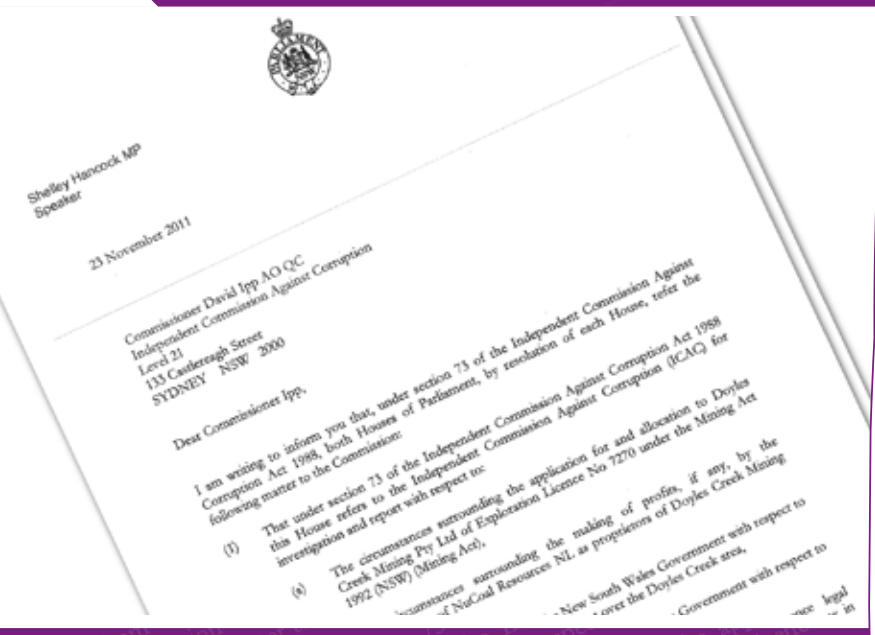
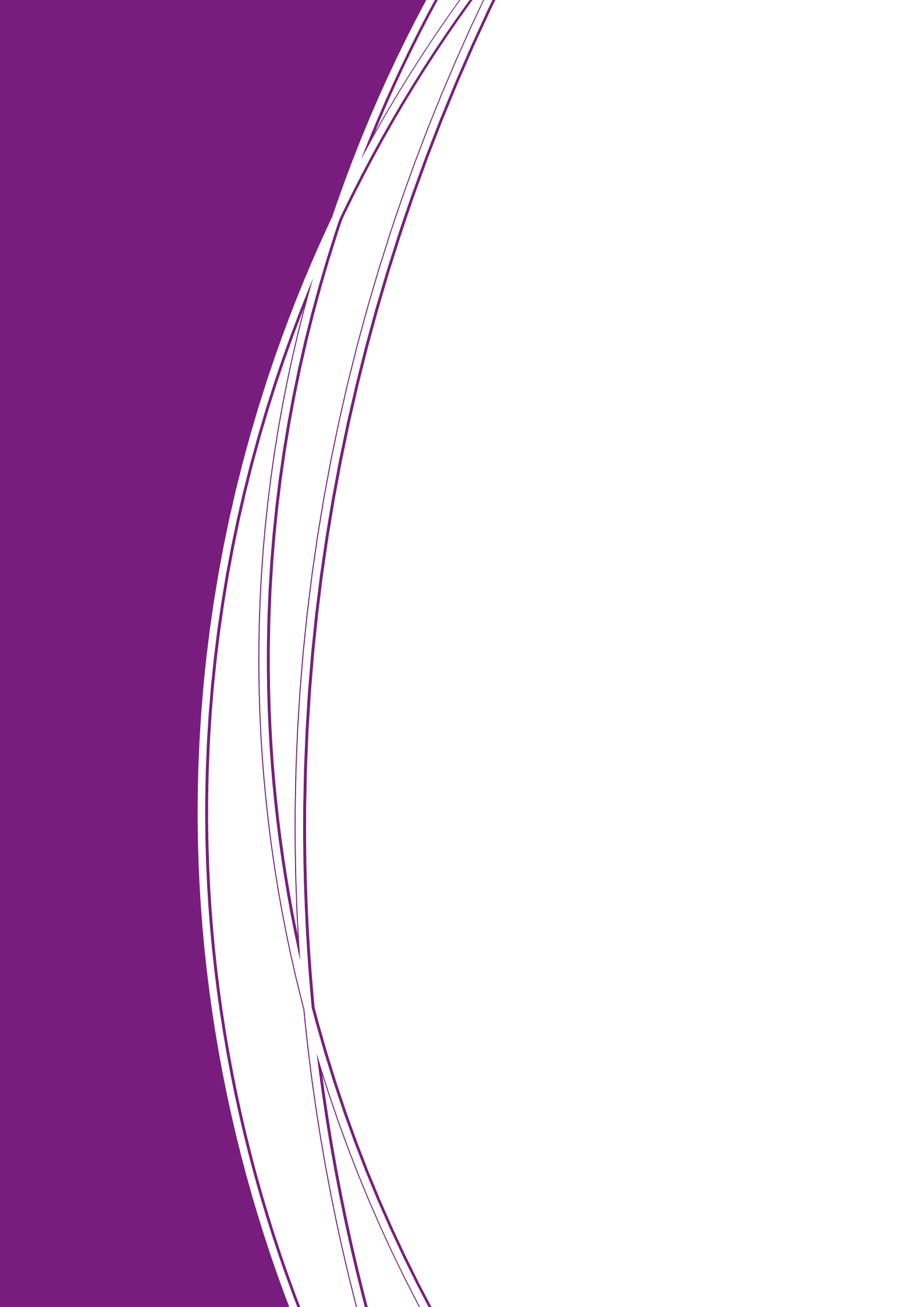


OPERATIONS JASPER AND ACACIA – ADDRESSING OUTSTANDING QUESTIONS

ICAC REPORT
DECEMBER 2013

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES



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INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

OPERATIONS JASPER AND ACACIA – ADDRESSING OUTSTANDING QUESTIONS

ICAC REPORT
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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 addressing the questions outstanding from the Commission's investigations known as Operation Acacia and Operation Jasper.

The Commission's 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

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Chapter 1: The questions addressed by this report and the Commission's recommendations

Operation Acacia

Operation Acacia is a segment of a composite investigation recently conducted by the NSW Independent Commission Against Corruption ("the Commission"). Operations Jasper and Indus comprise the other segments.

Operation Acacia concerned the conduct of Ian Macdonald (who, during the relevant period, was the minister for primary industries and the minister for mineral resources) in granting Doyles Creek Mining Pty Ltd (DCM) consent to apply for coal exploration licence (EL) 7270 in relation to land at Doyles Creek, and in granting the EL to DCM.

On 23 November 2011, both Houses of Parliament referred a series of questions to the Commission relating to EL 7270 and licences or leases under the *Mining Act 1992* ("the Mining Act") over the Doyles Creek area. The questions were as follows:

(1) What were the circumstances surrounding the application for and allocation of EL 7270 to DCM?

(2) What were the circumstances surrounding the making of profits, if any, by the shareholders of NuCoal Resources NL (the proprietor of DCM)?

(3) Whether recommendations should be made to the NSW Government with respect to licences or leases under the Mining Act over the Doyles Creek area.

(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.

Operation Acacia was undertaken as a result of this referral. The Commission's report on Operation Acacia, titled *Investigation into the conduct of Ian Macdonald, John Maitland and others* ("the First Acacia Report"), was furnished to the NSW Parliament in August 2013. The Commission's response to questions (1) and (2) is outlined in the First Acacia Report.

The current publication, insofar as it relates to Operation Acacia, concerns questions (3), (4) and (5).

Operation Jasper

Operation Jasper concerned a range of issues involving the conduct of Mr Macdonald, the Hon Edward Obeid Senior, Moses Obeid and others relating to, and arising from, the awarding of ELs in respect of the coal mining allocation areas known as Mount Penny, Glendon Brook and Yarrawa.

On 30 January 2013, during the course of the Operation Jasper segment of the Commission's public inquiry, the Hon Barry O'Farrell MP, NSW Premier, wrote to the Commission advising that the NSW Government would welcome any findings and recommendations the Commission may think it fit to make with respect to whether the NSW Government should:

(a) take any action with respect to licences or leases under the Mining Act relevant to the Commission's investigation and, if so, what action

(b) take any action with respect to amendment of the Mining Act and, if so, what action

(c) commence legal proceedings, or take any other action, against any individual or company in relation to the circumstances surrounding the allocation of ELs relevant to the Commission's investigation.

In July 2013, the Commission furnished its report on Operation Jasper, titled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others* ("the First Jasper Report"), to the NSW Parliament. The First Jasper Report sets out the results of the Commission's investigation into these matters.

This current publication, insofar as it relates to Operation Jasper, deals with questions (a), (b), and (c) of Premier O'Farrell's letter.

Counsel's advice

The Commission engaged Bret Walker SC and Perry Herzfeld (Counsel Advising – in contradistinction to Counsel Assisting – the latter being the counsel who assisted the Commission in the public inquiry) to advise on the substantive matters involved in questions (3), (4) and (5) referred by Parliament in Operation Acacia and questions (a), (b) and (c) asked in the Premier's letter in Operation Jasper. A copy of Counsel Advising's opinion ("the Opinion") is reproduced in this report as Appendix 1.

In instructing Counsel Advising, the Commission provided them with all the submissions that were received on these issues from affected parties, the relevant submissions of Counsel Assisting the Commission in Operations Acacia and Jasper, and other relevant information.

The Commission's answers to the questions

The Commission's responses to the questions are set out in summary form immediately below. These responses are discussed more fully later in this report.

The term "authority" is used in the report. It is the terminology used in the Mining Act to refer to an EL, an assessment lease or a mining lease.

Questions (3) and (a) – recommendations concerning licences and leases

The Commission is of the view that the granting of the authorities for Doyles Creek, Mount Penny and Glendon Brook was so tainted by corruption that those authorities should be expunged or cancelled and any pending applications regarding them should be refused.

The Commission recommends that the NSW Government considers enacting legislation to expunge the authorities for Doyles Creek, Mount Penny and Glendon Brook. That could be accompanied by a power to compensate any innocent person affected by the expunging (and, if the NSW Government deems it appropriate, any refusal to grant relevant pending applications) to the extent that that was considered appropriate.

Such legislation would have the benefit of reducing risks arising from challenges in the courts to any ministerial decision to cancel or not renew current authorities and to refuse to grant any authorities. Such legislation should be carefully drafted to avoid constitutional challenge. The Commission considers that legislation of this kind is the preferable method of expunging or cancelling the relevant authorities.

In the absence of special legislation, another reasonable option in relation to each of Doyles Creek, Mount Penny and Glendon Brook is to consider cancelling the relevant authorities and refusing pending applications for assessment leases under s 380A of the Mining Act, if the minister formed the view that it is in the public interest to do so.

Furthermore, in the absence of special legislation, the authority in relation to Doyles Creek could be cancelled by exercising power under s 125(1)(b2) of the Mining Act. This section provides that a decision-maker may cancel an authority if the decision-maker reasonably considers that the holder of the authority provided false or misleading information in, or in connection with, an application or any report provided under the Mining Act for, or with respect to, the authority. There is evidence referred to in the First Acacia Report that false and misleading statements were provided to the NSW Department of Primary Industries in connection with seeking consent to apply for the EL and the granting of the EL.

A possible further alternative approach is to allow the current authorities to continue until they expire and then refuse to renew them or refuse to grant a mining lease. The Commission does not favour this approach.

The Commission does not consider that any action should be taken with respect to the Yarrawa EL.

Questions (4) and (c) – action against individuals or companies

The Commission recommends that the NSW Government considers enacting legislation to provide for the confiscation of the proceeds of the conduct at issue obtained by those involved in, or with knowledge of,

that conduct. Such legislation could be modelled on the *Criminal Assets Recovery Act 1990*.

Alternatively, the NSW Government may consider the taking of action for recovery of profits or damages made, or caused by, persons involved in the conduct the subject of the Jasper and Acacia reports.

Questions (5) and (b) – amending the Mining Act

No recommendations are made that consideration be given to amending the Mining Act.

The Commission recommends that consideration be given to amending the *Environmental Planning and Assessment Act 1979* ("the EP&A Act") to make it clear that the minister for planning and infrastructure may take into account public interest considerations additional to those raised in the statutory report by the director-general of the NSW Department of Planning and Infrastructure when determining an application under Part 3A of the EP&A Act. This recommendation is relevant to the determination of the application for planning approval for an open cut coal mine at Mount Penny.

Recommendation that this report be made public

Pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session.

