

6 September 2019

Law & Justice Standing Committee
c/o – NSW Legislative Council
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Dear Committee Members

We thank members of the Standing Committee on Law and Justice (the **Committee**) for the opportunity afforded on 9 August 2019 to the current Directors of NuCoal (Messrs Gordon Galt, Michael Davies and Glen Lewis) and some of NuCoal's shareholders to appear and assist the Committee in its consideration of the *Mining Amendment (Compensation for cancellation of exploration Licence) Bill 2019* (the **Compensation Bill**).

We **attach** our further Submission as follows:

- Responses to Questions Taken on Notice (Attachment **A**)
- List of Supporting Documents (Attachment **B**)
- Response to the supplementary question in respect of compensation (Attachment **C**) – to be provided separately.

We believe that the responses in the submission address the matters taken on notice but are happy to further assist the Committee if they require any more information or discussion.

NuCoal has no objection to this submission being made public.

We list below what we believe are the main points for the Committee to consider in relation to the Compensation Bill and note that the Compensation Bill simply enables what ICAC recommended in its Operation Acacia Report – that compensation should be considered for innocent parties.

The key points are:

- There has never been any finding that NuCoal's shareholders had knowledge of or involvement in the improper conduct surrounding the grant of EL 7270.
- The *Mining Amendment Act (Operations Jasper and Acacia) 2014* denied persons affected by the cancellation of EL 7270 the opportunity to have their claims heard, in the absence of any measure to protect those individuals' rights to due process.
- The Compensation Bill does not of itself award compensation but importantly, affords these individuals with due process.

We therefore commend the proposed Compensation Bill to you and ask that you speed its progress into the Parliament for consideration and passage into law at the earliest opportunity.

Yours sincerely

Gordon Galt
Chairman
NuCoal Resources Ltd

Attachment A – Responses to Questions on Notice

Standing Committee on Law and Justice

Mining Amendment (Compensation for cancellation of exploration Licence) Bill 2019

1. Question 1: Transcript Page 5

NuCoal was asked whether it would agree that in 2006, a subsidiary of BHP paid \$100 million for access to a mining licence at Carooona?

1.1 **Short answer:** At the time of the Committee hearing, NuCoal was not aware of the details of the transaction involving the grant of the Carooona mining licence to BHP's subsidiary, other than that the price paid was approximately \$100 million. NuCoal has since consulted public records which confirm that Coal Mines Australia Limited, a wholly-owned subsidiary of BHP Billiton Limited paid approximately \$100 million in 2006 for Exploration Licence 6505 (**Carooona EL** or **EL 6505**) at Carooona. This amount comprised: an additional financial amount (**Additional Contribution** or **AC**) of \$93 million¹, and a *Minimum Contribution to the Coal Development Fund* (**MC**) of \$7 million, to reimburse the State for previous monies expended on the area.

1.2 *Additional information*

Question 1 arose during a discussion about the prices paid to the NSW Government for exploration licences at, amongst other sites, Carooona and Doyles Creek (**DC**). This following section considers the major differences between the Carooona and DC areas which explains why they should be distinguished.

The comparative information below also illustrates that the price paid for the Doyles Creek Exploration Licence 7270 (**EL 7270**) was not remarkable and was, in fact, competitive when compared with other deals contemporaneously accepted by the NSW Government for comparable exploration licences, including grants which resulted from a competitive tender process.

1.3 *Pricing of exploration licences*

The price paid for an exploration licence typically comprises:

- A Minimum Contribution to the Coal Development Fund (**MC**), which includes an amount paid to the Government to reflect the public monies previously spent on the project;
- An Additional Contribution (**AC**) amount, which is paid upfront and is set by the Government based on its policy view of many factors at the time of the grant including the offers received from the applicants; and
- Further commitments which are deferred. These include a proscribed payment based on the size of any subsequent project development and whether it is open cut or underground and may also include further arrangements agreed between the Government and the grantee. For example, in the case of DCM, the company offered to establish a training mine, contribute to a community development fund and make further payments to local organisations².

Given the existence of further commitments as explained above, the sum of the MC and AC, which is the upfront price paid to Government for an exploration

¹ O'Connor Marsden Report, 23 August 2010. This report is still publicly available on the internet via → http://www.dpi.nsw.gov.au/data/assets/pdf_file/0006/354651/Probity-review-doyles-creek-mining.pdf

² DCM Submission to the Department dated 18 March 2008, p 37, Section 9 – Community Trust Fund

licence, cannot be regarded as the “value” of an exploration licence. This issue is addressed further in question 3 below.

