

Submission

on

United Wambo Open Cut Coal Mine Project

to the

NSW Department of Planning & Environment

prepared by

Environmental Justice Australia

22 September 2016

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: United Wambo Open Cut Coal Mine Project

Applicant: United Collieries Pty Ltd

Application number: SSD 7142

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 project not proceed. We expect the ultimate approving authority to deny the application on the basis that the 50:50 joint venture lacks the requisite financial capacity and integrity, and its participants are not fit and proper.¹
2. The applicant, United Collieries Pty Ltd (**United Collieries**), makes the application as the manager of a 50:50 joint venture between it and Wambo Coal Pty Ltd (**Wambo Coal**).²
3. The joint venture project includes the proposed 'United Open Cut' and 'ongoing mining of the Wambo Open Cut' (the **Project**). Collectively the operations will 'maximise resource recovery by combining these two mines and removing operational constraints, enabling extraction of an additional approximately 150 million tonnes (Mt) of run-of-mine (ROM) coal over 23 years'.³
4. The Project is proposed after Australia has signed the United Nations Framework Convention on Climate Change (**UNFCCC**) Paris Agreement. On 31 August 2016 Australia signalled its expectation to ratify the Paris Agreement by the end of 2016.⁴ China and USA have also recently ratified the Paris Agreement.⁵ The Paris Agreement recognises 'climate change represents an urgent and potentially irreversible threat to human societies and the planet'.⁶ 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.⁷ 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.

United Collieries

5. United Collieries is 95% owned by Abelshore Pty Limited (**Abelshore**) which, we understand, is owned by Glencore Operations Pty Ltd, which is owned by Glencore Queensland Ltd, which is owned by Glencore Investment Holdings Australia Ltd, which is owned by Glencore Investment Pty Ltd, which is owned by Glencore Holdings Pty Ltd

¹ s380A of the *Mining Act 1992*

² United Wambo EIS p450

³ United Wambo EIS, p(i)

⁴ <http://www.abc.net.au/news/2016-04-23/world-leaders-gather-at-un-to-sign-paris-agreement-climate-deal/7352328>; http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160831c.aspx

⁵ <http://www.abc.net.au/news/2016-09-04/us-joins-china-in-ratifying-paris-climate-agreement/7812366>

⁶ Paris Agreement Preamble: <https://unfccc.int/resource/docs/2015/cop21/eng/09r01.pdf>

⁷ 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>.

(GHP).⁸ Those are all Australian companies. The last company, GHP, is owned by a Glencore company registered in Bermuda, Glencore International Investments Ltd.⁹ All companies are ultimately owned by Glencore plc (**Glencore**), an Anglo-Swiss commodities company headquartered in Switzerland.

6. Abelshore last submitted a financial report to ASIC in 2001.¹⁰ Its financial position is opaque.
7. Glencore Investment Pty Ltd is the head tax entity for Glencore in Australia.¹¹ Therefore we think its financial position is the most appropriate for this application. It paid \$3.9 million in tax in 2014 and \$0 in 2013 but the ultimate tax paid calculations are difficult to understand due to the complexity in its corporate structure and limited disclosures in 'special purpose' financial accounts.¹² We do not allege any illegality, but authorities may wish to consider its links to Bermuda and the opacity of United Collieries' structure with respect to 'fit and proper' status.

Wambo Coal

8. There is an arrangement between Wambo Coal and United Collieries which satisfies s380A(2)(o) *Mining Act 1992*; as such the position of Wambo Coal and its ultimate parent company Peabody Energy Corporation (**Peabody**) is of significance with respect to the 'fit and proper' status of the applicant.
9. Peabody sought protection from creditors under US Chapter 11 bankruptcy provisions in April 2016.¹³ Peabody is the ultimate controlling entity of Wambo Coal, and by virtue of seeking to take advantage of US bankruptcy laws and the joint venture relationship, is not a fit and proper person for the purposes of this application.¹⁴ Analysts doubt the Chapter 11 bankruptcy proceedings will make Peabody's operations profitable.¹⁵ Peabody itself acknowledges that its US bankruptcy proceedings may disrupt or impede its operations in Australia.¹⁶ The auditors of Wambo Coal Pty Ltd and other Peabody Australian companies state 'there is significant uncertainty whether the company and / or the consolidated entity will continue as a going concern'.¹⁷
10. The Project is estimated to cost \$84 million.¹⁸ If costs are shared equally between Wambo Coal and United Collieries, as one would expect in a 50:50 joint venture, Wambo Coal would need to spend \$42 million. However, Wambo Coal's 2015 financial statements show