Chapter 2: Submissions involving aspects of jurisdiction and procedural fairness

During the course of the Operation Acacia segment of the public inquiry, for reasons set out below, the Hon David Ipp AO QC, Commissioner, announced that the Commission – acting under s 104B of the ICAC Act – would seek the opinion of senior counsel to advise on the substantive matters involved in questions (3), (4) and (5) in Operation Acacia and questions (a), (b) and (c) in Operation Jasper and would provide that opinion to the NSW Parliament.

The Commission's intention so to act has given rise to submissions from affected parties in Operation Acacia on two issues to which the Commission, for the sake of convenience, shall refer as "the Preliminary Issues".

The first Preliminary Issue concerns the Commission's jurisdiction to advise and make recommendations in relation to question (4) of the questions referred by the NSW Parliament (and – by inference – the Commission's power to provide senior counsel's opinion on question (4) to Parliament). During the course of the Operation Acacia segment of the public inquiry, John Maitland and Mr Macdonald (supported by other affected parties) challenged the Commission's jurisdiction to advise or make recommendations as to 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.

The second Preliminary Issue concerns procedural fairness. During Operation Acacia, Andrew Poole and others (including Mr Maitland) submitted that procedural fairness required that, prior to providing senior counsel's opinion to the NSW Government about question (4), the Commission should provide affected parties with a copy of that opinion insofar as it relates to that question, and should give those parties an opportunity to make further submissions about any recommendations the Commission proposed to make based on that opinion.

Having set out the two Preliminary Issues, the Commission now emphasises what is not being challenged.

First, no challenge of any like kind has been made in Operation Jasper. Thus, this report does not deal with any like issues with regard to the Commission's jurisdiction to answer question (c) of Premier O'Farrell's letter, which raises similar issues to question (4) in Operation Acacia, and does not deal with any issue of procedural fairness in Operation Jasper.

Secondly, no party has submitted that issues of jurisdiction, or procedural fairness, arise out of questions (3) and (5) of Operation Acacia. That is to say, no party has challenged the Commission's jurisdiction to advise on questions (3) and (5) and no party asserts that any issue of procedural fairness arises in connection with any advice or recommendation the Commission might give with regard to questions (3) and (5). Accordingly, in this report, the Commission responds only to the challenges made, based on the submitted absence of jurisdiction and lack of procedural fairness, in relation to question (4).

The substantive issues raised by question (4) involve difficult, complex and as yet unsettled issues of law and equity of a civil (as opposed to criminal) nature. For this reason, the Commission determined it would be desirable to obtain advice from senior counsel on that question. At the public inquiry, the Commissioner announced that, for those reasons, the Commission would brief senior counsel to advise the Commission on that question (the Commission being empowered to do so by s 104B of the ICAC Act) and would provide that opinion to Parliament.

Having so determined to brief senior counsel, the Commission considered it expedient to ask senior counsel to advise on the other questions as well.

Chapter 3: The Commission's jurisdiction to advise on question 4

Jeremy Kirk SC, who, together with Matthew Darke SC and Simon Fitzpatrick, appeared on behalf of Mr Maitland at the Operation Acacia segment of the public inquiry, submitted that the Commission does not have unlimited power to make recommendations regarding any kind of conduct, circumstances or events of which it becomes aware in the course of its investigations, and that it is "not for the ICAC to investigate and report on private law causes of action that the State might have". Mr Kirk submitted that the functions and powers of the Commission are directed to the identification and prevention of corruption, that s 13(3)(a) and s 13(3)(b) "should not be construed as a wholesale widening of ICAC's power" and that, in both instances, the power of the Commission is grounded in "the results of its investigations", which are focused on determining whether corruption has occurred.

As a statutory body, the Commission can act only within its statutory powers. Section 13 of the ICAC Act sets out the principal functions of the Commission. The relevant parts of s 13 are provided below, and passages that are particularly apposite to the jurisdictional question are presented in bold:

> *(1) The principal functions of the Commission are as follows:*
>
> *(a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:*
>
> *(i) corrupt conduct, or*
>
> *(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
>
> *(iii)* ***conduct connected with corrupt conduct,***
>
> *may have occurred, may be occurring or may be about to occur,*
>
> *(b) to investigate any matter referred to the Commission by both Houses of Parliament,*
>
> *…*
>
> *(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,*
>
> *…*
>
> *(2) The Commission is to conduct its investigations with a view to determining:*
>
> *(a)* ***whether any corrupt conduct, or any other conduct referred to in subsection (1) (a), has occurred, is occurring or is about to occur, and***
>
> *(b) whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and*
>
> *(c) whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.*
>
> *…*
>
> *(3) The principal functions of the Commission also include:*
>
> *(a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned,* ***whether or not the findings or opinions relate to corrupt conduct,*** *and*
>
> *(b)* ***the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.***
>
> *…*

> (4) *The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report,* ***but section 9 (5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).***
>
> (5) *The following are examples of the findings and opinions permissible under subsection (3)* ***but do not limit the Commission's power to make findings and form opinions:***
>
> (a) *findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,*
>
> (b) ***opinions as to:***
>
> (i) *whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or*
>
> (ii) ***whether consideration should or should not be given to the taking of other action against particular persons,***
>
> (c) *findings of fact.*

It can be seen from the parts of s 13 quoted above that:

- by s 13(1)(a)(iii), one of the Commission's principal functions is to investigate any circumstances which, in the Commission's opinion, imply that conduct connected with corrupt conduct may have occurred, may be occurring or may be about to occur
- by s 13(3)(a), the Commission is empowered to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not its findings or opinions relate to corrupt conduct
- by s 13(3)(b), the Commission is empowered to formulate recommendations for the taking of action that the Commission considers should be taken
- by s 13(4), the Commission's powers to make findings, form opinions and formulate recommendations for the taking of actions are restricted only to a limited number of matters, none of which is presently relevant
- s 13(5)(b)(ii) gives as an example of the opinions permissible under s 13(3), opinions as to whether consideration should be given to the taking of action (apart from criminal proceedings) against particular persons.

Accordingly, it is crystal clear that s 13 confers power on the Commission to make recommendations concerning matters that do not involve corrupt conduct. This was confirmed by Bathurst CJ (with whom Barrett and Ward JJA agreed) in *Duncan v Ipp* [2013] NSWCA 189 at [38] as follows:

> [The] *powers of the Commission are not limited to investigating and reporting corrupt conduct. They include advising public authorities in relation to the prevention and elimination of corrupt conduct (s13(1)(d)-(h), s 13(2)(b)-(c)) and making recommendations as to action that should be taken in relation to the results of its investigations (s13(3)(b)).*

It is equally clear that s 13 confers power on the Commission to give opinions or recommendations as to whether consideration should be given to the taking of civil action against particular persons.

This construction of s 13 is consistent with the legislative history of s 13. Counsel Assisting drew attention to this history as follows:

> *Sections 13, 74, 74A and 74B were significantly amended by the* Independent Commission Against Corruption (Amendment) Act 1990 *(NSW) following the decision of the High Court in* Balog v Independent Commission Against Corruption *(1990) 169 CLR 625. That decision had taken a narrow view as to the scope of the Commission's powers to make findings.*
>
> *In the Second Reading speech for the Bill introducing the relevant amendments, specific mention was made as to the "pressing need" for the amendments arising out of the "confusion and uncertainty generated by the decision* [in Balog]*". It was then said* [Hansard, Legislative Assembly of NSW, 21 November 1990, p 10200)]:
>
> > *"Clearly the purpose for which the Commission was established would be undermined if the Commission were restricted in what it could report after completing its investigations. Thus the bill gives the Commission a clear and wide power to make and report findings and opinions based on the results of its investigations and to make recommendations for the taking of further action."*

Consistent with that statement, the Explanatory Note to the amendments introduced in respect of s 13 states:

> *"Item (7) clarifies the principal investigative functions of the Commission and clearly empowers the Commission to make findings, form opinions and formulate recommendations consequent on or incidental to its investigations, other than findings and opinions prevented by proposed section 74B (item 10))."*

The power to advise or recommend that the NSW Government should commence legal proceedings, or take any other action, against any individual or company in relation to the recovery of profits or payments that any such individual or company may have received or any other sum of money, in consequence of corrupt conduct or other dealings concerning an EL that was created in corrupt circumstances (as found by the Commission), falls squarely within the powers of the Commission as formulated in s 13. The submissions to the contrary are not accepted.

Counsel Assisting submitted further that "one strategy to combat corrupt conduct may be to pursue recovery of the profits of corruption from those who engage in corrupt conduct as a means of deterrence". The Commission accepts that this is another basis on which the Commission's power to offer advice on potential recovery actions may be based.

The above reasoning is applicable to the Commission's jurisdiction to advise and make recommendations in answer to question (4).

Mr Kirk accepted that, by s 13(5)(b), the Commission could express the opinion that consideration should be given by the NSW Government to the taking of "other action" against particular persons ("other action" comprises action other than seeking the advice of the Director of Public Prosecutions (DPP), under s 13(5)(a), as to whether proceedings should be commenced against particular persons for criminal offences). Mr Kirk appeared to accept that the expression of such an opinion would be a proper exercise of power by the Commission under s 13(3) of the ICAC Act. Tim Hale SC, who, together with David Mackay, appeared for Mr Macdonald in both Operation Jasper and Operation Acacia, adopted this submission.

Any decision by the NSW Government to commence civil action would necessarily include consideration of a range of factors, some of which are not taken into account in this report and in the Opinion, and which are not within the knowledge of either the Commission or Counsel Advising. Such factors involve matters such as the cost of the litigation, the ability of any affected party to repay any judgment sum, and relevant political, commercial and local issues. For these reasons, the Commission has decided to advise the NSW Government to *consider,* after having due regard to such factors, whether action should be taken in accordance with the Opinion. In such circumstances, the challenges by Mr Kirk and Mr Hale on this issue appear to fall away.

Mr Hale further submitted that the Commission only has the "functions and power to investigate matters of corruption or possible corruption" and that, as a result, the Commission is limited to recommending action in relation to corruption arising out of the circumstances in issues (1) and (2) of the scope and purpose (these paragraphs are set out in the First Acacia Report).

The matters to which the Commission has referred above refute this submission. The Commission need say nothing further about it.

It is necessary to deal with a further submission made by Mr Hale in relation to the question of the Commission's jurisdiction. At the commencement of the Operation Acacia segment of the public inquiry, the Commissioner expanded the scope and purpose of the public inquiry by adding a number of issues for investigation, including issue (11) as follows:

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

Issue (11) was later withdrawn during the course of the public inquiry. Mr Hale submitted that, as this issue was withdrawn, the Commission chose not to investigate the type of matters that might found any breach of the civil law or that might found a civil cause of action against Mr Macdonald but resolved instead to limit its investigation into whether or not Mr Macdonald engaged in corrupt conduct. Mr Hale argued that as the Commission did not enquire into matters relevant to establishing liability in civil proceedings, it was not empowered under s 13(3) of the ICAC Act to form opinions or formulate recommendations with respect to the commencement of such proceedings.

It is correct that, at the public inquiry, the Commission did not specifically investigate the potential civil liability of any person. But the findings the Commission has made in the course of finding that corrupt conduct occurred are of relevance in expressing opinions as to civil liability. For the

reasons set out above, the Commission is empowered to express opinions and make recommendations as to any potential civil liability that might arise on the hypothesis that the factual findings it has made in finding that corrupt conduct has occurred are capable of proof in an appropriate court, and this is what it has done.

The Commission adds that it was made clear at the time issue (11) was withdrawn that issues of possible improper conduct and breach of duties on the part of Mr Macdonald were likely to arise in the course of the public inquiry, and – by withdrawing issue (11) – the Commission was not precluding itself from investigating and making findings of corrupt conduct based on such improper conduct and breach of duties, or investigating and making findings of conduct connected with such corrupt conduct.

Furthermore, immediately after issue (11) was withdrawn, Counsel Assisting, in response to various submissions calling for particulars of the potential civil actions that might be the subject of advice in relation to question (4), made the following statement at the public inquiry:

> *Various of the submissions then call for particulars of the potential actions that might be the subject of advice. They assume that this has already been a subject of detailed consideration such that views have already been reached as to the possible actions. They are wrong in that regard. However, having regard to the factual matters which we outlined as being subject of inquiry in our opening statement as relevant to possible corruption, some obvious candidates jump out. (1) Principal and accessorial liability for breach of fiduciary and other duties owed to the state by Mr Macdonald. (2) Statutory and general law actions based on unconscionable conduct or misleading conduct. (3) General law actions based on fraud – and (4) the tort of conspiracy. Other actions may also suggest themselves, depending on the matters revealed on inquiry. We should note that while recklessness has been removed from the inquiry scope, you have made it clear that breach of duty by Mr Macdonald remains a live issue.*

The information provided by this statement (to which the Commission shall refer to as the "Statement as to Potential Causes of Action") left no doubt that findings the Commission might make concerning its investigation into corrupt conduct might, collaterally, give rise to advice about question (4). There is no substance to Mr Hale's submission and the Commission rejects it.

