Mr Maitland.

Mr Maitland testified that, at his initial meeting with Mr Macdonald on 19 January 2007, he told Mr Macdonald that ResCo was a "start up company" and that he, Mr Maitland, along with some Newcastle business people, was starting it up. He told Mr Macdonald that he was the chairman of ResCo. Mr Maitland accepted that, at that point in time, ResCo was an unknown company and had no business and no employees save for himself as chairman. He said that he was not sure if he had told Mr Macdonald that he had been granted 5% equity in the company, but did not think that he had so informed Mr Macdonald.

Mr Maitland met with Mr Macdonald on 19 January 2007 in an attempt to obtain Mr Macdonald's support for a direct allocation of the Doyles Creek EL on the basis that DCM would build and operate a training mine. Mr Maitland used a sales pitch in an attempt to persuade Mr Macdonald to support his proposal. The fact that Mr Maitland was a long-term mate and political ally of Mr Macdonald facilitated his ability to make the sales pitch. The sales pitch was that a training mine would be to the considerable benefit of the people of NSW. But, there was an additional and powerful factor that motivated Mr Maitland in making his sales pitch. That was the likelihood of him making millions of dollars were DCM to be allocated, directly, the EL. The propriety of Mr Maitland not disclosing to Mr Macdonald that he had a share in DCM and stood, personally, to make a fortune, were Mr Macdonald to approve the direct allocation, is highly questionable. One might think that that would be a very good reason for Mr Maitland to make such a disclosure, but – to the extent set out in the previous paragraph – he did not recall doing so.

Mr Macdonald understood that Mr Maitland was the chairman of DCM but asserted that he had no idea that Mr Maitland had shares in DCM.

Counsel Assisting submitted that Mr Macdonald had to know that those who stood behind DCM stood to profit from the EL. Mr Hale, in a strange submission, said that it was not open to Counsel Assisting to make this submission and said that it should be withdrawn. But when Counsel Assisting asked Mr Macdonald if he knew that the proponents were intending to profit from the commercial mine, Mr Macdonald replied:

> *Well, down the track if a mine was ever got going someone would obviously make some money, that happens with every proposition.*

Counsel Assisting then asked: "The exploration licence could make them a lot of money, couldn't it". Mr Macdonald replied, "Potentially".

Later, Counsel Assisting put to Mr Macdonald:

> *... You surely were not so noïve as to be completely obtuse to the prospect that people were going to make a lot of money out of this coalmining tenement that you were allocating?*

Mr Macdonald eventually replied, that Counsel Assisting's "conclusion is accurate".

These answers alone justify Counsel Assisting's submission.

While Mr Macdonald accepted that the EL could make the proponents a lot of money, Mr Macdonald denied knowing that Mr Maitland would make money were he to grant the direct allocation. He did, nevertheless, acknowledge the possibility that, if DCM obtained the EL, Mr Maitland would be the chairman of a very successful coal company.

Mr Macdonald agreed that there was "obviously" the potential for persons "to gain a benefit out of" the grant of the Doyles Creek EL. This is no more than common sense.

Mr Macdonald asserted that he did not apply his mind to whether Mr Maitland was a shareholder in DCM. He said, "I didn't consider that at all and I don't, I had no idea of what, what real arrangements he had". Had he known of a possible shareholding by Mr Maitland he said he would have become aware of a political difficulty. He said, "But the plain fact of the matter is I thought that, that it would, it would be politically difficult going forward".

When asked for the reasons that would give rise to the "problem" he had mentioned, Mr Macdonald said, "there would have been a feeling that someone in the Labor movement, Union movement, had made a gain in this area and that would have attracted considerable public attention and that has happened in just about every case that I know of where Unionists in particular have through their post work, you know, post Union field who have, who have gained a benefit out of a decision that might have been made by a Labor Government".

In this reply, Mr Macdonald appears to be dealing with the issue on the basis of a hypothetical situation in which Mr Maitland held shares in DCM, but not the situation that, in fact, he was presented with.

Mr Macdonald seems to be raising the problem of "someone in the Labor movement" gaining a benefit as a factor that supports his evidence that he did not know about Mr Maitland's shareholding (on the basis, presumably, that had he known, he would not have made the allocation). But the Commission is not persuaded by Mr Macdonald's reasoning. As mentioned above, the DPI had expressly warned Mr Macdonald about "probity issues" were he to make a direct allocation, and the perception of impropriety (without there being any knowledge of Mr Maitland's shareholding) was held by a number of persons to whose evidence reference has been made in this report. Notwithstanding these matters, Mr Macdonald ignored the issue of probity and, indeed, took measures to achieve the end he desired by concealing from the DPI, as far as possible, what he was doing in regard to the invitation to apply, and causing the media release relating to the direct allocation to be made at a time when it could be expected to achieve the least possible publicity.

Both Mr Macdonald and Mr Maitland declined to concede that Mr Maitland told Mr Macdonald that he held shares in DCM. It was in the interests of each to give such evidence, and the Commission does not believe it. That credibility finding, of course, does not establish affirmatively that Mr Macdonald knew that Mr Maitland held shares in DCM. In fact, there is no direct evidence that establishes affirmatively that Mr Macdonald knew of Mr Maitland's shareholding.

Nevertheless, the Commission is able to make findings, based on inference, relative to this issue.

As at August 2008, Mr Maitland had been requesting Mr Macdonald, during a period of more than a year, to grant DCM the EL. As mentioned, this was Mr Maitland's specific duty imposed on him by Mr Ransley, and he did his best to fulfil it. Mr Maitland was the person who, on DCM's behalf, had first raised the direct allocation with Mr Macdonald and, since then, had been DCM's point of contact with Mr Macdonald. Mr Maitland, as the chairman of DCM, had sat with Mr Macdonald at meetings and over meal tables throughout the application process, lobbying for and seeking the direct granting of the EL.

Mr Maitland was regarded by the minister's staff as the person in DCM who spoke on its behalf and as the person to whom they should speak concerning information about the application process. As is manifest from the

history of the transaction recounted in this report, the communications between Mr Maitland and the minister's office, including Mr Macdonald himself, were frequent. In fact, so frequent that a regular communication channel was opened up directly between Mr Maitland and Mr Macdonald's office. Mr Macdonald's ministerial staff closely identified Mr Maitland with the application. Mr Macdonald's office is unlikely to have understood Mr Maitland to be so closely connected with the mine without that understanding being shared by Mr Macdonald. Mr Maitland must have been recognised by Mr Macdonald as being a person who exercised considerable authority over the affairs of DCM.

Mr Macdonald did not treat Mr Maitland merely as some sort of lobbyist for DCM. Mr Macdonald positioned DCM so that it would contribute to the funding of the establishment of a chair of geology at the University of Newcastle. He achieved this by inviting Mr Maitland to the meeting with Professor Plimer, Dr Johnson and others. He favoured Mr Maitland (and, thereby, DCM) in other respects as set out previously. Mr Macdonald understood, at least, that Mr Maitland played a key role within DCM, and in that role exercised a high degree of responsibility.

Counsel Assisting submitted that "Macdonald could not have credibly believed that Maitland had no interest in the project and his pursuit of it throughout the relevant period was done as benevolent consultant". In the light of the circumstances set out earlier in the report, there is much to be said for this submission. At the very least, the Commission infers that Mr Macdonald turned his mind to the question of whether Mr Maitland was one of those who stood to benefit financially, were the EL to be granted. Not to have done this would have been contrary to human nature.

Having turned his mind to whether Mr Maitland was a shareholder of DCM, Mr Macdonald may well have asked Mr Maitland if he was a shareholder. Had he asked Mr Maitland, the Commission infers that Mr Maitland would have told Mr Macdonald the truth. There was no reason for him not to do so. Had he not asked Mr Maitland that question, the Commission infers that Mr Macdonald would simply have assumed that Mr Maitland was a shareholder of DCM. As the Commission is unable to find that Mr Maitland told Mr Macdonald that he was a shareholder in DCM, the Commission finds that Mr Macdonald assumed that Mr Maitland was a shareholder. This finding merely reinforces the Commission's finding that Mr Macdonald allocated the EL to Mr Maitland directly because Mr Maitland was his friend and mate.

Furthermore, and in any event, Mr Macdonald would have known that, by granting DCM the EL, he would advance Mr Maitland in his career as chairman of DCM and would confer a real benefit on him.

The power granted to Mr Macdonald under the Mining Act to issue ELs is not unfettered. Mr Macdonald was not at liberty to grant consent to apply for an EL or grant an EL for the purpose of providing an advantage or benefit to a mate and political ally.

Mr Hale submitted that the discretion granted to the minister under the Mining Act may be exercised by the minister "having regard to political considerations and what is considered by the Minister to be the public interest". That may be accepted. But Mr Hale went on to submit, "There is a not a duty to act partially or without bias". If that submission is intended to mean that a minister may decide to allocate an EL directly to a mate, or grant an EL to a mate for the substantial reason that that person is the minister's mate, then that submission is wholly rejected. A decision so made would constitute an exercise of power for an improper purpose.

The Commission accepts that Mr Macdonald genuinely believed that, generally speaking (and in theory), the establishment of a training mine would be to the benefit of the public. Relying on this belief on the part of Mr Macdonald, Mr Hale submitted that to "establish the unlawfulness of a decision on the ground of improper purpose it must be established that the purpose was his [Mr Macdonald's] only purpose, or at least a substantial purpose without which the power would not have been exercised in that particular way". Irrespective of whether this submission is correct, the Commission finds that:

(a) Mr Macdonald's belief that the establishment of a training mine would be to the benefit of the public was not a substantial reason for his decision to allocate the EL directly to DCM

(b) Mr Macdonald's desire to benefit his mate, Mr Maitland, was Mr Macdonald's substantial purpose in making that decision

(c) but for Mr Macdonald's desire as set out in (b), he would not have allocated the EL to DCM.

Chapter 35: Conspiracy

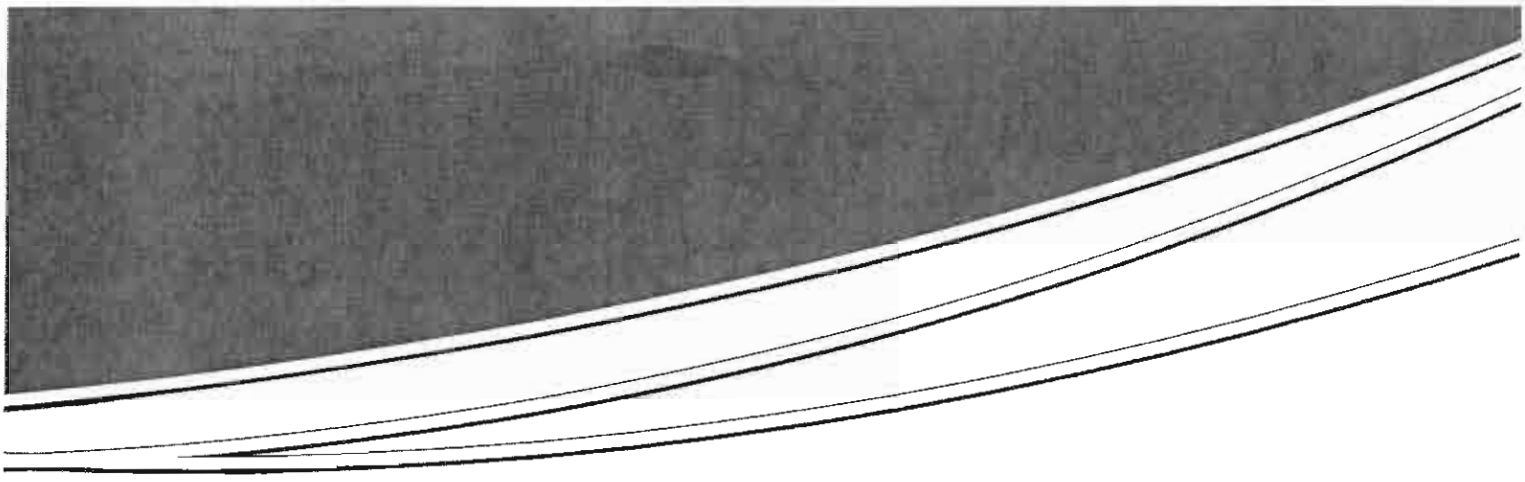
Counsel Assisting has submitted that there was a conspiracy between Mr Macdonald, Mr Maitland, Mr Ransley and Mr Poole for Mr Macdonald to grant an EL to DCM for reasons of partiality.

A key element of Counsel Assisting's contention was that each of Mr Maitland, Mr Ransley and Mr Poole should be held to have been aware that the decision to grant DCM the EL was motivated by partiality on the part of Mr Macdonald. Without that knowledge, the conspiracy alleged by Counsel Assisting could not be established. As to that knowledge, Counsel Assisting summarised the position as follows:

> *...it can be seen that the proponents were all aware that the EL if granted would constitute a valuable asset, which could make each of them a lot of money. They knew that the alternative to a direct allocation to DCM was a tender, for which large amounts of money might be paid by other companies to the government. They knew that they were getting the valuable asset effectively for free – with any payment well down the track after they would already have made a lot of money. They knew that the only justification for a direct allocation wos a significant public benefit, which was constituted in their case by the training mine proposal. They knew, however, that the training mine proposal could not rationally justify the direct allocation, because it did not amount to a significant public benefit, and could not be thought to outweigh whatever financial outcome might be achieved by a tender or EOI process. And they knew that the Department was opposed to the direct allocation (which made sense) but the Minister was in favour of it throughout (which did not make sense). They seemed to know that the tenement would be granted quite early in the process, notwithstanding Departmental opposition, and can be attributed with statements of significant confidence from an early stage. They knew that the process by which the tenement was awarded to them was highly irregular (although they were not aware of all the features which made it so). And they knew that Maitland had a good relationship with the Minister, that the process was a political one which he was managing, and that Maitland's relationship with the Minister was the only possible explanation for what occurred.*

Some of these elements can be accepted. The Commission accepts that the proponents all thought that the EL was worth a great deal of money, and that they were getting it for very little consideration – effectively for free. Mr Maitland expressed a possible value of $20 million to his friend Mr Tudehope during the process, and was involved in preparing documents for investors that would place the value much higher than that (he accepted $50 to $60 million with the potential for more). He accepted that the teaser documents to Chinese investors were placing the value at $150 million towards the end of 2008, and that he was aware that the grant of the EL, if it occurred, would transform his life.

Mr Ransley and Mr Poole also thought the EL would be extremely valuable to them if granted. According to his file note, Mr Ireland was told by Mr Ransley in August 2008, immediately after the consent to apply had been issued, that it was like the company receiving $50 million. Mr Ransley denied Mr Ireland's evidence based on this note, but Mr Ireland's evidence is accepted, and Mr Ransley's denial of it rejected as unbelievable. Mr Ireland's record was contemporaneous, and there is no reason to doubt his corroborative evidence of it. In any event, it is extensively corroborated by other evidence. In June 2008 (before the invitation), Mr Ransley told Westpac bank in a loan application that DCM had a potential value of $100 million, which suggests that the EL had a significant value (even if, as Mr Ransley insisted in evidence, the potential would not be fully realised until there was a proven JORC resource). Before he was aware of that document, Mr Chester gave evidence that, in 2008, figures like $100 million were being bandied about in DCM as the value of the EL. In December 2008, Mr Poole told Westpac bank that, based on Mr Chester's advice, the EL could be worth $100 million, calculated conservatively as $1 per tonne of expected reserve.



Each of them was aware that the valuable asset would come to them free of charge. The cost of the grant was all in the building of a training mine, which would occur well into the future, after the grant of a mining licence, and at a time at which the tenement could itself be used to raise funds from investors. Mr Poole acknowledged that, "none of our payment [for the EI] was up front". He accepted that value would be achieved at the granting of the EL, and that the price to be paid would then be years away and well after the time at which he intended to have sold out of the project. Mr Ransley accepted that, by the time the training mine would be built, the original owners of the company would all be very rich men, and that that was inevitable in December 2008. Mr Maitland had a similar awareness. They all knew that it was likely that they, as proponents, would make a lot of money immediately upon the granting of the EL, and that all the state would get in return was the training mine sometime in the future, paid for by future investors.

Counsel Assisting have also pointed to other features of the process that informed the proponents, such as the fact that the training proposal was very weak and could not have been thought to justify the allocation, that the DPI was opposed, that the process adopted was unusual or aberrant, and that they knew of the relationship between Mr Maitland and Mr Macdonald. The Commission has accepted that Mr Maitland was hired by Mr Ransley with that relationship in mind and was deployed to use that relationship in seeking the EL.

Put together, these factors present a powerful argument for inferring that each of Mr Maitland, Mr Ransley and Mr Poole was aware that the likely explanation for the allocation was partiality on the part of Mr Macdonald. And, if they were fixed with such knowledge at a given point in time, the steps taken by them in pursuit of the granting of the EL thereafter could be characterised as part of a conspiracy in furtherance of a common design.

Nevertheless, the Commission has accepted the submissions made for Mr Ransley and Mr Maitland to the effect that the evidence is insufficient to demonstrate to the high standard of proof that would be required that any of the directors was actually aware that Mr Macdonald was proposing to act with partiality. Critically, it has not been demonstrated that they knew that he was not being persuaded by advice from the DPI or other sources that opposed the direct allocation. They knew that Mr Macdonald had consistently expressed support for the training mine idea since it was first raised with him, and the Commission cannot exclude the possibility that they believed that Mr Macdonald had been persuaded by the concept alone. Because that possibility cannot be excluded as a reasonable explanation for their state of mind, and because a finding of a conspiracy would require the Commission to have a high level of satisfaction as to any inferences it drew in connection with the knowledge of the affected persons, the Commission does not make any findings of a conspiracy or of other conduct constituting aiding and abetting Mr Macdonald's wrongdoing.

Had the directors' knowledge of Mr Macdonald's partiality been established, then various matters are pointed to by Counsel Assisting as establishing the basis for the inference of an agreement or common understanding to act to ensure the allocation to DCM on the basis of Mr Macdonald's known partiality. In light of its findings on knowledge, however, it has not been necessary for the Commission to consider these matters further.

Chapter 36: False and misleading conduct

During the process of seeking consent to apply for the EL and the granting of the EL, a number of documents were prepared and submitted to the DPI and others within government involved in the process by, or on behalf of, DCM by the three proponents and certain advisers. Those documents made a number of statements that have been impugned in the course of the public inquiry.

As the inquiry progressed, while the truth of certain impugned statements remained contested, it became apparent that there were numerous misstatements (to use a neutral word) in the documents. In this chapter, the impugned statements are considered. As is found below, many of them are found to be false or misleading and in material respects.

The false or misleading statements are not trivial. Nor is it a matter of one isolated false or misleading statement that could be overlooked as a possible error or mistake. The relatively large number of false or misleading statements across various documents, and their combined effect, bespeaks deliberate dishonesty in the pursuit of the EL. They were deployed as part of the spin to justify a direct allocation of a valuable asset.

The findings that are made in respect of each distinct false or misleading statement are, in the Commission's view, individually and independently justified. But the number and significance of the false or misleading statements corroborates the Commission's conclusion of deliberate dishonesty and the Commission's rejection (in relation to the false or misleading statements found to be dishonest) of the counter arguments of error or mistake.

While many of the statements impugned by Counsel Assisting have been found to be materially false or misleading, this is not true of every such statement. In some instances, the Commission, having regard to the submissions of affected persons, has not accepted that a given statement impugned by Counsel Assisting was materially false or misleading. Where this is the case, the impugned statements are generally not the subject of further specific discussion.

The relevance of the false or misleading statements to corruption findings

For the false or misleading statements to involve conduct constituting corruption, they must satisfy the relevant requirements of s 8 and s 9 of the ICAC Act.

Insofar as s 8 is concerned, Counsel Assisting relied on s 8(1)(a) and s 8(2) of the ICAC Act. Those sections relevantly provide:

General nature of corrupt conduct

(1) Corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

...

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition)

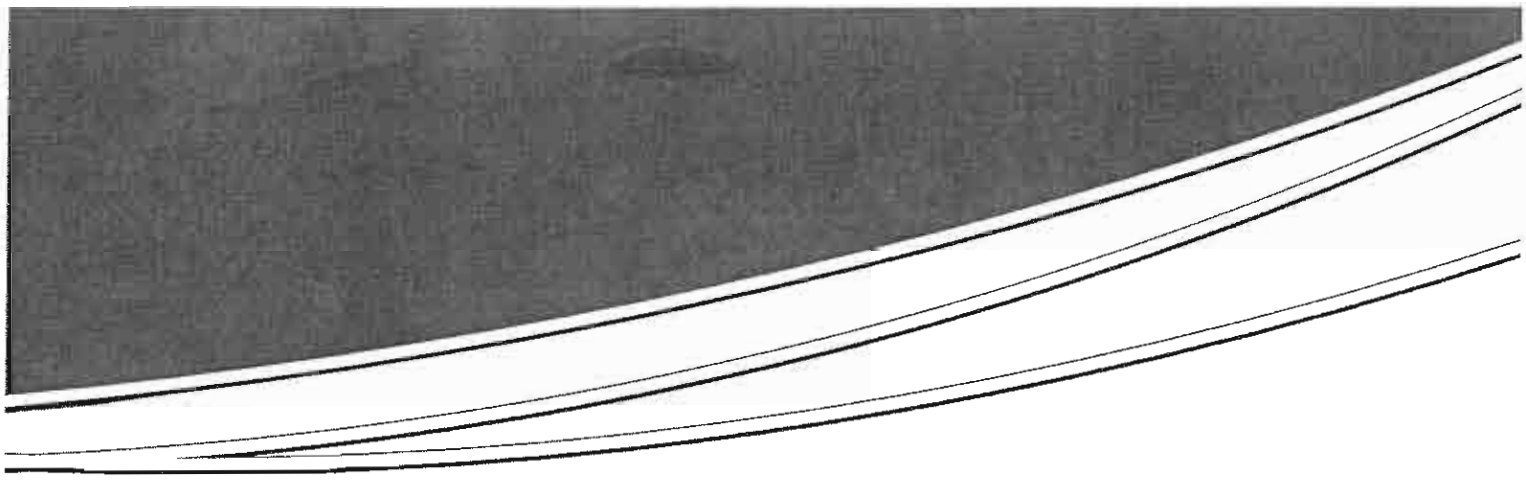
...

(e) fraud

...

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.



Below, the Commission finds that certain of the false or misleading statements come within s 8(2) of the ICAC Act. The numerous and material false or misleading statements contained in the key documents submitted in support of the allocation to DCM could adversely affect the exercise of official functions by those who in the ordinary course would assess the documents. They could also involve fraud given the circumstances in which they were deployed in pursuit of the granting of a valuable EL.

Insofar as s 9 of the ICAC Act is concerned, Counsel Assisting submitted that the making of the false or misleading statements could constitute or involve a number of criminal offences either on a principal or accessorial basis, including in respect of s 178BB of the *Crimes Act 1900* and s 374 of the Mining Act as they stood at the relevant time (and including aiding and abetting the commission of an offence by DCM under s 374 of the Mining Act).

Counsel Assisting also submitted that the conduct could constitute or involve contraventions of s 184 of the *Corporations Act 2001* (Cth) in that the relevant proponents were either reckless or intentionally dishonest and failed to exercise their powers and discharge their duties in good faith in the best interests of DCM or for a proper purpose.

Materiality of impugned statements

Various submissions have been made to the effect that certain of the impugned statements are not material. A requirement for materiality emerges from s 178BB of the *Crimes Act 1900* (as at the relevant time) and s 374 of the Mining Act, both of which refer to statements that are false or misleading in a material particular.

In this regard, the NSW Court of Criminal Appeal in *R v Maslen & Shaw* (1995) 79 A Crim R 199 (Hunt CJ at CL, Sully and Smart JJ agreeing) accepted that the term "material" should be interpreted as requiring no more and no less than that the false particular must be of moment or of significance, not merely trivial or inconsequential. It was further accepted that a particular will be material if it is relevant to the purpose for which it was being made, and that it will be relevant to that purpose if it may be taken into account by the person to whom the statement is made in making any decision upon the matter in respect of which the statement is made; it is unnecessary to establish that the statement is one that must or will be so taken into account. It was made clear that the question as to whether the particular is material is not whether that particular did in fact play any part in the decision made, and it involves an objective assessment.

In considering the issue of materiality, the context in which the documents were being deployed is relevant. This was no ordinary application for an EL. It was seeking to justify a direct allocation of a potentially valuable asset – rather than a competitive process involving the clear potential of significant monetary payments – based on a public benefit argument. Even Mr Macdonald recognised the obvious in his acceptance of the need to carefully consider the public benefit of the training mine and whether the proposed public benefit would outweigh the possible benefit from a tender so as to warrant the direct allocation. Furthermore, he similarly recognised that the Submission contained the detail of the proposed training proposal, and this needed to be looked at very carefully to make sure the proposal was worthwhile and was of public benefit.

In the ordinary case of an EOI as part of a competitive process where the major consideration is the monetary contribution offer, statements concerning the proposed operations may or may not be quite so significant. But here the justification for the grant was the training mine proposal. The documents describing that proposal were fundamental in the consideration of whether the proposal would yield a public benefit sufficient to justify the grant, or whether the state might be better off from a competitive process. This meant that the claims as to what was proposed by way of the training mine were of fundamental materiality.

Seen in that objective context, the statements found to be false or misleading (concerning such matters as resource size, the alliance, financial capacity, past due-diligence, and so forth) are matters that are material.

Most of the statements which are found to be false or misleading concerned matters which were taken into account by the DPI in the briefing note of 27 May 2008. Of course, the DPI was not ultimately persuaded by them. Nevertheless, and while emphasising the objective nature of the inquiry, the fact that the false or misleading statements were indeed taken into account tends to indicate that those statements were of a kind that may be taken into account by the person to whom the statement is made in making any decision upon the matter in respect of which the statement is made.

In this connection, it is also necessary to refer to the contention that no person in the DPI was misled. It has been further submitted that the statements cannot be material as no one in the DPI was misled. There are several answers to this contention. They are discussed below but they can be briefly stated for present purposes. First, it is not the case that no person in the DPI was misled. The submission is misconceived. Secondly, and in any event, the matter is one to be assessed objectively. Thirdly, it follows that no one need be misled for a statement to be materially false or misleading (cf *R v Maslen & Shaw*).

