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Practical Legal Issues Involved in Coal Asset Acquisitions or Private M&A Treaties: The View from the Purchaser

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SUMMARY

The starting point for examining practical legal issues in coal asset acquisitions is understanding the needs of the purchaser. The purchaser will drive the acquisition and determine what is to be achieved. This understanding must be arrived at before any due diligence can be conducted – if not, the due diligence cannot focus upon the issues of genuine concern and may become a costly, unwieldy mess. In order to determine the legal issues arising from the acquisition of coal assets (namely, coal mines), any investigation must include the structure of ownership of the assets, operation of the assets, infrastructure that is associated with the assets, regulation by government authorities and responsibility to stakeholders as these are unique to coal assets. It is within this framework that any acquisition of coal assets must be considered, and ultimately, from which an understanding of the purchaser, its aims, instructions and the practical issues which arise in the acquisition can be found.

This paper considers how the practical legal issues of acquisitions are principally affected by the purchaser's instructions, generally affected by the structure and legal relations involved in the coal assets themselves (that is, the scope of the due diligence) and in particular, the practical restrictions involved in the acquisition itself. To this end, this paper first describes the key issues which will arise in most acquisitions and second, details the investigations necessary to identify and resolve these issues.

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PRACTICAL ISSUES IN THE SALE

Practical legal issues only arise to the extent that a purchaser will permit these to. By way of example, consider the practical legal issues which arise from the purchase of all Hunter Valley coal mines as opposed to a single coal mine in western New South Wales. It is reasonable to expect that the degree of due diligence conducted on the single mine will, almost paradoxically, be more thorough (at least from a legal perspective) than the review conducted for a number of associated coal mines. The principal reason for this being that the single coal mine has far fewer documents (contracts, licences, consents, property titles etc) to review and these documents are more likely to be more important to a purchaser due to the specific nature of the acquisition. The purchaser will need to be assured that this single asset is a viable enterprise. The purchaser of the associated coal mines may, by comparison, not necessarily be as concerned over the minutiae of documentation as its threshold of what is material will cull these issues. For instance, the value of the several mines in close proximity are more likely to be in the synergies gained (and to be gained) from merger or restructuring the operations rather than reliant upon the output of coal from a particular coal mine. Ultimately, the purchaser will determine which issues are of concern to it and it is these issues that are practical legal issues requiring resolution.

As such, the risk management that the purchaser adopts, and the extent to which a legal review is incorporated within this, will largely determine:

- (a) the discovery of a legal issue; and
- (b) the resolution (if any) of that issue.

Notwithstanding the purchaser's instructions, generally legal issues arise, to varying degrees, as a result of:

- the identification and ownership of the asset;
- the value of the acquisition (both in costs and its value in synergies or other benefits to the purchaser);
- the method of acquisition; and
- any immediate plans for future divestment or restructuring,

and are managed through investigation and verification of these matters (that is, the "due diligence process"). Again, the extent of the legal management of the risks are determined by the purchaser in their instructions for the due diligence.

The extent to which the due diligence will be conducted is reliant on the purchaser's risk assessment plan and, as a function of this, the

issues which must derive from the conduct of the due diligence. However, subject to the revelation of any relevant or material matter in the due diligence inquiries, the acquisition will, insofar as it relates to the due diligence inquiries, turn on:

- (a) whether the coal asset is operating, and can continue to operate, under its statutory approvals;
- (b) whether the coal asset can continue to sell coal under its current agreements;
- (c) whether the acquisition is approved by the relevant government authority; and
- (d) what obligations (known or unknown) are being expected to be assumed.

OPERATIONS

The continued operation of coal assets is generally the principal concern of the purchaser. The ability of that asset to continue its operation depends upon compliance with the statutory approvals for development, transferability or continuation of mining tenements and stability of workforce. As noted in Table 1 below, all mining operations statutory approvals should be reviewed to ensure their currency and to identify any financial exposure. If a statutory approval for development is not current or if operations are continuing in breach of those conditions, there is a risk that the operation may be prevented from continuing to operate at all. While obtaining a warranty to the effect that “all consents are valid and operations are in compliance” from the vendor might give some comfort to purchaser, the purchaser is not acquiring the asset to later claim on the warranty.