For the reasons set out below, the Commission is satisfied that it has jurisdiction to provide advice to the NSW Government in relation to question (4) in Operation Acacia.

Chapter 4: The procedural fairness issue

Submissions were received by the Commission from a number of affected parties to the effect that a copy of the opinion to be obtained by the Commission (the Opinion, as it is referred to in this report) in relation to question (4), together with the Commission's proposed recommendations based on that opinion, should, as a matter of procedural fairness, be made available – prior to the publication of this report – to parties affected by that opinion and those recommendations.

Mr Kirk submitted that the Commission, having undertaken an extensive investigation prior to the commencement of the Operation Acacia segment of the public inquiry, "must already have a fairly clear picture of the facts, and the legal issues it considers them to raise" and, therefore, with regard to question (4), the Commission was required to disclose the possible civil causes of action to those persons against whom they may be brought. Mr Kirk submitted that the significant impact on reputation of any recommendation the Commission may make with regard to the commencement of civil proceedings against a person (as might be contained in any advice given in relation to question (4)) further warrants the disclosure of the advice to that person before publication by the Commission.

Patrick Griffin, who appeared for Andrew Poole at the Operation Acacia segment of the public inquiry, submitted that, in relation to question (4), procedural fairness required a person, whose interest or rights "may be about to be affected by the decision of an adjudicative body, [to] be informed of all charges and accusations against them in order to have a chance to reply [to] a decision that negatively affects their interests is made".

The submissions by Mr Kirk and Mr Griffin are typical of the submissions received on this issue.

Three preliminary matters need to be dealt with before the substance of these submissions is addressed.

First, at the time Mr Kirk made the submission quoted above, the Commission did not have "a fairly clear picture of the facts, and the legal issues it considers them to raise". Irrespective of that fact, however, the Commission does not accept the substance of the submissions made.

Secondly, that part of the Opinion and the Commission's recommendations based thereon relevant to question (4), are based on the Commission's factual findings set out in the First Acacia Report and the First Jasper Report. They are not based on any findings not made in those reports.

Thirdly, by giving advice and making recommendations to the NSW Government, the Commission is not acting as an "adjudicative body". The Commission is simply recommending that the NSW Government consider taking the measures set out herein.

Turning now to the substance of the submissions made by Mr Kirk and Mr Griffin (and those who made similar submissions), the Commission is of the view that the Statement as to Potential Causes of Action gave all affected parties adequate notice of the topics on which Counsel Advising might express an opinion. That the affected parties well understood the nature of those topics is demonstrated by the response to the Commission's invitation issued to all affected parties before obtaining counsel's advice.

The Commission invited all affected parties to provide written submissions to it on the matters about which Premier O'Farrell and the NSW Parliament had sought the Commission's advice in Operation Acacia. In response, many affected parties in Operation Acacia made written submissions that sought to deal with the

merits of question (4); that is, each set out grounds on which they contended that there was no merit in the NSW Government commencing legal proceedings or taking any other action against them. These parties are:

- Michael Chester
- Mr Macdonald
- Mr Maitland
- Vince Martin
- Andrew Poole.

The submissions made by Mr Macdonald and Andrew Poole on the merits were brief, but they did address the merits, and their submissions – like all others – were provided to Counsel Advising for their consideration.

In any event, the Commission does not accept that procedural fairness requires affected parties to be given prior notice of the Opinion.

As explained, in answer to question (4), the Commission is merely recommending to the NSW Government that it gives consideration to enacting legislation or commencing legal proceedings for the recovery of profits or damages from certain persons. It is obvious that there are factors, the details of which are not known to the Commission or Counsel Advising, that are likely to influence any final decision made by the NSW Government. The recommendation to "consider", rather than a recommendation to "adopt", introduces a material degree of remoteness between the Commission's recommendation and any action that the NSW Government might take in response.

Moreover, even if the NSW Government – after due consideration – accepts the Commission's recommendations with regard to question (4), the rights of any potential defendants will not be affected thereby. Their rights will be affected only should an appropriate court, on the completion of litigation relating to claims by the NSW Government, make orders having that effect. This distinguishes the present set of circumstances from those the subject of *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

Finally, the Commission does not accept that the publication of the recommendations in this report and the advice contained in the Opinion – recommendations and advice that may or may not be adopted by the NSW Government – have the potential to result in a relevant impairment of the reputation of any party. The publication in the media by potential litigants of optimistic advice they have received from counsel is a feature of everyday life and the public well understands the conditional nature and limited importance of opinions of that kind.

In summary, in the Commission's view, the publication of this report and the Opinion (as far as these documents relate to question (4)) would not relevantly affect the legal rights of affected parties or their reputations. The Commission is satisfied that procedural fairness does not require the Commission to furnish its recommendations and the advice contained in the Opinion to affected persons prior to the publication of this report.

Chapter 5: Answers to the questions

Current status of the ELs

Exploration licence 7270 granted to DCM was due to expire on 15 December 2012. On 21 November 2012, DCM submitted an application for renewal pursuant to s 113 of the Mining Act. That application remains pending and, therefore, by reason of s 117 of the Mining Act, EL 7270 remains in force.

On 7 March 2012, two applications were made for assessment leases over the area covered by EL 7270. An assessment lease entitles the holder of the lease to prospect on the land specified in the lease for specified minerals in accordance with the conditions of the lease. These applications remain pending.

NuCoal Resources NL ("NuCoal") has sought the requirements of the Department of Planning and Infrastructure's director-general for the preparation of an environmental impact statement to support a proposal to establish an underground mine and associated infrastructure for Doyles Creek. The Department of Planning and Infrastructure issued the director-general's requirements in May 2012. No further steps have been taken in the planning approval process since then and no development application has been submitted.

The Mount Penny and Glendon Brook ELs expire on 21 October 2014. The Yarrawa EL expires on 18 December 2014. No applications have been lodged for any mining leases for these areas.

In December 2010, Cascade Coal Pty Ltd made application under (the now repealed) Part 3A of the EP&A Act for development approval for an open cut coal mine at Mount Penny. Cascade Coal Pty Ltd lodged an environmental assessment for the project in August 2012. In October 2012, the Department of Planning and Infrastructure deemed the environmental assessment to be inadequate for public exhibition. No further steps have been taken in the planning process since then.

No applications for planning approval have been made with respect to the areas covered by the Glendon Brook and Yarrawa ELs.

Question (3) in Operation Acacia and question (a) in Operation Jasper

These questions concern whether the NSW Government should take any action with respect to licences or leases under the Mining Act with respect to the Doyles Creek, Mount Penny, Glendon Brook and Yarrawa tenements.

In instructing Counsel Advising in relation to the Doyles Creek tenement, the Commission informed them that it accepted the submission of Counsel Assisting to the effect that, given that the whole process leading to the giving of consent for application for, and granting of, EL 7270 was tainted with corruption, all grants under the Mining Act should be revoked or expunged and no pending applications should be granted.

In instructing Counsel Advising, the Commission expressed the view that:

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

- should it be considered appropriate, fresh consideration could be given to an allocation and NuCoal could be a participant in that process. The Commission expressed no view as to whether or not that should occur.

The views that the Commission so expressed to Counsel Advising largely were based on the following points made by Counsel Assisting, which the Commission accepts. These points are of particular relevance to the position of NuCoal:

a. EL 7270 was obtained by DCM and is still held by it. The EL is not transferrable. The position of NuCoal is not comparable to that of a bona fide purchaser for value and without notice. NuCoal is merely a shareholder of DCM.

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

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

d. The prospectus issued for the purposes of the reverse acquisition of DCM by NuCoal was lodged with the Australian Securities and Investments Commission on 2 December 2009. There was notorious public controversy from at least mid-2009 in relation to the circumstances of the granting of EL 7270 – in particular having regard to the relationship between Mr Maitland and Mr Macdonald, which was reflected in media coverage at the time. A Jerrys Plains community meeting was also held on 28 July 2009, for which DCM prepared sample questions and responses for delivery by Glen Lewis (the NuCoal managing director) and others in NuCoal. The document containing this sample included reference to "ICAC" issues. Those issues were dealt with at the meeting. Thus, before the backdoor listing, there was widespread controversy calling into question the circumstances of the granting of EL 7270, including that it may have been granted by Mr Macdonald to his "mate" Mr Maitland. Indeed, a concerted effort was made to publicly position the company so that it was removed from Mr Maitland in an effort to improve perception issues.

e. NuCoal acquired DCM with knowledge of the detail of the public controversy referred to in (d) above and the risky nature of the acquisition. For the reasons set out in (d), the investors in NuCoal must have acquired their shares in that company with an awareness of those risks. Those risks must have been reflected in the share price of NuCoal such that the price at which investors purchased their shares took account of the uncertainties.

f. Mr Lewis agreed that, from mid-2009 on, he dealt constantly with the public controversy concerning the circumstances of the granting of EL 7270, including throughout 2010 and beyond. Mr Lewis agreed that by the time of the reverse acquisition there was widespread public controversy. He dealt with potential investors at the time of the reverse acquisition and they raised questions with him about the controversy concerning the circumstances in which EL 7270 had been granted.

g. The reverse acquisition prospectus also emphasised the uncertainties associated with investing in NuCoal. It emphasised that the shares offered under the prospectus should be regarded as speculative, that investors should be aware that they may lose some or all of their investment and that prospective investors should make their own assessment of the likely risks. A number of specific risks were outlined, which included that DCM might not be able to acquire or might lose title to EL 7270 if conditions attached to licences were changed or not complied with.

h. The following exchange took place with Mr Lewis at the public inquiry:

> *MR SHEARER* [junior Counsel Assisting the Commission]: *So given what we've just been discussing, Mr Lewis, I take it you'd accept that investment from the time of the reverse acquisition onwards has occurred under the shadow of the controversy concerning the circumstance of the grant of the Exploration Licence?---Correct*.
>
> ...

THE COMMISSIONER: Sorry, can I just ask one question on that please, Mr Shearer? Mr Lewis, I take the shadow was the risk of something sinister being discovered in the course of this investigation?---That'd be correct, yes.

And the reason why there has been an effect on the share price of NuCoal is that by reason of the, of the Commission's investigation there is a risk of this – there is a risk of corruption being exposed?---By the nature of ICAC yes, I, I agree, yes.

I'm not suggesting that corruption occurred I just want to make it clear, I'm suggesting that the shadow involved the risk that the Commission might uncover corruption?---Correct, it certainly creates uncertainty in the market.

And that has occurred since the float?---My best recollection, and I'll be fairly sure it's accurate, is around March 2010.

...

Mr Lewis, the questions about the way in which the Exploration Licence was granted to Doyles Creek had already been raised in the press before the float or is that right?---They, they had, correct. Almost, I'd be fairly confident January 2009 fairly much straight after the announcement of the EL award.

...

MR SHEARER: And I've shown you references where that was taking place as from July 2009?---Correct.

And you were dealing with the community on the topic in about July 2009 too?---Correct.

i. The same is true of any moneys that NuCoal has expended on exploration and other activities associated with Doyles Creek. Those moneys have been expended with eyes wide open to the uncertainties, risks and possibilities.

In the First Jasper Report, the Commission found that the Mount Penny tenement was created by Mr Macdonald in accordance with a corrupt agreement with Edward Obeid Senior and Moses Obeid. Mr Macdonald did so contrary to his public duty as an officer of the Crown. The decision to create the tenement was not justified by reference to proper planning, mining, environmental, local, or economic considerations.

The Commission does not accept that Cascade Coal Pty Ltd has any valid argument capable of justifying the continued existence of the Mount Penny tenement in its present form. As Counsel Assisting submitted:

> *At the time Cascade Coal Pty Ltd entered into its agreement with Buffalo Resources Pty Ltd, its management knew that the Obeid family was involved in the mining venture and* [it] *was given and* [improperly] *used confidential information.*

On these grounds, the Commission considers, as Counsel Assisting submitted, "the Government [should] take all those measures which are necessary to make certain that the Mount Penny tenement [as presently constituted] is not developed into a mine".

