NSW GOVERNMENT

Office of the Inspector of the
Independent Commission Against Corruptic

Report concerning a Complaint by NuCoal Resources Limited about the conduct of the Independent Commission Against Corruption in Operation Acacia

(Special Report 18/03)

NSW GOVERNMENT | Office of the Inspector of the
Independent Commission Against Corruption

6 June 2018

Our ref: C32 2015 - 18/03

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

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

Dear Mr President & Madam Speaker

In accordance with sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the *ICAC Act*"), I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament a *Report concerning a complaint by NuCoal Resources Ltd about the conduct of the Independent Commission Against Corruption in Operation Acacia (Special Report 18/03).*

Pursuant to section 78(1A) of the *ICAC Act*, I recommend that the Report be made public forthwith.

Yours sincerely,

B. R. McClintock

Bruce R McClintock
Inspector, Independent Commission against Corruption.

1. I am pleased to provide pursuant to section 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") a report determining a complaint made against the Independent Commission Against Corruption ("the ICAC" or "the Commission") by NuCoal Resources Limited ("NuCoal") concerning a number of aspects of the Commission's conduct of Operation Acacia. That complaint is stated in a letter dated 19 September 2017 from NuCoal in the signature of Mr Gordon Galt the company's Chairman and the submission attached thereto.

Executive Summary

2. On 15 December 2008, the then Minister for Primary Industry and Minister for Mineral Resources Ian MacDonald, granted Doyles Creek Mining Pty Ltd ("DCM") an exploration licence, EL 7270 in circumstances that the ICAC in its Operation Acacia Report of August 2013[1] ("first Acacia Report") found to involve corrupt conduct on the part of a number of people including two directors of DCM. Consequently, the ICAC found that the grant of EL 7270 to DCM was tainted by corruption.

3. In circumstances which I will explain in more detail below, in 2009-2010 NuCoal acquired 100% of the issued shares in DCM, which became a wholly owned subsidiary of NuCoal.

4. The Commission does not suggest in the first Acacia Report that NuCoal was in any way involved in the corrupt conduct found by it, although in its December 2013 report *"Operation Jasper and Acacia – Addressing Outstanding Questions"* ("second Acacia Report") it found, in effect, that NuCoal should have been aware of the controversy surrounding the creation of EL 7270 and, thus, the possibility that corrupt conduct was involved.

5. In the second Acacia Report, the Commission expressed the view that because of the corruption involved in its creation, EL 7270 should be expunged or cancelled and suggested that the NSW Government consider enacting legislation to do so, noting that that could be accompanied by a power to compensate any innocent person affected by the expungement.

6. Legislation implementing that expungement (but without compensation) was enacted, see the *Mining Amendment Act (ICAC Operations Jasper and Acacia) Act 2014 No 1* ("the Expungement Act"). As a consequence NuCoal lost the entire value of its shareholding in DCM.

7. NuCoal makes a series of complaints about the ICAC's conduct of Operation Acacia and about the conclusion expressed in the first and second Acacia Reports, as set out in the 19 September 2017 letter referred above (which I have annexed 'A' this report)[2]. In summary, those complaints are:

---

[1] *Investigation into the Conduct of Ian MacDonald, John Maitland and Others, August 2013 ("Operation Acacia Report").*

[2] NuCoal originally complained to my predecessor the Hon David Levine AO RFD QC by letter dated 15 June 2015. Following correspondence, NuCoal stated its complaint in its final form in the 19 September 2017 letter referred to above.

a. That, contrary to law, the ICAC failed to consider NuCoal's submissions;

b. That, improperly, the ICAC engaged in discriminatory behaviour against NuCoal;

c. That, unreasonably and oppressively, the ICAC attacked one innocent party (NuCoal) but not another (Yarrawa);

d. The ICAC failed to investigate key issues.

8. Some at least of these issues were considered by the Supreme Court (Rothman J) in *NuCoal Resources Limited v Independent Commission Against Corruption* [previous] NSWSC 1400 ("NuCoal v ICAC") and rejected. The court found, for example, that the ICAC had properly considered NuCoal's submissions and investigated the matter fully. NuCoal did not appeal this decision.

9. I have concluded that none of the matters raised by NuCoal amount to "abuse of power, impropriety and other forms of misconduct" nor to "maladministration" within the meaning of section 57B(1)(b) and (c) of the ICAC Act. Accordingly, I have decided that this complaint should be dismissed.

10. This report sets outs my reasons for that decision.

Background - ICAC's Operation Acacia

11. Operation Acacia was concerned principally with the circumstances in which DCM came to acquire EL 7270. It began as a result of a referral by both Houses of Parliament under section 73 of the ICAC Act on 23 November 2011. Parliament raised 5 questions for investigation by the Commission as follows:

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

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

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

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

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

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

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

12. As stated, EL 7270 was granted to DCM on 15 December 2008. It is unnecessary for present purposes to set out the background to the grant or the facts that ultimately led the Commission to conclude that it was tainted with corruption. It is sufficient to say that that is what the Commission found.

13. On 23 November 2009, NuCoal entered into an option agreement with DCM and its shareholders as a result of which NuCoal received an option to purchase all the issued shares in DCM. On 2 December 2009, NuCoal lodged a prospectus for a public offer of 50 million shares at 20 cents per share as well other share issues. The details are stated by Rothman J in his judgment: [2015] NSWSC 1400 [11].

14. Ultimately NuCoal achieved 100% ownership of DCM and thus indirect ownership of EL 7270. At the time of listing, EL 7270 was valued at $100 Million dollars. The former shareholders made substantial profits on their investments in DCM.

15. On its terms EL 7270 would have expired on 15 December 2012. Prior to that date DCM submitted an application for renewal of a licence which had the effect of continuing EL 7270 pending determination by the relevant Minister at the time as to whether he would renew it. See *Mining Act* section 117.

16. The ICAC conducted its public enquiry in Operation Acacia between 18 March 2013 and 17 May 2013. NuCoal appeared by senior counsel at that enquiry. As stated, the first Operation Acacia Report, published in August 2013, did not contain any corrupt conduct findings against NuCoal, although such findings were made against Messrs Poole and Chester who were directors of NuCoal and had been associated with DCM. The first Acacia report did not deal with questions 3, 4 and 5 set out in [11] above in the referral by Parliament to the ICAC.

17. These questions were dealt with in the second Acacia Report, after the Commission had taken advice from experienced senior counsel Mr Brett Walker SC. That advice is attached as an appendix to the second Acacia Report

18. The second Acacia Report answered question 3 of Parliament's questions as follows:

> *The Commission is of the view that the granting of the authorities for Doyles Creek, Mount Penny and Glendon Brook was so tainted by corruption that those authorities should be expunged or cancelled and any pending applications regarding them should be refused. The Commission recommends that the NSW Government considers enacting legislation to expunge the authorities for Doyles Creek, Mount Penny and Glendon Brook. That could be accompanied by a power to compensate any innocent person affected by the expunging (and, if the NSW Government deems it appropriate, any refusal to grant relevant pending applications) to the extent that that was considered appropriate. Such legislation would have the benefit of reducing risks arising from challenges in the courts to any ministerial decision to cancel or not renew current authorities and to refuse to grant any authorities. Such legislation should be carefully drafted to avoid constitutional challenge. The Commission considers that*

legislation of this kind is the preferable method of expunging or cancelling the relevant authorities.

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

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

A possible further alternative approach is to allow the current authorities to continue until they expire and then refuse to renew them or refuse to grant a mining lease.

The Commission does not favour this approach.

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

19. As to NuCoal's involvement and the question whether its status as purchaser of DCM and the fact that no findings of corrupt conduct had been made against it should influence the Commission and its recommendations, the second Acacia Report said this:

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

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

- *the slate should be wiped clean by revoking or expunging all instruments that have been granted under the Mining Act in respect of the Doyles Creek area (to the extent that it is necessary to do so) and by not granting further instruments in respect of the pending applications*
- *should it be considered appropriate, fresh consideration could be given to an allocation and NuCoal could be a participant in that process. The Commission expressed no view as to whether or not that should occur. The views that the Commission so expressed to Counsel Advising largely were based on the following points made by Counsel Assisting, which the Commission accepts.*

These points are of particular relevance to the position of NuCoal:

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

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

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

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

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

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

g. The reverse acquisition prospectus also emphasised the uncertainties associated with investing in NuCoal. It emphasised that the shares offered under the prospectus should be regarded as speculative, that investors should be aware that they may lose some or all of their investment and that prospective investors should make their own assessment

of the likely risks. A number of specific risks were outlined, which included that DCM might not be able to acquire or might lose title to EL 7270 if conditions attached to licences were changed or not complied with.

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

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

...

THE COMMISSIONER: Sorry, can I just ask one question on that please, Mr Shearer?

Mr Lewis, I take the shadow was the risk of something sinister being discovered in the course of this investigation?---That'd be correct, yes.