If the operation is “generally” complying with its obligations, a determination of the extent of exposure to prosecution and fine should be determined. If the risk is identified as one which will not endanger the continued operation of the asset, it can be easily mitigated through a specific warranty. Consideration should also be given to the particular conditions of such consents if there are obligations to acquire properties or if there are issues or complaints regarding excessive noise or dust. It is noteworthy that development consents (at least in New South Wales) run with the land and do not need to be transferred. Transfers of mining authorities will, however require ministerial consent.¹

¹ Such as in New South Wales under s 121 of the *Mining Act*.

In New South Wales, persons with legal and/or equitable interests in a mining authority may apply to the Director General for registration of their interest on the mining authority.² If there are any registered interests these:

- (a) provide notice to a potential purchaser that the mining authority is to be transferred subject to another party's interest; and
- (b) give that interest priority over unregistered interests in the event of a legal proceeding regarding the mining authority.

Ultimately, the transfer of the mining authorities is an administrative matter for the purchaser and there are a number of ways to mitigate a perceived risk that a transfer will not be permitted – such as purchasing the actual company holding the authority or adding the transfer of the authority as a condition precedent to completion of the sale. The key practical issue for the purchaser is to assess the level of compliance with any conditions in those authorities – such as rehabilitation expenses or conditions requiring future capital expenditure.

As with other operational approvals, conditions in mining authorities should be reviewed to determine whether security (usually in the form of a bank guarantee) is required to be provided by the holder for the fulfilment of the terms of the mining authority. If a security is noted, this security will also need to be transferred to the purchaser. In practice, where the holder is the mine operating company, the security is provided by each of the joint venturers in proportion to their respective interests in the coal mine so that, an interest in the deposit and authority itself must be transferred.

In relation to the workforce, the purchaser must assure itself that the current employment structures are sufficiently flexible for its future plans.

Sale of Coal

Further to the approvals necessary to conduct the operations, the material contracts relating to production (for example, contract mining), transport, marketing and sales are integral to the continued operation of the asset. As a practical matter, most agreements in this respect will be easily assigned to the purchaser (the third party is generally of the view that the essential nature of the deal will not change). However, consideration must be given to any review periods within these agreements. The purchaser will want to ensure, at the least, that the current contracts for the sale of the product are maintained. It is a characteristic of the coal mining industry that coal

² Section 161(2) of the *Mining Act*.

sales contracts are generally high volume and for long terms although this is beginning to change with the dynamics of the price convergence between the long-term coal prices and the spot prices. Another key characteristic is that these contracts are frequently with buyers within the Asian market which mean that they are sensitive to change and subject to re-negotiation upon various grounds. The due diligence which is undertaken by the purchaser should determine with some certainty whether the coal sales contracts can be assigned without issue to the purchaser or whether further negotiations must be continued to ensure that these contracts are continued following the acquisition.

Tony Wassaf and Ross Carruthers,³ analysing two recent Supreme Court cases regarding coal supply contracts,⁴ note that reductions in the price of coal during the term in fixed term contracts may have the effect of influencing the coal purchaser under those contracts to call breaches of the contract so that they can negotiate a better price or terminate the contract. As a result, an acquisition of the company supplying the coal may well give rise to the purchasing company seeking to renegotiate the commercial terms of an existing agreement. While the extent to which this is possible will be determined by a careful review of each contract, the practical effect for the incoming purchaser must be for it to be fully apprised of those contracts which may be problematic and to factor this into their assessment of the coal asset and the price they will be prepared to offer.

Government Approvals

The final practical legal issues which fall for consideration are that of government approvals to the acquisition itself. In this regard, approvals are required under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and, depending on the acquisition, approval may be required (or queries answered) when raised by the Australian Competition and Consumer Commission (ACCC). In respect of the former, the *Foreign Acquisitions and Takeovers Act 1975* requires that the Federal Treasurer be notified of proposed acquisitions by foreign persons of “a substantial shareholding” (generally 15 percent by an individual party), or 40 percent where two or more persons act together) in an Australian company with total assets and value of

³ T Wassaf and R Carruthers, “Challenging Coal Supply Contracts – The New South Wales Experience” (2000) 19 AMPLJ 20.

⁴ *Peabody Resources Ltd v Macquarie Generation* (unreported, Supreme Court of New South Wales, Commercial Division, Einstein J, 19 November 1998) and *Novacoal Australia Pty Ltd v Macquarie Generation* (unreported, Supreme Court of New South Wales, Equity Division, Bergin J, 14 September 1999).

