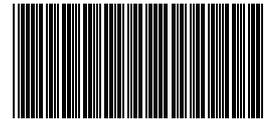




Filed: 21 October 2019 4:35 PM



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Form 7A/B
UCPR 14.3

DEFENCE

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2019/00184678

TITLE OF PROCEEDINGS

First Plaintiff	Les & Zelda Investments Pty Ltd (ACN 148 907 573) as Trustee for Les & Zelda Family Trust
First Defendant	WHITEHAVEN COAL LIMITED ABN 68124425396

FILING DETAILS

Filed for	WHITEHAVEN COAL LIMITED, Defendant 1
Legal representative	GUY HAMILTON FOSTER
Legal representative reference	
Telephone	02 9230 4000
Your reference	120801677-003

NOTICE OF LISTING

This matter has been listed with the statement of claim.

AFFIDAVIT

Deponent Name	Timothy Burt
Sworn/Affirmed on	21 October 2019

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Defence (e-Services), along with any other documents listed below, were filed by the Court.

Defence (UCPR 7A/7B) (2019-10-21 - Defence (Whitehaven Coal Limited).pdf)

[attach.]

Form 7A (version 5)
UCPR 14.3

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
Registry	Sydney
Case number	2019/184678

TITLE OF PROCEEDINGS

Plaintiff	Les & Zelda Investments Pty Ltd (ACN 148 907 573) as Trustee for Les & Zelda Family Trust
Defendant	Whitehaven Coal Limited (ABN 68 124 425 396)

FILING DETAILS

Filed for	Whitehaven Coal Limited (ABN 68 124 425 396), Defendant
Filed in relation to	Plaintiff's claim
Legal representative	Guy Foster (Partner) Allens, Solicitors
Legal representative reference	11274
Contact name and telephone	Guy Foster / Jonathan Light (02) 9230 4798 / (02) 9230 4423
Contact email:	Guy.Foster@allens.com.au / Jonathan.Light@allens.com.au

HEARING DETAILS

The proceedings are listed for directions on 30 October 2019.

PLEADING AND PARTICULARS

In answer to the Amended Statement of Claim dated 22 July 2019 (**ASOC**), the defendant says as follows:

Preliminaries

- A The headings used by the plaintiff in the ASOC are also used in this Defence for convenience only. They do not form part of the defendant's response to the ASOC and the defendant does not admit any factual assertions contained in, or in any way implied by, any heading used in the ASOC and repeated in this Defence.
- B The terms defined by the plaintiff in the ASOC have the same meaning in this Defence, unless otherwise defined or stated. The defendant does not admit any factual assertions contained in, or in any way implied by, any defined term used in the ASOC and repeated in this Defence.

Introduction

1. In answer to the allegations in paragraph 1 of the Claim, the Defendant:
 - (a) admits that the Plaintiff has purported to commence this proceeding as a Representative Party pursuant to Part 13A of the *Civil Proceedings Act 2011* (Qld); and
 - (b) otherwise does not admit the allegations in the paragraph.
2. The Defendant does not plead to paragraph 2 of the Claim which does not allege any matter against it.
3. In answer to the allegations in paragraph 3 of the Claim, the Defendant:
 - (a) admits the allegations in subparagraph (a) of the Claim;
 - (b) as to the allegations in subparagraph (b) of the Claim:
 - (i) says that it entered into a Share Purchase Agreement dated 11 December 2011 (**Share Purchase Agreement**) with each of the entities and persons specified in the first column of Part 1 of Schedule 2 of the Share Purchase Agreement (**Boardwalk Shareholders**), being:
 - (A) Boardwalk Resources Investments Pty Ltd ATF Boardwalk Resources Trust;
 - (B) Neban Pty Ltd ATF P.J. Christensen Family Trust;