Misleading conduct and partiality

Before turning to the substance of the statements, one submission advanced on behalf of Mr Maitland can immediately be dispelled. It was submitted on his behalf that:

> *A further point that should be made at this juncture is there is an obvious tension between the partiality and misleading conduct cases, which Counsel Assisting do not grapple with. If Macdonald was partial, there was no need to mislead him or, since he was the decision-maker, anyone else. Thus, it cannot be the position that both cases are correct.*

That submission itself fails to grapple with the intended audience of the materials submitted. That audience was principally the DPI and its officers. As the proponents knew, Mr Macdonald had throughout supported the project. He didn't need to be convinced. But, as the proponents and Mr Macdonald also always knew, the DPI was against the project throughout. No doubt, in the best world for DCM and Mr Macdonald, the DPI might have changed its mind. But it did not. For that reason, some semblances of a process were needed as cover.

January and February 2007

On 22 January 2007, Mr Maitland provided the minister's office with a briefing note in respect of the proposal, which was subsequently forwarded to the DPI. The briefing note contained the following statement:

(a) The area is with vacant title with sufficient coal resources to enable a small to medium sized mining operation

On 15 February 2007, DCM made an application to the minister for consent to apply for an EL. Mr Maitland signed the application letter, a copy of which was sent to the DPI. The letter contained the following statements:

(b) Initial geological reports have demonstrated the existence of structurally undisturbed blocks between faults in the area which may contain sufficient coal resources to enable the establishment of at least a small to medium sized mining operation which could accommodate a training initiative

(c) ResCo has completed an initial capital raising of approximately $1.5 million from its founding shareholders.

Mr Maitland was responsible for the false or misleading statements referred to in (a) and (b) above. As considered below, the Commission has concluded that the statement referred to in (c) above is misleading but not materially so.

The January briefing note contained certain observations as to the resource to which access was being sought. Those statements need to be seen against the background of the report which had earlier been provided by Dr Palese concerning the expected coal resources. In that report was a series of three bullet points as follows:

Advantages of this project area:

- *One of the very few areas still with vacant title, with sufficient coal resources to enable a medium to large size mining operation (refer to figure 1).*
- *Good quality, known "brand" coal resources, not difficult to market and known to be well regarded by the Japanese market.*
- *Closeness to coal infrastructure and services.*

By way of comparison, Mr Maitland's briefing note contained the following three numbered propositions:

> *The advantages for the project being granted in this area are:*
>
> *1. The area is with vacant title with sufficient coal resources to enable a small to medium sized mining operation.*

2. *Good quality, known-brand coal resources, not difficult to market.*

3. *Close to infrastructure and services.*

Mr Maitland had picked up almost verbatim the three bullet points in Dr Palese's report. But he had made one material change to the first point. Whereas in the first bullet point Dr Palese had described the area as sufficient for a "medium to large size mining operation", Mr Maitland adopted the description "small to medium sized mining operation". That change reflects a deliberate decision by Mr Maitland in his first written communication to the DPI to understate the anticipated resource size.

This approach to resource size was carried through to the letter sent to the DPI in February 2007. Paragraph 5 of that letter described the resource as "sufficient coal resources to enable the establishment of at least a small to medium sized mining operation".

The submissions on behalf of Mr Maitland addressed the statement in the February letter, rather than the January briefing note. In mounting his defence (placing reliance on the words "at least", which do not appear in the extracted January briefing note), the submission is made that it is not open to criticise Mr Maitland as he was not examined about the statement in the February letter but only the January briefing note. That is plainly not so. The change from "medium to large" to "small to medium" was simply carried over and repeated from one document to another, and he was questioned in depth on this issue.

An intention to mislead as to the potential resource is corroborated by an email exchange to which Mr Stevenson, Mr Maitland, Mr Ransley and Mr Poole were all a party. In the course of that email exchange, Mr Maitland asked Mr Stevenson whether "if we mention just the Whybrow and Redbank seams can we still access the woodlands hill creek seam at some later stage". At the meeting on 15 January 2007, Dr Palese had mentioned other seams, including the Woodlands Hill Creek seam.

In submissions on behalf of Mr Maitland, it was suggested that the email was simply Mr Maitland checking to ensure that the information being provided in the letter was sufficient. That ignores what the email shows as to Mr Maitland's state of mind. It reveals there was plainly consideration given, on the part of Mr Maitland at least, as to the ability to mention only some of the seams recognised as potential extraction targets, so long as they all could be eventually accessed, and ultimately a willingness to proceed on that basis (as is clear from the letter of 15 February 2007).

Indeed, all three directors became aware that one of the potential seams was going to be omitted from the letter to the DPI on the basis that they could still access it down the track if the EL was granted. And while it was suggested that Mr Ransley did not read the relevant email, the Commission does not accept that self-serving suggestion. After all, this was the beginning of, and the initial pitch for, a project which Mr Ransley was eager to pursue.

Taking account of all of these matters, the relevant statements in the January briefing note and the 15 February letter were calculated deceits on behalf of Mr Maitland. The submissions defending the statements as true (based on the words "at least" in the February letter, but not the January briefing note, and other matters of context) do not reflect a natural reading of the statements or their import. And so far as the February 2007 letter is concerned, the impugned statement was prefaced with what "Initial geological reports have demonstrated". The only geological report was that of Dr Palese, and it said something altogether different.

The effect of the statement made in the letter, especially in the context of the earlier briefing note, was to convey the representation that the best information available to the author of the letter was that the anticipated resource would support a small to medium sized operation. In truth, the best expert opinion available to the company was that the resource size was sufficient for a medium to large operation. There was, in fact, no basis for a suggestion that the resource might be sufficient only to support a small operation. The statement was misleading.

The Commission has concluded that Mr Maitland bears responsibility for the false or misleading statement in the January 2007 briefing note and the February 2007 letter. He was the author of the false or misleading statement in each document – he was principally responsible for lifting the corresponding words from Dr Palese's report and amending them, and he sent the briefing notes and signed the letter. He was also responsible for sending the email about the Woodlands Hill Creek seam, which corroborates an awareness that the possible resource was being understated.

The responsibility of the other two directors is more difficult to assess. There is no evidence that they were involved in the sending of the briefing notes. Without knowledge of those documents, the false or misleading statement in the letter (which was circulated to each of them in draft before it was published) may have been less apparent to them. Mr Ransley accepted that he was aware that the reference in Dr Palese's report was medium to large (words which he claimed not to understand) and he accepted that he was aware the letter to the DPI used "small to medium" (although he claimed to have placed no significance on the words). Mr Poole had access to the same documents, and must have had the same knowledge. Nor can Mr Ransley's suggestion that the term "medium to large" was a technical term which he did not understand

be accepted (contrary to the submission on his behalf, his evidence was to suggest he did not understand the term at the time). After all, he had been engaged in the mining industry for some time through his labour hire business. The Commission, however, considers that the evidence does not sufficiently demonstrate that Mr Ransley and Mr Poole noticed at this preliminary stage in the process that the letter contained a materially false or misleading statement as to the size of the resource.

The 15 February letter also addressed the financial position and means of the applicant company. The directors had been told by Mr Stevenson that it was necessary to include details of the financial resources available to the applicant as part of the application and, therefore, knew it was a significant matter.

At the time the application was made, ResCo owned no businesses. It had no assets other than some remaining portion of $100,000 contributed by its sole shareholder and it had no income. Rosa was conducting a capital raising of $1.5 million, which had not yet been completed. That capital raising must have been intended to support the acquisition of Eastern Mining and Construction Company (EMC) Pty Ltd by ResCo, which was anticipated and under negotiation in early February 2007. By the end of February 2007, ResCo had resolved that it would not be proceeding with the EMC acquisition.

The letter of 15 February included the statement "Resco has completed an initial capital raising of approximately $1.5 million from its founding shareholders". That statement was false or misleading. The capital raising was in Rosa and not ResCo, had not been completed and was disconnected from the training mine. They were two separate corporate entities and the evidence tends to suggest that, consistent with their distinct legal status, they were run as distinct entities.

The Commission concludes that the statement was false or misleading. Nevertheless, while the Commission does not accept that for practical purposes a capital raising by Rosa was a capital raising for the purpose of ResCo, it does have regard to the relationship between the entities in accepting the submission that the misleading nature of this statement was not relevantly material. It is, therefore, not necessary to consider who might bear responsibility for this particular statement.

The Training Mine Submission (March 2008)

The key document lodged was the Submission. When this document was rebranded for investor purposes it was renamed the "Doyles Creek Coal Project".

The Submission was lodged with government agencies on two occasions. The first was in March 2008 under cover of letter from DCM (dated 18 March 2008 and signed by Mr Maitland) addressed to Mr Coutts of the DPI. In that connection, the document was lodged in support of the pursuit of consent to apply for the EL.

It was then lodged a second time in late September 2008 under cover of a letter from DCM (dated 29 September 2008 and signed by Mr Maitland) addressed to the Mining Registrar at the DPI. This time, the document was being lodged as part of an application for the EL (consent to apply having been granted). In that application, Mr Maitland certified that the information contained in it and the attached documents (which included the Submission) was true and accurate.

The Submission stated that it had "the full support of the Doyles Creek board of directors and management". That board comprised Mr Maitland, Mr Poole and Mr Ransley. As to this statement, Mr Maitland gave the following evidence:

> *You took the view, didn't you, that the submission had the full support of the Doyles Creek Board of Directors?---Yes.*
>
> *And that was because it was a document that in fact had been discussed between the Board of Directors?---Yes.*
>
> *And everybody agreed with it?---Yes.*
>
> *And that was true in March 2008?---Yes.*
>
> *And in September 2008?---Yes.*

While Mr Maitland could not say whether the other directors read the document, it is plain that they did. Drafts were circulated to all three directors by email and all three provided comments, suggestions and input in respect of its contents. As Mr Poole acknowledged, all of the members of the board had a role to play in the document. Mr Poole agreed that he "reviewed the drafts and made some comments", and that he did so for the purpose of, amongst other things, making sure that the contents were accurate, with a particular focus on the financial matters. Mr Ransley agreed with similar propositions:

> *You had a hand in pursuance of that objective in the, in four documents, the February '07 letter, the March '08 letter, the submission that went forward in March and the September '08 application?---Saw those letters, yeah.*

Each of those documents was furnished either to the Department or the Minister in connection with your application for an Exploration Licence. Correct?---That's correct.

And each of them was discussed at board level or went on with the approval of yourself, Mr Maitland and Mr Poole. Correct?---Correct.

And you concurred in the making and publication of each of them. Is that right?---I had input to each of them.

The Commission finds that all of the directors had knowledge of the contents of the Submission, all were involved in the making and publication of the statements in it, and that Mr Ransley and Mr Poole agreed that Mr Maitland should provide it to the DPI.

The Submission contained a large number of inaccuracies (to use a neutral word). While certain inaccuracies or "errors" were acknowledged, each of Mr Maitland, Mr Ransley, Mr Poole and Mr Chester denied any wrongdoing. For example, Mr Maitland adopted the pattern of admitting that statements were in error or inaccurate but denying that they were false or misleading. The pattern, however, was not maintained with absolute consistency. When challenged as to one statement, the following exchange occurred:

That was false, wasn't it?---It's misleading.

All right. And the- - -?---I withdraw that. It's incorrect.

Excuse me. So you said misleading and then you've corrected yourself and said it was incorrect?---Yes.

Why have you done that?---Oh, simply because we – at that process – well, when this was being done um- - -

The dissembling was revealing.

Individual aspects of the Submission are considered below.

Resources

Various statements were made about the anticipated resource size in the tenement. Some of those statements are now conceded to be inaccurate, but are sought to be justified in various ways by affected persons including as honest mistakes. On the other hand, Counsel Assisting has sought to characterise them as knowingly misleading.

The relevant statements that the Commission finds to be false or misleading are as follows:

- The Submission stated that Doyles Creek "hosts a resource estimated at 91 million tonnes" (whereas Dr Palese's estimate of the resource was much larger – 308.6 million tonnes in two of many seams).
- The target coal seams would be principally the Whybrow and the Redbank Creek coal seams in the Wittingham Coal Measures, with total inferred in situ resources estimated at 125 million raw tonnes (when, as pointed out above, it was actually 308.6 million tonnes).
- The proposed location has the potential to support a small to medium sized coal mining operation (whereas the potentiality was known to be greater).
- The inferred in situ mineable coal resource for the exploration area was 69.9 million tonnes and the inferred in situ resource was 183.5 million tonnes (these figures came from the table annexed to the Submission, which was described as "a description of the in-situ coal resources for the Exploration Area" reflecting estimates for a much smaller area).

The Commission finds that each of the directors knew these statements were false or misleading.

At the time the Submission was made, the only geological advice available to DCM was Dr Palese's report of January 2007. The key figures in that report were Dr Palese's estimates for ELA 1 (being the area applied for by DCM). For the two seams he considered, he had estimated the total inferred in situ resource as being 308.6 million tonnes and the total inferred in situ mineable coal as being 125.3 million tonnes.

Those figures were estimates based on a limited data set. Certain submissions of affected persons have emphasised the limited data on which the estimates were based and which may be affected by further exploration and data. Those submissions are correct to a point. Further exploration producing a larger data set from which to make revised estimates may confirm those figures or result in increased estimates or result in decreased estimates. But it is important to note that this does not mean that the figures based on the available data were malleable or adjustable at will. They were not guesses or ad hoc numbers but estimates that adopted a recognised and understood geological vocabulary. In that field, various descriptors are applied to estimates to indicate the degree of certainty associated with the estimate, having regard to the size of the data set from which they are produced. Dr Palese's figures were the result of a careful and scientific process, involving a calculation extrapolated from available data in accordance with recognised scientific technique and applying that understood vocabulary. The uncertainty associated with the estimate (as compared to what might actually be in the ground) owing to the data limitations is indicated by the label "inferred". But it is still a calculation from available data – albeit an "inferred" calculation. Thus, submissions that have sought to defend certain resource statements in the Submission based on the limited data

and resultant uncertainty miss the point and provide those responsible with no comfort.

In addition, DCM had the input of Mr Ireland. Mr Ireland is not a geologist. He is, however, an experienced mine manager. He produced estimates of run of mine (ROM) coal – in simple terms, the coal that might actually be produced from the mine. Mr Ireland produced several iterations of his ROM calculations. Reference has already been made to the calculations he prepared on 9 November 2007. Those figures showed a ROM of 174 million tonnes over the life of the mine. Mr Poole and Mr Ransley became aware that on that basis the ROM figures might be very large. Mr Ireland produced a second iteration in December 2008, showing ROM figures from one seam, the Whybrow seam, of 68 million tonnes. During January 2008, Mr Ireland revised his ROM figures to account for an arithmetical error in his December calculations. His revisions increased the ROM allowance for the Whybrow seam from 68 million tonnes to 91 million tonnes. This figure of 91 million tonnes became prominent in the Submission. It is important to note that this was not an estimate by Mr Ireland of the quantity of coal in the tenement – his ROM estimates were not estimates of either a reserve or a resource. Rather, his calculations assumed an adequate reserve and provided a calculation of how much coal could be removed from a single seam by a series of longwalls. The calculations assumed the coal was present and without impairment. The calculations were significant as an input to the financial modelling that would occur – because they gave annual coal production figures. They cannot be substituted for reserve or resource allowances.

A third set of data should be mentioned here. Throughout the period from November 2007 to late 2008, the directors of DCM also appeared to believe that a reasonable estimate of the actual coal that could be mined in the tenement was 140 million tonnes. The evidence does not disclose how that estimate was arrived at. It could have been an extrapolation from Dr Palese's 125 million tonnes in two seams (allowing for some coal in other seams, such as the Woodlands Hill seam) or it could have been derived from Mr Ireland's first calculations of ROM coal. It is unnecessary to make any findings as to how the figure was derived. As mentioned above, there is ample evidence of its adoption by the principals of DCM. It appears in a file note of a meeting on 21 November 2007 at which each was present. It was mentioned by Mr Poole as the expected quantity of coal from the tenement to Mr Baxter (of Westpac bank) in March 2008, and it appears as the figure for mineable coal in various investor presentations used by Mr Maitland later in 2008.

One option that may have been open to DCM was to say nothing in the Submission about the anticipated size of the resource at Doyles Creek. However, having decided to make statements on that topic, it was essential to ensure that they were not misleading. A number of things could responsibly have been said in the Submission about resource size. It could have been said that:

- the total in situ inferred resource in two seams was 308.6 million tonnes
- the total inferred in situ mineable coal in two seams was 125.3 million tonnes
- the expected run of mine in one of the target seams was 91 million tonnes.

However, a number of statements made in the Submission as to resource were false or misleading. Thus, in the executive summary it was said that the tenement "hosts a resource estimated at 91 Mt" – when in fact Dr Palese's estimate of the resource was much larger – 308.6 Mt in two of many seams. Later in the document the resource in the two seams is described as 125 Mt, which is also wrong. The bullet points extracted from Dr Palese's report (referred to above) appear again – and again the tenement is described as sufficient for a "small to medium" sized mining operation. A similar claim was made in the executive summary, which referred to the location having "the potential to support a small to medium sized mining operation" – whereas the potentiality was known to be greater. The table annexed to the Submission, which was described as "a description of the in situ coal resources for the Exploration Area", was the wrong table. It reflected estimates for a much smaller area and contained much lower numbers (an inferred in-situ minable estimate of 69.9 Mt and an inferred in-situ resource of 183.5 Mt). Each of these errors significantly understated the correct position as to resource size in the tenement.

Confronted with the misstatements in the Submission, various witnesses offered various explanations. Of particular note was Mr Chester's evidence that a deliberate decision was made not to adopt Dr Palese's calculations in the Submission, but to use lower figures based around Ireland's calculations of ROM. He sought to explain this approach by saying that Dr Palese's figures "looked ridiculously high and were based on very rubbery numbers". He said he thought it was unsafe to trust a geologist on the estimation of coal resources but better to rely on a miner such as Mr Ireland. This explanation as to why Dr Palese's figures were set aside is absurd and cannot be accepted. Mr Lewis accepted that it would be an inaccurate and irresponsible approach. But Mr Chester's evidence that he made a deliberate decision not to adopt Dr Palese's figures for the purposes of the Submission can be accepted – it is corroborated by the terms of the Submission itself which did precisely that.

A number of the statements were acknowledged by certain of the directors (including Mr Maitland) as errors, but it was contended that they should be treated as mere mistakes and not as part of a scheme to mislead or as being misleading. They point to a number of matters; including the fact that a correct statement of resource appears in the Submission when it is said that the "in situ mineable resource in the Whybrow and Redbank seam ... is estimated at 125 million raw tones" and that various misstatements do not seem to form part of a coherent pattern as might have been adopted had there been an intent to mislead. The Commission rejects these submissions.

In this regard, it is telling that the key figure from Dr Palese's report was his estimate that there was an inferred resource of 308.6 million tonnes in the two principal seams in the tenement. That figure was never mentioned by the company in any communication with the DPI. The submissions on behalf of Mr Maitland, that its omission can be explained on the basis it "was not a particularly relevant figure", cannot be accepted. The documents before the Commission show that total resources are almost invariably quoted in discussion of the potentiality of a tenement; this includes in DPI documents, documents prepared by DCM, and documents released by NuCoal Resources NL. When the DPI released an area for an EOI, its materials would include a statement as to the total anticipated resource (for example, the Ridgelands release). All of the investor documents prepared by DCM included most prominently in each document a figure for total estimated in situ resource. When Mr Lewis was asked to prepare a revised estimate in December 2008, he (with Mr McCowan) prepared a revised estimate of the total in situ resource. That figure was immediately adopted by DCM in documents, which Mr Maitland assisted in preparing and distributing to potential investors.

Nor was there any misstatement in the Submission or any document submitted that comprised an overstatement of the resource having regard to the available information (as might be expected if each of the many errors on this topic were a mere mistake).

What is more, as Counsel Assisting submitted, the errors are glaring, and would have been picked up by the most cursory reading of the Submission by a person aware of the true position, even if that person just read the executive summary. The first false statement about resource appeared on the first page of the Submission, in the executive summary. It said that Doyles Creek hosts a resource estimated at 91 million tonnes, whereas Dr Palese's report indicated that Doyles Creek hosted a resource estimated at 308.6 million tonnes in two of the several seams (and so implying the possibility of a total resource much greater than 308.6 million tonnes). The misstatement is of such a magnitude that it could not have gone unnoticed.

Submissions on behalf of Mr Maitland suggest that, if the errors are glaring, this presents a difficulty for the contention that they are misleading. That is misconceived. The errors are glaring to each of the directors who had Dr Palese's report, which contained the correct figures. But for those who did not have that report, it was not so. Of course, the DPI did not have that report. The proponents of DCM did not provide the DPI with it.

The Commission also has regard to the body of evidence which otherwise suggests deliberate dishonesty in respect of resource statements. Much of this has been referred to already but bears repeating here.

This begins with the alteration of Dr Palese's bullet points, so as to change his description of the potential of the tenement to support a "medium to large" mining operation to the statement in the January 2007 briefing note and February 2007 letter, repeated in the March 2008 Submission, that the tenement would support a "small to medium" sized operation.

There is also the email from February 2007, in which Mr Maitland asked Mr Stevenson whether the company could omit mention of the Woodlands Hill seam.

Then, at the meeting on 21 November 2007, Mr Maitland said words to the effect that, "we think that there is 140 Mt mineable coal in the tenement, but we are going to model on 60 Mt". Those words, spoken to the other directors and advisors, are consistent with a shared intention to understate the resource size in the Submission.

In March 2008 (within a fortnight of the date of the Submission), Mr Baxter of Westpac bank was told by Mr Poole that there was anticipated to be 140 million tonnes of terminal coal from the tenement. That figure, identical to that referred to in Mr Stevenson's file note of 21 November 2008, and reproduced in investor presentations during 2008, reflected the directors' actual expectations of ROM coal from the two principal target seams.

Then, in mid-2008, the Submission was republished as part of an investor presentation for potential equity partners in China and elsewhere overseas. In the republished document, for which Mr Maitland was principally responsible, resource figures were adjusted to contain substantially higher estimates of the potential resource than those contained in the Submission.

In December 2008, when the tenement was granted, Mr Ransley asked Mr Lewis to prepare a revised estimate of the total resource, which he did, noting in an email to the directors that the estimate in the Submission had been conservative, and only done to show sufficient coal to justify the training mine. Various witnesses sought to explain and justify Mr Lewis' comment. The Commission construes, however, that email as meaning what it says – someone involved with the project at the time with

knowledge of the relevant matters must have told Mr Lewis of the matters he recorded in his email. When Mr Lewis (with Mr McCowan) prepared a revised estimate of over 500 million tonnes of resource in the tenement, each of the directors recognised that the figure represented a windfall financial gain to him, and Mr Ransley gave expression to the mutual delight when he emailed them "Merry bloody Christmas". Mr Lewis' revised figures were immediately adopted in investor materials being prepared at the time, which indicated the resource was sufficient to support a medium to large mine.

All of these matters indicate an actual intent on the part of the directors to mislead as to resource size in the Submission. And, while the submissions of affected persons have sought to explain each one away for different reasons, to look at each matter in isolation overlooks the combined effect of those matters. It is not just that there is one incident suggesting such an intention. There are multiple incidents throughout the history of the dealings.

The Commission concludes that each of the directors was aware that false or misleading statements were being made about the size of the resource. Each of them had been present at the meeting with Dr Palese in January 2007. Each of them had been present at the board meeting at which his report was tabled. Each was present at the meeting on 21 November 2007. Each understood that the size of the resource was key to the financial viability of the mining project. They must have at least seen the very first page where the first of the egregious errors is to be found. In fact, they each reviewed the Submission and provided comments. The Commission finds that they saw all of the statements in question and were aware that each was false or misleading.

Statements about resource size were clearly material in the context of the process that was being engaged. Statements of expected resource were included in DPI documents seeking EOIs over other areas (such as Ridgelands) and the expected resource was obviously relevant as to how much an interested person might be prepared to bid for the right to apply for an EL in a competitive process (including by additional financial contribution). In weighing up the benefit of a direct allocation of Doyles Creek, such matters as the expected return and the amount potentially receivable from a competitive process would be relevant to assessing whether stated public benefits were adequate to justify a direct allocation. Put simply, the size of the anticipated resource was directly linked to the value (including the potential or perceived value) of the tenement, and that was relevant to assessing whether any claimed benefits were such as to warrant the direct allocation of the tenement. The size of the anticipated resource would also be relevant to considering whether it was larger than required for a training facility. In short, statements as to the expected resource were fundamental to any proper consideration as to whether in the circumstances a direct allocation was appropriate.

This is different from a situation where an area was released for allocation by a competitive process. In that situation, after undertaking its own analysis of the potential resource, the DPI would typically release a document with information concerning the potential resource. Interested companies would then submit their EOIs, including details of any proposed additional financial contribution. But here, the DPI was not proposing to release Doyles Creek. In that circumstance, what it was told about the resource by DCM took on a greater significance.

The Strategic Alliance

The Submission presented the existence of a "strategic alliance" involving a number of significant institutions in the Hunter Valley as a key part of the proposal. The institutions included the HVTC, the WRHS, the University of Newcastle, Coal Services and ResCo. References were also made to a company called Sharp Training as the prospective provider of training services.

The Submission contained the following false or misleading statements about the strategic alliance. Save where otherwise stated, these statements were expressly made.

- An influential Strategic Alliance has been established with MOUs signed between mining services and occupational health and safety groups (ResCo Services Pty Ltd; Coal Services Pty Ltd), educational institutions (University of Newcastle; HVTC) and rescue services (Hunter Region SLSA Helicopter Rescue Service Limited) to undertake this venture.
- The dissolution of the alliance as a key risk has already been minimised owing to the existing arrangements in place to ensure commitment between all parties. All parties have signed MOUs to confirm their commitment to the Training Mine project (this and the preceding statement were false as to all but HVTC).
- Coal Services Pty Ltd will provide mine simulation, rescue and rehabilitation services.
- Training for trainee mine workers, deputy and under-managers will be accredited under the black coal competency standards and will be conducted by Sharp Training, a recognised and industry accredited training company specialising in the black coal industry.
- Alliance members were legally bound to undertake various substantive roles in the training proposal (this statement was implicitly made in the Submission).

As set out below, the Commission finds that Mr Ransley probably believed that MOUs with HVTC, the University of Newcastle and the WRHS had been executed. The Commission further finds, as is also set out below, that subject to the exception stated in the previous sentence, Mr Maitland, Mr Ransley and Mr Poole were aware that the statements were false or misleading.