Australian \$50,000,000 or where more than 50 percent of those assets is attributable to "Australian urban land". In the usual course, where an acquisition is within Australia's Foreign Investment Policy, "A Guide for Investors" dated September 1992, the Foreign Investment Review Board will advise the Treasurer that it has no objections to the acquisition. However, it is noteworthy that under the Act the Federal Treasurer can block an acquisition if it is satisfied that it will be contrary to the national interest.

Most recently, the Federal Treasurer, Mr Peter Costello, made orders under the *Foreign Acquisition and Takeovers Act 1975* (Cth) to prohibit Shell Australia Investment Limited's (Shell) acquisition of a substantial shareholding in Woodside Petroleum Limited (Woodside) "on national interest grounds". Mr Costello noted that Shell and Woodside were joint venturers in the North West Shelf, project, in which Woodside was the operator. In assessing exactly what was in the national interest, Mr Costello stated that the project should be developed to its full capacity and that "it is in the national interest for the operator of this project to develop the response [sic resource?] to its maximum and for sales from the NWS to be promoted in preference to competing sales from projects in other parts of the world".⁵

The stance of the Federal Treasurer in this matter indicates two salient issues in coal asset acquisitions:

- (a) the Federal Government is prepared to block acquisitions if it determines that development (or lack thereof) of resources jeopardises the national interest; and
- (b) the Federal Government also appeared to be at great pains to distinguish the facts of this acquisition in its reasons for blocking the acquisition. It remains to be seen whether a producing coal mine would be subject to such review or orders (as opposed to a project due to be exploited in the medium to long term). It would appear that there is less likelihood of intervention where foreign ownership and capital is exploiting a resource of generating income, producing work etc. as opposed to long-term planning which could delay the development.

On the domestic front, in reality coal acquisitions appear to have attracted the attention of the ACCC as such acquisitions can affect the domestic coal market and have the result of lessening of competition within it. To this end, s 50 of the *Trade Practices Act 1974* (Cth) provides that the following factors must be considered when determining whether the acquisition would have the effect of substantially lessening competition in a market:

⁵ Press Release No 25, Treasurer, 23 April 2001.

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

Again, by way of a recent example, Macquarie Generation, Australia's largest electricity producer based in the Hunter Valley in New South Wales, announced on 8 May 2001 that it had commenced legal proceedings against Coal & Allied Limited in relation to Coal & Allied Limited's acquisition of the Peabody Group's Australian assets.⁶ The basis for the action was stated as being brought under s 50 of the *Trade Practices Act 1974* (Cth). While the ACCC of the Australian Competition Tribunal may raise no objection to an acquisition, this does not preclude an action being commenced by any person suffering loss or damage pursuant to s 82 of the *Trade Practices Act 1974* (Cth).

In any event, the risks which are presented by gaining of government approval where necessary are practical risks which can be ameliorated, if not solved altogether, by successful negotiation in most instances.

STRUCTURE AND LEGAL RELATIONS

Identification of the Coal Asset and Proof of Ownership

With the general framework of practical risks and issues in mind, the purchaser will determine the extent to which a due diligence of the coal asset will be conducted. While the subjects for investigation in most due diligence inquiries fall into three categories (commercial, financial and legal), in order to identify the legal issues, it is necessary

⁶ Reuter News Service, 8 May 2001.

to particularly direct these inquiries to providing the purchaser with information to assist it in determining whether to purchase the coal assets and how to best structure the transaction. Although obviously subject to negotiation, the purchase of the interest will be conducted through a purchase of the interest directly (either a direct sale or procuring the sale by the wholly-owned subsidiary) or a sale of all of the shares in the wholly-owned subsidiary holding the interest – or, indeed, a combination of the two. In any event, the identification of the interest must be first established and its ownership verified.

Typically, coal assets are undertakings conducted through unincorporated joint ventures. The unincorporated joint venture structure offers several key benefits in that, it facilitates minimalisation of risks, it is a flexible structure which is not subject to the *Corporations Act 2001* (Cth) and, as opposed to other structures such as partnership, no party acts as an agent for the other and each party is treated as an independent taxpayer.

However, these advantages also bring with them issues for a purchaser trying to acquire an interest in an unincorporated joint venture (or an incorporated joint venture). Provisions within the joint venture agreement which will give rise to practical legal issues requiring resolution as part of the acquisition include: ownership of the interest; change of control; pre-emptive rights; third party securities; and the resulting consents and waivers required to ameliorate their effects.

A joint venture interest may be held as:

- (a) a direct interest where the vendor is a party to the joint venture agreement and is granted an interest under this agreement;
- (b) an indirect interest where the interest is held by a wholly-owned subsidiary on the vendor and the subsidiary is a party to the joint venture agreement; or
- (c) a combination of (a) and (b) above.