⁸ Previously called GHP 104 160 689 Pty Ltd

⁹ <http://www.smh.com.au/business/markets/glencores-tax-position-remains-unclear-20151029-gkmlgp.html>

¹⁰ Company search on www.asic.gov.au

¹¹ Glencore Investment Pty Ltd 2014 accounts, p13

¹² <http://www.smh.com.au/business/markets/glencores-tax-position-remains-unclear-20151029-gkmlgp.html>; Glencore Investment Pty Ltd 2014 accounts, p18

¹³ <http://www.peabodyenergy.com/content/120/press-releases>

¹⁴ s380A of the *Mining Act 1992*. Refer to the combined effect of subsections (2)(j) and (2)(o)

¹⁵ <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/>

¹⁶ Peabody Energy Corporation, 8-K SEC filing, 13 April 2016, p7

¹⁷ Wambo Coal Pty Ltd 2015 financial statements, lodged with ASIC and dated 29 April 2016 (**2015 Wambo Coal Accounts**), p41

¹⁸ <https://majorprojects.affinitylive.com/public/9c62eba59225c0aeb555512b0496bb43/SSD%20Application.html> 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 Coal accounts p26. Therefore we assume about \$535 million is required to complete the project.

that it does not have the financial capacity to undertake the expansion. At 31 December 2015 the applicant had only \$4.6 million in cash.¹⁹ Its traditional line of credit has expired.²⁰ Emergency funding provided on the eve of Peabody's bankruptcy is insufficient to cover expansion costs.²¹ Regardless, that US\$250 million loan services the entirety of Peabody's Australian operations.²² Those operations collectively lost \$1.2 billion dollars in 2014 and \$2.7 billion in 2015.²³ At 31 December 2015 the top-level Australian consolidated holdings company had negative shareholders' equity of \$6.5 billion.²⁴ Peabody Holdco is subject to serious questions about its status as a going concern.²⁵

11. Wambo Coal's financial problems are compounded by concurrent plans for the 'Southern Longwall Expansion' which is still yet to be approved. Wambo Coal estimated that project to cost \$651.9 million.²⁶
12. Of Wambo Coal's profit, 25% goes to a third party.²⁷ This follows protracted litigation brought by Wambo Coal, which it lost, culminating in an unsuccessful leave application to the High Court of Australia.²⁸
13. In addition, the underlying value of Wambo Coal's sales are at best opaque, with 38% of its coal sales going to related parties in 2015.²⁹
14. Wambo Coal's cash flows are controlled by the top-level Australian holding company, Peabody Australia Holdco Pty Ltd (**Peabody Holdco**).³⁰ That company in turn is held by Peabody entities registered in low-tax jurisdictions Gibraltar and the Netherlands.³¹ Peabody Holdco owes over US\$5.5 billion³² via a complicated web of intercompany loans to Peabody entities registered in Delaware,³³ an onshore US tax haven.³⁴ The debt is a major part of the US\$8.8 billion ultimately payable to US external lenders of Peabody.³⁵ Those financiers are creditors in the US bankruptcy proceedings.³⁶ The creditors can seek to call on that debt at any time, subject to the Chapter 11 bankruptcy proceedings, via an intricate web of Peabody intermediate holding companies registered in Gibraltar.³⁷ Peabody's intermediary holding companies might commit to not voluntarily calling on the applicant's debt, but it means little.³⁸ It is a matter for the external lenders and the US courts. Peabody's complicated holding and loan structure appears at **Appendix 1**.

