



**O'Connor Marsden  
& Associates Pty Limited**

ACN 135 783 792

Level 1, 1 York Street  
Sydney NSW 2000

T: + 61 (0) 2 9252 2565

F: + 61 (0) 2 9247 7161

[www.ocm.net.au](http://www.ocm.net.au)

Ms Dianne Leeson  
Assistant Director General  
Department of Premier and Cabinet  
Level 39, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

23 August 2010

Dear Ms Leeson,

**Re: Probity Review: Granting of an Exploration Licence to Doyles Creek Mining Pty Ltd**

As requested, O'Connor Marsden & Associates (OCM) has set out below its observations arising from our probity review of the Granting of an Exploration Licence (EL) to Doyles Creek Mining Pty Limited (DCMP).

#### Background

DCMP was awarded EL 7270 over the Doyles Creek area (the Area) in December 2008 after being invited to apply for an EL by the then Minister for Mineral Resources. The area is situated in the Upper Hunter Valley with a surface area of approximately 27 square kilometres. The southern boundary is limited by a national park and the eastern boundary by the township of Jerry's Plains.

The EL was subject to a number of the conditions including that any subsequent mine would be designated as a Training Mine. NuCoal Resources NL subsequently acquired all of the issued capital in DCMP.

The chronological timeline pre-award process for the EL was as follows:

- **22 January 2007:** Mr John Maitland submitted a briefing note to the then Minister's Office outlining a proposal for an underground training mine in the Upper Hunter Valley.
- **30 January 2007:** the then Deputy Director General of the Department of Primary Industries (the Department), Mr Alan Coutts, requested further details from Mr Maitland regarding the proposal. In particular, the Deputy Director General sought specific information as to how the proposed mine would operate on a commercial basis and what, if any, support would be required from Government.
- **6 February 2007:** Initial response received from Mr Maitland.
- **15 February 2007:** Written request made by Mr Maitland as Chair of ResCo Services Pty Ltd for an EL for a training mine at the Area for ResCo or a related entity.
- **22 February 2007:** A Ministerial Briefing was provided to the then Minister by the Department noting that the Area was previously explored by Bayswater Colliery Company Pty Ltd between September 1989 and April 1991. The Area was estimated to contain 62 million tonnes of underground coal reserves. It was noted in the Briefing that several companies had previously expressed an interest in the Area. The Briefing noted that these expressions of interest had not been progressed due to the sensitive nature of the Area due to its proximity to the Jerry Plains township and the Wollemi National Park. The Briefing further noted that the former Mine Safety Council (now called the Mine Safety Advisory Council) had considered a previous similar proposal in late 1999 – early 2000 and that the Council had determined that the Training Mine concept no longer be pursued.

The Briefing concluded by highlighting that there would be major policy difficulties, potential probity issues and environmental sensitivities involved in considering a proposed direct resource allocation for this purpose. Given that the Mine Safety Advisory Council had since been strengthened the Briefing outlined three potential options for the then Minister to consider.

Sydney  
+ 61 2 9252 2565

Melbourne  
+61 3 9811 4701

Brisbane  
+ 61 7 3303 0290

Canberra  
+61 2 6243 4811

These were:

- Reject the current proposal
  - Seek competitive expressions of interest for the proposed area under the Guidelines for Allocation of Future Coal Exploration Areas (March 2006) which includes a financial contribution
  - Refer the proposal to the Mine Safety Advisory Council and seek the Council's advice on the current training mine proposal to inform the Minister's further consideration.
- **18 March 2008:** Mr Maitland, in his capacity as Chair of DCMP, submitted a written request to the NSW Department of Primary Industry for an EL for the Area. He advised in the correspondence that DCMP is an associated company of ResCo and made reference to the previous correspondence from ResCo dated 15 February 2007.
  - **13 May 2008:** An internal analysis by the Department's Manager Operations, Mineral Resources prepared for the Deputy Director General concluded that the Minister consider a competitive allocation process, with a requirement to either establish a training facility or establish a broader industry training fund. As a result of this analysis the Deputy Director General wrote to Mr Maitland advising him that the proposal required further examination and referral to the Minister.
  - **2 September 2008** the Department received an inquiry from the Newcastle Herald inquiring as to the status of the EL. The inquiry referred to the then Minister having written to Mr Maitland inviting him to submit an EL for Doyles Creek. It was only subsequent to this inquiry, it would appear, that the Department became aware that the then Minister had written to Mr Maitland on the **21 August 2008**, in his capacity of Chair of DCMP, inviting DCMP to apply for an exploration licence over the Area subject to the provision of a supplementary submission outlining in detail the industry and wider community support for such a proposal.
  - **29 September 2008:** DCMP submitted a formal application for an EL for the Area under Part 3 of the Mining Act 1992. The Application included the required fee as set out in the Guidelines for Applications and also included a number of letters of support from various association and businesses associated with the Area or/and mining industry.
  - **15 December 2008:** Exploration Licence No. 7270 was granted to DCMP by the then Minister. The EL is subject to a number of conditions including conditions related to environmental management, a landholder liaison program, the company's commitment to establish a training mine, as well as the need to meet financial contributions to the State.

#### Scope of Services

Our engagement has as its objective to perform a probity review whether the process for granting the EL has been conducted with due regard to probity in accordance with the Mining Act 1992 no 29 (the Act).

We have focused on the following probity principles:

- Transparency
- Accountability and Responsibility
- Confidentiality and Conflict of Interest
- Value for Money

The specific objectives of our engagement were to examine and report on:

- The exercise by the then Minister of the functions conferred by the Mining Act in accordance with section 22 of the Act;
- The exercise by former Ministers of the functions conferred by the Mining Act in accordance with section 22 of the Act;
- The effectiveness and use of guidelines or procedures in place in assessing and determining licence applications; and
- Recommendations on options and mechanisms to improve licence approval processes from a transparency and probity perspective.

Our review procedures have been performed in accordance with ASAE 3000, and are designed to provide limited assurance, as defined by that standard, and are limited primarily to inquiries of relevant personnel, inspection of evidence, and observation of, and enquiry about, the operation of procedures for a small number of transactions or events.

ASAE 3000 requires that we comply with the relevant ethical requirements of the Australian professional accounting bodies. Should OCM be requested to perform additional tasks to meet our scope objective, these tasks will be agreed with you or another appropriate person prior to commencement.

In conducting our engagement, we highlight that it is the responsibility of the Department to ensure that appropriate probity controls are established and followed. We would also highlight that whilst the role of OCM may require probity input to improve the level of decision-making, we cannot, be the decision-maker in relation to probity issues arising. This responsibility resides with the Department.

This report has been prepared by OCM for the purposes of the Department of Premier and Cabinet. No responsibility to any third party is accepted as the report has not been prepared, and is not intended, for any other purpose. Please note the Statement of Responsibility at the conclusion of this report.

The liability of OCM is limited by a scheme approved under Professional Standards Legislation.

### Methodology

In meeting the above objectives, we have undertaken the following tasks:

- Reviewed the relevant sections of the Mining Act in relation to the granting of the License
- Met with the relevant Department of Industry & Investment personnel, including the Director General, to obtain a better understanding of the process and the exercise of the functions conferred by the Act by previous Ministers. We have also sought and received input from the former Deputy Director General of the Department.
- Reviewed supporting documentation such as correspondence and license applications
- Prepared a report on our review having particular regard to options and mechanisms, where appropriate, to improve the licence approval process from a transparency and probity perspective.

### Key Findings

*a. The exercise by the then Minister of the functions conferred by the Mining Act in accordance with Section 22 of the Act*

The relevant legislation is the Mining Act No 29. Division 3 of the Act addresses the granting of exploration licences. Section 22 of Division 3 states:

*(1) After considering an application for an exploration licence, the Minister:*

*(a) May grant to the applicant an exploration licence over all or part of the land over which a licence was sought.*

In addition, with reference to the conditions imposed in granting the EL to DCMP we note that Section 26 of the Act deals with conditions of an exploration licence. This section states under (1)

*(b) An exploration licence is subject to such conditions as the Minister may, when granting the license impose.*

On the basis of the above it would appear that the then Minister, in granting the EL, was acting within the powers granted to him under the legislation.

