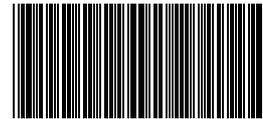




Filed: 20 June 2022 4:45 PM



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## Commercial List Response

### COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Commercial
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

### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Commercial List Response (Defence to FASOC (verified).pdf)

[attach.]

Form 7A (version 5)  
UCPR 14.3

## DEFENCE TO FURTHER AMENDED STATEMENT OF CLAIM

(Filed pursuant to orders made on 14 June 2022)

### COURT DETAILS

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

### TITLE OF PROCEEDINGS

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

### FILING DETAILS

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

### HEARING DETAILS

The matter is listed for directions on

## PLEADING AND PARTICULARS

In answer to the Further Amended Statement of Claim filed on 14 April 2022 (**Claim**), the defendant says as follows:

### Preliminaries

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

### A. Nature of Proceedings

1. In answer to the allegations in paragraph 1 of the Claim, the Defendant:
  - (a) admits that there were persons who between December 2011 and May 2012 were shareholders of Boardwalk Resources Limited (**Boardwalk** and **Boardwalk Shareholders**) and who in or about May 2012 were issued with shares and restricted shares (**Restricted Shares**) in the Defendant;
  - (b) does not admit that the matters pleaded in the Claim apply to a successor or permitted assign of such persons; and
  - (c) otherwise does not admit the allegations in the paragraph.
2. The Defendant does not admit the allegations in paragraph 2 of the Claim.
3. In answer to paragraph 3 of the Claim, the Defendant does not admit that the questions set out in Annexure A of the Claim and framed as common issues of law or fact:
  - (a) involve common issues of law or fact; or
  - (b) insofar as they do, that those questions are common with respect to all Group Members.
4. The Defendant does not plead to paragraph 4 of the Claim which does not allege any matter against it.

## **B. Parties**

### **B.1 The Plaintiff**

5. In answer to the allegations in paragraph 5 of the Claim, the Defendant:
  - (a) admits that the Plaintiff is a company duly incorporated in Australia and entitled to sue and be sued in its name and corporate style; and
  - (b) otherwise does not admit the allegations in the paragraph.
6. In answer to the allegations in paragraph 6 of the Claim, the Defendant:
  - (a) admits that immediately prior to the implementation of the transaction whereby the Defendant acquired certain shares in Boardwalk in May 2012 (**Boardwalk Transaction**), the Plaintiff held 2,000,000 shares in Boardwalk; and
  - (b) otherwise denies the allegations in the paragraph.
7. In answer to the allegations in paragraph 7 of the Claim, the Defendant:
  - (a) says that by reason of the Boardwalk Transaction:
    - (i) the Plaintiff transferred its shares in Boardwalk to the Defendant;
    - (ii) the Plaintiff was issued with 1,075,554 fully paid ordinary shares in the Defendant; and
  - (b) says further that on or about 1 May 2012 the Plaintiff executed or caused to be executed a Restriction Deed which provided for certain conditions that were applicable to 305,161 of the fully paid ordinary shares in the Defendant that were to be held by the Plaintiff; and
  - (c) otherwise denies the allegations in the paragraph.
8. The Defendant admits the allegations in paragraph 8 of the Claim.

### **B.2 The Defendant**

9. The Defendant admits the allegations in paragraph 9 of the Claim.
10. In answer to the allegations in paragraph 10 of the Claim, the Defendant:
  - (a) admits the allegations in sub-paragraphs (a) and (c)-(d); and
  - (b) does not admit the allegations in sub-paragraph (b).

## **C. Other persons**

### **C.1 BRI**

11. In answer to the allegations in paragraph 11 of the Claim, the Defendant:
  - (a) admits that in the period from around September 2011 to 20 December 2018, Boardwalk Resources Investments Pty Ltd (**BRI**) was a company, duly incorporated; and
  - (b) otherwise does not admit the allegations in the paragraph.
12. The Defendant does not admit the allegations in paragraph 12 of the Claim.
13. The Defendant does not admit the allegations in paragraph 13 of the Claim.
14. The Defendant does not admit the allegation in paragraph 14 of the Claim.
15. In answer to the allegations in paragraph 15 of the Claim, the Defendant:
  - (a) says that by reason of the Boardwalk Transaction:
    - (i) BRI transferred its shares in Boardwalk to the Defendant;
    - (ii) BRI was issued with 94,031,386 fully paid ordinary shares in the Defendant; and
  - (b) says further that on or about 1 May 2012 BRI executed or caused to be executed a Restriction Deed which provided for certain conditions that were applicable to 26,678,979 of the fully paid ordinary shares in the Defendant that were to be held by BRI; and
  - (c) otherwise denies the allegations in the paragraph.

### **C.2 Mr Nathan Tinkler**

16. The Defendant admits the allegations in paragraph 16 of the Claim.
17. In answer to the allegations in paragraph 17 of the Claim, the Defendant:
  - (a) admits the allegations in sub-paragraph (a);
  - (b) in answer to the allegations in sub-paragraph (b):
    - (i) says that Mr Paul James Flynn was a director of BRI from 1 June 2011 to 3 April 2012;
    - (ii) says that Mr Philip John Christensen was a director of BRI from 1 June 2011 to 20 March 2012; and

- (iii) otherwise admits the allegations in sub-paragraph (b);
  - (c) does not admit the allegations in sub-paragraphs (c) to (g);
  - (d) in answer to the allegations in sub-paragraph (h) admits that Mr Tinkler was a director of Aston Resources Limited (**Aston**) between 17 November 2011 and 3 May 2012 and Chairman of Aston immediately before the Boardwalk Transaction; and
  - (e) otherwise denies the allegations in the paragraph.
18. The Defendant does not admit the allegations in paragraph 18 of the Claim.

### **C.3 Mr Tony Haggarty**

19. The Defendant admits the allegations in paragraph 19 of the Claim.
20. The Defendant does not admit the allegations in paragraph 20 of the Claim.
21. The Defendant does not admit the allegations in paragraph 21 of the Claim.