1.4 *Comparative exploration licences*

- 1.4.1 The Caroonia EL was awarded to BHP in 2006 when coal prices were robust and the industry was optimistic about future prospects. The current bias against thermal coal in particular was not a significant consideration at the time.
- 1.4.2 The Caroonia EL area was very extensive at 350 square kilometers. The Caroonia EL included 3 target exploration areas which contained a coal deposit meeting the requirements of the JORC code with an estimate coal resource size of 1 billion tonnes³. The estimate was based on an extensive set of exploration data and analyses from 56 boreholes⁴, which had been commissioned earlier by the State of NSW.
- 1.4.3 At the time of the grant of EL 6505 in 2006 - in an upbeat economic climate - BHP had certainty that there was a very large, already explored and established, coal resource at Caroonia. This meant that the mine was a relatively low risk proposition, in view of the Government’s previous exploration expenditure and the fact that any development would be a purely commercial proposition.
- 1.4.4 By comparison, EL 7270 (the **Doyles Creek EL**) was much smaller in size at 27 square kilometers (8% of the total size of the Caroonia EL area) and the available data was limited to only 3 boreholes. The area at Doyles Creek also did not have a resource estimate which met the requirements of the JORC Code at the time of the licence application.
- 1.4.5 The economic climate in late 2008 was also different, as the industry was feeling the effects of the global financial crisis. Accordingly, the prospect of developing a viable mine at Doyles Creek carried a much higher risk.
- 1.4.6 The table below extracts the information from an “Expressions of Interest” process carried out by the NSW Government in 2008⁵. The process opened in August 2008 and was slated to close in November 2008. The process was ultimately extended to early 2009 and recommendations were made by the Department of Mineral Resources in June 2009. Doyles Creek and Caroonia were not part of the EOI process, but they have been added to the Table below for comparative purposes.

³ O’Connor Marsden Report, p 4

⁴ New South Wales Department of Primary Industries, “Summary of Expressions of Interest – Caroonia Tender Package”.

⁵ NSW Department of Industries, “Coal Release areas – Expressions of Interest Information” January 2009 pages 5 and 10; NSW Department of Industries, “Coal Release areas – Evaluation of Expressions of Interest” June 2009, see pages 15- 26

Area	Number of Drill Holes	Estimated Resource, Mt	Open cut / Underground	Minimum Contribution (MC), \$k (includes all required refund of public monies)	Additional Contribution (AC), \$k	Was AC the highest bid?	Other incentives for Government
Goonbri	14	10	OC	250	2,125	Y	Nil
Vickery South	10	50-70	One third OC	250	250	Y	Nil
Yarrawa	21	85	OC and UG	150	2,000	Y	Nil
Spur Hill	39	80	OC and UG	1,500	0	Not stated	<ul style="list-style-type: none"> - Community Trust and Scholarship scheme for local students. - Committed to negotiating an additional payment upon grant of mining lease and DA for OC and UG mining.
Glendonbrook	12	50	OC	300	0	Not stated	
Mt Penny	22	Large (>100)	Mainly OC	1,000	0	Not stated	
Long Mountain	0	10	UG	100	300	Y	- Community Consultation program
Ilford	19	92	OC and UG	250	750	N	<ul style="list-style-type: none"> - Land acquisition program of \$5 million - Community Liaison program
Cameron Road	11	26	OC and UG	250	250	N	- Consideration of a Community Liaison Program
Melrose	12	35	OC and UG	150	100	N	- Community Liaison Program
Ben Bullen	27	15	UG	300	150	Y	- Community Liaison Program
Doyles Creek	3	0	UG	1,106 ⁶	1,000 ⁷	N/A	<ul style="list-style-type: none"> - Establishment of a training mine (estimated cost of \$30m). - Establishment of a community trust fund to benefit community initiatives such as clubs, schools and public amenities. Payments to be made by Doyles Creek at a rate of 5% of the preceding financial year's net profit after tax. The trust was expected to received approx. \$50 million over the life of the mine for distribution.
Caroona	55	Very Large (1,000)	OC	7,000	93,000	Y	Nothing known.

