Submission No 16

INQUIRY INTO MINING AMENDMENT (COMPENSATION FOR CANCELLATION OF EXPLORATION LICENCE) BILL 2019

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Law & Justice Standing Committee
c/o – NSW Legislative Council
52 Martin Place
Sydney NSW 2000

By e-mail: law@parliament.nsw.gov.au

Dear Committee Members,

I am writing to you as a shareholder in NuCoal Resources Limited in support of the *Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019* (the **Compensation Bill**).

I have been associated with EL 7270 (**Licence**) since September 2008, 1 month after the then Minister issued a letter of invitation to Doyles Creek Mining Pty Ltd (**DCM**) to apply for an Exploration Licence over the proposed area. Therefore, I was not involved in any of the preceding discussions with Government regarding the application, but subsequently became acutely aware of all the details surrounding the granting of the Licence and all associated ICAC and Court actions.

By way of background, I have worked in the NSW Coal Mining Industry for the past 40 years, commencing as an Apprentice Electrician in 1980 and then working my way through all levels of Management including Mine Manager, General Manager and Managing Director. I was employed by DCM in early 2009 as the Manager for the development of the project and became a Director of DCM in June 2009 and then the Managing Director of NuCoal Resources Ltd (**NCR**) from February 2010, when the Company listed on the Australian Securities Exchange (**ASX**). As a result, I was involved in the entire ASX listing process, all investor presentations from 2010 to 2015 and was the primary public spokesperson for the Company in any media inquiries. I also participated in Operation Acacia as a witness.

In addition to my role as the Managing Director of NCR, I have been a shareholder in the Company since it was listed on the ASX. My full time position was made redundant in 2015 as the Company took steps to reduce costs (as was the entire NCR workforce that I had to retrench). These cost cutting initiatives were a direct result of the introduction of the Mining Amendment Act 2014. I still remain involved with NCR in the capacity of Non-Executive Director, which brings my association with the Company to 11 years, five of which I have been fighting the injustice and denial of basic rights for innocent victims.

Assisted by the Board, I have been engaged in lobbying for justice on behalf of all shareholders for the past 5 years, including several trips to Washington DC to meet with US Government Officers, Senators and Congressmen and have an intimate knowledge of how the US Government view the seizure of privately owned assets by the NSW Government, without compensation.

I could write hundreds of pages about this fiasco, but based on my knowledge that NuCoal is submitting a detailed document on behalf of all shareholders, I intend to focus my submission on relevant facts that I think are extremely important to anyone wishing to understand the mess that has been created by a politically driven witch hunt. Ultimately, the ill-informed and rushed action of the Government in 2014 wiped hundreds of millions of dollars off an ASX listed entity, primarily owned by Australian mum and dad investors who are completely innocent of any wrongdoing on every level.

Briefly, the facts are:

NuCoal Acquired EL 7270 legally via an ASX Listing in 2010-

NuCoal purchased DCM for $94m during the ASX listing process in February 2010, with EL 7270 being the primary asset of DCM. As a result, NuCoal became the legal owner of EL 7270 and was responsible for compliance with all of the onerous conditions attached to the Licence, including exploration of the area. As with all ASX listings, NuCoal had to comply with the requirements of both ASIC and the ASX, including independent reviews of legal compliance, financial status and a technical evaluation of the proposed acquisition. At no stage, did any of the Independent reviews identify a potential issue with the way the Licence was originally granted to DCM in 2008.

Additionally, a detailed prospectus was prepared by NuCoal outlining the proposed acquisition which was reviewed by both ASIC and ASX prior to publication. As part of the prospectus, there was a section informing investors of potential risks with investing in NCR which were typical generic statements for similar investments and Contrary to ICAC's view, the risk section did not mention any potential risk based on the Licence being granted corruptly. Any sensible person reading the risks section within the prospectus could not form the same view that was taken by ICAC and would see there was no basis to suggest investors should have been aware of the potential issue - the facts simply do not support such a conclusion.

