Supreme Court

New South Wales

Case Name:	NuCoal Resources Limited v Independent Commission Against Corruption
Medium Neutral Citation:	[2015] NSWSC 1400
Hearing Date(s):	27 October 2014
Date of Orders:	24 September 2015
Decision Date:	24 September 2015
Jurisdiction:	Common Law
Before:	Rothman J
Decision:	(1) Summons dismissed; (2) The plaintiff shall pay the costs of and incidental to the defendant; (3) The parties are at liberty to apply for any special order as to costs. Such application may be made by a submission of no more than 3 pages and is to be filed within 7 days of the date of this judgment. Any other party affected by any application for a different or special order for costs may respond to such submission within a further 7 days. The issue will be dealt with on the basis of the submissions filed.
Catchwords:	ADMINISTRATIVE LAW – judicial review – Independent Commission against Corruption Act 1998 s 73(2) – whether Commission failed to investigate fully in making recommendation
Legislation Cited:	Independent Commission Against Corruption Act 1988 Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014

Cases Cited:	Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 Attorney-General (NSW) v Quin [1990] HCA 21; (1990) 170 CLR 1 Beale v Government Insurance Office (NSW) (1997) 48 NSWLR 430 Craig v State of South Australia [1995] HCA 58; (1995) 184 CLR 163 D'Amore v Independent Commission Against Corruption [2013] NSWCA 187 Independent Commission Against Corruption v Cunneen [2015] HCA 14; (2015) 89 ALJR 475 Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149 Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332 Public Service Association (SA) v Federated Clerks' Union of Australia [1991] HCA 33; (1991) 173 CLR 132 Swift v SAS Trustee Corporation [2010] NSWCA 182
Category:	Principal judgment
Parties:	NuCoal Resources NL (Plaintiff) Independent Commission Against Corruption (Defendant)
Representation:	Counsel: N Williams/with J. Hoyle (Plaintiff) G. Watson SC/ with J. Emmett (Defendant) Solicitors: Quin Emanuel Urquhart & Sullivan (Plaintiff) Crown Solicitor's Office (Defendant)
File Number(s):	2014/784334
Publication Restriction:	None

JUDGMENT

1 **HIS HONOUR**: Essentially, the plaintiff, Nucoal Resources Limited (NuCoal) seeks judicial review of the recommendation made by the Independent Commission against Corruption (the Commission) in relation to the revocation of an exploration licence for mining over the Doyles Creek area.

2 In summary, the Commission recommended that the Government revoke all licences and leases associated with the Doyles Creek mining area and, in particular, the exploration licence owned and operated by Doyles Creek Mining Pty Ltd (DCM). NuCoal currently owns all the shares in DCM, having acquired them fourteen months after the exploration licence was granted.

3 The grounds of the Further Amended Summons are discursive but are essentially:

(1) The Commission failed to apply the rules of procedural fairness by failing to give proper and genuine consideration to the oral and written submissions made by NuCoal and by failing to give any consideration to what are termed "additional issues", being issues not addressed in the submissions of Counsel Assisting before the Commission;

(2) The Commission's failure to undertake the aforementioned tasks was a failure to perform the duty to investigate fully imposed upon the Commission under s 73(2) of the *Independent Commission Against Corruption Act* 1988 (*ICAC Act*);

(3) The foregoing, or some of it, amounts to a constructive failure by the Commission to exercise the power purportedly granted under s 74 of the *ICAC Act* to prepare reports;

(4) The recommendation of the Commission is vitiated by jurisdictional error, being the failure to take into account a required consideration, namely the arguments of NuCoal.

4 I have sought to summarise what I have otherwise described as a discursive set of grounds that include significant allegations. The difficulty with imprecise grounds of judicial review is that they tend to blur the distinction between judicial review and a merits review. The latter does not form part of the Court's jurisdiction.

5 As should be clear from the foregoing, the plaintiff's complaint does not concern any findings of corruption. Nor does it concern a want of jurisdiction. Rather, the plaintiff's complaint concerns an excess of jurisdiction: see *Public Service Association (SA) v Federated Clerks' Union of Australia* [1991] HCA 33; (1991) 173 CLR 132 at 164 per McHugh J. The plaintiff alleges that the recommendation, the making of which is within the general power or authority of the Commission, was performed in breach of the conditions necessary for its performance.

6 The facts as I have described them in this matter are, save for matters within a small compass, uncontroversial. The fundamental controversy is as to the conclusions drawn.

Background

The grant of the exploration licence

7 In summary, the facts leading to the grant of the exploration licence at the Doyles Creek area are that on or about 22 January 2007, Mr Maitland submitted a briefing note to the office of the Minister for Primary and Mineral Resources proposing an underground training mine in the upper Hunter Valley. On 30 January 2007, the Deputy Director General of the Department requested further details from Mr Maitland regarding the proposal. On 6 February 2007, an initial response was received from Mr Maitland.