Mr Maitland was the director who had the principal dealings with the so-called "alliance partners"; however, the others were also involved from time to time. And Mr Maitland kept the others up-to-date concerning his dealings. His evidence was:

> *You agree – dont' you – that throughout the period 2007 to 2008 Doyles Creek – the running of Doyles Creek Mining was principally yourself, Mr Poole and Mr Ransley?---Yes.*
>
> *And it was the sole endeavour of that company at the time throughout the period?---Yes.*
>
> *You were all very interested in it?---Yes.*
>
> *You regularly spoke to each other about it?---Yes.*
>
> *You kept them updated as to oll of your activities from time to time?---Yes.*
>
> *Including not just at board meetings but by telephone calls and emails? ---From time to time.*
>
> *And face to face meetings that weren't board meetings?---Yes.*
>
> *You told them about your interactions with the Minister?---Kept them up to date with whatever took place with the Minister.*
>
> *And your, and whatever he said, his views and wishes about matters?---I presume so.*
>
> *And also whenever you had interactions with the department you kept them up to date?---Yes.*
>
> *You also told them all about your meetings with Community Partners?---I presume so.*
>
> *And it was really operated in many ways like a partnership between the three of you?---We worked closely together.*

He also gave the following evidence:

> *Well as they were being prepared the idea of them was discussed with Mr Ransley and Mr Poole wasn't it?---It's recorded in the minutes in one of our meetings that - - -*
>
> *Well you kept them updated as to your dealings with potential partners didn't you?---I kept the board updated, yeah.*
>
> *You weren't just acting out on a frolic of your own were you?---A frolic?*
>
> *You were doing, you were acting on behalf of Doyles Creek - - -?---Yes.*
>
> *- - - with the knowledge and consent of the other directors?---Yes.*

The alliance was presented as a fundamental aspect of the proposal of critical importance to its viability. As Mr Maitland said, "if we don't have those alliance partners on board it's clear that a training mine won't go ahead". The second paragraph of the first page of the document, in the executive summary, stated:

> *An influential Strategic Alliance has been established with Memorandum of Understanding ("MOU") signed between mining services and occupational health and safety groups (ResCo Services Pty Ltd; Coal Services Pty Ltd), educational institutions (University of Newcastle; Hunter Valley Training Company) and rescue services (Hunter Region SLSA Helicopter Rescue Service Limited) to undertake this venture.*

As to the functions of each member of the alliance, the Submission said:

> *Key partnerships have been formed to ensure the success of the project:*
>
> - *Mining services company ResCo Services Pty Ltd will be responsible for operations management, mine simulation, rescue and rehabilitation*
> - *Educational institutions such as the University of Newcastle and Hunter Valley Training Company will utilise the mine training facility for training in disciplines such as mining operations, mining services, hospitality and horticulture*
> - *Hunter Region SLSA Helicopter Rescue Service Limited will be able to access the site for mining rescue operations training*
> - *Educators will also have the opportunity to utilise the site for research and development purposes*
> - *Coal Services Pty Ltd will provide mine simulation, rescue and rehabilitotion services*
> - *In addition, initiatives such as seam gas capture and liquefied natural gas production will be implemented to minimise the minds environmental footprint.*

The Submission went on to indicate that, "[t]he success of the Doyles Creek training mine is predicated upon the pooling of resources from industry, education and not-for-profit entities". Having described further the role of each organisation, the Submission asserted that DCM "in conjunction with" those organisations "will ensure that the mine is established to fulfil its role as a self-sustaining, long-term economically-viable training mine".

Under the rubric of "key risks", the Submission identified the dissolution of the alliance as a key risk that had been considered, but concluded: "[t]his risk has already been minimised owing to the existing agreements in place to ensure commitment between all parties. All partied [sic] have signed MOU's *[sic]* to confirm their commitment to the Training Mine project".

As Counsel Assisting submitted, the Submission used language of certainty and commitment and of partnerships having already been formed to ensure certain matters would be done at the mine site by the partners. And it spoke of MOUs being in place to confirm those commitments. The commitments were not expressed in generalities, or as hopes or intentions, but in specific things the partners had committed to and would do. Mr Chester accepted that it was necessary to have written agreements in place in order to justify the statements made in the Submission as to the alliance partners performing a role in the training facility, and there would have needed to be significant revision if he had been told that the allies were not party to existing commitments.

In fact, with the possible exception of HVTC, no such agreements had been signed and none was in place at any time before the grant of the EL. All of the statements as to signed MOUs or existing agreements were false. Mr Lewis, who would later be charged with taking the project forward, gave this evidence:

> *You, you read the submission when you became involved in the project? ---At which date?*
>
> *When you became involved in the project in September 2008 you read the submission?---I did once, yes.*
>
> *And you would have seen that it included reference to the existence for example of various Memoranda of Understanding?---Yes.*
>
> *And you were the person in charge of taking the project forward?---Not at that stage but subsequently, yes.*
>
> *And you read a submission saying that there were Memoranda of Understanding in existence which you learned weren't in existence?---Some months later, correct.*
>
> *That must have come as a bit of a surprise and shock to you?---Ah, the answer's yes.*

Mr Maitland made concessions as to the falsity of certain statements, and even (on one occasion) acknowledged that they were misleading:

> *The fact is that this submission was quite misleading, wasn't it, as to the nature of the alliances that had been formed?---No, it is misleading but - - -*
>
> *Quite misleading as to the - - -?---It's not deliberately so.*

Despite the above admission, Mr Maitland went on to deny particular propositions as to how the statements concerning the alliance were false or misleading. In particular, Mr Maitland sought to defend the Submission by arguing that there were good faith agreements in place, albeit not binding and not in signed documents. His evidence was that it did not matter that they were not signed and that signing was "an administrative detail". So, it was submitted on his behalf that the statements as to signed agreements "[were in] error, but it was not material" given the state of discussions with some (though, notably, not all) of the relevant "partners". And in evidence, Mr Poole adopted what he described as "Mr Maitland's argument". The argument is untenable. It is contradicted by the Submission itself, which identified dissolution of the alliance as a key risk that had been mitigated by the entry into binding agreements. Given the significance the alliance was said to play in the success of the training mine proposal, the matter was much more than one of immaterial administrative detail. And nor does this ignore what a MOU is. Such documents can take many forms (both binding or non-binding) with varying degrees of detail and commitment.

Mr Ransley claimed to have thought that the MOUs were signed because he had been told that by Mr Stevenson in an email in early 2008. That email was sent by Mr Stevenson on 28 February 2008 to Mr Chester, copied to Mr Maitland and Mr Ransley and said in part:

> *I know we have agreements with HVTC, the Uni and Hunter Region SLSA Helicopter Rescue Service Limited, but not sure whether there is a formal agreement in place with Coal Services Pty Limited, but John can confirm status.*

The email was wrong as to the position with the University of Newcastle and the WRHS. Nevertheless, and notwithstanding his evidence of being too busy, which he used to suggest not reading other emails, Mr Ransley gave evidence of having received this email and as a result believing that MOUs had been signed (with the exception of that with Coal Services). Counsel Assisting submitted that the Commission should reject Mr Ransley's evidence on this aspect. The Commission doubts that Mr Ransley had any recollection of reading the email upon which he relied when giving his evidence. Nevertheless, it considers it likely that he did read it at the time, and that he probably concluded that the MOUs with HVTC, the University of Newcastle and the WRHS had been executed. He must, however, have been aware that no signed agreement existed with ResCo – after all, he was on the board of both companies.

That is not the end of the matter. While certain draft MOUs had been prepared, and circulated amongst some of the alliance partners, they did not provide for any

significant commitment by any partner. Nor had any of the prospective partners, in fact, given a commitment to have any particular involvement in the training project. The draft MOUs merely provided for the establishment of steering committees and were terminable on 60 days' notice. Mr Jones of the WRHS thought the arrangements would involve much the same sort of thing as the WRHS had with other industry participants; involving displaying of their logo and other sponsorships, extractions and training mine personnel participating in extractions. He agreed that there were no material promises on either side. Despite all this, some quite extensive and absolute statements were made about the involvement of the partners in the project; statements that were unjustifiable and false given the state of affairs at the relevant times. And the MOUs that were contemplated would not have justified these statements, even if they had been signed. As to this, the draft MOUs were circulated to all of the directors (including Mr Ransley), such that they were aware of what they involved.

Mr Poole did not receive the email from Mr Stevenson. He could not rely on that email as providing a basis for a belief on his part that the MOUs had been signed. He claimed to have been reassured by the fact that the alliance partners, some of whom reviewed the document in draft, did not tell him that the agreements had not been signed. That, however, cannot be accepted. It is difficult to accept that Mr Poole was reliant on the alliance partners to tell him that his own company's submission was misleading, and that DCM had not signed agreements. Mr Poole had seen drafts of the agreements. Those draft agreements required two signatures by directors of DCM. The agreement with HVTC, which was signed (on an unknown date), included his signature. He must have been aware that he had not signed an agreement with the university or the WRHS, much less Coal Services. There was not even an MOU in place with ResCo and he, like Mr Ransley, was on the boards of both companies. As at March 2008 (or September 2008), no MOU with any of the alliance partners, such as the University of Newcastle or the WRHS, had been tabled at a meeting of the directors of DCM. Having regard to Mr Maitland's evidence about him keeping the other directors up to date with his dealings (extracted above), the Commission concludes that, in March and September 2008, Mr Poole was aware that the MOUs with the relevant organisations had not been signed.

The Submission also stated that the members of the alliance included Coal Services, which had not agreed to be involved in any form and which ultimately declined any involvement with DCM. Mr Maitland conceded that there was no arrangement with Coal Services:

> *You know don't you that there was no agreement in place with Coal Services at that time?---Yes.*
>
> *You agree with me?---Yes.*
>
> *Formal or otherwise?---Formal or otherwise.*

He sought, however, to suggest that he had a hope or expectation that it might participate in the end. As the evidence establishes, no proposal concerning any relationship between Coal Services and DCM ever seriously progressed at the relevant times. Mr Maitland made numerous admissions as to this and the submissions on his behalf concede that Coal Services had not agreed to be involved.

Mr Maitland's evidence, referred to above, was that he kept the other members of the board informed as to all of his dealings with alliance partners. An agreement with Coal Services would have been a significant matter given the status of that organisation. The Commission concludes that Mr Ransley and Mr Poole were each aware that there was no agreement in place with Coal Services.

Submissions on behalf of Mr Maitland contend that the inclusion of Coal Services was not deliberate. That is not so. In this regard, the email from Mr Stevenson of 28 February 2008 has a further significance. A further version of the Submission had been circulated early on 28 February 2008. Mr Maitland reviewed the Submission during the day on 28 February. He made suggestions for amendments to the page summarising the alliance partners. One effect of those changes was to emphasise the existence of an alliance partnership with Coal Services (which did not exist). A few hours later, he received Mr Stevenson's email, which raised a specific question as to whether there was any "formal agreement in place with Coal Services" and asked for confirmation from Mr Maitland. Mr Maitland was unable to explain why he took no steps as a result of receiving that email.

The evidence established that, on 28 February 2008, Mr Maitland turned his mind to the role of Coal Services in the alliance, when he proposed amendments to the summary of alliance partnerships, and again when he received Mr Stevenson's email. As he admitted in his evidence, he knew that there was no such agreement in place with Coal Services. And yet, he took no steps to ensure the Submission accurately stated the position. That Mr Maitland made changes to the Submission emphasising the role of Coal Services belies the submission that he must have told Mr Stevenson that Coal Services was not an alliance member. He knew this at the time he made his changes but made them nevertheless. There can be no doubt as to his deliberate dishonesty in this regard.

The Submission also claimed that, "[t]raining will be accredited under the black coal competency standards and will be conducted by Sharp Training, a recognised and industry accredited training company specialising in the black coal industry". The language with which the Submission spoke is again relevant – it spoke with certainty (training "will be conducted" by Sharp Training)

rather than hope or expectation. But there was not any kind of agreement, either informal or formal, with Sharp Training to provide the relevant training. It was a company based in Queensland and, at the time, had no operations in NSW. It was then seen as a possible acquisition, but there was no arrangement in place for training. If any kind of arrangement had been entered into for an organisation to conduct the training program at Doyles Creek, then this would have been a significant matter. Each of Mr Maitland, Mr Ransley and Mr Poole must have known that the claims about the role of Sharp Training were also false

In summary, each of Mr Maitland and Mr Poole (at least) knew that (with the possible exception of the HVTC) none of the MOUs had been entered into. Each of Mr Maitland, Mr Poole and Mr Ransley was aware that there was no MOU with ResCo or Coal Services. Each of the directors was aware that, even if executed, the contemplated MOUs could in no way justify the grandiose statements of their significance made in the Submission, as they contained no material obligation on either side and could be terminated on 60 days' notice. Each of the directors knew there was no agreement of any kind in place with Coal Services or Sharp Training. The Commission concludes that each of the directors was aware that the false or misleading statements about the alliance referred to above had been made in the Submission.

The Commission has observed that the claims as to what was proposed by way of the training mine were of fundamental materiality. The alliance was presented as a fundamental aspect of the training mine proposal. It was integral to the delivery of what was being proposed as the justification for the direct allocation. Given the significance the alliance was said to play in the success of the training mine proposal, the false or misleading statements as to the alliance were material. And, while the matter is to be determined objectively, the Submission itself assists to demonstrate the materiality of statements about the alliance. The Submission identified the existence of meaningful, signed commitments as mitigating a key risk to the project.

It was also specifically submitted that the non-participation of Coal Services was not material as it was only one of the alliance partners. That submission is contradicted by Mr Maitland's own evidence:

> *And the idea of setting up a training facility for underground coalminers with no relationship with Coal Services appeared to you to be impossible? ---Well, we hoped for a relationship with Coal Services.*
>
> *You thought it was- - -Well, they were, they, they were one of the- - -*
>
> *You thought it was a key, you thought it wos a key?--- - - -first groups we went to.*
>
> *Because you thought it would be a key aspect of the saleability of the project?---I thought it would be a very very valuable asset to a training mine.*

Given the nature of the proposed project, the significance of the alliance to its delivery and the status and role of Coal Services in training miners, its participation was plainly a material matter. The Submission said as much – as to the training facility it said "alliances with HVTC and Coal Services are also considered important to this aspect of the project".

Financial modelling

The financial modelling was principally the province of Mr Chester and of Mr Poole. Mr Chester's role was principally to accumulate data from the company, perform financial modelling and compile the relevant parts of the Submission. Mr Poole was the director with the greatest interest in, and involvement with, financial matters. He had early on been appointed acting financial officer and was to be remunerated for his work in that position. One of the objectives of the Submission – acknowledged by Mr Chester in his evidence – was to show that the proposed commercial mine and training facility could be financially sustainable with a "realistic and achievable model for capital costs and anticipated profitability". To that end, statements were made in the Submission as to the likely capital costs of the proposed mine and training facility, the proposed manner of financing those capital costs, and the likely cost and revenue of the training program.

Specifically, the following statements were false or misleading:

- The construction of the training facility was estimated to cost $7 million (as a statement of a current estimate of the likely future cost of the training facility it was entirely fabricated. It conveyed the false or misleading impression that proper modelling had been done, and a likely future capital expense had been derived).
- Revenue and expenses of the training facility by 2015 would each be $2.4 million (these were entirely fabricated and conveyed the false or misleading representation that the training facility had been carefully modelled and that it was intended to have the stipulated level of income and expenses).
- DCM was a "vehicle with sufficient financial resources to undertake the development of an underground training mine".

As to these aspects of the Submission, the Commission concludes that each of Mr Ransley and Mr Poole was aware at the time that a false or misleading statement was being made.

As to the capital costs of the mine, the figures adopted in the Submission were $209 million for the "Doyles Creek underground mine and ancillary facilities" and an additional $7 million for construction of the training facility. It is difficult to understand how the figure of $209 million was arrived at. Mr Lewis said in his evidence that it was a significant underestimation of the likely development costs of the mine. In December 2008, he recognised them as being in the order of $400–$500 million. He gave evidence acknowledging that the figure adopted in the Submission was wholly unrealistic and said "[c]learly there was no detail[ed] work done to check the accuracy of that number".

As to the $7 million for the cost of the training facility, no witness was able to explain how that was arrived at, or by whom, or on the basis of what items of cost. Mr Ransley thought it was the cost of equipment only but Mr Chester, who inserted the figure into the Submission, thought it was the cost of classrooms, a workshop and setting up within the training panel. Mr Poole said he just accepted the number as having been derived by experts. But none of the so-called experts took responsibility for it. Mr Martin, who designed the training facility, was not asked what its capital components were and did not contribute to the $7 million figure. Mr Chester was just given the number, without explanation, for insertion into the Submission.

The funding plan, set out in the Opes Prime letter, which accompanied the Submission, provided for only $209 million of funds. None of the principals noticed that the funding arrangement was short by the cost of the training facility. Mr Chester explained this as an "error". No doubt it was, but had any of Mr Ransley, Mr Poole or Mr Maitland thought that the Submission represented their actual formed intentions then each of them would have shown an interest in how much it was likely to cost, and how the money was going to be sourced. The error could not then have been made. The fact that none of them noticed that their funding plan did not include any money for the training facility is telling.

The Commission concludes that no one paid any attention to the $7 million or how it was reached. It was an arbitrary figure put into the Submission for the sake of appearances. It was part of the "spin".

The Submission also contained figures showing how much the training program would cost, and how much revenue would be raised. In February 2008, Mr Poole suggested by email that the model needed to reflect the fact that there was a training aspect. Until that point, remarkably, the financial model made no allowance for any training activities at the mine. When that suggestion was made, Mr Chester inserted into the financial models an arbitrary figure of $2 million (for 2014) and $2.4 million (for 2015) as the annual cost of the training facility. The same figures were inserted for the same years as the revenue from the training facility, so that the training facility appeared cost neutral.

Apparently, no discussion occurred at the board of DCM as to what the costs would actually be, or how the revenue would be raised. Mr Poole assumed that tuition fees would be paid, either by, or on behalf of, the trainees, but had not considered how much or on what terms, and had not taken into account the fact that the anticipated revenue would require approximately $100,000 per annum for every trainee miner (apprentices would presumably not be charged for their training). Mr Maitland conceded he showed no interest in the cost and revenue figures, which is extraordinary given his union background and the fact that the fees to be charged to trainees would affect in a fundamental way who had access to the program, whether it was viable and (therefore) the very fundamentals of the proposal. Mr Ransley said that the allocated cost of $2.4 million would be inadequate and would not even cover the salaries of trainers. It was clear he had paid no attention to the figures in 2008. He suggested the responsibility was with Mr Poole. But Mr Poole – and presumably also Mr Maitland and Mr Ransley – accepted the figures without curiosity. Mr Chester's evidence was that there was never a budget prepared and he did not know how the training facility would be funded. And he had not had the discussions that would have been necessary before any sort of sensible financial modelling could occur. No one from DCM ever showed any curiosity as to whether the training facility was going to make money or lose money or considered the fundamentals of a business model underlying what purported to be a credible and genuine proposal.

The Commission concludes that the figures in the Submission for the revenue and costs of the training facility were entirely invented and meaningless. They too were part of the "spin".

Counsel Assisting also made an attack on the revenue and cost figures of the commercial mine. The final version of the Submission showed annual revenue from 2015 of $248 million and annual profit of $55 million. There is reason to wonder how those figures were arrived at. At an earlier stage of the drafting, some of the profits in earlier years had been very high, and Mr Ransley suggested by email that, "the financials need to establish that the Mine shows a solid financial return without huge profits". Mr Chester interpreted the instruction as being to look at the inputs into the financial figures and work out if a particular result could be achieved which he was willing to do "as long as it was realistic". In subsequent emails, Mr Chester asked the principals to "review the financial outcomes to ensure they are appropriate as we will need to fine tune if not". He was responding to the requirement Mr Ransley had expressed to ensure a particular outcome was achieved.

Counsel Assisting pointed out that these communications are all consistent with the figures for the commercial mine being deliberately contrived to downplay the profitability of the mine. The outcome of the financial modelling, however, was to show a very profitable mining venture, albeit on the basis of certain unrealistic figures. As a result, the Commission does not conclude that the particular profit figures adopted by Mr Chester in the financial model as ultimately presented in the Submission were deployed as the contrivance suggested by Counsel Assisting.

The communications referred to above are, nevertheless, taken into account by the Commission in assessing the general approach adopted in the preparation of the Submission and the intentions of the persons concerned as to other impugned statements. For example, the communication from Mr Ransley, on its natural reading, shows no genuine concern with truth. He did not say that care needed to be undertaken to ensure accurate financials. Rather, he was concerned that the financials display an outcome. His approach recorded in the email was consistent with the approach he had dictated (as the Commission has found) in December 2007 as to the "need to demonstrate benefits and not a goldmine for entrepreneurs".

Additionally, it was false to state, as the Submission did, that DCM was a "vehicle with sufficient financial resources to undertake the development of an underground training mine". That statement – put in the present tense – was false. Mr Maitland conceded it was "inaccurate" but refused to admit it was "false", Mr Chester accepted that it was "not correct", and Mr Lewis accepted that to his knowledge it was false.

Responsibility for the false or misleading statements as to financial matters rests principally with Mr Poole, who must have been aware that there were things said in the Submission as to the financial aspects of the training facility and funding that could not be supported in fact. The Commission does not accept Mr Poole's denials in this regard, taking into account the obvious significance of these matters and his particular role in the financial affairs of the company. In Mr Ransley's case, the Commission does not accept that he did not interest himself in the financial modelling, at least to the stage of becoming aware that the Submission contained figures, such as the cost of the training mine, or the training revenue and expense predictions, that could not be supported. His long history of entrepreneurial endeavour and significant stake in the company are inconsistent with the idea that he did not show a close interest in these financial matters before the Submission was finalised.

The Commission here records that it rejects the contention of the directors that they were able to rely on Mr Chester as to the content of the Submission, and so did not consider the correctness of any statements in the Submission concerned with financial matters. The directors were aware that Mr Chester would rely on the company to give him information as to the detail of what was intended. Mr Chester's role was to collate and present that material. It was not his role to derive critical inputs into the financial modelling himself and adopt them without discussion with the directors of DCM.

As to the statement of the projected capital outlay, costs and revenue associated with the training mine, this was a fundamental part of the project to which the company was committing itself. It may well be, as the directors asserted, that they thought others, such as Mr Martin and Mr Chester, would prepare the detail of those numbers. In Mr Chester's case, that involved the collation and presentation of data given to him by DCM. His involvement does not explain why each of the directors did not also take an interest in the likely size, structure and financial performance of the proposed training mine. Given the time and effort that went into the Submission, the involvement of those directors in it, the preliminary meetings at which a reference to "spin" was recorded, and the centrality of the financial aspects to the enterprise, the Commission concludes that each of Mr Poole and Mr Ransley was aware of the falsity or misleading nature of what was contained in the Submission.

In Mr Maitland's case, the Commission does not draw the same conclusion (save as to the single matter referred to below). As extraordinary as it may be given the importance of the financials to the viability of the endeavour, it is consistent with his interactions with Mr Poole and Mr Ransley that he might have taken no interest in the financial modelling, and had simply assumed that Mr Ransley and Mr Poole between them, with Mr Chester's assistance, would assess and model accurately the financial viability of the project.

Given the knowledge of each of Mr Poole, Mr Ransley and Mr Maitland as to the financial position of DCM (they were all intimately involved in the affairs of the company, attended board meetings, and regularly discussed matters concerning the company with each other), each was aware of the falsity of the statement as to its capacity to undertake the development of an underground mine. This is the single matter upon which the Commission finds that Mr Maitland bears responsibility for a misstatement about financial matters. The Commission, however, does not find that this statement was relevantly material. It is a broad summary statement, and on its own conveys nothing specific about the financial state of DCM. The Submission itself makes clear that debt and equity funding would be sought in due course for the development of the commercial mine, and there was attached to the Submission (and the application in September 2008) letters of financial support intended to corroborate the

possibility of that funding. The financial modelling of the training aspects was material. A decision-maker could be expected to take account of statements in the Submission concerning the estimate of $7 million for construction of the training facility and estimates of revenue and expenses of the training facility. Mr Ransley and Mr Poole are responsible for these matters.

Benefit to the state

When read with its covering letter, the Submission makes some significant claims as to the public benefit that the Doyles Creek proposal would constitute for the state of NSW. As will be seen, the claims as to public benefit are plainly unsupportable. None could be made out on the basis of the proposal that was advanced. In respect of the anticipated public benefit of the training mine, the answer to the claims and statements made by DCM is to be found in the fine detail provided in the Submission itself, and a careful reader could, thereby, avoid being misled, although such a reader would have to take great care with the minute detail to avoid being distracted from the truth by the many pages of bold statements as to claimed public benefits.

As identified below, various representations were made to the effect that the proposal contained in the Submission would assist in a material way to alleviate a skills shortage in coal mining in NSW. All of the directors were aware that these contentions were false.

Central to the Submission was the contention, repeated throughout all of the proponents' dealings with the government, that, if DCM was granted a mining tenement, it would facilitate the easing of a skills shortage then apparent in the mining industry in Australia and NSW. The covering letter promised assistance in "addressing the severe shortage of semi skilled and skilled workers in the underground coal mining industry". In the executive summary, it was claimed that the proposal "seeks to address the current and expected future shortage of skilled labour by means of a practical real life mining operation in addition to numerous direct and indirect benefits to the coal sector, the economy, State and Federal governments and the community sector". Later in the document, it is claimed that the training facility "would provide the State of NSW with the opportunity to become a pioneer in "hands-on" experience as a component of training skilled employees in the coal sector and generally the Australian resources industry". And further: "By up-skilling the sector of the Australian workforce the Doyles Creek Training Facility seeks to mitigate the recent trend of sourcing migrant labour from offshore destinations such as Asia, South Africa and Europe. These skills can be utilised to satisfy the demand for appropriately-skilled employees for existing operations and to ensure the timely implementation of new and expanded coal projects that will minimise the potential for loss or deferral of valuable export income". Later, a claim is made in definite terms: "The Training Mine will provide direct benefit to the labour market by ... increasing the pool of available labour to mitigate the current and expected shortage set to be experienced by the mining sector". There are other similar examples.

All of those statements were of doubtful veracity, in at least two significant respects.

First, as to the need for an additional training facility to meet a skills shortage, the academic and industry material relied upon was at best ambiguous, and, on its most reasonable interpretation, entirely unsupportive. As to the nature of the problem to be overcome, the Submission included no detail, other than general statements to the effect that there was a skills shortage, and high-level references to certain industry and academic studies that Mr Chester claimed to have "skimmed" for the purposes of the Submission. From those reports, some headline figures were drawn, such as the claim that 70,000 additional skilled and semi-skilled workers were going to be required in the minerals industry over the next decade. The expected labour shortages addressed by the academic reports referred to were in the decade 2005–2015. There was no known expectation of a shortage after 2015, as Mr Chester acknowledged. Of the 70,000 headline figure, only 5,000 were anticipated to be required in NSW (2,000 of them in coal, and a subset of those in underground mines) and only 15,785 in coal nationwide. And the conclusion of the principal study was that the shortage was a people shortage, not a skills shortage – that is, it was "more a matter of attracting people to the industry" and was not a problem "that training policy can necessarily address". Furthermore, the reports suggested that the skills shortages were a geographical phenomenon not evident in the Hunter Valley. In summary, the academic and industry material relied upon by the proponents did not support the case that they were advancing. And the proposition that an additional training facility for coal miners in NSW constituted any sort of significant public good was entirely without support in any proper academic study. The Commission, however, has not taken this aspect of the misleading nature of the Submission any further. There is no clear evidence that any of the proponents was actually aware of the misleading nature of these statements. None of them professed to have reviewed the academic or industry literature himself (other than Mr Chester, who skimmed some of it).