There was NO "Notorious" Controversy that would alert Investors to any issue with the Licence Grant in 2008-

ICAC formed a view that there was "notorious public controversy" surrounding the granting of the Licence which again, is not supported by the facts and has since been proven incorrect in Poole v Chubb [2014] NSWSC 1832 where the Hon Justice Stevenson found *"The Court was also not persuaded that Mr Poole knew, or that a reasonable person in his position could be expected to know, that there was "emerging public controversy."*

The predominant negative media surrounding the project was based in the Hunter Valley as a number of landholders living in proximity to EL 7270 were fighting against the project (similar to any other proposed mining project in NSW or Qld for the past 20 years), so to suggest that anyone living outside the small area of such media reporting should have been aware of the issue is absurd and extreme. Equally, any prospective shareholders living in the Hunter Valley were used to hearing negative comments about any proposed mining project, as activists and landholders have been trying to stop mining projects for many years, so this media activity would not have been seen by Hunter residents as anything more than "white noise".

In the December 2013 ICAC report regarding Operation Acacia (addressing outstanding questions), at page 16 there are several sentences mentioning me, relating to controversy and "ICAC" issues during the listing and subsequent investor presentations. To read this page in isolation from all the related transcript from both the private interview and public hearing, is problematic as it does not provide the reader with the necessary understanding of all the facts. Additionally, as with all past ICAC investigations until it was shaken up in 2017 to provide a fairer and more transparent operating methodology, it was very hard to explain anything to ICAC when on the stand and almost impossible to have my SC interject and assist me to further elaborate on the topic at the time (unlike a proper court).

Notwithstanding the above, **ICAC still recommended compensation for any innocent party should be considered and in subsequent court cases, stated the innocent party they referred to was NuCoal.**

At all times, NuCoal complied with the onerous Licence Conditions and spent considerable funds exploring the area-

The conditions associated with EL 7270 were very onerous and included developing a Training Mine as part of the underground mine development. NuCoal complied with all conditions and this was verified by several audits undertaken by the DPI over a number of years.

Although not required by the conditions prior to the underground mine being developed, NuCoal proved its commitment to the training aspect of the project by constructing a surface Training Facility on land owned within the exploration area and had plans with Singleton Council to construct stage 2 of a surface training facility prior to the mine development commencing. Stage 3 would then have been constructed underground once the project had approval from the NSW Government.

The above point is another fact that was completely lost by ICAC and some sections of the media, as the training mine concept was humiliated throughout Operation Acacia and reported as a "sham" by both ICAC and some media, because at the time of the investigation (2012/13), the Training Mine had not been built even though the EL was granted in 2008. **In reality, it is impossible to build an Underground Training Mine until a Mining Lease is granted and the actual underground workings are being developed,** so to suggest that it was a sham is simply incorrect and an insult to everyone that was involved with the proposal.

NuCoal found considerable resources on the Licence area as a result of detailed and costly exploration over several years-

Prior to NuCoal commencing exploration in 2009, there was minimal geological information available across the area, with only 4 historic boreholes providing any idea of potential coal seams.

As a direct result of NuCoal's significant investment using shareholder funds for several years, over 500 mt of quality coal was identified. This discovery would have supported a mine life in excess of 25 years, therefore contributing to employment in NSW and significant Government Royalties and taxes over the life of the project (approx. $2.6 billion to the State and Commonwealth via taxes and royalties in the first 25 years).

The O'Connor Marsden Probity Report in 2010 provided additional confidence to Investors-

On 23 August 2010, a probity report by O'Connor Marsden, commissioned by the NSW Government, confirmed the validity of EL 7270 and concluded that *"it would appear that the then Minister acted within the powers afforded to him under the legislation*". The report also clarified that the process for allocating the Licence was valid, finding "*a number of examples where direct allocations have been granted by previous Ministers*".

In the report, there were 33 examples of previous Direct Allocations of exploration licences that were not tendered, so investors relied on the information in the report to further support the fact that there were no issues with the granting of EL 7270. I used this report as a marketing document to highlight that the grant of EL 7270 was not unusual and investors continued investing in good faith based on the contents and conclusions reached within this report.

ICAC recommended Innocent Parties be considered for Compensation-

In Judicial Review Proceedings in the Supreme Court of NSW, the ICAC clarified its position in respect of the identities of the innocent parties to whom it referred within its December 2013 Report.

Item 18 of the ICAC's response to the judicial review application from NuCoal stated:

"…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."