### **D. The Boardwalk Projects**

22. In answer to the allegations in paragraph 22, the Defendant:
- (a) does not admit sub-paragraph 22(a);
  - (b) says that:
    - (i) it admits the matters in sub-paragraph 22(b) were true as at immediately prior to 1 May 2021; and
    - (ii) otherwise does not know, and therefore does not admit sub-paragraph 22(b).
23. In answer to paragraph 23, the Defendant says:
- (a) the paragraph is embarrassing and is liable to be struck out as it is unclear the basis on which it is said that Boardwalk held any interests in assets owned by its subsidiaries; and
  - (b) under cover of that objection, otherwise denies the paragraph.
24. The Defendant admits the allegations in paragraph 24 of the Claim.
25. The Defendant admits the allegations in paragraph 25 of the Claim.

### **D.1 The Ferndale Project**

26. In answer to the allegations in paragraph 26 of the Claim, the Defendant:
- (a) says that the Ferndale Project is located at Yarrawa, approximately eight kilometres south-west of Denman and the exploration related to it (**EL7430**) covers approximately 3,742 hectares; and
  - (b) otherwise denies the allegations in the paragraph.
27. The Defendant admits the allegations in paragraph 27 of the Claim.
28. The Defendant admits the allegations in paragraph 28 of the Claim.
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 of the Claim, the Defendant:
- (a) says that Boardwalk's rights in respect of the Ferndale JV were set out in a Farm In Agreement dated 8 December 2010 and a Joint Venture Agreement dated 8 December 2010; and
  - (b) subject to the terms set out in the agreements referred to in paragraph (a) above, otherwise admits the allegations in the paragraph.
32. The Defendant does not admit the allegations in paragraph 32 of the Claim.
33. The Defendant admits the allegations in paragraph 33 of the Claim.
34. In answer to the allegations in paragraph 34 of the Claim, the Defendant:
- (a) admits that on or around 23 January 2013 JB Mining Services Pty Ltd issued a report titled "Coal Resources at Ferndale";
  - (b) otherwise denies the allegations in the paragraph.
35. The Defendant does not admit the allegations in paragraph 35 of the Claim.

### **D.2 The Dingo Project**

36. In answer to the allegations in paragraph 36 of the Claim, the Defendant:
- (a) says that the Dingo Project is located between the townships of Dingo and Duaringa near the Bowen Basin in Queensland and that the exploration permits related to it (**EPC 862, EPC 863 and EPC 1063**) cover an area of approximately 25,600 hectares; and

- (b) otherwise denies the allegations in the paragraph.
- 37. The Defendant admits the allegations in paragraph 37 of the Claim.
- 38. The Defendant admits the allegations in paragraph 38 of the Claim.
- 39. In answer to the allegations in paragraph 39 of the Claim, the Defendant:
  - (a) admits that the *Mineral Resources Act 1989* (Qld) contains provisions which deal with the circumstances in which the holder of an EPC is required to relinquish subblocks of an EPC; and
  - (b) otherwise denies the allegations in the paragraph.
- 40. In answer to the allegations in paragraph 40 of the Claim, the Defendant:
  - (a) says that by an agreement titled "Farm-In and Joint Venture Agreement" dated 16 July 2009, Independent Coal Pty Ltd and Aston Dingo Pty Ltd agreed to form a joint venture on the terms set out in that agreement; and
  - (b) otherwise denies the allegations in the paragraph.
- 41. The Defendant denies the allegations in paragraph 41 of the Claim.
- 42. The Defendant denies the allegations in paragraph 42 of the Claim.
- 43. The Defendant denies the allegations in paragraph 43 of the Claim.
- 44. The Defendant does not admit the allegations in paragraph 44 of the Claim.
- 45. The Defendant does not admit the allegations in paragraph 45 of the Claim.
- 46. The Defendant denies the allegations in paragraph 46 of the Claim.
- 47. The Defendant denies the allegations in paragraph 47 of the Claim.
- 48. The Defendant admits the allegations in paragraph 48 of the Claim.
- 49. The Defendant admits the allegations in paragraph 49 of the Claim.
- 50. In answer to the allegations in paragraph 50 of the Claim, the Defendant:
  - (a) admits that the Defendant did not do the matters set out in subparagraphs (a) or (b); and
  - (b) denies that the Defendant had any obligation to do the matters set out in subparagraphs (a) or (b) to the extent this is alleged.
- 51. The Defendant admits the allegations in paragraph 51 of the Claim.

52. The Defendant does not admit the allegations in paragraph 52 of the Claim.
53. The Defendant does not admit the allegations in paragraph 53 of the Claim.
54. The Defendant does not admit the allegations in paragraph 54 of the Claim.
55. In answer to the allegations in paragraph 55 of the Claim, the Defendant:
- (a) admits that the Defendant did not do the matters set out in subparagraphs (a) or (b); and
  - (b) denies that the Defendant had any obligation to do the matters set out in subparagraphs (a) or (b) to the extent this is alleged.
56. In answer to the allegations in paragraph 56, the Defendant:
- (a) admits that on 19 September 2018 the Queensland Government renewed MDL 512; and
  - (b) otherwise denies the allegation in the paragraph.
57. The Defendant admits the allegations in paragraph 57 of the Claim.
58. The Defendant denies the allegations in paragraph 58 of the Claim.

### **D.3 The Sienna Project**

59. In answer to the allegations in paragraph 59 of the Claim, the Defendant:
- (a) says that the Sienna Project is located in the Bowen Basin in Central Queensland and that the exploration permits related to it (**EPC 1033 and EPC2089**) cover an area of approximately 10,800 hectares; and
  - (b) otherwise denies the allegations in the paragraph.
60. The Defendant admits the allegations in paragraph 60 of the Claim.
61. The Defendant admits the allegations in paragraph 61 of the Claim.
62. The Defendant admits the allegations in paragraph 62 of the Claim.
63. The Defendant denies the allegations in paragraph 63 of the Claim.

#### **D.4 The Monto Project**

64. In answer to the allegations in paragraph 64 of the Claim, the Defendant:
- (a) says that the Monto Project is located near the town of Monto approximately 120km south-west of Gladstone, QLD and that that the exploration permit related to it covers an area of approximately 29,600 hectares; and
  - (b) otherwise denies the allegations in the paragraph.