8 On 15 February 2007, Mr Maitland, as chair of ResCo Services Pty Ltd, applied for an exploration licence for a training mine in the Doyles Creek area. On 22 February 2007, there was a ministerial briefing to the then Minister, Mr Ian Macdonald, as to the sensitivity of the area from a mining perspective and as to the interest of other parties in exploring and/or mining coal in the region. The briefing concluded that there would be potential probity issues associated with the grant of the proposal. The briefing note recommended the rejection of the proposal from Mr Maitland.

9 On 18 March 2008, Mr Maitland, in his capacity as chair of DCM, requested an exploration licence for the area covered by Doyles Creek mine. After certain intervening events, which are irrelevant for present purposes, the then Minister granted the exploration licence in question.

NuCoal's purchase of shares in DCM

10 On 23 November 2009, the plaintiff entered into an option agreement with DCM and all of the shareholders of DCM, which granted the plaintiff an option to purchase 100% of the issued shares in DCM.

11 On 2 December 2009, the plaintiff lodged its prospectus which records, amongst other things, that there was to be a public offer of 50 million shares at $0.20 per share; an offer of 15.5 million shares at $0.20 per share to the parties who had proposed the acquisition of DCM; an issue of 470 million

shares at $0.20 per share to the vendors of DCM; and an issue of 5 million shares at $0.20 per share to the existing directors of NuCoal. There were also other share issues. In short, some 10% of the shares in NuCoal were issued to the public and available for public purchase, the remainder going to various parties, including substantial amounts to the directors of DCM.

The Commission's investigation and its consequences

12 The New South Wales Parliament referred five questions to the Commission on 23 November 2011, pursuant to s 73 of the *ICAC Act*, about the conduct of the former Minister responsible for the grant of the exploration licence to DCM. Those questions included:

> "(1) What were the circumstances surrounding the application for and allocation of EL7270 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 New South Wales Government with respect to licences or leases under the *Mining Act* over the Doyles Creek Area?"

13 On 18 March 2013, the public investigation commenced. The plaintiff participated in the hearings and/or investigation. Its submissions to the Commission dated 3 June 2013 and 20 June 2013 are before the Court. The investigation concluded on 17 May 2013.

14 The Commission answered questions (1) and (2) above in a report (the First Acacia Report), which was furnished to the New South Wales Parliament in August 2013. In these proceedings there is no challenge to the First Acacia Report.

15 The substance of the findings contained in the First Acacia Report is notorious. The Commission concluded that corrupt conduct had occurred in the grant of the exploration licence to DCM by the then Minister and involving, amongst others, Messrs Maitland, Ransley, Chester and Poole. During the course of its consideration of the remaining questions, the Commission instructed Counsel Advising, who issued a joint opinion on 10 December 2013. The joint opinion is also available to the Court.

16 On 18 December 2013, the Commission's recommendations, which are sought to be impugned on this application, were provided to the New South Wales Parliament in a report entitled "Operations Jasper and Arcadia – Addressing Outstanding Questions" (the impugned report).

17 On or before 15 January 2014, the New South Wales Government issued the plaintiff with a show cause notice regarding action to be taken in respect of the exploration licence. Submissions were provided by the plaintiff to the Government on or about 15 January 2014.

18 On 31 January 2014, the New South Wales Parliament enacted the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014, which revoked the exploration licence without any payment of compensation to NuCoal.

The Operation of the ICAC Act

Objects of the ICAC Act

19 As is well-known, the Commission was established by the *ICAC Act* and is granted a number of functions and powers in support of the objects of the *ICAC Act*. Those objects include:

> "2A Principal Objects of Act
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> The principal objects of this Act are:
>
> (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
>
> (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
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> (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
>
> (b) to confer on the Commission special powers to inquire into allegations of corruption."

20 By s 12 of the *ICAC Act*, the Commission is to regard the protection of the public interest and the prevention of breaches of public trust as its paramount concern. Further, s 12A of the *ICAC Act* reinforces the focus of the Commission's attention on serious corrupt conduct and systemic corrupt conduct, whilst taking into account the role of other public officials in the prevention of corrupt conduct.

Principal functions of the Commission

21 Section 13(1) of the *ICAC Act* prescribes the principal functions of the Commission, which include, most importantly, the investigation of any allegation of corrupt conduct, or conduct that would allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct.

22 The term 'corrupt conduct' is defined in ss 7 and 8 of the *ICAC Act* and must be construed in accordance with the judgment of the High Court in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475 (*Cunneen*). The meaning of corrupt conduct is not in dispute in these proceedings and the recent judgment to of the High Court in *Cunneen*, which confines what may otherwise be a broad and literal construction of the powers of the Commission, plays no part in the determination of this matter.

