

21 October 2015

The Hon Anthony Roberts, MP
NSW Minister for Industry, Resources and Energy
Level 37 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

By email and post: office@roberts.minister.nsw.gov.au

Copy to: Kylie Hargreaves, Deputy Secretary, Department of Industry: Resources & Energy (kylie.hargreaves@business.nsw.gov.au)

Dear Minister

Wollongong Coal – Cancellation of Mining Rights

Russell Vale: CCL 745, ML 1575 and MPL 271

Wongawilli Coal: ML 1596 (expires 7 Oct. 2029)

Wongawilli Coal: ML 1565 and CCL 766 (both have expired on 9 Oct. 2015 - renewal currently being sought.)

1. We act for Lock the Gate Alliance. We are instructed to write to you regarding our client's assessment that Wollongong Coal is not a "fit and proper person" within the meaning of section 380A of the *Mining Act 1992* (NSW) (**the Act**). It is our client's contention that if you are of the view that Wollongong Coal is not a fit and proper person its existing mining rights should be reconsidered and any further applications to mine coal in NSW by Wollongong Coal ought to be refused.
2. Our client understands that the introduction of the fit and proper person provision in the Act empowers you as the decision-maker to refuse to grant or renew a mining right, as well as to cancel or suspend a mining right, if you determine a person is not fit and proper to hold a mining right.
3. Under section 380A(2) of the Act, the decision-maker may take into consideration a number of matters in determining whether a company is a fit and proper person to hold a mining right. These considerations include:
 - criminal conduct issues;
 - record of compliance with relevant legislation;
 - technical competence in regard to management of activities or works;
 - whether the company or a director thereof is not of good repute;
 - whether the company or a director thereof is not of good character, with particular regard to honesty and integrity; and
 - financial capacity to comply with obligations under the mining right.

4. The evidence suggests that Wollongong Coal is a loss-making company. It is our client's view that it is in clear and most probably terminal financial distress, as witnessed by the \$657 million shortfall in net current assets as of 31 March 2015, and the \$371 million of net losses reported in the last two years. The auditors of the group, Ernst & Young, note clearly that the firm's financial position raises significant uncertainty about the assumption of a going concern even over the next twelve months. We are instructed that it has a revolving door of senior management and has closed its traditional coal mining business.
5. In trying to develop a capital intensive, complex and potentially dangerous underground coal-mining project at Russell Vale, there is added community and environmental risk in terms of the Special Area of Sydney's water catchment. In March 2015, Water NSW explained that the Russell Vale expansion "*is located under a declared catchment area and under land managed as Schedule 1 Special Area (noting that the primary purpose of these areas is to protect the quality and quantity of water in our catchments and that a primary objective is to maintain their ecological integrity).*"¹
6. We note that when then Premier O'Farrell read the *Mining and Petroleum Legislation Amendment Bill 2014* for a second time, he made the point that the Bill amends the provisions of the Act to introduce a "*new test ... allowing the decision-maker to cancel or refuse to grant or renew a mining right or petroleum authority if, in the decision-maker's opinion, the applicant is not a 'fit and proper person'*".²
7. We also understand, as the former Premier said at the time, that when "*a decision-maker is taking action that will have a significant impact on a title holder's rights, such as cancelling a title, the decision-maker will have to be satisfied to a high standard of the relevant grounds.*"³
8. Given the need to be satisfied to a high standard that there are grounds to suspend or cancel a mining right, our client has undertaken its own research in relation to compliance issues and sought expert advice about technical competence and the company's financial capacity to comply with obligations.
9. To understand part of our client's case that Wollongong Coal is not a fit and proper person in accordance with the law, it is necessary to understand the links between Jindal Steel and Power and Wollongong Coal. These are described in Wollongong Coal's latest annual report, and are set out at **Attachment A** of this letter.

¹ Water NSW submission to PLANNING ASSESSMENT COMMISSION PREFERRED UNDERGROUND EXPANSION PROJECT WOLLONGONG COAL Ltd RUSSELL VALE COLLIERY, MARCH 2015.