The second respect in which this part of the Submission was misleading is more significant. Even if such a skills shortage had existed, the proposal advanced in the Submission could not possibly have addressed it at all, much less in the grandiose way in which the Submission described its potential. As has been pointed out already, the

training aspect was a miniscule part of the operation by any proper business measure. No new miners were anticipated from the training mine until training commenced in 2014, with the first 25 graduating at the end of that year at the earliest by which time the anticipated skills shortage (or people shortage) would be almost over.

More fundamentally, the numbers of anticipated trainees, when compared to those expected to be employed at the commercial mine, meant that it was inconceivable that the training proposal would make any contribution to the alleviation of a skills shortage in the period to 2015 or at any time in the foreseeable future. Mr Chester conceded, correctly, that the proponents could not reasonably assert that the project was designed to address a skills shortage were it anticipated that the mine would employ more skilled or semi-skilled workers than it would train. This is plainly correct, although the principals of DCM did not accept it.

Mr Poole's position was that any number of trainees, however small, would justify the claims made in the Submission, because a mine was inevitable at Doyles Creek, and, therefore, a mine with a special training program would contribute to the alleviation of a skills shortage. That contention is not accepted. A small number of trainees could never meet the grandiose claims made in the Submission, extracted above. And there is a more fundamental problem with Mr Poole's position. The grant of an EL to Doyles Creek was presented as a means of addressing a skills shortage – that was the supposed reason for the grant to DCM, and for any mine at all at that location. If the company intended to train 25 miners per year and employ 120, then it would not achieve that result. If more realistic figures for the likely employment at the mine were adopted, then the position is even worse – Mr Ireland's evidence was that the numbers of employees required at the mine would reach 300, in which case annual turnover of mine workers at the commercial mine could be expected to equal or exceed the number of trainees. And there was no basis in fact for the expectation that another mine would go ahead if DCM did not proceed – the DPI did not have Doyles Creek slated for release in 2007–08. What would happen, thereafter, was unknown.

Mr Ransley's response was based on his suggestion that it was intended to train many more than 25 miners a year, and that the numbers put into the Submission were just starting "conceptual" numbers. This evidence achieved a degree of prominence in his submissions where the proposal was described as containing "indicative details" or as being a "conceptual pre-feasability study", and the argument was picked up by submissions for Mr Maitland. Mr Maitland's submissions suggest that the Submission expressly stated that the figure of 25 miners a year was an initial figure only, intended to grow. But that is not correct. The proposal in the Submission was for an initial intake of 25 miners, seven statutory positions (five deputies and two under-managers) and 18 trade apprentices (nine fitters and nine electricians), to a total of 50 students in the first year. Numbers would increase in each of the succeeding three years, as a new intake was received, and those on multi-year courses (the apprentices and under-managers had a four-year course, the deputies a two-year course) worked their way through. By the fourth year, and every year thereafter, the Submission anticipated a total of 104 students in the training school, of whom only 25 would ever be trainee miners – a number not increased since the commencement of the program. At most, there could be 50 graduates in a year (on the years in which 25 miners, 18 apprentices and seven statutory positions all graduated). In other years, fewer might graduate. The rest of the students would be at some stage of an apprenticeship or statutory course. There was no suggestion in the Submission that any greater number would be trained at some stage in the future. The intention was for a single training panel, and Mr Martin's view was that 25 trainees could feasibly work on a single panel. The evidence before the Commission indicated that this panel would be mined out in possibly less than two years.

Nor can it be accepted that the proposal contained in the Submission was just conceptual, or "indicative details" or a starting point. The Submission contained statements about what DCM intended to do in the event it was awarded the EL and eventually built a mine. Those statements about what it was going to do were made in definite terms. Although plans for the future can always be altered, there was no intention within DCM to do anything other than what was contained in the Submission. Mr Poole's evidence was that his understanding was that what was put in the document was what was intended, and not just a starting point or placeholder. The Commission accepts Mr Poole's evidence. The Commission rejects Mr Ransley's evidence as to his contrary understanding, and finds that the Submission contained the only training proposal that was intended by DCM. Had there been some proposal within the company for a future expansion, then Mr Poole would have been aware of it, and some indication of it would have been contained in the Submission. The Commission concludes that there was no discussion in the company about the proposal being a starting or conceptual proposition to be expanded in an unspecified manner at some future stage.

Those plans were deployed so as to seek to justify a direct allocation of the EL to DCM by way of an asserted public benefit, rather than it being put out to a competitive process which DCM could not afford to participate in and that against a known background of the large amounts companies were prepared to pay in such a process. The significance of these matters is that the miniscule proposition advanced by DCM could not justify the grandiose promises made in the Submission, and could not justify any genuine belief in any of the participants that the

proposal could properly justify the grant of a significant State asset.

After all, as has been pointed out, none of the principals showed any interest whatsoever in the numbers of trainees put into the training mine proposal. They were not concerned with ensuring that the details comprised a significant public benefit. They were focused on it being the "spin".

As was pointed out earlier, a reader could, by focusing on the detail of the proposal, realise that the training proposal was miniscule and so avoid being misled by the grandiose statements in the Submission. While the statements identified above concerning the claimed public benefit were plainly false in that the proposal could never satisfy the claims, the means for discovering their falsity was within the Submission itself. In this regard, while the detail concerning the size of the tiny training panel was difficult to find in the Submission, the small number of students and trainees was stated in the Submission. And it was stated in the body of the Submission that underground training would take place in a stand-alone training production panel. As such, while the claimed public benefits were false and without basis, the Commission refrains from finding that they were materially false or misleading in the context of the entire Submission.

Miscellaneous matters

Various other aspects of the Submission were impugned by Counsel Assisting.

Extensive due diligence and detailed assessments

Problematic statements appeared in the Submission as to how the Doyles Creek site came to be selected. As has been seen above, the site was proposed by Dr Palese to Mr Martin in late 2006. The Submission made various large claims as to an extensive due diligence process having been undertaken to identify a specific site for the particular purpose of a training mine, the result of which was the identification of the Doyles Creek site. Thus, it was said that "extensive due diligence and detailed assessments have been carried out to identify a location suitable for the construction of a Training Mine Facility". The Submission went on to refer to a "rigorous assessment process" undertaken on the "premise that only a small to medium-sized mining operation would be required "and a "review of suitable tenements".

All of those statements are false or misleading. The truth of the matter is that no "rigorous assessment process" was undertaken as described. Nor was any "extensive due-diligence" undertaken. Nor were any "detailed assessments" carried out. Much less was a specific assessment process undertaken to find a suitable location on the specific premise that only a small to medium sized mining operation would be required. What, in fact, occurred was that Dr Palese told DCM about the Doyles Creek site. As Counsel Assisting submitted, this was not the outcome of any due diligence or assessment process, but simply a stroke of luck for those principals as the site fell into their hands through no work or effort of their own.

Mr Ransley sought to maintain that he undertook a rigorous assessment process of the kind described, with Mr Martin also involved. He maintained that several closed mines were identified and reviewed as potential site locations and said that all of this occurred in 2007 (of course, by then the company was already named Doyles Creek Mining). When pressed, however, Mr Ransley said he could not even remember approximate timing and later changed his timing to 2005 to 2008. But, by 2007, Dr Palese had told the proponents of DCM (including Mr Ransley) about the Doyles Creek site and Mr Maitland had sent off correspondence seeking access to that site in early 2007.

Counsel Assisting referred to the evidence given by Mr Ransley in his compulsory examination and which was tendered at the public inquiry. Mr Ransley was asked in that examination who he had spoken to about potential sites for an underground training mine before Doyles Creek emerged. He said he had one discussion with Graham Gaegler, who was a site superintendent with Rio and aside from that discussion could not recall a single other discussion. He went so far as to state:

> *I'm asking whether you had discussions with any other client about a training mine, underground training mine?---No, 'cause I didn't consider any other sites suitable to do what we needed to do.*
>
> *Well, I'm trying to understand what it is that you did in 2005 onwards to investigate sites for a possible training mine?---Talk, Commissioner, that was it.*
>
> *Talk?---Yeah.*

Yet, as Counsel Assisting pointed out, at the public inquiry Mr Ransley conceded that, in his compulsory examination, the one conversation he recalled with Mr Gaegler was unrelated to an underground facility. Otherwise, it was said that there was a walk around at Coorabong (after it closed) and West Wallsend. Mr Ransley conceded that he was unaware of a review of other suitable tenements, but defended the statement in the Submission on the basis that maybe someone else did it without his knowledge. The Commission accepts Counsel Assisting's submission that it is unbelievable that Mr Ransley would have been completely unaware of any such review. Furthermore, Mr Ransley's evidence on this topic was another example of his refusals to make

concessions about obvious matters and instead resorting to invention.

Mr Maitland conceded that he was unaware of DCM ever considering any other site or undertaking any rigorous assessment process on any other site or anything that could be described as a due diligence. He agreed that what had happened was that an opportunity was presented to acquire an EL, it was associated with the training mine idea and it was pursued. He accepted that relevant statements in the Submission concerning this were incorrect or "an overstatement". The reality is that there was no assessment process of the kind described in the Submission. There is not a single piece of paper evidencing such an assessment process.

It was submitted on behalf of Mr Ransley that the statements were not unreasonable descriptions. It follows from the above that this is not accepted. And the evidence of Mr Martin, in particular, so far as it might corroborate an inspection at West Wallsend, does not alter that position. The statements are false or misleading irrespective of whether such an inspection took place. It was also submitted on behalf of Mr Ransley that he did not know the statements were false. But that is not so either. Mr Ransley was supposed to be involved in these endeavours. He tried to give evidence justifying them.

The relevant statements were false or misleading, as Mr Ransley was aware. There is no evidence of what Mr Poole and Mr Maitland knew about Mr Ransley's previous efforts to locate a suitable site for a training mine, and, accordingly, the Commission makes no findings against either of them on this basis.

The suggestion of a process around the selection of Doyles Creek for the site of a training mine was material, because a decision-maker could be expected to conclude that, if this tenement were not granted to the proponents, it may not be possible to locate another site suitable for a training facility. That was the sense conveyed by the representations. They also tended to convey an appearance of rigour to the whole proposal, which it lacked.

A new board for DCM

The Submission also asserted that the company intended to create a new board, which would include members of the alliance. It said:

> *Pending successful grant of the Doyles Creek Exploration License* [sic], *a new Doyles Creek Board will be constituted that includes representatives from the community, union, government, ResCo, HVTC, the University of Newcastle, and the Hunter Valley Helicopter Rescue Service.*

In fact, there was no plan for a new board of DCM, constituted by the alliance partners or any of the other organisations and groupings referred to in the statement.

It was submitted that the statement was a mistake or else referred to the board of a new company to be established (reliance being placed on evidence of Mr Ransley and Mr Maitland). Mr Maitland, however, frankly conceded that he was unaware of any such plan and the statement was not correct. Mr Lewis, who would later be charged with taking the project forward, was unaware of any such proposal and said to his knowledge the statement was false. If there were such a proposal, given his later role, it can be expected he would have been aware of it. Against those concessions, Mr Ransley stubbornly defended the accuracy of the statement. But not a single contemporaneous document evidencing such a plan has been pointed to. Certainly, nothing to indicate that any of the so-called "alliance partners", union or government had been consulted about participating on such a new board.

As mentioned above, the Commission finds that each of the directors read the Submission and must have seen the section on the new board for DCM. Each of them knew that what was contained in that section was false or misleading.

The proposed new board could be expected to reinforce in the mind of the decision-maker the commitment of the proponents to the alliance partners, and their involvement in the future of the proposal. The importance of such matters has been considered elsewhere. Obviously the statement was deployed – in a stand-alone chapter in the Submission – so as to bolster the credibility of the proposal in the eyes of the reader. The Commission is satisfied that the statement was false or misleading in a material respect.

First letter of financial support

A letter from Opes Prime was attached to the Submission in March 2008, to support the capacity of the company to finance exploration and, in due course, a mine. In that letter, it was stated that, "we write to confirm OPG's support for the proposed capital raising of Doyles Creek" and that OPG was "pleased to advise that it will facilitate the provision of equity for Doyles Creek with the specific intention of sourcing funding for the proposal". That support was said to be premised upon the proposal "being considered value accretive to Doyles Creek". In that regard, the letter contained the following false or misleading statement:

> *OPG has previously carried out significant due diligence on Doyles Creek and is prepared to provide financial support based on the strength of the training mine concept.*

It then went on to describe the attractiveness of the transaction. In this regard, it made statements as to how the project was well-regarded as a pioneering example of the industry leading the campaign to mitigate a skills shortage. It also confirmed the existence of a "strategic alliance" with "credible groups", naming all of the supposed alliance partners, including Coal Services.

The statements were false or misleading. OPG had not performed any due diligence. Nor had Mr Chester. In the course of his work on the Submission, he had made it very clear to DCM that he was accepting figures given to him by the company, and was not checking their accuracy. That is the antithesis of due diligence. Thus, Mr Chester knew that the statements were false or misleading.

Furthermore, the financial support that was offered was premised on the non-existent due diligence. The letter conveyed the false impression that the prospect of the company attracting funding in due course when required had been enhanced by a third party performing a due diligence on the proposal. It also lent the imprimatur of Opes Prime (and verification by due diligence) to the various statements in the Submission of a public benefit, and the existence of the alliance.

Mr Chester was the author of the letter, and aware of its falsity. He knew that DCM intended to use it by attaching it to the Submission in support of its application for consent to apply for the EL.

Other circumstances surrounding the letter demonstrate that it was a sham. The letter was prepared by Mr Chester using a template from an unrelated matter. It was prepared between Friday, 22 February 2008 and early the following Monday morning. It was eventually executed on 6 March, although it carried the date 26 February 2008. It advised that Opes Prime would facilitate the raising of debt and equity to fund the project. Mr Chester prepared a draft for signature by Anthony Blumberg, a director from Opes Prime. As to the level of support that the letter offered, Mr Chester thought he could put in any numbers he liked, without regard to Opes Prime. He conceded that he knew that Mr Blumberg was relying on him as to how much money Opes Prime was being asked to contribute and understood that Mr Blumberg would sign any letter put in front of him. Mr Chester's evidence was that he thought Opes Prime had floated the idea of funding the mine with contacts in Singapore. However, no contemporaneous document corroborates that possibility, and during 2008 DCM looked to Xstrata and Chinese companies as potential equity partners, without ever seeking to pursue the possible equity partners that Opes Prime had supposedly identified in late February. The Commission concludes that there were no potential equity or debt providers sourced by Opes Prime as Mr Chester must have been aware. He was, therefore, aware of the various respects in which this letter was false or misleading. The materiality of letters of financial support is dealt with in relation to the further letter of financial support provided in September 2008.

After consent to apply had been received by DCM, a formal application for the granting of the EL was prepared and lodged. Part of that application included a number of attachments. Those attachments included the Submission. They also included a new letter of financial support from Paradigm Capital. As has been referred to above, Mr Maitland certified the truth and accuracy of the application and its attachments. In so doing, he repeated the various misleading statements in the Submission.

Second letter of financial support

Mr Stevenson had previously advised as to the need for evidence of financial capacity. That had originally been met at the time the Submission was first lodged (in March 2008) by the Opes Prime letter. But Opes Prime collapsed in March 2008, 10 days after the Submission had been lodged with the DPI. A hole needed to be filled. The DPI pro forma application listed the need for particulars of available financial resources to accompany the application, no doubt in view of this being required information by reason of s 13(5)(b) of the Mining Act. The pro forma suggested that the particulars might take the form of a recent audited set of financial statements or the financial section from the most recent company report. But that was not possible for DCM. It apparently had no such documentation and it certainly had no significant finances.

But that was not a serious problem. The solution to hand was for Mr Chester to generate a new letter to accompany the application. And so, Mr Ransley and Mr Chester discussed a new letter of comfort from Mr Chester's new firm, Paradigm Capital, to replace the Opes Prime letter from March. An email from Mr Stevenson on 23 September 2008 received by Mr Ransley, Mr Poole and Mr Maitland (amongst others) referred to the various parts of the pro forma application to be addressed and relevantly recorded:

> *Q11(a) requests "evidence of financial capacity to meet all exploration activity". The Form says this "can" be provided by way of recent audited financial statements for most recent company reports but as these are not available then a letter of financial support from a financial institution will have to be provided which I* [sic] *Craig is arranging.*

To this end, Mr Chester took the Opes Prime letter and republished and rebranded it. In so doing, he did make some amendments in consultation with Mr Ransley, the only significant amendments being to make some of the statements in the letter more certain.

The letter contained the following false or misleading statements:

- Paradigm is pleased to advise that it has arranged the appropriate equity providers for the Doyles Creek development.
- Paradigm has arranged the equity participants and raised the initial equity of $5 million for pre-development activities and the subsequent equity component for project development of an estimated $90 million. The A$90 million equity component will be provided subject to definition of sufficient coal reserves and favourable Bankable Feasibility Study outcomes.
- We have received strong support from equity participants based upon favourable outlook for coking coal markets, together with a desire to participate in a pioneering training venture with high calibre Strategic Alliance partners.
- Paradigm has previously carried out significant due diligence on Doyles Creek and is prepared to provide financial support based on the strength of the training mine concept.
- (under the heading of "Disclaimer" at the end of the letter): Paradigm has satisfactorily concluded its own due diligence of the proposed Training Mine facility and underground coal mine development. It is the intention of Paradigm to proceed with the financing arrangements as set out herein, subject to the completion of acceptable final project due diligence.

As to statements in the letter that equity had been arranged (the first and second statement set out above) Mr Chester ultimately conceded that the statement was false "in a verbal sense". Mr Chester sought to justify those statements by claiming to have had discussions with possible equity providers. He maintained that he had spoken to potential equity providers about the $90 million – quite separate to the Opes Prime investors from March. When pressed, however, he could not identify a single investor. Then, confronted with the transcript of his compulsory examination – when he was unable to give evidence of anyone other than the investors behind Opes Prime – he claimed to have had a new recollection. The Commission rejects his evidence. It was an improbable and unconvincing attempt to excuse false statements in the letter.

A draft of the letter had said that $5 million would be raised for the initial exploration. At Mr Ransley's direction, that was changed to "had been raised", thereby altering optimism into falsehood. No money had actually been raised and the statement is false. Each of Mr Chester, Mr Ransley and Mr Poole sought to defend the statement by giving evidence that Mr Poole and Mr Ransley had assured Mr Chester that, if required, the money would be provided by them. The Commission rejects their evidence on this aspect. It was all self-serving, and there exists other reasons to doubt that any such assurance had ever been given, including the following matters.

First, no contemporaneous record exists of the supposed commitments by Mr Poole and Mr Ransley, although the Commission has had access to many emails and other communications with or about potential investors and fund raising during 2008. No discussion is recorded at any board meeting, which one would expect to see if two of the directors had given a $5 million funding commitment in relation to the affairs of the company. The draft board minutes of 23 December 2008 referred to below indicate the absence of any such commitment.

Secondly, the version proffered in the public inquiry had not been advanced in the relevant parts of compulsory examinations tendered before the public inquiry. In his compulsory examination, Mr Ransley gave a completely different version of events to explain the statements in the September 2008 letter, asserting that he thought that Mr Chester had conducted a rights issue, and that the money was in the bank, which is far-fetched and entirely inconsistent with the asserted agreement. This was sought to be explained on his behalf as being an error – and the version he presented in compulsory examination is undoubtedly false. But, the Commission does not accept that it was an error in the sense meant by Mr Ransley. Rather, that evidence can be best interpreted as an attempt by him to cover for what he must have realised was a difficulty for him. Mr Chester, too, gave different evidence in compulsory examination. In Mr Chester's compulsory examination, he conceded that the statement about the $5 million was false, and did not mention the arrangement with Mr Ransley and Mr Poole, which became a prominent part of his evidence at the public inquiry.

Thirdly, other shareholders were not aware of the funding assurance – including Mr Maitland, who was on the board, and Mr Stevenson who attended most board meetings and who had been the source of the suggestion that a funding assurance be obtained. They would likely have known of it had it actually existed. Mr Lewis claimed a vague recollection when questioned about a December board meeting, but his recollection was that several options for the raising of $5 million were being discussed by the company in December (after the granting of the EL) and that Mr Ransley and Mr Poole were then willing to underwrite that amount if no funds were raised from shareholders or external funders. His recollection was not directed to the September 2008 funding letter, and did not rise to the level of an undertaking or commitment to Mr Chester or the company.

Fourthly, after the application was granted, there is no suggestion that Mr Chester or anyone else asked Mr Ransley and Mr Poole to honour the purported commitment. Rather, they carried on seeking finance, and did not commence significant drilling until the listing (although the program had called for $1.7 million to be spent on exploration activities in the first half of 2009). Nor did anyone suggest that Mr Chester produce his equity providers. Rather, the proponents went to China looking for money. The company did not have funds to explore in December 2008 and was looking to two sources for potential investors – investors in China and Xstrata. Had there been a binding commitment for the $5 million from Mr Ransley and Mr Poole, that could have been accessed immediately, and drilling commenced.

This is supported by the draft minutes of a board meeting of DCM held on 23 December 2008. At that meeting, Mr Poole delivered a "Finance Overview". He outlined certain financial commitments that DCM had to meet. This included the need to make a $1.1 million payment under the EL in equal instalments over four years; the first instalment ($275,000) was due at the end of the following month and, to meet that obligation, DCM had negotiated a short-term loan with Westpac bank. He then summed up the financial position of the company as follows:

> *Currently, the Company is overdrawn by about $50K (on $200k overdraft facility) and it was noted that all up the Company is approximately $750,000 in red in total. In light of this it was noted that no financial commitments are to be made by any Director without prior approval of AP.*

Potential investors were then discussed, with Mr Maitland reporting on continuing discussions "with Chinese companies for equity stake in the Company" and Mr Ransley advising that Xstrata had informally suggested they "would look at financing drilling of 10 holes to evaluation [sic] what is there and then discuss equity". No other source of funds or potential investors was identified. No reference to a commitment from Mr Ransley or Mr Poole to provide $5 million is recorded. No suggestion of calling upon Mr Chester's letter of financial support is made. Mr Ransley, far from proposing to reach into his own pocket, was apparently in discussions with Xstrata to fund the initial exploration activity. Exploration activity that, according to the application, was to involve drilling 14 holes in the next three months.

Fifthly, even if such commitments had been given, it was false to say in the letter that the $5 million had been raised. It had not been raised – it had not even been promised to the company. Even if their version of events were accepted (and it is not), Mr Ransley and Mr Poole had told Mr Chester they would contribute the $5 million. That could never be called upon by the company. There is a world of difference between a company having raised capital and it having been told by shareholders they will provide capital if necessary.

That the letter was a complete sham is also indicated by an email from Mr Chester to Mr Ransley on 18 September 2008 concerning its drafting. That email read as follows:

> *Craig,*
>
> *Please find attached draft for comment/feedback. The Disclaimer is included to look "official" and can be adjusted any way you want.*
>
> *Regards,*
>
> *Mike.*

The reference to the "Disclaimer" is the last section of the letter of support. Apparently, it was included to give the letter an appearance of genuineness that it plainly did not have. And, although this was to be a letter of financial support from a purported "independent corporate finance firm", it was being provided to Mr Ransley in draft for comment and alteration. The letter was a sham. It was created as a joint endeavour by Mr Chester and Mr Ransley to meet a need to demonstrate adequate financial resources given that the previous letter from Opes Prime (which the new letter was copied from) was now a useless letter given the intervening and very public collapse of that organisation.

Mr Chester and Mr Ransley were each responsible for, and aware of, the false statements in the letter. Paradigm Capital had not arranged any equity providers for the Doyles Creek project. It was false to state that $5 million had been raised. It was also false to state that the subsequent $90 million for mine development had been "arranged". The Commission finds that no equity participation for $90 million had been arranged by Mr Chester, with or without any qualification such as a favourable feasibility study.

Mr Maitland published the letter to the DPI. The Commission finds that Mr Ransley and Mr Chester agreed that Mr Maitland should provide it to the DPI. Evidence recording Mr Ransley's involvement has been referred to above. As Mr Stevenson's email records indicate, Mr Ransley was the person arranging the letter. He requested the letter, received a draft for comment, and directed that the statement concerning $5 million be changed to indicate it had been raised.

Nor had Paradigm Capital performed anything that could be described as "due diligence", much less "significant" or "satisfactory" due diligence. Rather, Mr Chester had, whilst in a previous role, assisted with the compilation of the March 2008 Submission, adopting such information and figures as he was given from the company, and without checking any of it. Thus, it was submitted on his behalf that

he was no more than a sub-editor. As has been pointed out already, such a process is the antithesis of due diligence. Both Mr Ransley and Mr Chester were aware that the letter was false in this respect.

The Commission finds that each of Mr Maitland and Mr Poole was aware of the proposal to obtain a letter of financial support from Mr Chester. Each had been party to emails from Mr Stevenson referring to the need to provide financial details. They were each aware that this was a requirement that DCM had to meet and that DCM had no substantive financial resources. Each had been party to the email from Mr Stevenson of 23 September 2008 stating that Mr Ransley was arranging a letter of support. Mr Poole, however, cannot be demonstrated to have seen the document in its final form and the Commission makes no finding against him under this sub-heading, "Second letter of financial support". Further, the evidence does not adequately establish that Mr Maitland knew that the statements referred to under this sub-heading were false or misleading.

The combined effect of the relevant statements in the letter was to convey the misleading impression that DCM had been the subject of a due diligence process by, or on behalf of, equity investors, and that the results of the due diligence supported a significant investment in the company. The result could be to deceive a reader into thinking that there had been a level of independent verification of the statements made in the Submission. Those matters might be expected to assist the decision-maker to approve the application, and so were material in the relevant sense.

But more fundamentally, details of the financial standing of a company were something that went to the viability and standing of the company to whom an EL might be granted. If an EL were to be granted, it could involve the need for significant expenditure. Here, DCM had no real financial standing – it had no assets or cash reserve. Its capacity to borrow was no doubt limited. In lieu of providing details of its financial resources and standing, it provided letters of financial support. They were not generated (and fabricated) because they were regarded as inconsequential – they were generated and provided for a reason. And reference to the role of Opes Prime was noted in Annex A to the DPI's briefing note of May 2008.

