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DEAL REPORT: WOLLONGONG COAL SCHEMES OF ARRANGEMENT

This edition of the Deal Report continues the focus on restructuring transactions with a summary of the recent ~US$347 debt restructuring undertaken by the Australian mining business Wollongong Coal Limited (ASX: WLC).

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The transaction involved the restructuring of certain loan facilities via creditors' schemes of arrangement (**Schemes**). Prior to implementation, the Schemes terminated automatically by their terms as certain required payments had not been made by the relevant condition precedent satisfaction date.

In order to revive the Schemes, the parties applied for a court order to retrospectively amend the terms of the Schemes to extend the due date of the required payments. The requested orders were granted and the subsequent decision of Justice Black in *Re Wollongong Coal Limited; Re Jindal Steel & Power (Australia) Pty Limited* [2020] NSWSC 614 confirms that Courts in Australia have the ability to retrospectively amend the timing provisions attached to a scheme of arrangement once approved.

This transaction is significant as market participants now have certainty that, in some circumstances, the Courts will allow for the amendment of an approved scheme, rather than requiring parties to resort to the costly and lengthy process of implementing a second overriding scheme of arrangement.

PARTIES

Scheme Companies: Wollongong Coal Limited (**WCL**) and Jindal Steel & Power (Australia) Pty Ltd (**JSPAL**).

Scheme Creditors: the persons who were lenders under 2 loan facility agreements.

TRANSACTION SNAPSHOT

The Scheme Companies successfully completed a circa US$347 million debt restructuring via schemes of arrangement between each of the Scheme Companies and the Scheme Creditors (**Schemes**). Both Scheme Companies are members of Jindal Steel & Power Group, an Indian steel and energy group.

The Schemes, which were approved by the NSW Supreme Court on 14 February 2020, sought to improve the solvency position of the Scheme Companies and provide them with breathing room pending regulatory approvals to re-commence mining operations and consequently generate revenue and improve cash flow. The Schemes had the effect of restructuring the Scheme Companies' existing secured loan facilities by offering the Scheme Creditors the opportunity to participate in two restated facilities, with the cumulative effect being a reduction to the principal amount outstanding upon particular milestones occurring and an extension of the repayment schedule.

The existing secured loan facilities were those provided pursuant to a facility agreement dated 6 August 2015 (**Axis Facility**) and a facility agreement dated 24 December 2015 (**SBI Facility**), in each case as amended, varied or supplemented from time to time. JSPAL was the borrower under the Facilities and the guarantors included, among others, WCL and two of its subsidiaries (namely Oceania Coal Resources NL and Wongawilli Coal Pty. Ltd.).

TRANSACTION SNAPSHOT (CONT.)

The Schemes also facilitated the proposed sale of non-mining assets that, subject to the Schemes, formed part of the Scheme Creditors' security (with the effect that the assets may be realised other than on a forced-sale basis).

Prior to implementation, the Schemes terminated automatically by their terms as certain required payments had not been made by the relevant condition precedent satisfaction date. The Scheme Companies sought court orders retrospectively extending the timing provisions attached to the Schemes, effectively reviving the Schemes.

TRANSACTION HIGHLIGHTS

The Scheme Companies sought to restructure the outstanding debt of US$276.99 million under the Axis Facility and US$70.05 million under the SBI Facility owed to the Scheme Creditors by reallocating the debt to restated secured loan facilities, being Facility A and Facility B (the **Facilities**).

Pursuant to the Schemes:

+ approximately US$269.13 million of the outstanding debt under the Axis Facility was allocated to Facility A;
+ approximately US$7.86 million of the outstanding debt under the Axis Facility was allocated to Facility B; and
+ the total outstanding debt under the SBI Facility was allocated to Facility A.

The Facilities are required to be repaid through instalments, with all outstanding amounts under Facility A to be repaid on or before 30 September 2022 and all outstanding amounts under Facility B to be repaid on or before 30 September 2028.

Amongst other things, both JSPAL and WCL were also required to make certain initial equalisation payments to Scheme Creditors as a condition precedent to the Schemes.

REPAYMENT INCENTIVES

The principal outstanding amount under Facility A will be reduced by up to 29% if certain milestones are achieved, including the repayment of certain amounts outstanding by particular dates.

