

**NUCOAL RESOURCES LIMITED v STATE OF NEW SOUTH WALES**  
**(S138/2014)**

Date writ of summons filed: 25 June 2014

Date special case referred to Full Court: 23 September 2014

In December 2008 the New South Wales Minister for Mineral Resources granted an exploration licence under the *Mining Act* 1992 (NSW) (“Mining Act”) to Doyles Creek Mining Pty Limited (“DCM”). In early 2010 the Plaintiff (“NuCoal”) purchased all of the shares in DCM. NuCoal later paid for exploration and development work that had been carried out by DCM.

In November 2012 DCM applied for a renewal of its exploration licence (“the Renewal Application”).

In August 2013 the Independent Commission Against Corruption (“ICAC”) published a report entitled “Investigation into the Conduct of Ian Macdonald, John Maitland and others (Operation Acacia)”. In that report ICAC made findings of corrupt conduct against several of NuCoal’s shareholders who had in the past been directors of NuCoal and DCM. In a report published in December 2013, “Operations Jasper and Acacia – addressing outstanding questions”, ICAC found that the grant of the exploration licence to DCM was tainted by corruption and that NuCoal’s purchase of DCM had not been at arm’s length. That report recommended that the New South Wales Government pass special legislation to cancel DCM’s exploration licence and refuse applications associated with it.

On 31 January 2014 the *Mining Amendment (ICAC Operations Jasper and Acacia) Act* 2014 (NSW) (“the Amendment Act”) added Schedule 6A to the Mining Act. Provisions of Schedule 6A cancel the exploration licence held by DCM (along with similar licences held by two subsidiaries of Cascade Coal Pty Limited) and declare void any associated applications (which include the Renewal Application). Schedule 6A also provides that the New South Wales Government is not liable to pay compensation for any consequences arising from the operation of the Schedule.

NuCoal was required to submit certain information from its exploration activities to the New South Wales Department of Trade and Investment under ss 163C and 248B of the Mining Act. Schedule 6A reinforces and extends the operation of those sections in respect of the cancelled licences. NuCoal has rights under the *Copyright Act* 1968 (Cth) (“Copyright Act”) in respect of some of the exploration information it provided.

NuCoal commenced proceedings in this Court, challenging the validity of the Amendment Act or alternatively certain provisions of Schedule 6A to the Mining Act. NuCoal submits that in passing the Amendment Act, the New South Wales Parliament (“the Parliament”) purported to assign guilt and impose punishment. NuCoal contends that the Parliament has never possessed such power. That lack of power, NuCoal submits, is borne out by relevant colonial-era statutes in relation to the establishment and powers of both the Parliament and the

Supreme Court of New South Wales, and the *Constitution Act 1902* (NSW) as impacted by the Commonwealth Constitution. NuCoal submits in the alternative that even if the Parliament has such power, the power must be exercised judicially. Such exercise would involve hearing from affected parties, considering only relevant information and avoiding arbitrariness. NuCoal submits that Schedule 6A operates arbitrarily in that it punishes shareholders of the company who had no involvement in any corruption.

NuCoal also contends that clause 11 of Schedule 6A, which authorises certain officials to use information obtained under the Mining Act is, pursuant to s 109 of the Commonwealth Constitution, invalid to the extent of its inconsistency with the *Copyright Act 1968* (Cth).

A Notice of a Constitutional Matter was filed by NuCoal. The Attorneys-General of the Commonwealth and the States of Victoria, Queensland, Western Australia and South Australia are intervening in the proceedings.

The parties filed a Special Case, which Justice Gageler referred for consideration by the Full Court.

The Special Case states the following questions for the opinion of the Full Court:

1. Are clauses 1 to 13 of Schedule 6A to the Mining Act, or any of them, invalid?
2. Is clause 11 of Schedule 6A to the Mining Act inconsistent with the Copyright Act and inoperative to the extent of that inconsistency?
3. Who should pay the costs of the Special Case?