It cannot be said that letters of financial support, and the relevant statements in them, were merely trivial or inconsequential. Plainly, they may be taken into account by the person to whom the statement is made in making any decision upon the matter in respect of which the statement is made. That this is so is indicated by the statutory scheme itself. Particulars of financial resources is one of the mandatory requirements in respect of the information that an application for an EL must contain (s 13(4)(c) and s (5)(b) of the Mining Act), and, therefore, part of the information that must be considered in deciding to grant an EL (s 22(1) of the Mining Act).

Community support

The covering letter to the application in September 2008 contained a statement that there was "...overwhelming community support from the Jerry's [sic] Plains community demonstrated by previous communications from the community to the Minister". This was false or misleading.

The Commission has already set out the opposition that was expressed at the sole community meeting, which representatives of DCM addressed. Without repeating that discussion, the overwhelming picture that emerged was one of community opposition. In this regard, the Commission has referred to the evidence of Mr Reynolds and Mr Maitland. To this might be added the evidence of Helen Holt and Ian Moore. Indeed, Mr Maitland fairly conceded that it was plain from the meeting that "[t]he community was against a mine", including the DCM mine, and that a large majority was against it. The Commission has rejected Mr Ransley's evidence to the contrary.

Prior to the application for the EL (or the granting of the EL) there was no further whole-of-community meeting. There were some dealings with a select group of individuals who made up a "mine watch committee" within the community. There is no suggestion that, even in those meetings, it was conveyed to DCM that the community was now supportive of the proposal, contrary to the hostility and opposition that was clearly expressed at the community meeting. What the record shows is that promises continued to be made, and threats of a tender with a potentially worse mining company being awarded the EL were again made. Such meetings occurred on 23 July 2008 and 26 August 2008 (the latter was also attended by representatives of the alliance partners).

The community never gave the project a statement of support. It was suggested to Mr Maitland at the meeting on 23 July 2008, "that the school scenario may look like a facade merely to create a mining operation" and material posted on a community website containing a summary of one of the further meetings stated, "[t]he [minewatch] committee does not support Mr Maitland's proposals". A community meeting (not including representatives of DCM) called for an update following the 26 August 2008 meeting; one resident put the position neatly, saying that there was "a lot of candy being thrown" about while questioning the "integrity" of the promises being made as well as a desire to see something in writing.

In due course, two letters were written by members of the community, neither expressing community support for the project.

David Thelander, a member of the mine watch committee, wrote a letter to Mr Munnings in the minister's office concerning both the DCM application and the Wambo application. That letter outlined various matters that were

urged to be incorporated as conditions of any consent both in respect of the DCM application and the Wambo application. It was not a letter that offered support for either application, but stipulated conditions that should be incorporated in the event approval was to be given. This letter was in the possession of DCM from at least 22 September 2008. It was then forwarded to Mr Stevenson for the preparation of a "proposed agreement" with the community.

Another letter was sought by Mr Maitland from Paul Nichols, also a member of the mine watch committee. Mr Nichols wrote to Mr Macdonald saying that, if DCM reached agreement with the community on various issues, that "once the agreement was finalised" the community would "be in a position to consider our support...". No such agreement was ever finalised (although a draft MOU was prepared by Mr Stevenson, and circulated to the DCM board members, but it was not intended to effect any real or binding agreement, and was never executed by anyone).

On its face, the correspondence from Mr Nichols and Mr Thelander did not indicate community support for the DCM project (even were it assumed that they could speak for the community, which itself was a controversial proposition within Jerrys Plains). That was known to DCM. "Previous communications from the community to the Minister" did not demonstrate any community support for the establishment of the mine.

Mr Maitland found it difficult to defend the statement of "overwhelming community support". In evidence he said:

> *The bottom line is no one could have reasonably said in September 2008 that there was overwhelming community support from the Jerrys Plains community?---(No Audible Reply)*
>
> *That's true, isn't it?---Well, I've already said that the community would prefer no mine.*

Later, he would suggest that the claim was an "overstatement" and sought to justify it on the following basis:

> *Well, because um, they were opposed to any form of mining, any form of mining. It's a, it's a sort of a devil you know ah, as opposed to the devil you don't.*

The covering letter to the application that contained the statement that there was overwhelming support from the Jerrys Plains community was signed by Mr Maitland. As stated above, Mr Ransley agreed that he saw this letter. The statement was false or misleading. This was known to both Mr Maitland and Mr Ransley (who had both been to the community meeting). Mr Maitland published the letter to the DPI. The Commission is satisfied that Mr Ransley agreed that Mr Maitland should do so.

Community response to mining development was, plainly, a factor that could be relevant to any political or planning decision. Again, while the matter is an objective question, this was acknowledged in the evidence of Mr Coombs and the community concerns and opposition were referred to in the DPI's briefing notes of February 2007 and May 2008.

Was the DPI misled?

Several of the affected persons have submitted that the DPI was not, in fact, misled. In this regard, particular reliance has been placed on the following evidence of Mr Coutts:

> *THE COMMISSIONER: Mr Coutts, let's try and cut this short. Do you or do you not say that the proposal was misleading in any respect?---No, I don't. Like, we looked at it at face value, I didn't see it as being misleading.*

That does not establish that nothing in the Submission (or other documents) was misleading. Nor does it establish that the DPI was not misled. All it demonstrates is that Mr Coutts was not aware of anything in the Submission being misleading. But, that is hardly surprising, because he was not in a position to know the truth as to the matters that sat behind the impugned statements. As Mr Coutts made clear, the DPI "looked at it at face value".

So, for example, Mr Coutts and the other officers in the DPI could have had no idea that, contrary to what was stated in the Submission, there were no executed agreements with the alliance partners. But this was something known to various of the proponents, as discussed above. And, as to this matter, it is plain that the DPI was misled. Annex A to the 27 May 2008 briefing note contained details of the training proposal. The very first paragraph of that document stated that "[DCM] has established a strategic alliance under a memorandum of understanding with ResCo Services, Coal Services Pty Ltd, the University of Newcastle, Hunter Valley Training Company and the Hunter Region SLSA Helicopter Rescue Service to undertake the venture". But, as examined above, that was not the case.

Nor, by way of further example, could the DPI have had any idea that Paradigm Capital had not arranged any equity investors (as was claimed) or that the relevant funds had not been raised (as was claimed).

The DPI was in no position to know the truth in respect of the various impugned statements. These were matters known to some or all of Mr Maitland, Mr Ransley, Mr Poole and Mr Chester. They were kept from the DPI and, as Mr Coutts said, the DPI assessed the documents "on face value".

Chapter 37: Corrupt conduct findings, s 74A(2) statements and other matters

In making findings of fact and corrupt conduct, the Commission applies the civil standard of proof on the balance of probabilities, which requires facts to be proved to a reasonable satisfaction taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

As to this matter, Ms Williams (on behalf of Mr Ransley) and Mr Hale (on behalf of Mr Macdonald) submitted that the criminal standard of proof is the relevant standard to be applied by the Commission in making findings of corrupt conduct. These submissions are considered in detail in Appendix 3 to this report. The Commission there rejects Mr Hale's and Ms Williams' submissions, which are contrary to the recent decision of the Court of Appeal in *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 and other authorities referred to in Appendix 3.

Corrupt conduct is defined in s 8 and s 9 of the ICAC Act. Those sections and the Commission's approach to making findings of corrupt conduct are set out in Appendix 2 to this report.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) of the ICAC Act.

In the case of s 9(1)(a), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

In their submissions to the Commission, Counsel Assisting did not suggest any other part of s 9(1) as a basis for making a corrupt conduct finding. The Commission has, therefore, restricted its consideration to s 9(1)(a) of the ICAC Act.

Corrupt conduct – Mr Macdonald, Mr Maitland, Mr Ransley, Mr Poole and Mr Chester

Ian Macdonald

The Commission is satisfied that Mr Macdonald acted contrary to his duty as a minister of the Crown in granting DCM consent to apply for the EL in respect of land at Doyles Creek and by granting the EL to DCM, both grants being substantially for the purpose of benefiting Mr Maitland. But for that purpose, he would not have made those grants.

Such conduct is corrupt conduct for the purpose of s 8 of the ICAC Act. It is conduct which, on Mr Macdonald's part, constitutes or involves the partial exercise of his official functions and, therefore, comes within s 8(1)(b) of the ICAC Act. It is also conduct which, on Mr Macdonald's part, constitutes or involves a breach of public trust under s 8(1)(c) of the ICAC Act.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the common law offence of misconduct in public office.

The common law offence of misconduct in public office is part of the criminal law of NSW. The elements of the offence have been considered in *R v Huy Vinh Quach* (2010) 201 A Crim R 522. Redlich JA (with whom Ashley JA and Hansen AJA agreed) said that the elements were as follows:

1. *a public official;*
2. *in the course of or connected to his public office;*
3. *wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his duty;*
4. *without reasonable excuse or justification; and*

5. *where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.*

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Macdonald committed the common law offence of misconduct in public office by granting DCM consent to apply for the EL and by granting the EL to DCM, both grants being substantially for the purpose of benefiting Mr Maitland. Such conduct comes within the scope of misconduct that is serious and merits criminal punishment, particularly having regard to Mr Macdonald's role and responsibilities as a minister of the Crown.

Accordingly the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission, therefore, finds that Mr Macdonald engaged in corrupt conduct by granting DCM consent to apply for the EL in respect of land at Doyles Creek and by granting the EL to DCM, both grants being substantially for the purpose of benefiting Mr Maitland.

John Maitland, Craig Ransley, Andrew Poole and Michael Chester

The findings below as to the false or misleading statements and the materiality of those statements and the finding of corrupt conduct in each case are based on the findings in chapter 36.

Section 8 of the ICAC Act

January and February 2007

The Commission is satisfied that, on 22 January 2007, Mr Maitland published to Mr Macdonald's office and the DPI a briefing note in respect of DCM's proposal. The briefing note contained the following statement:

(a) The area is with vacant title with sufficient coal resources to enable a small to medium sized mining operation.

On 15 February 2007, DCM made an application to the minister for consent to apply for an EL. A copy of the application was sent to the DPI. Mr Maitland signed the application letter with knowledge that it would be provided to the DPI. The application letter contained the following statement:

(b) Initial geological reports have demonstrated the existence of structurally undisturbed blocks between faults in the area which may contain sufficient coal resources to enable the establishment of at least a small to medium sized mining operation which could accommodate a training initiative.

The Commission is satisfied that statements (a) and (b), identified above, contained in the briefing note of 22 January 2007 and the application letter of 15 February 2007 were false or misleading. These statements were material. Mr Maitland made and published the statements to the DPI knowing they were false or misleading.

The Training Mine Submission (March 2008)

On 18 March 2008 and 29 September 2008, Mr Maitland lodged the Submission with the DPI. On each occasion, this occurred under cover of a letter from DCM, which Mr Maitland signed. On the first occasion, the Submission

was lodged in support of DCM's application for consent to apply for the EL in respect of land at Doyles Creek. On the second occasion, the Submission was lodged in support of DCM's application for the EL. The Submission contained the following statements, all of which were material:

Resources

(c) Doyles Creek hosts a resource estimated at 91 million tonnes.

(d) The target coal seams would be principally the Whybrow and the Redbank Creek coal seams in the Wittingham Coal Measures, with total inferred in situ resources estimated at 125 million raw tonnes.

(e) The proposed location has the potential to support a small to medium sized coal mining operation.

(f) The inferred in situ mineable coal resource for the Exploration Area was 69.9 million tonnes and the inferred in situ resource was 183.5 million tonnes (these figures came from the table annexed to the Submission).

The Strategic Alliance

(g) An influential Strategic Alliance has been established with MOUs signed between mining services and occupational health and safety groups (ResCo Services Pty Ltd; Coal Services Pty Ltd), educational institutions (University of Newcastle; HVTC) and rescue services (Hunter Region SLSA Helicopter Rescue Service Limited) to undertake this venture.

(h) The dissolution of the alliance as a key risk has already been minimised owing to the existing arrangements in place to ensure commitment between all parties. All parties have signed MOUs to confirm their commitment to the Training Mine project (this statement and statement (g) were false as to all supposed alliance partners, save for HVTC).

(i) Coal Services Pty Ltd will provide mine simulation, rescue and rehabilitation services.

(j) Training for trainee mine workers, deputy and under-managers will be accredited under the black coal competency standards and will be conducted by Sharp Training, a recognised and industry accredited training company specialising in the black coal industry.

(k) Alliance members were legally bound to undertake various substantive roles in the training proposal (this statement was implicitly made in the Submission).

Financial modelling

(l) The construction of the training facility was estimated to cost $7 million.

(m) Revenue and expenses of the training facility by 2015 would each be $2.4 million.

Extensive due diligence and detailed assessments

(n) Extensive due diligence and detailed assessments have been carried out to identify a location suitable for the construction of a training mine facility.

(o) A rigorous assessment process was undertaken to locate a suitable site as the basis of this Submission, on the premise that only a small to medium sized mining operation would be required for the Submission to be economically viable.

(p) A review of suitable tenements/projects highlighted a lack of high quality available locations with potentially economically viable reserves and vacant title.

A new board for DCM

(q) Pending successful grant of the Doyles Creek Exploration Licence, a new Doyles Creek Board will be constituted that includes representatives from the community, union, government, ResCo, HVTC, the University of Newcastle, and the Hunter Valley Rescue Service.

The Commission is satisfied that the statements (c) to (k) and (q), identified above, contained in the Submission, were false or misleading. Mr Maitland made and published the statements to the DPI knowing that they were false or misleading. At all relevant times, Mr Poole was aware of the statements, and knew they were false or misleading but, nevertheless, agreed to the publication thereof by Mr Maitland to the DPI.

Mr Ransley knew that statements (c) to (f), (i) to (k) and (q) were false or misleading and statements (g) and (h) were false or misleading insofar as they referred to ResCo and Coal Services but, nevertheless, agreed to the publication thereof by Mr Maitland to the DPI.

The Commission is satisfied that the statements (l) and (m), identified above, contained in the Submission, were false or misleading, that Mr Maitland published the statements to the DPI, that Mr Ransley and Mr Poole at all relevant times were aware of the statements, and knew they were false or misleading but, nevertheless, agreed to the publication thereof by Mr Maitland to the DPI.

The Commission is satisfied that the statements (n) to (p), identified above, contained in the Submission, were false or misleading, that Mr Maitland published the statements to the DPI, that Mr Ransley at all relevant times was aware of the statements, and knew they were false or misleading but, nevertheless, agreed to the publication thereof by Mr Maitland to the DPI.

First letter of financial support

A letter from Opes Prime Group (OPG), dated 26 February 2008, was prepared by Mr Chester to support the capacity of DCM to finance exploration and, in due course, the establishment of a mine. On 18 March 2008, the OPG letter was lodged with the DPI under cover of a letter from DCM and signed by Mr Maitland. The OPG letter contains the following material statement:

(r) OPG has previously carried out significant due diligence on Doyles Creek and is prepared to provide financial support based on the strength of the training mine concept.

The Commission is satisfied that the statement (r), identified above, contained in the letter was false or misleading, that Mr Chester made the statement knowing it was false or misleading. Mr Maitland published the letter containing the statement to the DPI. Mr Chester agreed to the publication of the letter to the DPI knowing it contained the statement that was false or misleading.

Second letter of financial support

On 19 September 2008, Mr Chester prepared a letter in support of DCM's application for the EL from Paradigm Capital, of which he was a director. On 29 September 2008, the Paradigm Capital letter was lodged with the DPI under cover of a letter from DCM and signed by Mr Maitland. The Commission is satisfied that the letter was created as a joint endeavour by Mr Chester and Mr Ransley to meet a need to demonstrate to the DPI that DCM had adequate financial resources to undertake exploration and the establishment of a mine. The letter contained the following statements, all of which were material:

(s) Paradigm is pleased to advise that it has arranged the appropriate equity providers for the Doyles Creek development.

(t) Paradigm has arranged the equity participants and raised the initial equity of $5 million for pre-development activities and the subsequent equity component for project development of an estimated $90 million. The A$90 million equity component will be provided subject to definition of sufficient coal reserves and favourable Bankable Feasibility Study outcomes.

(u) We have received strong support from equity participants based upon favourable outlook for coking coal markets, together with a desire to participate in a pioneering training venture with high calibre Strategic Alliance partners.

(v) Paradigm has previously carried out significant due diligence on Doyles Creek and is prepared to provide financial support based on the strength of the training mine concept.

(w) Paradigm has satisfactorily concluded its own due diligence of the proposed Training Mine facility and underground coal mine development. It is the intention of Paradigm to proceed with the financing arrangements as set out herein, subject to the completion of acceptable final project due diligence.

The Commission is satisfied that the statements (s) to (w), identified above, contained in the letter were false or misleading, that Mr Chester and Mr Ransley made the statements knowing they were false or misleading, that Mr Maitland published the letter containing the statements to the DPI, and that Mr Chester and Mr Ransley agreed to the publication thereof by Mr Maitland to the DPI knowing the letter contained the statements (s) to (w) that were false or misleading.

Community support

On 29 September 2008, DCM forwarded its application for the EL to the DPI under the cover of a letter signed by Mr Maitland. The letter contained the following material statement:

(x) We understand there is also overwhelming community support from the Jerrys Plains community demonstrated by previous communications from the community to the minister.

The Commission is satisfied that the statement (x), identified above, contained in the letter was false or misleading, that Mr Maitland made and published the statement to the DPI knowing it was false or misleading, that Mr Ransley at all relevant times was aware of the statement, and knew it was false or misleading but, nevertheless, agreed to the publication thereof by Mr Maitland to the DPI.

Corrupt conduct for the purpose of s 8 of the ICAC Act

The documents containing the false or misleading statements identified as (a) to (x) above were assessed by DPI officers – each of whom is a public official. That assessment took place in respect of the exercise by those persons of their official functions in relation to the giving of consent to apply for an EL or the granting of an EL. The numerous false or misleading statements contained in those documents were material and could adversely affect, either directly or indirectly, the exercise of those official functions. As stated in the body of this report, they concern fundamental matters which would affect whether an assessment of the merit of the proposal could be undertaken so as to justify the giving of consent and the grant of the EL as a valuable asset.

The conduct of Mr Maitland in making and publishing to the DPI the false or misleading statements identified as (a) to (k), (q) and (x) above is corrupt conduct for the purposes of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Maitland that could adversely affect, either directly or indirectly, the exercise of official functions by DPI officers and which could involve fraud and company violations (offences under s 178BB of the *Crimes Act 1900*, s 374 of the Mining Act and s 184(1) of the *Corporations Act 2001*). It, therefore, comes within s 8(2)(e) and s 8(2)(s) of the ICAC Act.

The conduct of Mr Ransley in agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (f), (g) to (h) (insofar as the statements referred to Resco and Coal Services), (i) to (q) and (x) above is corrupt conduct for the purposes of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Ransley that could adversely affect, either directly or indirectly, the exercise of official functions by DPI officers and which could involve fraud and company violations (offences under s 178BB of the *Crimes Act 1900*, s 374 of the Mining Act and s 184(1) of the *Corporations Act 2001*). It, therefore, comes within s 8(2)(e) and s 8(2)(s) of the ICAC Act.

The conduct of Mr Ransley in making the false or misleading statements identified as (s) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI is corrupt conduct for the purposes of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Ransley that could adversely affect, either directly or indirectly, the exercise of official functions by DPI officers and which could involve fraud and company violations (offences under s 178BB of the *Crimes Act 1900*, s 374 of the Mining Act and s 184(1) of the *Corporations Act 2001*). It, therefore, comes within s 8(2)(e) and s 8(2)(s) of the ICAC Act.

The conduct of Mr Poole in agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (m) and (q) above is corrupt conduct for the purposes of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Poole that could adversely affect, either directly or indirectly, the exercise of official functions by DPI officers and which could involve fraud and company violations (offences under s 178BB of the *Crimes Act 1900*, s 374 of the Mining Act and s 184(1) of the *Corporations Act 2001*). It, therefore, comes within s 8(2)(e) and s 8(2)(s) of the ICAC Act.

The conduct of Mr Chester in making false or misleading statements identified as (r) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI is corrupt conduct for the purposes of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Chester that could adversely affect, either directly or indirectly, the exercise of official functions by DPI officers and which could involve fraud (offences under s 178BB of the *Crimes Act 1900* and s 374 of the Mining Act). It, therefore, comes within s 8(2)(e) of the ICAC Act.

Section 9 of the ICAC Act

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider s 178BB of the *Crimes Act 1900* (since repealed but which continues to apply to the conduct referred to above), s 374 of the Mining Act (also repealed but which continues to apply to the conduct referred to above) and s 184(1) of the *Corporations Act 2001*.

Section 178BB of the *Crimes Act 1900* provides that a person whosoever, with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) which he or she knows to be false or misleading in a material particular or which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular shall be liable to imprisonment for five years.

For the purpose of s 178BB of the *Crimes Act 1900*, it is an element of the offence that the statement be made with an "intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever". The issue is not relevant to s 374 of the Mining Act.

The Commission is satisfied that the making or publication of the statements (a) to (x) was done, by each of Mr Maitland, Mr Poole, Mr Ransley and Mr Chester (as described above) with the intent of obtaining an EL for DCM. The potential value of an EL was notorious, and each was aware of it. The evidence of their knowledge of

the value of an EL to DCM is addressed elsewhere in the report. Each stood to benefit from the grant of an EL to DCM.

Section 374 of the Mining Act provides that:

> *A person must not:*
>
> *(a) in or in connection with an application under this Act, or*
>
> *(b) in purported compliance with any requirement under this Act,*
>
> *furnish information that the person knows to be false or misleading in a material particular.*

Section 184(1) of the *Corporations Act 2001* provides that:

> *A director or other officer of a corporation commits an offence if they:*
>
> *(a) are reckless; or*
>
> *(b) are intentionally dishonest;*
>
> *and fail to exercise their powers and discharge their duties:*
>
> *(c) in good faith in the best interests of the corporation; or*
>
> *(d) for a proper purpose.*

The concept of "good faith" in this area of company law has been defined to include at least four aspects: an exercise of powers or duties in the interests of the company, in the sense of not misusing or abusing those powers; avoidance of conflicts between personal interests and those of the company; a prohibition on taking advantage of the position to make secret profits; and a prohibition on the appropriation of the company's assets for their own benefit.

The concept of "a proper purpose" in this part of company law has been understood to mean much the same thing as "good faith".

John Maitland

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found against Mr Maitland relating to making and publishing to the DPI of the false or misleading statements identified as (a) to (k), (q) and (x) above were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Maitland committed separate criminal offences of making a false statement or making a misleading statement, contrary to s 178BB of the *Crimes Act 1900*, separate offences of publishing a false statement or publishing a misleading statement, contrary to s 178BB of the *Crimes Act 1900*.and separate offences of furnishing a false statement in connection with an application under the Mining Act or furnishing a misleading statement in connection with an application under the Mining Act, contrary to s 374 of the Mining Act.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found against Mr Maitland relating to making and publishing to the DPI the false or misleading statements identified as (a) to (k), (q) and (x) above, were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Maitland committed criminal offences under s 184(1) of the *Corporations Act 2001*. This is because, as a director of DCM, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of DCM or for a proper purpose by making and publishing false or misleading statements to the DPI in the course of applying for consent to apply for an EL and applying for an EL on behalf of DCM.

Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission, therefore, finds that Mr Maitland engaged in corrupt conduct by making and publishing to the DPI the false or misleading statements identified as (a) to (k), (q) and (x) above.

Craig Ransley

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found relating to Mr Ransley agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (f), (g) to (h) (insofar as the statements referred to ResCo and Coal Services), (i) to (q) and (x) above and Mr Ransley making the false or misleading statements identified as (s) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Ransley committed separate criminal offences of making a false statement or making a misleading statement, contrary to s 178BB of the *Crimes Act 1900*, separate offences of concurring in publishing a false statement or concurring in publishing a misleading statement, contrary to s 178BB of the *Crimes Act 1900*, and separate offences of aiding and abetting furnishing a false statement in connection with an application under the Mining Act or aiding and abetting furnishing a misleading statement in connection with an application under the Mining Act, contrary to s 374 of the Mining Act.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found relating to Mr Ransley agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (f), (g) to (h) (insofar as the statements referred to ResCo and Coal Services), (i) to (q) and (x) above and Mr Ransley making the false or misleading statements identified as (s) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Ransley committed criminal offences under s 184(1) of the *Corporations Act 2001*. This is because, as a director of DCM, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of DCM or for a proper purpose by making and agreeing to publish false or misleading statements to the DPI in the course of applying for consent to apply for an EL and applying for an EL on behalf of DCM.

Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission, therefore, finds that Mr Ransley engaged in corrupt conduct by agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (f), (g) to (h) (insofar as the statements referred to ResCo and Coal Services), (i) to (q) and (x) above and by making the false or misleading statements identified as (s) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI.

Andrew Poole

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found relating to Mr Poole agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (m) and (q) above were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Poole committed separate criminal offences of concurring in publishing a false statement or concurring in publishing a misleading statement, contrary to s 178BB of the *Crimes Act 1900*, and separate offences of aiding and abetting furnishing a false statement in connection with an application under the Mining Act or aiding and abetting furnishing a misleading statement in connection with an application under the Mining Act, contrary to s 374 of the Mining Act.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found relating to Mr Poole agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (m) and (q) above were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Poole committed criminal offences under s 184(1) of the *Corporations Act 2001*. This is because, as a director of DCM, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of DCM or for a proper purpose by agreeing to publish false or misleading statements to the DPI in the course of applying for consent to apply for an EL and applying for an EL on behalf of DCM.

Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission, therefore, finds that Mr Poole engaged in corrupt conduct by agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (m) and (q) above.

Michael Chester

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found relating to Mr Chester making false or misleading statements identified as (r) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Chester committed separate criminal offences of making a false statement or making a misleading statement, contrary to s 178BB of the *Crimes Act 1900*, separate offences of concurring in publishing a false statement or concurring in publishing a misleading statement, contrary to s 178BB of the *Crimes Act 1900*, and separate offences of aiding and abetting furnishing a false statement in connection with an application under the Mining Act or aiding and abetting furnishing a misleading statement in connection with an application under the Mining Act, contrary to s 374 of the Mining Act.

Accordingly, the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission, therefore, finds that Mr Chester engaged in corrupt conduct by making false or misleading statements identified as (r) to (w) above and agreeing to Mr Maitland publishing those statements to the DPI.