With regard to the Glendon Brook tenement, Counsel Assisting submitted:

> *Cascade Coal has acquired the benefit of the Glendon Brook tenement because it entered into the agreement with Monaro Coal, Moses Obeid, Paul Obeid and Gardner Brook in respect of the Mount Penny tenement. That … was a corrupt agreement.* … [For] *the same considerations that would apply in respect of the Mount Penny tenement, it would be inappropriate to permit Cascade Coal to retain the benefits of the Glendon Brook tenement.*

The Commission agrees with the submissions above.

By reason of the vast number of innocent investors in the Yarrawa tenement, Counsel Assisting submitted that it is not appropriate that the Commission make any recommendations to disrupt current activities on that tenement. The Commission agrees with this submission.

Potential action under existing legislation

Section 125 of the Mining Act sets out a number of circumstances in which a decision-maker may cancel an authority (that is, an EL, assessment lease or mining lease). Section 125(1)(b) provides that an authority may be cancelled if the holder of the authority contravenes a provision of the Mining Act or regulations. Section 125(1)(b2) provides that an authority may be cancelled if the decision-maker reasonably considers that the holder of the authority provided false or misleading information in, or in connection with, an application or any report provided under the Mining Act or with respect to the authority.

The first of these grounds of cancellation requires establishment of a contravention of the Mining Act.

The furnishing of information in relation to an application under the Mining Act, which the person knows to be false or misleading in a material particular, is an offence under s 378C of the Mining Act. In the First Acacia Report, the Commission found Mr Maitland, Mr Ransley, Andrew Poole and Mr Chester made false or misleading statements to the Department of Primary Industries in connection with the process of seeking consent to apply for the EL for Doyles Creek and the granting of that EL.

The second ground of cancellation requires the decision-maker to reasonably conclude that false or misleading information has been provided.

In each case, it was Mr Macdonald who, as minister, granted the relevant ELs. Counsel Advising are of the view that on balance it is not a bar to cancellation under s 125 of the Mining Act that Mr Macdonald, as the original decision-maker, was presumably not misled. At paragraph 52 of the Opinion, Counsel Advising state that:

> *The new Minister could properly and lawfully take the view that the provision of misleading information could very well have affected either the initial grant or the continuance of these exploration licences, by deflecting principled concerns on the part of responsible public servants, or by suppressing political concerns that could have caused scandal, of a kind that could endanger continuance of the licences.*

The Commission agrees with this statement.

The Commission also agrees with Counsel Advising's views on this issue, as expressed in paragraph 53 of the Opinion, that the power to cancel an EL is not to be equated with a judicial power to set aside an administrative action and, therefore, the power under s 125 of the Mining Act is not confined to cases where the misleading information had actually brought about the granting of an EL that would not otherwise have been granted.

A difficulty, however, in proceeding under s 125 of the Mining Act, at least in the case of Cascade Coal Pty Ltd, is whether false or misleading information was provided in the application itself. The relevant conduct of Travers Duncan, John McGuigan, John Atkinson, John Kinghorn and Richard Poole occurred after the ELs had been granted. At paragraph 54 of the Opinion, Counsel Advising express the view that, because of this fact, any decision taken under s 125(1)(b2) of the Mining Act adverse to Cascade Coal Pty Ltd would be "vulnerable" to appeal.

Section 380A(2) of the Mining Act is also relevant to this consideration. It provides:

> *The public interest is a ground (in addition to any other available ground) on which any of the following decisions may be made under this Act:*
>
> *(a) a decision to refuse to grant, renew or transfer a mining right,*
>
> *(b) a decision to refuse a tender for a mining right,*
>
> *(c) a decision to cancel a mining right or to suspend operations under a mining right (in whole or in part),*
>
> *(d) a decision to restrict operations under a mining right by the imposition or variation of conditions of a mining right.*

A "mining right" is defined to include an EL, an assessment lease and a mining lease.

The section applies to a decision based on conduct that occurred, or a matter that arose, before the commencement of the section.

At paragraph 56 of the Opinion, Counsel Advising state that:

> *...the addition of this reason to exercise the cancellation power could properly enable the Minister to take the view that it is in the public interest to cancel what might be termed a tainted exploration licence, even if the holder had not itself supplied false or misleading information in relation to the application for it.*

Before proceeding to cancel an EL, the decision-maker is required to comply with the procedural requirements of s 126 of the Mining Act. If the EL is then cancelled, that decision may be appealed to the Land and Environment Court. Section 128 of the Mining Act provides that fresh evidence or evidence additional to that available to the decision-maker when the decision was made may be admitted in the hearing. A decision to cancel based on the "public interest" amendments may well result in prolonged litigation.

Counsel Advising have also considered the option of taking no action to cancel the relevant ELs but rather to allow them to expire and not grant any applications for assessment leases or mining leases.

As noted above, each of the Mount Penny, Glendon Brook and Yarrawa ELs are due to expire in late 2014. The Doyles Creek EL was due to expire in December 2012 but remains in force by virtue of the fact that an application for renewal of the EL has been submitted.

The Mining Act grants discretionary power to the minister tasked with deciding whether to grant an assessment lease or a mining lease. At paragraph 63 of the Opinion, Counsel Advising state that:

> *The public interest in refusing to extend any further benefits beyond those already obtained under the Mining Act, in these circumstances, would be well within the ambit of proper purpose in exercise of this ministerial discretion. The provisions of the new sec 380A of the Mining Act make explicit the propriety of considering the public interest in exercising such a power, probably unnecessarily in our opinion. The real question is whether the public interest does comprehend the approach described above – and we think that it clearly does.*

While this is an option, it is not one which the Commission recommends be taken by the NSW Government. It would allow the relevant entities to retain, for some time, the benefit of ELs obtained as the result of corruption. Although the Mount Penny and Glendon Brook ELs are due to expire in late 2014, the making of applications for assessment leases or for renewal of the ELs would have the effect of keeping the ELs in force until such time as the applications were determined. Refusal by the minister to grant or renew such applications would almost inevitably lead to litigation, thereby causing further delay to resolution. The Commission does not consider it is in the public interest to risk delaying resolution of these matters.

In relation to any applications made under the EP&A Act, Counsel Advising note that public interest considerations may inform the decision of the minister whether to grant or refuse any application.

There is an additional matter that requires consideration. This is the manner and extent to which the relevant decision-making minister can rely on the Commission's findings.

At paragraph 69 of the Opinion, Counsel Advising express the view that:

> *...the most problematic aspect of the statutory decision-making canvassed above, which we have considered in anticipation of it being raised in judicial review proceedings, is the manner and extent to which the Minister in question (including those public servants advising the Minister) use the Commission's findings.*

Counsel Advising take the view that any minister called upon to make relevant decisions under the Mining Act or the EP&A Act is entitled to take into account the fact and content of the First Acacia Report and the First Jasper Report. Counsel Advising, however, make the following points at paragraph 70 of the Opinion:

> *The Reports contain, as they must under the Commission's statutory duties, conclusions or findings. But they are not judicial, and should not be seen as rising further than the evidence and inferential reasoning upon which they are said to be based (or, indeed, in light of which they may well be challenged). We think it would be inappropriate as a matter of administrative law for the Commission's findings to be regarded as dispensing the Minister from considering and reaching as appropriate whatever conclusions the Minister regards as justified in light of all the circumstances. True, those circumstances properly include the notorious scope, scale and elaborateness of the Commission's investigations, hearings and Reports, but nonetheless the Commission's findings must not dictate the Minister's views.*

The Commission agrees with these points.

There is an additional factor to be taken into account.

Mr Duncan, John McGuigan, Mr Atkinson, Mr Kinghorn and Richard Poole have commenced proceedings in the Supreme Court seeking to have the findings that they engaged in corrupt conduct set aside. While the Commission considers it has good prospects of resisting these claims, there is always a risk inherent in litigation. Should the claims be rejected at first instance, it is possible – perhaps likely – that some or all of the plaintiffs would seek leave to appeal. It is likely to be some time before the litigation is resolved.

In these circumstances, it would be prudent for any relevant minister to proceed without assuming that the findings made by the Commission concerning these persons will not be set aside.

There is, however, ample material, apart from the Commission's findings, that may be considered. This includes the evidence set out in the Commission's reports, the transcripts of the evidence, the exhibits tendered during the public inquiry, the submissions made by Counsel Assisting and the relevant submissions made in response to those submissions. The Commission agrees with the opinion of Counsel Advising that this evidence should be considered by those responsible for making the relevant decisions.

Counsel Advising also raise the issue of procedural fairness, which is dealt with at paragraphs 73, 74 and 75 of the Opinion. This is an issue that will need to be taken into consideration by the relevant decision-makers.

Counsel Advising do not consider that s 93 of the ICAC Act prevents evidence given to the Commission being used as a basis for the relevant decision-makers forming a view about what action to take. The Commission agrees.

The advice provided by Counsel Advising, based on existing legislative provisions, reveals certain difficulties inherent in each of the approaches suggested, not least of which is the likelihood that any decision adverse to existing interests may result in administrative law challenges to ministerial decisions.

In light of the difficulties with expunging or cancelling the existing authorities under current legislation, Counsel Advising also raise the issue of special legislation to expunge the authorities resulting from the conduct exposed by the Commission's investigation (see in particular paragraphs 99 and 100, and from paragraphs 102 to 105 of the Opinion). One advantage of such legislation is that it would significantly reduce the risks associated with any administrative law challenge to ministerial decisions to cancel or not renew ELs or refuse to grant any assessment leases.

Counsel Advising suggest that such legislation could be accompanied by conferral of a personal and non-compellable power on a suitable minister to authorise an ex gratia payment by the state to compensate any innocent person affected by the expunging to the extent the minister might think fit.

Counsel Advising have considered the constitutionality of such legislation and are not of the view that the state would be prohibited from so legislating. Such legislation would, of course, need to be carefully drafted to avoid successful constitutional challenge. It is not for the Commission to advise on how such legislation should be drafted. That is a matter for the NSW Government, which, of course, can take whatever advice it deems necessary on this matter.

For the reasons set out in the Opinion, the Commission considers that special legislation of this kind is the preferable method of expunging or cancelling the relevant authorities and for refusing to grant any applications for assessment leases or mining leases.

Recommendations concerning question (3) and question (a)

The Commission recommends that the NSW Government considers enacting legislation to expunge the authorities for Doyles Creek, Mount Penny and Glendon Brook. That could be accompanied by a power to compensate any innocent person affected by the expunging (and, if the NSW Government deems it appropriate, any refusal to grant relevant pending applications) to the extent that was considered appropriate.

The Commission is of the view that special legislation of this kind is the preferable method of expunging or cancelling the relevant authorities.

In the absence of special legislation, another reasonable option in relation to each of Doyles Creek, Mount Penny and Glendon Brook, is to consider cancelling the relevant authorities and refusing pending applications for assessment leases under s 380A of the Mining Act, if the minister formed the view that it is in the public interest to do so.

Furthermore, in the absence of special legislation, the authority in relation to Doyles Creek could be cancelled by exercising power under s 125(1)(b2) of the Mining Act.

A possible further alternative approach is to allow the current authorities to continue until they expire and then refuse to renew them or refuse to grant a mining lease. The Commission does not favour this approach.

The Commission does not consider that any action should be taken with respect to the existing Yarrawa authority.

Question (4) in Operation Acacia and question (c) in Operation Jasper

These questions concern 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 the relevant ELs.

These questions are dealt with from paragraphs 79 to 92 of the Opinion.

Counsel Advising have considered whether the NSW Government could commence proceedings for judicial review in relation to the granting of the ELs. This issue, in essence, is whether the affected authorities could be set aside by the taking of legal proceedings (as opposed to relying on special legislation).

Counsel Advising note that, in principle, it would be open to the state to commence proceedings for relief in the nature of certiorari or declaratory relief to have the ELs set aside. The Commission agrees with Counsel Advising, however, that the preferable course with respect to the authorities is to enact special legislation to achieve this end.

A possible alternative approach is to utilise the provisions of the Mining Act to cancel those authorities.

In the case of the Mount Penny project application currently with the Department of Planning and Infrastructure, it would be open to the minister for planning and infrastructure to decline to grant the application on public interest grounds. The Commission is of the view that, while this is a viable option, the better course is to expunge the authorities by enacting special legislation.

Counsel Advising have also considered whether the NSW Government could commence proceedings for recovery of loss suffered by the state caused by persons as a result of the conduct exposed by the Commission's investigation or for the profits obtained by persons as a result of such conduct. The Commission agrees with Counsel Advising that there are difficulties in pursuing these courses.

Counsel Advising express the view that a more sensible course would be to cancel or not renew the ELs. The Commission agrees with this view.

