

**IMPORTANT LEGAL NOTICE**  
**OPT OUT NOTICE**

**Milestone Shareholder Class Action against Whitehaven Coal Limited**

**1. Why is this notice important?**

A class action has been commenced in the Supreme Court of New South Wales by Les & Zelda Investments Pty Ltd as trustee for Les & Zelda Family Trust against Whitehaven Coal Limited. The action arises out of the 2012 merger of Aston Resources Limited and Whitehaven Coal Limited and the concurrent acquisition of Boardwalk Resources Limited by Whitehaven Coal Limited.

The Supreme Court has ordered that this notice be published for the information of persons who might be members of the class on whose behalf the action is brought and may be affected by the action. You have been identified as a potential Group Member. **You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the Court.** If there is anything in it that you do not understand, you should seek legal advice.

**2. What is a class action?**

A class action is an action that is brought by one person (“**Plaintiff**”) on his or her own behalf and on behalf of a class of people (“**Group Members**”) against another person (“**Defendant**”) where the Plaintiff and the Group Members have similar claims against the Defendant.

Group Members in a class action **are not** individually responsible for the legal costs associated with bringing the class action. In a class action, only the Plaintiff is responsible for the costs.

Group Members are “bound” by the outcome in the class action, unless they have opted out of the proceeding. A binding result can happen in two ways being either a *judgment* following a trial, or a *settlement* at any time. If there is a judgment or a settlement of a class action, Group Members *will not* be able pursue the same claims and *may not* be able to pursue similar or related claims against the Defendant in other legal proceedings. Group Members should note that:

- (a) in a *judgment* following trial, the Court will decide various factual and legal issues in respect of the claims made by the Plaintiff and Group Members. Unless those decisions are successfully appealed, they bind the Plaintiff, Group Members and the Defendant. Importantly, if there are other proceedings between a Group Member and the Defendant, it is likely that neither of them will be permitted to raise arguments in that proceeding which are inconsistent with a factual or legal issue decided in the class action.

- (b) in a *settlement* of a class action, where the settlement provides for compensation to Group Members, it is likely to extinguish *all* rights to compensation which a Group Member might have against the Defendant which arise in any way out of the events or transactions which are the subject-matter of the class action.

If you consider that you have claims against a Defendant which are based on your individual circumstances or are otherwise additional to the claims described in the class action, then it is important that you seek independent legal advice about the potential binding effects of the class action **before** the deadline for opting out (see below).

### 3. What is this class action?

This class action, the Milestone Shareholder Class Action against Whitehaven Coal Limited class action is brought by the Plaintiff, Les & Zelda Investments Pty Ltd as trustee for Les & Zelda Family Trust on its own behalf and on behalf of all persons who are “Group Members” as defined in the proceeding.

The Plaintiff alleges in the Statement of Claim in Supreme Court of New South Wales proceeding numbered 2019/184678 (*Les & Zelda Investments Pty Ltd as trustee for Les & Zelda Family Trust v Whitehaven Coal Limited*) that:

- a) As part of the merger between Aston Resources Limited and Whitehaven Coal Limited, Whitehaven Coal Limited also purchased Boardwalk Resources Limited under a scrip bid.
- b) Under the scrip bid, the Boardwalk Resources Limited shareholders were issued with two kinds of Whitehaven shares, namely: (a) ordinary shares; and, (b) restricted shares called “Milestone Shares”.
- c) At the time of the acquisition of Boardwalk Resources Limited, it held interests in five coal assets being: Dingo, Sienna, Monto, Ferndale and Oaklands North (**Boardwalk Projects**).
- d) Boardwalk Resources Limited injected \$150 million into the merged entity. The milestone shareholders allege that the \$150 million was to be used for the ongoing development of the Boardwalk Projects, the repayment of existing debt in the amount of \$50 million, and in payment of deferred payments in the amount of \$15 million relation to Boardwalk’s acquisition of a mining project known as the “Sienna Project”. In general terms, the Group Members say Whitehaven was required to use the \$150 million in the above manner based on one or more of the following legal characterisations, including as arising from material presented to investors in roadshow presentations and the content of the scheme booklet provided to ASIC and the Federal Court with Whitehaven’s endorsement as part of Court approval processes that occurred shortly before the merger:

- (i) an agreement (or agreements) with Whitehaven;
  - (ii) an assumption that was adopted by both Whitehaven and Group Members to the above effect; and/or,
  - (iii) a promise made by Whitehaven to the above effect
- e) Developing any one of the Boardwalk Projects to the point of the grant of a mining lease and/or environmental approval would trigger release of the restrictions on 17.01 million milestone shares. If two of the Boardwalk Projects obtained mining leases and environmental approvals, all 34.02 million milestone shares would be free from restrictions.
- f) The Plaintiff says that, in breach of the agreements, or contrary to the assumption or promise, Whitehaven Coal Limited failed to develop any of the Boardwalk Projects to the point of the grant of a mining lease and/or environmental approval.
- g) The Plaintiff further says that the conduct of Whitehaven in relation to the Boardwalk Projects, and other conduct involving the payment of dividends, the reduction of capital, and the implementation of a share buy-back were oppressive to, unfairly prejudicial to, and unfairly discriminatory against the Group Members.

The Defendant to the class action is Whitehaven Coal Limited. The Defendant does not agree with the above allegations and is defending the class action.

#### **4. What is 'Opt Out'?**

The Plaintiff in a class action does not need to seek the consent of Group Members to commence a class action on their behalf or to identify a specific Group Member. However, Group Members can cease to be Group Members by opting out of the class action. An explanation of how Group Members are able to opt out is found below in the section headed "How can you opt out of the proceeding".

#### **5. Are you a Group Member?**

You are a Group Member if you are an individual or a corporation who:

- (a) between December 2011 and May 2012 were a shareholder of Boardwalk Resources Limited (ABN 89 130 433 617); and who
- (b) in or about May 2012 were issued with ordinary shares and restricted shares in Whitehaven Coal Limited as a result of Whitehaven's merger with Aston Resources Limited (ABN 91 129 361 208),

including their successors and permitted assigns.

If you are unsure whether or not you are a Group Member, you should contact SMB Law on 02 7923 3207 or email [sbriggs@smblaw.com.au](mailto:sbriggs@smblaw.com.au) or seek your own legal advice without delay.

## 6. Will you be liable for legal costs if you remain a Group Member?

You will **not become liable for any legal costs** simply by remaining as a Group Member for the determination of the common questions. However:

- (a) if the preparation or finalisation of your personal claim requires work to be done in relation to issues that are specific to your claim, you can engage SMB Law or other lawyers to do that work for you. A copy of the terms on which SMB Law are acting in the class action may be obtained from them by calling the number shown below;
- (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Plaintiff in running the class action but which are not able to be recovered from the Defendant; and
- (c) class actions are often settled out of court. If this occurs in the class action, you may be able to claim from the settlement amount without retaining a lawyer.

## 7. Funding of the litigation

On 3 May 2024, the Plaintiff executed a “*Class Action Litigation Funding Agreement*” with Noorinya Holdings Pty Ltd (ATF Noorinya Holdings Trust) (**Funder**) for the provision of funding to pay the legal costs associated with the Plaintiff running these proceedings, as well as to meet adverse costs order made against the Plaintiff or the Funder in these proceedings (**Funding Agreement**).

The obligation to pay such legal costs – described as “**Project Costs**” in the Funding Agreement – is conditional upon:

- (a) certain Group Members beyond the Plaintiff (14 further in total) executing the Funding Agreement;
- (b) the Plaintiff’s solicitors (SMB Law) entering into an approved legal services agreement; or
- (c) in lieu of the above two conditions, the Funder waiving compliance with the above two conditions precedent.

The second pre-condition has been satisfied and, by instrument dated 22 May 2024, the Funder has waived the first pre-condition (although, noteworthy, some of the Group Members (beyond the Plaintiff) have executed the Funding Agreement, but not all of the 14 further identified).