- (C) Ian Stuart Craig & Angela Craig ATF Craig Family Super Fund;
 - (D) Kahnay Group Pty Ltd ATF Kane Family Trust;
 - (E) Sally Reynolds;
 - (F) Heth Investments Pty Ltd ATF Troy Palmer Family Trust;
 - (G) Donna Dennis Investments Pty Ltd ATF Donna Dennis Family Trust;
 - (H) Les & Zelda Investments Pty Ltd ATF Les & Zelda Family Trust;
 - (I) Steven Van Barneveld;
 - (J) Ross Brims;
 - (K) Ben Lawrence;
 - (L) John Thompson;
 - (M) Matthew Thomas Keen ATF Keen Investment Trust;
 - (N) Chris Summers;
 - (O) Helen Blackney; and
 - (P) Peter Blackney;
- (ii) says that under the Share Purchase Agreement, the Boardwalk Shareholders agreed to sell to the Defendant all of the ordinary shares in Boardwalk Resources Limited (**Boardwalk**), other than New Lender Shares (as defined in the Share Purchase Agreement) on the terms set out in the Share Purchase Agreement;
- (iii) will rely on the terms of the Share Purchase Agreement for their full force and effect; and
- (iv) otherwise does not admit the allegations in the subparagraph.
- (c) as to the allegations in subparagraph (c) of the Claim:
- (i) says that it was a condition precedent to the sale of the ordinary shares in Boardwalk by the Boardwalk Shareholders that a proposed scheme of arrangement between Aston Resources Limited (**Aston**) and certain of its members under which the Defendant would acquire certain shares in

Aston (**Scheme**) had received court approval in the manner contemplated in the Share Purchase Agreement;

- (ii) says that the parties to the Share Purchase Agreement could agree to waive the conditions precedent under it;
 - (iii) will rely on the terms of the Share Purchase Agreement for their full force and effect; and
 - (iv) otherwise denies the allegations in the subparagraph;
- (d) as to the allegations in subparagraph (d) of the Claim:
- (i) says that:
 - (A) the Milestone Shares were fully paid up shares in Whitehaven from 2 May 2012 when the Boardwalk Transaction was implemented; and
 - (B) the 'Trigger Events' and 'Vesting' conditions are set out in clauses 3.2 and 3.3 of the Restriction Deed;
 - (ii) will rely on the terms of the Share Purchase Agreement and the Restriction Deed for their full force and effect; and
 - (iii) otherwise denies the allegations in the subparagraph;
- (e) as to the allegations in subparagraph (e) of the Claim:
- (i) says that:
 - (A) the Milestone Shares were fully paid up shares in Whitehaven from 2 May 2012 when the Boardwalk Transaction was implemented; and
 - (B) the 'Trigger Events' and 'Vesting' conditions are set out in clauses 3.2 and 3.3 of the Restriction Deed;
 - (ii) will rely on the terms of the Share Purchase Agreement and the Restriction Deed for their full force and effect; and
 - (iii) otherwise denies the allegations in the subparagraph;
- (f) denies the allegations in subparagraph (f) of the Claim;

- (g) as to the allegations in subparagraph (g) of the Claim:
 - (i) says that:
 - (A) in an ASX announcement dated 14 March 2012 it recommended to its shareholders that they approve the allotment and issuance of 119,905,183 ordinary shares for the acquisition of Boardwalk Resources Limited ACN 130 433 617 as referred to in the explanatory memorandum; and
 - (B) in an ASX announcement dated 9 March 2012, Aston recommended to its shareholders that they vote in favour of the proposed acquisition by the Defendant of all of the issued shares in Aston by means of a members' scheme of arrangement; and
 - (ii) otherwise denies the allegations in the subparagraph;
- (h) as to the allegations in subparagraph (h);
 - (i) says that on 16 April 2012:
 - (A) its shareholders voted at an extraordinary general meeting in favour of issuing Whitehaven shares to acquire Boardwalk Resources Limited; and
 - (B) Aston's shareholders voted at an extraordinary general meeting in favour of the merger between Whitehaven and Aston; and
 - (ii) otherwise denies the allegations in the subparagraph;
- (i) as to the allegations in subparagraph (i):
 - (i) says that on 18 April 2012, the Federal Court of Australia approved the Scheme; and
 - (ii) otherwise denies the allegations in the subparagraph;
- (j) as to the allegations in subparagraph (j):
 - (i) admits that the Scheme was implemented on 2 May 2012;
 - (ii) says that on 1 May 2012, it acquired Boardwalk Resources Limited;
 - (iii) says that on or about 2 May 2012, each of the Boardwalk Shareholders were issued with the Whitehaven Shares and the Milestone Shares set

opposite their names in Schedule 2 to the Share Purchase Agreement;
and

- (iv) otherwise denies the allegations in the subparagraph;
- (k) as to the allegations in subparagraph (k):
 - (i) says that the 'Trigger Events' in clause 3.2 of the Restriction Deed have not occurred and therefore no 'Vesting' under clause 3.3 of the Restriction Deed has taken place; and
 - (ii) otherwise denies the allegations in the subparagraph.
- 4. The Defendant does not plead to the allegations in paragraph 4 of the Claim which does not allege any matter against it.
- 5. The Defendant denies the allegations in paragraph 5 of the Claim.
- 6. The Defendant does not admit the allegations in paragraph 6 of the Claim.