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

I'm not suggesting that corruption occurred I just want to make it clear, I'm suggesting that the shadow involved the risk that the Commission might uncover corruption?---

Correct, it certainly creates uncertainty in the market.

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

...

Mr Lewis, the questions about the way in which the Exploration Licence was granted to Doyles Creek had already been raised in the press before the float or is that right?---

They, they had, correct. Almost, I'd be fairly confident January 2009 fairly much straight after the announcement of the EL award.

...

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

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

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

In the First Jasper Report, the Commission found that the Mount Penny tenement was created by Mr Macdonald in accordance with a corrupt agreement with Edward Obeid Senior and Moses Obeid.

Mr Macdonald did so contrary to his public duty as an officer of the Crown. The decision to create the tenement was not justified by reference to proper planning, mining, environmental, local, or economic considerations.

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

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

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

20. Parliament accepted the Commission's recommendations as set out in the second Acacia Report and enacted the Expungement Act. As stated, Parliament did not see fit to include any provision for compensation to NuCoal caused by cancellation of EL 7270 and the consequent destruction of the value of its shareholding in DCM.

NuCoal's Complaint and its Submission

21. NuCoal's 19 September 2017 letter setting out its complaint to me is attached to this report as is my letter to NuCoal dated 29 August 2017 (Annexure 'B'). For convenience I will summarise the complaint quoting some relevant parts.

22. The first aspect of the complaint is an assertion that the ICAC failed to consider the submissions which NuCoal made to it. NuCoal says:

1.1 The ICAC misunderstood the evidence and overstated the significance of Counsel Assisting's submissions. In making its finding, the ICAC expressly stated that it accepted the submissions of Counsel Assisting the ICAC (Peter Braham SC and Alan Shearer). In fact, it all but copied and pasted those submissions into the December Report.

1.2 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, or the written opinion of Counsel Assisting annexed to it, is any recognition, let alone analysis of the detailed and factually supported arguments contained in NuCoal's reply submission

1.3 NuCoal's submission was simply ignored.

....

1.5 NuCoal's arguments within its reply submission were underpinned by sound legal policy considerations. The arguments made by Counsel Assisting were addressed by NuCoal 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.*

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.*

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 two days in July 2009. Moreover, there was never any allegation of corrupt conduct capable of vitiating the grant of EL 7270.*

23. The second aspect of the complaint is put by NuCoal on the basis that the ICAC engaged in improperly discriminatory behaviour against it. The allegation seems to be that the Commission had determined NuCoal to be "innocent" yet failed to make that clear publicly. The submission contains the following:

2.2 ICAC believes, and has publicly stated, that NuCoal is completely innocent of any wrongdoing. It apparently reached this belief early in 2013 and did not change its mind as a result of Operation Acacia.

2.3 In evidence of this statement, we present Item 18 of ICAC's response to NuCoal's judicial review case against ICAC (awaiting decision Supreme Court). Item 18 states (our underlining for emphasis):

"ICAC found that NuCoal was not in a position of a bona fide purchaser without notice (December Report, page 16). Relevantly ICAC's recommendation that EL 7270 be cancelled was not based on any wrongdoing by NuCoal. The reason for this recommendation was expressly because "the process leading to the giving consent for application for, and granting of, EL 7270 was tainted by corruption and the "slate should be wiped clean" (December report, page 15). It is evident from the December Report that ICAC was not persuaded that there was sufficient reason to preserve EL 7270 in the face of the findings of corrupt conduct made in the First Acacia Report. However, ICAC expressly held out the possibility that any innocent party affected by the expunging might be compensated to the extent that was considered appropriate, in its formal recommendation (December Report, page 20). Given the attention given to

NuCoal in the section of the report on referred question 3, it can be inferred from the face of the report that NuCoal and those of its shareholders not involved in the corrupt conduct were contemplated within "any innocent party" (indeed, it is not evident who else was meant by "any innocent party"). As NuCoal acknowledges at PS[22], the Commissioner specifically identified NuCoal's "innocence of wrongdoing" on 20 March 2013 at T4913. Nothing in the December Report suggests that ICAC resiled from that position".

2.4 Notwithstanding this belief, the ICAC failed to even mention this position within the December 2013 Report. If ICAC was unbiased we submit that it was duty bound to publish this most material finding - that is believed NuCoal to be completely innocent - in a definitive and strong statement in its December 2013 report.

24. The third aspect of NuCoal's complaint is described by it as "unreasonable and oppressive behaviour in ICAC's attack on an innocent party". The submission relies on the fact that the Commission recommended the expungement of EL 7270 but not of the Yarrawa tenement EL 7340 considered by the ICAC in Operation Jasper. In the second Acacia Report the Commission had this to say about the fate of EL 7340;

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

25. Obviously enough, the claim is that the Commission treated EL 7270 and its owners inconsistently to, and more detrimentally than it treated the Yarrawa tenement and its owners.

26. The fourth aspect of the complaint alleges that the ICAC did not properly investigate several key matters. It is incorporated in the following paragraphs from the 19 September 2017 letter:

1.4 ICAC's recommendations were predicated on a number of findings made in the December Report:

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 because 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".*

4.2 c. Again the calling of relevant industry witnesses would have established the way the applicants went about business was normal. Both the department and the applicants knew that if the funds had not been raised then the EL conditions would be breached and the EL would go back to the State. All parties involved in exploration fundamentally understand these requirements, which have existed for a very long time. This was not the basis for fraud by the applicants.

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

The Commission's Response and its Submission

27. I gave ICAC an opportunity to respond to Nucoal's complaint as set out in NuCoal's letter dated 19 September 2017 as referred to in [1] and [21] above. The ICAC responded by letter dated 12 March 2018 which is attached (Annexure 'C'). As to the first aspect of NuCoal's complaint the ICAC makes the following points:

    a. It points out that Rothman J dealt with this same argument that the Commission failed to consider NuCoal's submissions and rejected it. *NuCoal v ICAC* especially at [77].

    b. It explicitly warned NuCoal through its counsel Mr Leeming (as his Honour then was) of the possibility that there should no mining lease (that is, that EL 7270 be cancelled).

c. NuCoal on a number of occasions orally and in writing addressed this issue arguing that there should be no cancellation.

28. As to the second aspect of the complaint, failure to refer to the view supposedly held by the Commissioner that NuCoal was "innocent", the Commission argues that it was unnecessary for it to make any reference to that fact because it had not made any finding of wrongdoing against NuCoal.

29. As to the third aspect, inconsistency between the treatment of EL 7270 and EL 7430 (the Yarrawa tenement), the Commission argues that the relevant circumstances of the creation of the two tenements were different and in particular, that the creation of EL 7430 was not vitiated by serious corrupt conduct and fraud, as was the creation of EL 7270.

30. As to the fourth aspect of NuCoal's complaint, failure to call witnesses, the Commissioner argues that the evidence of technical experts or the NuCoal non-executive directors was irrelevant to the issues, particularly to the question whether the ICAC was entitled to form the view that a change in a shareholding of a company (DCM) should not immunise the company from improper conduct of the company or its directors.

Consideration and Determination of Complaint

31. Section 57B(1) of the ICAC Act specifies my functions in the following terms;

a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
b) ***to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission,*** *and*
c) ***to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission****, and*
d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
a) contrary to law, or
b) unreasonable, unjust, oppressive or improperly discriminatory, or
c) based wholly or partly on improper motives.

32. The parts emphasised are the parts relevant to determining this complaint. It will be seen that the word "maladministration" is defined by both words in parentheses after the reference to it in section 57B(1)(c) and by the definition set out in section 57B(4). I note that for conduct to amount to maladministration it must be action or inaction of a **serious nature** and satisfy the requirements set out in sub section 57B(4).

33. The concepts of "abuse of power, impropriety and other forms of misconduct" are not

defined in the ICAC Act, no doubt because Parliament believed that there meaning is obvious and uncontroversial. That seems to me to be the case.

34. I should also point out that the Act gives the Inspector only one way of dealing with a complaint, that is, by making a report or recommendation. While not explicit in section 57B(1)(b) & (c) such reports must be made to Parliament. Perhaps recommendations might be made to the ICAC itself as well as to Parliament, but it seems clear that reports can only be made formally to Parliament and, specifically, to the Presiding Officers. This power is further affected by sub section 5:

(5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:
(a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and

(b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

As to "special reports", the Act makes clear that such reports are to be made to the Presiding Officers:

77A Special reports
The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:
(a) any matters affecting the Commission, including, for example, its operational effectiveness or needs, and

(b) any administrative or general policy matter relating to the functions of the Inspector, and

(c) any other matter relating to the exercise of a function to audit, deal with or assess any matter under section 57B that the Inspector considers warrants the making, in the public interest, of a special report.

It is unnecessary for me to differentiate between these two sources of my power to make reports resolving complaints. They are both applicable.