23 More relevantly for current purposes, the principal functions of the Commission also include investigating any matter referred to it by both Houses of Parliament: s 13(1)(b) of the *ICAC Act*.

24 The other provisions of s 13 of the *ICAC Act* are also informative. Section 13(2) requires the Commission to conduct investigations with a view, relevantly, to determining whether corrupt conduct has occurred; whether 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 whether any methods of work of any public authority or public official did or could encourage the occurrence of corrupt conduct. The provisions of s 13(2) apply, on their face, to all investigations by the Commission and clearly relate back to the principal functions of the Commission in s 13(1)(a) and (b). That is not to say that the Commission cannot conduct its investigations with a view to determining other matters.

25 By s 13(3) of the *ICAC Act*, the principal functions of the Commission are extended to include the making of "findings" and the forming of "opinions" on the basis of the results of its investigations or events with which its investigations are concerned, whether or not the findings or opinions related to corrupt conduct, and to include the formulation of "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".

26 It is significant that the recommendations of the Commission may be made on the basis of findings or opinions formed by it or, as an alternative, on the basis of the results of its investigations. In other words, in exercising the principal function contained in s 13(3)(b) of the *ICAC Act* the Commission is not required to undertake an investigation in order to formulate recommendations on the basis of findings previously made. Of course, the findings may well have been made in circumstances that required an investigation.

Referrals by Parliament

27 As earlier stated, s 73 of the *ICAC Act* allows the Houses of Parliament to refer to the Commission any matter as referred to in s 13. The Commission's duty is to comply with any directions contained in a reference by the Parliaments and to investigate fully a matter so referred to it for investigation: s 73(2) – (3) of the *ICAC Act*.

28 It was the plaintiff's submission in these proceedings that the Commission was unable to make recommendations contained in the impugned report without previously "fully investigating" all of the issues. Ultimately, in this matter, it is unnecessary to determine with precision what the adverb "fully" means where used in s 73(2). It is sufficient for present purposes to note that the term "fully investigate" does not involve an unending investigation of each minor aspect of every subsidiary issue raised during the course of an investigation or for the purpose of recommendations.

29 Far more relevantly for the purposes of this application for judicial review, there is no issue of primary fact which is the subject of challenge. In the absence of the identification of a factual issue that was wrongly determined or was not the subject of determination, no practical consequence results from the failure "to fully investigate". I deal with this issue later in these reasons.

Reports of the Commission

30 As a consequence of the powers conferred on the Commission, the Commission may prepare reports in relation to any matter that is the subject of an investigation and shall prepare reports in relation to a matter referred to it by

both Houses of Parliament, or in relation to a matter that has been the subject of the conduct of a public inquiry (save as to an exception that is currently irrelevant): s 74 of the *ICAC Act*.

31 Under s 74A(1) of the *ICAC Act*, the Commission is authorised to include in a report statements as to its findings, opinions and recommendations and statements as to its reasons for any such findings, opinions and recommendations.

32 Any report must include, in respect of each "affected" person, a statement as to whether consideration should be given to referring the matter to the Director of Public Prosecutions or to taking disciplinary action of some kind or another: s 74A(2) of the *ICAC Act*. An affected person is defined in s 74A(3) as a person who, in the opinion of the Commission, is the subject of "substantial allegations". The plaintiff is not an affected person within the meaning of s 74A(3) of the *ICAC Act*.

Other relevant provisions

33 In terms of the jurisdiction of the Commission to hear and determine a matter, there need not be a complaint to trigger the exercise of the Commission's powers or functions, as the Commission may conduct an investigation on its own initiative: s 20 of the *ICAC Act*. Except in the case of a referral by both Houses of Parliament, the Commission has a discretion as to whether or not to investigate a matter. Given that in this matter there was a referral by the Houses of Parliament, no such discretion arises.

The Commission is not bound by the rules of evidence and may inform itself on any matter in such manner as it considers appropriate: s 17 of the ICAC Act. Relationship of NuCoal to DCM

34 As is made clear from the earlier outline of facts, the exploration licence that was the subject of the recommendation by the Commission was granted to DCM. The exploration licence was not granted to NuCoal. DCM's relationship to NuCoal is one of wholly owned subsidiary, as a result of NuCoal's acquisition of 100% of the shares in DCM in 2010. No government conduct nor any recommendation of the Commission has affected NuCoal's shareholding. To the extent that NuCoal acquired the shares in DCM, it continues to hold those shares.

35 In truth, NuCoal complains that the major asset owned by DCM was the subject of confiscation pursuant to the legislation passed by the New South Wales Parliament, following the recommendation of the Commission.