²[http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/0/0ea2e5897fe517bfca257c8a0012b284/\\$FILE/2r%20Criminal%20Assets%20&%20Mining.pdf](http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/0/0ea2e5897fe517bfca257c8a0012b284/$FILE/2r%20Criminal%20Assets%20&%20Mining.pdf)

³ *Criminal Assets Recovery Amendment Bill 2014* and *Mining and Petroleum Legislation Amendment Bill 2014*, Mr Barry O'Farrell (Premier and Minister for Western Sydney), Second Reading Speech, (25th February 2014) p 55.

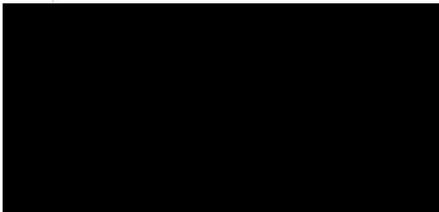
10. It is our client's contention that as Wollongong Coal is not a fit and proper person in accordance with the Act, it would be appropriate for you to exercise your discretion and cancel or suspend Wollongong Coal's mining rights under the Act. Our client has set out its case in this regard and it is provided to you as **Attachment B** to this letter.

11. In light of Wollongong Coal's parlous financial situation, its and its related entities' record of non-compliance in India and Australia, and allegations of criminal conduct currently before the Indian courts, our client asks that you give serious consideration to cancelling the mining rights of Wollongong Coal in Sydney's drinking water catchment, in accordance with the fit and proper person provisions in the Act.

12. Members of our client group seek a meeting with you to follow up on the matters raised in this letter and its attachments.

13. We look forward to your timely written response to the matters raised. If there are any matters that you would like to discuss please do not hesitate to contact the writer on [REDACTED] or by e-mail at [REDACTED].

Yours sincerely,
EDO NSW



Sue Higginson
Principal Solicitor

Enclosures: Attachment A
Attachment B

ATTACHMENT A – LINKS BETWEEN NAVEEN JINDAL, JINDAL STEEL AND POWER, JINDAL STEEL & POWER (MAURITIUS) LIMITED, WOLLONGONG COAL AND WONGAWILLI COAL PTY LIMITED

Mr Naveen Jindal & Jindal Steel & Power Limited

- Mr Naveen Jindal is Chair of Jindal Steel & Power (**JSPL**), a company registered in India.
- The Jindal family own 61.29% of JSPL, via the family's Promoter and Promoter Group.⁴
- JSPL own 100% of Jindal Steel & Power (Mauritius) Limited.⁵

Jindal Steel & Power (Mauritius) Limited

- Jindal Steel & Power (Mauritius) Limited (**JSPML**) is a holding company registered in Mauritius.
- As at 1 September, 2015, JSPML own 82% of Wollongong Coal shares.⁶
- JSPML currently provides a cash advance facility of \$100 million to Wollongong Coal, of which - as of 31 March 2015 - the group had drawn down on approximately \$56 million.⁷

Wollongong Coal

During the financial year ended 31 March 2015 approximately 60% (in 2014, 30%) of Wollongong Coal's revenue was derived from sales to JSPL.⁸

- **Wollongong Coal Board:** *"The current board structure consists of two independent non-executive directors and two nominee non-executive directors. The current board structure may not be in accordance with CGC's [ASX Corporate Governance Council's] Recommendation 2.1 but it is certainly in favour of the Company especially when it is not generating any revenue and solely relying on and seeking constant funding from Jindal Steel & Power (Mauritius) Limited, the majority stakeholder."*⁹
 - **Board Chair:** Mr Ashish Kumar was appointed as a Non-Executive Director and Chairman of the board of directors of Wollongong Coal on 16 June 2015. Mr Kumar is a nominee of JSPML.¹⁰ The 2015 Annual Report describes Mr Kumar as a *"veteran of Jindal Steel & Power Limited (JSPL) operations"* who has also been a *"technical assistant to the Chairman, Mr. Naveen Jindal for a period of 8 years"*.¹¹
 - **JSPML nominee non-executive director:** Mr Azad Bhura was appointed as a Non-Executive Director of Wollongong Coal on 22 May 2015. Mr Bhura is a nominee of JSPML.¹² Mr Bhura has been *"associated with*

