

9 September 2016

The Hon Anthony Roberts  
Minister for Industry, Resources and Energy

By email only: [REDACTED]

To the Honourable Anthony Roberts,

**Peabody – complaint & request for review of fit and proper status**

1. Environmental Justice Australia (**EJA**) is a not-for-profit law firm. We represent the Hunter Communities Network (**HCN**), a network of community groups concerned about the environmental and social impact of coal mines in New South Wales.
2. Our client wishes to lodge a complaint about Peabody Energy Corporation (USA) (**Peabody**) and its Australian subsidiaries that operate mines in New South Wales. HCN requests an investigation into the ‘fit and proper’ status under s 380A of the *Mining Act 1992* (NSW) of:
  - (a) Wambo Coal Pty Ltd; and
  - (b) Wilpinjong Coal Pty Ltd.<sup>1</sup>
3. We understand there is no current investigation into these companies. We note the department is conducting similar investigations into Wollongong Coal Ltd.<sup>2</sup>

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<sup>1</sup> Metropolitan Collieries Pty Ltd operates the Metropolitan Colliery in NSW. It is also owned by Peabody (USA) and thus should also be subject to an investigation of fit and proper status by virtue of the actions of its parent company.

<sup>2</sup>

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryEventTranscript/Transcript/9752/Transcript%20-%20Uncorrected%200160831%20-%20GPSC5%20-%20Industry%2c%20Resources%20and%20Energy%20-%20Roberts.pdf> p12

## Background

4. Wambo Coal Pty Ltd (**Wambo**) operates the Wambo coal mine, a combined open-cut and underground mine about 5 kilometres west of Warkworth, NSW. Wambo's current mining leases are ML 1402 (1992), ML 1572 (1992) and ML 1594 (2007).<sup>3</sup>
5. Wilpinjong Coal Pty Ltd (**Wilpinjong**) operates the Wilpinjong coal mine, an open-cut mine about 13 kilometres east of Ulan, NSW. Wilpinjong's current mining licence is ML1573 (1992).<sup>4</sup>
6. Wambo and Wilpinjong's ultimate Australian domiciled parent company is Peabody Australia Holdco Pty Ltd (**Holdco**). The ultimate parent company overall is Peabody, domiciled in the USA. Each of Wambo and Wilpinjong is reliant on Peabody, Holdco and their subsidiaries for financing arrangements.
7. The solvency of Holdco, and therefore the very existence of Wambo and Wilpinjong, is dependent on a range of agreements, formal and informal, between a number of entities of the Peabody group. For example, in support of the view that Holdco was a going concern in April 2016, the company's directors referred to an assurance by another Peabody company based in the low-tax jurisdiction of Gibraltar not to voluntarily redeem over \$2 billion in preference shares in Holdco. However risk of redemption by creditors under Chapter 11 bankruptcy appears high. Holdco at 31 December 2015 had negative \$3.8 billion in equity.<sup>5</sup>
8. Peabody group's corporate structure is complex. However it is beyond doubt that numerous formal and informal agreements keep Wilpinjong and Wambo operating, and that each is controlled by Peabody. EJA's May 2016 submission on the Wambo Southern Longwall Expansion contains detailed information on the group's structure and finances.<sup>6</sup> Since the date of that submission further Peabody accounts have been released casting further doubt over the financial health of the Australian operations.<sup>7</sup>
9. Peabody and its subsidiaries are in poor financial health. Peabody applied for debtor relief from creditors on 13 April 2016 by subjecting itself to the Chapter 11 bankruptcy process overseen by US courts.
10. Peabody is commonly referred to as bankrupt. If Peabody were domiciled in Australia it would not have the benefit of the Chapter 11 process and the company would be in administration. Wambo and Wilpinjong continue to operate, it seems, only because the

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<sup>3</sup> <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/current-titles-reports-applications-and-services/title-status-reports/CoalMonthly-TitlesCurrent-2016-09.pdf>

<sup>4</sup> As above

<sup>5</sup> Holdco 2015 financial report, p12

<sup>6</sup> <https://www.envirojustice.org.au/sites/default/files/files/160513%20EJA%20Submission%20-%20Wambo%20-%20Southern%20Longwall%20Modifications.pdf>

<sup>7</sup> <http://www.abc.net.au/news/2016-06-02/peabody-australia-coal-company-loses-nearly-3-billion/7471748>

Chapter 11 process can determine how much and when creditors will receive money owing to them.