The Plaintiff

- 7. The Defendant admits the allegations in paragraph 7 of the Claim.
- 8. The Defendant admits the allegations in paragraph 8 of the Claim.
- 8A. In answer to the allegations in paragraph 8A of the Claim, the Defendant:
 - (a) does not admit the allegations in subparagraph (a);
 - (b) does not admit the allegations in subparagraph (b);
 - (c) admits that Mr Tinkler was:
 - (i) a director of BRI between 9 September 2010 and 9 February 2016; and
 - (ii) a director of Aston between 23 January 2008 and 6 August 2010 and between 17 November 2011 and 3 May 2012, and Chairman of Aston immediately before the Merger; and
 - (d) otherwise denies the allegations in the paragraph.
- 9. [Deleted in Claim.]

The Defendant

- 10. The Defendant admits the allegations in paragraph 10 of the Claim.
- 11. As to the allegations in paragraph 11 of the Claim, the Defendant:

- (a) admits the allegations in subparagraph (a);
- (b) admits the allegations in subparagraph (b); and
- (c) as to the allegations in subparagraph (c):
 - (i) admits that the Defendant was a listed company on the ASX; and
 - (ii) otherwise denies the allegations in the subparagraph.

Funding initiatives for the development of Boardwalk Projects

Boardwalk IPO

11A. As to the allegations in paragraph 11A of the Claim, the Defendant:

- (a) admits that Boardwalk was not listed on the ASX; and
- (b) otherwise does not admit the allegations in the paragraph.

12. In answer to the allegations in paragraph 12 of the Claim, the Defendant:

- (a) admits that as at 30 June 2011, Boardwalk had certain interests in the Boardwalk Projects;
- (b) says that Boardwalk also had a 19.9% interest in Coalworks Limited which:
 - (i) had a portfolio of coal assets which included the Oaklands North Project;
 - (ii) had a 92.5% interest in the Ferndale Project which would reduce upon completion of farm-in obligations by Boardwalk; and
 - (iii) had a 71% interest in the Vickery South Project which would reduce to a 51% interest upon completion of a bankable feasibility study to be funded by Coalworks' joint venture partner, ICRA Vickery Pty Ltd;
- (c) says that:
 - (i) footnote 62 of the table from section 5.8.6 of the Scheme Booklet replicated in the Plaintiff's particulars states 'The potential quantity and quality of the Exploration Targets is conceptual in nature, there has been insufficient exploration to define Resources and it is uncertain if further exploration will result in determination of Resources'; and
 - (ii) the 'Port Infrastructure' of the 'Monto Project' in the table from section 5.8.6 of the Scheme Booklet says 'Gladstone (160km away)'; and
- (d) otherwise does not admit the allegations in the paragraph.

12A. The Defendant does not admit the allegations in paragraph 12A of the Claim.

Proposed Acquisition and Merger

Boardwalk Acquisition

12B. The Defendant does not admit the allegations in paragraph 12B of the Claim.

12C. In answer to the allegations in paragraph 12C of the Claim, the Defendant:

- (a) says that on or about 2 November 2011, the Defendant signed a confidentiality deed with Boardwalk to allow for the exchange of confidential information for the purpose of considering, evaluating, negotiating and finalising documentation relating to and implementing a proposal whereby Aston or a subsidiary of Aston may acquire all or some of the business, assets or share capital of Boardwalk and the Defendant (**Confidentiality Deed**); and
- (b) otherwise does not admit the allegations in the paragraph.

12D. In answer to the allegations in paragraph 12D of the Claim, the Defendant:

- (a) admits that:
 - (i) following execution of the Confidentiality Deed, the Defendant was granted access to a data room; and
 - (ii) the data room contained written information relating to Boardwalk; and
- (b) otherwise does not admit the allegations contained in the paragraph.

12E. In answer to the allegations in paragraph 12E, the Defendant:

- (a) admits that on 25 November 2011, Boardwalk, Aston and the Defendant executed a non-binding term sheet headed "Project Trifecta" (**Term Sheet**); and
- (b) otherwise does not admit the allegations in the paragraph.

12F. In answer to the allegations in paragraph 12F, the Defendant:

- (a) admits the allegations in paragraph 12F of the Claim; and
- (b) will rely on the terms of the Term Sheet for their full force and effect.

12G. The Defendant denies the allegations in paragraph 12G of the Claim.