⁴ Jindal Steel and Power Annual Report 2014-15, p 96

⁵ Wollongong Coal, Annual Report 2015, p 26

⁶ Wollongong Coal, Annual Report 2015, p 68

⁷ Wollongong Coal, Annual Report 2015 p 59

⁸ Wollongong Coal, Annual Report 2015, p 40

⁹ Wollongong Coal, Annual Report 2015, p 17

¹⁰ Wollongong Coal, Annual Report 2015, p 5

¹¹ Wollongong Coal, Annual Report 2015, p 6

¹² Wollongong Coal, Annual Report 2015, p 5

*Jindal Group since 2004 and has worked in various capacities in finance function”.*¹³

- **WLC has only two independent non-executive directors:** Mr Anghie & Dr Firek.
- **Chief Executive Officer:** Wollongong Coal’s Chief Executive Officer, Mr Milind Oza, worked as “*President, Global Ventures, Jindal Steel and Power Limited (JSPL) before joining the Company as CEO. He remains the Chairman of Jindal Power Senegal SAU.*”¹⁴ Jindal Power Senegal SAU is a subsidiary of Jindal Power Ventures (Mauritius) Limited.¹⁵

Wongawilli Coal Pty Limited

- Wongawilli Coal Pty Ltd is 100% owned by JSPL.¹⁶
- Wongawilli Coal is currently seeking renewal of ML 1565 and CCL 766 within a Sydney Catchment Authority Metropolitan Special Area, proclaimed under the *Sydney Water Catchment Management Act 1998* (NSW) (now repealed). ML 1565 and CCL 766 expired on 9 October 2015.

¹³ Wollongong Coal, Annual Report 2015, p 7

¹⁴ Wollongong Coal, Annual Report 2015, p 8

¹⁵ Jindal Steel and Power Annual Report 2014-15, pp 96, 172

¹⁶ Jindal Steel and Power Annual Report 2014-15, pp 96, 195

ATTACHMENT B – THE CASE FOR SUSPENSION / CANCELLATION OF MINING RIGHTS

Criminal conduct (section 380A(2)(a))

Under section 380A(2)(a) of the Act, one of the tests for being a fit and proper person is whether the person or (in the case of a body corporate) a director of the body corporate or of a related body corporate has compliance or criminal conduct issues.

Compliance or criminal conduct issues are defined in section 380A(3) as arising where:

(a) the decision-maker is satisfied that the person or body corporate has contravened any relevant legislation, whether or not the person or body corporate has been prosecuted for or convicted of an offence arising from the contravention, or

(b) in the previous 10 years, the person or body corporate has been convicted in New South Wales or elsewhere of a serious offence or an offence involving fraud or dishonesty, or

(c) the person or body corporate has held a mining right, or any other instrument issued or granted under relevant legislation, that has been suspended, cancelled or revoked.

Contravention of relevant legislation

Our client instructs that Wollongong Coal, in its various operations within NSW, has committed several contraventions of the *Environment Planning and Assessment Act 1979* (NSW) and other 'environment protection legislation' (as defined in section 380A(7)):

- The Risky Business: Undermining Sydney's Water report, published by the Protect Sydney's Water Alliance, notes that non-compliance notices and breaches have been issued by both the NSW Environment Protection Authority and the Department of Planning and Environment: "*The breaches and non-compliances vary in severity, but cumulatively they demonstrate a company whose financial situation has likely caused a lapse in technical and operational proficiency.*"¹⁷
- Wollongong Coal has been subject to eight non-compliance notices from the NSW Environmental Protection Authority for breaching the conditions of its Environmental Protection Licence.¹⁸
- The Department of Planning and Environment has documented at least eight separate instances of non-compliance with MP10_0046 (Preliminary Works Pt3A Approval). The Risky Business report describes some of these as "*fundamental*

¹⁷

[https://d3n8a8pro7vhmx.cloudfront.net/sunriseproject/pages/646/attachments/original/1437516827/2015-07-21_Wollongong_Coal_Report_\(FINAL\).pdf?1437516827](https://d3n8a8pro7vhmx.cloudfront.net/sunriseproject/pages/646/attachments/original/1437516827/2015-07-21_Wollongong_Coal_Report_(FINAL).pdf?1437516827) at p 11.