35. But Parliament has **not** granted the Inspector any power to engage in a merits review of Commission decisions, still less to operate as some form of appellate tribunal making determinations about whether the decisions of the ICAC or findings of corrupt conduct are right or wrong.

36. In dealing with this complaint (like others I have dealt with) I will keep in mind the functions Parliament has given the Inspector and the limitations on those functions which it has enacted.

37. As stated, I have no power to consider whether a finding of corrupt conduct was correctly made unless it is affected by abuse of power, impropriety, misconduct and maladministration, and will not do so. Rather, I will focus solely on the question

whether the criteria expressed in section 57B(1)(b) & (c) have been satisfied. In doing so I will bear in mind that those criteria require expressly in the case "maladministration" and implicitly in the case of section 57B(1)(b) concepts, a serious degree of wrongfulness. I say implicitly in the case of s57B(1)(b) because by their very nature, abuse of power, impropriety and misconduct involve a serious degree of wrongfulness not constituted, for example, by rudeness to a witness by a Commissioner no matter how regrettable that may be.

38. I am unable to see how any of the four matters which form the basis of NuCoal's complaint amount to any of the matters referred to in section 57B (1)(b) & (c). Consider for example, the alleged failure to consider submissions made by NuCoal. In my opinion that could not amount to misconduct if, for example, it occurred as a result of inattention, a slip or incompetence. It can only satisfy the statutory criteria, it seems to me, if there were an element of intention, something approaching wilful blindness (to use a concept from another area of law). None of the factual material upon which NuCoal relies is capable of establishing that. Similar considerations apply to other aspects of the complaint. Put shortly, NuCoal has not satisfied me that any of the concepts stated in section 57B(1) (b) and (c) are established. This would entitle me to dismiss the complaint without more. Nevertheless, I will respond in detail to it. Before I do so, it would be remiss of me not to point out that ultimately it was Parliament that made the decision that has so aggrieved NuCoal, that is, to pass the Expungement Act without allowing for compensation to NuCoal for the loss of the value of its shares in DCM. I have no power under the ICAC Act to express any view about that. Parliament is supreme and it saw fit to pass the legislation in question. In this connection, the following remarks of Rothman J in *NuCoal v ICAC* are apposite:

> *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.*

39. As to the first aspect of the complaint, failure to consider NuCoal's submission, it seems to me that there are two answers, the first is that Rothman J considered the identical argument on the facts in *NuCoal v ICAC*. I see no reason why I should not apply his Honour's findings. The second is that, having considered that facts myself, I have come to the same view as his Honour, that is, that the factual basis of the argument is not made out.

40. In addition, in my letter dated 29 August 2017 to NuCoal, I raised his Honour's decision and sought a submission from it in the following terms;

"I refer also to the decision of Rothman J in NuCoal v ICAC. His Honour appears to have rejected a submission that Nucoal was denied procedural fairness by the ICAC. I would appreciate any submission or argument you wish to make as to what account, if any, I should take of his Honour's judgment and the specific finding referred to".

NuCoal made no submission in response to that invitation and I regard its silence as telling.

41. Rothman J expressed his conclusions on this argument as follows;

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.

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.

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.

42. I consider I am entitled to accept that finding without more and apply it here.

43. In addition, I agree with his Honour.

44. I do so because examination of the transcript of Operation Acacia's public inquiry makes clear that the issue was squarely raised by the Commission and answered by counsel for NuCoal, Mr Leeming SC. The following are the relevant extracts:

MR LEEMING: Mr Commissioner, last Monday you asked me a question. I'm now in a position to inform the Commission as to NuCoal's response to your question.

THE COMMISSIONER: Yes.

MR LEEMING: That's a response to your request on 22 April, 2013 at transcript 6940 to 6943 for an indication of NuCoal's attitude in the event that corrupt conduct is found as to a recommendation allowing the Mining Lease to go ahead but imposing a condition relating to a sum of money to be paid by NuCoal to the Government representing the sum of money or representing a reasonable assessment of the sum of money that the Government would have obtained had there been an open tender with the knowledge that's now been revealed.

Your request, Commissioner, and NuCoal's response is contingent upon a finding of corrupt conduct that relates to the allocation of EL 7270 without there being an open tender. NuCoal does not oppose that recommendation. Further, in the event that there is such a finding of corrupt conduct then NuCoal would not oppose any Mining Lease it may ultimately be offered being subject to a condition that it pay an amount reflecting the additional money the Government would have obtained had there been an open tender conducted at the time the Doyles Creek Mining Pty Limited was invited to apply for EL7270. NuCoal's position is without prejudice to such rights as NuCoal may have to sue and be compensated by those involved in any corrupt conduct.

NuCoal notes that the Commission does not propose to determine what the amount would have been in the event that there is a finding of corrupt conduct. NuCoal is hopeful that it will be able promptly to reach agreement with the Department, however, if agreement is not reached it would be appropriate to incorporate a mechanism for binding an expert determination of the amount. (3/5/2012 T7306)

THE COMMISSIONER: Yes. Now I just want to deal separately with paragraphs 3 and 5 of the scope. Paragraph 3 is whether recommendation should be made to the New South Wales Government with respect to licences or leases under the Mining Act over the Doyles Creek area and 5 is whether to recommend that any action be taken by the New South Wales Government with respect to amending the Mining Act.

Now the Commission would be greatly assisted in those matters by hearing particularly from the Department, from NuCoal and from Darley and it does occur to me that those three parties should be invited to file their submissions on those two paragraphs by the 15 June.

I am contemplating making this order and I thought about this really carefully, I must tell the parties – I know that I haven't heard from anybody in particular. I've heard from Counsel Assisting who wanted four weeks, I've said for his submissions I have refused that for obvious reasons because I think it's too long, but I'm going to give Counsel Assisting generally on, at least on items 1 and 2 and paragraph 7 onwards to 10 June to file submissions, and I propose giving the other parties until 20 June.

Now if that stands, coming back to paragraph 4, Counsel Assisting would reply to the earlier submissions – no I'm sorry I've given the wrong date, the wrong date for the Department, NuCoal and Darley , that should be by 3 June just on paragraphs 3 and 5. Counsel assisting will reply by 15 June and anybody else who wishes to make submissions on the issue will then have the benefit of the Department, NuCoal and Darley and they should incorporate any submissions they wish in their submissions which would be due on 20 June.

45. In addition NuCoal addressed the issue of the future of EL 7270 in its written submission dated 29 May 2013. It was unnecessary for the Commission to refer to every argument and every submission put to it and a failure to do so is no basis for suggesting that it failed to consider the submissions.

46. This basis for NuCoal's complaint is not made out.

47. In this connection I should deal specifically with the argument put by NuCoal to me and set out in [22] above that the Commission failed to consider the argument put by NuCoal in its reply submission that NuCoal's position was comparable to a bona fide purchaser for value without notice and such failures called in to question the validity of the Commission's recommendations concerning NuCoal.

48. It appears to me that ICAC directly engaged with this argument in the second Acacia Report and found that while NuCoal may have been a bona fide purchaser for value it could not be said to have not have had notice of the vitiating factors. That is the basis for the recommendation for expungement as can be seen from the passage I have quoted in [19] above. I might add that that was a finding the Commission was entitled to make on the evidence of Mr Lewis also quoted in paragraph 19 above and it did so.

49. This was certainly the view of Rothman J:

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.*

    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 Acacia Report and which, together with a certain policy view, formed the basis of the recommendation that issued.

50. As to the second basis of the complaint, the failure to make clear publicly that the Commission was of the view that NuCoal was "innocent", there are several reasons for rejecting the proposition in addition to the one stated in paragraph 38 above that it does not on its face amount to misconduct or maladministration.

51. The first reason for rejecting this argument is that it mischaracterises the submission of counsel for ICAC in the proceedings before Rothman J. I do not read it as having the wide ranging significance that NuCoal thinks. It seems to me to say no more and no less than the recommendation for expungement of EL 7270 was not based on wrongdoing on NuCoal's part. The recommendation for expungement as set out in the second Acacia Report in the passages which I have quoted in paragraphs 18 and 19 above proceeded on the basis that the Commission accepted that NuCoal had not engaged in wrongdoing. Rather it was squarely based on a finding that there had been serious corrupt conduct on the part of DCM and its directors and shareholders and that merely because there had been a change in shareholders a company could not evade the consequences of its wrongdoing for that reason. But in any event it was DCM's corrupt conduct which led to the cancellation and it is disingenuous of NuCoal to confront that issue.

52. To explore this, in a little more detail, the ICAC made the following two relevant findings, quoted above and which I will repeat:

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.*

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.*

53. It is obvious from (a) in the preceding paragraph that the Commission viewed the question of NuCoal's "innocence" in a more nuanced manner than its submission appears to appreciate. The finding that the position that NuCoal was not comparable to that of a bona fide purchaser for value without notice clearly shows this.

54. The finding in (c) also answers NuCoal's argument. As a statement of the law it is correct and one clearly open to the ICAC.

