



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP23/36

Wednesday, 22 November 2023

Whitehaven Coal Limited – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 24 October 2023 by Whitehaven Coal Limited (ASX: WHC) (**Whitehaven**) in relation to its affairs (see [TP23/33](#)).

Background

Whitehaven is an ASX listed company. Bell Rock Capital Management LLP (**Bell Rock**) is an investment manager.

In July 2020, Bell Rock started holding a derivative interest in Whitehaven shares in the form of cash settled total return swaps.

On 10 June 2022, Bell Rock's long position¹ in Whitehaven shares first crossed 5%, at 5.126% of the voting rights in Whitehaven,² and remained undisclosed, contrary to Guidance Note 20 on Equity Derivatives (**GN 20**).³

Between 10 June 2022 and 30 October 2023, Bell Rock's undisclosed long position changed by at least 1% on several occasions, reaching 13.041% on 30 June 2023 (including a 4.774% relevant interest in Whitehaven shares).

On 7 July 2023 and 23 October 2023, Whitehaven wrote to Bell Rock seeking confirmation of Bell Rock's relevant interest in Whitehaven shares and any derivative position disclosable under GN 20.

¹ Being either a long equity derivative position or a relevant interest in securities or a combination of both, as defined in Guidance Note 20 – Equity Derivatives

² Noting that, at this time, Bell Rock's position in Whitehaven shares was only an equity derivative position

³ See at [9]

On or around 12 October 2023, Bell Rock started a campaign urging Whitehaven shareholders to vote against certain resolutions at Whitehaven's upcoming annual general meeting (AGM).

Subsequent to Whitehaven's application, Bell Rock released the following notices under GN 20 on the ASX:

- on 30 October 2023, disclosing (among other things) a long position relating to approximately 5.31% of Whitehaven's shares and
- on 10 November 2023, disclosing (among other things) that its long position fell below 5%.

Declaration

The Panel considered that:

- Bell Rock attempted to exercise influence over Whitehaven with its campaign to Whitehaven shareholders ahead of Whitehaven's AGM
- Bell Rock acquired, and continued to acquire, a substantial interest in Whitehaven without informing the market contrary to GN 20
- the holders of shares in Whitehaven did not know the identity of persons who acquired a substantial interest in Whitehaven and were not aware of the extent of Bell Rock's economic interest in Whitehaven and
- the acquisition of control over voting shares in Whitehaven has not taken place in an efficient, competitive and informed market.

The Panel considered that the circumstances were unacceptable having regard to the purposes of Chapter 6 set out in section 602.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Orders

The Panel has made orders that Bell Rock give to Whitehaven and ASX a corrective notice under GN 20 in a form approved by the Panel.

The sitting Panel was Jeremy Leibler, Ron Malek (sitting President) and Deborah Page.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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Australian Government

Takeovers Panel

ANNEXURE A

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

WHITEHAVEN COAL LIMITED

CIRCUMSTANCES

1. Whitehaven Coal Limited (**Whitehaven**) is an ASX listed company. Bell Rock Capital Management LLP (**Bell Rock**) is an investment manager.
2. In July 2020, Bell Rock started holding a derivative interest in Whitehaven shares in the form of cash settled total return swaps.
3. On 4 October 2021, Guidance Note 20 on Equity Derivatives (**GN 20**) came into operation, which provides, among other things, that (footnote omitted):

The Panel expects disclosure to be made where the long position of a person and their associates:

- (i) *is 5% or more and*
- (ii) *if so, changes by at least 1% or falls below 5%*

of the voting rights in an entity. Failure to disclose in accordance with paragraphs 12 to 18 below may give rise to unacceptable circumstances, irrespective of whether a control transaction has commenced.

4. On 10 June 2022, Bell Rock's long position¹ in Whitehaven shares first crossed 5%, at 5.126% of the voting rights in Whitehaven, and remained undisclosed.²
5. Between 10 June 2022 and 30 June 2023, Bell Rock's undisclosed long position changed by at least 1% on the following dates:
 - (a) on 30 June 2022, to 6.137%

¹ Being either a long equity derivative position or a relevant interest in securities or a combination of both, as defined in Guidance Note 20 – Equity Derivatives

² Noting that, at this time, Bell Rock's position in Whitehaven shares was only an equity derivative position