36 Fundamentally, the issue depends on whether the Commission was wrong in law to come to the view, as it did, that a change in the shareholding of a company should not immunise that company from the consequences of improper conduct by it or its directors that resulted in a profit. I will deal with this matter in the course of the consideration of the issues in the current application. But before doing so, it is appropriate for me to restate the principles that apply to the exercise of judicial review.

The Principles of Judicial Review

37 As earlier stated, there is a fundamental distinction between correcting administrative injustice or error by a review of the merits of that administrative conduct, on the one hand, and, on the other hand, determining the extent of power and legality of the exercise of the administrative function: *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1. The High Court, in *Quin*, supra, said:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
>
> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.
>
> There is one limitation, "Wednesbury unreasonableness" (the nomenclature comes from Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223), which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power: Nottinghamshire County Council v Secretary of State for Environment [1986] AC 240 at 249. Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a

> purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined." (per Brennan J at 35-36)

38 When a decision-maker has failed to take into account a criterion required by law to be considered, or has taken into account a criterion that was impermissible, or utilised the wrong test or asked the itself the wrong question, or misapprehended the nature or limits of its power as a consequence of which it performed an act or made a decision which authority does not sanction, there will be jurisdictional error or error of law: *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24. Jurisdictional error will also occur where there has been a denial of procedural fairness.

39 It is unnecessary to determine the effect, if any, of the approach to judicial review of the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332. In that case the High Court said:

> "[64] A standard of reasonableness in the exercise of a discretionary power given by statute had been required by the law long before the first statement of 'Wednesbury unreasonableness' in Associated Provincial Picture Houses Ltd v Wednesbury Corporation. In Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002, McHugh and Gummow JJ instanced the 1891 decision of Sharp v Wakefield. In Re Refugee Review Tribunal; Ex parte Aala, Gaudron and Gummow JJ said that the requirement of reasonableness represents the development of legal thought which began before federation and accommodates s 75(v) to that development.
>
> [66] This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.
>
> [72] The more specific errors in decision-making, to which the courts often refer, may also be seen as encompassed by unreasonableness. This may be consistent with the observations of Lord Greene MR, that some decisions may be considered unreasonable in more than one sense and that 'all these things run into one another'. Further, in Minister for Aboriginal Affairs v Peko-Wallsend Ltd, Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'. Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in

> reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.
>
> [76] As to the inferences that may be drawn by an appellate court, it was said in House v R that an appellate court may infer that in some way there has been a failure properly to exercise the discretion 'if upon the facts [the result] is unreasonable or plainly unjust'. The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification." (per Hayne, Kiefel and Bell JJ)

40 Notwithstanding the breadth with which the High Court approaches judicial review in the extract above, it is important to note that the High Court also reaffirms that "there is an area within which a decision-maker has a genuinely free discretion".

41 Error of law that may be the subject of judicial review must be distinguished from merit review otherwise we are "apt to encourage a slide into impermissible merit review": *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45], per Basten JA. Fundamentally, the Court must be careful to distinguish between merit review and judicial review

Consideration of the Grounds

42 Before dealing with the detailed grounds upon which the plaintiff relies, it is necessary to restate or to place in context some of the issues and facts upon which reliance were placed.

Duty to investigate and report

43 As has been made clear, the plaintiff submitted that the duty to investigate fully, imposed upon the Commission by the terms of s 73(2) of the *ICAC Act*, created an obligation to "address, consider or otherwise meaningfully engage with" the arguments of the plaintiff that were relevant to the matters referred by the Houses of Parliament.

44 No court or tribunal has a duty to address every argument that is the subject of submissions. As is now trite, the duty of the court or tribunal to give reasons is satisfied by the articulation of the essential grounds on which the decision rests in a manner that allows the parties to understand why it is the court or tribunal

has reached its decision. By extension, the duty to investigate fully under s 73(2) of the *ICAC Act* does not require express comment on every submission that is made. Such an obligation would not be akin to an obligation "to fully investigate", but rather to state reasons in a manner otherwise not contemplated by the common law or the statute.

45 Moreover, as a matter of fact, the Commission plainly engaged with the submissions of the plaintiff. Even in the circumstances where no express reference is made to every nuanced submission, the transcript discloses an engagement by the Commission with the arguments put forward by the plaintiff, a consideration of those arguments, and the impugned report addresses the Commission's conclusions and recommendations in a way that does not breach the duty to investigate fully non-fact issues, assuming, for present purposes, that such a duty does exist, which I shall now consider.