Any decision by the NSW Government to commence civil action would necessarily also include consideration of a range of external factors (such as the cost of the litigation, the ability of any affected party to repay any judgment sum, and relevant political and commercial issues) not factored into the Opinion and which are not within the knowledge of the Commission.

Another external factor that the NSW Government may take into account is that to which Counsel Assisting referred in their submissions as follows:

> *Finally, in considering the pursuit of civil causes of action, the adoption of other mechanisms for the recovery of proceeds by State agencies may be a relevant consideration for the NSW Government.*

In this regard, the Commission noted in the First Acacia Report that there was evidence before it of the financial benefits accrued by Mr Maitland, Mr Ransley and Andrew Poole and has provided relevant information to the NSW Crime Commission for such action as it considers appropriate. If the relevant proceeds of corruption are forfeited under proceeds of crime legislation, the need for civil proceedings may not eventuate.

From paragraphs 98 to 105 of the Opinion, Counsel Advising consider the desirability of special legislation. Of relevance to question (4) and question (a) is the suggestion that legislation could provide for the confiscation of the proceeds of the conduct at issue obtained by those involved in, or with knowledge of, that conduct.

A benefit of such legislation is that it would significantly reduce the risks associated with litigation to obtain monetary remedies against those who profited from the conduct exposed by the Commission's investigation.

Counsel Advising suggest that such legislation could be modelled on the *Criminal Assets Recovery Act 1990*.

As pointed out by Counsel Advising, while that Act may provide a means by which proceeds of the relevant conduct can be recovered, the difference between that Act and the proposed special legislation is that confiscation under the latter could turn, not on proof of illegal activity, but on proof of matters that are more specifically targeted to the conduct at issue. Counsel Advising have noted, at paragraph 101 of the Opinion, that such legislation "...could turn, for instance, on proof (on the balance of probabilities) of the derivation of proceeds from the grant of EL 7270 with knowledge that the grant of that exploration licence involved false or misleading conduct".

The Commission agrees with these views.

Recommendations concerning question (4) and question (c)

The Commission recommends that the NSW Government considers enacting legislation to provide for the confiscation of the proceeds of the conduct at issue obtained by those involved in, or with knowledge of, that conduct. Such legislation could be modelled on the *Criminal Assets Recovery Act 1990*.

Alternatively, the NSW Government may contemplate the taking of action for recovery of profits or damages made or caused by the persons involved in the conduct the subject of the First Jasper Report and the First Acacia Report.

Question (5) in Operation Acacia and question (b) in Operation Jasper

These questions concern whether the NSW Government should take any action to amend the Mining Act. The Commission has also considered whether the EP&A Act should be amended and whether special legislation should be considered.

Since publication of the First Jasper Report and the First Acacia Report in July and August 2013 respectively,

the Mining Act has been amended by the *Mining and Petroleum Legislation Amendment (Public Interest) Act 2013*. The amendments, which commenced on 27 November 2013, make public interest an additional ground for making a decision to refuse to grant, renew, transfer or cancel a mining right or suspend operations under a mining right (a mining right includes an EL, an assessment lease or a mining lease).

These amendments apply to a decision with respect to an application or other matter that was pending at the time of the amendments and a decision that is based on conduct that occurred, or on a matter that arose, before the commencement.

Counsel Advising's consideration of possible legislative amendments is set out from paragraphs 93 to 105 of the Opinion.

Counsel Advising consider there is no need to amend the Mining Act in order to prosecute any of the potential legal remedies disclosed in the Opinion. The Commission agrees with this view.

At paragraphs 96 and 97 of the Opinion, Counsel Advising note that:

> *However, we observe in passing that the provisions concerning the power to grant assessment leases (sec 41), the power to grant mining leases (secs 63 and 64), the power to renew exploration licences (sec 114) and the power to cancel authorities (sec 125) each contain what may be an anomaly. It is present in other provisions of the Act also. It is this.*
>
> *Each provision we have mentioned permits certain action on the ground that the decision-maker "reasonably considers" that false or misleading information of a specified type has been provided as well as on certain other grounds which turn, not on the decision-maker's state of mind, but on the position in fact. An example is the contravention of a provision of the Act: that must be demonstrated in fact, not to the reasonable satisfaction of the decision-maker. It may be that thought should be given to whether these provisions should turn wholly on the decision-maker's state of mind.*

The Commission makes no recommendation on this issue.

In December 2010, a project application was submitted to develop an open cut coal mine at Mount Penny. The application was lodged pursuant to the (now repealed) provisions of Part 3A of the EP&A Act and is being dealt with as a transitional Part 3A project under Schedule 6A of the EP&A Act.

If development consent were to be granted by the minister for planning and infrastructure under Part 3A of the EP&A Act, then s 75V of the EP&A Act would apply. This may mean that an application for a mining lease cannot be refused if it is necessary for carrying out a project approved under Part 3A of the EP&A Act. It is not entirely clear to what extent the recent amendments to the Mining Act, which allow the public interest to be taken into account in deciding to refuse to grant a mining lease, affect this provision. In the Commission's view, it is strongly arguable (albeit not certain) that once the underlying authority is cancelled or expunged, the development consent under the EP&A Act becomes a nullity.

The Commission previously sought advice from Mr Walker as to whether public interest criteria form part of the considerations in determining whether to grant a development consent and, in particular, whether the minister could take into account the evidence before the Commission when considering the public interest. That advice was provided to the Commission and published together with the Commission's letter of 20 February 2013 to Premier O'Farrell.

The advice then received was that it was open to the NSW Government to consider that, in light of the nature of the evidence led during the public inquiry, the substantial media publicity that arose as a result of that evidence, and the general notoriety of the issues that were the subject of that evidence, public interest criteria should be applied to any decision affecting the development application. Mr Walker's advice was that, under the EP&A Act, public interest criteria form part of the considerations in determining whether to grant a development application. Where an application is being dealt with under Part 3A of the EP&A Act, the minister is required to consider a statutory report by the director-general of the NSW Department of Planning and Infrastructure before determining the application. Such a report may address public interest issues that the director-general considers relevant to the development.

It was Mr Walker's opinion that the minister could take into account public interest considerations when considering a Part 3A approval, even if those considerations were not identified in the director-general's report. The Commission agreed with this advice but in its letter to the premier noted Mr Walker's further advice that it is arguable that the minister should not take into account any matter not raised by the director-general.

At paragraph 94 of the Opinion, Counsel Advising note that it may be prudent to amend the EP&A Act to make it clear that the public interest may be considered when determining Part 3A applications. The Commission agrees with this view.

Recommendations concerning question (5) and question (b)

The Commission does not recommend that consideration be given to amending the Mining Act.

The Commission recommends that consideration be given to amending the EP&A Act to make it clear that the minister for planning and infrastructure may take into account public interest considerations additional to those raised in the report by the DPI's director-general when determining an application under Part 3A of the EP&A Act.

Appendix 1: Opinion of Counsel Advising

THE INDEPENDENT COMMISSION AGAINST CORRUPTION:
OPERATIONS ACACIA AND JASPER

JOINT OPINION

Introduction

1 We have been asked to advise the Independent Commission Against Corruption (**the Commission**) on three issues emerging from Operation Acacia and Operation Jasper investigations. The Operation Acacia investigation concerned rights under the *Mining Act 1992* (NSW) (**the Mining Act**) granted with respect to Doyles Creek. The Operation Jasper investigation concerned such rights granted with respect to Mount Penny, Glendon Brook and Yarrawa.

2 The three issues on which we have been asked to advise are as follows:

(a) any recommended action by the New South Wales government with respect to licences or leases under the Mining Act over the areas the subject of the investigations;

(b) whether the New South Wales government should commence legal proceedings, or take any other action, against any individual or company in relation to the circumstances surrounding the allocation of exploration licences with respect to the areas the subject of the investigations, namely EL7270 (Doyles Creek), EL7406 (Mount Penny), EL7405 (Glendon Brook) and EL7430 (Yarrawa);[1] and

(c) any recommended action by the New South Wales government with respect to amendment of the Mining Act.

3 These issues are, with respect to Doyles Creek, three matters referred to the Commission by resolutions of each House of Parliament[2] and, with respect to the

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[1] In relation to this issue, we have been instructed not to consider potential criminal proceedings or proceedings for the confiscation of the proceeds of crime. We have also been instructed not to consider the correctness of submissions, which we understand have been made to the Commission, to the effect that it lacks jurisdiction to make any statement or recommendations concerning the commencement of legal proceedings or the taking of action against any company or individual.

[2] See letter dated 23 November 2011 from The Hon Shelley Hancock MP and The Hon Don Harwin MLC to Commissioner Ipp.

other areas, the subject of a request from the government to the Commission.[3] In reports published in July 2013 **(the Jasper Report)** and August 2013 **(the Acacia Report)**, in which the Commission made findings concerning the subject of the investigations, the Commission stated that it had decided to report later on these issues.[4]

4 When giving our advice, we have also been asked to consider the effect, if any, of the pendency of judicial review proceedings in which persons found by the Commission to have engaged in corrupt conduct are seeking declarations to the effect that those findings were without or in excess of jurisdiction, are a nullity and are wrong in law.

5 In advising on these matters, except where otherwise noted, we have proceeded on the basis of the facts and findings stated in the Jasper Report and the Acacia Report and irresistible inferences drawn from those facts and findings, as set out below.

Facts and findings

6 The Commission's findings are complex and lengthy. It is not necessary to describe them in great detail in this advice. The following summary is sufficient. The paraphrases are for convenience – we have advised on the basis of the full text of the two Reports.

7 We have also considered all the submissions supplied to us, being those made to the Commission in relation to the matters about which findings were made in the two Reports. Those submissions, of course, extend beyond the specific topics on which we have been asked to advise. Our consideration of them has focussed on the limited material that addresses those specific topics.

Doyles Creek

8 On 15 December 2008, then Minister for Primary Industries and Minister for Mineral Resources, the Hon Ian Macdonald MLC, granted Doyles Creek Mining Pty

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[3] Letter dated 30 January 2013 from the Premier, the Hon Barry O'Farrell MP, to Commissioner Ipp. We have reversed the order of issues (b) and (c) for convenience.

[4] Jasper Report, pp 16–17; Acacia Report, p 15.

Ltd (**DCM**) an exploration licence pursuant to sec 22 of the Mining Act known as EL7270.[5] He had earlier, on 21 August 2008, granted DCM consent to apply for the exploration licence as required by subsec 13(3).[6]

9 The direct grants to DCM were contrary to advice provided to Mr Macdonald by the Department of Primary Industries (**DPI**), which recommended allocation of the exploration licence by a competitive process and spoke strongly against directly allocating the exploration licence to DCM.[7] Mr Macdonald was aware at the time that a number of other companies were interested in the exploration licence and that a competitive process could attract substantial offers of additional financial contributions to the State.[8] By the direct grant to DCM, Mr Macdonald:

(a) deprived the State of the chance of receiving far more for the tenement, by way of additional financial contribution, that it might have received under a competitive process;

(b) deprived the State of the opportunity of receiving the payments to be made by the successful tenderer in a competitive process immediately upon the grant of the exploration licence;

(c) deprived the State of receiving bids on a competitive basis to construct and operate a training mine; and

(d) conferred a substantial benefit on DCM's shareholders, involving many millions of dollars.[9]

10 The Commission found that Mr Macdonald did not have a genuine belief that the direct allocation was for the public good.[10] Rather, the Commission found that he made the direct allocation to benefit Mr John Maitland. Mr Maitland was a former leader of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union. He was a shareholder in and chairman of DCM at the time EL7270

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5 Acacia Report, p 11.
6 Acacia Report, p 13.
7 Acacia Report, pp 13, 24.
8 Acacia Report, p 13.
9 Acacia Report, pp 24–26.
10 Acacia Report, pp 102–106.

was granted.[11] Mr Maitland was a man with whom Mr Macdonald had a close professional relationship, to whom he was closely politically aligned, to whom he was indebted for past political support and who was a "mate". The desire to benefit Mr Maitland was a substantial purpose in Mr Macdonald's decision to make the direct allocation and but for that desire he would not have allocated the exploration licence to DCM.[12]

11 Mr Maitland had been recruited to the role of chairman by Craig Ransley, who founded DCM (then called ResCo Services Pty Ltd) with Andrew Poole.[13] The Commission found that the evidence was insufficient to demonstrate that any of Messrs Maitland, Ransley or Poole were actually aware that Mr Macdonald was proposing to act with partiality. Though there were powerful arguments to that effect, the evidence was insufficient to satisfy the high standard of proof that would be required for a finding of a conspiracy for Mr Macdonald to grant an exploration to DCM for reasons of partiality.[14]

12 In addition to Messrs Maitland, Ransley and Poole, another shareholder in DCM was Michael Chester; he was also an adviser to DCM who undertook financial modelling and prepared certain documents on its behalf.[15]

13 The Commission found that, in various documents provided to the Minister's office and the DPI in connection with the application for consent to apply for an exploration licence and then the exploration itself, each of Messrs Maitland, Ransley, Poole and Chester made or agreed to the making of material statements that were false or misleading which they knew to be false or misleading.[16]

14 In early 2010, DCM achieved a "backdoor listing" on the ASX, through a "reverse acquisition": a listed shelf-company called Supersorb Environmental NL, which was renamed NuCoal Resources NL (**NuCoal**), acquired all the shares in DCM in exchange for which existing shareholders were issued shares in NuCoal. That

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11 Acacia Report, p 12.