The principal amount outstanding under Facility B is repayable in full and is not eligible for any reduction to the principal amount.

WCL is prohibited from paying dividends or providing any other distribution to shareholders until the Facilities have been repaid in full.

INDEPENDENT EXPERT REPORT

An independent expert concluded that if the Schemes were implemented, the likely outcome for the Scheme Companies would be further time to maximise the value of their assets and obtain the regulatory approval necessary to restart mining operations, provision of the additional liquidity required to restart mining operations, and an improvement to the solvency position of the Scheme Companies.

The Independent Expert Report also expressed the following opinions as to the likely return to Scheme Creditors under the SBI Facility and Axis Facility in three scenarios as follows:

+ $0.48 to $1.00 for each existing dollar of claim if the Schemes are implemented, assuming each of the Scheme Companies continue operating as going concerns;
+ $0.19 to $0.26 for each existing dollar of claim if the Schemes are implemented, assuming each of the Scheme Companies are wound up within six months of the second court hearing date; and
+ $0.08 to $0.16 for each existing dollar of claim if the schemes are not implemented.

APPLICATION OF THE GIBBS RULE

English law will not recognise a foreign insolvency restructuring such as a scheme of arrangement to the extent to which it seeks to discharge debts that arose pursuant to a contract governed by English law, without such a foreign restructuring proceeding being subject to an equivalent English restructuring proceeding. This rule, established in *Antony Gibbs & Sons v L'Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399, is known as the "Gibbs Rule". The effect of the Gibbs Rule in Australia is that any company seeking to restructure a debt arising pursuant to a contract governed by English law must enter into dual schemes of arrangement in both Australia and the UK. This is a burdensome requirement, and has been the subject of both judicial and academic criticism.

In the present case, the Scheme Companies managed to avoid the requirement to pursue dual foreign Schemes by amending the governing law of the relevant facility agreement. Prior to the first court hearing in respect of the Schemes, the majority of lenders under the Axis Facility executed a consent letter whereby the governing law of the Axis Facility was amended from the law of England to the law of New South Wales, on terms that the governing law was to then automatically revert to the law of England at a later date (which post-dated the execution of Facility A and Facility B). In his judgement following the second court hearing, Justice Gleeson confirmed that this amendment was sufficient to circumvent the application of the Gibbs Rule to the Schemes.

REVIVAL OF SCHEME

Prior to the expected initial implementation date, the Schemes terminated automatically by their terms. This occurred at 11.59pm on 29 March 2020 when the 'CP Satisfaction Long Stop Date' passed without certain required payments being made by JSPAL.

The Scheme Companies sought orders from the NSW Supreme Court to amend the Schemes. Specifically, they sought orders to retrospectively extend the 'CP Satisfaction Long Stop Date' and the 'Settlement Long Stop Date' (as defined) with the effect that the Schemes did not terminate at 11.59pm on 29 March 2020 but remained on foot until the following day when the Scheme Creditors obtained the requisite waiver, and so continued thereafter.

On 29 April 2020, the Court made the requested orders amending the Schemes to retrospectively amend the 'CP Satisfaction Long Stop Date' to 1 April 2020 and the 'Settlement Long Stop Date' to 6 May 2020, effectively reviving the Schemes.

Justice Black's decision on this matter in *Re Wollongong Coal Limited; Re Jindal Steel & Power (Australia) Pty Limited* [2020] NSWSC 614 is significant as it confirms that, in certain circumstances, the Court will allow for the amendment of timing provisions attached to an approved scheme of arrangement. This position is an exception to the general legal principle that a scheme of arrangement, once approved by a Court, cannot be amended or varied by the Court, other than by a second scheme of arrangement.

CREDITOR SUPPORT

The transaction was well supported by creditors with:

+ approximately 95% of creditors present and voting, holding approximately 89% of the total value of outstanding debt under the Axis Facility and SBI Facility supporting the Schemes at the scheme meetings; and
+ approximately 88% of creditors in number, holding approximately 83% of the total value of outstanding debt under the Facilities supporting the amendment of the 'CP Satisfaction Long Stop Date' and 'Settlement Long Stop Date'.

Note: Gilbert + Tobin's market-leading Restructuring and Insolvency Team advised the supporting scheme creditors in respect of the Schemes. The information contained in this Deal Report is based solely on publicly available information.

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