46 As earlier stated, nothing in the objects or the terms of s 73 of the *ICAC Act* require an interpretation of the duty to investigate fully, imposed by s 73(2), as one that requires investigation on an exhaustive basis of every point raised by a participant. In my view, although not necessary to decide in this case, the duty to investigate fully is a duty imposed in relation to those principal functions of the Commission identified in ss 13(1)(a) and (b); in other words, the provision of s 73(2) of the *ICAC Act* refers back to those two provisions.

47 If the foregoing interpretation of s 73(2) were correct, that would mean that the duty to investigate fully would be confined to allegations or complaints of corrupt conduct, to conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or to conduct connected with corrupt conduct, which conduct may have occurred, be occurring or may be about to occur, subject to the exception next mentioned.

48 The duty to investigate fully would also extend to the matters referred "by both Houses of Parliament". There was a duty on the Commission to investigate fully those matters that were contained within the five questions referred by Parliament. The Commission fulfilled that duty by its investigation, the findings of which were contained in the First Acacia Report.

49 In addition, the power to make recommendations, being a further principal function prescribed by s 13(3), also does not involve "the investigation of every point raised in addresses", as submitted by the plaintiff. As I stated earlier in this judgment, recommendations may be formed on the basis of findings already made, without any further investigation.

50 In sum, in my view, although in this matter unnecessary to decide finally, the duty to investigate fully is a duty to investigate fully those facts that are relevant to the making of a finding or the formation of an opinion relevant to matters in s 13(1)(a) and (b) of the *ICAC Act*. The duty does not require an investigation of all submissions before making a recommendation in circumstances where findings have previously been made.

51 Furthermore, the proposition that the duty to investigate fully includes an obligation to express views engaging with every point raised in addresses would be inconsistent with the provisions of s 74A(1) of the *ICAC Act*, which allow (but do not expressly require) the Commission to make statements of its findings, opinions and recommendations and to make the statements of its reasons.

52 If the obligation in s 73(2) of the *ICAC Act* were to require the Commission to engage with every point raised in addresses, there would be no reason for a provision which allowed the Commission to provide a statement of its reasons. As has been authoritatively stated, that which is required in a report by the Commission is a statement of the reasons that led to its conclusion; there is no obligation to make findings on every argument or to "engage with" every argument: *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430.

53 Ultimately, this submission of the plaintiff would require the Court to issue remedies in the nature of judicial review because the Commission has expressed its reasons without reference to the submissions of NuCoal. If, on the other hand, the Commission were to have commenced its conclusions with the words "contrary to NuCoal's submissions" or to have more fully recited NuCoal's submissions before expressing its view, the plaintiff would have no

argument. This is not a counsel of perfection; it is a counsel of prolixity. It was sufficient for the Commission to come to its recommendations by disclosing its reasoning process based upon the facts that it had already found to exist in the First Arcadia Report and that were not challenged by the plaintiff in these proceedings.

Requirement to report

54 The foregoing also deals with the submissions before the Court that the Commission failed to fulfil its statutory duties relating to the requirement to report. To some extent, the submissions regarding the duty to investigate fully, addressed above, and regarding the power to report were merged during the course of argument. Nevertheless, as set out above, the Commission has adequately and sufficiently disclosed its reasoning process and, in so doing, dealt with the matters that were raised by the plaintiff before it and that were relevant to the reasoning the Commission adopted. The report provides sufficient reasons and satisfies the Commission's duty under s 74(2) of the *ICAC Act*.

Procedural fairness

55 The plaintiff also submitted to the Court that the Commission failed to afford it procedural fairness by failing to consider its submissions. However, the extracts of the transcript to which I have been taken, disclose that the Commission did consider the plaintiff's submissions and requested the plaintiff on multiple occasions to clarify its role in the proceedings, which it did.

56 Furthermore, the hearings were conducted on the basis of a clear acknowledgement by the Commission of the difference in interest between the plaintiff, on the one hand, and, on the other, those that were once its directors and against whom there were serious allegations of corruption. The Commission, in the course of the hearing, identified that an issue in its investigation was the degree to which the plaintiff and its shareholders had appreciated the risk of corruption findings in relation to the grant of the exploration licence and the risk of the effect those findings, if made, would have on the licence held by DCM and thereby the shares in DCM that the plaintiff was purchasing. The Commission raised the issue of its knowledge of

the risk associated with findings of corruption with the plaintiff during the course of the hearings.

57 Ultimately, the Commission took the view that the risk associated with findings of corruption was a notorious fact before the acquisition by the plaintiff of the shares in DCM. However, the Commission also took the view that the plaintiff, as an entity, was involved in no wrongdoing and none of the Commission's findings were based on any suggestion of the plaintiff being involved in wrongdoing.