- (b) on 15 July 2022, to 7.217%
 - (c) on 22 August 2022, to 8.236%
 - (d) on 6 October 2022, to 9.435%
 - (e) on 9 January 2023, to 10.442% (including a 1.355% relevant interest in Whitehaven shares)
 - (f) on 26 April 2023, to 11.507% and
 - (g) on 30 June 2023, to 13.041% (including a 4.774% relevant interest in Whitehaven shares).
6. On 16 June 2023, Bell Rock wrote to the board of Whitehaven stating (among other things) that Bell Rock was *“currently the largest shareholder in Whitehaven”* and Bell Rock’s views in response to recent press reports that Whitehaven *“was looking to participate in a competitive auction to acquire BHP’s metallurgical coal mines”*. Whitehaven and Bell Rock subsequently corresponded on this issue.
 7. On 27 June 2023, Bell Rock requested a copy of Whitehaven’s register of members.
 8. On 7 July 2023, Whitehaven wrote to Bell Rock seeking confirmation of Bell Rock’s relevant interest in Whitehaven shares and any derivative position disclosable under GN 20. In response, Bell Rock stated that it *“is not, and has not been, a substantial holder and no disclosure of its current interest is required under section 671B of the Corporations Act 2001 (Cth)”*.
 9. On 12 October 2023, Bell Rock wrote to Whitehaven shareholders, advising them to vote against the adoption of Whitehaven’s 2023 remuneration report and the grant of single incentive plan awards to Whitehaven’s Managing Director at Whitehaven’s upcoming annual general meeting (**AGM**). In its letter, Bell Rock stated (among other things) that *“Bell Rock Capital has made public comments about our concerns with [Whitehaven’s] attempt to purchase BHP’s Daunia and Blackwater mines... Regardless of your view on the BHP transaction, as a shareholder, you need to ask one question – without total shareholder return (TSR) in [Whitehaven’s] structure, how can you be sure management is acting in your best interests?”* (original emphasis). Bell Rock further stated that *“Bell Rock’s approach is as a long-term strategic investor and we manage just under 5% of [Whitehaven] stock... The Board’s view may have been based on a misconception that Bell Rock is a short-term investor and will be gone soon. This is wrong.”*
 10. On 18 October 2023, Whitehaven announced that it had agreed to purchase the Blackwater and Daunia coal mines.
 11. On 19 October 2023, Bell Rock’s undisclosed long position changed by at least 1%, to 9.891% (including a 4.781% relevant interest in Whitehaven shares).

12. On 23 October 2023, Whitehaven wrote to Bell Rock requesting that it confirm either the details of any derivative interests in Whitehaven shares or that it holds none.
13. On 24 October 2023, Whitehaven made an application to the Panel concerning Bell Rock's failure to disclose its derivative interest in Whitehaven shares.
14. On 26 October 2023, at Whitehaven's AGM, 40.61% of the votes were cast against the resolution to adopt the company's remuneration report, which constituted a first strike for the purposes of section 250U³.
15. On 30 October 2023, Bell Rock released a notice under GN 20 on the ASX, disclosing a long position relating to approximately 5.31% of Whitehaven's shares (including a 0.60% relevant interest in Whitehaven shares).
16. On 10 November 2023, Bell Rock released a further notice under GN 20 on the ASX, disclosing that, on 8 November 2023, its long position fell below 5%, relating to approximately 4.995% of Whitehaven's shares (including a 0.598% relevant interest in Whitehaven shares).

EFFECT

17. It appears to the Panel that:
 - (a) Bell Rock attempted to exercise influence over Whitehaven with its campaign to Whitehaven shareholders ahead of Whitehaven's AGM
 - (b) Bell Rock acquired, and continued to acquire, a substantial interest in Whitehaven without informing the market contrary to GN 20
 - (c) the holders of shares in Whitehaven did not know the identity of persons who acquired a substantial interest in Whitehaven and were not aware that Bell Rock had an economic interest in Whitehaven in addition to the "just under 5% of [Whitehaven] stock" referred to in Bell Rock's 12 October 2023 letter to shareholders (see paragraph 9) and
 - (d) the acquisition of control over voting shares in Whitehaven has not taken place in an efficient, competitive and informed market.

CONCLUSION

18. It appears to the Panel that the circumstances are unacceptable having regard to the purposes of Chapter 6 set out in section 602.

³ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

19. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

20. The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Whitehaven.

Tania Mattei
General Counsel
with authority of Ron Malek
President of the sitting Panel
Dated 21 November 2023



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ANNEXURE B

CORPORATIONS ACT

SECTION 657D

ORDERS

WHITEHAVEN COAL LIMITED

The Panel made a declaration of unacceptable circumstances on 21 November 2023.

THE PANEL ORDERS

1. As soon as practicable after and subject to approval by the Panel under Order 2, Bell Rock Capital Management LLP (**Bell Rock**) must give to Whitehaven Coal Limited (**Whitehaven**) and ASX a corrective notice under Guidance Note 20 – Equity Derivatives (**Disclosure**).
2. A draft of the Disclosure must be provided to the Panel within five business days of the date of these orders for review and approval by the Panel. Any changes requested by the Panel must be reflected in the draft of the Disclosure in a form acceptable to the Panel.
3. Whitehaven must publish the Disclosure on its ASX Announcements Platform within one business day of receiving the Disclosure.

Tania Mattei
General Counsel
with authority of Ron Malek
President of the sitting Panel
Dated 21 November 2023