Section 74A(2) statements

In making a public report, the Commission is required by the provisions of s 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances, the Commission is of the opinion that consideration should be given to the following:

a) obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence

b) the taking of action against the person for a specified disciplinary offence

c) the taking of action against the person as a public official on specific grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An "affected" person is defined in s 74A(3) of the ICAC Act as a person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, the investigation.

The Commission is satisfied that Ian Macdonald, John Maitland, Craig Ransley, Andrew Poole and Michael Chester are "affected" persons.

Before dealing with each of the above, it is worthwhile to set out the approach the Commission has taken to making statements under s 74A(2) of the ICAC Act.

In each case, the Commission first considers whether there is any evidence of a criminal offence. If there is insufficient evidence capable of constituting a criminal offence, it follows that the Commission will not be of the opinion that consideration should be given to obtaining the advice of the DPP. If there is evidence capable of constituting a criminal offence, the Commission assesses whether there is or is likely to be sufficient admissible evidence to warrant the commencement of a prosecution. In undertaking this assessment, the Commission takes into account declarations made pursuant to s 38 of the ICAC Act. The evidence of a witness that is given subject to such a declaration cannot be used in evidence against that person in any criminal proceedings unless those proceedings are for an offence under the ICAC Act. In such cases, it is therefore necessary to consider whether there is sufficient other evidence that is admissible before stating an opinion that consideration should be given to obtaining the advice of the DPP.

It is also relevant to consider s 14(1)(b) of the ICAC Act. That section provides that one of the Commission's functions is to furnish evidence to the appropriate authority of the jurisdiction concerned that may be admissible in the prosecution of a person for a criminal offence against a law of another state, the Commonwealth or a territory.

Where the Commission is satisfied that there is admissible evidence of a breach of Commonwealth legislation, such as the *Corporations Act 2001*, it will also furnish the relevant evidence to the appropriate authority, being the Commonwealth DPP.

Mr Macdonald, Mr Maitland, Mr Ransley, Mr Poole, and Mr Chester gave their evidence under a s 38 declaration and, therefore, their evidence is not admissible against them in criminal proceedings other than for an offence under the ICAC Act.

There is, however, other admissible evidence which would be available to the DPP in relation to Mr Macdonald. This includes evidence of the relationship between Mr Macdonald and Mr Maitland and evidence from Mr Foley that Mr Macdonald said that he had the support of the Miners Union during the lunch at the Noble House restaurant. Evidence from DPI officers, Mr Gibson and Mr Munnings concerning Mr Macdonald's knowledge of the DPI's opposition to the direct allocation of the EL to DCM, his failure to take account of the DPI's briefing note listing the serious problems it had with the Submission, his failure to obtain advice from other bodies about the merits of the training mine proposal, his conduct in issuing the letter of invitation without the knowledge or involvement of the DPI and carrying out the allocation contrary to the DPI's recommendation would also be available. In addition, the DPP could also have regard to the evidence of DPI officers that, at the time Mr Macdonald invited DCM to apply for the EL, coal ELs were valuable assets and that Mr Macdonald was pushing the DPI to find areas for coal exploration to take advantage of the significant revenue to be earned by the government from their competitive allocation.

In the case of Mr Maitland, Mr Ransley, Mr Poole and Mr Chester the available admissible evidence includes: evidence from Dr Palese about introducing the Doyles Creek site to DCM and providing information to the directors of DCM about the size of the anticipated coal resource at the site; evidence from Mr Demura, Mr Ireland, Mr Martin and Mr Randall about the nature of the technical information available to DCM about the resource; evidence from senior officers at Coal Services and Sharp Training that, at the relevant time, no arrangement had been entered into with DCM to provide training or any other mine-related services at the proposed training facility; and evidence from the Strategic Alliance partners, save HVTC, that, at the relevant time, they had not signed MOUs with DCM to "confirm their commitment to the Training Mine project". Evidence is also available from the Jerrys Plains community about the opposition to the proposal at the relevant time.

The Commission is not satisfied that there is available admissible evidence of any criminal offence related to the false or misleading statements identified as (l), (m), (q), (r) and (s) to (w).

Mr Macdonald

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Macdonald for the common law offence of misconduct in public office in relation to his conduct in granting DCM consent to apply for the EL and granting the EL to DCM, both grants being substantially for the purpose of benefiting Mr Maitland.

Mr Maitland

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Maitland for offences under s 178BB of the *Crimes Act 1900* in relation to his making and publishing to the DPI the false or misleading statements identified as (a) to (k) and (x) above. Offences under s 374 of the Mining Act are statue barred.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Maitland for offences under s 112(2) and s 87(1)(a) of the ICAC Act in relation to his conduct in discussing the evidence he gave at a compulsory examination with Mr Tudehope and testifying at the public inquiry that he sought to comply with the obligation imposed on him to keep secret the evidence he gave at the compulsory examination. Mr Kirk notes in his submissions that he reserves the right to supplement his submissions about referring this aspect of Mr Maitland's conduct to the DPP upon receipt of the transcript of Mr Maitland's compulsory examination. The Commission, however, is simply expressing the opinion that consideration should be given to obtaining the advice of the DPP with respect to these matters and does not regard it as necessary to provide Mr Kirk with a copy of the compulsory examination transcript before doing so.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Maitland for offences under s 184(1) of the *Corporations Act 2001* in relation to his making and publishing to the DPI the false or misleading statements identified as (a) to (k), and (x) above.

Mr Ransley

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Ransley for offences under s 178BB of the *Crimes Act 1900* in relation to his agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (k), (n) to (p) and (x) above.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Ransley for offences under s 184(1) of the *Corporations Act 2001* in relation to his agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (k), (n) to (p) and (x) above.

Mr Poole

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Poole for offences under s 178BB of the *Crimes Act 1900* in relation to his agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (k) above.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Poole for offences under s 184(1) of the *Corporations Act 2001* in relation to his agreeing to Mr Maitland publishing to the DPI the false or misleading statements identified as (c) to (k) above.

Mr Chester

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Chester for any offence .

Other matters

During the course of the investigation, the Commission obtained evidence that it has either referred to other agencies or will refer for their consideration.

The NSW Crime Commission

The *Criminal Assets Recovery Act 1990* provides that the NSW Crime Commission may apply to the Supreme Court of NSW for an assets forfeiture order. The Supreme Court of NSW may make such an order where it finds that a person has engaged in serious crime-related activity, even if the person has not been charged or convicted of any criminal offence.

There was evidence before the Commission of the financial benefits accrued by Mr Maitland, Mr Ransley and Mr Poole as a result of the corrupt conduct the Commission has found to have been engaged in by Mr Macdonald.

The Commission has provided relevant information to the NSW Crime Commission pursuant to s 16(3) of the ICAC Act for such action as the NSW Crime Commission considers appropriate.

The Australian Securities and Investments Commission

During the course of the public inquiry, there was evidence of possible breaches of the *Corporations Act 2001*. This included evidence concerning the conduct of Mr Maitland, Mr Ransley and Mr Poole while they were directors of DCM. That evidence is referred to in this report. The Commission will disseminate relevant evidence to the Australian Securities and Investments Commission for such action as it considers appropriate.

Appendix 1: The role of the Commission

The ICAC Act is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of NSW, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

The ICAC Act applies to public authorities and public officials as defined in s 3 of the ICAC Act.

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The principal functions of the Commission, as specified in s 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and cooperating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both s 8(1) or s 8(2) and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Section 8(1) provides that corrupt conduct is:

a. *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*

b. *any conduct of a public official that constitutes or involves the dishonest or partial exercise of ony of his or her official functions, or*

c. *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*

d. *any conduct of a public official or former public officiol that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

Section 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Section 9(1) provides that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

a. *a criminol offence, or*

b. *a disciplinary offence, or*

c. *reasanable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*

d. *in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.*

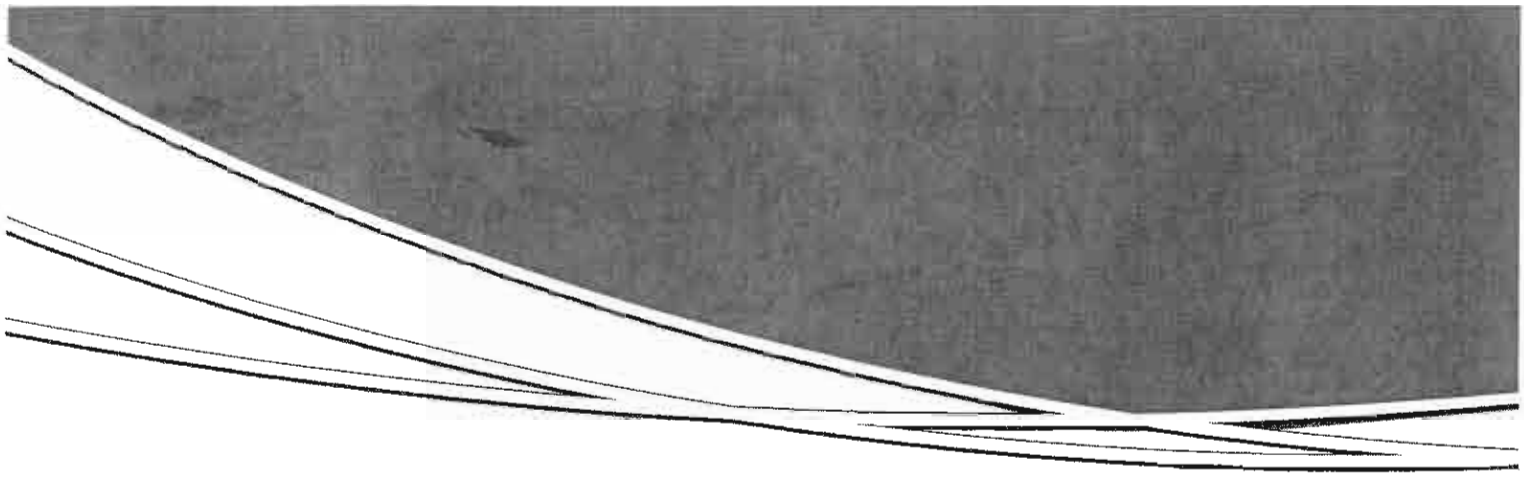
Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Section 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Section 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in s 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

The Commission adopts the following approach in determining whether corrupt conduct has occurred.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of s 9(5). In the case of



s 9(1)(a) and s 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of s 9(1)(b), s 9(1)(c) and s 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

> *...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejfek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution*, Queensland, 1977 (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.

Appendix 3

Preliminary

In the opening chapter of this report, reference was made to the fact that, in closing submissions, complaints were made concerning the way in which the public inquiry was conducted by the Commission and Counsel Assisting.

Before going to the particular criticisms, it is necessary to make some explanatory remarks about the nature of the public inquiry that the Commission conducts under s 31 of the ICAC Act.

The nature of the public inquiry

The public inquiry is an inquisitorial investigation. To that extent it is similar to a Royal Commission. In opening the Royal Commission into the Red Lion Square Disorders of 15 June 1974 Lord Scarman made remarks in an opening statement as to the nature of such an inquiry and the implications on how it was to be conducted (the passage is reported in the article by Lord Justice Sedley *Public Inquiries: A Cure Or A Disease?* (1989) 52 Mod L Rev 469 at 470). Those remarks have become a template for opening a Royal Commission and have been quoted many times. It is generally regarded as authoritative to the extent that it explains the basic rules of an inquisitorial inquiry and the procedures that such an inquiry will ordinarily adopt.

The Commissioner, when opening the Operation Acacia segment of the public inquiry, paraphrased what Lord Scarman had said and made a statement to similar effect as follows:

> *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.*

The following general principles can be stated:

(a) The Commissioner makes all procedural decisions.

(b) The Commissioner decides what witnesses are to be called.

(c) The Commissioner decides to what matters evidence will be directed.

(d) The Commissioner decides how witnesses will be examined, bearing in mind the inquisitorial rather than adversarial nature of the inquiry (this rule has a direct bearing on whether witnesses may be asked leading questions or not).

(e) There is no right to cross-examination. The Commissioner may, nevertheless, allow cross-examination but, generally, will do so only to the extent that the Commissioner considers that particular questions will be helpful to the inquiry.

These principles are consistent with the following provisions of the ICAC Act:

- By s 31(1), a public inquiry under the ICAC Act is held "[f]or the purposes of an investigation" – that is, a public inquiry is part of the overall investigation the Commission may undertake to investigate and expose corruption (s 2A(a)(i) and s 13(1)(a)).
- By s 17(2), public inquiries are to be conducted with as little emphasis on an adversarial approach as is possible.
- By s 31(4), a public inquiry is to be conducted by the Commissioner (or by an Assistant Commissioner). Counsel Assisting are appointed to assist the Commission (s 106), but the inquiry is that of the Commission and not Counsel Assisting.
- By s 34(1), cross-examination can occur only by leave of the Commissioner, and only to the extent that the Commissioner considers that such cross-examination is relevant. This applies to both

Counsel Assisting and others who appear before the Commission.

- Section 35 deals with the power to summon witnesses and the taking of evidence. By s 35(1), the Commissioner has the power to summon a person to appear at a public inquiry to give evidence. Under the ICAC Act, no other person has that power.

The roles of the Commissioner and Counsel Assisting

The submissions criticising Counsel Assisting assume that decisions about matters, such as the calling of witnesses and the like, were made by them alone. That assumption is not well founded.

The applicable directions made clear that the determination of Counsel Assisting as to which witnesses are called was "[s]ubject to the control of the Commissioner". Indeed, the Commission was actively involved in deciding which witnesses would be called and the matters to which their evidence was to be directed.

Any obligation that Counsel Assisting may have concerning such matters as the calling of evidence is qualified by the control and direction of the Commission. That control and direction is to be exercised by the Commission having regard to such matters as the public interest, the need to provide fairness to those affected, the Commission's view as to the issues that were relevant to the inquiry (as determined after the long investigation undertaken before the inquiry commenced) as well as other matters particular to any given case.

The contention that the duties of Counsel Assisting are the same as those of a prosecutor in a criminal trial is wrong. For example, the duties of a prosecutor in regard to the calling of witnesses do not apply in a proceeding that is not a criminal trial: *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501; [2012] HCA 17. Even in a criminal trial, a prosecutor is not obliged to call any witness who might conceivably have something to say on a given topic (cf. *R v Kneebone* (1999) 47 NSWLR 450; *R v Gibson* [2002] NSWCCA 401; *R v Apostilides* (1984) 154 CLR 563).

In Operation Acacia, questions of relevance and duplication relating to the calling and questioning of witnesses had special significance. In opening remarks made by the Commissioner on the very first day of the Operation Acacia public inquiry segment, reference was made to the capacity for the inquiry to drag on for a very long time and that it was not in the public interest that this should occur; a factor which, it was said, would be taken into account when making procedural decisions. Operation Acacia was a lengthy and costly inquiry. It needed to be conducted within reasonable limits consistently with the giving of procedural fairness. Those limits did not extend to pursuing every topic to its extremities and eliciting further evidence no matter how peripheral, tangential, duplicative or unreliable the evidence might be.

Delay in making complaints

It is against this background that the complaints of the affected parties must be assessed. A principal complaint was that relevant witnesses were not called or documents not tendered.

For the sake of completeness, the Commission will proceed to deal with each such complaint individually, but the failure of counsel for the affected parties to avail themselves of the various mechanisms whereby they could have asked for those witnesses to be called is a complete answer to their complaints. For them not to have done so, sitting in silence during the inquiry, and then directly and personally criticising Counsel Assisting for failing to call a witness, is disingenuous and irresponsible.

Closing submissions by Counsel Assisting

In providing closing submissions, Counsel Assisting are not required to examine every conceivable or theoretical inference that might be drawn in respect of a particular matter. In an inquiry of the size and scale of Operation Acacia, this would be practically impossible. Such submissions would be singularly unhelpful to the Commission.

Rather, Counsel Assisting are entitled to press a full and firm case for findings of corruption in the event that they believe there is a reasonable basis for such findings. In so doing, they are free to advance submissions as to the inferences that they consider are the more likely and probable inferences to be drawn from given evidence. This is especially so where the affected persons are represented by capable counsel who are themselves able to provide submissions as to why the inferences urged by Counsel Assisting should not be adopted or why other inferences should be drawn.

The principles governing findings of corrupt conduct

The relevant sections in the ICAC Act

Section 8, as its title declares, concerns "the general nature of corrupt conduct". Section 8(1) provides that corrupt conduct is:

> *(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or*

impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

For present purposes, it is sufficient to note that s 9(1)(a) provides:

> *Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence.*

Section 7(1) is consistent with s 9(1), as it provides:

> *For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.*

Section 13(3A) provides:

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

The standard of proof

Mr Hale submits that, in making findings under s 9, "the Commission must apply the criminal standard because the evidence must be admissible in a criminal trial". Ms Williams also contends that the criminal standard of proof was relevant for the purposes of s 13(3A). In her principal submissions, she contends:

> *[W]here, in making findings of fact … ICAC has inferred from circumstantial evidence the existence of a state of mind or other matter that is an element of the relevant criminal offence, and where that circumstantial evidence leaves open an alternative reasonable inference which is consistent with innocence, ICAC must take into account the availability of that inference and the fact that it would preclude a properly instructed jury from convicting the affected person. ICAC will be aware of the alternative inferences, because it will have weighed up those inferences in determining where the balance of probabilities lies.*
>
> *The availability of reasonable inferences consistent with innocence is a relevant matter that ICAC must take into account in applying s 13(3A) and is fundamentally inconsistent with the state of satisfaction required by that section … [H]ow can ICAC be satisfied that the facts as found establish the elements of the offence in circumstances where ICAC knows that one of those facts which is itself an element of the offence has been inferred from circumstantial evidence, and that the inference could not be drawn in criminal proceedings? If ICAC did purport to reach the state of satisfaction required by s 13(3A) in those circumstances, it would be acting in accordance with some idiosyncratic, subjective standard.*

Ms Williams emphasises that, where proof of an element is dependent on inference, "ICAC cannot reach the state of satisfaction required by s 13(3A) if there are other reasonable inferences available that are consistent with innocence". That, of course, represents the criminal standard of proof in a circumstantial case. The difference between the criminal and civil standards of proof in relation to such cases was explained in *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141, both referring to *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 where the High Court said at 5:

> *The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise.*

The issues raised by Ms Williams were addressed by the Court of Appeal in *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 at [217]-[221] per Basten JA (Bathurst CJ agreeing). Basten JA said (at [221]):

> *That leaves open the question as to the matter about which the Commission must be satisfied under s 13(3A). It would clearly be inconsistent with both the function of the Commission and the structure of the Act generally*

to hold that the Commission must be satisfied beyond reasonable doubt that an offence has been committed. The Commission is not a criminal court and is not required to reach conclusions on the basis of material which would constitute admissible evidence in a criminal proceeding: cf s 17(1). So understood, s 13(3A) requires that the Commission be satisfied that the conduct has occurred and that it is conduct of a kind which constitutes a criminal offence. The combined purpose of ss 13(4) and 74B, is to emphasise that the Commission is not delivering a verdict on a criminal charge.

Ms Williams was apparently unaware of the decision in *D'Amore* at the time of her original submissions. Sometime later, Ms Williams provided supplementary submissions on the topic. In those submissions, additional contentions were advanced concerning the decision of the Court of Appeal and the position was maintained as to the relevance of the criminal standard in making corruption findings. Ms Williams did not squarely address the above cited passage but submitted, in effect, that what Basten JA had said was wrong. Presumably, underlying those submissions was the notion that the Commission should disregard the Court of Appeal's decision, recently handed down and directly on point.

D'Amore is binding on this Commission and, with respect to their Honours, the Commission considers it to be correct. Indeed, the approach enunciated by Basten JA is the approach the Commission has followed since the introduction of s 13(3A).

The submission that the criminal standard of proof must be applied is also contrary to what was said in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 (per Mahoney JA at 168); *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 at [6] per Beasley P (with whom Bathurst CJ agreed); *D'Amore v Independent Commission Against Corruption* [2012] NSWC 473 at [37] per McClennan CJ at CL; and *Kazal v Independent Commission Against Corruption* [2013] NSWC 53 per Harrison J at [35] and [43].

The Commission rejects the submissions of Mr Hale and Ms Williams as to the standard of proof applicable.

Sections 9 and 13(3A) of the ICAC Act

In the light of the argument advanced by Ms Williams as to s 13(3A), the Commission adds the following.

Section 9(5) reinforces the effect of s 13(4) and s 74B, to which Basten JA referred. These sections clearly differentiate between the reporting by the Commission of findings of corrupt conduct and findings that a person is guilty of a criminal offence. While the Commission is authorised to report the former, it cannot report the latter. These sections reflect what was said by the High Court in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at [17]. The High Court, in that case, drew attention to provisions in the ICAC Act that indicated, first, that the Commission was intended to be primarily an investigative body and not a body that would make determinations, however preliminary, as part of the criminal process, and, secondly, that it would be inappropriate for the Commission to report a finding of guilt or innocence. The ICAC Act has been substantially amended since *Balog*, but none of the changes affects what has been stated in the previous sentence.

In *Greiner v ICAC* (1992) 28 NSW LR 125 Priestley JA said at 187:

> [I]*t is my opinion that in s 9(1)(a) cases the definition ss 7, 8 and 9 work together with the empowering subs (3) of s 13 to give the Commissioner power to say:*
>
> > *I find facts (a) to (n); they constitute corrupt conduct within s 8: if accepted by an appropriate tribunal as proved beyond reasonable doubt they would constitute a particular criminal offence; therefore the conduct is corrupt conduct for the purposes of the Act.'*

Taking into account the amendment to the ICAC Act by the insertion of s 13(3A), and having regard to the remarks of McClellan CJ at CL in *D'Amore v ICAC* [2012] NSW 473 at [75], as well as those of Basten JA at [221] in his Honour's judgment in the Court of Appeal decision in *D'Amore*, it would be appropriate for the Commission to conclude, in appropriate cases:

> *The Commission has found facts (a) to (n); the Commission is satisfied on a balance of probabilities that those facts constitute corrupt conduct within s 8. If those facts were to be proved to the appropriate standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a Court would find that X has committed the criminal offence of ABC under the law of NSW. Therefore the conduct constituted by those facts is corrupt for the purposes of the Act.*

A statement in these terms satisfies both s 8, s 9 and s 13(3A), on the one hand, and s 74B(1) on the other.

If the ICAC Act were to be construed as Ms Williams submits, the effective operation of the Commission would be seriously hampered.

The Commission will not adumbrate further on this issue having regard to the authoritative statement of the Court of Appeal in *D'Amore*. Ms Williams' submissions on the approach to s 9 and s 13(3A) are rejected.

Overview of criticisms concerning the general conduct of the inquiry

As in Operation Jasper, various submissions have been made criticising the conduct of the inquiry. Those submissions have been advanced by Mr Hale and Mr Mackay (on behalf of Mr Macdonald), Mr Kirk, Mr Darke and Mr Fitzpatrick (on behalf of Mr Maitland) and Ms Williams (on behalf of Mr Ransley). The individual submissions of those persons are considered below. In every case they are without basis. When the submissions are dealt with below, for the sake of convenience, the Commission will refer only to senior counsel (when senior counsel represents the party concerned) to identify who made them.

Before dealing with the individual submissions, the Commission will make some general observations concerning the conduct of the inquiry.

The investigation involving Operation Acacia was long and extensive. The Commission received the Parliamentary reference on 23 November 2011. Fifty-four compulsory examinations were conducted prior to the commencement of the public inquiry. Thirty-three statements were taken during the investigation and 42 interviews with witnesses were conducted. Many thousands of documents were examined. These facts are relevant to the observations the Commission made in its report on Operation Jasper and which the Commission sets out below, such observations being applicable to Operation Acacia as well.

> *The Commission conducts a public inquiry as part of its investigation. It is not a stand-alone procedure. Typically, months of preliminary enquiries, as part of the overall investigation, are required before it can be determined whether or not a public inquiry should be held. If an investigation appears – within the criteria laid down by the ICAC Act – to justify a public inquiry, a public inquiry may be held. The Commission can conduct a public inquiry only "if it is satisfied that it is in the public interest to do so": s 31(1) of the ICAC Act. That level of satisfaction can be arrived at only after the Commission has formed a provisional view as to the credibility of some of the witnesses and after a careful consideration of the facts, which ot that stage have been uncovered. The prior investigations determine the approach to the public inquiry that the Commission decides is appropriate and necessary. That is, the general direction of the investigation is determined by the Commission by reference ta the provisional views it has formed in consequence of all the material it has discovered before the inquiry commences. And, relevance of evidence, generally, is determined by reference to these provisional views and the direction that the Commission has determined when deciding to hold a public inquiry. Of course, that does not mean that exculpatory evidence is excluded, or that possible new lines of inquiry are eschewed. But the Commission will not allow questions to be asked directed to issues that it deems to be irrelevant. And, in this regard, it is Counsel Assisting who has a major responsibility in determining that the inquiry remains within reasonable bounds. The submissions suggesting that Counsel Assisting had a closed mind, fail to understand this feature of inquiries undertaken by the Commission.*
>
> *Counsel Assisting, when commencing his or her role in assisting the Commission, is made aware of the provisional views the Commission has formed and the reasons for them. It is the duty of Counsel Assisting to bear these views in mind when conducting the inquiry. In particular, these views bear upon decisions that may be taken in determining what evidence is to be adduced. Of course, Counsel Assisting and the Commission must act fairly, and reveal any material that in their view is reasanably exculpatory.*
>
> *The foregoing is a major point of difference between an ICAC public inquiry, on the one hand, and royal commissions, inquiries of a nature similar to royal commissions, and criminal trials, on the other.*
>
> *Of course, nothing in what has been said so far implies that Counsel Assisting (or the Commission) is entitled to act unfairly. But fairness is a relative concept that can be determined only in its own context and circumstances and by reference to any relevant statute applicable. The context and circumstances involving an investigation by the Commission are unique. Within these boundaries, it is for the Commission, and not parties affected, to determine what questions are relevant and what lines of enquiry are to be followed.*

Invitations relating to the calling of witnesses and the tendering of documents made by Counsel Assisting to counsel for affected parties

Certain of the submissions seek to impugn Counsel Assisting and the inquiry itself on the basis that relevant evidence was ignored or relevant witnesses were not called. There is no truth in these allegations, as is dealt with below:

(a) Directions were made prior to the beginning of the public inquiry setting out a mechanism by which interested persons could request that a person be called as a witness in the event Counsel Assisting did not call them. Nobody availed themselves of that mechanism.