58 Nevertheless, the Commission's recommendation did not depend on the degree to which any particular shareholder had knowledge of the possibility of such adverse findings. The Commission's recommendation is based upon a proposition that immunity should not be granted simply because there had been a change in the ultimate or beneficial ownership in the company (through an acquisition of DCM's shares) that had involved itself in corrupt conduct.

59 Otherwise, the detailed submissions of the plaintiff that were put before the Court are dealt with below or do not require detailed analysis. To the extent necessary in relation to any other argument, I accept the submissions of the defendant in relation to those issues.

Conclusion

60 As stated on multiple occasions previously, the plaintiff's critical challenge to the Commission's findings in the impugned report relates to the duty to "fully investigate" in determining the nature of the conduct of NuCoal as the acquiring shareholder of DCM.

61 The Commission came to the view that NuCoal, as an entity, was "innocent of any wrongdoing". In those circumstances, it is unclear precisely what it is the plaintiff suggests should have been found by the Commission. Assuming, without accepting, that the duty to investigate fully applied in a way that imposed a duty to "fully investigate" in relation to its recommendations, as distinct from its findings of fact upon which the recommendations were made, it is unclear what the Commission could find that was inconsistent with the interests of the plaintiff, other than that which it did.

62 The plaintiff's submission was that its conduct was wholly innocent. The Commission accepted that view. In those circumstances, it was unnecessary to investigate further.

63 Chapter 5 of the impugned report, issued in December 2013, deals with the answers to question (3) referred by Parliament. After citing some minor background (most of the background having been set out in the First Acacia Report), the Commission set out the following passage:

> "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 the 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 reserve 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 compiled with.

h. The Following exchanged 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 time 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."

64 The fact that at the beginning of the extract set out above the Commission refers to the submission of Counsel Assisting and to its acceptance of that submission and the fact that the Commission expressed its view in a manner that adopted a prior opinion expressed by the Commission and/or Counsel Assisting does not detract from the expression of opinion and the reasoning process adopted by the Commission.

65 Ultimately, the Commission came to the view that the plaintiff, as an entity, was not involved in any wrong doing, but that the plaintiff acquired the shares in DCM with the knowledge that there was a risk that the Commission would make findings of corrupt conduct and that the Government would take action, the effect of which would be that DCM would lose its major asset and the value of the shares acquired in DCM would fall dramatically.

66 The material before the Court (and before the Commission) establishes that in early 2010 NuCoal acquired DCM by the issuing of 470 million shares in NuCoal to the shareholders in DCM in exchange for, and in proportion to, those shareholders' relative shareholding in DCM. The prospectus issued for the reverse acquisition of DCM by the plaintiff had been lodged with ASIC on 2 December 2009. On and from 5 February 2010 (or a time relatively close

thereto), the following persons were directors of the plaintiff: Mr Michael Davies, Mr Glen Lewis, Mr James Beecher, Mr Gordon Galt, Ms Megan Etcell (who was also the secretary of the plaintiff), Mr Michael Chester and Mr Andrew Poole. The latter two were the subject of corruption findings in the First Acacia Report.

67 The material also establishes that the public controversy in relation to the relationship between the then Minister and Mr Maitland was notorious from at least mid-2009. In July 2009, at a community meeting concerning the Doyles Creek mine operations, the then Managing Director of the plaintiff was given a document containing sample questions and responses by DCM. Those sample questions and responses referred, expressly, to the "ICAC" issues.

68 Thus, at the time that the shares in DCM were acquired by the plaintiff, it had been forewarned of the issues associated with the grant of the exploration licence on the basis of the relationship between Mr Maitland and the then Minister. Moreover, as is clear from the foregoing, the directors of the plaintiff at the time of the acquisition included directors of DCM who were involved in the conduct about which complaint has been made and on which the Commission has made adverse findings.

69 Nevertheless, the Commission did not make a finding that each of the shareholders in the plaintiff was aware of the risk of findings of corrupt conduct being made. Given the Commission's rationale that the change in shareholding of a company should not immunise that company from the consequences of improper conduct, the fact, if it were the fact, that a shareholder or a majority of shareholders were aware of the risk would be irrelevant. On the basis of that policy view, it was unnecessary for there to be any further investigation.

70 I do not take the view that any further investigation was necessary under the duty to investigate fully imposed upon the Commission by s 73(2) of the *ICAC Act*. I do not, in those circumstances, need to consider whether the duty to investigate fully applied to all five of the questions referred by both Houses of Parliament. In other words, I do not need to decide whether the duty to investigate fully applied separately to the recommendations of the kind here made, in circumstances where findings of corrupt conduct had already been

made. I accept, for the purpose of dealing with this submission, that there was a duty to investigate fully. That duty was satisfied by the findings of fact that were fully investigated prior to the First Arcadia Report and which, together with a certain policy view, formed the basis of the recommendation that issued.