¹⁹ 2015 Wambo Coal Accounts, p8 (submitted)

²⁰ 2015 Wambo Coal Accounts, p1

²¹ 2015 Wambo Coal Accounts, p1

²² Via the top-level Australian holding company, Peabody Australia Holdco Pty Ltd: 2015 Wambo Coal Accounts, p9

²³ 2015 Peabody Holdco Accounts, p6

²⁴ 2015 Peabody Holdco Accounts, p7

²⁶ According to Wambo Coal's 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 Coal Accounts p26. Therefore we assume about \$535 million is required to complete the project.

²⁷ 2015 Wambo Coal Accounts, p1. Note: the B Class shareholder holds 25 million shares.

²⁸ 2015 Wambo Coal Accounts, p32

²⁹ 2015 Wambo Coal Accounts, pp23,36

³⁰ 2015 Wambo Coal Accounts, p9

³¹ ASIC Company Search of Peabody Australia Holdco Pty Ltd.

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

³³ Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, pF-41;

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

³⁴ http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?_r=0

³⁵ <https://mscusppegrs01.blob.core.windows.net/mmfiles/sitemedia/ch11/first%20day%20declaration.pdf>

³⁶ <http://www.kccllc.net/peabody/document/1642529160413000000000162>

³⁷ Peabody Energy Corporation, 8-K SEC Filing, 30 September 2013, p2 and Exhibit 10.2

³⁸ 2015 Wambo Coal Accounts, p10

15. Wambo Coal's reported cash assets are not held by it. They are held by an intermediary holding company,³⁹ and thus can be used to service debts of other companies in Peabody's Australian group. These assets in part secure a tranche of US\$2.9 billion in debt.⁴⁰ At 31 December 2015, Wambo Coal held negative \$42 million in current assets.⁴¹ It has over \$23 million in workers entitlement liabilities,⁴² and had contingent liabilities of over \$72 million in respect of guarantees for financial assurance on environmental rehabilitation.⁴³
16. Wambo Coal 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.⁴⁴ It has over \$16 million in liabilities for minimum payments for operating and finance leases from related parties.⁴⁵
17. Peabody in its 10 August 2016 'five-year business plan' allocated US\$100 million to 'life extension capital totaling [sic] ~\$100M for projects that deliver volume beyond 2021' in Australia. This Project and the Wambo Longwall Expansion are two such projects. Collectively they are expected to cost Wambo Coal \$693 million. Aside from the fact that US\$100 million is clearly inadequate to ensure Wambo Coal has the financial capacity to comply with its obligations in the joint venture partnership and Longwall Expansion, the presentation of Peabody's financial position in its five-year business plan is, according to the Institute of Energy Economics and Financial Analysis (IEEFA), 'misleading'.⁴⁶ IEEFA expect instead of successfully trading out of the Chapter 11 bankruptcy proceedings, Peabody will simply go bankrupt again.⁴⁷
18. Peabody's five-year business plan skirts around requirements to disclose less favourable economic conditions as a result of likely emissions regulations, as required by the November 2015 'Assurance of Discontinuance' with the New York Attorney General's Department.⁴⁸ Instead of referring to International Energy Agency (IEA) scenarios, Peabody appears to cherry-pick favourable analyst data, which has the same effect as referring to the worst-case climate change EIA scenario, but without needing to disclose stricter carbon emission regulation scenarios that are detrimental to the assumptions that underpin its business plan.⁴⁹
19. In a different publication to the Securities and Exchange Commission dated 8 August 2016, Peabody confirmed it preferred the worst case economic scenario for climate change:

³⁹ 2015 Wambo Coal Accounts, p9 referring to \$170 million held by an intermediate holding company, Peabody Australia Mining Pty Ltd