65. The Defendant admits the allegations in paragraph 65 of the Claim.

66. The Defendant denies the allegations in paragraph 66 of the Claim.

67. The Defendant denies the allegations in paragraph 67 of the Claim.

#### **D.5 Boardwalk's alleged control of the Boardwalk Projects**

68. The Defendant does not admit the allegations in paragraph 68 of the Claim.

69. The Defendant does not admit the allegations in paragraph 69 of the Claim.

#### **D.5 The Oaklands North Project**

70. The Defendant does not admit the allegations in paragraph 70 of the Claim.

### **E. The Whitehaven Deal**

#### **E.1 Planned Boardwalk IPO**

71. The Defendant does not admit the allegations in paragraph 71 of the Claim.

72. The Defendant does not admit the allegations in paragraph 72 of the Claim.

#### **E.2 Project Trifecta**

73. The Defendant does not admit the allegations in paragraph 73 of the Claim.

74. The Defendant does not admit the allegations in paragraph 74 of the Claim.

75. In answer to the allegations in paragraph 75 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.

76. In answer to the allegations in paragraph 76 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 in the paragraph.

77. The Defendant does not admit the allegations in paragraph 77 of the Claim.

78. The Defendant does not admit the allegations in paragraph 78 of the Claim.

### **E.3 The alleged Sydney Meetings**

79. The Defendant denies the allegations in paragraph 79 of the Claim.

80. The Defendant denies the allegations in paragraph 80 of the Claim.

81. The Defendant denies the allegations in paragraph 81 of the Claim.

82. The Defendant denies the allegations in paragraph 82 of the Claim.

### **E.4 Project Trifecta – Final Term Sheet & Due Diligence**

83. The Defendant denies the allegations in paragraph 83 of the Claim.

84. In answer to the allegations in paragraph 84 of the Claim, the Defendant:

(a) says that the Term Sheet was expressed to be:

(i) not binding on any party;

(ii) that other offer conditions may emerge following due diligence;

(iii) that Aston was to draft the proposed scheme booklet with input from the Defendant as required; and

(b) otherwise admits the allegations in subparagraphs (a)-(d) and (f) of the Claim; and

(c) denies the allegation in sub-paragraph (e) of the Claim.

**F. Purchase Agreements and Restriction Deeds****F.1 Alleged Express Terms of the Purchase Agreements**

85. The Defendant admits the allegations in paragraph 85 of the Claim.
86. In answer to the allegations in paragraph 86 of the Claim, the Defendant:
- (a) admits that on or about 11 December 2011, Farallon Capital Institutional Partners II, LP, Noonday Special Situation Partners, LP and other entities entered into an agreement with the Defendant whereby the Defendant agreed to purchase certain Share Warrants as part of an acquisition by the Defendant of interests in Boardwalk; and
  - (b) otherwise denies the allegations in the paragraph.
87. The Defendant admits the allegations in paragraph 87 of the Claim.
88. The Defendant admits the allegations in paragraph 88 of the Claim.
89. In answer to the allegations in paragraph 89 of the Claim, the Defendant:
- (a) denies the allegations in sub-paragraph (a);
  - (b) admits the allegations in sub-paragraph (b);
  - (c) denies the allegations in sub-paragraph (c);
  - (d) admits the allegations in sub-paragraph (d);
  - (e) denies the allegations in sub-paragraph (e);
  - (f) admits the allegations in sub-paragraphs (f) and (g);
  - (g) denies the allegations in subparagraph (h); and
  - (h) says further that the Agreements contained further terms to the following effect:
    - (i) in respect of the Share Purchase Agreement, that BRI warranted to the Defendant that the Boardwalk Information (as defined in the Share Purchase Agreement) as included or incorporated by reference in the scheme booklet in respect of the proposed Scheme would not as at the date of dispatch of the scheme booklet contain any statement which was misleading or deceptive in any material respect (by omission or otherwise); and

### Particulars

Share Purchase Agreement, clause 4.11(b)(ii)

- (ii) in respect of each Agreement, that the relevant Agreement superseded all previous agreements about its subject matter and embodied the entire agreement between the parties to it;

### Particulars

Clause 15.6 of the Share Purchase Agreement, clause 13.6 of the Warrant Purchase Agreement, clause 13.6 of the Minority Lenders Purchase Agreement,

#### **F.2 Express Terms of the Restriction Deeds**

90. The Defendant admits the allegations in paragraph 90 of the Claim.
91. In answer to the allegations in paragraph 91 of the Claim, the Defendant admits that the pleaded Restrictions were contained in the Restriction Deed, but says further that additional restrictions were also contained in that deed.
92. The Defendant admits the allegations in paragraph 92 of the Claim.
93. The Defendant admits the allegations in paragraph 93 of the Claim.
94. The Defendant admits the allegations in paragraph 94 of the Claim.
95. The Defendant admits the allegations in paragraph 95 of the Claim.
96. The Defendant does not admit the allegations in paragraph 96 of the Claim.
97. The Defendant admits the allegations in paragraph 97 of the Claim.
98. The Defendant admits the allegations in paragraph 98 of the Claim.

#### **F.3 Alleged Implied Terms**

99. The Defendant denies the allegations in paragraph 99 of the Claim.
100. The Defendant denies the allegations in paragraph 100 of the Claim.
101. The Defendant denies the allegations in paragraph 101 of the Claim.
102. The Defendant denies the allegations in paragraph 102 of the Claim.

#### **G. Alleged Estoppel**

103. The Defendant denies the allegations in paragraph 103 of the Claim.

- 104. The Defendant denies the allegations in paragraph 104 of the Claim.
- 105. The Defendant denies the allegations in paragraph 105 of the Claim.
- 106. The Defendant denies the allegations in paragraph 106 of the Claim.
- 107. The Defendant denies the allegations in paragraph 107 of the Claim.
- 108. The Defendant denies the allegations in paragraph 108 of the Claim.
- 109. The Defendant denies the allegations in paragraph 109 of the Claim.
- 110. The Defendant denies the allegations in paragraph 110 of the Claim.
- 111. The Defendant denies the allegations in paragraph 111 of the Claim.
- 112. The Defendant denies the allegations in paragraph 112 of the Claim.
- 113. The Defendant denies the allegations in paragraph 113 of the Claim.
- 114. The Defendant denies the allegations in paragraph 114 of the Claim.
- 115. The Defendant denies the allegations in paragraph 115 of the Claim.
- 116. The Defendant denies the allegations in paragraph 116 of the Claim.
- 117. The Defendant denies the allegations in paragraph 117 of the Claim.