55. Finally, this argument relies crucially on a submission made by Counsel but that is all it is. I do not believe it is right to treat it as some form of binding admission by the Commission.

56. I reject the second basis of the complaint.

57. As to the third basis, the supposed discrimination between the treatment of EL 7270 and EL 7340, I accept the argument of the Commission. The circumstances of the creation of the two tenements were not the same for reasons stated by the Commission.

58. I should add that inconsistency of treatment is often a weak argument simply because, of itself, it does not compel a finding of injustice. It may be inconsistent with the view that the person complaining has been treated justly and the other too leniently.

59. The third basis for complaint is rejected.

60. As to the fourth basis, failure to address key issues, I accept the Commission's submissions. In my opinion none of the matters in question require either investigation or the calling of witnesses. Consider, for example, the assertion that the ICAC should have called the non-executive directors of NuCoal and this resulted in a "miscarriage of justice". The Commission, however, had formed the view that NuCoal itself was not involved in any wrongdoing and those directors could not have added anything on that topic. The basis for the recommendation of expungement was the wrongdoing of DCM and the Commission's view that a change in shareholding should not affect the consequences for DCM. "Innocence" of NuCoal or its non-executive directors seems to me to be irrelevant to that topic.

61. In this connection I refer also to the findings of Rothman J which I have set out in paragraph [53] above.

Conclusion

62. I provided NuCoal with a draft of this report so as to enable it to provide any comments upon that draft that it wished. It did so by letter dated 10 May 2018 which I have attached for the information of Parliament (Annexure 'D'). I have not, however, been persuaded by those comments that I should change any aspect of this report.

63. For these reasons I have decided that NuCoal's complaint should be dismissed.

64. Pursuant to 78(1A) of the ICAC Act I recommend that this Report be made public forthwith.

Bruce R McClintock SC
Inspector
Independent Commission Against Corruption
6 June 2018

HEAD OFFICE

Unit 8
24 Garnett Road
Greenhills NSW 2323

PO Box 2155
Greenhills NSW 2323

P +61 2 4015 0500
F +61 2 4015 0599

W www.nucoal.com.au
E admin@nucoal.com.au

ABN 29 060 352 990

19 September 2017

Bruce McClintock SC
Inspector, Independent Commission against Corruption
GPO Box 5341
Sydney NSW 2001

By e-mail: oiicac_executive@oiicac.nsw.gov.au

Dear Inspector,

Thank you for your letter dated 29 August 2017 and congratulations on your appointment to Inspector, Independent Commission against Corruption (**ICAC**).

Following previous meetings and correspondence with your predecessor, the Hon David Levine AO RFD QC, we are writing to outline NuCoal's significant concerns in relation to the investigation by the ICAC entitled Operation Acacia. In our view ICAC did not conduct its enquiry into Operation Acacia properly, to the extent that we believe that the conduct of the Commission amounts to serious maladministration under the *Independent Commission Against Corruption Act 1988* (the **ICAC Act**).

We have not been able to determine precisely why the maladministration occurred because NuCoal had no standing in Operation Acacia, the Company was not investigated and NuCoal's independent directors were not called as witnesses.

We have been trying to obtain relevant information via Freedom Of Information (GIPA), but to date our requests have been largely refused so have not produced any meaningful information. These refusals, in conjunction with the clear maladministration by ICAC, leave us with the belief that the conclusions of Operation Acacia were politically driven, predetermined and not arrived at independently by the ICAC.

The following submission seeks to outline the critical errors in the Operation Acacia process that we believe could have been avoided by ICAC conducting the investigation in a thorough and competent manner.

We are appealing to you now, to review the matter in this submission and would appreciate the opportunity to discuss and further expand on this issue, at the earliest opportunity.

Yours sincerely,

Gordon Galt
Chairman, NuCoal Resources Ltd

Background

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

We believe there were major flaws in the processes and logic that resulted in the conclusions that were made in both reports and that these actions, or inactions, amount to maladministration in accordance with the ICAC Act and are further outlined below.

1. Contrary to law - the ICAC failed to consider NuCoal's submissions

1.1 The ICAC misunderstood the evidence and overstated the significance of Counsel Assisting's submissions. In making its findings, the ICAC expressly stated that it accepted the submissions of Counsel Assisting the ICAC (Peter Braham SC and Alan Shearer).[1] In fact, it all but copied and pasted those submissions into the December Report.

1.2 The ICAC did not address any of the comprehensive and compelling arguments made by NuCoal in reply to those submissions[2]. Wholly absent from the December Report, or the written opinion of Counsel Advising[3] annexed to it, is any recognition, let alone analysis, of the detailed and factually supported arguments contained in NuCoal's reply submission.

1.3 NuCoal's submission was simply ignored.

1.4 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

[1] December Report, p.16.
[2] NuCoal reply submission dated 20 June 2013
[3] The December Report was prepared with the assistance on an advice by Counsel Advising (Bret Walker SC and Perry Herzfeld of counsel).
[4] December Report, pp.16-17.

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".

1.5 NuCoal's arguments within its reply submission were underpinned by sound legal and policy considerations. The arguments made by Counsel Assisting were addressed by NuCoal 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.[5]

(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.[6]

(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 2009. Moreover, there was never any allegation of corrupt conduct capable of vitiating the grant of EL 7270.[7]

1.6 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.[8] 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.[9]

1.7 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.

2. Improper Discriminatory behaviour by ICAC

2.1 Public comments made by the ICAC subsequent to the release of the December Report further illustrate the bias of the ICAC in respect to NuCoal.

---

[5] December Report, p.16, points (a), (b) and (c).
[6] December Report, p.16, points (d), (e) and (g).
[7] December Report, p.16, points (e), (f) and (h).
[8] *Independent Commission Against Corruption Act 1988* (NSW) ss.8, 9, 13, 74A and 74B.
[9] *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [47] per French, Sackville and Hely JJ.

2.2 ICAC believes, and has publicly stated, that NuCoal is completely innocent of any wrongdoing. It apparently reached this belief early in 2013 and did not change its mind as a result of Operation Acacia.

2.3 In evidence of this statement, we present Item 18 of ICAC's response to NuCoal's judicial review case against ICAC (awaiting decision in the Supreme Court). Item 18 states (our underlining for emphasis):

"ICAC found that NuCoal was not in a position of a bona fide purchaser without notice (December Report, page 16). Relevantly ICAC's recommendation that EL 7270 be cancelled was not based on any wrongdoing by NuCoal. The reason for this recommendation was expressly because "the process leading to the giving of consent for application for, and granting of, EL 7270 was tainted by corruption and the "slate should be wiped clean" (December Report, page 15). It is evident from the December Report that ICAC was not persuaded that there was sufficient reason to preserve EL 7270 in the face of the findings of corrupt conduct made in the First Acacia report. However, ICAC expressly held out the possibility that any innocent party affected by the expunging might be compensated to the extent that was considered appropriate, in its formal recommendation (December report, page 20). Given the attention given to NuCoal in the section of the report on referred question 3, it can be inferred from the face of the report that NuCoal and those of its shareholders not involved in the corrupt conduct were contemplated within "any innocent party" (indeed, it is not evident who else was meant by "any innocent party"). As NuCoal acknowledges at PS[22], the Commissioner specifically identified NuCoal's "innocence of wrongdoing" on 20 March 2013 at T4913. Nothing in the December report suggests that ICAC resiled from that position."

2.4 Notwithstanding this belief, the ICAC failed to even mention this position within the December 2013 Report. If ICAC was unbiased we submit that it was duty bound to publish this most material finding – that it believed NuCoal to be completely innocent – in a definitive and strong statement in its December 2013 report.

2.5 It is difficult to believe that this amazing omission is anything but deliberate and NuCoal finds it hard to understand, why, instead of disclosing this matter, the ICAC chose to do the following:

- went to great lengths to demonise NuCoal by accusing the company of misleading investors about the risk of investment;
- made erroneous statements about the existence of "widespread" and "notorious" public controversy (debunked by Justice Stevenson in Poole v Chubb, 533); and
- dismissed NuCoal's third party status, in denial of the substance of the NuCoal acquisition of Doyles Creek, without calling for or providing any supporting evidence.

2.6 To compound and re-illustrate this clear bias, Commissioner Ipp sent a statement to The Australian (reported 26 June 2015) which repeated these matters, and others, but once again failed to mention his belief that NuCoal is innocent of any wrongdoing.

2.7 We believe the bias demonstrated by the ICAC was aimed to confuse, assist the creation of a negative public perception and mislead Parliamentarians, into passing the Mining Amendment Act.

2.8 This case is further supported by the fact that, when the draft legislation was published - ICAC did not make strong public statements warning the Parliament that NuCoal was

innocent and should be compensated or that denial of access to any legal process was not one of its recommendations. In fact ICAC said nothing.