12H. The Defendant denies the allegations in paragraph 12H of the Claim.

12I. The Defendant denies the allegations in paragraph 12I of the Claim.

- 12J. The Defendant denies the allegations in paragraph 12J of the Claim.
- 12K. The Defendant denies the allegations in paragraph 12K of the Claim.
13. In answer to the allegations in paragraph 13 of the Claim, the Defendant:
- (a) admits the allegations in paragraph 13; and
 - (b) will rely on the terms of the Share Purchase Agreement for their full force and effect.
- 13A. The Defendant denies the allegations in paragraph 13A of the Claim.
- 13B. The Defendant denies the allegations in paragraph 13B of the Claim.
14. In answer to the allegations in paragraph 14 of the Claim, the Defendant:
- (a) as to subparagraph (a):
 - (i) says that Whitehaven agreed to acquire all of the Sale Shares on the terms and conditions of the Share Purchase Agreement;
 - (ii) will rely on the terms of the Share Purchase Agreement for their full force and effect; and
 - (iii) otherwise denies the allegations in the subparagraph;
 - (aa) as to subparagraph (aa):
 - (i) says that Boardwalk or its nominee was required to either subscribe, or procure one or more other Vendors or a Warrant Holder or New Lender to subscribe, for the 75,786,713 Subscription Shares in Boardwalk for the Subscription Amount of \$150,000,000 (including any amount loaned pursuant to clause 4.8 of the Share Purchase Agreement);
 - (ii) will rely on the terms of the Share Purchase Agreement for their full force and effect; and
 - (iii) otherwise denies the allegations in the subparagraph;
 - (ab) as to subparagraph (ab):
 - (i) says that clause 4.1(a) of the Share Purchase Agreement obliged the Vendors to procure that Boardwalk and its subsidiaries, in the period between 11 December 2011 and the Completion Date, conduct its business and operations in the ordinary course and substantially consistent with the Boardwalk Budget and substantially consistent

(subject to any applicable laws, regulations and Regulatory Approvals) with the manner in which each such business and operation had been conducted in the period prior to 11 December 2011;

- (ii) says that the Boardwalk Budget in Annexure B of the Share Purchase Agreement included a figure of \$23,634,676 under the 'Total FY12' column with respect to 'Total JV costs' which included:
 - (A) \$17,068,102 for the Ferndale Project;
 - (B) \$1,012,335 for the Sienna Project;
 - (C) \$4,749,571 for the Dingo Project; and
 - (D) \$804,668 for the Monto Project;
- (iii) will rely on the terms of the Share Purchase Agreement for their full force and effect; and
- (iv) otherwise denies the allegations in the subparagraph;
- (b) admits the allegations in subparagraph (b);
- (ba) admits the allegations in subparagraph (ba);
- (c) as to subparagraph (c):
 - (i) says that Schedule 2 of Part 1 of the Share Purchase Agreement sets out the consideration for the acquisition as 73,361,477 Whitehaven shares and 29,059,232 Milestone Shares; and
 - (ii) otherwise denies the allegations in the subparagraph;
- (ca) admits the allegations in subparagraph (ca); and
- (d) as to subparagraph (d):
 - (i) says that:
 - (A) the Milestone Shares were fully paid up shares in Whitehaven from 2 May 2012 when the Boardwalk Transaction was implemented; and
 - (B) the 'Trigger Events' and 'Vesting' conditions are set out in clauses 3.2 and 3.3 of the Restriction Deed;
 - (ii) will rely on the terms of the Share Purchase Agreement and the Restriction Deed for their full force and effect; and

(iii) otherwise denies the allegations in the subparagraph.

15. [Deleted in Claim.]

Aston Resources & Merger

15A. The Defendant admits the allegations in paragraph 15A of the Claim.

16. [Deleted in Claim.]

17. In answer to the allegations in paragraph 17 of the Claim, the Defendant:

- (a) admits that the ASX Announcement of 12 December 2011 contained statements to the effect of those set out in subparagraphs (a) to (e) of paragraph 17;
- (b) will rely on the terms of the ASX Announcement for their full force and effect; and
- (c) otherwise denies the allegations in the paragraph.

18. [Deleted in Claim.]

Statements as to the proposed Merger and Boardwalk Transaction

ASX Announcement

18A. In answer to the allegations in paragraph 18A of the Claim, the Defendant:

- (a) admits that the ASX Announcement of 12 December 2011 contained the text quoted in subparagraphs (a) to (c) of paragraph 18A of the Claim;
- (b) will rely on the terms of the ASX Announcement for their full force and effect; and
- (c) otherwise denies the allegations in the paragraph.