⁶ NuCoal Prospectus – page 62, section 6

⁷ NuCoal Prospectus – page 62, section 6

- 1.4.7 Leaving aside Caroona, which is demonstrably an outlier in the table, and looking at the remaining 12 areas:
- the Doyles Creek MC was the second highest;
 - the Doyles Creek AC was the third highest; and
 - Doyles Creek offered significant other incentives to the Government.
- 1.4.8 In comparison to Spur Hill, which was arguably the most analogous area to Doyles Creek:
- The Doyles Creek MC was lower than Spur Hill but there were 39 drill holes at Spur Hill compared to 3 at Doyles Creek;
 - The Doyles Creek AC was significant whereas Spur Hill offered nil; and
 - Doyles Creek offered significant other incentives.
- 1.4.9 As a general comment, open cut mines are larger and lower cost to develop than underground mines.
- 1.4.10 The above table illustrates that the price paid by DCM was certainly not an anomaly and reflected the risk of the proposal in view of the lack of reliable exploration data available at the time of the grant.
- 1.4.11 For completeness, it is noted that in August 2016, BHP agreed with the NSW Government that it would accept a payment of \$220 m and would cease progression of the Caroona Coal Project by agreeing to the cancellation of Exploration Licence 6505. BHP acknowledged the Government's willingness to agree an acceptable financial outcome for the cancellation of the EL. The \$220 m payment reimbursed BHP for its upfront payment (MC + AC) and for what BHP had paid for work carried out while the EL was in force.
- 1.4.12 In comparison, when the Doyles Creek EL was cancelled pursuant to the Mining Amendment Act, only the MC was reimbursed. There was no compensation payment made for the AC or the work done during the tenure of the EL.
- 1.4.13 The Caroona mine is therefore a relevant precedent of compensation being paid upon the cancellation of an exploration licence.
- 1.4.14 The proposed Compensation Bill provides a mechanism by which NuCoal's shareholders who have suffered financial loss as a result of the cancellation of EL 7270 can have their claims heard and assessed.

2 Question 2: Transcript Pages 10-11

NuCoal was asked about other examples of licences granted through direct allocation. NuCoal was also asked to address the concerns raised by Clayton Utz in its report:

- 2.1 ***Short answer:*** There are numerous examples of licences granted through direct allocation, the details of which are noted below. The concerns raised in the Clayton Utz report – namely about the Minister – were dealt with by Independent Commission Against Corruption (ICAC). ICAC made no findings of improper conduct in respect of NuCoal or its shareholders.
- 2.2 *Licences granted through direct allocation*
- 2.2.1 At the Committee hearing, Mr Lewis referred to a “probity report” prepared by O’Connor Marsden in 2010 at the request of the Department of Premier and Cabinet.

- 2.2.2 Appendix B in the O'Connor Marsden Report lists a selection of direct licence allocations for coal mines in NSW since 1988. There are 38 examples in this list, at least 9 of which relate to a direct approach for an exploration licence to develop a new mine. The grant of EL 7270 by direct allocation was therefore not unusual. Further, at the time of acquiring DCM, NuCoal engaged leading commercial lawyers, Price Sierakowski, to undertake due diligence, the results of which confirmed that the EL appeared to have been validly granted.
- 2.2.3 The O'Connor Marsden Report concludes that in granting EL 7270, the minister was acting within the powers granted to him under the legislation⁸.
- 2.2.4 This report is still on the NSW Government's relevant website⁹.
- 2.2.5 NuCoal raised funds following the publication of this report and spent the funds undertaking the tasks set out as conditions of EL 7270.
- 2.2.6 Direct allocations by the NSW Government are not an anomaly. At the hearing of the case of *R v Macdonald; R v Maitland* [2015] NSWSC 1704, witness testimony given on behalf of the Department of Primary Industries¹⁰ confirmed that the number of direct allocations by the NSW Government between 1997 and 4 November 2014 was 108. Of these, 79 were within a gazetted minerals allocation area, 24 were not within a minerals allocation area and 5 were for titles which no longer exist.

2.3 Clayton Utz Report

- 2.3.1 After the change in Government at the 2011 election, Clayton Utz was engaged by the Department of Primary Industries to "*investigate the efficacy and decision making process in respect of the allocation of the Doyles Creek EL*". A copy of the report by Clayton Utz, entitled 'Review of Doyles Creek Exploration Licence Allocation Process: Preliminary Report' dated 4 November 2011, is provided. The primary concern raised by the Clayton Utz Report is that the Minister did not follow the Guidelines for Allocation of Future Coal Exploration Areas (March 2006, updated January 2008) or the recommendations and advice of his department in granting EL 7270. This concern was subsequently referred by both Houses of Parliament to the NSW Independent Commission Against Corruption on 23 November 2011, and the inquiry known as Operation Acacia was undertaken.
- 2.3.2 The ICAC published its findings in respect of Operation Acacia in a report dated August 2013 and a supplementary report dated December 2013. ICAC's findings are addressed at paragraphs 1.2.13 to 1.2.15 of NuCoal's written submission to this Committee. Importantly, ICAC did not make any findings in respect of improper conduct on behalf of NuCoal or its shareholders.
- 2.3.3 The concerns expressed in the Clayton Utz Report should therefore be viewed in their proper context, namely as preceding the detailed examination undertaken by ICAC.

