Submission No 31

INQUIRY INTO LEASING OF ELECTRICITY INFRASTRUCTURE

Organisation: NuCoal Resources Ltd

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The Director
Select Committee on the Leasing of Electricity Infrastructure
Parliament House
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Sydney NSW 2000

Submission to the Select Committee on the Leasing of Electricity Infrastructure

I am writing to you on behalf of NuCoal Resources Ltd (**NuCoal**), an ASX listed Company with over 3400 shareholders, to highlight significant sovereign risk matters that should be considered during any transaction to lease the NSW Electricity Infrastructure.

Key issues

Australia is considered by foreign investors to be a safe haven for foreign investment. It has not suffered civil unrest, crippling inflation or despotic rule (and the usual attendant instability in central banks' decision-making); all circumstances that frequently give rise to sovereign risk concerns in other countries.

What foreign investors don't know – but should – is that a long-standing practice and assumption of constitutional law in this country gives rise to an equivalently dire risk to their monies. Under the Commonwealth Constitution, the Australian Government may only expropriate property on "just terms" (s 51(xxxi)). For the Australian States, however, there are no constitutional prohibitions or limitations on expropriation at all. It is predominantly the purview of the States to own land, grant leases, administer mining rights and commission infrastructure projects. As such, foreign investment is subject to the whims of the States and, in particular, changes of government. Investors in any project that is subject to state government approval, administration or legislation could find their assets impaired or wholly expropriated (with no compensation).

Evidence / Case Studies

By way of background, NuCoal's 100% owned subsidiary Doyles Creek Mining Pty Ltd (**DCM**) had legal tenure over EL 7270, which was one of a number of exploration licences cancelled in early 2014 pursuant to the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014 (the **Act**). The Act was passed by the NSW Parliament following a hearing by the NSW

Independent Commission Against Corruption (**ICAC**) into the circumstances of the awarding of certain licences. In essence, ICAC found that the process leading up to and including the giving of consent for the application for, and grant of, the Licence was tainted with corruption.

The corruption findings related to a period between 2007-2008, long before NuCoal purchased DCM in 2010. Neither NuCoal, or any of its Directors, were found to be guilty of anything by ICAC – in fact it has been widely acknowledged publicly that NuCoal is an innocent party.

The specific law cancelled the licence, denied compensation, indemnified the state of NSW against any attempt to sue it and indemnified the state of any responsibility for the alleged corrupt actions of the Minister. In addition, the law allowed the NSW Government to take, without compensation, all of NuCoal's exploration data generated during the 4 years of exploration which cost NuCoal in excess of $25 million. In drafting the law, the NSW Government ignored one of the recommendations of the ICAC, that it should consider compensation to innocent parties.

Since the law was passed, NuCoal has been pursuing legal options to get some justice for its shareholders, and one of these is via the Free Trade Agreement (**FTA**) between Australia and the USA. Approximately 30% of NuCoal's shareholders are US registered shareholders and any successful claim would result in well over $100 million.

NuCoal also recently took the NSW Government to the High Court of Australia to have the specific law deemed invalid. In submissions, the Federal Government and all states except Tasmania, argued strongly that the status quo regarding the ability of the states to basically do what they want in terms of expropriation should remain as it is now**. In other words none of them wanted any strings put on their unfettered ability to expropriate without compensation.** The case was awarded in favour of the States, which highlights the significant sovereign risk issues outlined in this submission.

As a result of our representations to the US Government, in pursuit of a right to take the Australian Government to the International Court of Arbitration, some International Investors now know that expropriation without compensation can happen in Australia – and it already has.

As further evidence, the Victorian Government recently cancelled contracts for the construction of the multi-billion dollar East West link infrastructure project. It could use special law to bypass the majority of contractually agreed compensation rights; presumably to at least some of its global investors and financiers.

Finally, prior to the election, The NSW Opposition Labor Party threatened to cancel the $800 million coal mine project at Wyong NSW in which investors – including the South Korean company Kores – have already spent $110 million.

Legal action by NuCoal will continue into the foreseeable future and reporting of the matters will carry on within National and International media outlets, making this issue material during any planned sale of the Electricity Assets.

Summary / Recommendation

If the NSW Government wishes to sell off a major infrastructure project to foreign investors they **must disclose** to all potential Investors that they could lose their investment, or be unfairly treated (particularly upon an election being called). This may happen in the event that the Government changes power or the Government of the day finds it politically expedient to implement law for whatever reason it determines, as recent examples have clearly demonstrated.

We would be happy to provide any further information or documentation on this significant issue.

Yours faithfully

Glen Lewis
Managing Director