The interest in the joint venture represents the vendor's:

- interest in the joint venture assets (such as mining equipment, real property and mining authorities);
- obligations under the joint venture agreement (and associated documents) particularly in respect of financing;
- representation and voting entitlements on the joint venture's operating committee;
- share of coal produced; and
- shareholding in any joint venture related company.

Establishing ownership – joint venture interest

The proof of ownership of joint venture interests commences with a review of the underlying joint venture agreement. If the vendor is not a party to this agreement, an examination of joint venture amending agreements, deeds of assignment and areas of release must also be reviewed. Ultimately, this is an exercise of reconstruction and one which will reveal ancillary information for the practical operation of the joint venture and the coal mine. If the vendor is not a party to the joint venture agreement or an amending agreement, why not? Is it a matter of poor documentation procedures or is there a substantive reason?

Establishing ownership – sale of shares

In addition to the examination of the ownership of the interest, where shares in a subsidiary are proposed to be sold to convey the interest in the asset, it is also necessary to conduct a review of the ownership of those shares. The purpose of this review is to confirm the vendor's claim that it owns the shares in the company holding the interest and also to combine this review with the outcome of the ownership of the interest by that company. Depending upon the structure, it may be necessary to trace the ownership of that company through its group structure. To this end, a vendor will wish to ensure that its purchase is only for the interest and not any associated debts of the company to the group or to the owner of the shares.

Ascertaining the ownership of the shares in a company should be a relatively simple matter. The key steps involved are:

(a) review the statutory records of the company. The company is required under s 169 of the *Corporations Act 2001* (Cth) to maintain a register of members detailing the:

- members name and address;
- date of entry into this register;
- number of shares held by each member; and
- any unpaid amounts owing on the shares.

In the absence of evidence to the contrary, the company register is proof of the matters shown in it. Further, the company's constitution will provide how shares are to be transferred and the methods. Some companies' constitutions provide that the directors must approve a transfer of shares and these records should be reviewed to:

- cross-check against the company register; and

- reveal share transfers which, although approved by the directors, are yet to be entered into the register;
- (b) review any matter arising from the company's register. If there are irregularities in the ownership, those must be investigated (for instance, shareholding through trusts will require the underlying trust documents to be examined); and
- (c) review the statutory register maintained by the Australian Securities and Investments Commission (ASIC). However, as a practical issue, this register is only as good as the company's compliance with its filing obligations and the speed with which ASIC processes new filings.

Practical Joint Venture Issues

Pre-emptive rights

Once the joint venture interest is established, the purchaser must then determine whether it is possible to purchase that interest. In this respect, the presence of pre-emptive rights clauses are commonly found in joint venture agreements and have the effect of preventing joint venture parties from freely disposing of their interest in the joint venture. A pre-emptive rights clause will generally specify that a joint venturer may not dispose of its interests unless it first offers that interest for sale to the other joint venturers on the same terms as proposing to sell to the purchaser. The reasons for inclusions of such clauses in joint venture agreements are identified succinctly by Erin Feros⁷ in her paper delivered at the 1998 AMPLA Conference as:

- (a) to ensure the identity (and thereby, the financial capacity and reliability) of the participants to the joint venture;
- (b) to control the number of participants in the joint venture;
- (c) to provide a means for a participant to exit the joint venture in an ordered and equitable manner to the existing participants.

Setting to one side the issue of whether the purchaser is prepared to proceed with its consideration of a purchase as it may eventually only be expending considerable sums in investigation to provide little more than a competitive bid for an existing venturer to purchase, finding a workable solution to avoid the pre-emptive provisions provides a preliminary legal issue. Typical avoidance techniques have historically included related party transactions involving restructuring and on-sale of rights and obligations relating to the interest (rather than sale of the interest itself) to the purchaser. However, any such techniques should be dealt with as part of the vendor's sale of the interest. As a result, the purchaser must be satisfied that the interest can be transferred (regardless of the method

⁷ Erin Feros, "Joint Venture Issues" [1998] AMPLA Yearbook 385.

which achieves this end) so long as it is fully apprised that its interest may be the subject of some contention (if the method of transfer is ineffective). Again, the instructions of the purchaser will determine whether it considers pre-emptive rights as an issue for it or whether it is an issue for the vendor. Ultimately, the only way for certainty in such a transfer is to negotiate a commercial solution to any pre-emptive rights problems.