⁸ O'Connor Marsden Report, pages 3 and 5

⁹ http://www.dpi.nsw.gov.au/data/assets/pdf_file/0006/354651/Probity-review-doyles-creek-mining.pdf

¹⁰ Transcript of hearing in NSW Supreme Court proceedings 2015/00059940 and 2015/00059990 dated 15 February 2017, at T692.33-38.

3 Question 3: Transcript Pages 8-10

How did EL 7270 go from \$2.04 million (the price paid by DCM) to a valuation of \$95 million in approximately 8 months?)

- 3.1 **Short answer:** The higher valuation of EL 7270 obtained in 2009 was the result of DCM undertaking significant work between 2008 and 2009 to: obtain the geological data to verify the viability of a coal extraction program; develop mine layouts; and obtain the necessary resource classification which indicated an inferred coal resource of approximately 247 million tonnes. This work, even without further drilling activity, permitted the use of more sophisticated valuation techniques, including a valuation method based on a price per tonne estimate, which enabled a more meaningful assessment of the value of the deposits on EL 7270. These factors are described in further detail below.
- 3.2 The “upfront price paid” for EL 7270 by DCM was \$2.106 million (not \$2.04 million as estimated during the hearing). This amount consisted of several components:
- (a) An MC amount of \$1.106 million cash payable to the NSW Government for historical exploration spending by the State; and
 - (b) An AC amount of \$1 million cash payable to the University of Newcastle via annual payments of \$250,000 AUD for the period of the licence, being 4 years. This payment was a funding contribution towards the NSW Institute for Carbon Sequestration at the University of Newcastle¹¹.

In addition, there was a commitment from DCM to establish a training mine if a project was developed at the Doyles Creek site, at an estimated cost of \$30m, and a commitment to establish a community trust fund whereby DCM would contribute, at a proposed rate of 5% of the preceding financial year’s net profit after tax, to directly benefit various community initiatives. The development of a training mine was made a specific condition of EL 7270.

Further there was the standard agreement to pay an amount per tonne of coal extracted¹².

- 3.3 As explained above, given the existence of further commitments, the sum of the MC and AC, which is the upfront price paid to the Government for an exploration licence, is not and cannot properly be regarded as the “value” of the exploration licence. To the best of NuCoal’s knowledge, the Government does not undertake a formal commercial “valuation” of exploration licences before they are granted.
- 3.4 In his evidence, Mr Lewis referred to a report which explained the increase in the valuation of EL 7270 between December 2008 and late 2009. There are two relevant independent reports, both of which were prepared by Palaris and are enclosed:
- (a) a valuation undertaken retrospectively in 2018 against the VALMIN Code (2005) to give, using only the data available to the Department at the time, an estimate of the value of EL 7270 as at 1 July 2008 (**2008 VR**)¹³; and
 - (b) an explanation of the differences between the 2009 VR and the 2008 VR (**Value Outcomes Briefing Note**)¹⁴.
- 3.5 Definition D43 of the VALMIN Code refers to the value of a mineral asset as ““the amount of money (or the cash equivalent of some other consideration) for which

¹¹ NuCoal Prospectus – page 62, section 6

¹² O’Connor Marsden Report, p 4.

¹³ Palaris 2008 Valuation Report prepared by Palaris Mining Pty Ltd.

