



Mining Amendment (ICAC Operations Jasper and Acacia) Bill 2014

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Extract from NSW Legislative Council Hansard and Papers Thursday 30 January 2014.

Second Reading

The Hon. DUNCAN GAY (Minister for Roads and Ports) [11.04 a.m.]: I move:

That this bill be now read a second time.

The State has been shocked by the revelations of corruption exposed last year by the Independent Commission Against Corruption [ICAC]. Counsel Assisting described it as being on a scale not witnessed since the days of the Rum Corps. Today, the Mining Amendment (ICAC Operations Jasper and Acacia) Bill 2014 will draw a line under this appalling episode. It will restore to the people of New South Wales the assets that were taken from them for private gain and without proper regard to the public interest. And, most importantly, it will continue the process of restoring to the people of New South Wales their confidence in the integrity of government and the mining industry in this State.

Clause 4 of this bill will cancel the exploration licences in respect of Doyles Creek, Mount Penny and Glendon Brook. The cancellation of those licences was, of course, recommended by the Independent Commission Against Corruption. That recommendation followed the Independent Commission Against Corruption's earlier findings of corrupt conduct against various individuals, including the former Minister and a number of officers from the companies involved. The Government is aware that some of those findings are now the subject of current or threatened legal challenge. We are also aware that the Independent Commission Against Corruption's jurisdiction to recommend cancellation of the licences is being challenged. However, the action proposed in this bill does not stand or fall based on the findings or recommendations of the Independent Commission Against Corruption. Having regard to the information that has been exposed to public scrutiny, the Parliament itself can and should form its own view as to whether these licences should be cancelled. The Government believes they should be.

In the course of its investigations and proceedings known as Operations Jasper and Acacia, the Independent Commission Against Corruption brought to light a wealth of information about the course of events that led to exploration licences being granted to three companies—Doyles Creek Mining, Mount Penny Coal and Glendon Brook Coal. Having considered that information, and submissions made by the licence holders and others, the Government considers Parliament will be satisfied that the relevant licences and the processes that led to them being granted are tainted by serious corruption. The circumstances are exceptional. Hopefully, they are unique; and certainly as a government, we are determined to ensure that they are never repeated. The taint of corruption affecting the licences cannot be removed in the manner suggested by Cascade Coal and NuCoal, by their simply paying to the State some portion of the profits they otherwise stand to make from these licences. This is not a situation that anyone can simply buy their way out of.

While it is pointless to speculate as to what the outcome of a proper resource allocation process would have been, there is ample information to suggest that it is most unlikely that any of the current licence holders would have obtained the licences that they did in the absence of impropriety. The fact that these coal resources were released, the location and size of the particular tenements, the exclusion from access to the licence of other interested parties, and the events leading to the relevant licences being granted to the current licence holders—all these lie under a cloud. It is the Government's view that the only appropriate way to address the situation is to cancel the licences so as to place the State, as nearly as possible, in the situation it would have been in had those licences never been granted. For that reason we propose that the licences will be cancelled and the fees paid for them will be repaid.

This view is set out in the objects clause of the bill, clause 3. It sets out four specific objects of the bill: one, to cancel the licences and ensure that the tainted processes that led to them being granted do not infect future processes, such as mining leases; two, to ensure that the State has the opportunity, if considered appropriate in the future, to allocate rights in respect of the land using proper process in the public interest; three, to ensure that no person may derive any further financial benefit from the tainted processes; and four, to protect the State against the potential for further loss or damage. The decision has been made that no compensation will be payable in respect of the cancellation. The bill also protects the State against any liability whatsoever in respect of the circumstances that led to the granting of the licences. These provisions do not, of course, protect any individuals or private companies who have engaged in deliberate wrongdoing.

The decision to cancel these exploration licences without compensation has not been made lightly. The

Government recognises that this bill will abrogate common law rights that would otherwise operate, including common law rights regarding property. In passing this legislation the Parliament will clearly be extinguishing, without compensation, whatever property rights might otherwise subsist in the licences as well as in certain exploration information. By immunising the State from liability the bill will also abrogate other common law rights, including contractual rights. As I said, this is not a decision we take lightly.

Before introducing this bill the Government sought, and considered carefully, submissions from the licence holders. We have also taken into account numerous submissions we received from affected shareholders. The report from ICAC suggested that consideration could be given to the provision of ex gratia financial compensation to "innocent persons". It is important, however, to be clear about what is meant by "innocent" in this context. Those who purchase shares in a company may be innocent in fact of any conduct involving the company. However, they invest in the company, seeking the chance of financial gain; they accept the upside benefits of the corporation's activities, which they fund; and they enjoy the downside protection of limited liability. Shareholders collectively choose the directors and others who guide the business and who, if poorly chosen or poorly supervised, may engage in wrongful conduct or actions that otherwise lead to poor outcomes for shareholders.

NuCoal cannot be regarded as a bona fide purchaser for value and without notice. There is evidence of some public notoriety surrounding the circumstances of the Doyles Creek licence at the time NuCoal and its shareholders invested in it. NuCoal itself was a recently listed shelf company. Although it is a separate legal entity the reality is that NuCoal was merely the vehicle for the back-door listing of Doyles Creek Mining. There is also evidence of corruption involving several of the directors and founders of Doyles Creek Mining, including two who were appointed to the board of NuCoal at the time of the Doyles Creek acquisition. As ICAC has said:

The consequences of improper transactions cannot be avoided merely because its shares have been subsequently traded.

While the Government believes that as a matter of principle the shareholders have no legitimate claim to compensation from the taxpayer that is not to say that some shareholders should not feel aggrieved by what has happened. However, their grievance should properly be directed at those individuals who were involved in, or at the very least had knowledge of, wrongdoing. The appropriate course of action for them is against the directors of the company, if they can be shown to have breached their duties as directors. It is a matter for those shareholders if they wish to seek legal advice on any remedies they may have.

A number of submissions suggest that the cancellation of these licences, without compensation, may raise concerns about sovereign risk. In response to that I say that the greatest form of sovereign risk, the greatest threat to the stability and certainty needed by business in dealing with governments, is the risk of corruption. It is the risk that corrupt public officials and their private sector mates will distort public processes, will manipulate markets and will act for their own private benefit in secret deals, all at the expense of the public interest. This bill puts an end to that. As clause 3 of this bill states, the core purposes of this legislation are restoring public confidence in the allocation of the State's valuable mining resources; promoting integrity in public administration above all other considerations, including financial considerations; and deterring future corruption. Of course, the bill is also about putting the State in as near as possible to the same position as it would have been had this corruption never occurred.

The Government has no immediate plans to re-release the relevant land for prospecting or mining. However, the bill may allow for that to happen in the future, if considered appropriate. Importantly, any future process will be undertaken in the public interest and in accordance with proper probity requirements. Those requirements will include the reforms that this Government is implementing in response to ICAC's earlier recommendations. I note that this bill does not address all of the matters raised in ICAC's report. The Government proposes to introduce a further bill to deal with those and other associated issues after Parliament resumes at the end of February. However, it is critical that we act expeditiously and decisively to cancel these licences now. I acknowledge in the gallery members of the communities that were affected and who fought like tigers to protect their communities. I commend the bill to the House.