¹⁸ Protect Sydney's Water Alliance, RISKY BUSINESS UNDERMINING SYDNEY'S WATER, p 14

failures of environmental management, such as the failure to install subsidence monitors prior to the beginning of construction of Longwall 4 and unauthorised clearing of vegetation in endangered upland swamps in order to install equipment.”¹⁹

Our client contends that Wollongong Coal is currently in breach of its mining tenement conditions, which constitutes a breach of section 5 of the *Mining Act 1992* (NSW). Wollongong Coal is required to lodge \$47,865,000 in securities, but appears to have lodged only \$47,591,000, a shortfall of **\$274,000** (see summary information in Table 1 and Table 2).

Current liabilities against mining leases

Table 1: Current liabilities against relevant MLs, CCLs and MPLs

Entity	Lease	Security required by lease	Date of decision	Notes
WLC	ML 1575 & CCL 745	\$7,715,000	16 Nov 2014	ML 1575 requires employment of 22 people or minimum \$385,000 spent per annum “prospecting or mining the lease”. Rehabilitation must be “to the satisfaction of the Director-General” (no amount specified).
WLC	ML 1575, CCL 745 & MPL 271	\$7,581,00	5 May 2014	This 5 May decision appears to have been superseded by the 16 Nov 2014 decision, although there is a discrepancy with MPL 271, which is not mentioned in the 16 Nov 2014 doc.
Wongawilli Coal Pty Ltd	ML 1596	\$40,000,000	3 Feb 2012	ML 1596 requires employment of 128 people or minimum \$2,240,000 spent per annum “prospecting or mining the lease”.
Wongawilli Coal Pty Ltd	ML 1565 & CCL 766	\$150,000	14 Oct 2008	

¹⁹ Protect Sydney’s Water Alliance, RISKY BUSINESS UNDERMINING SYDNEY’S WATER, p 14

Table 2: Securities required v bank guarantees

Required	Currently in Bank of India guarantees	Shortfall
\$7,715,000	\$5,657,000	
\$40,000,000	\$1,924,000	
\$150,000	\$40,010,000	
\$47,865,000	\$47,591,000	\$274,000

Conviction of serious offence

Our client holds significant concerns in relation to alleged criminal conduct of Wollongong Coal’s parent company, JSPL, in India. This conduct is detailed in the following section, as convictions have not yet been handed to JSPL or its directors (some of whom may also be directors of Wollongong Coal). Any convictions in relation to this conduct, particularly if levelled against directors of Wollongong Coal personally (noting that the definition of ‘directors’ in section (7) would include Mr Ashish Kumar, Mr Azad Bhura and Mr Milind Oza, all formerly associated with JSPL), may constitute convictions of a ‘serious offence involving fraud or dishonesty’ as defined in section 380(7).

Not of good repute and not of good character (sections 380A(2)(f)-(i))

Under section 380A(2)(f) of the Act, one of the tests for being a fit and proper person is whether, in the opinion of the decision-maker, the person is not of good repute. Section 380A(2)(g) includes the test of whether, in the opinion of the decision-maker, a director of the body corporate or a related body corporate is not of good repute.

Under section 380A(2)(h), the decision-maker can consider whether the person is not of good character, with particular regard to honesty and integrity. Section 380A(2)(i) enables the same test to occur to assess whether a body corporate, a director of the body corporate or a related body corporate is not of good character, with particular regard to honesty and integrity.

