

Submission

on

Wambo Mine – Modification 12 – Southern Longwall Modifications

to the

NSW Department of Planning & Environment

prepared by

Environmental Justice Australia

13 May 2016

Environmental Justice Australia is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

This submission was prepared by EJA's **Climate & Finance Program**. It investigates strategic and legal avenues for stakeholders to ensure companies and financiers take into account their climate impacts. We also help people understand the impact of climate change policies on business as the world transitions to renewable energy.

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Submitted to:

NSW Department of Planning & Environment

Submission regarding: Application to modify a development consent

Applicant: Wambo Coal Pty Ltd

Location: Wambo Mine, NSW

DA modification number: DA 305-7-2003 MOD 12

Description: Southern Longwall Modifications

1. Environmental Justice Australia (**EJA**) is a not-for-profit law firm. We make this submission to the NSW Department on Planning and Environment with the expectation that the Planning and Assessment Commission (**PAC**) will provide a determination on the application. We urge the PAC to invoke its discretion and advise that this DA modification not proceed. We expect the ultimate approving authority to deny the application on the basis that the applicant and its controlling entities lack the requisite integrity and are not fit and proper persons.¹
2. The applicant, Wambo Coal Pty Ltd, applies to modify the Wambo mine to extend the mine's operating life from 2025 to 2031.² It does so at the time of Australia signing the United Nations Framework Convention on Climate Change (**UNFCCC**) Paris Agreement.³ The Paris Agreement recognises 'climate change represents an urgent and potentially irreversible threat to human societies and the planet'.⁴ The agreement is explicit that 'deep reductions in global emissions will be required in order to achieve the ultimate objective of the Convention' which is to avoid dangerous man-made climate change, or keep temperature rise to well under 2 °C.⁵ This application is contrary to the Paris Agreement as it will contribute to increased carbon emissions. The PAC should be alive to this serious contradiction in Australia's position on this issue of global importance.
3. EJA makes this submission one month after Peabody Energy Corporation (**Peabody**), the ultimate US parent company of the applicant, sought protection from creditors under US Chapter 11 bankruptcy provisions.⁶ Peabody is the ultimate controlling entity of the applicant, and by virtue of seeking to take advantage of US bankruptcy laws, is not a fit and proper person for the purposes of this application.⁷ Analysts doubt the Chapter 11 bankruptcy proceedings will make Peabody's operations profitable.⁸ Peabody itself acknowledges that its US bankruptcy proceedings may disrupt or impede its operations in Australia.⁹ The auditors of Wambo Coal Pty Ltd state 'there is significant uncertainty whether the company and / or the consolidated entity will continue as a going concern'.¹⁰

¹ s380A of the *Mining Act 1992*

² <https://majorprojects.affinitylive.com/public/5310a22a6d9ad9555538d2bf9755695a/Wambo%20Mine%20-%20Mod%2012%20-%20Preliminary%20EA.pdf> p4

³ <http://www.abc.net.au/news/2016-04-23/world-leaders-gather-at-un-to-sign-paris-agreement-climate-deal/7352328>

⁴ Paris Agreement Preamble: <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>

⁵ This is the combined effect of article 2 of the 1992 United Nations Framework Convention on Climate Change, available here <https://unfccc.int/resource/docs/convkp/conveng.pdf> and articles 1 and 4 of the UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010: Part Two Action taken by the Conference of the Parties at its sixteenth session, available here: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

⁶ <http://www.peabodyenergy.com/content/120/press-releases>

⁷ s380A of the *Mining Act 1992*. Refer to the combined effect of subsections (2)(j) and (2)(o)

⁸ <http://www.afr.com/business/mining/coal/half-of-all-global-coal-assets-may-be-uneconomic-20160510-gos37u> ;

<http://ieefa.org/mckinsey-report-sees-no-end-u-s-coal-industry-spiral/>

⁹ Peabody Energy Corporation, 8-K SEC filing, 13 April 2016, p7

¹⁰ Wambo Coal Pty Ltd 2015 financial statements, lodged with ASIC and dated 29 April 2016 (**2015 Wambo Accounts**), p41