**H. Whitehaven-Aston Scheme**

- 118. The Defendant admits the allegations in paragraph 118 of the Claim.
- 119. In answer to the allegations in paragraph 119 of the Claim, the Defendant:
  - (a) says that Pricewaterhouse Coopers Securities prepared an independent expert's report in connection with the proposed Scheme between Aston and its members and that report formed part of the Scheme Booklet sent by Aston to its members; and
  - (b) otherwise denies the allegations in the paragraph.
- 120. The Defendant denies the allegations in paragraph 120 of the Claim.
- 121. In answer to the allegations contained in paragraph 121, the Defendant:
  - (a) says that on 9 March 2012 the Federal Court of Australia made orders for the convening of a meeting of Aston's shareholders to consider the proposed scheme between Aston and its members, which orders included provision for the distribution of a Scheme Booklet to Aston's members;

(b) says that at around the time that the Federal Court made the orders referred to above, on 12 March 2012, an investor presentation was released to the ASX on the Defendant's ASX platform which included statements to the following effect:

(i) in relation to the Dingo Project, at page 21:

*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;*

and

*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;*

(ii) in relation to the Sienna Project at page 21:

*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;*

(iii) in relation to the Ferndale Project at page 23:

*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;*

and

*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;*

- (iv) in relation to the Monto Project at pages 23 and 24:

*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

*- 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;*

- (v) says further that the 12 March 2012 Investor Presentation contained additional statements to the following effect:

- (A) that the presentation contained forward-looking statements which involved a number of risks and uncertainties and that these statements reflected current expectations, beliefs, hopes, intentions or strategies regarding the future and assumptions based on currently available information and that such forecasts, prospects or returns were by their nature subject to significant uncertainties and contingencies (pg 1);
- (B) that if one or more risks or uncertainties were to materialise, or should underlying assumptions prove incorrect, actual results may vary from the expectations, beliefs, hopes, intentions and strategies described in the presentation and that readers of the presentation were cautioned not to place undue reliance on any forward-looking statement (pg 1);
- (C) no representation or warranty was made as to the accuracy, completeness, reliability, fairness or correctness of the information, conclusions and opinions (including any forward-looking statements) contained in the presentation (pg 1);

- (D) that to the maximum extent permitted by law, no person accepted any liability or responsibility for loss arising from the use of the information contained in the presentation (pg 1);
- (E) that no representation or warranty, express or implied, was given as to the accuracy, completeness or correctness, likelihood of achievement of any forecasts, prospects or returns contained in the presentation (pg 1);
- (F) that the information contained in the presentation was not investment or financial product advice and was not intended to be used as the basis for making an investment decision (pg 1);
- (G) that the statements in the presentation were, unless otherwise stated, made only as at the date of the presentation and remained subject to change without notice (pg 1);
- (H) that a reader of the presentation should seek his or her own independent professional advice in relation to the technical, financial and commercial matters relating to the information and rely on their own due diligence and analysis (pg 1);
- (I) that a reader of the presentation should not assume that quantities reported as “resources” will be converted to reserves under the JORC Code 2004 Edition or any other reporting regime or that the merged entity would be able to legally and economically extract them (pg 1);
- (J) all references to future exploration, production, exploration targets and production targets made in relation to Boardwalk were subject to completion of all necessary feasibility studies, delivery of all necessary approvals, construction and financing arrangements, as well as certain other risks (pg 1);
- (K) stated the stage of each of the Sienna, Dingo, Monto and Ferndale Projects as either “Exploration” or “Exploration/Pre-Feasibility”, being the two earliest stages that a project could have (pgs 3 and 13);
- (L) stated that the net present value of synergies in respect of assets held by Boardwalk related to a future matter which involved risk

and uncertainty and, accordingly, no assurance could be given that the actual value of the synergies achieved would not materially differ from those anticipated (pg 5); and

(M) in respect of the Exploration Targets for each of the Sienna, Dingo, Monto and Ferndale Projects, stated that the potential quantity and quality of the Exploration Targets was conceptual in nature, there had been insufficient exploration to define Resources and it was uncertain if further exploration would result in the determination of Resources (pg 19);

(c) says further that the Scheme Booklet distributed by Aston to its members contained statements to the following effect:

- (i) the consideration payable by the Defendant in respect of Boardwalk (whether taking into account the Milestone Shares or not) exceeded the valuation of Boardwalk determined by the independent expert;
- (ii) in section 9.3.3 on pages 205 and 206 that:

*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;*

- (iii) it was important for readers of the Scheme Booklet to read it in its entirety (pg i);
- (iv) the Scheme Booklet contained both historical and forward-looking statements and that statements other than of historical fact were, or were deemed to be, forward-looking statements (pg i);
- (v) Forward-looking statements involved known and unknown risks, uncertainties and other factors that may cause actual results, performance or achievements to differ materially from the anticipated results, performance or achievements, expressed, projected or implied by the forward-looking statements (pg i);
- (vi) The Defendant did not make any representation or warranty as to likelihood of fulfilment of any forward-looking statement, or any events or results expressed or implied in any forward-looking statement, except to the extent required by law, and readers were cautioned to not place any undue reliance on any forward-looking statement in the Scheme Booklet (pg i);
- (vii) Any subsequent forward-looking statement by the Defendant or any person acting on its behalf was qualified by the matters set out at pgs i-ii of the Scheme Booklet (pg i);
- (viii) that a reader of the Scheme Booklet should not assume that quantities reported as “resources” will be converted to reserves under the JORC Code 2004 Edition or any other reporting regime or that the merged entity would be able to legally and economically extract them (pg ii);
- (ix) that the Scheme Booklet’s references to exploration targets in respect of the Ferndale, Dingo, Sienna and Monto Projects had not been subject to sufficient sampling to be defined as a resource under the JORC Code and that the potential quantity and quality of these potential coal resources

was conceptual in nature since there had been insufficient work completed to define them beyond exploration targets and that it was uncertain if further exploration would result in the determination of a resource (page ii);