¹⁴ Value Outcomes Briefing Note Report prepared by Palaris Australia Pty Ltd.

the Mineral or Petroleum Asset should change hands on the Valuation Date in an open and unrestricted market between a willing buyer and a willing seller in an “arm’s length” transaction, with each party acting knowledgeably, prudently and without compulsion.”¹⁵

- 3.6 The 2008 VR gives a range of between A\$0.9 million and A\$2.9 million AUD, with a preferred valuation of A\$1.9 million AUD. The 2008 VR was based on the following factors as at the valuation date of 1 July 2008:
- (a) The Doyles Creek area was at an early exploration status. It was a largely untested area that, aside from the eastern edge near Jerrys Plains, had not been located within historical exploration tenements. The area had sparse distribution of exploration boreholes;
 - (b) Underground mining potential was viewed as low by Bayswater Colliery and the Department of Mineral Resources¹⁶ (as it was then known) in light of the depth of cover, structural complexity and volcanic intrusions. Exploration data at Doyles Creek was limited to three drill intersections within the tenement area (JP12, DC6 and W9A). Five additional data points were near to, but not within, the tenement (JP3, D12, DC7, ABB16 and ABB19). Some of these intersected relevant seams and they showed intrusions and stratigraphic markers;
 - (c) There were no comprehensive geological reports on the area, and no resource estimates available that met the requirements of the JORC Code (2004). Geological and geotechnical risks were assessed as being moderate or high because the lack of exploration data provided a low level of geologic confidence; and
 - (d) The lack of exploration and other data meant that there were limited methods which could be applied to produce a valuation. The Geoscientific Rating method was considered to be the most appropriate in the circumstances.
- 3.7 In late 2009, ahead of the float of NuCoal which was scheduled for early 2010, Palaris was engaged to prepare an independent valuation report for EL 7270 (**2009 VR**)¹⁷ as at 1 November 2009. The 2009 VR valued EL 7270 between A\$74 million and A\$124 million AUD, with a preferred valuation of \$99 million AUD. A copy of the 2009 VR is enclosed.
- 3.8 The 2009 VR was informed by the information available at the time of the grant and by the extra work undertaken by DCM over the 12-month period following the grant of EL 7270, including:
- (a) sourcing and interpretation of additional geological data;
 - (b) calculation/generation of a JORC resource;
 - (c) preparation of potential mine layouts, including consideration of access, seam thickness, stratigraphy, faults, folds, igneous intrusions, step outs from boundaries, surface features that couldn’t be undermined, likely dilution and wash plant yield; and
 - (d) preparation of Discounted Cash Flow financial model valuations.

¹⁵ Palaris 2008 Valuation Report, page 30

¹⁶ The Department of Mineral Resources is now known as The Department of Resources and Geosciences.

¹⁷ Palaris 2009 Valuation Report prepared by Palaris Australia Pty Ltd.

- 3.9 The main factors which explain the difference in the valuation from 1 July 2008 to 1 November 2009 are:
- (a) The underground mining potential in the Doyles Creek area was reinvestigated by DCM which resulted in the ability to prepare a JORC resource;
 - (b) Having a JORC resource classification was significant because it permitted different valuation techniques to be adopted and signified to potential investors that there was a chance that coal resources could be delineated in mineable blocks; and
 - (c) Application of the Yardstick valuation method, which is based on transaction multiples of recent similar coal transactions, resulted in a materially higher valuation estimate than previous estimates.
 - (d) The existence of the JORC resource and supporting data also enabled preparation of a high-level discounted cash flow (**DCF**) model based on conceptual longwall mine plans provided by DCM. The DCF method valuation supported the Yardstick method.

4 Question 4: Transcript Page 11

Was DCM's submission to the Minister untrue when it stated that "Doyles Creek Mining Pty Ltd ... had sufficient resources to undertake the development of an underground training mine"

- 4.1 **Short answer:** NuCoal is not aware of DCM's intention when it prepared the submission to the Minister. However, as set out in further detail below, based on the information available to NuCoal, there is no reason to doubt the truth of DCM's statement that it had sufficient financial resources to undertake the development.
- 4.2 In Part 2 of the submission provided by DCM to the Department on 18 March 2008 (**Submission**), it was stated that the company was *"a vehicle with sufficient financial resources to undertake the development of an underground training mine as the primary focus of its objectives... The Doyles Creek Training Mine Facility can be differentiated from previous concepts as the coal mine is projected to generate sufficient financial returns to support the training mine operation on a long-term self-sustaining basis"*.
- 4.3 In Part 7 of the Submission, DCM included 6 paragraphs under the heading 'Project Funding' which discussed the ways in which the project would be funded, initially and into the future.
- 4.4 DCM's statements regarding its ability to finance the project should however be read in context, as NuCoal believes they were read by the Department. In particular, NuCoal considers that DCM's statements were not intended to convey that the company had hundreds of millions of dollars at its disposal at the time it made the Submission, but self-evidently that was not the case and it was never taken to be the case by the reader (the NSW Government).
- 4.5 With its experience and specialised knowledge regarding the mining industry, the Department would have been familiar with the usual approach to funding mining projects. In this regard, it is well-known that mining projects progress through stages and the financial resources required for each of these stages varies significantly. Usually, a mining project will involve the following stages:
- Initial evaluation which is funded by entrepreneurs and investors who accept the attendant risk. Funding requirement is low at 1-2% of full project development cost (in the case of DC <\$5m);