In addition to the following specific concerns, the concerns outlined in relation to section 380A(2)(a) above are also relevant for consideration under sections 380A(2)(f)-(i) in relation to Wollongong Coal.

Compliance with planning and environmental legislation (parent company JSPL in India)

The ultimate holding company for Wollongong Coal, JSPL, has a poor record of compliance with Indian planning and environmental laws in its domestic operations. Our client contends that this poor compliance record, and the disregard exhibited for Indian laws, is sufficient and particularly relevant to cast sufficient doubt over

Wollongong Coal's standing as a person of good repute and good character to carry out mining operations within NSW:

- A major coal mine proposed by JSPL – among the biggest of its kind in Chhattisgarh – was opposed by local villagers. Starting in 2008, community organiser Ramesh Agrawal organised residents to voice their opposition and filed numerous petitions highlighting JSPL's failure to hold mandatory public meetings and obtain environmental clearance for the project. In April 2012, the National Green Tribunal revoked the permits required for the mine to break ground, citing the various violations reported in Agrawal's petitions.²⁰
- JSPL was accused in May 2010, by Ramesh Agrawal, of starting work on a power plant without the requisite clearance mandated by India's environmental legislation. In April 2012 the environmental regulator, the Ministry for Environment and Forests, acted on Agrawal's complaint and suspended JSPL's clearance.²¹
- In Raigarh, Chattisgarh, JSPL wanted to build a 2.4-gigawatt coal-fired power plant. *"[R]esidents said they weren't allowed to voice their concerns at public hearings to decide whether the company could build."* (Under Indian law then, a project involving land acquisition requires approval from 70% of the locals who would be impacted by it.) *At one such meeting in January 2008 seven people, including Harihar Patel, the Khamaria village head, were beaten by police; some were hospitalized for a week. "The company has a 'no objection' certificate okaying the project, but we never gave it." Patel told...at the time"*.²²
- Two instances of illegal occupation of lands in relation to JSPL mining projects:²³
 - *"In the case of Haripriya Bai Patel, 6 acres of her land was illegally occupied by Jindal Power Limited [JPL], and without any money or documents changing hands, construction of a residential complex for its employees began on the land. Haripriya Bai went to the district collector with this complaint, who ordered that the land be immediately returned to her, in its original form. When this did not happen, she took her case to the high court in Bilaspur, who ordered the same thing, most recently in November 2013, when it gave the company 15 days in which to return the land."*
 - *"Krishna Sao, a resident of Tamnar, found that 2 acres of land had been illegally occupied by JPL in 2002, and digging began on it without his consent. He was offered 2 lakh rupees per acre (at the time, legal transactions were usually settled at 50,000 rupees per acre), but he refused, and took his case first to the Sub District Magistrate (SDM) court, and then to the High Court in Bilaspur. In 2006 the court ordered that his land be returned, but he was unable to get this order implemented."*

Compliance with planning and environmental legislation (parent company JSPL in Mozambique)

²⁰ <http://www.goldmanprize.org/recipient/ramesh-agrawal/>

²¹ <http://www.illawarramercury.com.au/story/1911804/jindal-inside-story-on-new-gujarat-owners/>

²² <http://www.forbes.com/sites/meghabahree/2013/06/12/indian-billionaire-naveen-jindal-in-trouble-again/>

²³ Land Acquisition and Transfers for Private Industry, Centre for Equity Studies | Working Paper, p 18, http://centreforequitystudies.org/wp-content/uploads/2014/02/Land-Acquisition-and-Transfers-for-Private-Industry_2112131.pdf

Conduct of JSPL in its Mozambique operations, at its Chirodzi open cut coal mine, has been reliably documented in a report entitled *Dirty Profits*, published in 2013 by the European Coalition for Corporate Justice, a reputable body calling for ethical investment.²⁴ To this end, the report – researched by 30 authors in 10 countries – documents the unethical behaviour of 26 global companies, all cited for violating international norms and standards. The report is a compilation of “*the most pertinent data available from reputable news and media sources, industry focused journals, community organisations, NGOs, legal records and other sources.*”²⁵