4. The DA modification expansion will cost over \$500 million.¹¹ The financial statements show the applicant will not have the financial capacity to undertake the expansion. At 31 December 2015 the applicant had only \$4.6 million in cash.¹² Its traditional line of credit has expired.¹³ Emergency funding provided on the eve of Peabody's bankruptcy is insufficient to cover expansion costs.¹⁴ Regardless, that US\$250 million loan services the entirety of Peabody's Australian operations.¹⁵ Those operations collectively lost \$1.2 billion dollars in 2014 and had negative shareholder's equity of \$3.9 billion.¹⁶
5. The applicant's slim gross profit margins are susceptible to the ongoing structural decline¹⁷ in seaborne thermal coal prices.¹⁸ Of the applicant's profit, 25% goes to a third party.¹⁹ This follows protracted litigation brought by the applicant which it lost, culminating in an unsuccessful leave application to the High Court of Australia.²⁰
6. In addition, the underlying value of the applicant's coal sales are at best opaque, with 38% of its coal sales going to related parties in 2015.²¹
7. The applicant's cash flows are controlled by the top-level Australian holding company, Peabody Australia Holdco Pty Ltd (**Australia Holdco**).²² That company in turn is held by Peabody entities registered in low tax jurisdictions Gibraltar and the Netherlands.²³ The Australia Holdco owes over US\$5.5 billion²⁴ via a complicated web of intercompany loans to Peabody entities registered in Delaware,²⁵ an onshore US tax haven.²⁶ The debt is a major part of the US\$8.8 billion ultimately payable to US external lenders of Peabody.²⁷ Those financiers are creditors in the US bankruptcy proceedings.²⁸ The creditors can seek to call on that debt at any time via an intricate web of Peabody intermediate holding companies registered in Gibraltar.²⁹ Peabody's intermediary holding companies might commit to not voluntarily calling on the applicant's debt, but it means little.³⁰ It is a matter for the external lenders and the US courts. Peabody's complicated holding and loan structure appears at **Appendix 1**.
8. The applicant's reported cash assets are not held by it. They are held by an intermediary holding company,³¹ and are thus can be used to service debts of other companies in

¹¹ According to the application dated 5 September 2012 the financial capacity required is \$651.9 million. It is not clear if this amount has increased or decreased in the last three and a half years. As at 31 December 2015 the applicant recorded \$116.4 million in 'Underground development costs capitalised at cost': 2015 Wambo Accounts p26. Therefore we assume about \$535 million is required to complete the project.

¹² 2015 Wambo Accounts, p8 (submitted)

¹³ 2015 Wambo Accounts, p1

¹⁴ 2015 Wambo Accounts, p1

¹⁵ Via the top-level Australian holding company, Peabody Australia Holdco Pty Ltd: 2015 Wambo Accounts, p9

¹⁶ 2014 Peabody Australia Holdco Accounts, pp6,

¹⁷ <http://www.afr.com/business/mining/coal/half-of-all-global-coal-assets-may-be-uneconomic-20160510-gos37u>

¹⁸ <https://majorprojects.affinitylive.com/public/5310a22a6d9ad9555538d2bf9755695a/Wambo%20Mine%20-%20Mod%2012%20-%20Preliminary%20EA.pdf> p10

¹⁹ 2015 Wambo Accounts, p1. Note: the B Class shareholder holds 25 million shares.

²⁰ 2015 Wambo Accounts, p32

²¹ 2015 Wambo Accounts, pp23,36

²² 2015 Wambo Accounts, p9

²³ ASIC Company Search of Peabody Australia Holdco Pty Ltd.

²⁴ Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, pF-41

²⁵ Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, pF-41;

http://www.sec.gov/Archives/edgar/data/1064728/000106472816000157/btu_20151231xex21.htm

²⁶ http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?_r=0

²⁷ <https://mscusppegrs01.blob.core.windows.net/mmfiles/sitemedia/ch11/first%20day%20declaration.pdf>

²⁸ <http://www.kccllc.net/peabody/document/164252916041300000000162>

²⁹ Peabody Energy Corporation, 8-K SEC Filing, 30 September 2013, p2 and Exhibit 10.2

³⁰ 2015 Wambo Accounts, p10

³¹ 2015 Wambo Accounts, p9 referring to \$170 million held by an intermediate holding company, Peabody Australia Mining Pty Ltd

Peabody's Australian group. These assets in part secure a tranche of US\$2.9 billion in debt.³² Currently, the applicant holds negative \$42 million in current assets.³³ It has over \$23 million in workers entitlement liabilities,³⁴ and as at 31 December 2015 had contingent liabilities of over \$72 million in respect of guarantees for financial assurance on environmental rehabilitation.³⁵