Change of control and assignment

Change of control and assignment issues are invariably interlinked with pre-emptive rights issues. As a matter of course, particular attention should be paid to how the change of control/assignment clause operates, how it is defined (as this may be defined by reference to a repealed act) and most importantly, what events it triggers. Again, the purchaser must determine whether it can proceed to purchase at all, and, if it must assume an element, what the extent of that risk is. The primary legal issue for the purchaser, after first determining that it is possible to obtain the interest, is to examine the likelihood of failure of this method of acquisition and with it the loss of the costs of investigation of the coal asset.

Third party securities

As part of the review conducted by the purchaser to determine what constitutes the joint venture interest, the purchaser should be made aware of any securities and financial instruments which have been entered into relating to the interest which is being purchased. An investigation would generally focus upon whether various facilities are still current, what amounts have been drawn down and remain outstanding under the facilities, what interest rates and periods are currently applicable, whether any defaults have occurred in relation to the facilities or whether the facility documentation has been amended or supplemented by correspondence or other documentation. As distinct from the consideration of pre-emptive rights and change of control/assignment clauses, the consideration of the securities relate to what the purchaser will be liable for once it acquires the asset (as opposed to whether it can acquire at all). In this respect, unless the security documents are properly reviewed, there is a risk that there may be a default which could require a repayment of all amounts owing under it. In addition, a default under one facility could lead to a default under other facilities as frequently group facilities contain cross default provisions. Consideration should also be given to whether there are any negative pledge arrangements which will affect the grounds of security over assets or the ability of a subsidiary to give security over assets, without the beneficiary of the pledge being given

an equivalent security. Other financing documents of relevance would include inter-company loans and existing guarantees unless these are properly dealt with (by way of waiver, transfer or otherwise) a purchaser may be liable for repayment of the loan depending upon the terms of the loan or guarantee.

Waivers and consents

By far the most satisfactory resolution of pre-emptive rights clauses, change of control/assignment clauses and third party securities, is to obtain waivers or consents to the transaction. Where this is not possible, the structure of the transaction must reflect a suitable risk management strategy. For instance, as opposed to paying a purchase price, the vendor may agree to the purchaser paying the outstanding amounts under a finance document. Nonetheless, each solution is unique to its set of circumstances.

Due Diligence

On the presumption that the issues regarding transfer of the interest (however held) can be resolved, the purchaser can focus its inquiries to verification of those issues of particular concern to it. Notably, these inquiries will be directed towards operations and sales (as detailed above) but will also include an examination of the liabilities underlying the assets and the extent to which these might affect the purchase price.

Table 1 below has been prepared with particular reference to an acquisition in Australia and summarises a typical due diligence review for such an acquisition. However, the physical location of the coal asset will also be a practical issue for the purchaser, as the peculiarities of the legal system of the jurisdiction within which the asset is located will influence how the review is conducted as well as the focus of the inquiries. For example, a purchaser from Australia will often have a different concept of “due diligence” from a law firm in the United States of America, South America or South Africa as this concept has been developed within each of those legal systems. The purchaser must be clear in the extent to which it deems adequate due diligence must be conducted whilst conscious of the peculiarities to the location of the asset (compare the situation in Indonesia with trespassing miners undertaking operations at established coal mines and the new Minerals Development Bill in South Africa).

Ultimately, the purchaser determines what issues are relevant, the extent to which investigations are conducted and adequate and how it can best manage the consequences of purchasing the coal asset.

Table 1 – Due Diligence Inquiries

	Specific Issues	Purpose
Joint Venture Documents	Management of the joint venture: (a) operating committee (function, budget, approval, membership, voting) (b) management committee (appointment and termination, functions, budget preparation and "calls") (c) finance obligations (how these are determined, how and when, how are these secured – cross charges, negative pledges) (d) joint venture companies (operating company, management and sales company).	To determine how (and if) the joint venture works in practice, how much control the vendor has. To determine where consents are required by the joint venture parties to the acquisition.
Contracts	(a) Coal sales contracts As these are critical business contracts for any mining joint venture, pre-completion disclosure of all terms (for example: buyer's identity and price) may not be possible due to the market sensitive nature of the information of confidentiality constraints imposed by third parties on the vendor. Issues to be considered: (i) Domestic or export contract? (ii) Long term or spot contract? (iii) What type of coal is being supplied, coking or steaming? (iv) What is the contract tonnage? (v) What is the price per tonne of coal and what are the payment terms? In what currency? What are the delivery terms and delivery schedules?	To identify: (a) the nature of the contract; (b) the parties to the contract; (c) the duration of the contract and its key terms; (d) principal customers and suppliers; (e) the construction of contracts; namely, whether a contract is constituted by a single document, or an exchange of correspondence, or is able to be implied through a course of conduct by the parties; (f) the existence and effect of any change of control or assignment provisions that may be activated by completion of the proposed transaction; (g) the existence and extent of indemnification and limitation of liability provisions; (h) an obligation to provide security (for example: venturer guarantees) in respect of the performance by joint venture operator of contract obligations; and (i) the existence and status of any claims under such contracts.