### Fit and proper

11. The reasons why Wambo and Wilpinjong are not 'fit and proper' under the *Mining Act 1992* (NSW) are numerous and compelling. Some are due to Peabody's actions because we understand the 'fit and proper' test extends to entities with which the mining right holder has formal or informal arrangements in connection with mining activities or with persons that can influence those activities.<sup>8</sup> We summarise the issues below.

### *Financial capacity*

12. Neither Wambo nor Wilpinjong can demonstrate the financial capacity to comply with obligations under current or future mining rights. Each entity has applied to expand mining operations. The companies state the capital investment required for two expansion plans is over \$750 million.<sup>9</sup> The additional joint venture expansion with Glencore would likely increase Wambo's capital requirements by \$40 million.<sup>10</sup> Wambo and Wilpinjong in response to questions about financial capacity to expand each refer to a US\$250 million loan.<sup>11</sup> However the loan documents state it was provided for operational liquidity to the Australian business.<sup>12</sup> We understand this means the loan cannot be used for capital expenditure (expansion). For a group in bankruptcy it strikes us as strange that there is no real indication of where the money will come from. It is an offence under NSW law to provide misleading information.
13. On 10 August 2016 Peabody published its five-year business plan. The plan allocates US\$100 million (A\$131 million) to mine expansion in Australia. Peabody's revenue modelling is based on an economic scenario that corresponds with a 6°C rise in average global temperatures from pre-industrial times.<sup>13</sup> So, not only is the allocated money inadequate, but in our view in light of the Paris Agreement the assumptions used to forecast that US\$100 million will be available are fundamentally flawed. US financial analysts have described Peabody's presentation of its financial position in its business plan as 'misleading'.<sup>14</sup>

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<sup>8</sup> Section 380A(2)(n) & (o) *Mining Act 1992* (NSW)

<sup>9</sup> Wambo \$653m p3:

<https://majorprojects.affinitylive.com/public/84bd4e932384288c84a352763a2c8056/Wambo%20Mine%20-%20Mod%2012%20-%20Application%20form.pdf>

Wilpinjong \$101m:

<https://majorprojects.affinitylive.com/public/317d3160f201faf78e12fb95d13fb458/Wilpinjong%20Extension%20Project%20-%20Application.html>

<sup>10</sup> If capital costs of \$83m are shared equally between the joint venture partners:

<https://majorprojects.affinitylive.com/public/9c62eba59225c0aeb555512b0496bb43/SSD%20Application.html>

<sup>11</sup> For example, Wambo, in response to submissions on the Southern Longwall Expansion cited the US\$250m loan (p29,30) as key to viability in the context of expansion. It did not address how it would fund the expansion plans.

<sup>12</sup> 13 April 2016 Peabody SEC filing, PDF p79 (agreement p10):

[app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=10870077&type=PDF&symbol=BTUUQ&companyName=Peabody+Energy+Corp&formType=8-K&dateFiled=2016-04-13&cik=0001064728](http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=10870077&type=PDF&symbol=BTUUQ&companyName=Peabody+Energy+Corp&formType=8-K&dateFiled=2016-04-13&cik=0001064728)

<sup>13</sup> Peabody 8 August 2016 10-Q SEC filing, p71: "We believe the Current Policies Scenario is the most appropriate for our investors to consider..."