*b. The exercise by former Ministers of the functions conferred by the Mining Act in accordance with section 22 of the Act*

The Department provided a number of examples where, over the previous 20 years, direct allocations have occurred. Set out in Appendix B to our report is a selection of such direct allocations. Whilst noting that a number of these relate to extensions to existing mines, we also noted that there are also several examples where the direct allocations have occurred as a result of a direct approach for a specific area.

c. *The effectiveness and use of guidelines or procedures in place in assessing and determining licence applications*

The Department has produced a set of guidelines for the allocation of future coal exploration areas (January 2008). By way of introduction the guidelines state that following an order from the Governor of New South Wales, all of the coal deposits in NSW lie within a Minerals Allocation Area (MAA) under the Mining Act 1992. The guidelines further state that within the MAA, the Minister's consent is required before an application can be made for a coal exploration licence.

Information on the types categories used for potential coal allocation areas is provided within the guidelines. The categories are grouped into four types ranging from major stand-alone areas to small areas unrelated to existing mines. For each category, the guidelines set out the typical process for allocation such as tender or expression of interest.

The guidelines state that normally allocations are made on a competitive basis, however they further state that "there may be circumstances where coal allocations are made subject to certain conditions and including a financial contribution".

We understand that the typical processes followed by the Department, consistent with the guidelines, are to call for tenders or expressions of interests depending on the type of the exploration licence exploration made. It is also the Department's practice to appoint a probity adviser/auditor to such processes to provide independent assurance as to the process followed.

We understand also that these conducting tenders/expressions of interest have in recent times realised significant financial benefits for the State. By way of example the Caroonna and Watermark expressions of interest processes realised additional financial amounts of approximately \$93m and \$276m respectively, although the estimated coal resources for both deposits are large: in excess of 1 billion tonnes.

We note that as a result of the conditions attached to the EL for DCMP that the company will be required to make a payment per tonne of coal extracted which is likely to raise between \$7.5 million - \$15 million depending on whether the coal is sold in domestic or export markets respectively. We note that this is in line with amounts received where similarly sized resources have been tendered prior to the EL being granted.

Whilst the guidelines refer to "circumstances where coal allocations are made subject to certain conditions" we note that no specific examples are provided within the guidelines as to what might constitute such circumstances.

We consider that the guidelines could be enhanced from a transparency perspective by providing such examples. We also consider that transparency could be further enhanced by the Minister providing a level of detail in the public domain when he/she elects to use their powers under the Act to apply special circumstances (refer to d) below.

d. *Recommendations on options and mechanisms to improve licence approval processes from a transparency and probity perspective.*

1. *Provide examples as to the types of circumstances which could give rise to coal allocations being made subject to certain conditions*

The guidelines for the allocation of future coal exploration areas (January 2008) are currently silent on the types of circumstances that might arise in awarding ELs by direct approach. We consider that transparency in the EL application process could be enhanced by providing such examples in the guidelines. These examples could draw upon the previous occasions where this has occurred.

2. *Publish Coal Exploration Licence Conditions and Annual Reports on Progress on the Internet*

Currently conditions related to Exploration licences are available from the Department of Industry and Investment on application. Greater transparency could be achieved by publishing the conditions relating to a coal exploration title on the Department's internet site once the title is granted. This could be strengthened even further if the Department's assessment on the progress by the company against the conditions were also published on the Department's website. We note that should this recommendation be pursued that care will need to be taken not to release material that is commercial-in-confidence.

### 3. *Mandatory Competitive Coal Allocations*

Consideration should be given to making it mandatory for all coal allocations with a potential in situ resource of greater than 100 million tonnes to be progressed through a competitive allocation process (Expressions of Interest or Tender).