	Specific Issues	Purpose
Contracts (continued)	<p>(b) Haulage agreements (road and rail) Issues to consider:</p> <ul style="list-style-type: none"> (i) haulage fee calculation and frequency of review; (ii) minimum annual tonnage requirements; (iii) availability of committed rolling stock or other transport equipment; and (iv) loading and discharge rates. 	
	<p>(c) Coal handling agreements (port facilities) Issues to consider:</p> <ul style="list-style-type: none"> (i) facility capacity; (ii) minimum delivery tonnages; (iii) receipt, storage and preparation protocols; (iv) vessel loading rates; and (v) sampling procedures. 	
	<p>(d) Marketing agreements Issues to consider:</p> <ul style="list-style-type: none"> (i) exclusive or non-exclusive appointment; (ii) duration and review of appointment; (iii) which territory? and (iv) calculation and payment of marketing fee. 	

	Specific Issues	Purpose
<p>Contracts (continued)</p>	<p>(e) Equipment supply agreements These agreements cover major capital expenditure items such as coal preparation plant, continuous miners, conveyor systems, heavy load trucks, and drilling equipment. Issues to consider: (i) Has all the equipment been delivered, installed or commissioned? (ii) What amounts (if any) are outstanding instalments payments? (iii) Has title passed or is there a Retention of Title (ROT) clause?</p>	
<p>Mining Authorities</p>	<p>(a) type of authority and authority number (mining or assessment lease, exploration licences or applications for such authorities); (b) name of holder; (c) date of grant and duration; (d) status of authority (current or pending); (e) area (in hectares); (f) mineral type; (g) royalty payable; (h) permitted mining method (for example: open cut); (i) restrictions applicable (if any) to surface usage or depth of mining activity; (j) special conditions of grant (for example: minimum annual expenditure or minimum number of employees); (k) requirement for a security deposit; and (l) registered interests on the mining authority.</p>	<p>to identify all mining authorities related to the coal mine; to confirm the ownership of each mining authority and the nature of the interest claimed in it by the vendor; to identify and registered interests (encumbrances) which may affect a mining authority.</p>

	Specific Issues	Purpose
Real Property	<ul style="list-style-type: none"> (a) ownership of all relevant land; (b) examination of registered encumbrances; and (c) rights of access to land. 	<p>Identify land Identify freehold and leasehold interests that are held and any access rights necessary to be held.</p> <p>Identify land affected Determine that property which is affected by any encumbrance and examine that encumbrance. Details as to the nature and extent of each encumbrance be outlined and reviewed.</p> <p>Extent of report It is necessary to produce a report which can be used in making an assessment. In this respect, it will often be necessary to liaise closely with technical or operations manager to determine whether any affectation on the title will have an impact on future operations (for example, does an easement in favour of an adjoining land owner run through an area of future expansion?).</p>
Financing arrangements	<ul style="list-style-type: none"> (a) obtain details of all agreements/ arrangements in place for financing; (b) briefly summarise the nature and structure of these agreements/arrangements; (c) identify and examine who provides the funding (both establishment & operational); (d) identify and examine the present amount outstanding and the limits that are in place; (e) identify and examine whether there are any unusual clauses in the financing documents that would be triggered by the proposed transaction; (f) identify and examine whether there is any evidence of default under any of the financing documents; (g) identify and examine whether there are any terms which are extraordinary (for example, excessive interest rates, very short term of loan or facility); (h) identify and examine any provisions in relation to the termination of the agreements/arrangements. 	<p>To summarise financing arrangements which are in place.</p> <p>General corporate facilities Mining operations tend to have general corporate facilities that may be affected by the sale of the coal mining company or its assets. Common features of these general corporate facilities include negative pledge arrangements where an organisation undertakes not to grant security over any of its assets, without giving the beneficiary of the pledge an equivalent security. A number of general corporate facilities contain a clause providing the financier with a right to terminate the facility in the event of a change of control.</p>