⁴⁰ Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, pF-41

⁴¹ 2015 Wambo Coal Accounts, p9

⁴² 2015 Wambo Coal Accounts, p30

⁴³ 2015 Wambo Coal Accounts, p33

⁴⁴ 2015 Wambo Coal Accounts, p36

⁴⁵ 2015 Wambo Coal Accounts, p34

⁴⁶ <http://ieefa.org/wp-content/uploads/2016/09/IEEFA-memo-on-Peabody-Bankruptcy.pdf> p8

⁴⁷ <http://ieefa.org/ieefa-alert-peabodys-plan-to-emerge-from-bankruptcy-is-likely-to-end-in-bankruptcy-again-%E2%80%A8/>

⁴⁸ <http://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf>

⁴⁹ For example, the five year business plan 'Industry Fundamentals' section devotes an entire page to 'New coal Generating Capacity Supports Seaborne Thermal Long-Term Demand' (page 23). In particular, Peabody stated 'Over 85% of additional concentrated in Asia-Pacific - ASEAN capacity forecasted to surge ~75% by 2021'. EJA calculated a 78% forecast capacity increase for ASEAN countries in accordance with July 2016 information on planned coal fired power generators. The forecast is based upon megawatt capacity of 'Announced + Pre-permit + Permit' proposed coal plants compared to current operating capacity: www.endcoal.org/wp-content/uploads/2016/08/CountryMW.pdf

We believe that the Current Policies Scenario is the most appropriate for our investors to consider because we believe that it has proven to be the scenario that has yielded the most accurate projections of coal usage.⁵⁰

20. The IEA's Current Policies Scenario 'assumes no changes in policies from the mid-point of the year of publication (previously called the Reference Scenario)'. This appears to correspond with the IEA's 6°C global warming scenario, which is 'largely an extension of current trends'.⁵¹ The PAC is asked to consider whether a fit and proper person can realistically base its financial projections on a 6°C warming scenario. These projections appear directly related to Peabody realising the necessary cash for this Project. Furthermore, Peabody asserts the 'Current Policies Scenario' is the most appropriate for investors. In contrast, the IEA's 'New Policies Scenario' is its central scenario which takes into account proposed policies around climate regulation.
21. In the absence of a reasonable basis for Peabody's forecast, and where directors have not acknowledged and educated themselves about the significance of the Paris Agreement and its imminent ratification, there exists a possibility of breach of laws by the company and officeholders.
22. Given the financial constraints on Peabody and Wambo Coal, we also query the adequacy of Wambo Coal's statement in response to concerns about financial capacity for the Southern Longwall Expansion.⁵²
23. If the Project were to proceed and Wambo Coal found money for capital expenditure, increased mine-site disturbance would result. Additional financial assurance would be required for rehabilitation⁵³ and Wambo Coal would likely contribute 50% of what is required. Wambo Coal's financial statements acknowledge significant concern about the ability to provide increased financial assurance.⁵⁴ If the Wambo Coal and United Collieries cannot pay to rehabilitate the site, and if financial assurance is insufficient, the taxpayer could ultimately be left to finance rehabilitation. Or the site does not get rehabilitated at all.⁵⁵
24. Expansion is recognised as a way that coal companies can avoid closing and rehabilitation costs crystallising on balance sheets.⁵⁶ The Project effectively expands the United and Wambo operations and therefore delays rehabilitation obligations and expenses. Effectively the Project buys time to sell assets to inexperienced and potentially more financially constrained operators who may not have the capacity to comply with mining leases.⁵⁷ Peabody was the largest private sector coal mining company in the world and

⁵⁰ Peabody Energy Corporation, Quarterly report with a continuing view of a company's financial position, SEC Form 10-Q, dated 8/08/2016, p71

⁵¹ <http://www.iea.org/publications/scenariosandprojections/> accessed 22 September 2016. The IEA may change its scenarios.