Justice Rothman also recorded in his reasons the following acknowledgements of the ICAC's position's in respect of NuCoal:

a) "…the Commission also took the view that the plaintiff, as an entity, was involved in no wrongdoing and none of the Commission's findings were based on any suggestion of the plaintiff being involved in wrongdoing." at [57];
b) "The plaintiff's submission was that its conduct was wholly innocent. The Commission accepted that view…." at [62];
c) "Ultimately the Commission came to the view that the plaintiff, as an entity, was not involved in any wrong doing…." at [65]; and
d) ICAC "did not come to the view that the plaintiff acted corruptly. On the contrary, the Commission accepted that the plaintiff acted innocently…" at [80].

What more evidence of innocence do NuCoal shareholders need to provide to Government to remedy the injustice that has been inflicted upon them??

The O'Farrell Government rushed the Mining Amendment Act through Parliament-

Based on discussions I have had with many MP's over the past few years, it is evident that the Mining Amendment Act was rushed through Parliament by the O'Farrell Government and few, if any, MP's had time to fully understand the content and or intent of the Bill before voting. As a direct result of this haste, the Bill was simply passed as I believe MP's understood that it was in accordance with the ICAC report-

It seems ironic to me that such a bill could have been included in "Urgent" legislation that was voted on in January 2014 when Parliament was recalled to vote on the "One Punch Legislation" at that time.

How could a proposed Bill to expropriate privately held assets, be deemed so urgent to waive the usual 5 days available for MPs to understand and raise questions prior to voting?

NuCoal's value was destroyed by an act of Government, by passing the Mining Amendment Act in 2014-

Prior to the ICAC investigation and subsequent Government legislation, NuCoal was trading with a market capitalisation in excess of $300m (approx. $400m at its peak). After the Mining Amendment Act was passed, NuCoal's value fell to less than $20m and at the time of writing, was worth approximately $16m.

The majority of the value decline can be directly attributed to the expropriation of EL 7270 without compensation and has therefore had a detrimental and extreme impact on all shareholders.

Premier O'Farrell admits he would like to have compensated NuCoal-

At a Community Cabinet meeting at Maitland on 10 February 2014, Ex-Premier Barry O'Farrell was asked by a NuCoal shareholder why NuCoal was not receiving any compensation for the cancellation of its Licence.

His response to this question was:

"…if I had the money, we would. But, if you hadn't noticed, state governments, like local councils, and indeed the federal government, don't have a lot of spare cash sitting around. The mint in Macquarie Street closed a helluva long time ago."

I personally find this offensive and shows a complete lack of understanding of the impact the expropriation had on innocent people. It is simply wrong for a Government to avoid liabilities based on their perceived inability to pay.

How can this happen in Australia?

Premier O'Farrell Publicly attacks the Board of NuCoal and subsequently apologises-

The following is an extract from an ASX release by NuCoal dated 24th March 2015, highlighting the then Premiers comments about NuCoal Directors, which were subsequently proven incorrect as shown below-

Public Apology from Ex-Premier, Barry O'Farrell

Ex-Premier Barry O'Farrell has agreed to issue an apology and correction of the record to the Directors of NuCoal Resources Ltd (**NuCoal**). NuCoal is the public company that was stripped of its Doyles Creek exploration licence by the passing of a law introduced into the NSW Parliament in early 2014.

Mr O'Farrell's apology is in response to a defamation action which was served on him by the Directors. Mr O'Farrell has also agreed to pay significant costs incurred by the Directors during their pursuit of the matter.

Mr O'Farrell's public apology and correction, which is set out below, is in relation to comments he made at the Community Cabinet meeting held in Maitland soon after the State Parliament passed the cancellation law.

To: Gordon Galt, Glen Lewis, James Beecher and Michael Davies

Correction

During my time as Premier, on 10 February 2014, I conducted a community Cabinet meeting in Maitland. At that meeting, in response to a question, I stated that ICAC had made adverse comments about the directors of Nucoal Resources. I also stated that the directors of NuCoal Resources were attempting to distract shareholders from their responsibilities as directors. I accept that those remarks may have suggested that the current directors of Nucoal (Messrs Galt, Lewis, Beecher and Davies) had been the subject of such comments. I accept that ICAC did not make adverse comments about those current directors of Nucoal. I did not intend to suggest that it had. I also accept that those directors were not attempting to distract shareholders from their responsibilities to them. I regret my comments and apologise to the four gentlemen in question.