	Specific Issues	Purpose
Financing arrangements (continued)		<p>Project financing Another common feature of the coal mining industry is the use of project financing. Typically, a mining company will grant to the financiers security over all its assets in consideration for providing a facility commitment as required for a particular project.</p> <p>Other issues Other common financing arrangements particularly in larger organisations include intercompany loans, parent company guarantees and indemnity deeds. These arrangements require examination with a view to possible implications in the event of a change of control.</p>
Environment, planning, native title	<p>Land All mining operations should be examined to determine the existence of development consent and to determine the level of compliance with any conditions of consent for development (such as restrictions and obligations to acquire dust and noise affected properties). Analyse the possibility of contamination of the site and surrounding areas. rehabilitation requirements, procedures and cost estimates. Current and past waste management procedures should also be the subject of review and analysed for possible liabilities. Also consider:</p> <ul style="list-style-type: none"> • development applications, what is the status, the purpose and consider any correspondence; • correspondence which would indicate a liability; • local (state) law to determine likelihood prosecution and limit of fine. 	<p>The purpose of a review for this section is to identify environmental issues of significance in relation to the mines and mining operations subject to the potential acquisition. Generally review all licences, permits, consents, approvals necessary for operations and review technical audit reports.</p>

	Specific Issues	Purpose
<p>Environment, planning, native title (continued)</p>	<p>Water</p> <p>The volume and quantity of underground water inflows into the coal mine is directly related to the hydro geological environment. The design of pits or mines can be altered within this environment in order to reduce the problems of inflows, drainage and disposals. Soils, vegetation and existing users of ground water can be seriously affected by declining water levels as a result of ground water inflows to mines. The effect of mining on the local environment specifically in relation to water distribution should be examined.</p> <p>Coal is washed after extraction and small particles of coal are removed. These are called tailings. The water and the tailings are generally washing into a tailings dam. The treatment of this water and the tailings should form part of a due diligence report.</p> <p>The Hunter Valley region is characterised by high salinity of ground water, and some moderately saline surface water. Uncontrolled saline release would have long-term adverse impact on the region. Salt is a by-product of the coal burning process and rising salinity of local waterways is an issue to be addressed in a due diligence report.</p> <p>Air emissions</p> <p>Methane, carbon dioxide and water are generated as by-products of the coal formation process. The bituminous coals of the Sydney and Bowen basins typically contain gas consisting of over 95% methane with smaller quantities of carbon dioxide, methane, higher hydrocarbons, nitrogen and inert gases. About 90% of the methane gas is absorbed onto the coal surface, the remainder exists as free gas in the natural fracture system of the seams or is dissolved within the seam water.</p> <p>Air quality control should also be considered.</p>	

	Specific Issues	Purpose
<p>Environment, planning, native title (continued)</p>	<p>Native title and cultural heritage Depending upon the specific requirements of the client, you should consider:</p> <ul style="list-style-type: none"> (a) claims; (b) status; (c) registration; (d) ILUA or other agreement; (e) current negotiations; (f) assessment of volatility/extinguishment. <p>Licences Depending upon the jurisdiction, a coal mine would expect to hold a number of licences which permit pollution to an allowable limit (for example, use/pollution of air and water). The currency of these licences should be determined, the conditions of the licence reviewed, problems with compliance determined, etc.</p> <p>Other considerations Given the extensive use of railways in mining operations careful attention should be paid to access rights and any other statutory conditions for use of rail lines.</p>	
<p>Industrial relations and employment</p>	<p>Change of control provisions These contracts are generally examined with a view to any change of control provisions and the possible creation of liabilities in relation to it. The identity of the appropriate employer is also important in the event of a corporate restructure either pre or post completion. Particular attention should be paid to unusual terms in relation to industrial disputes, accommodation and leasing schemes.</p>	<p>The aim of a review of documents in relation to this section is to report on any unexpected or unusual industrial agreements, individual employment contracts or related arrangements. Any substantial employment related disputes or claims, either historical or current, redundancy and retention schemes should also be reviewed.</p>