By reason of the above satisfaction and waiver of the conditions precedent in the Funding Agreement, the Funder has agreed to pay the Project Costs associated with these proceedings, up to a limit, which is contained in clause 1.1 of the Funding Agreement under the definition “Costs Limit”. That “Costs Limit” may be increased from time to time by written agreement between the Funder and the parties to the Funding Agreement. Such Project Costs include:

- (a) the legal costs of the lawyers retained on behalf of the Plaintiff in these proceedings; and

- (b) any quantified adverse costs order made in the proceedings against the Plaintiff or the Funder and in favour of the Defendant.

In return for providing this funding, all Group Members who sign the Funding Agreement agree that any benefits obtained or realised from these proceedings on behalf of all Group Members, whether by judgment, settlement, costs order, or by way of interest (defined as “**Resolution Benefits**” in the Funding Agreement), are to be distributed as follows:

- (a) *first*, to pay to the lawyers any outstanding balance of the Project Costs owed and payable to them;
- (b) *secondly*, to pay to the Funder an amount equal to the Project Costs paid by the Funder; and
- (c) *thirdly*, to pay to the Funder a commission, being 50% of the aggregate Resolution Benefits for all Group Members, or such other percentage or amount as determined by the Court.

The foregoing is only a summary of the Funding Agreement. A copy of the Funding Agreement may be obtained from SMB Law by email to [sbriggs@smblaw.com.au](mailto:sbriggs@smblaw.com.au). You should obtain a copy of the Funding Agreement, and either contact SMB Law (on 02 7923 3207 or email [sbriggs@smblaw.com.au](mailto:sbriggs@smblaw.com.au)), or seek your own legal advice, if you have any questions or queries about the terms and effect of the Funding Agreement.

You are **not** obliged to enter into the Funding Agreement whether you opt in or out of the proceedings. If you are considering entering into the Funding Agreement, you should obtain your own legal advice before doing so.

If you do not sign the Funding Agreement, you will **not** incur any liabilities under that agreement. However, if these proceedings resolve, by settlement or judgment, on terms such as to give rise to Resolution Benefits in favour of the Group Members, the Court may order, including on the application of the Funder, that Group Members who benefit from the resolution of the class action, but who have not signed the Funding Agreement with the Funder, should (but *only* from the Resolution Benefits otherwise receivable by them) contribute equally with Group Members who have signed a Funding Agreement. There are two ways that the Court may order for this to happen:

- (a) a Common Fund Order; or
- (b) a Funding Equalisation Order.

A Common Fund Order (or CFO) is an order of the Court that provides for the Funder to receive a percentage that the Court considers to be fair and reasonable of any Resolution Benefits agreed to be paid by the Defendant in settlement of a class action, or of any judgment monies or benefits awarded by the Court to the Group Members. The effect of such an order is that all Group Members are required to contribute to the Funder an equal percentage from any Resolution Benefits otherwise receivable by them.

A Funding Equalisation Order (or FEO) is similar to a Common Fund Order, but requires (if made by the Court) the “*unfunded Group Members*” (being, those who have not signed the Funding Agreement with the Funder), from any Resolution Benefits otherwise receivable by them, to contribute equally to the commission and

any other costs that “funded Group Members” (being, those who have signed a Funding Agreement) have agreed to pay the Funder under the Funding Agreement. This means that all Group Members, both funded and unfunded, contribute equally to the commission and any other costs that funded Group Members have agreed to pay to the Funder.

The above information about the effect of a Common Fund Order or a Funding Equalisation Order is a summary only. If you want further information in relation to these matters, you can contact SMB Law (on 02 7923 3207 or email [sbriggs@smblaw.com.au](mailto:sbriggs@smblaw.com.au)), or seek your own legal advice.

## **8. What will happen if you choose to remain a Group Member?**

Unless you opt out, you will be bound by any settlement or judgment of the class action. If the class action is successful you will be entitled to share in the benefit of any order, judgment or settlement in favour of the Plaintiff and Group Members, although you may have to satisfy certain conditions before your entitlement arises. If the action is unsuccessful or is not as successful as you might have wished, you will not be able pursue the same claims and may not be able to pursue related claims against the Defendant in other legal proceedings.