71 As summarised earlier in this judgment, the first ground of appeal is a failure to apply the rules of procedural fairness by giving proper and genuine consideration to the submissions of the plaintiff before the Commission. This bold assertion flies in the face of the detailed reasons provided by the Commission. Throughout the impugned report, the Commission is at pains to summarise the arguments of the plaintiff and to deal with them. There are occasions when that consideration is by reference to the opinion of Counsel Advising and the acceptance of the opinion or submissions of Counsel Advising. Nevertheless, the reasoning process of the Commission is established directly and the reader of the report would understand precisely the reasons that the recommendation has been made.

72 As a matter of fact, each of the submissions put to the Commission by the plaintiff have been considered by the Commission and the ground relating to the failure of procedural fairness must fail.

73 In relation to the second ground of appeal, I have already dealt with the nature of the duty to investigate fully required by s 73(2) of the *ICAC Act*. That which was required to be investigated fully was the five questions referred by both Houses of Parliament. It is, in those circumstances, not appropriate to extract a supplementary report dealing with the recommendations of the Commission and to treat that separately from substantive report in which the primary findings of fact were made. The First Acacia Report, together with the impugned report and recommendation, as a matter of fact, investigates fully the factual issues relevant to the determination of a recommendation.

74 I do not, by the foregoing, determine that the provisions of s 73(2) require the Commission to investigate fully all issues associated with the making of a recommendation in every case. It would seem that some recommendations may be made on the basis of principle after the finding of facts. In my view, the recommendations in the impugned report are in that category.

75 Nevertheless, to the extent that it was necessary for the Commission to investigate fully the matter contained in question (3) of the referral from both Houses of Parliament, a full investigation has occurred and there has been no breach of the duty imposed by s 73(2) of the *ICAC Act*.

76 As a consequence of the foregoing, in relation to the third ground of appeal, the Commission's report, and the recommendation contained therein, does not amount to a constructive failure to exercise the power purportedly granted under s 74(2) of the *ICAC Act* to give adequate reasons.

77 Ultimately, a complete reading of the impugned report discloses that the Commission dealt with each argument or submission presented by the plaintiff. There is no jurisdictional error associated with any failure to give reasons. I do not intend in these reasons to repeat each of the chapters in the impugned report which, in large measure, are wholly concerned with taking into account the arguments of the plaintiff that were put before it.

78 As earlier stated, the Commission expressly referred to the purchase by the plaintiff of the shares in DCM. It also referred to the fact that, as a matter of law, the exploration licence was not transferrable and that the plaintiff was not the owner of the exploration licence. Rather, the plaintiff was the owner of shares in DCM which was, in turn, the owner of the exploration licence. In those circumstances, the plaintiff is not, in my opinion, a bona fide purchaser for value without notice of the exploration licence. Whether it was akin to a bona fide purchaser for value without notice is wholly a matter of opinion on which no doubt people may differ. The Commission's conclusion was not unreasonable.

79 Moreover, the Commission dealt with the inferences that arise from the timing of the acquisition and the circumstances of the public controversy associated with the grant of the exploration licence to DCM by the then Minister. In my opinion, the Commission's findings were reasonable and within its general discretion as decision maker. That said, ultimately, the Commission's finding that the plaintiff was aware of the risk of findings of corrupt conduct did not form the basis for its recommendation that the exploration licence be revoked. The recommendation, as I have said, was based on its policy view.

80 Further, the Commission did not come to the view that the plaintiff acted corruptly. On the contrary, the Commission accepted that the plaintiff acted innocently and made the recommendations on the basis of that acceptance.

81 Fundamentally, the recommendation of the Commission as to the conduct that the Parliament should adopt in dealing with the ownership of the exploration licence granted under corrupt circumstances was that the change in the shareholding in DCM should not entitle DCM to be immunised from the consequences of its improper conduct and that of its directors. The Commission took the view that "the consequences of the improper transactions entered into by a company cannot be avoided merely because it shares have been subsequently traded".

82 It may be that there are some people, acting reasonably, who may have a different view as to the policy considerations underlying that conclusion. But that conclusion, as a matter of principle, once adopted, renders all of the arguments and factual disputation (if any) relating to the position of the plaintiff or its shareholders, as distinct from the position of DCM, irrelevant.

83 It may be said as a criticism of the recommendation of the Commission that its attitude to the subsequent purchase is "puritanical". I do not accept that criticism.

84 Yet whether or not the Court, as presently constituted, accepts that criticism or accepts the Commission's policy position on overcoming improper or corrupt conduct by a company or its directors matters little. The policy position is not legally unreasonable and is within that category of decision making, or the making of recommendations, where the Commission has a "genuinely free discretion".