12 Acacia Report, pp 107–109, see also pp 28–33.

13 Acacia Report, p 12.

14 Acacia Report, pp 110–111.

15 Acacia Report, pp 14, 44, 124.

16 Acacia Report, pp 137–139.

listing valued EL7270 at approximately $100 million. Messrs Maitland, Ransley, Poole and Chester made substantial profits.[17] Most of the original shareholders of DCM have since realised much of their investments for very large sums of money.[18]

15 Though not stated in the Acacia Report, we are instructed that:

(a) EL7270 was due to expire on 15 December 2012; on 21 November 2012, an application for a renewal was submitted by DCM pursuant to sec 113 of the Mining Act; that application remains pending; and, accordingly, by reason of sec 117, EL7270 remains in force;

(b) on 7 March 2012, applications for assessment leases were submitted pursuant to sec 33 of the Mining Act and those applications remain pending; and

(c) also in March 2012, an application was made under Pt 4 Div 4.1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EPA Act**) for development consent.

Mount Penny, Glendon Brook and Yarrawa

16 Mr Macdonald disclosed confidential information to Edward Obeid Sr and his son Moses Obeid to the effect that the DPI intended to grant a number of exploration licences in the area near to a property owned by them called Cherrydale, which would cover that property.[19] The Obeids realised that they would be able to make a great profit if they acquired rights to two surrounding properties while being the owners of Cherrydale and this was the purpose of the purchase of these properties.[20]

17 Mr Macdonald called for information from the DPI on the coal resources in the Mount Penny area, at the instigation of Edward Obeid Sr, in terms of an agreement he had reached with Edward Obeid Sr and Moses Obeid to create the Mount Penny tenement over Cherrydale.[21] Mr Macdonald directed that a Mount

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17 Acacia Report, pp 12, 101, appendix 4.

18 Acacia Report, p 12.

19 Jasper Report, p 38.

20 Jasper Report, pp 39, 79.

21 Jasper Report, p 45.

Penny tenement be created, without notice, without deliberation and without a DPI briefing.[22] Once that decision was taken, because of the geographic features and an existing neighbouring tenement it was inevitable that the Mount Penny tenement would fit on top of Cherrydale.[23]

18 Mr Macdonald took these steps to benefit the Obeids. This was to help and benefit his close friend and patron, Edward Obeid Sr, who had supported him in difficult times in the past and who might be induced to help him in similar ways in the future.[24]

19 The DPI had identified nine areas that it considered to be suitable for a competitive expression of interest (**EOI**) process, in accordance with the DPI's *Guidelines for Allocation of Future coal Exploration Areas*.[25] Mr Macdonald placed unjustified limitations on this process, limiting it to be by invitation only and to small-to-medium miners only.[26] He provided information as to the identity of the companies invited to participate to Moses Obeid, to enable the Obeids to pursue a mining interest.[27]

20 The Obeids at first sought to do so in a venture with Monaro Mining NL (**Monaro Mining**) through a company beneficially owned by the Obeids as to 88% called Voope Pty Ltd (**Voope**). Paul Brook, a merchant banker, beneficially owned the remaining 12% of Voope.[28]

21 Monaro Mining made bids for each of the Mounty Penny, Glendon Brook and Yarrawa tenements.[29] However, Monaro Mining subsequently resolved to attempt to get out of its bids on the best available terms. It did so by selling to Voope all the shares in the subsidiary which had been intended to apply for exploration licences

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22 Jasper Report, p 64–66.
23 Jasper Report, p 68–69.
24 Jasper Report, p 31, 143.
25 Jasper Report, p 72.
26 Jasper Report, pp 72–74.
27 Jasper Report, p 86.
28 Jasper Report, p 90, 92.
29 Jasper Report, p 96.

awarded to Monaro Mining and renaming the subsidiary Loyal Coal Pty Ltd (**Loyal Coal**).[30]

22 Before its completion, Mr Macdonald reopened the EOI process as a favour to a mining magnate, Travers Duncan.[31] That permitted Cascade Coal Pty Ltd (**Cascade**), a company in which Mr Duncan had an interest, to lodge a bid for Mount Penny and Glendon Brook.[32] The other investors in Cascade were John McGuigan, John Atkinson, John Kinghorn, Brian Flannery, Greg Jones and Richard Poole. Mr McGuigan was its managing director.[33]

23 The Obeids and Mr Brook reached an agreement with Cascade to enter a joint venture. Those negotiating on behalf of Cascade, namely Mr McGuigan, his son James McGuigan, Mr Jones and Mr Poole knew that the Obeids were the party with whom they were entering the joint venture.[34] Mr Duncan knew of the agreement.[35]

24 The joint venture involved an agreement between Cascade and Buffalo Resources Pty Ltd (**Buffalo Resources**), a company beneficially owned as to 88% by the Obeids and as to 12% by Mr Brook called, for a joint venture to explore and develop the Mount Penny area if an exploration licence were granted to Cascade in respect of that area. An aspect of that joint venture involved Buffalo Resources arranging the withdrawal of the bids made on behalf of Loyal Coal in respect of Mount Penny and Glendon Brook.[36]

25 This was part of the joint venture because Moses Obeid and Mr Brook had told Cascade that they had inside information in respect of the progress of the EOI assessment, that Monaro Mining was going to succeed in respect of Mount Penny and Glendon Brook, and that Cascade would come second, so that if Loyal Coal withdrew its bids, Cascade was guaranteed of success. The information that Monaro Mining

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30 Jasper Report, pp 107–108.
31 Jasper Report, pp 98, 105.
32 Jasper Report, p 106.
33 Jasper Report, p 121.
34 Jasper Report, pp 109, 115–119.
35 Jasper Report, pp 111–112.
36 Jasper Report, p 110–111.

was going to succeed had been provided to Moses Obeid by Mr Macdonald.[37] Mr Macdonald disclosed this information to benefit the Obeids.[38]

26 The joint venture also involved an agreement to the effect that, if Cascade won its bid for the Mount Penny exploration licence, it would purchase each of the three properties owned by the Obeids for four times the market value, contingent upon Cascade obtaining mining approval.[39]

27 The EOI Evaluation Committee had decided that Monaro Mining should succeed in respect of its bids for *inter alia* Mount Penny, Glendon Brook and Yarrawa. But before that recommendation was formalised, pursuant to the joint venture described above, Monaro Mining withdrew its bids in respect of Mount Penny and Glendon Brook.[40] The result was that Cascade's bid in respect of those tenements was successful.[41] Cascade was issued exploration licences EL7406, in respect of Mount Penny, and EL7405, in respect of Glendon Brook.

28 Soon after, Cascade determined to sell either its equity or the benefit of the exploration licences to an ASX listed company called White Energy Company Ltd (**White Energy**). It had a close correlation of directors and shareholders with Cascade: Mr Duncan was its chairman; Mr Flannery was its managing director; Messrs Atkinson, McGuigan and Kinghorn were each directors; and Mr Poole was its financial adviser and the controller of a substantial shareholding.[42]

29 To pursue the transaction, Cascade determined to remove the apparent interests of the Obeids, because their continuing involvement posed a risk to the value of the Mount Penny tenement.[43] The purchase was agreed for $60 million.[44] It was to be effected by a transaction involving two further companies, to disguise the involvement of the Obeids. Messrs Duncan, McGuigan, Atkinson, Poole and

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37 Jasper Report, p 112.
38 Jasper Report, p 143.
39 Jasper Report, p 111.
40 Jasper Report, pp 106–107, 120.
41 Jasper Report, p 114, 120.
42 Jasper Report, p 121.
43 Jasper Report, pp 124–125.
44 Jasper Report, p 126.

Kinghorn knew that the transaction was in truth a transactions with the Obeids.[45] In the result:

(a) Mr Brook was paid $1.75 million; and

(b) the Obeids were paid $30 million and, in lieu of the remaining $30 million, took up shares in Cascade.[46]

30 Following this, steps were taken to effect the sale of all Cascade shares to White Energy for $500 million, but it ultimately failed when the independent committee of the White Energy board that had been appointed to oversee the transaction and, subsequently the ASX, began asking questions the answers to which would have required revealing the involvement of the Obeids.[47]

31 The Commission found that Messrs Duncan, McGuigan, Atkinson, Kinghorn and Poole variously concealed from the New South Wales government and relevant public officials the Obeids' involvement in the Mount Penny tenement, to obtain the financial advantage of preventing a loss in the value of their holdings in Cascade should the sale to White Energy not proceed or if the New South Wales government took steps to cancel the exploration licence or announced that it would not grant a mining lease in light of the Obeids involvement.[48]

32 As to Yarrawa, the Monaro Mining bid was successful. It was invited to apply for an exploration licence.[49] However, those standing behind the bid, namely Voope as the shareholder of Loyal Coal, were not able to finance the contributions payable to the DPI upon application for the exploration licence. So they reached an agreement with Coalworks Ltd (**Coalworks**) by which the latter would meet the expenses in exchange for a 90% interest through a unit trust arrangement.[50] An exploration licence, EL 7430, was issued to Loyal Coal in respect of the Yarrawa tenement.

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45 Jasper Report, pp 128–130.

46 Jasper Report, pp 14–15, 127–128.

47 Jasper Report, pp 131, 137–138.

48 Jasper Report, pp 148–153.

49 Jasper Report, pp 139–141.

50 Jasper Report, p 141.

Loyal Coal held it on trust as to 90% for the benefit of a wholly owned subsidiary of Coalworks and 10% for the benefit of Voope.[51]

33 Boardwalk Resources Pty Ltd was subsequently introduced to the project, on the basis that it would spend $25 million to earn a 50% interest in the tenement.[52] Coalworks no longer has an interest in the Yarrawa tenement, following a hostile takeover by Whitehaven Coal Ltd.[53] The Obeids' interest has been reduced to 7.5% but, through negotiations relating to the interest, they became entitled to share options in Coalworks sold by them for over $1.5 million.[54]

34 Cascade incorporated Mount Penny Coal Pty Ltd **(Mount Penny Coal)** to undertake necessary exploration under the exploration licence.[55] Though not stated in the Jasper Report, we are instructed that, as a first step towards applying for a mining lease, Mount Penny Coal lodged an application with the DPI on 16 December 2010, pursuant to Part 3A of the EPA Act,[56] for an open cut coal mine and that that application is still pending. We are also instructed that no application for a mining lease has been made to date for the Mount Penny tenement.

35 In the event that a mining lease is granted over the Mount Penny tenement, the Obeids' interest in Cascade could be worth $50 to $100 million.[57]

36 In the meantime, since December 2009, Cascade has paid the monthly mortgage repayments on the three properties[58] and has entered into "access" agreements under which it agreed to pay over $30,000 per month for access to the properties.[59]

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51 Jasper Report, pp 141–142.

52 Jasper Report, p 142.

53 Jasper Report, p 142.

54 Jasper Report, pp 15, 141–142.

55 Jasper Report, p 120.

56 Part 3A has been repealed but we are instructed that the application is being dealt with as a "transitional Part 3A project" under sch 6A.

57 Jasper Report, pp 14–15.

58 Jasper Report, p 120.

59 Jasper Report, p 14.

Issue (a): Action with respect to leases or licences

37 Senior Counsel has previously advised the Commission, by an Opinion dated 19 February 2013 in Operation Jasper on *Public interest considerations in planning approval application*. We revisit below some of the matters in that Opinion particularly in relation to the use of material before the Commission by Ministers making statutory decisions including under the Mining Act.

Administrative law

38 The circumstances summarized above in which Mr Macdonald granted an exploration licence to DCM include the Minister proceeding against the advice of the DPI. The evidence before the Commission was such that it produced the findings to the effect that Mr Macdonald's decision was critically influenced by a desire to benefit Mr Maitland, and that Mr Maitland and his associates had been party to making false or misleading statements in the process relating to the eventual grant of the exploration licence.