## **9. What Group Members need to do**

### **(a) How you can remain a Group Member?**

**If you wish to remain** a Group Member there is **nothing you need to do** at the present time. The Plaintiff will continue to bring the proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the Plaintiff and the Group Members. However, you are invited to contact the Plaintiff’s lawyers, SMB Law, on the number below and register as a Group Member so that future notices about the class action can be sent to your preferred address.

### **(b) How you can opt out of the class action?**

**If you do not wish to remain** a Group Member you must opt out of the class action. If you opt out you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the class action, but you will be at liberty to bring your own claim against the respondent, provided that you issue Court proceedings within the time limit applicable to your claim. If you wish to bring your own claim against the respondent, you should seek your own legal advice about your claim and the applicable time limit **prior** to opting out.

**If you wish to opt out** of the class action you **must do so** by completing an “**Opt Out Notice**” in the form attached to this document and marked “Schedule A” (Form 115 of the UCPR approved forms), and returning it to the Registry of the Supreme Court of New South Wales at the address on the form. **IMPORTANT: the Notice must reach the Registry by no later than 4:00pm AEST on 28 June 2024**, otherwise it will not be effective.

You should submit the Opt Out Notice if:

- (i) you qualify as a Group Member and you wish to opt out of the class action; or
- (ii) you believe that you have been incorrectly identified as a Group Member, because you do not meet the criteria set out in the section headed “Are you a Group Member” above.

Each Group Member seeking to opt out should fill out a separate form. If you are opting out on behalf of a company or business please provide your name, the name of the company or business and your position within the company or business (e.g. director or partner).

**10. What happens if I do nothing?**

As explained above, if you do nothing you will remain a Group Member, provided you meet the criteria outlined above. As a Group Member, you will be bound by any judgment or settlement entered into in that class action.

**11. Where can you obtain copies of relevant documents?**

Copies of relevant documents, including the Statement of Claim, and the Defence may be obtained by:

- (a) inspecting them between 9am and 5pm at the offices of SMB Law, contact details for which are available from <https://www.smblaw.com.au/firm> or by calling 02 7923 3207; or
- (b) by contacting the Supreme Court of New South Registry (contact details are available at <https://supremecourt.nsw.gov.au/>) and paying the appropriate inspection fee.

Please consider the above matters carefully. If there is anything of which you are unsure, you should contact SMB Law on 02 7923 3207 or email [sbriggs@smblaw.com.au](mailto:sbriggs@smblaw.com.au) or seek your own legal advice. You should not delay in making your decision.

## SCHEDULE A

Form 115 (version 2)

UCPR 58.2

### OPT OUT NOTICE

#### COURT DETAILS

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

#### TITLE OF PROCEEDINGS

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

#### FILING DETAILS

Filed for	<b>[name]</b> , person opting out of representative proceedings
#Legal representative	[solicitor] [firm]
#Legal representative reference	[reference number]
Contact name and telephone	[name] [telephone]
Contact email	[email address]

#### OPT OUT NOTICE

Name of person opting out

Address of person opting out

I, a group member in these representative proceedings, opt out of the proceedings.

I understand that in opting out:

- 1 I forgo the right to share in any relief obtained by the representative party in the representative proceedings;
- 2 I am not entitled to receive any further notification about the conduct or disposition of the proceedings; and
- 3 To the extent that I have a claim against the defendant(s), any limitation period suspended by the commencement of the representative proceedings has recommenced to run.



## SIGNATURE

#Signature of legal representative

#Signature of or on behalf of  
person opting out if not legally  
represented

Capacity

[eg solicitor, authorised officer of person opting out,  
person opting out]

Date of signature

## NOTICE TO PERSON OPTING OUT

You must, within the time specified in the notice to group members:

file this form in the registry of the court at the address below, or in the manner provided in the notice to group members; and

serve a copy of this form on the representative party at the address, or in the manner provided, in the notice to group members.

## REGISTRY ADDRESS

Street address	Supreme Court of NSW Law Courts Building, Queen's Square 184 Phillip Street Sydney NSW 2000
Postal address	Supreme Court of NSW GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272