Investor Presentations

19. In answer to the allegations in paragraph 19 of the Claim, the Defendant:

- (a) admits that an Investor Presentation entitled "Creating a leading independent Australian Coal Company" was released on the Defendant's ASX platform on 12 December 2011;
- (b) admits that an Investor Presentation entitled "Creating a leading independent Australian Coal Company" was released on the Defendant's ASX platform on 12 March 2012; and
- (c) otherwise does not admit the allegations in the paragraph.

20. In answer to the allegations in paragraph 20 of the Claim, the Defendant:

- (aa) admits that page 3 of the Investor Presentation dated 12 December 2011 contained the text quoted in subparagraph (aa);
- (ab) admits that page 13 of the Investor Presentation dated 12 December 2011 contained the text quoted in subparagraph (ab);
- (a) admits that page 10 of the Investor Presentation dated 12 March 2012 contained the text quoted in subparagraph (a);
- (b) admits that page 20 of the Investor Presentation dated 12 March 2012 contained a statement to the effect of that set out in subparagraph (b);
- (c) admits that page 20 of the Investor Presentation dated 12 March 2012 contained a statement to the effect of that set out in subparagraph (c);
- (d) admits that page 20 of the Investor Presentation dated 12 March 2012 contained a statement to the effect of that set out in subparagraph (d);
- (e) admits that page 20 of the Investor Presentation dated 12 March 2012 contained a statement to the effect of that set out in subparagraph (e);
- (f) as to subparagraph (f):
 - (i) says that page 21 of the Investor Presentation dated 12 March 2012, in relation to the Dingo Project, states:

Three stage drilling program focussed on Pearl Creek with the objective of defining a JORC Resource by May 2012

 - Stage 1 completed – 640 boreholes
 - Stage 2 substantially completed – 42 open holes
 - Stage 3 completion in March 2012 – 29 cored holes;
 - (ii) says that page 21 of the Investor Presentation dated 12 March 2012, in relation to the Dingo Project, also contains the following footnote:

The potential quantity and quality of the Exploration Target is conceptual in nature, there has been insufficient exploration to define Resources and it is uncertain if further exploration will result in the determination of Resources;

and
 - (iii) otherwise denies the allegations in the subparagraph;

(g) as to subparagraph (g):

(i) says that page 21 of the Investor Presentation dated 12 March 2012, in relation to the Sienna Project, contains the following footnote:

The potential quantity and quality of the Exploration Target is conceptual in nature, there has been insufficient exploration to define Resources and it is uncertain if further exploration will result in the determination of Resources;

and

(ii) otherwise admits the allegations in the subparagraph;

(h) as to subparagraph (h):

(i) says that page 23 of the Investor Presentation dated 12 March 2012, in relation to the Ferndale Project, states:

Stage 3 infill drilling underway to confirm open-pit area (planned completion in March 2012, with defined resources in May 2012)

Boardwalk has rights to earn up to 50% direct interest in Ferndale through farm-in

- Stage 1 of farm-in (25%): minimum resource of 50 Mt or incur exploration expenditure of A\$10m. Expected to be completed by end of March 2012

- Stage 2 of farm-in (25%): completion of bankable feasibility study or total exploration expenditure of A\$25m;

(ii) says that page 23 of the Investor Presentation dated 12 March 2012, in relation to the Ferndale Project, also contains the following footnote:

The potential quantity and quality of the Exploration Target is conceptual in nature, there has been insufficient exploration to define Resources and it is uncertain if further exploration will result in the determination of Resources;

and

(iii) otherwise denies the allegations in the subparagraph;

(i) as to subparagraph (i):

- (i) says that page 24 of the Investor Presentation dated 12 March 2012, in relation to the Monto Project, states:

- Planned exploration program over four target zones based on regional geological data and known coal intersections

- Drilling program planned for completion in April 2012, further defining existing exploration target;

- (ii) says that page 23 of the Investor Presentation dated 12 March 2012, in relation to the Monto Project, also contains the following footnote:

The potential quantity and quality of the Exploration Target is conceptual in nature, there has been insufficient exploration to define Resources and it is uncertain if further exploration will result in the determination of Resources;

and

- (iii) otherwise admits the allegations in the subparagraph; and
- (j) otherwise relies on the terms of the Investor Presentations dated 12 December 2011 and 12 March 2012 for their full force and effect.