- Detailed exploration, proof of concept and feasibility studies – funded by investors looking towards an actual mine development. Funding requirement is between 10 and 15% of full mine development (\$30-50m); and
 - Project development – funded by mixture of equity and debt, including joint venturers and offtakers. Funding requirement is high (\$500m).
- 4.6 The proper reading of the quoted statement by DCM should be - and was - taken by the Government in context. DCM actually was a vehicle with sufficient financial resources to undertake the development, which in context meant to progress through the above steps. DCM undertook the first step and was fully funded throughout this step. The shareholders of DCM personally had, or believed they could readily get, the funds to back their statement. The existence of NuCoal actually proves that the DC Project progressed to the second of the above project development steps.
- 4.7 At the time of the grant of EL 7270, the NSW Government laid out the strict conditions of the EL. These meant that if it turned out that DCM could not progress to the second step of the project, then the Government would be entitled to reclaim the EL, so there never was - and never is - any downside for the Government if DCM had not been able to raise the funds to progress to the second stage.
- 4.8 At the time when the EL was cancelled NuCoal had progressed the project through the second stage of development as set out in 4.6 above and was entering the third stage. Detailed feasibility studies were already completed. The NSW Government had issued the Development Guidelines for the project. A joint venture had been arranged with Mitsui Matsushima which was to provide \$40m cash for 10% of the project.

5 Question 5: Transcript Pages 11-12

Whether DCM's submission to the Minister was untrue when it said that the primary focus of the company was the development of an underground training mine? In addition, when NuCoal prepared its prospectus, did it say its primary goal was an underground training mine?

The two questions raised above relate to two very different points in time and documents which were produced for different purposes.

5.1 *DCM Submission*

5.1.1 It was suggested in the Committee's line of questioning that DCM was "committing a fraud" on NSW by proposing that the primary focus of its business was the development of an underground training mine as opposed to the operation of a commercial mining operation (see Transcript page 12). That contention is not correct.

5.1.2 The Submission to the Department, dated March 2008, includes numerous references to support DCM's position regarding an operational mine funding a training mine:

(a) Section 1 'Executive Summary states:

*"This submission by Doyles Creek Mining Pty Ltd (...) seeks approval to be granted the Exploration Licence (Doyles Creek ELA) in order to construct a Training Mine Facility in the Hunter Valley of New South Wales, **concurrent with the development of a sustainable underground coal mine** [emphasis added] to provide practical and theoretical mining and OH&S experience and expertise."*

- (b) Section 4 'Mining Operation' – sub heading Development Capital Requirements states:

“Initial capital required to develop the Doyles Creek underground mine and ancillary facilities is estimated at \$209 million including a longwall system.

An additional \$7 million has been budgeted for the construction of the Doyles Creek Training Facility”.

- (c) This point is further clarified in Part 12 under the heading 'Financial Overview' where it states:

“The Training Mine Facility has been forecast as cost neutral and has been incorporated into the financial model. Training Mine Facility costs have been included with training revenues offset as the Facility has been treated as a separate cost centre”.

- 5.1.3 This specific matter was considered and rejected by Stevenson J in *Poole v Chubb*¹⁸ following a detailed review of the relevant primary documents. The Court rejected the argument that the DCM Submission was misleading in respect of its statements regarding the training mine aspect of the Doyles Creek Project.

- 5.1.4 The Court accepted Mr Poole's argument at [574], that:

"It is perfectly legitimate for more detail on the training facility to have been provided to the Minister and the [Department], who were being asked to grant the [Exploration Licence] by way of direct allocation on the basis of DCM building the training mine, and less detail to have been provided on this aspect to potential investors who presumably, for the most part, would be persuaded to invest not for altruistic reasons but in the expectation that they would see a return on their investment based on the proposal's commercial success."