<sup>14</sup> <http://ieefa.org/wp-content/uploads/2016/09/IEEFA-memo-on-Peabody-Bankruptcy.pdf>

### *Non-compliance with relevant legislation*

14. Wambo and Wilpinjong's statements in response to queries about financial capacity to expand the respective mines may be misleading in a material particular, thus contravening the *Mining Act 1992* (NSW). We note Wambo's ongoing non-compliance with environmental laws as a result of its operations.<sup>15</sup>

### *Is not of good repute, is not of good character with particular regard to honesty and integrity*

15. Peabody bases its 10 August 2016 financial projections on a 6°C global warming scenario.<sup>16</sup> Whilst it is impossible to predict the magnitude of impacts to Australia under this extreme warming scenario, federal government authorities consider it to be in Australia's best interests to limit warming to the maximum extent possible.<sup>17</sup> Peabody ignores the Paris Agreement and parties' commitment to limiting average global temperature increase to well under 2°C, a goal supported by the World Bank IMF and OECD as a clear market signal to investors.<sup>18</sup> Current policies are derided by the World Bank and eminent economists.<sup>19</sup>
16. Peabody's over-optimistic reliance on unrealistic, extreme global warming scenarios has sparked legal action by the New York State Attorney General. The proceedings were settled in November 2015 when Peabody undertook to inform investors of other global warming scenarios.<sup>20</sup> It failed to do this in its five-year business plan.<sup>21</sup>
17. In a further example relating to integrity, in June 2016 EJA wrote to the Queensland Department of Environment and Heritage Protection about a Peabody subsidiary, Peabody (Wilkie Creek) Pty Ltd (**Wilkie Creek**), providing misleading information about its financial position. Wilkie Creek made a successful application for a discount to financial assurance on the basis of 'financial stability' after providing accounts of a mid-level holding company in support. The accounts that should have been provided were those of the Australia-based parent company, Holdco. The accounts of the mid-level company showed equity of \$4.2 billion more than Holdco which, at the time, had negative \$2.6 billion in equity and was a major solvency risk.<sup>22</sup> Giving false or misleading material to the Queensland government is an offence under section 480 of the *Environmental Protection Act 1994* (Qld).

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<sup>15</sup> <https://www.envirojustice.org.au/sites/default/files/files/160513%20EJA%20Submission%20-%20Wambo%20-%20Southern%20Longwall%20Modifications.pdf>

<sup>16</sup> Our analysis of the coal demand assumptions in the five-year business plan reveal it is based on current planned coal fired power generating capacity. The International Energy Agency links this scenario to 6C warming: <https://www.iea.org/publications/scenariosandprojections/>

<sup>17</sup> Climate Change Authority, Targets and Progress Review, Final Report, February 2014, p41

<sup>18</sup> <http://www.worldbank.org/en/news/speech/2016/04/21/carbon-pricing-panel---setting-a-transformational-vision-for-2020-and-beyond>

<sup>19</sup> <https://www.theguardian.com/environment/2016/may/05/climate-change-coal-power-asia-world-bank-disaster>

<sup>20</sup> <http://www.ag.ny.gov/press-release/ag-schneiderman-secures-unprecedented-agreement-peabody-energy-end-misleading>

<sup>21</sup> Peabody 10 August 2016 8-K SEC announcement, for example the 'Industry Fundamentals' data on forecast increased ASEAN coal power generation capacity to 'surge ~75% by 2021' (p23), appears based on all current planned coal fired power.

<sup>22</sup> Wilkie Creek Operations Plan 30 January 2015, Appendix C, attaching FY2013 accounts for Peabody Energy Australia Pty Ltd (p7). Cf FY2013 accounts for Peabody Australia Holdco Pty Ltd (see FY14 PAH accounts p7 showing FY13 results).

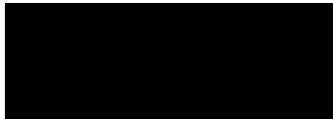
*Has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors*

18. On 13 April 2016 Peabody applied to the United States Bankruptcy Court for protection, as a debtor, under 'Chapter 11' bankruptcy provisions. Peabody owes U\$8.8 billion in debt. Approximately U\$5.5 billion is owed by its failing Australian operations.

We look forward to your advice about whether you will investigate the matters raised in this letter.

Please let us know if you require further information.

Yours sincerely,



**David Barnden**  
**Lawyer**  
**Environmental Justice Australia**