Roadshow Presentations

- 20A. The Defendant does not admit the allegations in paragraph 20A of the Claim.
- 20B. The Defendant does not admit the allegations in paragraph 20B of the Claim.
- 20C. In answer to the allegations in paragraph 20C of the Claim, the Defendant:
- (a) admits that the 'Project Trifecta – Potential Investor Questions' document (Investor Questions Document) set out a number of possible responses to anticipated investor questions;
- (b) admits that the Investor Questions Document contained the text quoted in subparagraphs (a) to (j) of paragraph 20C;
- (c) says that officers of Aston and the Defendant were provided with the Investor Questions Document; and
- (d) otherwise does not admit the allegations in the paragraph.
21. In answer to the allegations in paragraph 21 of the Claim, the Defendant:

- (a) admits that its officers Tony Haggarty, John Conde and Allan Davies attended and appeared at a series of investor roadshows until March 2012; and
 - (b) otherwise does not admit the allegations in the paragraph.
22. The Defendant denies the allegations in paragraph 22 of the Claim.
- 22A. The Defendant denies the allegations in paragraph 22A of the Claim.
- 22B. The Defendant does not admit the allegations in paragraph 22B of the Claim.
- 22C. The Defendant denies the allegations in paragraph 22C of the Claim.
23. [Deleted in Claim.]
24. [Deleted in Claim.]

Scheme Booklet

25. In answer to the allegations in paragraph 25, the Defendant:
- (a) admits that Aston issued the written Scheme Booklet on 9 March 2012;
 - (b) denies that the Defendant issued the written Scheme Booklet;
 - (c) says that a copy of the written Scheme Booklet was uploaded on the Defendant's ASX platform on 9 March 2012; and
 - (d) otherwise admits the allegations in the paragraph.
26. In answer to the allegations in paragraph 26 of the Claim, the Defendant:
- (a) admits that page 4 of the Scheme Booklet contained a recommendation to the effect of that set out in subparagraph (a);
 - (b) admits that page 5 of the Scheme Booklet contained a recommendation to the effect of that set out in subparagraph (b);
 - (c) admits that page 6 of the Scheme Booklet contained a statement to the effect of that set out in subparagraph (c);
 - (d) as to subparagraph (d):
 - (i) says that at part 5.8.1 of the Scheme Booklet it states:

During the period between execution of the Boardwalk Transaction Documents and 31 March 2012, BRI will make loans to Boardwalk to assist with funding of Boardwalk's operations. Existing Boardwalk Securityholders will contribute A\$150 million cash to

Boardwalk if the Scheme becomes Effective, which will be used for the ongoing development of its assets including repayment of existing debt. This amount will include the amount of any loans made to Boardwalk by BRI after 11 December 2011 to assist in funding Boardwalk's operations. ;

and

- (ii) otherwise denies the allegations in the subparagraph;
- (e) admits that page 12 of the Scheme Booklet contained the text quoted in subparagraph (e);
- (f) admits that page 13 of the Scheme Booklet contained the text quoted in subparagraph (f);
- (g) admits that page 28 of the Scheme Booklet contained the text quoted in subparagraph (g);
- (h) admits that page 67 of the Scheme Booklet contained the text quoted in subparagraph (h);
- (i) admits that page 67 of the Scheme Booklet contained the text quoted in subparagraph (i);
- (j) in answer to the allegations in subparagraph (j):
 - (i) denies that subparagraphs 20(b) to (i) accurately summarise the terms of the Scheme Booklet; and
 - (ii) otherwise does not admit the allegations in the subparagraph;
- (k) admits that page 79 of the Scheme Booklet contained the text quoted in subparagraph (k);
- (l) admits that page 92 of the Scheme Booklet contained the text quoted in subparagraph (l);
- (m) admits that page 94 of the Scheme Booklet contained the text quoted in subparagraph (m);
- (n) admits that page 117 of the Scheme Booklet contained the text quoted in subparagraph (n);
- (o) admits that page 125 of the Scheme Booklet contained the text quoted in subparagraph (o);

(p) in answer to the allegations in subparagraph (p):

(i) says that section 9.3.3 on pages 205 and 206 of the Scheme Booklet also says:

The interplay between these restrictions results in a wide range of potential outcomes.

For example, the maximum dilution impact would arise in the event of a takeover of the Merged Group without any further exploration activity in relation to the Boardwalk Assets.

On the other hand, the minimum dilution is, by definition, zero, reflecting a situation where none of the Milestone Shares vest, or the continued exploration outcomes are very favourable such that the increase in value on the Boardwalk assets outweigh any potential dilution from the contingent consideration.