⁵² Wambo Coal stated: 'Peabody Energy has made available to its Australian platform a committed US\$250 million (M) revolving Intercompany Loan Facility. The Intercompany Loan Facility is designed to provide additional liquidity to support the ongoing operations of the Australian business during Peabody Energy's Chapter 11 reorganisation, with draw amounts being tied to operating budgets and subject to certain availability restrictions' at p28: https://majorprojects.affinitylive.com/public/63ee308a130e016c929ed0016a2b0da6/Wambo%20Mine_MOD%2012_%20Response%20to%20Submissions.pdf

⁵³ http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0006/363516/ESG1-Rehabilitation-Cost-Estimate-Guidelines.PDF

⁵⁴ Peabody Energy Corporation, 10-K SEC Filing, 16 March 2016, p77; 2015 Wambo Coal Accounts, p10

⁵⁵ <http://www.theherald.com.au/story/3878268/australia-is-fast-becoming-the-land-of-ghost-mines/>

⁵⁶ 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

⁵⁷ <http://www.smh.com.au/business/energy/old-challenges-for-the-new-face-of-australian-coal-20160406-gnzpdp.html>

has succumbed to bankruptcy, along with four of the other largest listed US coal mining companies in 2015/2016.⁵⁸

25. One real and understated reason Wambo Coal needs the Project to go ahead is the 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.⁵⁹ The contract appears to extend well over ten years and therefore past the current expected life of Wambo.⁶⁰
26. Wilpinjong, like Wambo Coal, is a Peabody subsidiary seeking to expand its NSW operations.⁶¹ 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'.⁶² If either Wambo or Wilpinjong do not fulfil minimum volume requirements, the other must make up the shortfall or pay penalties.⁶³ In 2015 Wambo sold over \$70 million in coal to Wilpinjong.⁶⁴
27. Another issue going to the flaws of Wambo Coal's controlling entities is Peabody's breaches of New York law.⁶⁵ Further, we note that Peabody, through Peabody (Wilkie Creek) Pty Ltd provided incorrect accounts to the Queensland Department of Environment and Heritage Protection in its 2015 Plan of Operation for the purpose of seeking a discount on rehabilitation guarantees on the basis of 'financial stability'. Accounts for a mid-level holding company (Peabody Energy Australia Pty Ltd) were provided instead of the top-level holding (Peabody Holdco) that controlled the finances of Peabody operations in Australia. The accounts provided were, in our view, potentially misleading in a material particular. Shareholders' equity was reported as *positive* \$1.6 billion in the accounts provided. In stark contrast the accounts for Peabody Holdco reported *negative* \$2.6 billion in shareholders equity.⁶⁶ The accounts provided masked significant debt.
28. Wambo Coal has been involved in a number of recent incidents of environmental malfeasance.⁶⁷ The applicant pleaded guilty to releasing nitrogen oxides from a May 2014 blast event with unexpected consequences and the penalty judgment is pending.⁶⁸ The most recent environmental failure was in January 2016. A temporary erosion and sediment control dam failed releasing 3 megalitres of sediment-laden water into a creek and river system. Formal legal interviews have been requested with staff and compliance action may be taken.⁶⁹ In light of recent cost savings initiatives⁷⁰ we expect the applicant will struggle to avoid serious environmental failures in the future.

⁵⁸ <http://www.peabodyenergy.com/content/101/about-us>

⁵⁹ 2014 Peabody Holdco Accounts, p29

⁶⁰ 2015 Wambo Coal Accounts, p35

⁶¹ <http://www.planning.nsw.gov.au/News/2016/Community-feedback-sought-for-the-Wilpinjong-Extension-Project>

⁶² 2015 Wambo Coal Accounts, p35

⁶³ This is the effect of 'joint and severable'.

⁶⁴ 2015 Wambo Coal Accounts, p36

⁶⁵ <http://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf> at [23]

⁶⁶ EJA letter to DEPH dated 12 July 2016.