3. Unreasonable and Oppressive behaviour – ICAC's attack on one innocent party and not another

3.1 The Commissioner recommended to cancel EL 7270 but saw no problem with recommending the continuation of the Yarrawa licence (in Operation Jasper) because of the *"thousands of innocent investors involved in the ownership of Yarrawa"*.

3.2 Given the ICAC's belief that NuCoal was an innocent party (as outlined above) – why did the Commissioner take a different view towards NuCoal's investors when they, exactly like the Yarrawa investors, were entirely innocent of any wrong doing?

3.3 The ICAC's position in respect of Yarrawa was entirely inconsistent to its position in respect of NuCoal - the ICAC simply recommended in a one paragraph statement that no action be taken with respect to the existing Yarrawa authority.[10] That was stated to be because of *"the vast number of innocent investors in the Yarrawa tenement"*.[11] No other reason was given.

3.4 When the ICAC's findings concerning the grant of the Yarrawa and the Doyles Creek tenements are examined, it is evident that there is no material difference between the two that could justify the inconsistent recommendations made by the ICAC. The NuCoal and Yarrawa investors are in no relevantly different position – therefore the ICAC's recommendations should have been consistent, accordingly.

3.5 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.

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

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

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

3.8 NuCoal's shareholders were in a materially identical position to the investors in the Yarrawa tenement and it is almost inconceivable that ICAC did not treat NuCoal and its shareholders in the same way that it treated the Yarrawa investors.

---

[10] December Report, p.20.
[11] December Report, p.17.

4. ICAC did not properly investigate key elements

4.1 Mining Information

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

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

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

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

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

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

(f) Dr Guy Palese was the only geologist from whom the Commission took evidence. Dr Palese, quite proudly, in his evidence said that he took a contrarian view to all the others that had looked at this area (page 36 of the August Report) "Dr Palese said that, whilst others had thought the area was heavily faulted and therefore less desirable for exploitation, he (Dr Palese) had a different view." (and page 11) -

"While earlier boreholes had led some to believe that the coal measures may have been affected by igneous intrusions, when stratigraphic drilling was undertaken at a deeper level as part of this program Dr Palese recognised that this was not so in respect of the lower seams, which are typically the target of mining activity."

(g) Again Dr Palese's evidence was based on 4 drill holes. It was a contrarian view and could have been completely wrong but it fitted the Commissions case against the applicants.

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

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

4.2 Finance

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

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

(c) Again the calling of relevant industry witnesses would have established the way the applicants went about business was normal. Both the department and the applicants knew that if the funds had not been raised then the EL conditions would be breached and the EL would go back to the State. All parties involved in exploration fundamentally understand these requirements, which have existed for a very long time. This was not a basis for fraud by the applicants.

4.3 Other interested parties

(a) There was discussion that there were many other interested parties who had sought access to the area and would therefore have been interested in a competitive tender. Page 12 quotes two - Excel and later Peabody. Excel owned

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

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

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

NSW GOVERNMENT | Office of the Inspector of the Independent Commission Against Corruption

29 August 2017

Our Reference: C32 2015 04

Mr Gordon Galt
Chairman
Nucoal Resources Limited

By email: admin@nucoal.com.au

Dear Sir

I have been appointed Inspector of the Independent Commission Against Corruption (ICAC) effective 1 July 2017.

I have reviewed the file in respect of the complaint made by Nucoal Resources Limited to my predecessor, the Hon David Levine AO RFD QC on 15 June 2015, including the updating material the last item of which seems to have been sent by Nucoal to this office on 5 October 2016.

Would you let me know no later than Friday 15 September 2017 whether Nucoal wishes me to proceed to determine its complaint?

If it does, I would appreciate it if you would provide the following:

(a) A concise statement of the respects in which Nucoal asserts that ICAC's conduct amounted to abuse of power, impropriety, any other form of misconduct or maladministration (as defined in section 57B(4) of the Independent Commission Against Corruption Act 1988.

(b) The identity of each officer of the ICAC whom you assert was responsible for each such item of conduct.

In providing these particulars please bear in mind that my principal functions and powers as Inspector are those set out in Part 5A of the ICAC Act. I can only deal with (by reports and recommendations to Parliament) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or officers of the ICAC (section 57B(1)(b)); and deal with (by reports and recommendations to Parliament) conduct amount to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or officers of the ICAC (section 57B(1)(c)). Specifically,

I am not an appeal body, that is, I have no power to reverse or change any decision of ICAC, nor to find that it was wrong or factually incorrect.

I refer also to the decision of Rothman J in *Nucoal Resources Limited v Independent Commission Against Corruption* [2015] NSWSC 1400. His Honour appears to have rejected a submission that Nucoal was denied procedural fairness by the ICAC. I would appreciate any submission or argument you wish to make as to what account, if any, I should take of his Honour's judgment and the specific finding referred to.

I propose to supply both Nucoal's original complaint, dated 15 June 2015 and any reply to this email to the ICAC for its comments (as section 79A of the ICAC Act requires).

I look forward to your reply. If the date stated above cause any difficulty please let me know.

Yours sincerely,

B. R. McClintock

Bruce McClintock SC
Inspector, Independent Commission against Corruption.

Office of the Inspector of the Independent Commission Against Corruption
GPO Box 5341, Sydney NSW 2001
T: (02) 9228 5260 | E: oiicac_executive@oiicac.nsw.gov.au

Annexure C

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

Mr. Bruce McClintock SC
Inspector of the ICAC
OIICAC

Via email to: oiccac_executive@oiicac.nsw.gov.au

Your Ref: C32 2015 07

Dear Inspector,

Re: Operation Acacia – NuCoal Resources

I refer to our previous correspondence in this matter and your request for the Commission's response to a complaint made on behalf of NuCoal Resources Ltd (NuCoal).

The complaint is set out in the submission provided to you under cover of a letter dated 19 September 2017 from Gordon Galt, the Chairman of NuCoal. Although other material was provided by NuCoal, I note your advice that you propose to limit your inquiries and consideration to the matters set out in the letter of 19 September 2017 (the complaint).

The essence of the complaint is that the Commission engaged in serious maladministration in relation to an aspect of the Operation Acacia investigation. That aspect concerned the Commission's recommendation to the NSW Government that it consider enacting legislation to expunge the exploration licence authority for Doyles Creek.

Before addressing the complaint in detail it is useful to set out some relevant background information on how the Commission came to make that recommendation.

Background

Operation Acacia was primarily concerned with the circumstances in which Doyles Creek Mining Pty Ltd (DCM) came to acquire mining exploration licence 7270 (EL 7270). The investigation came about as the result of a referral by both Houses of Parliament under s 73 of the ICAC Act. The matters Parliament required the Commission to investigate and report on included:

a) any recommended action by the NSW Government with respect to licences or leases under the *Mining Act 1992* over the Doyles Creek area; and

b) whether the NSW Government should commence legal proceedings or take any other action against any company in relation to the circumstances surrounding the allocation of EL 7270.[1]

EL 7270 was granted to DCM on 15 December 2008. Subsequently, DCM became a wholly owned subsidiary of NuCoal as a result of NuCoal acquiring all the shares in DCM. This was done by issuing 470 million shares in NuCoal to the shareholders of DCM in exchange for, and in proportion to, their shareholding in DCM. The transaction was effected in this way because EL 7270 was not transferable. Thus, EL 7270 continued to be held by DCM. By 2010, when NuCoal was listed on the Australian Securities Exchange, the listing valued EL 7270 at about $100m. The original shareholders in DCM made substantial profits from their investment.

EL 7270 was due to expire on 15 December 2012. On 21 November 2012 DCM submitted an application for renewal of the licence. While that application was pending, EL 7270 remained in force by virtue of s 117 of the Mining Act. It was therefore a matter for the then minister whether or not to renew EL 7270. The minister could also cancel EL 7270 under s 125 of the Mining Act.

Between 18 March 2013 and 17 May 2013, the Commission conducted a public inquiry for the purposes of the investigation. NuCoal was legally represented by senior counsel (Mark Leeming SC) at the public inquiry.

The Commission published its report on the investigation in August 2013 (the August 2013 report).

In the August 2013 report, the Commission found that Ian Macdonald, when Minister for Primary Industries and Minister for Mineral Resources, engaged in corrupt conduct by acting contrary to his duty as a minister of the Crown in granting DCM consent to apply for EL 7270 and by granting EL 7270 to DCM, both grants being substantially for the purpose of benefitting John Maitland. Other corrupt conduct findings were made against Mr Maitland, Craig Ransley, Andrew Poole and Michael Chester in relation to the making of false statements to the Department of Primary Industries in support of the DCM application for EL 7270. Each was, either directly or indirectly, a shareholder in DCM and both Mr Chester and Mr Poole were directors of NuCoal. No corrupt conduct findings were made against NuCoal.

The August 2013 report did not address the question of whether the NSW Government should take any action with respect to EL 7270 (the outstanding question). The outstanding question was addressed in a further report published in December 2013 (the December 2013 report).[2]

In order to address the outstanding question, the Commission sought and received written submissions from counsel assisting the Commission in Operation Acacia and other relevant parties, including NuCoal. Details relating to that process are set out below.