### 4. *Establish a Public Exposure Test for all Direct Coal Resource Allocations*

Consideration should be given to having as a requirement the Minister gazette and publish in national and regional newspapers an intention to grant a coal exploration title for all titles that are proposed as a direct exploration title allocation (less than 100 million tonnes). This notice of intention should state the reasons for considering a direct coal allocation and invite submissions from parties who may have an interest in exploring the resource. The Minister should consider these submissions in deciding whether to proceed with a direct allocation or establish a competitive allocation process.

This process could be further strengthened for areas with the potential to be stand alone mines by inclusion of an independently chaired Assessment Committee which would utilise professional probity and governance skills and would provide the final advice to the Minister. This would not be dissimilar to the recently initiated Planning Assessment Committee which advises the Minister for Planning on Part 3A matters under the NSW Planning Assessment Act (1979). However, a PAC style committee would not be appropriate for minor additions to existing mines. These small additions would still follow the Public Exposure Test as outlined in the first paragraph above.

As previously referred to above, the Department has had a practice of appointing a probity adviser to oversee expression of interests/tendering processes. We consider it appropriate for the Department to appoint a probity adviser/auditor for those instances where direct allocations, as requested, are proposed.

To do this would be consistent with the NSW Independent Commission Against Corruption Guidelines which recommends consideration to the appointment of a probity auditor/adviser where an agency enters into a sole contract/direct negotiation process.

### 5. *Strengthen Approval Conditions for the Transfer of Ownership in Exploration Titles*

Currently there is a requirement for an approval from the Minister for a transfer of ownership of an exploration title to another entity. However, companies have the potential to avoid having to gain an approval from the Minister by selling the holding company and transferring the exploration title as a company asset. This could be strengthened by requiring an approval for a change in ownership of any company holding an exploration licence, with an appropriate period of prior advice. Failure to obtain approval could result in cancellation of the Title.

### 6. *Additional Observations in relation to the DCMP Process*

In relation to the DCMP process, we consider that transparency and accountability could have been enhanced by the Department having available to it a response from the Minister's Office to the Department's briefing which suggested that tenders be sought from the market in determining the basis for proceeding with the EL application.

In addition, whilst mindful that there are Codes of Conduct established to address how any issues of conflict of interest are to be considered and addressed, given the concentration of stakeholders that exists within the sector and the potential therefore for conflicts to arise, we consider it prudent for a record to be maintained that the issue of conflicts of interest has been specifically considered during a direct allocation process. This record should confirm that either no conflicts were identified or to the extent that any arose how such conflicts were addressed. The task of considering this issue could be included in the scope of a probity adviser/probity auditor to the process (refer to the earlier recommendation regarding the appointment of a probity adviser/probity auditor to the process).

### Summary

On the basis of our work performed it would appear that the then Minister acted within the powers afforded to him under the legislation in granting the EL to DCMP. There are a number of examples where direct allocations have been previously made by previous Ministers.

Notwithstanding the above we consider that there are several opportunities to further enhance key probity principles in relation to the application for, and the subsequent awarding of, coal mining ELs. These opportunities are referred to above and include providing a greater level of consultation and communication to key stakeholders to support the decision making process.

Should you wish to discuss our probity observations raised above please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rory O'Connor', written in a cursive style.

**Rory O'Connor**  
**Director**  
**O'Connor Marsden & Associates**

## **Appendix A: Statement of Responsibility**

### **Management's Responsibility**

OCM is not responsible for whether, or the manner in which, any recommendations made in this report are implemented. The advice and/or recommendations ("advice") should be assessed by the Department's management for their full impact before they are implemented.

### **OCM's Responsibility**

Our responsibility is to provide advice based on our experience and knowledge of the subject matter of the project. For the avoidance of doubt, the procedures performed in carrying out this project did not constitute an assurance engagement in accordance with Australian Standards for Assurance Engagements, nor did it represent any form of audit under Australian Standards. We have therefore not expressed any form of assurance opinion in the advice, and none should be inferred from any commentary in this report.