To assess a precise estimate of the impact of the contingent consideration requires allowance for a wide variety of uncertain factors including:

- the prospects and timing of both exploration success, and achievement of the required approvals;*
- the economics of any proposed mining activity;*
- the coal price and exchange rate levels at the time the mines begin and continue to operate;*
- the share price performance and dividend policy of the merged group during the period of restriction;*
- the prospects, potential outcomes and timing of takeover activity in relation to the merged group;*

and

(ii) otherwise admits that section 9.3.3 on pages 205 and 206 of the Scheme Booklet contain the text quoted in subparagraph (p); and

(q) will otherwise rely on the terms of the Scheme Booklet for their full force and effect.

27. [Deleted in Claim.]

28. [Deleted in Claim.]

Whitehaven Notice of Meeting

28A. In answer to the allegations in paragraph 28A of the Claim, the Defendant:

- (a) admits that page 2 of the letter from the Chairman in the Notice of Meeting contained the text quoted in subparagraph (a);
- (b) admits that page 2 of the letter from the Chairman in the Notice of Meeting contained the text quoted in subparagraph (b);
- (c) admits that page 4 of the explanatory memorandum in the Notice of Meeting contained the text quoted in subparagraph (c);
- (d) admits that page 5 of the explanatory memorandum in the Notice of Meeting contained the text quoted in subparagraph (d);
- (e) as to subparagraph (e):
 - (i) says that the sentence before the quoted text states:

Other than the Ferndale project, the Boardwalk assets do not currently have JORC Code-compliant Resources delineated as to date there has been insufficient geological and financial analysis (including drilling work) undertaken to provide the required level of evidence to convert the assets' Exploration Targets into Resources;

and
 - (ii) otherwise admits that page 6 of the explanatory memorandum in the Notice of Meeting contained the text quoted in subparagraph (e);
- (f) in answer to the allegations in subparagraph (f):
 - (i) denies that subparagraphs 20(b) to (i) accurately summarise the terms of the Scheme Booklet;
 - (ii) otherwise does not admit the allegations in the subparagraph;
- (g) admits that page 15 of the explanatory memorandum in the Notice of Meeting contained the text quoted in subparagraph (g);
- (h) admits that page 17 of the explanatory memorandum in the Notice of Meeting contained the text quoted in subparagraph (h); and

- (i) will otherwise rely on the terms of the Notice of Meeting for their full force and effect.

Completion of Boardwalk Transaction and the Merger

- 29. The Defendant admits the allegations in paragraph 29 of the Claim.
- 30. The Defendant admits the allegations in paragraph 30 of the Claim.
- 31. In answer to the allegations in paragraph 31, the Defendant:
 - (a) admits the allegations in subparagraph (a); and
 - (b) as to subparagraph (b):
 - (i) says that the Boardwalk Transaction was completed on 1 May 2012; and
 - (ii) otherwise denies the allegations in the subparagraph.
- 32. In answer to the allegations in paragraph 32 of the Claim, the Defendant:
 - (a) says that Schedule 2 of Part 1 of the Share Purchase Agreement sets out the consideration for the acquisition as 73,361,477 Whitehaven shares and 29,059,232 Milestone Shares;
 - (b) says further that:
 - (i) approximately \$50,000,000 of the Payment was applied to the repayment of Boardwalk debt as set out in section 1.3 of the 'Independent Expert's Report on the proposed merger with Whitehaven Coal Limited' on page 134 of the Scheme Booklet;
 - (ii) approximately \$9,500,000 of the Payment was applied to pre-committed funding; and
 - (iii) \$10,000,000 of the Payment was applied to the balance of the deferred consideration for the acquisition of the Sienna Project as set out in Section 5.8.7 of the Scheme Booklet; and
 - (c) otherwise admits the allegations in the paragraph.
- 33. The Defendant admits the allegations in paragraph 33 of the Claim.
- 33A. The Defendant denies the allegations in paragraph 33A of the Claim.
- 33B. The Defendant denies the allegations in paragraph 33B of the Claim.
- 33C. The Defendant denies the allegations in paragraph 33C of the Claim.

33D. The Defendant denies the allegations in paragraph 33D of the Claim.

33E. The Defendant denies the allegations in paragraph 33E of the Claim.

33F. The Defendant denies the allegations in paragraph 33F of the Claim.

33G. The Defendant denies the allegations in paragraph 33G of the Claim.

33H. The Defendant denies the allegations in paragraph 33H of the Claim.