The Commission then engaged Bret Walker SC and Perry Herzfeld to provide advice on the outstanding question. They were provided with copies of the submissions received by the Commission, which included Nucoal's submissions. In instructing Messrs Walker and Herzfeld, the Commission informed them that it accepted the submission of counsel assisting the Commission that the whole process leading to the granting of EL 7270 was tainted with corruption and that it should be expunged. The reasons for coming to that view are set out at pages 16 and 17 of the December 2013 report. They include that:

---

[1] The full terms of reference are set out at page 8 of the Commission's report *Investigation into the conduct of Ian Macdonald, John Maitland and others*

[2] *Operations Jasper and Acacia – addressing outstanding questions*

a) EL 7270 was obtained by DCM and is still held by it. 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) At the relevant time each of Messrs Maitland, Ransley and Poole were directors of DCM and their conduct and knowledge are to be attributed to DCM. At the time NuCoal acquired the DCM shares Messrs Chester and Poole became directors of NuCoal and 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.

I have not reproduced all of the reasons in this letter because they are lengthy but they should be taken into account in assessing the complaint.

The advice of Messrs Walker and Herzfeld, which is published in the December 2013 report, considered that one option was for Government to introduce special legislation to expunge the interests resulting from the conduct exposed by the Commission's investigation. The advice noted that one advantage to such an approach would be to obviate risks associated with administrative law challenges to any ministerial decision to cancel or not renew licences.

In the December 2013 report, the Commission expressed the view that the granting of EL 7270 was so tainted by corruption that it should be expunged or cancelled. The Commission recommended that the NSW Government consider enacting legislation to expunge EL 7270 and noted that could be accompanied by a power to compensate any innocent person affected by the expunging.

It was, of course, a matter for the NSW Government whether it accepted any recommendation made by the Commission.

The NSW Government subsequently passed the *Mining Amendment Act 2014*, which had the effect of expunging EL 7270 without compensation.

The complaint – failure to provide procedural fairness

Those aspects of the complaint concerning an alleged failure to provide procedural fairness or to properly (or at all) take into account the submissions made on behalf of NuCoal are attempts to re-agitate matters that were litigated in the Supreme Court in 2014 and which are the subject of judgement by Rothman J in *NuCoal Resources Ltd v ICAC* [2015] NSWSC 1400. Those proceedings were dismissed with costs. NuCoal did not seek to appeal.

Rothman J's judgement provides a comprehensive analysis and rebuttal of those matters. In particular I note the following at [77] "...a complete reading of (the December 2013 report) discloses that the Commission dealt with each argument or submission presented by (NuCoal)". No additional arguments have been advanced in the complaint in relation to those matters. In the circumstances, it would be appropriate for you to rely upon his Honour's findings.

In addition to the analysis set out in the judgement, I note the following.

NuCoal was placed on notice as to what potential recommendations the Commission might make as early as April 2013. On 22 April 2013, in the course of the public inquiry, Commissioner Ipp raised with Mr Leeming, senior counsel for NuCoal, the prospect that

corrupt conduct findings might be made in relation to the issuing of EL 7270 and identified three possible courses open to the Commission, being to recommend:

a) there should be no mining lease,
b) the mining lease should stand with no conditions,
c) the mining lease should stand but with the condition NuCoal pay a sum of money to the NSW Government.

The Commissioner invited a response from NuCoal. Mr Leeming responded to this invitation in the public inquiry on 3 May 2013 (see T7306).

On 17 May 2013, towards the end of the public inquiry, the Commissioner called for submissions from NuCoal and others with respect to the outstanding question (see T8548-8554).

NuCoal provided written submissions dated 29 May 2013 (and an erratum dated 3 June 2013). The substance of those submissions was that no action should be taken with respect to EL 7270.

Other submissions on this issue were made by Coolmore Australia Pty Ltd, Darley Australia Pty Ltd, and joint submissions of the Department of Trade and Investment, Regional Infrastructure & Services and the Department of Planning & Infrastructure. Counsel assisting also provided written submissions dated 15 June 2013.

The submission of counsel assisting was that each of the relevant decisions leading to the granting of EL 7270 was vitiated by serious corrupt conduct and fraud. The submissions considered the position of NuCoal but concluded that, as the process leading to the giving of consent and the granting of EL 7270 was tainted with misleading conduct, fraud and corruption, the slate should be wiped clean by revoking or expunging all instruments granted under the Mining Act relating to EL 7270. The submissions also addressed the submission by NuCoal of allowing a mining lease to be granted but imposing a financial payment on NuCoal. Counsel assisting did not consider this option should be recommended.

All these submissions were provided to NuCoal and NuCoal was given an opportunity to make further submissions in response. NuCoal provided submissions in response dated 20 June 2013. The substance of those submissions was that the Commission should not make recommendations adverse to NuCoal in relation to EL 7270.

Having considered all the submissions it had received, the findings made in the August 2013 report, and the advice received from Messrs Walker and Herzfeld, the Commission was entitled to form the views expressed and the findings made in the December 2013 report.

It was not necessary for the Commission to set out in the December 2013 report each and every submission advanced by NuCoal or to specifically address each of those submissions.

The complaint – discriminatory behaviour

This aspect of the complaint relates to various comments made by the Commission (and Commissioner Ipp) to the effect that NuCoal had not engaged in any wrongdoing and the failure to mention that in the December 2013 report or when the NSW Government was considering amending the Mining Act to expunge EL 7270.

There is nothing surprising in the comments. No findings of wrongdoing on the part of NuCoal were made in the August 2013 or December 2013 reports. The basis for the Commission's recommendation in the December 2013 report with respect to EL 7270 is set out above. The

recommendation was not dependent upon NuCoal having engaged in wrongdoing. It was not necessary for the Commission, in the December 2013 report, to make specific reference to the absence of any finding of wrongdoing on the part of NuCoal. Nor was it necessary to do so when the NSW Government was considering amending the Mining Act.

The complaint – treatment of the Yarrawa EL

This aspect of the complaint concerns what NuCoal perceives to be the different treatment afforded by the Commission to the Yarrawa EL 7430 to that of EL 7270.

In the December 2013 report, the Commission stated that it did not consider any action should be taken with respect to EL 7430. That was because, as set out below, the circumstances pertaining to EL 7430 differed from those pertaining to EL 7270.

Yarrawa was one of nine areas identified by the Department of Primary Industry (DPI) as being suitable for a competitive expression of interest process. Unlike EL 7270, there was no finding made by the Commission that the creation of the Yarrawa tenement was proposed by Mr Macdonald in order to improperly benefit anyone.

Monaro Mining Pty Ltd bid for the Yarrawa tenement through a subsidiary. The Commission found, in the Operation Jasper report, that Monaro Mining made a genuine bid for the tenement[3]. The bid succeeded on its merits. Unlike the case in EL 7270, the relevant decisions leading to the grant of EL 7430 were not vitiated by serious corrupt conduct and fraud.

It was submitted, by counsel assisting the Commission in Operation Jasper, that, in these circumstances, it would not have been appropriate for the Commission to recommend the NSW Government take any action to expunge EL 7430. The Commission accepted that submission.

The complaint – failure to call witnesses

This part of the complaint concerns what is described as a failure by the Commission to call the NuCoal non-executive directors or technical experts to give evidence at the public inquiry. Such evidence however was not relevant to the issues under investigation, particularly with regard to whether the Commission was entitled to form the view that a change in shareholding of a company should not immunise that company from the consequences of improper conduct by the company or its directors. I also note that neither of the written submissions made on behalf of NuCoal identified any need to call such witnesses. I have not checked the transcript of the public inquiry to ascertain whether any such request was made during the course of the public inquiry. I assume from the absence in the complaint of any reference to such a request that none was made.

The complaint – other matters

Mr Galt's letter of 19 September 2017 refers to the conclusions reached in Operation Acacia having been "politically driven, predetermined and not arrived at independently by the ICAC." No basis for this assertion is set out in the complaint. As can be seen from the above, there is no evidence to support any such assertion.

---

[3] *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, page 96

I trust the above information will be helpful in resolving the complaints. Please let me know if you require any further information or more detailed response on any aspect of the complaint.

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

12 March 2018

HEAD OFFICE

Unit 8
24 Garnett Road
Greenhills NSW 2323

PO Box 2155
Greenhills NSW 2323

P +61 2 4015 0500
F +61 2 4015 0599

W www.nucoal.com.au
E admin@nucoal.com.au

ABN 29 060 352 990

10 May 2018

Bruce McClintock SC
Inspector, Independent Commission against Corruption
GPO Box 5341
Sydney NSW 2001

By e-mail: oiicac_executive@oiicac.nsw.gov.au

Dear Inspector,

Thank you for providing a copy of the draft report to the Presiding Officers of the New South Wales Parliament (**Parliament**) in relation to NuCoal's complaint to you concerning the Independent Commission Against Corruption's (**the ICAC**) conduct in Operation Acacia.