### **Inherent Limitation**

The matters raised in this report are only those which came to our attention during the course of performing our procedures and are not necessarily a comprehensive statement of all the weaknesses that exist or improvements that might be made. We cannot, in practice, examine every activity and procedure, nor can we be a substitute for management's responsibility to maintain adequate controls over all levels of operations and their responsibility to prevent and detect irregularities, including fraud. Accordingly, management should not rely on our report to identify all weaknesses that may exist in the evaluation process, or potential instances of non-compliance that may exist.

### **Limitations on use**

The advice contained herein is made solely to the management of Department of Premier and Cabinet in accordance with our engagement letter and should not be quoted in whole or in part without our prior written consent. We disclaim any assumption of responsibility for any reliance on this advice to any person other than the management of Department of Premier and Cabinet, or for any purpose other than that for which it was prepared.

We disclaim all liability to any other party for all costs, loss, damages, and liability that the other party might suffer or incur arising from or relating to or in any way connected with the contents of our report, the provision of our report to the other party, or the reliance on our report by the other party.

Liability limited by a scheme approved under Professional Standards Legislation.

Confidential - this document and the information contained in it are confidential and should not be used or disclosed in any way without our prior consent.

© OCM, August, 2010. All rights reserved.

Appendix B: A Selection of Direct Coal Allocations in NSW since 1988

	Project Name	Details	Date	Comment
1	Mandalong Mine	A404	Mar-88	Replacement area for Cooranbong Colliery
2	BHP South Coast	A 396	Jun-88	For extension to mines
3	Vickery	A 406	Nov-88	For extension to mines
4	Tahmoor	A 410	Apr-89	For extension to mine
6	Clarence	A 416	Aug-89	For extension to mine
7	Ulan	A421	Nov-89	For extension to mine
5	Mt Owen	A 423	Dec-89	For development of new mine
8	Baal Bone	A 420	Jan-90	For extension to mine
9	Mt Owen	A 429	Jul-90	For development of new mine
11	Endeavour	A432	Feb-91	For extension to mine
10	Wambo/United	A444	May-91	For extension to mine
12	Hunter Valley Mine	A435	May-91	For extension to mine
13	Bulga Extension	A447	Sep-91	For extension to mine
14	Bulga Extension	A450	Dec-91	For extension to mine
15	Mt Pleasant	EL	Apr-92	Area to supply coal for proposed coal/water mixture plant
16	Newstan Extension	Initial EL	Oct-96	Direct approach for mine extension
17	Beltana	Initial EL	Apr-97	For major underground extension to open cut mine
18	Maison Dieu	EL	Apr-97	Direct approach for area adjacent to existing mine
19	Bickham Project	Two ELs	May-97	Direct approach about a speculative area
20	Ravensworth East	Initial EL	May-97	Extension for Ravensworth Mine
21	Tasman Mine	Initial EL	Aug-97	Direct approach to develop mine
22	Mangoola Project	Initial EL	Feb-99	Direct approach for a new area
23	Ulan Mine Extensions	Initial EL	Apr-99	Direct approach for mine extension area
24	Mt Arthur Mine Extension	EL	Jul-02	Underground mine adjacent to existing open cut mine
25	Werris Creek	Initial EL	Sep-02	Direct approach to develop mine.
26	Narrabri North Project	Initial EL	May-04	Direct approach to develop underground mine
27	Plashett EL Area	EL	Jan-07	Direct approach for an area
28	Dellworth EL Area	EL	Jun-07	Direct approach for an area
29	Wilpinjong Ext	EL	Mar-08	Direct approach for extension to existing mine
30	Wambo Extension	EL	Sep-08	Extension to Wambo mine
31	Cobbora	EL	Aug-09	Direct approach seeking coal source for coal for power utilities
32	Whitehaven Operations	4 Initial ELs	Early to mid 2000's	Direct approach to develop several small mines (Rocglen, Sunny Side, Tarrawonga, & Canyon)
33	Able Mine	2 ELs	July 98 & Dec 07	Direct approach to develop mine adjacent to existing operation