NUCOAL RESOURCES LTD

Important Note:

This is a redacted version of the submission lodged by NuCoal Resources Ltd to the New South Wales Government on Wednesday 15 January 2014.

This version has been redacted for legal reasons. Bracketed words have been inserted and do not appear in the original of this document.

NuCoal Submission to New South Wales Government

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1. Introduction

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

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

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

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

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

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

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

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

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

[3] December Report, p.15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2. The ICAC's recommendations

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

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

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

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

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

(a) Question 3:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] December Report, p.16.

3. The ICAC's findings are infected with error

3.1 The ICAC misunderstood the evidence and overstated the significance of Counsel Assisting's submissions. There was an innocent explanation and an entirely proper legal answer to each of the matters raised by Counsel Assisting and adopted, apparently without question, by the ICAC. As noted above, [NuCoal's] submission was not referred to at all in either the December Report or the written opinion of Counsel Advising annexed to it.

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

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

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

3.5 NuCoal addresses the arguments made by Counsel Assisting as follows:

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

(b) **NuCoal Prospectus:** NuCoal's shareholders purchased their securities without any appreciation of any risk that EL 7270 might be expunged by reason of allegedly corrupt conduct. It is self-evident that the NuCoal Prospectus did not contemplate any such risk.[9]

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

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

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

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

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

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

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

NuCoal is a bona fide purchaser for value and without notice

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

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

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

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

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

3.12 In the course of its acquisition of DCM, NuCoal engaged specialist corporate lawyers, Price Sierakowski, to undertake due diligence and prepare a report. In their report dated 19 November 2009, the lawyers confirmed that they "*conducted searches of the Tenement in registers maintained by the NSW Department of Primary Industries ("DPI") on 27 October 2009*". They concluded that *"[t]he searches that we have carried out in relation to the Tenement do not reveal any failure to comply with the conditions in respect of the Tenement*".

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

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

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

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

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

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

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

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

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

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

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

Attribution of knowledge

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

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

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

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

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

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

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

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

NuCoal Prospectus

3.22 The ICAC misunderstood the statements about risk in the NuCoal Prospectus. Consistent with Chapter 6D of the *Corporations Act 2001* (Cth), NuCoal set out the risks associated with any proposed investment in sections 1 and 8 of the prospectus.[18] Section 1.12 is directed to the general risk "*as with any share investment*". Section 8.4 is directed to the risk of loss of title to the tenements "*if conditions attached to the licences are changed or not complied with*".

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

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

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

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[15] August Report, p.144.

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

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

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

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

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

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

Public controversy

3.27 The major plank on which the ICAC's recommendation to consider expunging EL 7270 relies is what it called the "*notorious public controversy*" surrounding the grant of the licence.[21] The use of the adjective "*notorious*" is unwarranted. The ICAC's analysis was one of historical revisionism rather than a correct recounting of the actual events.

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

3.29 The controversy to which Counsel Assisting alluded in their submissions, which was adopted by the ICAC, is limited to a total of 11 news items on regional radio and television on 21 and 22 July 2009.[23] Those media items were confined to the regional sphere and there is no suggestion that they were elevated to a State-wide, national or international concern such as to gain notoriety. They provide no support for the ICAC's finding that NuCoal was aware of any controversy.

3.30 The media items were generally to the effect that there was a "*conflict of interest*" in granting EL 7270 because "*mining union boss John Maitland was one of the proponents*". The allegation, as reported in the ABC Upper Hunter, was put by the then Opposition. In answer to the allegation, 6 of the news items refer to Mr Macdonald having "*denied the allegations*", "*refuted allegations*" and "*defended the process of granting an exploration licence*". In that context, Mr Macdonald made statements that "*no corners were cut in the granting of the licence for a training mine*" and that there had been "*extensive public consultation over the proposal in the six months before the exploration licence was issued*".

3.31 It is trite that allegations and denials of such allegations occur as part of the ordinary course of public and political debate. To the reasonably minded citizen, what, if anything, was to be made of the scuttlebutt? Public criticism of political decisions and rejoinder by politicians is ordinary discourse. Six of the news items related to denials by a Minister of the Crown, while others said that the NSW Government defended the process leading to the grant of the licence. Any reasonably-minded person confronted with this information would consider it neutral at worst.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[26] December Report, p.17.

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

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

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

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

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

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

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

NCR

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

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

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

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

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

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

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

[30] October Report, p.27.

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

NCR

4. Procedural fairness limitations on the ICAC's processes

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

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

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

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

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

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

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

[32] December Report, p.13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NCR

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

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

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

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

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

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

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

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

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

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

NCR

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

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

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

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

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

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

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

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

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

NCR

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

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

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

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

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

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

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

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

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[34] December Report, p.20.

[35] December Report, p.17.

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

[37] Operation Jasper Report, p.88.

[38] Operation Jasper Report, p.92.

[39] Operation Jasper Report, p.91.

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

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

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

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

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

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

NCR

6. What should now be done?

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

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

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

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

NCR

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

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

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

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

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

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

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

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

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

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

NCR

[42] December Report, p.16

7. Public benefit to NSW

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

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

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

<u>The Doyles Creek coal resource</u>

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

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

NCR

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

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

7.8 The relevant facts are these:

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

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

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

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

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

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

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

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

7.11 Most significantly, the exploration carried out by NuCoal has established the existence of previously unknown resources in the area, the most important of which is the 85Mt resource in the Whynot seam. This resource is one of the most valuable undeveloped coal resources in NSW. It is a low ash, semi-soft coking coal and is a prime example of the type of coal that will be needed by the world's steel industry for the foreseeable future.

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

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

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

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

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

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

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

NCR

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

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

(b) Ongoing jobs for 350 workers.

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

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

Goal 3 Driving economic growth in regional NSW

Goal 4 Increasing the competitiveness of doing business in NSW

Goal 5 Placing downward pressure on the cost of living

Goal 6 Strengthening the NSW skill base

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

NCR

7.18 According to the NSW Mineral Council:[43]

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

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

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

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

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

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

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

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

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

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

NCR

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

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

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

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

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

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

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

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

7.27 An increase in perceptions of sovereign risk should concern not only potential and current investors, but also the Government and the community - especially the regional community. If the government makes decisions which reinforce negative perceptions about NSW, revenue, exports and regional job opportunities will all be adversely affected.

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

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

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

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

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

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

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

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

[46] October Report, p.25.

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

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

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

<u>NuCoal is a good corporate citizen</u>

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

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

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

7.39 NuCoal has also cooperated completely with all requests by the NSW Government and the ICAC over the past two years, despite suffering significant costs and losses.

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

8. Litigation risk to NSW

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

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

8.3 Potential causes of action would include the following.

Constitutional litigation

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

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

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

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

8.8 In the present case, NuCoal's joint venture partner in the Doyles Creek project, Mitsui, valued EL 7270 at September 2012 in the amount of $360 million for a minority interest.[48] That is equivalent to approximately $500 million for a controlling interest at the prevailing rate of a 30% premium and accounting for the funds expended by NuCoal in good faith on the Doyles Creek project. (Of course, that is its value consequent upon NuCoal's exploration and development activities, and not its value when EL 7270 was granted in December 2008.) As a minimum, fair compensation to NuCoal for the expunging of EL 7270 would need to reflect that amount.

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

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

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

International investment treaty arbitration

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

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

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

Misfeasance in public office

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

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

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

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

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

Other actions

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

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9. Conclusion

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

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

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