It is our view that the draft report has misconceived the complaint made by NuCoal, and the draft report has not investigated the ICAC's maladministration including the legality or propriety of its activities in relation to Operation Acacia.[1]

We submit that the draft report fails to address this fundamental complaint set out in our letters to you of 19 September 2017 and 29 March 2018.

Our submission of 19 September 2017 set out the critical errors in the Operation Acacia Reports which could have been avoided had the ICAC effectively and appropriately undertaken its activities.

Our letter of 19 September 2017 stated that "*We had not been able to determine precisely why the maladministration had occurred...*" and our letter of 29 March 2018 stated that "*the matters outlined above further illustrate why ICAC did not conduct its enquiry into Operation Acacia properly...*".

In these circumstances, we believed it is incumbent on you to exercise the functions of your office to investigate our complaint.

In particular, given the second Acacia Report provided the basis for which the expungement of Exploration Licence 7270 (**EL 7270**) occurred without allowing for compensation, it is the process of how that report came to be prepared that requires your investigation, not the findings.

We do not believe your draft report has assessed the effectiveness and appropriateness of the procedures of the ICAC relating to the legality or propriety of its activities in relation to Operation

[1] Section 57B(1)(d) of the *Independent Commission Against Corruption Act 1988*

Acacia. We have sought to meet with you to expand on our submission, a suggestion which you have not taken up, which has perhaps led to some confusion as to the nature of NuCoal's complaint.

We accept that you are not acting as an appeal body to change the decision of the ICAC, however, the process by which the ICAC found in the first Acacia Report that the granting of EL 7270 to Doyles Creek Mining Pty Ltd (**DCM**) was tainted by corruption was based on the ineffectiveness and/or lack of propriety by the Commission and its officers. This has not been dealt with in your draft report.

That is, the ICAC did not conduct its enquiry into Operation Acacia properly and that findings from the High Court of Australia, the Supreme Court of NSW, the District Court of NSW and the Local Court of NSW all provide the basis for you to investigate whether or not there was a serious degree of wrongfulness in ICAC's investigation which amounts to maladministration.

The fact that the brief was given to ICAC by the Parliament meant, and still means, that ICAC failed through maladministration, ineffectiveness and/or impropriety to properly carry out its brief to the Parliament, and that the Acacia reports therefore misled the Parliament and affected all the Parliament's subsequent actions as a result.

In addition to all of the above, we have set out specific rebuttals of points you have made. We set these out later in this reply.

In the circumstances, it is premature to dismiss our complaint or for you to provide your report in its current form to Parliament at this time.

We provide the following comments and evidential bases which we submit should assist your investigation prior to any final report being presented to Parliament. They are as follows:

1. Background of the ICAC inquiry and the findings of corrupt conduct against the directors of DCM – contrary to law[2]

(a) In 2011, at the time the Acacia inquiry commenced and at the date of the first Acacia Report in August 2013, the ICAC had no power to conduct the investigation as it did and exceeded its jurisdiction;[3]

(b) The original findings of corrupt conduct against the directors of DCM were not made according to law and were a nullity;

(c) In early 2015, the directors of DCM commenced judicial review proceedings for a declaration that the finding they had engaged in corrupt conduct were not made according to law and were a nullity. Copies of the proceedings were provided to the Office of the Inspector.

---

[2] Section 57B(4)(a) of the *Independent Commission Against Corruption Act 1988*
[3] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14

(d) It is a fact that the findings of corrupt conduct by the ICAC against the directors of DCM, and upon which Parliament acted to expunge EL 7270, only stand due to the Parliament passing legislation retrospectively validating the findings of the ICAC as assented to on 6 May 2015.[4]

2. Director of DCM and NuCoal - Mr. Poole – unjust and improper motives[5]

(a) Mr Poole was a director of DCM and NuCoal and the ICAC found that Mr. Poole engaged in corrupt conduct.[6]

(b) Essential to the finding of corrupt conduct was ICAC's conclusion that Mr. Poole was aware that a submission put to the Department of Primary Industries on 18 March 2008 by Doyles Creek Mining Pty Ltd contained false and misleading statements (**Submission**).

(c) Mr. Poole maintained in his evidence to the ICAC that, at all relevant times, he believed that every statement in the Submission was true.[7]

(d) In August 2014, whether or not Mr. Poole knew that the Submission contained false and misleading statements was agitated in litigation brought by Mr. Poole against his Directors' and Officers' Liability insurer, Chubb Insurance Company of Australia, in the Supreme Court of New South Wales.[8]

(e) Mr. Poole's belief, as stated in his evidence to the ICAC, was vindicated in the proceedings, with his Honour Mr. Justice Stevenson holding Mr. Poole was not aware that the Submission was misleading.[9] Proper examination of the facts by ICAC at the time of its enquiry should have led to the same conclusion and had this occurred no corrupt finding should have been made.

(f) His Honour Mr. Justice Stevenson also held that there was no notorious controversy in relation to the circumstances of granting EL 7270. The existence of ongoing and notorious controversy was fundamental to the ICAC recommendations in the second Acacia Report. It was the basis for the Commission's conclusion that NuCoal should have known that there was possible corruption in the EL grant. Proper examination of the facts should have led to a different conclusion.

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

---

[4] *Independent Commission Against Corruption Amendment (Validation) Act 2015*
[5] Section 57B(4)(b) and (c) of the *Independent Commission Against Corruption Act 1988*
[6] First Acacia Report p. 142
[7] ICAC Acacia Transcript page 8262.36-40
[8] *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832
[9] *Poole v Chubb* ibid [685]

"Nor do I think that a reasonable person in Mr Poole's position could be expected to know that there was a real possibility of there being a public inquiry."[10]

(h) Importantly, during the hearing, Mr. Poole became aware that there were documents of DCM which had not been put before the ICAC public inquiry and documents which should have fairly been put to him by Counsel Assisting, or properly been referred to by the Commissioner, which supported his belief that the Submission was not misleading. The existence of these documents and their non-use by ICAC means that it was ICAC that was doing the misleading and not properly executing its brief of investigation and reporting to the Parliament – not Poole.

(i) On 24 February 2015, this was the subject of a complaint to the Inspector of the ICAC which asked to investigate if the conduct in not disclosing the exculpatory documents was conduct amounting to maladministration on the following grounds:

a. The ICAC unjustly failed to put before the public inquiry in Operation Acacia all relevant documents; and

b. The ICAC, the Commissioner (the Honorable David Ipp AO QC) and Counsel Assisting (Mr. Peter Braham SC) knew of or ought to have known of exculpatory documents in relation to Mr. Poole and unreasonably or improperly failed to explore the content of the documents with him.

As far as NuCoal is aware, there has been no decision in respect of this complaint.

3. Director of DCM - Mr. Ransley - unjust and improper motives[11]

(a) Mr. Craig Ransley was a director of DCM and the ICAC found that Mr. Ransley engaged in corrupt conduct.[12]

(b) Essential to the finding of corrupt conduct was whether or not Mr. Ransley was aware that a Submission put to the Department of Primary Industries on 18 March 2008 by DCM contained false and misleading statements.

(c) On 23 July 2015, two Court Attendance Notices were issued against Mr. Ransley by an officer of the ICAC for alleged offences in relation to the making and publishing to the Department of Primary Industries false or misleading statements contrary to section *178BB of the Crimes Act 1900 (NSW)*.

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

---

[10] *Poole v Chubb* ibid [692 -696]
[11] Section 57B(4)(b) and (c) of the *Independent Commission Against Corruption Act 1988*
[12] *First Acacia Report p. 141*

(e) Note that:

(i) No prosecution of Mr. Ransley for misleading the ICAC was recommended in the August 2013 Report;

(ii) the charge of giving false or misleading evidence to the ICAC was not commenced for over four years; and

(iii) prosecution of Mr. Ransley appears arbitrary when compared with the failure to prosecute Barry O'Farrell after O'Farrell misled the ICAC in April 2014.

(f) After an 8-week trial, on 27 November 2017, his Honour Zahra SC DCJ found Mr. Ransley not guilty in relation to the alleged offences in relation to the making and publishing false and misleading statements to the Department of Primary Industries.

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

(h) ICAC should have reached these same conclusions in the Acacia investigation. By not making these conclusions and stating so in its Acacia report, ICAC misled the Parliament and did not execute its brief to properly investigate and report.

(j) A costs application is to be heard in the District Court in June 2018 based on the following:

a. The fact that many of the exculpatory documents relied upon by Judge Zahra were brought to the Crown and the Court's attention by Mr. Ransley and were not included in the original Crown tender bundle. Some crucially important documents were apparently never disclosed by the ICAC to the Crown and during Operation Acacia.

b. There were board minutes of the Hunter Region SLSA Helicopter Rescue Service Ltd which had been edited without its knowledge and included in the Crown bundle by the ICAC.

c. There were documents which were included by the ICAC which were subject to client legal privilege. The Crown abandoned its proposed tender of certain documents on that basis.

d. The failure to obtain proper statements from the witnesses prior to trial. The Crown relied instead on evidence given in the ICAC, which did not reflect the actual evidence given by the witnesses at trial.