- 5.1.5 The Court also found that the Department itself found that the amount of coal to be “removed from the mine” dwarfed that which would be extracted from the “training panel” and that the proposal was “actually for a major mining operation”. The Court found that if it was DCM's objective to persuade the Department that the proposal was no more than a training mine, “the Department was not fooled for a moment”.¹⁹

- 5.1.6 In relation to the “cost neutral” aspect of the training mine, the statements from DCM's submission indicate that DCM had concluded that the training mine aspect would be “cost neutral” and included financial figures and estimates to verify this matter. The Government was never in any doubt that the training mine would be funded by the operation of a commercial mine. The Government was certainly not misled in this matter.

- 5.1.7 Indeed, in *Poole v Chubb*,²⁰ Stevenson J at [576] considered the specific “cost neutral” aspect of the DCM Submission. His Honour accepted Mr Poole's evidence in cross-examination that he had discussed with Mr Chester the financial analysis of the costs of the training facility which were included in the DCM Submission. Stevenson J found no reason to question Mr Poole's evidence on this issue and ultimately his Honour did not accept the argument that the “cost neutral” aspect of DCM's Submission was misleading. In this way, the Court's finding supports the conclusion that

¹⁸ *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832.

¹⁹ *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832 at [334]-[335].

²⁰ *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832.

DCM had not misrepresented the facts when it stated that it had sufficient financial resources to undertake the development of the training mine.

5.2 NuCoal's Prospectus and statements regarding the purpose of the company

5.2.1 We note the following statements from the NuCoal Prospectus:

- (a) On page 22 of the NuCoal Prospectus, under the heading "Business Plan":

"The Company's business plan is ultimately to develop a mining operation to produce a coal product suitable for export through the Newcastle Coal Terminal. It is envisaged the coal will be extracted through Longwall mining methods. Prior to any commitment to mine, the Company will first utilise the funds raised from the Public Offer to continue with further drilling, resource definition and metallurgical studies and initiate a pre-feasibility study on the project."

- (b) the training mine was referenced - also on page 22 of the NuCoal Prospectus:

"An extension to the Doyles Creek project is the proposed establishment of a specialised coal centric training facility run in parallel with the proposed mine. The ultimate outcome is for attendees, both new entrant and existing black coal workers, to qualify up to certificate level 4 under the accreditation of the Coal Training Package MNC04, endorsed by the National Training Quality Council of Australia. The on-site training facility will broaden the educational experience by providing attendees with both theoretical and practical mining experience. The site will encompass best practice training rooms and workshop facilities in addition to accommodation and associated amenities. No other facility currently exists in Australia whereby the actual training facility is situated within an operating mine.

The ultimate value of the training mine is expected to be realised in both the additional revenue stream for the Company and in the securing of skilled labour for use at the Doyles Creek Project."

- 5.2.2 These express statements demonstrate that NuCoal's investors were appropriately informed in respect of the objectives of the company. In addition to the company's objective of developing a coal mining operation, the development of a training mine was clearly an integral aspect of NuCoal's business plan.

- 5.2.3 The training mine was a primary focus of NuCoal's objectives, and an actual training facility had been established at Doyles Creek on land owned by NuCoal. Training had been undertaken by the time the EL was cancelled – which was a long way in front of what was needed under the EL conditions and which clearly demonstrated that NuCoal was complying with the EL conditions in spirit and in fact. NuCoal had been audited several times concerning compliance with EL conditions and always passed with flying colours.

6 Question 6: Transcript Pages 12-13

A question was directed to Mr Lewis regarding Mr Chester's evidence before ICAC in April 2013, including whether he stated that he and others knew that the granting of an exploration licence would add something in the order of \$100 million to the value of the company