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Barry O'Farrell MP

NuCoal has pursued all possible legal avenues for justice (although very limited)-

NuCoal has pursued the limited legal avenues available, due to the draconian nature of the Mining Amendment Act preventing access to natural justice via the usual "Rule of Law" processes that exist in Australia.

The Mining Amendment Act –

- Cancelled the Licence without allowing the due process usually afforded under the Mining Act 1992 (NSW), with no public hearing and no right of appeal;

- Denied any right to compensation for affected parties; and

- Required NuCoal to give all the confidential exploration data that the Company had paid for to the State of NSW at no cost to the State.

Denying access to the Court system to fight this expropriation is the greatest injustice throughout this ordeal. Even murderers in NSW get to defend themselves in a properly constituted court, yet this basic legal right was taken away from NuCoal shareholders by the NSW Government.

Shareholders have been severely impacted financially, and many are impacted emotionally-

I have dealt with Shareholders for many years since 2010 and have first-hand knowledge of how this act of Government has severely impacted many people - both financially and emotionally and have continually been asked similar questions by many shareholders, such as –

"How can they do this to us? We haven't done anything wrong"

"Why didn't we get compensation? Even ICAC suggested innocent parties should be considered for compensation"

"Theft of private assets by a Government is expected in some third world countries, but not in Australia. How can they get away with this?"

Personally, I have been to hell and back as a direct result of the cancellation of the Licence and subsequent destruction of NuCoal - a Company I helped build from the ground up over many years. I have had to undertake significant psychological medical treatment over a number of years, to get myself back on track, as it is very hard to rationalize how innocent people can be treated this way by a Government and as the Managing Director, I have carried a great burden as a direct result of what has happened.

Many of the shareholders in NuCoal are friends, relatives or previous work colleagues, who all invested in NuCoal based on my involvement and their understanding of my previous work history in the NSW Coal Industry and therefore confidence in the project being responsibly developed. Additionally, I presented to all Institutional Investors when they considered investing their funds with NuCoal, so therefore was the face for the Company and the subsequent destruction in value.

US Investors pursue Compensation via the AUSFTA-

I have travelled to Washington DC on 2 occasions to lobby the US Government on behalf of the US shareholders. I can assure you that everyone that I have spoken to on both trips, struggle to understand how this could have happened in Australia- a country they felt was a mature trading partner.

Once I explained the history and detail, based on the undisputed facts, they usually commented that they could not believe this is an issue in Australia- most say Mozambique or similar Countries are expected to conduct themselves this way, but not a developed Nation, like Australia, that is supposed to have a "Rule of Law".

I can assure you that this issue will not simply “go away” like I am sure the Federal Government hope, as the US Government feel that the Free Trade Agreement between Australia and the US should prevent such issues. I will not duplicate the letter that Robert Lighthizer, the most senior person in the US Government Trade office (reporting to the President), sent to the Australian Trade Minister, as I know NuCoal have supplied it in their submission- but it is clear from his wording, that the US does not take the expropriation without compensation lightly!

Justice has been denied for over 5 years-

It has now been 5 years since the asset was taken from NuCoal, without compensation, and like many other people that have campaigned for justice, I am weary from having to fight with a Government that I thought was elected to help the people and the State of NSW. In saying that, I have a personal resolve, as does the entire Board of NuCoal, to fight this injustice until the very end as it is a moral obligation we can’t avoid.

After 5 years, all facts have now been made public and there is **NO EVIDENCE TO SAY NuCoal Shareholders are guilty of anything,** except investing in an ASX Company that had a vision to create value for all stakeholders in NSW and beyond.

The NSW Government need to carefully understand the facts to this case, not the media hype, and do what is right.

Restore Natural Justice in NSW and provide NuCoal shareholders access to the Rule of Law that has been denied by the Mining Amendment Act since 2014.

The Proposed Bill provides a mechanism to achieve Natural Justice-

The Bill proposed by the Hon Rev Fred Nile provides a pathway towards justice via an Independent Arbiter that can consider all facts and determine compensation, if appropriate.

Failure to support this bill is a further denial of natural justice for innocent people that deserve much better than the way they have been treated to date.

I am more than happy for this submission to be made public.

In closing, I would like to thank the Committee for this opportunity and hope justice can be achieved once and for all.

Yours sincerely

Glen Lewis.