- (x) that Aston understood that Boardwalk had set its exploration targets based on Boardwalk's understanding to date of the geology of the projects and the number and type of exploration targets it had identified (pg ii);
- (xi) in respect of the Boardwalk Projects, that mineral exploration was an inherently uncertain activity and that there could be no assurance that further exploration of the exploration targets for the Boardwalk projects would be successful or lead to the estimation of additional resources or reserves of the quantity indicated by exploration targets or at all (pg ii);
- (xii) that the consideration paid to the Boardwalk Shareholders in respect of the acquisition of the Boardwalk shares was greater than the value of those shares, whether or not the Milestone Shares were taken into account;

#### **Particulars**

Scheme Booklet, pg 2 (fn 2), pg 5(fn 8), pg 10, pg 13-14, 19, 26 (fn 20),  
pg 31, 67

- (xiii) that the Milestone Shares would only be freed from the Restrictions contained in the Restriction Deed if certain conditions were met;

#### **Particulars**

Scheme Booklet, pg 4 (fn 5), 67, 68, 90, 117, 134

- (xiv) the resources of the merged Aston/Whitehaven entity were not represented as including the Dingo, Sienna, Ferndale or Monto Projects as Boardwalk had not delineated any resources or reserves for those assets (pg 26, fn 23, pg 29 fn 27, pg 30, fn 30, pg 80, fn 69, pg 81 fn 72);
- (xv) the stage of each of the Sienna, Dingo, Monto and Ferndale Projects was either "Exploration" or "Exploration/Pre-Feasibility", being the two earliest stages that a project could have (pg 28);

- (xvi) the Boardwalk Projects provided the Defendant with “future development options” and a “platform for growth in the medium to longer term”, rather than any assurance that those Projects would be developed (pg 67);
- (xvii) the key risks to the Boardwalk Projects included:
  - (A) there was no guarantee that future exploration on Boardwalk’s existing tenements would lead to economically viable resourced being identified and developed;
  - (B) Boardwalk may be unable to meet, or be delayed in meeting, its farm-in obligations;
  - (C) there may be delays in obtaining or the inability to obtain relevant authorisations and permits (including mining leases) which could adversely impact on the viability of new projects or their cost and development time frames;
  - (D) changes to laws, regulations and government policy may adversely impact Boardwalk’s ability to conduct future exploration activities (pg 68);
- (xviii) the Board of a merged Aston/Whitehaven intended to explore opportunities to optimize the group’s existing operations and development projects and maximise value for shareholders, but final decisions regarding such matters would be made by the Board in light of material information and circumstances at the relevant time (pg 85);
- (xix) that there were significant risks associated with investment in the merged Aston/Whitehaven entity and the development of the projects that it would hold.

### **Particulars**

Scheme Booklet, sections 7.1, 7.2 and 7.4

- (d) says further that the Independent Expert’s Report contained in the Scheme Booklet contained statements to the following effect:
  - (i) there were risks resulting from uncertainties in the estimation of exploration targets and/or mineral resources and variances in expected production and forecast cashflows to those achieved (pg 128);

- (ii) there were risks and possible additional costs related to the successful development of the exploration stage assets to be acquired from Boardwalk, which included the enactment of legislation, environmental regulations, title to existing tenements, and the obtainment of authorisations, licenses and other approvals (pg 128);
- (iii) the asset portfolio comprising the Boardwalk Projects represented only potential projects, which were subject to whether they could be successfully developed;

**Particulars**

Scheme Booklet, pgs 162, 163, 165, 205

- (iv) the value of Boardwalk was less than the value of the consideration paid by the Defendant, even excluding the Milestone Shares.

**Particulars**

Scheme Booklet, pgs 204-206

- (e) otherwise denies the allegations in the paragraph.

122. The Defendant admits the allegations in paragraph 122 of the Claim and says further:

- (a) that prior to the meeting, a notice of meeting was distributed to Aston members, which contained statements to the effect that:

- (i) in the notice of meeting:

*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;*

- (ii) in the letter from the Chairman in the Notice of Meeting, that the Milestone Shares would be subject to restrictions on voting and transfer until various development milestones were met (pg 2);
- (iii) in the explanatory memorandum in the Notice of Meeting that:
  - (A) the Milestone Shares would be subject to certain restrictions until the occurrence of certain trigger events (pg 3-4);

- (B) the Boardwalk Projects provided the Defendant with “future development options” and a “platform for growth in the medium to longer term”, rather than any assurance that those Projects would be developed (pg 14);
- (C) changes to laws, regulations and Government policy may adversely impact Boardwalk’s ability to conduct further exploration activities (pg 14);
- (D) the value of the consideration payable for Boardwalk (even excluding the Milestone Shares) exceeded the valuation of Boardwalk determined by the independent expert for the Scheme (pg 15); and
- (E) the Boardwalk Projects were characterized as undeveloped and early stage coal properties (pg 15-16).

123. The Defendant admits the allegations in paragraph 123 of the Claim.

**I. Completion of the Agreements**

124. The Defendant denies the allegations in paragraph 124 of the Claim.

125. In answer to the allegations in paragraph 125 of the Claim, the Defendant:

- (a) denies the allegations in subparagraphs (a) and (e); and
- (b) admits the allegations in subparagraphs (b)-(d).

126. The Defendant admits the allegations in paragraph 126 of the Claim.

127. The Defendant admits the allegations in paragraph 127 of the Claim.

128. The Defendant admits the allegations in paragraph 128 of the Claim.

129. The Defendant denies the allegations in paragraph 129 of the Claim.

130. The Defendant refers to paragraphs 128 and 129 above, and otherwise denies the allegations in paragraph 130 of the Claim.