- 6.1 **Short answer.** As explained below, Mr Chester's evidence before ICAC on 12 April 2013 was not to the effect that he knew that the granting of an exploration licence would add approximately \$100 million to the value of the company.
- 6.2 In his evidence before ICAC in April 2013, Mr Chester explained that:
- (a) Part of his professional experience was in estimating potential market values of a company's assets such as mining licences or exploration licences (ICAC Transcript of 12 April, 6282T.35-36).
 - (b) Prior to the grant of EL 7270, he understood generally from his experience in the mining industry that the acquisition of an exploration licence would add significant value to the company that gained the licence (ICAC Transcript of 12 April, 6282T.12-35).
 - (c) Following the grant of the licence, in around December 2008, he had a discussion with Mr Ransley about the estimated market value of exploration licences for coal in New South Wales. At this time, there were already estimated figures attributed to the market value of EL 7270. He did not recall who created those figures. However, he stated that he received certain estimated figures that "*might have been \$100 million or something of that nature*" (ICAC Transcript of 12 April, 6282T.37-6283T.18).
 - (d) Mr Chester explained that those figures were, to him, "*pie in the sky numbers*" because of the fact that "*there was no JORC resource at that point in time and I always work on the basis that there needs to be a JORC resource for a project to have a substantiated value*" (ICAC Transcript of 12 April, 62823T.14-17).
 - (e) Mr Chester also stated that the figure might have been calculated "*on the basis of JORC-compliance resources which wasn't the case at Doyles Creek because there were only five or six holes drilled at the time*" (ICAC Transcript of 12 April, 62825T.36-42).
 - (f) In relation to the method adopted to calculate the value of the licence, Mr Chester stated that he was not sure that the "*dollar per tonne*" method was used to reach the \$100 million figure. This was because any calculation reached on that basis "*would have been conditional upon the fact that there would have been JORC resources*", as "*those sorts of numbers don't apply to areas where there's only five or six holes*" or where resources are not "*JORC compliant*". Mr Chester's evidence was that there was "*no JORC compliant reserve in 2007 or 2008*" (ICAC Transcript of 12 April, 6286T.20-35).
- 6.3 As noted above in the response to Question 3, prior to the grant of EL 7270 and the further geological studies done at Doyles Creek, the lack of exploration and other data meant that the resource was not JORC compliant – so as previously explained there were limited valuation methods which could be applied to produce a valuation. Mr Chester's evidence before ICAC, as set out above, supports this position.

7 Question 7: Transcript Page 18

A question was directed to Mr Galt in relation to the letter sent by the US Trade Representative to DFAT and whether a copy could be supplied to the Committee as a question on notice

- 7.1 NuCoal understands that a copy of the letter from the US trade representative, Ambassador Lighthizer, addressed to the Department of Foreign Affairs and Trade, has been provided to the Chairman of the Committee.

8 Concluding Comments

- 8.1 The Compensation Bill provides for the appointment of an independent arbitrator to assess and determine claims for compensation. This is an appropriate, fair and open mechanism to address the concerns of shareholders who have suffered economic loss as a result of the cancellation of EL 7270.
- 8.2 The above responses and much of NuCoal's evidence given at the hearing on 9 August 2019, relate to various historical matters which have been the subject of many years of detailed inquiries, in various forums and courts. Throughout those processes, there has never been any finding made to the effect that the "mum and dad" and other shareholders of NuCoal had knowledge of or involvement in, any so-called improper conduct surrounding the grant of EL 7270 by the then Minister.
- 8.3 The questions and responses above do not bear upon the efficacy of the Compensation Bill and the need to provide an arrangement in which persons who were detrimentally affected by the cancellation of EL 7270 are afforded procedural fairness in respect of their claims for compensation. Such a process is consistent with the original recommendations of the ICAC, that consideration be given to "a power to compensate any innocent person affected by the expunging" of EL 7270.
- 8.4 NuCoal, on behalf of its shareholders, welcomes and wholly supports the enactment of the Compensation Bill to provide fairness and justice to NuCoal's shareholders.

Attachment B – List of Supporting Documents

The following source documents are provided via a separate file:

	Title of Document	Date
1.	Probity Review: Granting of an Exploration Licence to Doyles Creek Mining Pty Ltd, prepared by O'Connor Marsden & Associates Pty Ltd	23 August 2010
2.	New South Wales Department of Primary Industries, "Summary of Expressions of Interest – Caroono Tender Package"	2016
3.	NSW Department of Industries, "Coal Release areas – Expressions of Interest Information"	January 2009
4.	NSW Department of Industries, "Coal Release areas – Evaluation of Expressions of Interest"	June 2009
5.	Review of Doyles Creek Exploration Licence Allocation Process: Preliminary Report, prepared by Clayton Utz	4 November 2011
6.	Prospectus for Supersorb Environmental NL ACN 060 352 990, to be renamed NuCoal Resources NL	2 September 2009
7.	EL 7270 Valmin Code Valuation Report prepared by Palaris Australia Pty Ltd	November 2009
8.	EL 7270 Valmin Code Valuation Report prepared by Palaris Australia Pty Ltd	July 2018
9.	EL 7270 Valuation Outcomes Briefing Note Report prepared by Palaris Australia Pty Ltd	July 2018
10.	Poole v Chubb Insurance Company of Australia Ltd [2014] NSWSC 1832	19 December 2014