⁶⁷ 2015 Wambo Coal Accounts, pp1,2

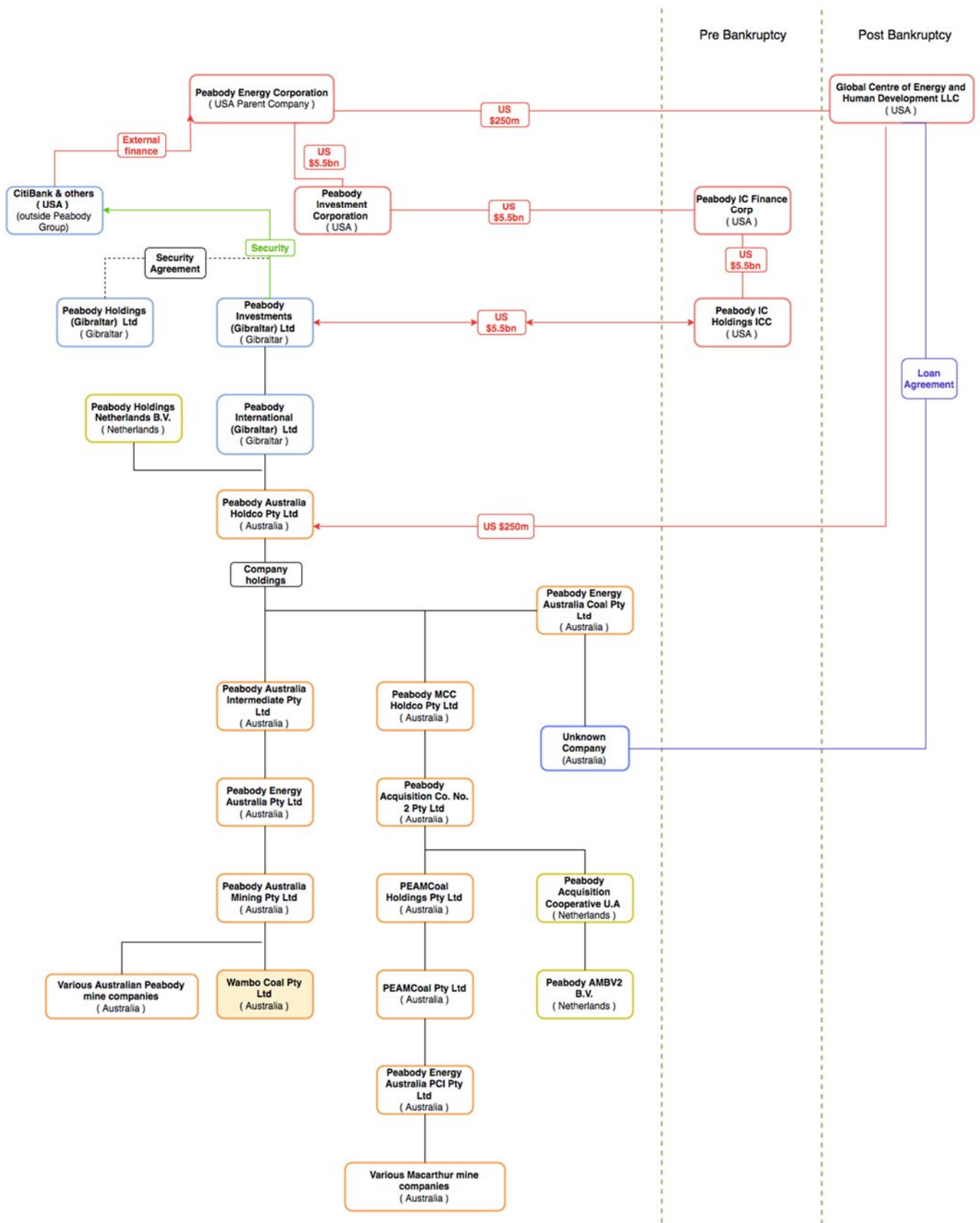
⁶⁸ 2015 Wambo Coal Accounts, pp1,2

⁶⁹ 2015 Wambo Coal Accounts, pp1,2

⁷⁰ 2015 Wambo Coal Accounts, p2

Appendix 1

Peabody company, loan and securitisation structure



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