9. The applicant is beholden to a range of Peabody entities via formal and informal agreements. In 2015 it paid over \$12 million in 'management fees' to a related party registered in Australia.³⁶ It has over \$16 million in liabilities for minimum payments for operating and finance leases from related parties.³⁷
10. If the proposed modification were to proceed and the applicant somehow found money for capital expenditure, increased mine-site disturbance would result. Additional financial assurance would be required for rehabilitation.³⁸ The applicant's financial statements acknowledge significant concern about the ability to provide increased financial assurance.³⁹ If the applicant cannot pay to rehabilitate the site, and if financial assurance is insufficient, the taxpayer could ultimately be left to stump up money to rehabilitate. Or the site does not get rehabilitated at all.⁴⁰
11. Expansion is recognised as a way that coal companies can avoid closing and rehabilitation costs crystallising on balance sheets.⁴¹ It buys companies time to sell assets to inexperienced and potentially more financially constrained operators who may not have the capacity to comply with mining leases.⁴² Peabody was the largest private sector coal mining company in the world and has succumbed to bankruptcy, along with four of the other largest listed US coal mining companies in 2015/2016.⁴³ Peabody is trying to sell off assets quickly.⁴⁴ If Wambo were to be operated by a different entity in the future, it could be a smaller, inexperienced company without operational savvy, less sophisticated access to finance and completely lacking any benefits provided by of economies of scale and integrated trading companies. Such a company may not reliably operate the mine nor afford to expand it.
12. One real and understated reason the applicant needs to expand Wambo appears to be satisfaction of a 'ship or pay' contract with Newcastle Coal Terminal. The applicant has a contract worth \$1.2 billion to supply coal, along with its neighbouring Wilpinjong coal mine, also controlled by Peabody.⁴⁵ The contract appears to extend well over ten years and therefore past the current expected life of Wambo.⁴⁶

³² Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, pF-41

³³ 2015 Wambo Accounts, p9

³⁴ 2015 Wambo Accounts, p30

³⁵ 2015 Wambo Accounts, p33

³⁶ 2015 Wambo Accounts, p36

³⁷ 2015 Wambo Accounts, p34

³⁸ http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0006/363516/ESG1-Rehabilitation-Cost-Estimate-Guidelines.PDF

³⁹ Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, p77; 2015 Wambo Accounts, p10

⁴⁰ <http://www.theherald.com.au/story/3878268/australia-is-fast-becoming-the-land-of-ghost-mines/>

⁴¹ Environmental Justice Australia, Dodging Clean Up Costs: Six Tricks Coal Mining Companies Play, 13 April 2016, p10: https://envirojustice.org.au/sites/default/files/files/EJA_Dodging_clean_up_costs.pdf

⁴² <http://www.smh.com.au/business/energy/old-challenges-for-the-new-face-of-australian-coal-20160406-gnzpdp.html>

⁴³ <http://www.peabodyenergy.com/content/101/about-us>

⁴⁴ <http://www.smh.com.au/business/mining-and-resources/peabody-sells-australian-coal-acreage-20160509-goqcmq.html>

⁴⁵ 2014 Australia Holdco Accounts, p29

⁴⁶ 2015 Wambo Accounts, p35

13. Wilpinjong, like Wambo, is seeking to expand its NSW operations.⁴⁷ Authorities should consider Wilpinjong's application carefully in light of its financial capacity and issues related to its controlling entities raised in this submission. The 'ship or pay' contract at issue is 'joint and severable'.⁴⁸ If either Wambo or Wilpinjong do not fulfil minimum volume requirements, the other must make up the shortfall or pay penalties.⁴⁹ In 2015 Wambo sold over \$70 million in coal to Wilpinjong.⁵⁰
14. The applicant is controlled by its US parent company and intermediate holding companies.⁵¹ Its Australian top-level holding company failed to file its 2015 financial accounts on time,⁵² seemingly breaching regulator requirements.⁵³ The Australian Securities and Investments Commission appears to have incorrect information about the company's filing requirements.⁵⁴ Without the 2015 accounts of the Australia Holdco it is impossible to get an accurate picture of the financial position of the applicant, although we note the dire financial position evident at the end of 2014 and the likelihood that the financial state of Australia Holdco has deteriorated further in 2015 and again in 2016 to date. Conclusions could be drawn about the integrity of this controlling entity and whether it is fit and proper. Another issue going to the flaws of the applicant's controlling entities is Peabody's breaches of New York law.⁵⁵
15. The applicant has been involved in a number of recent incidents of environmental malfeasance.⁵⁶ The applicant pleaded guilty to releasing nitrogen oxides from a May 2014 blast event with unexpected consequences and the penalty judgment is pending.⁵⁷ The most recent environmental failure was in January 2016. A temporary erosion and sediment control dam failed releasing 3 mega litres of sediment-laden water into a creek and river system. Formal legal interviews have been requested with staff and compliance action may be taken.⁵⁸ In light of recent cost savings initiatives⁵⁹ we expect the applicant will struggle to avoid serious environmental failures in the future.

⁴⁷ <http://www.planning.nsw.gov.au/News/2016/Community-feedback-sought-for-the-Wilpinjong-Extension-Project>

⁴⁸ 2015 Wambo Accounts, p35

⁴⁹ This is the effect of 'joint and severable'.