In the chapter on JSPL it is alleged that the company has been “*widely criticised in Mozambique for partaking in human rights violations, environmental destruction and corruption ... and abusing Mozambican workers.*”²⁶

The report claims that since 2013 JSPL has been mining without an approved Environmental Impact Assessment, in violation of Mozambique’s environmental laws.²⁷

We are instructed that there have been serious clashes between local people and JSPL employees and security guards. In spite of the company’s promises to resettle people being evicted from their land, local people have not been resettled and have received no compensation. JSPL claims it cannot wait for the Mozambican government to negotiate resettlement and compensation plans, saying it had to start mining to its deadline before any agreements were in place. So around 2500 villagers have to live near open cut mining and there are health impacts from coal dust and from dynamiting used to extract coal. JSPL employs a private army, and there have been a number of assaults on local people.²⁸

The chapter on JSPL concludes “*Protests like those occurring in Mozambique are not new to the company ... In the Indian states of Odisha, Jharkand and Chattisgarh, where there are large populations of indigenous tribal people, Jindal has been destroying farms and livelihoods for many years.*”²⁹

Our client contends that, given the fact JSPL is the ultimate holding company for Wollongong Coal, and the fact that several directors of Wollongong Coal have had high-level involvement in JPSL, these serious allegations from the European Coalition for Corporate Justice against JSPL cast significant doubt on whether Wollongong Coal can be considered of good repute and good character.

Corruption charges against Naveen Jindal

The chair of JSPL (the majority shareholder of Wollongong Coal), Naveen Jindal, has had corruption charges filed against him in the wake of India’s coal block allocation scandal, being charged with criminal misconduct, conspiracy and cheating after authorities alleged he paid bribes to Government officials to secure coal block

²⁴ Source: www.facing.finances.org/en/publications/dirty-profits-2/.

²⁵ *Dirty Profits 2*, p 7.

²⁶ *Dirty Profits 2*, p 36.

²⁷ *Dirty Profits 2*, p 37.

²⁸ *Dirty Profits 2*, p 37.

²⁹ *Dirty Profits 2*, p 37.

allocations at discount prices.³⁰ A brief overview of this and associated scandals are as follows:

- In September 2014, the Indian Supreme Court cancelled about 200 coal blocks that the central government had allocated between 1993 and 2010. The court said the allocations were “*arbitrary, illegal and amounted to unfair distribution of national wealth.*” 11 of the coal blocks cancelled belonged to the Jindal group, 7 of which were owned by JSPL.³¹

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

- On 20 October, 2014, India’s Business Today reported that the Central Bureau of Investigation (CBI) had “*registered another case against Jindal Steel Power in connection with the coal scam probe*” alleging “*cheating and corruption...This is the second case against the company...*”³³

- [REDACTED]
- [REDACTED]
- [REDACTED]

³⁰ See Sydney Morning Herald reports here: <http://www.smh.com.au/business/india-tycoon-bribe-charges-20130612-2o4cy.html> and here: <http://www.smh.com.au/business/jindal-caught-up-in-coal-bribe-scandal-in-india-20130612-2o4cs.html>

³¹ <http://www.businesstoday.in/moneytoday/stocks/coal-sector-coal-blocks-supreme-court-tata-group-jspl/story/211765.html>

³² <http://www.smh.com.au/business/jindal-caught-up-in-coal-bribe-scandal-in-india-20130612-2o4cs.html>

³³ <http://businesstoday.intoday.in/story/cbi-registers-case-against-jindal-steel-in-coal-block-scam/1/211547.html>

³⁴ <http://indianexpress.com/article/india/india-others/coal-scam-cbi-files-charge-sheet-against-14-others/>

[REDACTED]

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[REDACTED]

³⁵ [http://indianexpress.com/article/india/india-others/\[REDACTED\]-promised-madhu-koda-congress-support-for-coal-block-cbi/](http://indianexpress.com/article/india/india-others/[REDACTED]-promised-madhu-koda-congress-support-for-coal-block-cbi/)