39 Given the DPI advice against the grant and Mr Macdonald's desire to benefit Mr Maitland, we do not read these findings by the Commission as supporting the inference that Mr Macdonald was induced by any of those statements to make the grant, or even that he believed them to be true at all.

40 In administrative law terms, plausible objections to the validity of the grant of the exploration licence to DCM include Mr Macdonald taking into account the irrelevant consideration constituted by his desire to benefit his "mate" Mr Maitland, bias by him as Minister in that regard, and bad faith on that account. Another rubric of administrative law objection is the improper purpose of benefitting Mr Maitland.

41 We would not go so far as to describe Mr Macdonald's decision to grant the exploration licence to DCM as so unreasonable that no reasonable decision-maker could have so decided (the so-called *Wednesbury* ground), given the broad range of evaluation and discretion available to a minister, assumed in relation to this ground to be acting with pure motive. Nor does it suffice to make out this ground that a minister acted contrary to the advice, however considered and cogent, of his or her public

servant advisers – although that circumstance may, depending upon detailed facts, lend great weight to a *Wednesbury* contention.

42 The circumstances summarized above in which Mr Macdonald granted the exploration licences in respect of Mount Penny and Glendon Brook to Cascade also included, if not opposition to, considerable constraints on full consideration of disinterested DPI advice – in effect, in material respects, proceeding by firm ministerial direction. The evidence before the Commission was such that it produced the findings to the effect that Mr Macdonald's various decisions were made in order to benefit the Obeids and Mr Travers Duncan, and that Mr Duncan and his associates concealed the Obeids' involvement in the Mount Penny tenement from relevant officials.

43 Given Mr Macdonald's desire to benefit the Obeids, we do not read these findings by the Commission as supporting the inference that Mr Macdonald was induced by that concealment to make the grants, let alone that he had no suspicion that the Obeids were involved.

44 In administrative law terms, plausible objections to the validity of the grants of the exploration licences to Cascade might be thought to include Mr Macdonald taking into account the irrelevant consideration constituted by his desire to benefit Mr Duncan, bias by him as Minister in that regards, and bad faith on that account. Again, that could be expressed as an improper purpose. However, an analysis of that kind is not so straightforward as it appears to be in the case of the grant to DCM.

45 We have considered the antecedent actions by Mr Macdonald to create the Mount Penny tenement, which was the subject of evidence before the Commission that produced the finding that this was done in order to benefit Mr Obeid Sr. Given the intervening EOI process, of itself the obviously flawed character, as a matter of administrative law, in those antecedent actions may not affect the validity of the eventual grants of exploration licences to Cascade.

46 But those actions do not stand alone, not least because the EOI process itself included the provision of confidential State information to Mr Moses Obeid to assist the Obeids in that process. And, more significantly, the evidence before the Commission was such as to produce the findings about Mr Macdonald reopening the

EOI process as a favour to Mr Duncan. On the other hand, the story became more complicated with the EOI evaluation in favour of Monaro Mining rather than Cascade, and Monaro Mining's subsequent withdrawal of bids with the result that Cascade's bid succeeded.

47 It may well therefore be that in administrative law terms, there are some difficulties in identifying the eventual grants of exploration licences to Cascade as themselves vitiated by grounds such as those noted in 44 above. It cannot be assumed, for example, that the vitiated creation of the Mount Penny tenement flows through to invalidate any and every later administrative step in relation to it, via the EOI process to the eventual grants to Cascade.

Action under the Mining Act and the EPA Act

48 In this setting, we turn to the question of governmental action with respect to licences or leases under the Mining Act.

49 The starting point is, of course, the statutory provisions governing the continued existence of the exploration licences. Of those, sec 125 of the Mining Act is the most drastic, empowering the Minister to cancel exploration licences (a licence being "an authority") for example if their holders (ie DCM or Cascade, or in relation to Yarrawa) have contravened a provision of the Act or Regulations, or the Minister reasonably considers that their holders provided false or misleading information in or in connection with the applications for them: paras 125(1)(b) and (b2).

50 The first of these grounds of cancellation requires the jurisdictional fact to exist, being contravention of the Mining Act. One contravention to be considered is evoked by the Commission's finding, in relation to Doyles Creek, of a breach of the then sec 374 of the Mining Act, now sec 378C, which amounts to criminal fraud. It presents an awkward position concerning the proof of a crime, given that the onus in any appeal provided against cancellation appears to be placed by sec 128 on the person whose exploration licence has been cancelled on the ground of that person's contravention of the Act.

51 This second of these grounds of cancellation does not require a jurisdictional fact to exist, being the provision of false or misleading information – rather, the

jurisdictional fact is the state of mind, judged objectively, of the Minister considering whether to cancel. The fact that the Commission had considered the evidence before it and reached the findings summarized above, in particular in 13 and 31, would be quite likely, we think, to permit a minister in that position to reasonably consider that false or misleading information had been provided. It would be the fact of the Commission's finding, as opposed to the fact of misleading, that would provide the reasonable basis for this approach.

52 One difficulty in proceeding to consider a cancellation under sec 125 of the Mining Act is that in each case the Minister who granted the exploration licence was, as noted above, presumably not misled at all. On balance, we do not think that this circumstance would prevent the application of sec 125, if it were otherwise available. The new Minister could properly and lawfully take the view that the provision of misleading information could very well have affected either the initial grant or the continuance of these exploration licences, by deflecting principled concerns on the part of responsible public servants, or by suppressing political concerns that could have caused scandal, of a kind that could endanger continuance of the licences.

53 Furthermore, the power to cancel an exploration licence is not to be equated with a judicial power to set aside an administrative action. In the latter case, it is axiomatic that (barring special legislative provision otherwise) the validity of the administrative action is judged by the court in light of events up to and concluding with the purported decision in question. No doubt, in the former case, that would usually be the expectation of those considering possible situations for exercise the power to cancel. That is, a powerful reason to cancel would be that the misleading information had actually brought about the grant of a licence that would not otherwise have been granted. However, in our opinion, a broad and salutary discretion is granted by statutory words not requiring or even apt to be read down so as to confine lawful exercise of the power to cancel (under para 125(1)(b2)) to cases where the misleading information was critical in this way. There are strong policy reasons why the power should be available *pour encourager les autres*. Those reasons are, we think, even stronger when the decision-maker is suspected, in this case found by the Commission, to have connived in the outcome.

54 Another difficulty in proceeding to consider a cancellation under sec 125 of the Mining Act, most obvious in the case of Cascade, is the doubtful question whether there was false or misleading information provided in the application itself. The circumstances summarized at 31 above, of course, post date the issue of the exploration licences to Cascade. We think any view by a minister adverse to Cascade under para 125(1)(b2) of the Mining Act would be vulnerable to appeal, of the kind noted in 58 below.

55 On 27 November 2013, assent was given to the Bill for the *Mining and Petroleum Legislation Amendment (Public Interest) Act 2013* (NSW), which introduced sec 380A to the Mining Act. These new provisions will apply to relevant administrative acts under the Mining Act even if applications with respect to them were made before the introduction of sec 380A. These provisions therefore cover not only any putative future cancellation of exploration licences, but also the pending applications for the grants of assessment or mining leases. They add in the case of cancellations and make plain in the case of grants the availability of a ground generally expressed as being the public interest.

56 For reasons similar to those we give in 53 above, we think that the addition of this reason to exercise the cancellation power could properly enable the Minister to take the view that it is in the public interest to cancel what might be termed a tainted exploration licence, even if the holder had not itself supplied false or misleading information in relation to the application for it. These very broad considerations of the public interest might be thought peculiarly appropriate for a minister responsible to a house of parliament to exercise – but in relation to cancellation, the statutory appeal noted in 58 below will nonetheless shift that responsibility to the judges.

57 It is not a difficulty, but rather a procedural requirement of great importance, that subsec 126(1) of the Mining Act stipulates for a specified form of procedural fairness, which must be afforded before a minister makes any decision whether or not to cancel these exploration licences.

58 Again, it is not a difficulty but rather a matter of substantial jurisdiction that any decision to cancel these exploration licences may be appealed to the Land and Environment Court under sec 128 of the Mining Act. That appeal is of the fullest

kind, and not restricted to matters of law or usual grounds of judicial review: subsec 128(2).

59 Holding an exploration licence is one of the possible qualifications to apply for and be granted the further stages in rights under the Mining Act, being assessment leases under Part 4 and mining leases under Part 5: paras 33(3)(a) and 51(3)(a). By a combination of provisions the detail of which does not matter, exploration licences for which renewal has been sought or over land in respect of which assessment leases or mining leases have been applied for by their holders continue in force pending such renewal or lease decisions: secs 113, 117 and subsec 29(2). That is the position for the exploration licences in question.

60 If the Doyles Creek, Mount Penny, Glendon Brook and Yarrawa exploration licences are not cancelled under para 125(1)(b2), they will remain in force only until expiry of their terms (fixed under sec 27) unless applications to renew them or for grants of assessment leases or mining leases are finally dealt with.

61 The provisions governing the power to renew exploration licences are found in sec 114; governing the power to grant (which includes the decision not to grant) assessment leases are found in sec 41; in relation to mining leases, they are found in sec 63 (in sec 64 governing tenders in particular). A common element in these provisions is the discretion to grant or refuse. As well, all these provisions specify grounds for refusal expressly without limiting the generality of that discretion.

62 An indication, but not restriction, of the legislative intention for the nature of this discretion to refuse the grant of leases may be found in the common form of these non-exhaustive specified grounds for refusal. They are contravention by an applicant or applicant corporation's director of the Act or Regulations, or the Minister (as "decision-maker") reasonably considering that the applicant provided false or misleading information in connection with the application. We read these as explicit illustrations of a public interest concern for compliance with relevant law, and for observance of probity and accountability with respect to relevant administrative procedures. For the sake of clarity, we emphasize that the specified grounds need not be actually resorted to in the situation upon which we are advising: the application in relation to which the second of them is stipulated may not be the original application

at all, depending upon facts. Rather, the substantive quality of these two grounds that have been specified forcefully show the concern for unsullied process that may lawfully inform the broadly expressed discretion.

63 It seems to us incontestable that the circumstances summarized above, if they are considered by a minister who is addressing the question whether or not to renew exploration licences or to grant assessment or mining leases to DCM or Cascade, or in relation to Yarrawa, could justify a refusal to do so. The public interest in refusing to extend any further benefits beyond those already obtained under the Mining Act, in these circumstances, would be well within the ambit of proper purpose in exercise of this ministerial discretion. The provisions of the new sec 380A of the Mining Act make explicit the propriety of considering the public interest in exercising such a power, probably unnecessarily in our opinion. The real question is whether the public interest does comprehend the approach described above – and we think that it clearly does.

64 Depending on expiry dates set by the initial grant of the exploration licences, the licences would, if leases were refused, expire in due course or (if already expired but still in force pending lease applications being finally dealt with) will cease to have effect upon notification of those lease refusals.

65 The mineral resources of the State to be found in these areas can immediately thereafter, depending on policy and operational decisions including under the Mining Act, be made available to persons and through processes that can be checked for the appropriate qualities of transparency, probity and propriety.

66 So far as the EPA Act is concerned, the position as to Mount Penny was already considered in the Opinion of Senior Counsel mentioned previously. In short, for the reasons there stated, the position is essentially the same as that stated above in relation to the Mining Act. That is, public interest considerations may legitimately inform the decision of the Minister whether to grant or to refuse the application under Pt 3A (now repealed) pursuant to sec 75J. In the case of the application under Pt 4 Div 4.1 of the EPA in respect of Doyles Creek, consideration of the public interest is expressly made a mandatory consideration by sec 79C.

67 The possibilities canvassed in 49–66 above contemplate the taking of administrative actions under the Mining Act or the EPA Act all of which could be judicially reviewed. It follows from the advice we have given above that in our opinion the proper analysis of these powers provides a sound footing in law for such decisions to be made.

68 Of course, the requisite views of the facts and weighing of policy and other discretionary factors are peculiarly matters for the decision-making Minister, who may take into account but must not be bound in any sense by our advice.

Use of the Commission's findings

69 We believe that the most problematic aspect of the statutory decision-making canvassed above, which we have considered in anticipation of it being raised in judicial review proceedings, is the manner and extent to which the Minister in question (including those public servants advising the Minister) use the Commission's findings.