85 Ultimately, the recommendation of the Commission goes to the Parliament. It is for the Parliament to determine what it will do in relation to it. The Parliament decided that it would promulgate legislation the effect of which was the removal of the exploration licence originally granted in corrupt circumstances. The Parliament is not (and cannot be) the subject of judicial review. The legislation is either valid or invalid depending upon issues of constitutional law that are unrelated to any issue before the Court in these proceedings.

86 Moreover, the summons in this matter was filed on 14 March 2014. The Parliament promulgated the legislation, being the *Mining Amendment (ICAC Operation Jasper and Acacia) Act* 2014, on 31 January 2014. As a consequence, at the time of the filing of the summons, the recommendation of the Commission had no extant operation in and of itself. Its effect had been spent and the summons, when filed, was, in its terms, futile.

87 Lastly, it should be pointed out that the recommendations contained in the impugned report included a recommendation that Parliament legislate to rescind the grant of any exploration licence associated with the activities that were the subject of the investigation, but also included a recommendation that innocent parties be compensated. That latter aspect of the recommendation was rejected by Parliament. By choosing to foreclose compensation to innocent parties (individuals or companies), the Parliament obviously adopted, to a greater extent, the policy position of the Commission that the purchase of shares, even innocently, in a company that had engaged in corrupt conduct ought not to immunise that company from the consequences, which included the reversal of the effect of the corruption.

88 Fundamentally, NuCoal argued it is innocent. Parliament, not the Commission, has determined that if NuCoal be innocent, it ought not to be compensated.

Decision on orders sought

89 Given the manner in which I have summarised the submissions of the plaintiff, it is appropriate for me to deal explicitly with the orders it has sought.

90 By a Further Amended Summons filed 14 August 2014, the plaintiff sought orders with which I deal as follows:

(1) The Commission did not act otherwise than in accordance with law in investigating the matters referred by the Houses of Parliament on 23 November 2011.

(2) In the context that the impugned report was a second stage in the investigation of the questions referred by the Houses of Parliament, the Commission, in preparing and furnishing the impugned report to the Houses of Parliament, did not act otherwise than in accordance with law.

(3)(a) The Commission, for the reasons already expressed, while finding that NuCoal was “not comparable to a bona fide purchaser for value without notice”, took the policy view that the subsequent purchase of shares in a corrupt company ought not to immunise that corrupt company from the effect of measures aimed at reversing the consequences of that corruption.

In taking that view, the Commission did not act otherwise than in accordance with law.

(3)(b) The Commission did not take the view that the knowledge of Mr Chester and Mr Pool was, or should be, attributed to NuCoal.

The Commission stated the fact of the knowledge of Messrs Chester and Poole, the notorious nature of the events and the role of the then directors (or some of them) and recommended that if any innocent party were affected by the expunging of the licences or leases, such innocent party could be subject to compensation.

The recommendation as to possible compensation was not implemented by Parliament.

Given the terms of the recommendation, the innocence or otherwise of a party affected by any expunging was a matter for subsequent argument and decision to the Parliament.

Given the non-acceptance of the proposal for compensation by the Parliament, any finding by the Commission of either the innocence or the knowledge of corruption of NuCoal was irrelevant to the effect on it of any such finding.

The Commission did not act, in any of the foregoing aspects, otherwise than in accordance with law.

(3)(c) The findings, if there were any, to the effect described in the Further Amended Summons sub-paragraph 3(c) have been dealt with earlier in this judgment and were irrelevant to the recommendation made and to the ultimate consequences for NuCoal of the legislation expunging the exploration licence.

For that and other reasons previously discussed, the findings, if any, were not made otherwise than in accordance with law.

(3)(d)-(f) The declarations sought in sub-paragraphs (3)(d), (e) and (f) of the Further Amended Summons are otherwise covered by the foregoing rulings, but, expressly, the findings sought to be impugned in those sub-paragraphs, if made, were not made otherwise than in accordance law and are irrelevant to the recommendation of the Commission and to the consequences imposed by the Parliament.

(4) No error of law or jurisdictional error is disclosed and certiorari is refused. Further, certiorari would otherwise be refused because the recommendation is neither the ultimate decision in the decision making process that arrives at a legal effect of consequences, nor does it sufficiently determine or is it sufficiently connected with, the decision that has legal effect or consequences: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

91 For the foregoing reasons, the Court makes the following orders:

(1) Summons dismissed;

(2) The plaintiff shall pay the costs of and incidental to the defendant;

(3) The parties are at liberty to apply for any special order as to costs. Such application may be made by a submission of no more than 3 pages and is to be filed within 7 days of the date of this judgment. Any other party affected by any application for a different or special order for costs may respond to such submission within a further 7 days. The issue will be dealt with on the basis of the submissions filed.

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