131. The Defendant denies the allegations in paragraph 131 of the Claim.

132. In answer to the allegations in paragraph 132 of the Claim, the Defendant:

- (a) says that on or about 1 December 2014, it lodged an application to renew EL7430 with the NSW Government and provided a proposed five year work

program and expenditure showing a forecast expenditure of \$2,129,600 in respect of the Ferndale Project;

- (b) says that the forecast expenditure was not linked to the years 2014 – 2019; and
  - (c) otherwise denies the paragraph.
133. In answer to the allegations in paragraph 133 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 133 of the Claim.
134. In answer to the allegations in paragraph 134 of the Claim, the Defendant says that:
- (a) its consolidated 30 June 2015 statutory result includes the impact of a \$355m impairment charge in relation to early stage exploration assets; and
  - (b) otherwise denies the paragraph.
135. The Defendant admits the allegations in paragraph 135 of the Claim.
136. The Defendant does not admit the allegations in paragraph 136 of the Claim.
137. In answer to the allegations in paragraph 137 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 137 of the Claim.
138. In answer to the allegations in paragraph 138 of the Claim, the Defendant says that:
- (a) during the year ended 30 June 2017, an impairment charge of \$55m was recognised in respect of early stage exploration assets;
  - (b) it otherwise denies the paragraph.
139. The Defendant does not admit the allegations in paragraph 139 of the Claim.
140. The Defendant admits the allegations in paragraph 140 of the Claim.
141. The Defendant denies the allegations in paragraph 141 of the Claim.

142. The Defendant admits the allegations in paragraph 142 of the Claim.
143. The Defendant denies the allegations in paragraph 143 of the Claim and says further that the mining leases and environmental approvals for the Milestone Projects have not been obtained as at the date of this Defence in circumstances where it is not in the best interests of the Defendant to do so.

### **Particulars**

It is not in the best interests of the Defendant to develop the Milestone Projects for reasons including:

- (a) the decrease in coal prices in the period following the implementation of the Scheme;
- (b) the coal quality, coal type, coal concentration and coal depth in respect of the Milestone Projects when taking into account coal prices;
- (c) further consideration of drilling results that has revealed it would not be economically rational to develop the Milestone Projects;
- (d) in respect of the Sienna Project, legislative changes by reason of the Queensland Urban Exploration Ban Policy;
- (e) in respect of the Dingo Project, geological complexities which would impede development;
- (f) in respect of the Dingo Project, the fact that the joint venture partner in respect of that project was placed into voluntary administration in November 2015; and
- (g) in respect of the Ferndale Project, anticipated difficulties in obtaining exploration licences and environmental licenses.

Further particulars may be provided following the service of evidence.

## **J. Alleged Contraventions**

### **J.1 Alleged Breach of Contract – Further Action Clause**

144. In answer to the allegations in paragraph 144 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and

- (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 144 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

- 145. The Defendant denies the allegations in paragraph 145 of the Claim.
- 146. The Defendant denies the allegations in paragraph 146 of the Claim.

**J.2 Alleged Breach of Deed – Full Effect Term**

- 147. In answer to the allegations in paragraph 147 of the Claim, the Defendant:
  - (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 147 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

- 148. The Defendant denies the allegations in paragraph 148 of the Claim.
- 149. The Defendant denies the allegations in paragraph 149 of the Claim.

**J.2 Alleged Breach of Contract and/or Deed – Duty of Cooperation**

- 150. In answer to the allegations in paragraph 150 of the Claim, the Defendant:
  - (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 150 of the Claim.

### Particulars

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

151. In answer to the allegations in paragraph 151 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 151 of the Claim.

### Particulars

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

152. The Defendant denies the allegations in paragraph 152 of the Claim.
153. The Defendant denies the allegations in paragraph 153 of the Claim.

### **J.3 Alleged Breach of Contract and/or Deed – Good Faith Term**

154. In answer to the allegations in paragraph 154 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 154 of the Claim.

### Particulars

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

155. In answer to the allegations in paragraph 155 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 155 of the Claim.

### **Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

156. The Defendant denies the allegations in paragraph 156 of the Claim.

157. The Defendant denies the allegations in paragraph 157 of the Claim.

#### **J.4 Alleged Breach of Contract and/or Deed – Use of Funds Term**

158. The Defendant denies the allegations in paragraph 158 of the Claim.

159. The Defendant denies the allegations in paragraph 159 of the Claim.

160. The Defendant denies the allegations in paragraph 160 of the Claim.

161. The Defendant repeats paragraphs 141 to 159 above, and does not admit the allegations in paragraph 161 of the Claim.

162. The Defendant denies the allegations in paragraph 162 of the Claim.

163. The Defendant denies the allegations in paragraph 163 of the Claim.

#### **I.2 Alleged Breach of Contract – Reasonable Endeavours Term**

164. In answer to the allegations in paragraph 164 of the Claim, the Defendant:

- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
- (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 164 of the Claim.

### **Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

165. The Defendant denies the allegations in paragraph 165 of the Claim.

166. The Defendant denies the allegations in paragraph 166 of the Claim.

167. In answer to the allegations in paragraph 167 of the Claim, the Defendant:

- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and

- (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 167 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

- 168. The Defendant denies the allegations in paragraph 168 of the Claim.
- 169. The Defendant denies the allegations in paragraph 169 of the Claim.
- 170. In answer to the allegations in paragraph 170 of the Claim, the Defendant:
  - (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 170 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

- 171. The Defendant denies the allegations in paragraph 171 of the Claim.
- 172. The Defendant denies the allegations in paragraph 172 of the Claim.
- 173. In answer to the allegations in paragraph 173 of the Claim, the Defendant:
  - (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 173 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

174. The Defendant denies the allegations in paragraph 174 of the Claim.
175. The Defendant denies the allegations in paragraph 175 of the Claim.
176. In answer to the allegations in paragraph 176 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 176 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

177. The Defendant denies the allegations in paragraph 177 of the Claim.
178. The Defendant denies the allegations in paragraph 178 of the Claim.
179. In answer to the allegations in paragraph 179 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 179 of the Claim.

**Particulars**

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

180. In answer to the allegations in paragraph 180 of the Claim, the Defendant:
- (a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and
  - (b) under cover of the objection in subparagraph (a), denies the allegation in paragraph 180 of the Claim.

### Particulars

Further particulars may be provided following the Plaintiff particularising its case in accordance with the Court's orders of 22 April 2022 and the service of evidence.

- 181. The Defendant denies the allegations in paragraph 181 of the Claim.
- 182. The Defendant denies the allegations in paragraph 182 of the Claim.