70 In our opinion, in proceeding to consider factual matters relevant to deciding whether or not to cancel or not renew exploration licences, or to grant assessment or mining leases, or whether to approve or disapprove an application under the EPA Act, a minister is entitled to take into account the fact and content of the two Reports. The Reports contain, as they must under the Commission's statutory duties, conclusions or findings. But they are not judicial, and should not be seen as rising further than the evidence and inferential reasoning upon which they are said to be based (or, indeed, in light of which they may well be challenged). We think it would be inappropriate as a matter of administrative law for the Commission's findings to be regarded as dispensing the Minister from considering and reaching as appropriate whatever conclusions the Minister regards as justified in light of all the circumstances. True, those circumstances properly include the notorious scope, scale and elaborateness of the Commission's investigations, hearings and Reports, but nonetheless the Commission's findings must not dictate the Minister's views.

71 The Reports can and should be used, were a minister to proceed to consider these possibilities under the Mining Act or the EPA Act, as an indication of what may be appropriate for the Minister to conclude, depending upon the outcome of the

process we sketch below. (We are not advising that this process is necessitated by law, although that it well arguable. We are advising that observing it will likely enhance the substantive quality of a ministerial decision, will afford appropriate fairness to those who might be aggrieved by any adverse decision and will probably reduce the litigation risk.)

72 The Reports' so-called findings permit recourse to the submissions by Counsel Assisting, and where appropriate to answering submissions on behalf of affected persons, which in turn open an extensive array of evidentiary references. Much of the transcript and many of the exhibits before the Commission's hearings are available to be read, including by those who would advise a minister in this position. We think that should be done.

73 Further and most importantly, we advise that, quite apart from the specific provisions of subsec 126(1) of the Mining Act, the nature of the decision and the gravity of the outcome were it to be adverse to holders of licences or applicants for renewals, leases or approvals indicate a strongly arguable implied requirement of procedural fairness. Even if that is not so, the content of the answering submissions that we have read, and public statements by affected persons of which we are aware, combine to urge that decent administration would be well served by providing the holders of licences and applicants for leases with a reasonable opportunity to put their positions in opposition to cancelling the licences or refusing renewals or leases.

74 It seems to us that as a matter of practical fairness those affected persons should be informed that the Minister will take the two Reports into account, and that they should therefore make submissions in writing within a reasonable time to the Minister as they are advised in that regard, including if they desire so as to inform the Minister of any of the so-called findings by the Commission with which those persons disagree. It may be that they seek also to draw attention to the pending challenge to those findings.

75 Having mentioned the scale, scope and elaborateness of the Commission's work, we therefore note that it could be expected that any such submissions might reasonably exceed, at least in volume and detail, the kind of material usually received

by way of representation in relation to Mining Act decisions. The touchstone is simply reasonableness, and rigid limitations should be avoided.

76 Finally, on this topic, we draw attention to sec 93 of the *Independent Commission Against Corruption Act 1988* (NSW). The use of evidence given to the Commission as part of the basis for a view on the part of the Minister that licences ought be cancelled or not renewed might, on a literal reading, be said to be to cause damage, loss or disadvantage to persons on account of evidence that they gave before the Commission.

77 To the extent that the persons who suffer damage, loss or disadvantage are not those who gave evidence before the Commission, this issue of course does not arise. But, in any event, we do not think that this reading is appropriate.

78 An object of the Act is to investigate and expose corruption involving or affecting public authorities and public officials (sec 2A). It is entirely consistent with that object that material exposed by the Commission might be used as a basis to reverse or ameliorate the consequences of such conduct, by a lawful exercise of statutory powers, though that may cause damage, loss or disadvantage, including to those who gave evidence about it. Such exercise of statutory powers cannot in our view be said to fall within sec 93.

Issue (b): Legal proceedings

79 We now turn to consider the legal proceedings which might be contemplated by the State.

Proceedings for judicial review

80 We have identified above a number of bases upon which the licences granted in respect of Doyles Creek, Mount Penny, Glendon Brook and Yarrawa may be infirm in an administrative law sense and thus liable to be set aside. In principle, it would be open to the State to commence proceedings for relief in the nature of *certiorari* or declaratory relief directed to that end.

81 However, this does not seem to us to be the most sensible course to pursue. The more sensible course is to utilise the provisions of the Mining Act and the EPA Act to cancel or not to renew those licences.

Proceedings for recovery of loss or profits

82 We turn next to the prospect of proceedings for recovery of loss suffered by the State or profits obtained by individuals as a result of the conduct the subject of the Reports.

83 So far as loss suffered by the State is concerned, we think that any such proceedings have a real and fundamental difficulty. However such proceedings are framed, and that in itself may be a matter of some difficulty, it would be necessary to show that but for the impugned conduct the State would have been in a better financial position and, further, to quantify the amount by which the State would have been better off. As presently advised, our view is that this is likely to be a most problematic endeavour.

84 There is nothing in the Jasper Report, concerning Mount Penny, Glendon Brook and Yarrawa, which indicates how such loss might be identified or quantified. In relation to Doyles Creek, the material summarised at 9 above is suggestive. But the quantification of loss necessary for any loss-based action on the grounds there summarised seems to us likely to be highly speculative.

85 Turning, then, to proceedings directed to recovery of the profits made by persons involved in the conduct the subject of the Reports, we think that such proceedings could reasonably be contemplated.

86 Agents of the Crown have been held liable to account for secret commissions obtained in breach of fiduciary duty.[60] So far as we are aware, current authority does not extend so far as to place ministers in a fiduciary relationship to the State.[61] There

[60] See, eg, *Reading v Attorney-General* [1951] AC 507; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

[61] An allegation that a Minister owed fiduciary duties to the Crown was the premise of the case with which the Privy Council was concerned in *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30. However, the correctness of the premise did not arise for consideration.

are arguments against such extension but, equally, there are forceful arguments in favour of such extension. We consider it to be an open question.

87 If it were concluded that Mr Macdonald did owe fiduciary obligations to the State, the conduct summarised above could in various ways be characterised as being in breach of those obligations, in that it involved a preferring of the interests of both himself (albeit on the material in the Reports not in a way that benefited him financially, at least directly) and others (in a way that did benefit them financially) over his duties to the State.

88 A different approach, not dependent upon establishing a breach of fiduciary duty by Mr Macdonald, might be to reason by analogy with cases that have held that those who obtain property by theft or fraud hold the property on constructive trust for the owner or defrauded person.[62] From that analogy it may be open to argue that DCM, less obviously, Cascade and, less obviously still, the holder of the licence with respect to the Yarrawa tenement, obtained their licences in such a way as to hold them on constructive trust for the State, on terms requiring them to surrender those licences to the State (see Mining Act, para 125(1)(a)).

89 If one or other of these approaches were accepted, established equitable doctrines could be deployed to support a claim for orders requiring those who procured, or were involved in, or had a sufficient degree of knowledge of, the conduct by Mr Macdonald in breach of fiduciary duty, or the failure of the licence holders to honour the constructive trust and surrender their licences to the State, to account for the profits made as a result.[63] Those profits could credibly be claimed to extend to profits made by shareholders with the requisite degree of knowledge or involvement.

90 We emphasise that we say nothing more than these actions might be reasonably contemplated. It will be apparent that they are not without difficulty or a requirement for development of equitable doctrine.

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[62] *Black v S Freedman & Co* (1910) 12 CLR 105; *Evans v European Bank Ltd* (2004) 61 NSWLR 75 (CA).

[63] Those doctrines are not limited to that expressed in *Barnes v Addy* (1874) LR 9 Ch App 244. See, eg, *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (FC) at [242]–[248]; Gummow, "Knowing Assistance" (2013) 87 *Australian Law Journal* 311.

Proceedings for declaration of constructive trusts

91 We have identified above ways in which proceedings to recover loss suffered by the State, or profits obtained by individuals, as a result of the conduct the subject of the Reports may be constituted. It will be seen that they centre around equitable doctrines. It will also be seen that one route to monetary remedies involves a conclusion that licences held by, say DCM or Cascade, were held on constructive trust for the State.

92 For completeness, we note that, it would be open to the State to commence proceedings for a declarations that this is so and orders requiring that those trusts be honoured by surrender of the licences to the State. However, as with proceedings for judicial review of the grant of the licences, a more sensible course seems to us to be cancellation or non-renewal of the licences pursuant to the powers granted by the Mining Act.

Issue (c): Legislative amendments

93 We turn finally to consider the legislative amendments which might be contemplated by the State.

Amendments to the EPA Act

94 For the reasons given in the previous opinion of Senior Counsel to which reference has earlier been made, there is some doubt as to whether the public interest may be considered concerning the application in respect of Mount Penny pursuant to Pt 3A of the EPA Act (now repealed). It may be prudent to amend the EPA Act, with effect in respect of the pending application, so as to make it clear that that may be done.

Amendments to the Mining Act

95 As to amendments to the Mining Act, we do not consider that any amendments are required to give effect to the suggestions made earlier in this advice.

96 However, we observe in passing that the provisions concerning the power to grant assessment leases (sec 41), the power to grant mining leases (secs 63 and 64),

the power to renew exploration licences (sec 114) and the power to cancel authorities (sec 125) each contain what may be an anomaly. It is present in other provisions of the Act also. It is this.

97 Each provision we have mentioned permits certain action on the ground that the decision-maker "reasonably considers" that false or misleading information of a specified type has been provided as well as on certain other grounds which turn, not on the decision-maker's state of mind, but on the position in fact. An example is the contravention of a provision of the Act: that must be demonstrated in fact, not to the reasonable satisfaction of the decision-maker. It may be that thought should be given to whether these provisions should turn wholly on the decision-maker's state of mind.

Special legislation

98 Finally, we make the following observations.

99 We think that there is much to be said for the simplicity of enactment of special legislation to address the circumstances discussed in the Reports. We have in mind special legislation directed to two broad matters.

100 *First*, legislation could expunge the interests resulting from the conduct at issue. That could be accompanied by conferral of a personal and non-compellable power on a suitable minister to authorise an *ex gratia* payment by the State to compensate any person affected by the expunging to the extent that the minister thought fit (allowing the minister to provide compensation to persons the minister considered to be "innocent").

101 *Secondly*, legislation could provide for the confiscation of the proceeds of the conduct at issue obtained by those involved in or with knowledge of that conduct. Such legislation would of course need to be drafted carefully. It could be modelled on the *Criminal Assets Recovery Act 1990* (NSW), including so far as that Act provides suitable means for confiscation orders to be supervised by the court. That Act provides for confiscation orders in respect of property which is the proceeds of various kinds of specifically defined illegal activity (even in the absence of a conviction). It may provide a means by which proceeds of the conduct at issue here can be recovered. However, the difference between that Act and the special

legislation that we have in mind is that confiscation under the special legislation could turn, not on proof of illegal activity, but on proof of matters that are more specifically targeted to the conduct at issue. Without seeking to specify the precise drafting that may be employed, it could turn, for instance, on proof (on the balance of probabilities) of the derivation of proceeds from the grant of EL7270 with knowledge that the grant of that exploration licence involved false or misleading conduct.

102 Such legislation would have the benefit of obviating risks associated with administrative law challenge to decisions by the Minister to cancel or not renew licences and difficulties associated with relying upon equitable doctrine to pursue monetary remedies against those who have profited from the conduct the subject of the Reports.

103 On current doctrine, our view is that there is no constitutional prohibition against legislation of this kind. The States have the power to expropriate proprietary interests without compensation.[64] There is no difficulty per se presented by the fact that such expropriation is achieved by legislation directed to the specific proprietary interests, rather than by general legislation which permits a decision-maker to make an order directed to specific interests. A pejorative description of such legislation as a "bill of pains and penalties" does not of itself invoke any recognised constitutional doctrine applicable as a limitation on State legislative power.[65]

104 The only constitutional doctrine which might be engaged is the *Kable* doctrine, in light of the involvement of the courts in the making of confiscation orders of the kind to which we have referred. The success of a challenge to legislation of a somewhat similar kind in *International Finance Trust Company Ltd v New South Wales Crime Commission*[66] may well motivate a challenge to the validity of such legislation.

105 However, we do not read that decision as denying to the States power to enact *any* legislation providing for the confiscation of property that is not consequential on a finding of guilt in criminal proceedings. Provided that the problematic provisions of

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[64] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

[65] *Haskins v The Commonwealth* (2011) 244 CLR 22 at [25].

[66] (2009) 240 CLR 319.

the legislation at issue in that case (for example the *ex parte* nature of aspects of the procedure) were not replicated, we think as a matter of principle that such legislation should survive any challenge. (Of course, we state that view only as a matter of principle. A definitive view could not be formed without consideration of the precise terms of the legislation in question.)

10 December 2013

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