³⁶ <http://business-humanrights.org/en/villagers-allege-use-of-threats-and-coercion-for-land-acquisition-by-jindal-power-limited-company-denies-claims>

³⁷ <http://www.goldmanprize.org/recipient/ramesh-agrawal/>

Treatment of Russell Vale workforce

In addition to the serious issues raised by companies and persons connected with Wollongong Coal overseas, our client is of the view that the conduct of Wollongong Coal in relation to its workforce at Russell Vale also indicates that it is not of good repute and good character:

- In September 2015, the CFMEU issued a media release questioning Wollongong Coal's "*honesty about its intentions at Russell Vale, after it was revealed the company had deliberately planned to axe permanent workers at nearby Wongawilli mine in order to replace them with contractors at lower rates of pay in the future.*" The union concluded their statement by saying that "*if Wollongong coal continued to refuse to commit to permanent, local employees the company would lose the support of the community and the union.*"³⁹
- In May 2014, Wollongong Coal attempted to negotiate a new Enterprise Agreement, which was voted down by employees when Wollongong Coal proposed they work for \$21 an hour. CFMEU district president Bob Timbs described that the Wollongong Coal proposal "*would have given us one of the worst enterprise agreements in the coal industry, and would have lowered the wages to 1970s or 80s wages.*"⁴⁰

Suspension from ASX

Our client notes that Wollongong Coal was placed in a trading halt as it was suspended from Official Quotation from 1 June 2015 "*following failure to lodge its Preliminary Final Report for the period ended 31 March 2015, in accordance with Listing Rules.*"⁴¹ Our client contends that this further brings into question the good repute and character of Wollongong Coal.

Financial capacity to comply with obligations under the mining right (section 380A(2)(m))

Under section 380A(2)(m) of the Act, one of the matters for consideration about whether a company is a fit and proper person is, "*whether the person has demonstrated to the decision-maker the financial capacity to comply with the person's obligations under the mining right.*"

Wollongong Coal is a loss-making company and in our client's view most probably in terminal financial distress, as witnessed by the \$657 million shortfall in net current assets as of 31 March 2015, and the \$371 million of net losses reported just in the

³⁸ Land Acquisition and Transfers for Private Industry, Centre for Equity Studies | Working Paper, p 17, http://centreforequitystudies.org/wp-content/uploads/2014/02/Land-Acquisition-and-Transfers-for-Private-Industry_2112131.pdf

³⁹ <http://cfmeu.com.au/wollongong-coal-sacks-all-permanent-workers-refuses-to-deny-tactic-to-re-open-with-contractors>

⁴⁰ <http://www.miningaustralia.com.au/news/a-sad-day-for-coal-mining-as-wollongong-coal-cuts>

⁴¹ ASX Market release, 1 June 2015, 'Suspension from Official Quotation', <http://www.asx.com.au/asx/statistics/displayAnnouncement.do?display=pdf&idsId=01629789>

last two years.⁴² The auditors of the group, Ernst & Young, note clearly that the firm's financial position raises significant uncertainty about the assumption of a going concern even over the next twelve months. A summary of Wollongong Coal's financial woes is as follows:

- The company's 2014/15 Annual Report announced a net loss of \$199,216,000, with net current liabilities at \$657,067,000 against a market capitalisation of about \$138m.⁴³
- On 31 August 2015, Ernst and Young in their Independent Auditor's report of Wollongong Coal, found that "*there is significant uncertainty whether the company will continue as a going concern 12 months from the date of the report, and therefore whether it will realise its assets and extinguish its liabilities in the normal course of business ...*"⁴⁴
- Wollongong Coal's directors publicly acknowledged in their 2015 Annual Report that if "*one or more of the planned measures [to return the company to profitability] do not eventuate or are not resolved in the consolidated entity's favour, then in the opinion of the directors, there will be significant uncertainty regarding the ability of the consolidated entity to continue as a going concern and pay its debts and obligations as and when they become due and payable.*"⁴⁵
- The company's share price has declined about 90% over the last 2 years and was last trading at about 2 cents per share.⁴⁶
- On 1 June, 2015, the company's shares were placed in a trading halt following failure to lodge its Preliminary Final Report for the period ended 31 March 2015 in accordance with Listing Rules. It has not recommenced trading since then, nor has it complied with its quarterly reporting requirements.
- In September 2013, under the company's previous ownership and name, the company's auditor questioned Gujarat NRE's "*ability to survive.*"⁴⁷