#### J4. Distribution to Shareholders

- 183. The Defendant admits that s 254T of the Corporations Act 2001 (Cth) contains the restriction pleaded in paragraph 183 of the Claim, but says that section contains further restrictions.
- 184. In answer to the allegations in paragraph 184 of the Claim, the Defendant:
  - (a) says that the allegations pleaded in that paragraph represent a restriction on a corporation reducing its share capital;
  - (b) says further that the restriction on which the Plaintiff relies applies unless a company is otherwise permitted by law to reduce its share capital; and
  - (c) otherwise denies the allegations in the paragraph.
- 185. In answer to the allegations in paragraph 185 of the Claim, the Defendant:
  - (a) admits that on 17 August 2017, it announced a proposed distribution of \$0.20 to shareholders;
  - (b) says that the capital distribution component of that distribution was contingent on shareholder approval in General Meeting; and
  - (c) otherwise denies the allegations in the paragraph.
- 186. In answer to the allegations in paragraph 186 of the Claim, the Defendant:
  - (a) says that the proposed capital distribution pleaded in paragraph 185 of the Claim was approved by a majority of voting shareholders at a General Meeting of the Defendant on 25 October 2017; and
  - (b) otherwise denies the allegations in the paragraph.
- 187. In answer to the allegations in paragraph 187 of the Claim, the Defendant:

- (a) admits that the matters pleaded in paragraphs 187(a) and (b) of the Claim were identified as part of the basis for the capital reduction pleaded in paragraph 185 of the Claim in the Defendant's Notice of Annual General Meeting dated 22 September 2017; and
  - (b) otherwise denies the allegations in the paragraph.
- 188. In answer to the allegations in paragraph 188 of the Claim, the Defendant:
  - (a) says that Whitehaven paid an unfranked dividend of \$0.06 per share to Whitehaven shareholders; and
  - (b) otherwise admits the allegations in paragraph 188 of the Claim.
- 189. In answer to the allegations in paragraph 189 of the Claim, the Defendant:
  - (a) denies that some or all of the Plaintiff and Group Members were not entitled to vote at the Annual General Meeting of the Defendant on 25 October 2017 in circumstances where some or all of those persons held ordinary fully paid shares in the Defendant that were not subject to any restriction;
  - (b) says that none of the Plaintiff or any Group Member sought to raise any concern at the Annual General Meeting on 25 October 2017 (or otherwise) as to the appropriateness of the proposed capital reduction or the manner in which it was conducted;
  - (c) admits that the Plaintiff and Group Members were not entitled to receive a dividend or return of capital in respect of Milestone Shares that they held in accordance with the terms of the Restriction Deed to which they had agreed; and
  - (d) otherwise denies the allegations in the paragraph.
- 190. The Defendant does not admit the allegations in paragraph 190 of the Claim.
- 191. The Defendant denies the allegations in paragraph 191 of the Claim.
- 192. The Defendant denies the allegations in paragraph 192 of the Claim.
- 193. The Defendant denies the allegations in paragraph 193 of the Claim.
- 194. The Defendant admits the allegations in paragraph 194 of the Claim.
- 195. The Defendant admits the allegations in paragraph 195 of the Claim.
- 196. In answer to the allegations in paragraph 196 of the Claim, the Defendant:

- (a) says that to the extent that the Plaintiff or a Group Member held ordinary fully paid shares in the Defendant that were not subject to the restrictions in the Restriction Deed (or otherwise disentitled from receiving a dividend payment) those persons received a dividend on or about 2 March 2018 from the Defendant;
  - (b) admits that the Plaintiff and Group Members were not entitled to receive a dividend in respect of Milestone Shares that they held in accordance with the terms of the Restriction Deed to which they had agreed; and
  - (c) otherwise denies the allegations in the paragraph.
197. The Defendant denies the allegations in paragraph 197 of the Claim.
198. The Defendant denies the allegations in paragraph 198 of the Claim.
199. The Defendant denies the allegations in paragraph 199 of the Claim.
200. The Defendant admits the allegations in paragraph 200 of the Claim.
201. The Defendant admits the allegations in paragraph 201 of the Claim.
202. In answer to the allegations in paragraph 202 of the Claim, the Defendant:
- (a) says that to the extent that the Plaintiff or a Group Member held ordinary fully paid shares in the Defendant that were not subject to the restrictions in the Restriction Deed (or otherwise disentitled from receiving a dividend payment) those persons received a dividend on or about 13 September 2018 from the Defendant;
  - (b) admits that the Plaintiff and Group Members were not entitled to receive a dividend in respect of Milestone Shares that they held in accordance with the terms of the Restriction Deed to which they had agreed; and
  - (c) otherwise denies the allegations in the paragraph.
203. The Defendant denies the allegations in paragraph 203 of the Claim.
204. The Defendant denies the allegations in paragraph 204 of the Claim.
205. The Defendant denies the allegations in paragraph 205 of the Claim.
206. The Defendant admits the allegations in paragraph 206 of the Claim.
207. The Defendant admits the allegations in paragraph 207 of the Claim.
208. In answer to the allegations in paragraph 208 of the Claim, the Defendant:

- (a) says that to the extent that the Plaintiff or a Group Member held ordinary fully paid shares in the Defendant that were not subject to the restrictions in the Restriction Deed (or otherwise disentitled from receiving a dividend payment) those persons received a dividend on or about 6 March 2019 from the Defendant;
  - (b) admits that the Plaintiff and Group Members were not entitled to receive a dividend in respect of Milestone Shares that they held in accordance with the terms of the Restriction Deed to which they had agreed; and
  - (c) otherwise denies the allegations in the paragraph.
209. The Defendant denies the allegations in paragraph 209 of the Claim.
210. The Defendant denies the allegations in paragraph 210 of the Claim.
211. The Defendant denies the allegations in paragraph 211 of the Claim.
212. The Defendant admits the allegations in paragraph 212 of the Claim.
213. The Defendant admits the allegations in paragraph 213 of the Claim.
214. In answer to the allegations in paragraph 214 of the Claim, the Defendant:
- (a) says that to the extent that the Plaintiff or a Group Member held ordinary fully paid shares in the Defendant that were not subject to the restrictions in the Restriction Deed (or otherwise disentitled from receiving a dividend payment) those persons received a dividend on or about 19 September 2019 from the Defendant;
  - (b) admits that the Plaintiff and Group Members were not entitled to receive a dividend in respect of Milestone Shares that they held in accordance with the terms of the Restriction Deed to which they had agreed; and
  - (c) otherwise denies the allegations in the paragraph.
215. The Defendant denies the allegations in paragraph 215 of the Claim.
216. The Defendant denies the allegations in paragraph 216 of the Claim.
217. The Defendant denies the allegations in paragraph 217 of the Claim.
218. The Defendant admits the allegations in paragraph 218 of the Claim.
219. The Defendant admits the allegations in paragraph 219 of the Claim.
220. In answer to the allegations in paragraph 220 of the Claim, the Defendant:

- (a) says that to the extent that the Plaintiff or a Group Member held ordinary fully paid shares in the Defendant that were not subject to the restrictions in the Restriction Deed (or otherwise disentitled from receiving a dividend payment) those persons received a dividend on or about 6 March 2020 from the Defendant;
  - (b) admits that the Plaintiff and Group Members were not entitled to receive a dividend in respect of Milestone Shares that they held in accordance with the terms of the Restriction Deed to which they had agreed; and
  - (c) otherwise denies the allegations in the paragraph.
221. The Defendant denies the allegations in paragraph 221 of the Claim.
222. The Defendant denies the allegations in paragraph 222 of the Claim.
223. The Defendant denies the allegations in paragraph 223 of the Claim.
224. The Defendant admits the allegations in paragraph 224 of the Claim.
225. The Defendant admits the allegations in paragraph 225 of the Claim.
226. The Defendant admits the allegations in paragraph 226 of the Claim.
227. The Defendant admits the allegations in paragraph 227 of the Claim.
228. In answer to the allegations in paragraph 228 of the Claim, the Defendant:
- (a) says that to the extent that the Plaintiff or a Group Member held ordinary fully paid shares in the Defendant that were not subject to the restrictions in the Restriction Deed (or otherwise disentitled from receiving a dividend payment) those persons received a dividend on or about 11 March 2022 from the Defendant;
  - (b) admits that the Plaintiff and Group Members were not entitled to receive a dividend in respect of Milestone Shares that they held nor could they sell on market those shares in accordance with the terms of the Restriction Deed to which they had agreed;
  - (c) says, further that the pleaded on market share buyback conferred no benefit on those shareholders who sold their shares as part of the buyback above the ability to sell those shares in the ordinary way on ASX;
  - (d) says, further that the Plaintiff and Group Members benefitted from the pleaded on market buy-back by reason of the reduction in issued shares of the Defendant in

the same way as any other holder of fully paid ordinary shares in the Defendant;  
and

(e) otherwise denies the allegations in the paragraph.

229. The Defendant denies the allegations in paragraph 229 of the Claim.

230. The Defendant denies the allegations in paragraph 230 of the Claim.

231. The Defendant denies the allegations in paragraph 231 of the Claim.

#### **J5. Alleged Oppression**

232. In answer to the allegations in paragraph 232 of the Claim, the Defendant:

(a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and

(b) under cover of the objection in subparagraph (a);

(i) repeats its response in paragraphs 50, 55, 58, 63, 67, 106 to 108, 114, 133, 137, 141, 142, 143, 158, 161, 164, 167, 170, 173, 176, 185, 188, 189, 190, 191, 192, 194 to 198, 200 to 204, 206 to 210, 212 to 216, 218 to 222 and 224 to 230; and

(ii) denies the allegation in paragraph 232 of the Claim.

233. In answer to the allegations in paragraph 233 of the Claim, the Defendant:

(a) says that the Plaintiff's allegation is vague, embarrassing, or otherwise liable to be struck out; and

(b) under cover of the objection in subparagraph (a) denies the allegation in paragraph 233 of the Claim.

#### **K. Limitations**

234. In further answer to the allegations of contractual breach in paragraphs 144-145, 147-148, 150-152, 154-156, 158-160, 162, 165-166, 168-169, 171-172, 174-175 and 177-181, if it is established that the relevant terms existed (which is in part denied) and that there was a breach of those terms (which is denied) any cause action is statute barred by operation of s 14 of the *Limitation Act 1969* (NSW) or s 10 of the *Limitation of Actions Act 1974* (Qld) to the extent that it occurred prior to 20 December 2012.

235. In further answer to the allegations in relation to an alleged estoppel in paragraphs 109, 110, 116 and 117 of the Claim, if it is established that the relevant estoppel exists (which is denied) any cause of action is barred by reason of the operation of ss 14 and 23 of the *Limitations Act 1969* (NSW), s 10 of the *Limitation of Actions Act 1974* (Qld), those provisions applied by analogy, and/or the doctrine of laches.

**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 Jonathan Light

Date of signature

20/6/2022

**AFFIDAVIT VERIFYING**

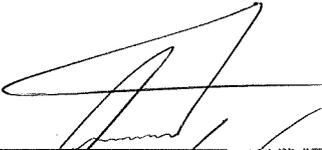
Name: Timothy Burt  
Address: Level 28, 259 George Street, Sydney, NSW  
Occupation: General Counsel and Company Secretary, Whitehaven Coal Limited  
Date: 20 JUNE 2022

I affirm:

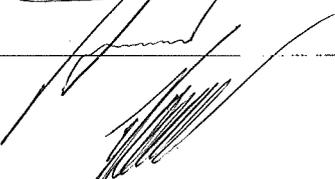
1. I am the General Counsel and Company Secretary of Whitehaven Coal Limited and am authorised to verify this defence on its behalf.
2. I believe that the allegations of fact contained in the defence are true.
3. I believe that the allegations of fact that are denied in the defence are untrue.
4. After 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

LEE MOORE

Address of witness

Level 28, 259 George Street, Sydney, NSW

Capacity of witness

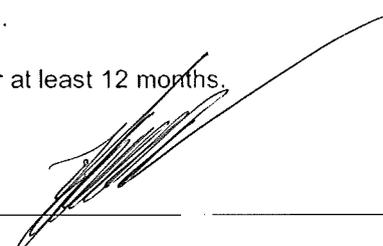
Solicitor

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

I, LEE MOORE, 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: 20/06/2022

**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  
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