The Boardwalk Projects have not been developed

33I. In answer to the allegations in paragraph 33I of the Claim, the Defendant:

(a) admits that the mining leases and environmental approvals for the Boardwalk Projects have not yet been obtained as at the date of this Defence; and

(b) otherwise denies the allegations in the paragraph.

33J. The Defendant denies the allegations in paragraph 33J of the Claim.

33K. The Defendant denies the allegations in paragraph 33K of the Claim.

34. [Deleted in Claim.]

35. [Deleted in Claim.]

Breach of Contract

35A. The Defendant denies the allegations in paragraph 35A of the Claim.

36. [Deleted in Claim.]

Misleading or Deceptive Conduct

37. The Defendant denies the allegations in paragraph 37 of the Claim.

38. [Deleted in Claim.]

39. [Deleted in Claim.]

39A. The Defendant denies the allegations in paragraph 39A of the Claim.

40. [Deleted in Claim.]

Damages

Boardwalk Shareholders

40A. The Defendant denies the allegations in paragraph 40A of the Claim.

40B. The Defendant denies the allegations in paragraph 40B of the Claim.

- 40C. The Defendant denies the allegations in paragraph 40C of the Claim.
- 40D. The Defendant denies the allegations in paragraph 40D of the Claim.
- 40E. The defendant denies the allegations in paragraph 40E of the Claim.
41. [Deleted in Claim.]
42. [Deleted in Claim.]
- 40F. The Defendant denies the allegations in paragraph 40F of the Claim.
- 40G. The Defendant denies the allegations in paragraph 40G of the Claim.
- 40H. The Defendant denies the allegations in paragraph 40H of the Claim.
43. In further answer to the Plaintiff's and Group Members' claims for breach of contract pleaded in paragraph 35A of the Claim, if the Plaintiff or any Group Member establishes any such breach (which is denied), the Defendant says that:
- (a) such claims are subject to the limitation period set out in section 14 of the *Limitation Act 1969* (NSW);
 - (b) any such claims arose no later than a reasonable period of time after the Scheme;
 - (c) to the extent that it is determined that a reasonable time elapsed before 20 December 2012, the Plaintiff's and Group Members' claims are statute barred.
44. In further answer to the Plaintiff's and Group Members' claims for damages pursuant to s 236 of the *Australian Consumer Law*, if the Plaintiff or any Group Member establishes any contravention of s 18 of the *Australian Consumer Law* (which is denied) and establishes that it has suffered loss or damage (which is denied), the Defendant says:
- (a) such claim is subject to the limitation period set out in section 236(2) of the *Australian Consumer Law*;
 - (b) any loss or damage was suffered by the Plaintiff and any Group Member by no later than the time at which it acquired the Milestone Shares in May 2012;
 - (c) the Plaintiff's and Group Members' causes of action arose no later than the time at which they acquired the Milestone Shares; and
 - (d) in the premises, the Plaintiff's and Group Members' claims are statute barred.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

Solicitor for the defendant

by his partner

ROSS DRINNAN

Date of signature

21 October 2019

AFFIDAVIT VERIFYING

Name: Timothy Burt

Address: Level 28, 259 George Street, Sydney, NSW

Occupation: General Counsel and Company Secretary, Whitehaven Coal Limited

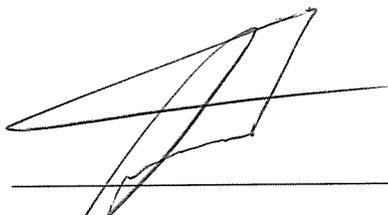
Date: 21 October 2019

I affirm:

1. I am the General Counsel and Company Secretary of Whitehaven Coal Limited and am authorised to verify this defence on its behalf.
2. I believe that the allegations of fact contained in the defence are true.
3. I believe that the allegations of fact that are denied in the defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Sydney, New
South Wales

Signature of deponent



Signature of witness



Name of witness

Carmen Pantlin

Address of witness

Level 28, 259 George Street, Sydney,
NSW

Capacity of witness

Solicitor

CERTIFICATE UNDER SECTION 34(1)(C) OF OATHS ACT 1900

I, Carmen Pantlin, solicitor, certify the following matters concerning the making of this affidavit by the person who made it:

1. I saw the face of the person.
2. I have known the person for at least 12 months.

Signature of
authorised witness



Date: 21 October 2019

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Whitehaven Coal Limited (ABN 68 124 425 396)
Address Level 28, 259 George Street, Sydney, NSW

Legal representative for filing party

Name Guy Foster
Practising certificate number 11274
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