(b) As the public inquiry was nearing conclusion, Counsel Assisting made a public announcement inviting interested persons to approach them should they desire a relevant witness, who had not

been called, to be called. Counsel Assisting said that they would consider any such request and would attend to it as appropriate. Nobody took up that invitation.

(c) Counsel Assisting tendered all documents that they were asked to tender on behalf of interested persons, including Mr Macdonald, Mr Maitland, Mr Ransley, Mr Chester and NuCoal.

(d) Directions were also made prior to the beginning of the public inquiry providing a mechanism by which interested persons could seek to tender documents in the event Counsel Assisting refused to do so. Nobody availed themselves of that mechanism.

Early in the Operation Acacia public inquiry segment, Counsel Assisting made an open statement asking anybody who held a concern as to a failure to adduce evidence to raise the matter squarely. Nobody responded to that invitation until after the public inquiry had concluded. It is as though the representatives concerned have stored points up their sleeves only to seek to deploy them tactically in final submissions to impugn the inquiry at a time when any legitimate issue (should there be one) can, practically, no longer be dealt with. If this is what lies behind the submissions, and the failure to make any complaint during the public inquiry, it is deplorable.

As the inquiry was nearing its conclusion, Counsel Assisting made the following public statement:

> *Next week the witnesses we expect to call are Messrs Sheldrake, Flannery, Combe and Ms Sharp of the Hunter Valley Training Company. There is a possibility we will also call Mr Stevenson and Mr Healey from Coal Services but there are some logistical and other matters to attend to before I can make that certain, I say that so that people can prepare and also so because apart from the four principals, if I can ascribe* [sic] *them that way, that will conclude the witnesses for the inquiry as we currently see it and I wanted to let people know that so that any interested person who thinks we should call any other person, any other witness, can let me know in the near future because the opportunity to call a witness is going to expire early next week and if we are going to give consideration to such a request we want to do it now.*

Nobody availed themselves of that open invitation.

Counsel Assisting also made statements from time to time as to their intention not to call a particular witness and invited the representatives of interested persons to discuss the matter with them if they held a different view. So, for example, Counsel Assisting indicated that they did not propose to call Mr Hewson or Mr Badenoch, as they were of the view that neither of them could assist the inquiry and that, if anyone had a view that either of them should be called, they should discuss it with Counsel Assisting. No one responded to such invitations.

Submissions have been made from the safety of chambers, after the conclusion of the public inquiry, contending that Counsel Assisting failed in their duties by neglecting to call witnesses or tender documents and in other respects. That is despite the legal representatives concerned sitting in silence throughout the public inquiry and raising no grievance about these matters. By not having raised their concerns at a time when they might have been remedied (should any remedy have been warranted), they have acquiesced in the conduct of the inquiry. The Commission shall refrain from commenting further on the propriety of those counsel who have behaved in this way.

Specific criticisms of the conduct of the public inquiry

Submissions on behalf of Mr Macdonald

Mr Hale made submissions in Operation Acacia concerning the conduct of the public inquiry similar to those he made in Operation Jasper. In so doing, he also seeks to impugn Counsel Assisting. Specific complaints are made, in particular relating to the calling of witnesses and the tendering of materials.

Alleged failure to call witnesses

So far as witnesses are concerned, a number of particular people are identified by Mr Hale who were not called, whom he maintains should have been called. They are:

(a) Sharan Burrows – Ms Burrows wrote a letter of support for the training mine. Every other person who wrote a letter of support was called. The Commission tried numerous times to contact Ms Burrows, without success. She is based in Europe and any evidence she could have given could not have been of central significance to the allegations. Her circumstances were explained in Counsel Assisting's closing submissions. Yet, despite knowing those circumstances, Mr Hale complains that she was not called. He does not explain how the Commission is to compel a person's attendance when they are situated in Europe.

(b) The Hon Morris Iemma – Mr Iemma was premier at the time the invitation to apply for an EL was issued. He was the subject of a compulsory examination, including in relation to matters concerning Doyles Creek. He was not directly involved in the relevant events and not considered to be able to offer any relevant evidence to the inquiry of a kind that would not be given by other witnesses. He was, in any event, called in Operation Jasper. Directions provided that

evidence in Operation Jasper was evidence in Operation Acacia. Mr Hale had the opportunity to question him on that occasion.

(c) David Agnew – Mr Agnew was an employee of the DPI. He was interviewed for the purpose of Operation Acacia. The Commission concluded that Mr Agnew's evidence was peripheral to the events at issue and, further, the evidence that he could give duplicated that of other DPI witnesses. For these reasons, the Commission decided not to call him.

(d) Nick Roberts – Mr Roberts was said by Mr Macdonald to have been at a meeting with him at a time when telephone records revealed that he received a telephone call from Mr Maitland. He was not interviewed or the subject of a compulsory examination. The Commission did not know that he could have anything to do with Operation Acacia until Mr Hale, in his closing written submissions, criticised the failure to call him. Mr Macdonald's original evidence was that he did not know if he had such a telephone call, he didn't think he did, but he didn't deny it and he didn't know if he spoke to Mr Maitland on the occasion in question. He then said he did not think he spoke to Mr Maitland on that day because he was engaged "in pretty heavy meetings". Mr Hale questioned Mr Macdonald on the basis that his diary records showed that there was a meeting which he attended with Mr Roberts and Dr Sheldrake, which started at 11.00 am on 21 August 2008 (the call taking place at 11.40 am on 21 August). On this basis, it was suggested that Mr Macdonald would not have taken the call on his mobile telephone. That evidence was given on the second-last day of the public inquiry. The diary entries were provided to Counsel Assisting at about the same time. All this took place after the open invitation that had been made concerning the calling of witnesses. Given those matters, there is no basis to the criticism. Furthermore, Mr Roberts was a person wholly disinterested in the Doyles Creek matter (in the sense of having no involvement in it); it is unlikely that he would recall whether, during a meeting five years ago, Mr Macdonald took a mobile telephone call. There is the added circumstance that Dr Sheldrake, who is also supposed to have been at the meeting, was called and yet not asked any question about the matter by Mr Hale. This complaint has the hallmarks of being contrived to make up a case that otherwise does not exist.

(e) John Graham – Mr Graham was the subject of a compulsory examination. He was not considered to have any additional relevant evidence to offer the inquiry that would provide support in respect of the matters referred to in Mr Hale's submissions. For that reason he was not called.

The Commission considers that, in the circumstances, it is fatuous to complain about the failure to call these witnesses when every opportunity had been given to Mr Hale to request that particular witnesses be called and he remained silent about the witnesses mentioned above until making his final written submissions.

Questioning of witnesses

A series of further submissions advanced, complaining about the manner in which witnesses were questioned. They also have no substance.

A submission is put that Dr Sheldrake was not asked about the meeting on 21 August 2008, referred to above in relation to Mr Roberts. The short answer to this is that Dr Sheldrake was called, Mr Hale questioned him but did not himself ask questions about this matter. Mr Hale did put questions concerning the matter to Mr Macdonald but chose not to do so in respect of Dr Sheldrake.

Furthermore, at the time Counsel Assisting did not have access to relevant parts of Mr Macdonald's diary and his evidence about the meeting was given after Dr Sheldrake was called. There is no basis to criticise Counsel Assisting for failing to ask a witness a given question about a topic that they had no knowledge of, and in respect of which Mr Hale (who apparently did know about it) had every opportunity to put the question to the witness but nevertheless refrained from doing so.

Submissions are also made criticising the manner of questioning. It is suggested that Counsel Assisting put propositions to which assent was sought, whereas other legal representatives asked non-leading questions. Again, this complaint loses sight of the fact that this is an investigation, and a part of the investigation that culminated after many months of intensive questioning of witnesses and the gathering of evidence. Counsel Assisting do not come to the public inquiry without knowledge of the results of the prior investigation. As part of their briefing for the inquiry, they are put in a position where they are able to assess what witnesses may be led and the respects in which they may be led. This is part of the overall control that the Commission exercises over the inquiry (and must exercise – if the inquiry is to be kept within reasonable bounds).

In any event, an examination of the transcript shows that Counsel Assisting asked non-leading or leading questions depending on the circumstances at hand and the interest of the inquiry and the witness. It also shows that the representatives of other parties often asked leading questions, including on matters of importance to their case. By way of particular example is Mr Hale's asking leading questions of witnesses as to the events at the dinner in

the Strangers' Dining Room (including Mr Maitland and Mr Ransley, who had a relevant identity of interest). The Commissioner made clear on several occasions his attitude towards leading questions and the answers given in response to them (namely, they would go to weight).

The complaint is without merit.

While certain questioning was robust, particularly of those persons who were the subject of corruption allegations, in no case was it outside reasonable bounds. Those persons were represented by able and experienced practitioners who could, and did, make objections when they thought it appropriate to do so. Those objections were treated on their merits at the time. No complaint was made, and is not now made, as to any particular ruling.

Complaint is also made that Mr Hale was refused leave to cross-examine Mr Munnings on his relationship with Mr Maitland and Mr Ransley. This has been dealt with in the body of the report. Of course, the objection is to a ruling of the Commissioner rather than having anything to do with Counsel Assisting.

Before making the relevant ruling, the Commissioner asked what the line of questioning had to do with the position of Mr Macdonald. As is mentioned in the report, no satisfactory response was given other than to indicate that it went to the reliability of some of the evidence.

The Commission had provided directions before the inquiry commenced to the effect that it would not allow cross-examination without counsel telling the Commission their client's affirmative case in regard to the issues on which questions were to be directed. On the first day of the Operation Acacia public inquiry segment, the Commissioner stated:

> *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. Before allowing cross-examination I may ask counsel to state the affirmative cases that they intend to make on behalf of their respective clients particularly when I am unclear on what issues they wish to cross-examine. I should say generally that I will not allow the kind of fishing expedition that is usually allowed in trials where credibility is being explored. Of course each case will be dealt with on its own merits. The basic principle I will apply is that I will ordinarily not allow cross-examination designed only to establish 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.*

Mr Hale was not able to identify any relevant interest or affirmative case and leave was refused. Even now, in written submissions, Mr Hale is not able to identify any positive case that he would have put to Mr Munnings. The contemplated exercise appears to have been a fishing endeavour without any basis. This view is reinforced by the circumstances relating to the request for access to the compulsory examination transcript of Mr Munnings referred to below.

Access to compulsory examination transcripts

The remaining complaint concerns a lack of access to compulsory examination and interview transcripts. It was put that Mr Macdonald had been denied access to all witness statements and transcripts of compulsory examinations. It was further specifically submitted that Mr Macdonald has not had access to his own compulsory examination, nor those of Mr Hewson and Mr Badenoch, such that he does not know if they said anything exculpatory. Complaint is also made as to the refusal of access to the compulsory examination of Mr Munnings.

Counsel Assisting does not determine the issue of access to compulsory examination transcripts. Such transcripts are subject to a suppression order under s 112 of the ICAC Act made by the Commission. Only the Commission can vary such an order. It would be an offence for Counsel Assisting to divulge the contents of a compulsory examination that is the subject of a suppression order. Insofar as this issue is raised in support of the personal attack on Counsel Assisting, this is a complete answer to it.

During the course of Operation Acacia, Mr Hale made only one request for access to compulsory examination transcripts, namely, that of Mr Munnings. The Commission refused that request for reasons that it gave at the time. No other request was made for access to any other transcript. The circumstances of the request for the Munnings transcript are worth setting out in some detail, however, particularly as the complaint seems to be tied to the conduct of Counsel Assisting:

> *MR HALE: Yes, I think I'll go first but if I could at risk of incurring your ire could I call for the transcript of compulsory examination - - -*
>
> *THE COMMISSIONER: No, no, call for them but they are refused.*
>
> *MR HALE: But I was just going to say and just so it's clear the basis is that having regard to the number of occasions there has been referenced to that examination and the extent to which Counsel Assisting has relied upon that transcript to assist Mr Munnings to certain answers access might lead to different answers once we'd have the opportunity to looking at it. That's, that's the basis of my application.*
>
> *MR BRAHAM: If there's some particular topic that my friend wants to explore that would assist me to to respond.*

A blanket request for Mr Munnings, transcript of Mr Munnings compulsory examinations should not be granted, Commissioner, the reasons are obvious.

THE COMMISSIONER: Yes. Are you able to refine your request, Mr - - -

MR HALE: If only in the most general way anything that bears upon the evidence that he gave today.

THE COMMISSIONER: What, the whole length of his evidence?

MR HALE: Yes.

THE COMMISSIONER: Certainly not.

MR HALE: There is about the reference to gifts, political - - -

THE COMMISSIONER: No. You've said what it is. Are you now refining it?

MR HALE: No, no. It's – all, all his evidence that he gave today.

THE COMMISSIONER: No.

MR BRAHAM: Well I will, I will make this suggestion that as to the relationship between Mr Maitland and Mr Macdonald and this witness's appreciation of it as to the reference to the ELA being gifted in this witness's evidence Mr Shearer and I could consider whether there are any other pages of the examinations which turn on the topic. I don't think there are.

THE COMMISSIONER: Yes.

MR BRAHAM: We'd turn our minds to that. I think – are they the two - - -

THE COMMISSIONER: That is very generous of you, Mr Braham. As far as I'm concerned there is no entitlement to them in the terms you have asserted previously and in your written submissions.

MR HALE: Yes.

THE COMMISSIONER: But if Mr Braham is prepared to provide you with material that he thinks does not prejudice the inquiry I will be happy to agree to you receiving those. Proceed with your cross-examination now please.

Mr Hale never responded to the invitation of Counsel Assisting and the Commission later gave further reasons for the refusal of access in respect of the request for the entire Munnings compulsory examination transcript. The passage quoted reveals the fairness with which Counsel Assisting treated Mr Hale's request and the open-ended or "fishing" nature of Mr Hale's request. The further reasons to which the Commissioner referred were given immediately after Mr Munnings concluded his evidence and appear in the extract from the transcript that is Appendix 5 to this report. Those reasons should be read with reasons that, in Operation Jasper, the Commissioner gave generally for not releasing copies of compulsory examination transcripts. Those reasons are Appendix 5 to this report.

Mr Hale complains that he was not given access to Mr Macdonald's own compulsory examination to determine whether he said anything exculpatory of himself. During the public inquiry, Mr Hale made no request for such transcripts. Access to such transcripts had, however, been refused in Operation Jasper on the grounds contained in Appendix 6 and Mr Hale was entitled to assume that any such request would be refused again. Mr Macdonald was present at his own examination and presumably knew what his own evidence was. He had legal representatives present at the examination, who were free to take notes and discuss the examination with him. He gave evidence at the public inquiry in response to questions not only of Counsel Assisting, but also his own counsel and the representatives of other interested persons. He had every opportunity to present whatever exculpatory evidence he wished to offer in respect of himself.

The submission has been made that denial of access to compulsory examination transcripts has led to a denial of procedural fairness. It was said that Mr Macdonald did not know if something exculpatory was said in those transcripts and he was denied the opportunity to consider any prior inconsistent statements of witnesses given in private session. That submission must also be rejected. In Operation Jasper, the Commissioner gave reasons for refusing Mr Macdonald's request for copies of compulsory examination transcripts (see Appendix 6.) The Commission abides by those reasons.

In his closing submissions, Mr Hale submitted that "the failure to release the transcripts is inconsistent with the judgment of Foster J in *Bankers Trust Australia Ltd v National Securities and Investments Commission* (1989) 85 ALR 475 ('the *Bankers Trust* case')". In the *Bankers Trust* case, Foster J relied on the fact that the legislation he was required to construe did not "empower the Commission to make orders for non-disclosure of testimony taken in the [private] hearing" (at 483). His Honour contrasted that legislation with legislation that gave the National Crime Authority power to direct that evidence "given before it shall not be published at all or not published except in such manner and to such persons whom the Authority specifies". Section 112(1) of the ICAC Act, like the National Crime Authority legislation to which Foster J referred, expressly provides that the Commission may direct that any evidence given before it shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies. Thus,

the *Bankers Trust* case is fundamentally different from the cases on which the Commissioner relied in his reasons delivered on 11 February 2013, and Mr Hale's reference to it is quite unhelpful.

Mr Hale then suggested that the failure to release the transcripts was inconsistent with the Commission's "usual practice". That is a false submission. The usual practice is not to release the transcripts and is based on the cases referred to in the Commissioner's reasons delivered on 11 February 2013.

As to Mr Hewson and Mr Badenoch, as noted above, Counsel Assisting publicly announced to the inquiry that they were of the view that those persons could not offer any assistance to the inquiry and for that reason they were not being called. They also invited anybody who held a contrary view to speak to them. Nobody did. The complaint as to lack of access to the compulsory examinations of those individuals needs to be seen in that light and is rejected.

Mr Hale submits that denial of access to compulsory examination transcripts has led to a denial of procedural fairness. It is said that Mr Macdonald did not know if something exculpatory was said in those transcripts and he was denied the opportunity to consider any prior inconsistent statements of witnesses given in private session. That submission must also be rejected.

Before turning to the detail of it, it should be stated in clear terms that the Commission is not aware of anything exculpatory in any transcript that was not the subject of evidence in the public inquiry. If there was credible exculpatory evidence given by a witness, the Commission would expect Counsel Assisting to adduce it by calling that witness at the public inquiry. In no circumstance, to the Commission's knowledge, did Counsel Assisting fail to do so.

So far as procedural fairness is concerned, the starting point is that the scope of any such obligation must be considered against the statutory scheme at issue with attention to the "practical context in which the decision-maker must consider whether to exercise the power": *Re MIMA; Ex parte Miah* (2001) 206 CLR 57 at [29]-[31]; *SZBEL v MIMIA* (2006) 228 CLR 152 at [26]; *Kioa v West* (1985) 159 CLR 550 at 584, 516-616. Any such duty is subject to the "particular statutory framework", which must be given "full effect": *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475 at 504. The requirements do not involve a "fixed body of rules": *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475 at 504; they are flexible and must be "moulded" to the circumstances of the particular case: *Kioo v West* at 585; and *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88 at [25]. Those matters are significant in the context of a large public inquiry under the ICAC Act and the provisions of s 112, which specifically allow for the suppression of material where the Commission is satisfied that this is in the public interest.

There are five points to be made.

The first is that the Commission has, as a matter of practice, adopted the position that, when it holds a public inquiry, it has regard only to evidence adduced or tendered at the public inquiry in making its findings. This is a position not only arrived at before a final report is delivered, but before the commencement of a public inquiry.

The second follows from the first. As a consequence, the Commission has not had regard to any material not before the public inquiry in making its findings. The material is not information which the Commission has (or has ever) proposed to take into account in making its findings. The only evidence that the Commission has had regard to in formulating its findings is that in the public inquiry.

The third is that, as framed in *Kioa v West* and *Applicant VEAL*, any duty of disclosure concerns "adverse information" or material "adverse to his interest". But here the complaint is not that material adverse to Mr Macdonald's interest may exist, which will be taken into account. It is that information has not been disclosed which, it is speculated, may be exculpatory. What Mr Hale and Mr Mackay submit is required by procedural fairness is disclosure of thousands of pages of material (being the transcripts of compulsory examinations and the exhibits tendered during them) so that they can go on a fishing expedition, based on nothing more than speculation that they might find something exculpatory. It should be borne in mind that these compulsory examinations were carried out subject to suppression orders under s 112 of the ICAC Act; this gave the witnesses some confidence that, save where the Commission decided that the evidence was to be used in a public inquiry, their evidence and the exhibits would be confidential. The protection so given by the ICAC Act and orders of the Commission would be destroyed were the Commission to be required, against its wishes, to disclose these documents to all affected persons (and, there is little doubt that, were Mr Hale's application to be acceded to, like applications would be made by all other affected persons). The basic point is that in such circumstances an important mechanism of the ICAC Act, one on which the Commission heavily relies to persuade witnesses to tell the truth and to cooperate, would be defeated. No duty of procedural fairness requires the facilitation of a speculative fishing expedition of that kind or the frustration of a power expressly conferred on a decision-maker by Parliament.

The fourth has been alluded to already. Any requirement of procedural fairness must accommodate itself to the governing statutory framework. In this case, that includes

the provisions of s 112 as well as the division between a preliminary investigation, compulsory examination and public inquiry.

The fifth arises from the observation of Brennan J in *Kioa v West* at 628 that "[a]dministrative decision making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made". Those remarks have particular significance in the context of Operation Acacia. As has been mentioned, the inquiry into this matter was very lengthy, involved over 50 witnesses giving evidence at the public inquiry and involved vast amounts of documentary material extending to in excess of 40 lever arch folders. As a result, it was also very expensive. The public inquiry would not have been aided by being clogged by speculative enquiries of the kind contemplated by Mr Hale and Mr Mackay.

Failure to put before the inquiry all relevant documents

Mr Hale complains that the Commission has failed to put before the inquiry all relevant documents. But no document is identified that should have been tendered. Rather, the complaint, so far as it relates to documents, appears to concern access to compulsory examination transcripts or witness interviews – a complaint that has been dealt with above. For completeness, so far as the complaint might concern other unspecified documents, it is without substance.

Generally, the Commission points out that the directions it made before the inquiry commenced provided a procedure for the tendering of documents. If an interested person sought to have a document tendered not otherwise in evidence, they were to request Counsel Assisting to tender that material and if they refused then the interested person could apply to the Commission to tender the material themselves. In the event, interested persons (by their representatives) availed themselves of that process by requesting that Counsel Assisting tender various documents that they wished to place before the Commission. In every such case, Counsel Assisting tendered that material and it was received into evidence, even in cases where Counsel Assisting noted that their relevance was not apparent. Counsel Assisting were content to tender the material in the event the relevant person wished to rely on it. The material tendered by Counsel Assisting at the request of others included a statement by Mr Maitland concerning his past achievements, a bundle of material identified by Mr Ransley, various materials identified by NuCoal Resources NL (including a slide presentation and operational materials) and a statement provided by Mr Chester intended to be exculpatory in respect of a particular issue and a bundle of material identified by him. So far as Mr Macdonald is concerned, a large folder of material was identified by his representatives and tendered by Counsel Assisting at the request of Mr Hale. In no case did Mr Hale, or any interested person, make an application for the tender of a document that Counsel Assisting had refused to tender or identify any other document not before the Commission that should be tendered. In those circumstances, it is disingenuous, to say the least, for Mr Hale to advance criticisms on the basis that not all documents were placed before the Commission.

Given that Counsel Assisting tendered every document they were asked to tender on behalf of Mr Macdonald (even when they doubted their relevance) and there were directions otherwise providing for the tender of documents, Mr Hale's complaint has no substance whatever. In those circumstances, to criticise Counsel Assisting after the public inquiry is complete is, at best, irresponsible.

The inquiry has been compromised

Mr Hale makes the further submission that the inquiry has been so badly compromised, it is not in a position to determine the truth. It is said that the Commission does not have before it all relevant evidence and has not heard all relevant witnesses. As a result, the inquiry is not an inquiry within the meaning of s 31 or an investigation as per s 13(2) of the ICAC Act. The factual premises of this submission have been dispelled above. As is apparent from that discussion, the submission of Mr Hale is wholly without basis. It bears repeating that Mr Hale made no suggestion as to this matter during a public inquiry in which he participated over a number of months. Rather, he sat silently in the hearing room and chose to make his assertions concerning missing witnesses and documents after the event. His forensic decision deprives his submission of any force.

Pre-determination of inquiry and actual bias

Mr Hale advances a further submission that attacks both Counsel Assisting and the Commission. Paragraph 4 of Mr Hale's submissions state:

> *When viewed objectively as a whole* [Counsel Assisting] *conducted the inquiry as if it was adversarial proceedings. It could not be said that the Commission looked at both sides of the question, the allegations, in a balanced way. Those called who gave evidence thought to support the allegations were not or rarely cross-examined to test the reliability of their evidence. For example, Departmental and Ministerial staff in whose interests it would be to distance themselves from the decisions were asked leading questions to establish just that and their evidence was barely tested, except by other counsel. Those who gave evidence which did not support the allegations or case*

> *theory were treated in a hostile manner* ... [Counsel Assistings'] *submissions themselves exemplify the way in which the inquiry was conducted.* [Counsel Assisting] *opened on a certain basis and then* [Counsel Assistings'] *submissions argue a case in support of the allegations made in the opening. Rather than being an inquiry into what really happened it appears to have a pre-determined outcome.*

The suggestion of a predetermined outcome can only be sensibly understood as an allegation against the Commission of actual bias. This is a far-reaching submission on the part of Mr Hale. After all, it is not Counsel Assisting who determine the outcome of the inquiry, but the Commission. One would think that he would have to have sound grounds for such a submission, before making it.

But, Mr Hale's submission of a predetermined outcome is based on propositions that ignore the nature of a public inquiry under the ICAC Act. As the Commission has stated above, a public inquiry is but the culmination of what is normally a lengthy investigation involving many months of preliminary enquiries and the canvassing of witnesses by interviews and statements (and Operation Acacia was an investigation of this kind). Often, this takes more than a year, as it did in the case of Operation Acacia. The Commission repeats that, by the ICAC Act, it can conduct a public inquiry only "if it is satisfied that it is in the public interest to do so": s 31(1) of the ICAC Act.

Section 31(2) of the ICAC Act provides that:

> *Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:*
>
> *(a) the benefit of exposing to the public, and making it aware, of corrupt conduct,*
>
> *(b) the seriousness of the allegation or complaint being investigated,*
>
> *(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*
>
> *(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

When having regard to the benefit of exposing the allegations to the public and the other factors expressly mentioned in s 31(2), the Commission cannot make a proper judgment as to whether a public inquiry should be held without assessing the information it has obtained in its preliminary investigation and coming to a provisional view as to the reliability of that information.

The Commission's level of satisfaction that the ICAC Act calls for requires a balancing exercise. Once the required level of satisfaction has been achieved, the prior investigations influence the general direction of the investigation, and the inquiry as well. To save time, leading questions may be asked of witnesses who, in accordance with the Commission's provisional view, are telling the truth. The Commission expects that those who contend otherwise will cross-examine such witnesses and they are given an appropriate opportunity to do so. It is generally open to counsel for the affected parties to cross-examine all witnesses – and that is precisely what, throughout the inquiry, Mr Hale, Mr Kirk, Ms Williams and other counsel did. It is through such a process that the Commission is assisted in determining the truth. That is, in the case of witnesses whose evidence is led by Counsel Assisting, the Commission pays careful regard to the witness' demeanour and answers in cross-examination and then makes up its mind as to the credibility of that witness.