⁵⁰ 2015 Wambo Accounts, p36

⁵¹ 2015 Wambo Accounts, p9

⁵² Search of www.asic.gov.au registers for 2015 accounts of Peabody Australia Holdco Pty Ltd.

⁵³ <http://asic.gov.au/regulatory-resources/forms/forms-folder/388-copy-of-financial-statements-and-reports/>

⁵⁴ Correspondence from ASIC dated 11 May 2016. EJA is seeking clarification.

⁵⁵ <http://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf> at [23]

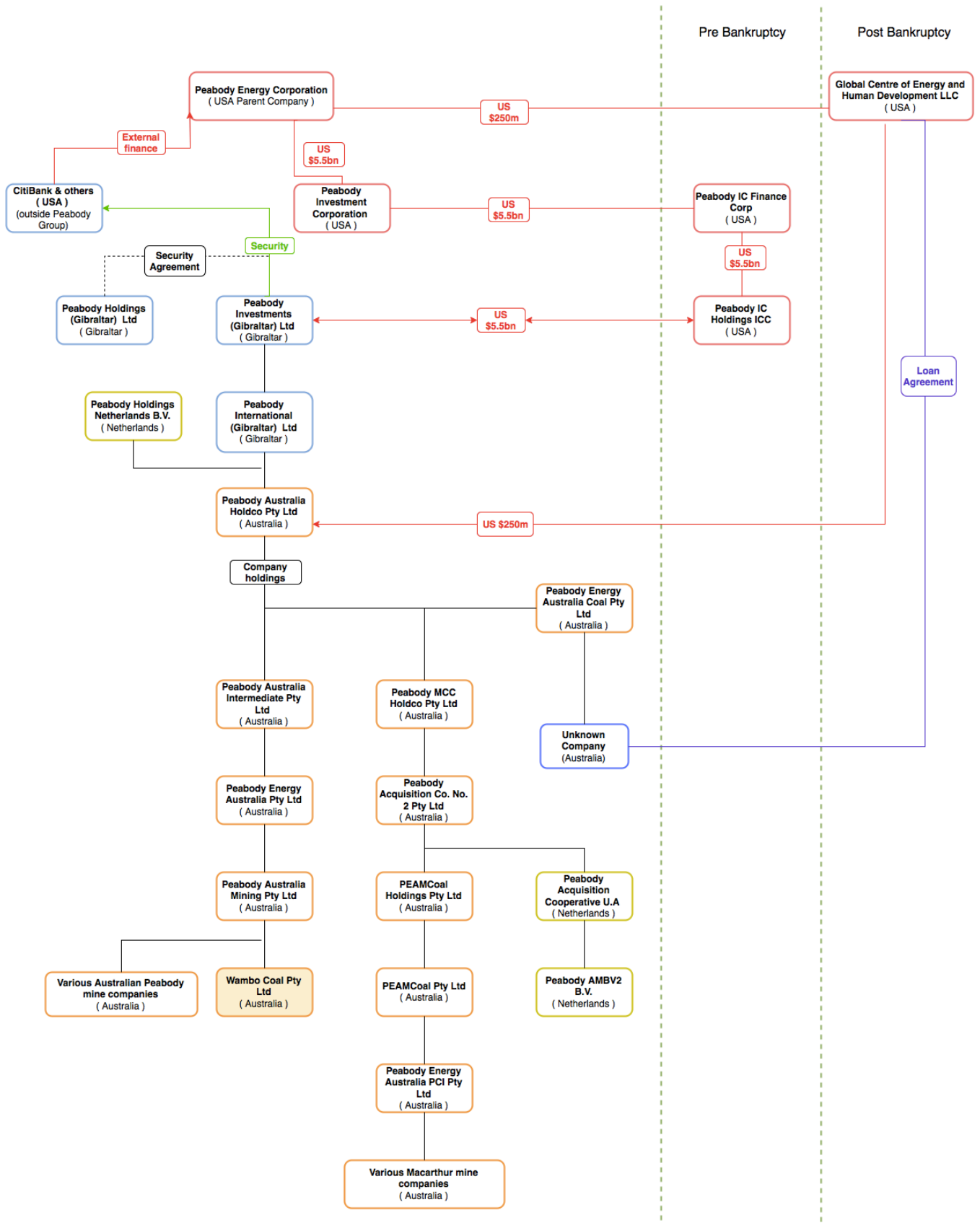
⁵⁶ 2015 Wambo Accounts, pp1,2

⁵⁷ 2015 Wambo Accounts, pp1,2

⁵⁸ 2015 Wambo Accounts, pp1,2

⁵⁹ 2015 Wambo Accounts, p2

Appendix 1 Peabody company, loan and securitisation structure



Source: Peabody Energy Corporation SEC filings, Peabody Australia Holdco Pty Ltd ASIC filings