Our client also considers that the non-compliances of Wollongong Coal with the security conditions of its mining tenements (as outlined in relation to section 380(2)(a) above) are further indications of Wollongong Coal's inability to meet its financial obligations under those tenements. Technical competency to manage mining activities and works (section 380A(2)(e))

Section 380A(2)(e) of the Act empowers the decision-maker to consider whether the management of the activities or works that are to be authorised, required or regulated under the mining right are not or will not be in the hands of a technically competent person.

Our client is concerned that Wollongong Coal's technical capacity may be compromised by the questionable financial capacity of the company at present, noting the following:

- In March 2014, a roof collapse at Wongawilli mine buried an expensive piece of longwall mining equipment and forced the company to revert to an older, less

⁴² Figures from Wollongong Coal, Annual Report 2015.

⁴³ <http://www.smh.com.au/business/markets/quotes/summary/WLC/wollongong-coal-limited>

⁴⁴ Wollongong Coal, Annual Report 2015, p 66

⁴⁵ Wollongong Coal, Annual Report 2015, p 27

⁴⁶ Analysis derived from Bloomberg data. Shares were trading for about \$0.20 each in March 2013.

⁴⁷ http://articles.economictimes.indiatimes.com/2013-09-30/news/42536823_1_gujarat-nre-coking-coal-australian-subsidiary-audit-report

productive mining method. In August, 2014, WLC announced that the Wongawilli mine had been put into 'care and maintenance.'

- Mine workers told the ABC in September 2015 that they were “*worried the Russell Vale colliery is being allowed to sink into disrepair*”. There have been three roof falls in WLC mines over the last 12 months. “*Water leaking into the roof strata has caused some roof bolts to be corroded, one miner said, also raising questions about the stability of the swamps or creeks above the mined areas. “The mine is in a state of disrepair and will turn into a death trap,” he said. “It’s not sour grapes; it’s real. The mine has had multiple major roof falls, areas of incorrect bolting patterns, inadequate support and corroded roof bolts due to water which have been identified”*”.⁴⁸
- In the case of a mine proposed under Sydney’s water catchment, the first triple layer mining operation attempted in Australia, technical and financial capacity are crucially important.
- The Review PAC noted the serious consequences if something goes wrong: “*The potential for leakage from the Cataract Reservoir through geological structures should also be assessed, given the seriousness of the consequences if a connection between the Cataract Reservoir and the mine occurs.*”⁴⁹
- Advice from various government agencies, committees and experts has raised significant issues and uncertainties that need to be addressed. Some of these issues have been acknowledged by the proponent, yet have not been resolved, for example, in relation to the risks to Cataract Reservoir, the proponent acknowledges that:

*“it should be recognised that there are limited options to control any significant inflow through sealing up the longwall panels of the mine portals. The Wongawilli Seam, the Balgownie Seam and the Bulli Seam are all hydraulically connected through the intersecting goafs that are interconnected between all three seams and there is not considered to be any credible way to control inflow to the mine from Cataract Reservoir by preventing water egress from the mine. The Bulli Seam workings are in the shallow cover areas above the portals on the Illawarra Escarpment.”*⁵⁰

⁴⁸ <http://www.illawarramercury.com.au/story/3355871/miners-worry-as-roof-falls-continue/?cs=300>

⁴⁹ Planning Assessment Commission Review Report on Russell Vale Underground Expansion Project, p 23

⁵⁰ Gujarat NRE Coking Coal Ltd, quoted in Protect Sydney’s Water Alliance, RISKY BUSINESS UNDERMINING SYDNEY’S WATER, p 8.