(k) It is anticipated that, following this hearing, the failure to disclose the exculpatory documents will be the subject of a complaint to the Inspector of the ICAC to investigate if the conduct in not so disclosing was conduct amounting to maladministration on the following grounds:

a. The ICAC unjustly failed to put before the public inquiry in Operation Acacia all relevant documents; and

b. The ICAC, the Commissioner The Honourable David Ipp AO QC and Counsel Assisting Mr. Peter Braham SC knew of, or ought to have known of, exculpatory documents in relation to Mr. Ransley and unreasonably or improperly failed to explore the content of the documents with him.

4. Other Points – not understood or rebutted

(a) We note that there is an error in your draft on Page 6. The four paragraphs following point i. are in relation to the "*First Jasper Report*" and appear irrelevant to your draft report.

(b) Your points 24 and 29. The quote referred to is from page 17 of the second Acacia Report under a heading "Potential action under existing legislation" and refers to all the tenements under consideration, not just the Yarrawa tenement, EL 7340. It concludes at page 20 that there were certain difficulties in dealing with the tenements under current legislation and therefore the Commission considered special legislation as the preferable method of expunging or cancelling the relevant authorities and not action in respect of any of the tenements under existing legislation.

The only reason stated by ICAC for leaving Yarrawa untouched was "*By reason of the vast number of innocent investors in the Yarrawa tenement, Counsel Assisting submitted that it is not appropriate that the Commission make any recommendations to disrupt current activities on that tenement*"[13].

At that time, Whitehaven Coal, the holder of the Yarrawa tenement, had approximately 8,500 shareholders and NuCoal approximately 3,000. This suggests that corrupt behaviour goes unpunished with a large number of shareholders while a company with a smaller, but still significant number of shareholders, is liable for findings of corrupt behaviour. Does this mean that the BHP's of this world have carte blanche to engage in corrupt behaviours?

As is apparent from the above, the Commission's reasons stated in your report are actually "new" reasons which have never before been raised. This appears to be another reinvention of history.

(c) Your point 30. We find it difficult to understand that not calling technical witnesses and NuCoal's non-executive directors is considered irrelevant to the issues. ICAC made out the case that EL 7270 was something of a "*dripping roast*", full of resources that everyone knew were there – to justify a conclusion that some very valuable property was awarded – and because it was very valuable it must have been done corruptly. Had proper independent technical witnesses been called, the true position – that there was zero resource on the EL according to any code e.g. JORC, at the time of grant, that achieving success on the EL was therefore highly speculative and risky rather than a near certainty, that the resources found were

[13] *ICAC Report p. 17*

only found by extensive, later exploration and were unknown to anyone when the EL was granted, could have been properly established.

The failure to call NuCoal non-executive directors meant that the ICAC's conclusions regarding the history of NuCoal, and especially the Prospectus and its comments on risk, which conclusions are totally spurious and unsupported by market practice, were not able to be debunked. How anyone who engages in commercial practice in the field of IPO's could attach the characteristics alleged by ICAC to the statements of the Prospectus seems to be a deliberate misstatement of the facts aimed at bolstering a position negative to NuCoal.

ICAC's statements about this are another reinvention of history and practical reality. The Prospectus was developed and reviewed by ASIC and the ASX in accordance with normal market practice and did not once reference or infer that investors should be concerned about corrupt granting of the EL. Had such a risk existed then the matter would never have been passed by these regulatory bodies. In truth, they saw nothing wrong and neither should ICAC have seen any wrong – because there was nothing wrong.

ICAC should have reached these conclusions and could easily have done so by calling any appropriately qualified witness, including officers of the ASX or ASIC. It is not apparent that any of these officers were consulted and yet ICAC saw fit to misconstrue and misjudge their work. By not having appropriate witnesses, and then by raising this as a key justification for expungement, demonstrates that ICAC has not done its job properly and then as a result clearly misled the Parliament.

(d) Your points 55 and 64. You correctly note that the recommendation for expungement as set out in the second Acacia Report proceeded on the basis that the Commission accepted that NuCoal had not engaged in wrongdoing. The basis for the recommendation of expungement was the wrongdoing of DCM.

What is now clear from the judicial findings in the Courts of NSW is that in publishing the Submission there was no "*serious corrupt conduct on part of DCM and its directors and shareholders*" which could provide a basis for such a conclusion.

How the ICAC could have come to its clearly erroneous conclusions with its vast resources of officers and budget is the very issue we wish you to investigate. Indeed, to use your words, it is disingenuous if the issue is not confronted. We are of the view that there is evidence that the ICAC had possession of exculpatory material in relation to the directors of DCM, which it knew of or ought to have known of and unreasonably or improperly failed to disclose in its public hearings and which, if disclosed, would have debunked ICAC's bases for its findings of corrupt conduct. Without such findings, there was no basis for misleading the Parliament or the expungement.

(e) Your point 59. We find it hard to believe that you may regard submissions made by ICAC's Counsel in the Judicial Review as not being "*some sort of binding admission by the Commission*". Surely the ICAC is required to be a truthful entity?

Submissions on innocence were made by Counsel and were repeated several times as listed in your point 23/2.3. We submit that these were clearly matters on which Counsel and ICAC had conferred and reached a view. In our view, innocence is innocence – there is no room for ICAC to clearly admit innocence and then for you or they to deny it or nuance it.

(f) Your points regarding notorious public controversy. It was established by his honour Mr. Justice Stevenson that there was no notorious public controversy. This is a fact. You have failed to mention this in your report – rather you seem to have pursued the point negatively as far as NuCoal is concerned.

One of the key matters alleged as being controversial was whether Maitland was Macdonald's mate. This was pure speculation in mid-2009 and the matter has in the fullness of time, like many "rumours", been proven to be completely false.

In any case, controversy is not corruption. We can look to the granting of the casino licence at Barangaroo under the same light, for example, and there are many other examples of controversial decisions by Government.

(g) Various points regarding whether there was a known risk of an ICAC investigation. This is nothing more than another reinvention of history. There was no ICAC investigation on foot or mooted in 2009 so nothing was or could have been occurring under the shadow of an ICAC hearing. Refer to our point 2(f) citing His Honour Justice Stevenson's conclusion regarding knowledge of any ICAC inquiry, which clearly supports the above.

Further, there was a probity report issued in August 2010, after NuCoal was listed and on which investors undoubtedly relied, by O'Connor Marsden & Associates Pty Limited (commissioned by the NSW Government itself) that concluded:

"On the basis of our work performed, it would appear that the then Minister acted within the powers afforded to him under the legislation in granting the EL to DCMP. There are a number of examples where direct allocations have been previously made by previous Ministers."

There was still no mention of any ICAC investigation by the time this report was issued by the NSW Government. In fact, there was no mention at all of any potential ICAC hearing until after the O'Farrell Government was elected in 2011. The decision to use ICAC instead of a Special Commission, as recommended in a report by Clayton Utz into the award of EL 7270, was a decision of the O'Farrell government and was against the recommendation given by Clayton Utz and, as far as we know, was also against the recommendation of the relevant Minister at the time.

5. Other Matters – not addressed

In our letter to you of 29 March 2018, we raised additional issues which we believed were relevant to our initial complaint. As noted in Parliament by the Hon Dr Peter Phelps MLC – testimony given in private by Nathan Rees, Luke Foley and Kristina Keneally, in respect of Operation Acacia, was contradictory with evidence given at the public hearings, and in some instances – evidence was withheld by the ICAC legal and investigative team altogether. It is believed that this secret evidence would have weakened, if not destroyed, ICAC's case.

6. Conclusion

In NuCoal's view, the above provides numerous and further clear bases for an investigation into the conduct of the ICAC relating to the legality and propriety of its activities in relation to Operation Acacia.

The conduct of the ICAC officers, who failed to put before the public inquiry in Operation Acacia all relevant documents and continued to withhold such documents until compelled to do so in later criminal and civil proceedings, must be a matter of grave concern to you as the Inspector.

Indeed, given the outcome of the judicial determinations and other facts set out above, it is Operation Acacia which appears to be so tainted that its findings should be cast aside and this, we believe, is what you should, after your own thorough investigation, be recommending to Parliament.

It is abundantly clear that there is every reason to believe, based on the evidence, that ICAC's investigation and the conduct of its enquiry in Operation Acacia reached unsupportable conclusions which served to mislead the Parliament into passing the law which expunged EL 7270.

We look for your confirmation that a suitable investigation will be forthcoming.

Yours sincerely,

Gordon Galt
Chairman, NuCoal Resources Ltd