This approach does not mean that exculpatory evidence is excluded, or that possible new lines of enquiry are ignored. Indeed, as a matter of practice the Commission instructs Counsel Assisting in all cases, as it did in Operation Acacia, to adduce all relevant evidence available to the Commission, whether inculpatory or exculpatory. And, to the best of the Commission's knowledge, this is precisely what Counsel Assisting have done, without exception. There was extensive cross-examination, subject to an affirmative case being put, of most of the witnesses by counsel for the affected parties and Counsel Assisting, in turn, cross-examined the affected parties extensively. There is nothing unusual in that. Mr Hale's submission that the inquiry "appears to have a predetermined outcome", loses sight of this feature of all inquiries undertaken by the Commission under the ICAC Act. It also shows a basic lack of understanding of what is meant by investigatory and inquisitorial proceedings as occurs in accordance with the provisions of the ICAC Act – hence, his complaint that Counsel Assisting "conducted the inquiry as if it was adversarial proceedings".

No complaint has been received by counsel for any of the witnesses that they were treated in a "hostile" manner. In the course of the public inquiry, Mr Hale did not submit that any witness had been so treated. Mr Hale's submissions as to the way the public inquiry was conducted are rejected. The Commission considers them to be entirely without substance.

There is another factor that defeats Mr Hale's argument on this issue. During the course of the inquiry, a disqualification application was made on behalf of Mr Macdonald for reasonable apprehension of bias, but that application was said to be based on the application made by Mr Duncan in curial proceedings concerning Operation Jasper on the strength of matters unconnected with the conduct of

the inquiry. Those proceedings were dismissed, following appeals to the Court of Appeal and an application for special leave to appeal to the High Court. But, no other application for disqualification, and no suggestion of bias or predetermination, was made by any party throughout the conduct of the inquiry.

At no stage during the course of the public inquiry did Mr Hale (or anyone else) make any other application or suggestion concerning apprehended or actual bias or a predetermined outcome. Again, the submission is first made by written submissions, long after the hearing of evidence is concluded. It is far too late for submissions of this kind to be made. Mr Hale should have raised his complaints about the leading of witnesses, the failure to cross-examine witnesses, the alleged treatment of witnesses in a hostile manner, and the way in which, according to him, Counsel Assisting sought to support the submissions they made in opening, when the conduct about which he now complains became apparent during the course of the inquiry. It should not be made now for the first time.

Early in the public inquiry, Counsel Assisting made an open statement asking anybody who held concerns as to the conduct of the inquiry to raise the matter squarely. Counsel Assisting stated:

> *Our brief is to investigate the matters under inquiry and so far as we are aware there is no suggestion that we have failed to adduce evidence because of some preconceived theory, nor that such a course has been countenanced by the Commission. If at any point such a view is maintained it ought to be raised squarely.*

No one responded to that statement so as to raise any such view during the conduct of the inquiry.

Submissions on behalf of Mr Maitland

Mr Kirk submits that Counsel Assisting have not sought to assist the Commission to uncover the truth of the matters the subject of inquiry, they have acted in a partisan manner and their conduct has fallen short of certain requirements. He has not provided any further detail in support of these accusations. They are simply made by way of bald assertion devoid of corroboration or support.

In assessing this submission regard should be had to the statement of Counsel Assisting referred to above. Mr Kirk did not respond to the invitation in that statement.

Given the unspecific nature of the accusations, it appears to go no further than the submissions advanced on behalf of Mr Macdonald (dealt with above) and Mr Ransley (dealt with below).

There is one exception to the above. The argument is put that the very advancing of submissions or questions suggesting that Mr Maitland was financially motivated is indicative of a failure by Counsel Assisting to dispassionately investigate the facts. It is another strange submission, and an absurd one at that. No credible submission can be made that there were no reasonable grounds for the making of such submissions or putting such propositions to Mr Maitland. These appear from the body of the report. In such circumstances, Counsel Assisting are perfectly entitled to make submissions and put propositions consistent with their assessment of the evidence. Equally, it is open to those who represent Mr Maitland to contend that other conclusions should be drawn upon the evidence. Far from justifying allegations of impropriety, it is through such a process that the Commission is assisted to arrive at the truth.

Counsel Assisting tendered the document outlining Mr Maitland's background, which was called in aid of his counsel's submissions as to his motivations. What is more, Counsel Assisting made the specific submission that, notwithstanding their contentions as to the true reason for a training mine:

> *That is not to say that both Ransley and Maitland might not also have had reasons to genuinely support a training mine. Especially in the case of Maitland, there is a body of evidence which supports the notion that the CFMEU in general, and Maitland in particular, had long supported the idea that some training of underground miners should occur in a dedicated underground training facility.*

Counsel Assisting, on this issue, has acted with entire propriety. Mr Kirk's submission is rejected.

The further submission is put that for the Commission to rely upon the submissions of Counsel Assisting "would itself be inconsistent with the duties of fairness that lie upon the Commission". This is yet another strange submission. It has echoes of Ms Williams' assertion (referred to below) that were the Commission to "draw the inferences contended for by counsel assisting without first considering alternative inferences that are reasonably available on that evidence" it would give rise to "a reasonable apprehension of bias (and may be indicative of actual bias)."

On one view, it may have been made to pressure the Commission in advance of it preparing its report. Ms Williams' submission may have been made for a like purpose. It is not profitable to speculate about these matters. It is sufficient to say that neither submission has any persuasive force. It goes without saying, of course, that the Commission will treat each issue on its merits having regard to the submissions of all parties. It does not need to be reminded of its function by reference to veiled allegations of unfairness or bias, whether apprehended or actual.

Submissions on behalf of Mr Ransley

Ms Williams submits that Counsel Assisting failed to address the availability of alternative inferences consistent with innocence in the context of s 9 and s 13(3A) of the ICAC Act and thereby failed to present their submissions in a manner consistent with their professional duties. This extraordinary submission was couched in a form such that it depended for its validity on the correctness of Ms Williams' argument concerning the proper construction of s 13(3A). The Commission has dealt with this argument above and has found (by reference to *D'Amore* – and other authorities – and various sections of the ICAC Act) that that argument is wrong in law. Thus, the foundation for the argument that Counsel Assisting have failed to do their duty, because they made submissions contrary to Ms Williams' contentions as to the law, disappears.

The Commission, however, considers itself constrained to comment further on this submission. The making of submissions by counsel, otherwise than in accordance with their opponent's perception of the law, could rarely be a breach of professional obligations. In the circumstances of the present inquiry, by no stretch of the imagination could that be the case, even if Ms Williams' submissions on the law were to have been correct. And to compound the egregious nature of the submissions, they are not. Accordingly, the attack on Counsel Assisting was entirely unwarranted. What makes the attack even more remarkable is that, despite Ms Williams becoming aware of the Court of Appeal's decision in *D'Amore*, which undermined the premise of her argument, in her supplementary submissions she did not withdraw her previous criticisms.

Ms Williams went on to submit that, for the Commission to rely on the submissions of Counsel Assisting, the following would arise:

> [I]*t would be unsafe for ICAC to rely on the evidence referred to in their submissions in support of any potential finding of fact or inference as an accurate and impartial summary of the whole of the relevant evidence. It would not only be unsafe but would also give rise a reasonable apprehension of bias (and may be indicative of actual bias) for ICAC to make findings of fact without assessing the whole of the relevant evidence, or to draw the inferences contended for by counsel assisting without first considering alternative inferences that are reasonably available on that evidence.*

The Commission has been the recipient of some strange submissions in the course of this inquiry, but this is amongst the strangest. The submission, in effect, is that, if the Commission relies on the submissions of Counsel Assisting, and does not accept the correctness of Ms Williams' submissions in making findings of fact, such findings would give rise to a reasonable apprehension of bias on the part of the Commission and even may be indicative of actual bias. In the opinion of the Commission, this is an improper submission. It carries within it an implication of an intimidatory threat. The Commission will not respond further to it save for saying that, in each instance in which the Commission has made a finding of fact or drawn an inference, it has had regard to all of the evidence as well as the pertinent submissions made to it by Counsel Assisting and by persons affected.

Appendix 4: Summary of profits of original DCM shareholders

Summary of financial information				
	A	B	C	D
Shareholder	Initial Investment	Net Profit made @ 31/12/11 (from sales of share)	Market value of unsold shares @ 31/12/2011	Total Net Profit (B + C)
Jonca Investments P/L (John Maitland)	$165,623.00	$5,985,526.26	$8,924,206.59	$14,909,732.85
Nera Ransley (wife of Craig Ransley)	$318,017.28	$14,887,364.05	$-	$14,887,364.05
Pooles Australia (Andrew Poole)	$364,648.00	$5,385,366.48	$13,083,007.95	$18,468,374.43
Maxine Poole	$400.00	$-	$32,625.86	$32,625.86
James Stevenson	$65,964.00	$3,144,325.95	$-	$3,144,325.95
James Stevenson and Elizabeth Pinnock as Trustees for the Stevenson Pinnock super fund	$56,938.00	$2,608,442.00	$-	$2,608,442.00
Micjud Pty Ltd (Michael Chester)	$23,339.12	$435,092.88	$595,227.42	$1,030,320.30
Kimberly Chisholm - Lenark Pty Ltd	$70,019.80	$6,753,836.15	$-	$6,753,836.15
Lawrence Ireland - Climb Super Pty Ltd	$36,212.00	$1,353,849.00	$140,213.00	$1,494,062.00
Michael Abela	$25.00	$1,367.00	$-	$1,367.00
Paul Dickson	$25.00	$-	$2,087.00	$2,087.00
Ricketts Point Investment P/L	$6,214.00	$-	$394,454.00	$394,454.00
Tuxon Pty Ltd (Robert Hargraves)	$1,335.00	$73,839.00	$-	$73,839.00
Stacey Noonan	$16,806.00	$1,425,698.19	$-	$1,425,698.19
Vincent Martin	$-	$417,647.00	$-	$417,647.00
Valzan Pty Ltd	$65,344.00	$2,780,382.00	$-	$2,780,382.00
Top Plain Properties P/L (Kenneth Mackinnon)	$8,333.00	$213,190.00	$348,300.00	$561,490.00
1) Baysoni (Glen Lewis) Shareholding 1	$100,000.80	$1,267,310.04	$2,392,819.11	$3,660,129.15
2) Baysoni (Glen Lewis) Shareholding 2	$99,999.36	$1,267,311.48	$2,392,734.87	$3,660,046.35
Jeffrey Roderick Williams	$93,360.36	$3,847,315.00	$1,431,000.00	$5,278,315.00
Jessica Tsiakis	$46,680.68	$3,164,732.00	$-	$3,164,732.00
TOTAL	$1,539,284.40	$55,012,594.48	$29,736,675.80	$84,749,270.28

Appendix 5: Transcript

THE COMMISSIONER: Mr Hale, I just want to add something to your blanket requests for transcripts of compulsory examination. I have already given reasons on this and this - what I'm going to say now is really supplementary to that. I am sure you understand, Mr Hale, because you've been appearing here long enough, including in compulsory examinations that it is a matter of practice for me to direct and for any acting Commissioner holding a compulsory examination to make a direction under section 112 of the Act that any evidence given before the Commission shall not be published except in such manner and to such person as the Commission specifies. Section 112(1)(A) provides that the Commission is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest. All compulsory examinations undertaken in connection with any, with the three operations which together form one overall investigation, were subject to such a direction. I'm sure you know that insofar as you appeared in a number of compulsory examinations that direction was made. Now, I do not regard it to be necessary or desirable in the public interest to disclose at the interests of a party all the compulsory examination transcripts of all the compulsory examinations that were undertaken for the purpose of this inquiry which you have previously requested and which I understand you to really be desirous of obtaining again because there is a great deal of material in those compulsory examinations that are irrelevant. There's a great deal of material in those compulsory examinations which are personal. There is occasionally material in those compulsory examinations which if disclosed to the public could cause personal harm to individuals, including physical harm.

In addition, you can look around and see how many counsel are appearing here today. I would imagine that there are about 15, there are often over 30. I've given leave I think to about 50 or 60 to appear in this particular segment. If everybody was to ask for and obtain compulsory examination transcripts the time taken to do this, the cost of doing it and the likelihood of irrelevant questions being asked as a result is such that I regard it completely against public interest to cause, to allow a disclosure. If it comes - dealing with a particular, the particular request - what I have said is of equal application to requests for individual compulsory examination transcripts of other persons in general terms. I do not regard it in the public interest as it being desirable to allow those transcripts to be disclosed. Some counsel have asked for extracts of compulsory examinations transcripts which are confined to particular topics with which they are concerned. Those have been allowed because in those cases where they've been allowed the considerations which I have expressed do not apply.

I also do not regard it appropriate generally to allow persons to have the compulsory examination transcript in its entirety of the compulsory examination undertaken in respect of that particular party. I may say that in all instances in which you have been concerned, Mr Hale, your client has had representation by counsel including yourself in most if not all cases, perhaps not all, but in all cases - I mean not all involving you but in all cases your client has had representation by counsel who is quite aware of what was said, usually a solicitor has been present as well, there has never been any objection to any person representing the witness taking notes of what was said. So generally in my view there is no need for those transcripts to be disclosed, I do not regard them to be in the public interest in doing so. Despite all these matters which I regard as self-evident you have continually persisted in making these blanket requests for transcripts. I have now elaborated upon the reasons I gave last time and I think in future it would be - I would appreciate it if you wish to make requests for transcripts again for the sake of preserving your right of creating some foundation for some application elsewhere you're perfectly entitled to do that and I'd had no objection to that but unless you have any new points to raise please do not attempt to reargue the matter.

Appendix 6: Reasons delivered on 11 February 2013 for refusing Mr Macdonald's request for copies of compulsory examination transcripts

COMMISSIONER: On more than one occasion during this public inquiry, Mr Hale has applied for orders requiring the Commission to provide his client, Mr Macdonald, with copies of the compulsory examination transcripts that contain exculpatory material relating to Mr Macdonald or, if I have understood correctly, copies of all compulsory examination transcripts. I think it desirable to state now in full my reasons for refusing those applications.

These reasons will apply to any future such applications unless any new grounds are advanced.

In these inquisitorial proceedings it is the Commission's obligation to afford all persons who might be affected by its findings procedural fairness. I do not regard that obligation as requiring the Commission to provide Mr Hale with the transcripts he has sought. As background to Mr Hale's applications I point out that the Commission has held 92 [sic] *compulsory examinations, some involving several hours of questioning. These examinations have been undertaken over a period of approximately 20 months. Some witnesses have, over time, participated in more than one compulsory examination. The Commission has also interviewed in excess of 60 potential witnesses and many witnesses have participated in more than one interview. Virtually all of those interviews hove been recorded. In addition, the Commission has obtained 12 witness statements.*

The material obtained in this woy extends to many thousands of pages. I give these particulars to indicate the scale of the evidentiary material obtained by the Commission and the practical difficulties that would thereby arise if the Commission were to accede to Mr Hale's applications ond like applications which other persons no doubt would be induced to make should Mr Hale's application be granted.

There is the odditional consequence that with a very large number of counsel involved in this inquiry the disclosure Mr Hale seeks will probably cause the inquiry to extend immeasurably in length. The delay in itself is an important factor to be taken into account as given the seriousness of the allegations in this inquiry it is in the public interest that the Commission report its findings to Parliament as soon as possible.

Furthermore, the delay would cause large amounts of unnecessary costs to be incurred and inconvenience suffered. This would occur in circumstances in which the Commission has decided that the material sought is unnecessary and irrelevant as it would not advance the inquiry in any respect.

I appreciate that arguably these practical difficulties alone should not stand in the way of procedural fairness properly assessed. But in my view the practical difficulties are not without relevance in deciding what procedural fairness requires in this case.

The Commission has in any event decided that irrespective of these practical difficulties there are other compelling grounds that alone cause it to conclude that Mr Hale's applications should be dismissed. These are as follows:

(a) Before evidence was led in this public inquiry, the Commission carefully assessed oll the evidence it had so far obtained, including all the compulsory exominotion transcripts, interviews and statements to which I hove referred. Having considered all this material, the Commission determined which of the potential witnesses from whom that material had been obtained could give relevant evidence at the public inquiry. That assessment has continued throughout the course of the inquiry. The Commission has determined to call all those witnesses so identified irrespective of whether a witness's testimony supports the allegation that contention that corrupt conduct has been committed or whether thot testimony is exculpatory of any person. By the end of the evidence in this inquiry all such witnesses will have been called.

That is the Commission's intention, and there is no reason to think that that intention will not be fulfilled. The Commission considers that through the leading of the evidence of these witnesses and the relevant questioning of them by others will lead to the discovery of the truth. Compare Australian Securities and Investments Commission v Hellicar (2012) HCA 17, at [241] et seq per Heydon, J.

(b) In the majority of instances the compulsory examination constitutes the first occosion when officers of the Commission are in a position to explore with potential witnesses the evidence they may be able to give. Thus, on such occasions, the Commission officers generally osk open-ended and wide-ranging questions. In this way, much irrelevant material is adduced. Before these witnesses are colled to testify, Counsel Assisting the Commission and Commission officers sift through the material to identify evidence that is relevant. At the public inquiry, Counsel Assisting, having considered the compulsory examination testimony and the other preliminary evidence obtained, endeavours to adduce only those parts of such material as are relevant. It would be contrary to the public interest to disclose publicly, material that is irrelevant.

(c) Counsel Assisting gave a full and detailed opening address and, throughout the questioning of witnesses, has been at pains to make clear what allegations are being made, if any, against the persons concerned.

(d) I am satisfied that in this way all persons who have, who may be affected by any findings the Commission makes, have or will have been fairly apprised of the allegations against them. I do not understand it to be contended otherwise by anyone.

(e) I have invited any person who wishes to have testimony called to proceed in accordance with directions I have mode in that regard.

(f) All persons who wish to reply to the allegations that have been made against them have been and will be given a full and fair opportunity of answering relevant evidence that might be adverse to them.

(g) As has elsewhere been noted, disclosure of the compulsory examination transcripts could compromise the investigation and inquiry or cause the investigation and inquiry to be less effective than it otherwise would have been. For the Commission to disclose its hand prematurely, "will not only alert suspects to the progress of the Commission, but may well close off other sources of inquiry". These words were spoken in National Companies & Securities Commission v News Corporation Ltd (1984) 156 CLR 296 *by Mason, Wilson and Dawson JJ at 323 – 4; see also Gibbs CJ at 316. Premature disclosure may allow corrupt witnesses to tailor their evidence dishonestly. Secrecy and silence are often effective means and indeed sometimes the only means of enabling the truth to be discovered.*

(h) Evidence given at compulsory examinations is virtually always given subject to a suppression order in terms of s 112 of the Independent Commission Against Corruption Act 1988. *Such a suppression order renders the evidence so given in effect secret. The Commission generally reserves the right to vary that order if it considers that the public interest requires it to do so. Such a suppression order is often an important factor in persuading witnesses to tell the truth. If an order for disclosure as sought by Mr Hale is made, otherwise than for the reason that it is in the public interest to do so, the benefits to the Commission and the state in holding the compulsory examination, and making the suppression orders, could to o material extent be lost. Moreover the disclosure of certain evidence contained in the transcripts, interviews and statements could lead to serious harm to witnesses and, indeed, to others mentioned by such witnesses. The Commission is of the view that it is not in the public interest to disclose the compulsory examination transcripts as Mr Hale seeks. The same applies to the interviews and statements the Commission has obtained.*

(i) The approach that the Commission has adopted is in occord with three first instance decisions of the Supreme Court of New South Wales, namely Aristodemou v Temby and the Independent Commission Against Corruption *(unreported) NSWSC 14 December 1989, per Grove J; Donaldson v Wood (unreported) NSWSC 12 September 1995, per Hunt CJ at CL (upholding a decision of Wood J, who was then acting as a Royal Commissioner);* Morgan v Independent Commission Against Corruption *(unreported) NSWSC 31 October 1995, per Sperling J. See also* Glynn v Independent Commission Against Corruption *(1990) 20 ALD 214 per Wood J. The judges who delivered these judgments were, with respect to their Honours, deeply experienced in the law relating to investigatory bodies such as the ICAC as well as the criminal law. The principles embodied in their decisions have led to a practice being adopted by this Commission that has remained unchallenged for at least 17 years.*

The practical considerations applicable to this inquiry, to which I earlier referred when opening my remarks on this issue, reinforce the conclusion to which the Commission has come.

For these reasons, the transcripts of the compulsory examinations will not be produced as Mr Hale requires.

Appendix 7: Special conditions of EL 7270

SECTION F: SPECIAL CONDITIONS

49

This licence is not transferable and is granted solely to allow determination of resource capacity to support a training mine. Should the licence holder not meet all commitments outlined in these conditions with respect to a training program and subsequent development of a training mine, the licence will be cancelled.

50

The licence holder shall fully meet all financial and other commitments relating to the awarding of the exploration licence as specified in, and subject to the provisions and conditions of its Exploration Licence Application and associated submissions ("Commitments"). The Commitments are set out in the conditions below.

51

The licence holder shall ensure that during the term of this licence, all work programs, further studies and other commitments – including exploration, mine planning and feasibility, hydrological and other environmental studies – are satisfactorily completed within the timeframes contained in the original proposal and associated submissions.

52

The licence holder shall, develop a training program for its proposed activities within one year of the grant of the licence. Aspects of the program will include:

- details of types of training to be provided during exploration and any subsequent mining,
- training plans,
- course accreditation,
- identification of staffing levels ,key staff, training personnel or organisations and numbers of trainees
- Health and Safety Management system.

53

The licence holder shall, within six months of the grant of the licence, establish a "Training Mine Coal Exploration Project – Community Consultative Committee" that reflects the broad interests of the community in the area. This committee is to be chaired by a person appointed by the Minister for Mineral Resources. Regular meetings are to be held as determined by the Chairperson. All reasonable costs associated with the Chairperson's involvement and the maintenance of the operations of the committee (excluding the personal costs of other committee members) are to be borne by the licence holder.

54

The licence holder shall provide a detailed (confidential) annual report to the Department of Primary Industries at the end of each year of the licence which substantiates that all commitments and studies as outlined in its application to the Department are being satisfactorily met along with all licence conditions related to training. This report should also

demonstrate that expenditure commitments made by the licence holder to the project are being satisfactorily met.

55

Subject to achieving satisfactory results in each stage of the exploration program and further data that becomes available during the exploration phase, the licence holder is expected to seek project approval under NSW planning legislation from the Government for the development of a training mine within the licence area within three years of issuing of the licence.

56

The licence holder shall pay the Department of Primary Industries:

(a) the payment of A$1.106 million for the refund of public expenditure previously incurred by the Department of Primary Industries for exploration and evaluation of the area.

(b) a payment of A$250,000 per annum for the period of this licence as a funding contribution towards the NSW Institute for Carbon Sequestration at the University of Newcastle.

57

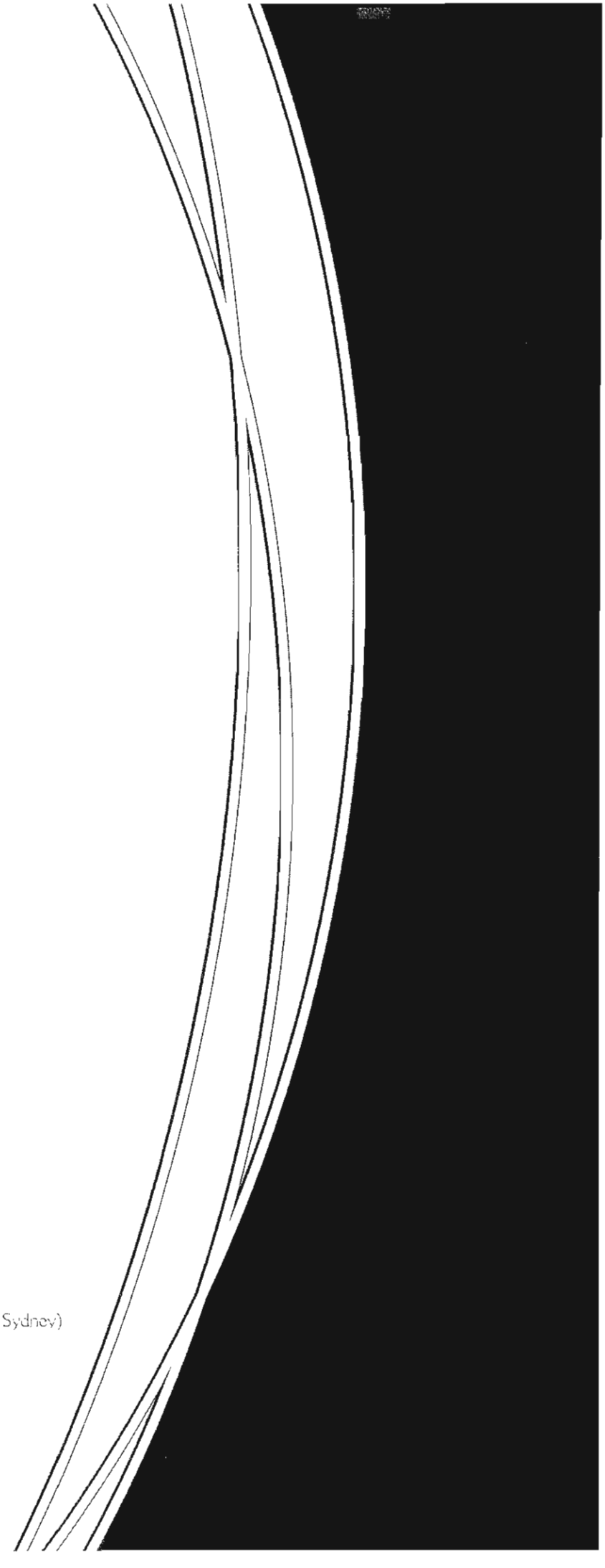
(a) If the licence holder does not substantially meet its Commitments or fails to comply with the title Conditions and/or Special Conditions, then the Minister may, subject to first complying with condition (c) below, cancel any title in place at that time, unless the licence holder demonstrates to the satisfaction of the Minister that there is a bona fide reason for failure to substantially meet its Commitments or to comply with a Condition or indicate that it will remedy the failure to the satisfaction of the Minister.

(b) If the licence holder fails to commence substantial development of a training mine within three years of the awarding of the original exploration licence, subject to all necessary approvals, the Minister may, subject to first complying with condition (c) below, cancel any title in place at that time, unless the licence holder demonstrates to the satisfaction of the Minister that there is a bona fide reason for such failure and that there is intention to proceed with training mine development.

(c) Any cancellation of title by the Minister must be undertaken in accordance with the provisions relating to cancellation as set out in the *Mining Act (NSW) 1992* (including section 126, as amended or replaced).

58

Any mining lease granted as a consequence of the exploration carried out by the holder on this exploration licence will be subject to financial contributions in accordance with the Guidelines for the Future Allocation of Coal Exploration Areas issued by the Minister in March 2006 and updated in January 2008 or any future revision of the guideline in place at the time.



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