	Specific Issues	Purpose
Industrial relations and employment (continued)	<p>Workplace health and safety Workplace health and safety features significantly in mining operations. A high incident rate of personal injury is characteristic. Present and potential liability in this area should be examined with a view to ascertaining the nature and extent of liability. A history of industrial dispute is also an important focal point for possible future costs.</p> <p>(a) inquiries to identify litigation and potential litigation (to company and to courts); (b) inquiries regarding adequate insurance (c) assess and review correspondence</p>	
Litigation	<p>(a) summarise the superannuation arrangements; (b) examine unusual obligations or liabilities</p>	<p>The aim of this review is to identify litigation, examine the potential exposure and, where possible, advise on prospects of success.</p> <p>The aim of this review is to examine the current superannuation requirements and to identify any unusual obligations or liabilities in relation to superannuation arrangements.</p>
Superannuation		
IP and IT	<p>Inventions A patent grants the owner of the patent the exclusive right to use or authorise the use of the patent for the term of the patent (which is 20 years in Australia). It may be important to trace the history of the acquisition of various patents acquired by the entity. Patents may not necessarily be taken on face value as to their worth, patents may be vulnerable to legal challenge if it can be shown that the patent is not novel, or is obvious or that the specifications are flawed, or that the owners are not the actual inventors and the agreement assigning the interest in the patent is invalid. Particularly with respect to mining machinery inventions, some components of the invention may incorporate other inventions which are themselves patentable. The patent can only be used on the terms that the other invention incorporated into the patent can be used. Licence agreements may specify conditions of use which may include restrictions on the use or even the location of the use of a particular invention or require payment on use. These licence agreements often have time limitations. These conditions should be noted in a due diligence report. Any assignment of patents should also be checked for stamp duty compliance. If duty has not been paid and the asset/s are in a state of Australia a stamp duty liability may arise.</p>	<p>Assessment of the entity under review in relation to intellectual property typically involves ascertaining the existence of rights in relation to inventions used in mining operations, methods and processes used in mining operations and marketing tools used in relation to the mining operations and marketing products. The review of material may also encompass an assessment of the commercial value of these rights and possible threats to that value.</p>

	Specific Issues	Purpose
<p>IP and IT (continued)</p>	<p>Copyright Copyright may be an asset held by an organisation. Copyright most often plays an important role in the protection of software. Often software may be licensed to a company rather than owned by the company and the licence may be personal to that licensee. Consent of the licensor may be required to assign the licence to another entity.</p> <p>Business Names, Domain Names and Trade Marks Confirmation of the registration of business names, or mine names are required to ensure that the goodwill and reputation of the entity are sufficiently protected and may be transferred. Similarly, domain names may also be searched to ascertain the level of vulnerability of the organisations name. Trade marks search may also be useful in determining the level of protection currently afforded to the trade marks of the organisation under review.</p> <p>Information Technology Issues to be addressed in a due diligence report with regard to information technology should include:</p> <ul style="list-style-type: none"> (a) whether the IT systems are owned or licensed; (b) if the IT systems are licensed, whether the licences can be assigned and whether a change of control of the licensee is a default; (c) if there is scope to improve, modify or enhance the systems; (d) if the systems are properly maintained; and (e) if the system licensors; developers or maintainers limit their liability for defects in the systems. 	

	Specific Issues	Purpose
Construction	<p>Practical Completion</p> <p>Each contract should be examined in order to ascertain whether the project has reached Practical Completion and whether a Certificate of Practical Completion has been provided. Where the organisation under review is the contractor, it is important to ascertain whether the Principal holds a security or has in place a parent company guarantee in relation to the contract. Details of the above securities need to be examined particularly for clauses which may be triggered by a change of control. Further, anything which indicates that there is a potential claim in relation to the project should be noted.</p> <p>Indemnity clauses</p> <p>Construction contracts commonly contain indemnity clauses which are a source of potential liabilities. Contracts in this section should also be analysed for other avenues of exposure in relation to guaranteed completion dates, and indemnities in relation to environmental destruction. The source of these liabilities should be identified as well as providing an outline of the extent of the potential exposure.</p> <p>The right to suspend works and rights arising out of such a suspension should also be noted. Termination rights are also significant rights to be noted in a due diligence report.</p> <p>Information as to the stage of the construction process may also be important to add to the report, particularly when guaranteed completion dates are provided in construction contracts. This information may be difficult to elicit and all avenues pursued in order to obtain should be noted.</p>	<p>To examine the construction contracts entered into by the vendor in relation to the coal asset.</p>
Insurance	<p>(a) currency of policies;</p> <p>(b) coverage of policies;</p> <p>(c) any provisions in policies which may be triggered by a change in control.</p>	<p>To examine the current arrangements and potential exposures.</p>

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