Australian Government

Takeovers Panel

# Reasons for Decision
# Whitehaven Coal Limited
# [2023] ATP 12

**Catchwords:**

*Declaration – orders – disclosure – equity derivatives - extension of time for making application – shareholder activism – guidance note – substantial holding – relevant interest*

*Corporations Act 2001 (Cth), sections 249N, 250U, 602, 602A, 657A(2), 657C, 671B*

*New Ashwick & Anor v Wesfarmers (2000) 18 ACLC 742 at 750*

*Guidance Note 1 – Unacceptable Circumstances, Guidance Note 20 – Equity Derivatives*

*PM Capital Asian Opportunities Fund Limited 01 [2021] ATP 17, Webcentral Group Limited 03 [2021] ATP 4, Tribune Resources Ltd [2018] ATP 18, Austral Coal Limited 03 [2005] ATP 14, Austar United Communications Limited [2003] ATP 16*

| Interim order | IO undertaking | Conduct | Declaration | Final order | Undertaking |
|---|---|---|---|---|---|
| NO | NO | YES | YES | YES | NO |

## INTRODUCTION

1. The Panel, Jeremy Leibler, Ron Malek (sitting President) and Deborah Page, made a declaration of unacceptable circumstances in relation to the affairs of Whitehaven. The application concerned a failure by Bell Rock to disclose a derivative interest it held in Whitehaven. The Panel considered that Bell Rock's deliberate failure to disclose its Long Position in Whitehaven in accordance with GN 20 over a long period of time while seeking to exercise influence over the affairs of Whitehaven was contrary to the principles set out in section 602[1]. The Panel made a declaration of unacceptable circumstances and orders requiring corrective disclosure.

2. In these reasons, the following definitions apply.

| | |
|---|---|
| **AGM** | Whitehaven's annual general meeting held on 26 October 2023 |
| **Bell Rock** | Bell Rock Capital Management LLP |
| **Bell Rock's Response** | has the meaning given in paragraph 8 |
| **First Disclosure** | Bell Rock's disclosure under GN 20 dated 30 October 2023 |
| **First Letter** | has the meaning given in paragraph 6 |
| **GN 20** | Guidance Note 20 - Equity Derivatives |
| **Incentive Plan Resolution** | has the meaning given in paragraph 14 |

[1] 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)

| | |
|---|---|
| **Letter to Shareholders** | has the meaning given in paragraph 14 |
| **Long Position** | either a long equity derivative position or a relevant interest in securities or a combination of both |
| **Proposed Acquisition** | has the meaning given in paragraph 4 |
| **Remuneration Report Resolution** | has the meaning given in paragraph 14 |
| **Second Disclosure** | Bell Rock's disclosure under GN 20 dated 10 November 2023 |
| **Second Letter** | has the meaning given in paragraph 16 |
| **Swaps** | has the meaning given in paragraph 31 |
| **Threshold Date** | has the meaning given in paragraph 73 |
| **Whitehaven** | Whitehaven Coal Limited |

## FACTS

3. Whitehaven is a coal mining company listed on the ASX (ASX code: WHC). Bell Rock is an investment manager based in the United Kingdom.

4. On 16 June 2023, Bell Rock sent a letter to Whitehaven's board, stating *"[w]e are currently the largest shareholder in Whitehaven"* and requesting information in relation to "*the required rate of return or valuation threshold…for an acquisition*" following recent press reports that Whitehaven was "*looking to participate in a competitive auction to acquire BHP's metallurgical coal mines*" (**Proposed Acquisition**). Bell Rock also stated "*[w]e wish to make clear we will oppose any deal where we consider returns are inferior to the value of Whitehaven standalone (ex-cash)… All excess cash, down to an acceptable buffer, should be distributed to shareholders as soon as possible.*"

5. On 22 June 2023, the Whitehaven board responded to Bell Rock stating that, until there was "*an agreement in place that protects both Whitehaven and Bell Rock, it is not appropriate to provide you with information that has not been provided more broadly to the market.*"

6. On 27 June 2023, Bell Rock requested a copy of Whitehaven's register of members "*for the purpose of identifying and analysing the Members Register and considering whether to contact the Company's members in relation to the governance of the Company and information that has been provided by the Company to shareholders.*"

7. On 7 July 2023, Whitehaven sent a letter to Bell Rock stating that "*[i]n collating relevant materials to respond to [Bell Rock's request for a copy of Whitehaven's register of members], Whitehaven is concerned that Bell Rock may have a disclosable relevant interest in Whitehaven shares*" and that it would issue a tracing notice. In the letter, Whitehaven also noted the requirement under GN 20 to disclose an equity derivative position which (combined with any physical holding) represents 5% or more of the voting rights in an entity and sought confirmation of Bell Rock's relevant interest in

Whitehaven's shares and any derivative position held in Whitehaven which was disclosable under GN 20 (**First Letter**).

8. In response, on 11 July 2023, Bell Rock sent a letter to Whitehaven stating that "*Bell Rock is an investment manager that manages 40,000,023 Whitehaven shares, which based on the current share capital, reflects approximately 4.78% of the Whitehaven voting shares as of today. Bell Rock is not, and has not been, a substantial holder and no disclosure of its current interest is required under section 671B"* (**Bell Rock's Response**).

9. On 4 August 2023, Bell Rock sent a letter to Whitehaven's board requesting answers to a list of questions regarding the Proposed Acquisition.

10. On 27 August 2023, Bell Rock sent a letter to Whitehaven requesting that certain resolutions be put to shareholders at the AGM, including a resolution that Whitehaven's constitution be amended to allow shareholders to propose resolutions at a general meeting and, if passed:

    (a) a resolution that a shareholder vote be sought prior to the directors undertaking "*any significant change, either directly or indirectly, to the nature or scale of [Whitehaven's] activities*"

    (b) a resolution that Whitehaven "*pay one or more interim and/or final dividend payments to shareholders of no less than 50% of the Company's net profit after tax or 50% of the free cash flow*" and

    (c) a resolution to institute a policy on board tenure.

11. Whitehaven declined to include Bell Rock's proposed resolutions on the basis that it did not hold at least 5% of the voting power in Whitehaven.[2]

12. Between August and September 2023, there were additional requests for information from Bell Rock to the Whitehaven board in relation to the Proposed Acquisition.

13. On 20 September 2023, Whitehaven released the notice of meeting for its AGM, to be held on 26 October 2023.

14. On 12 October 2023, Bell Rock wrote to Whitehaven shareholders (**Letter to Shareholders**), advising them to vote against the adoption of Whitehaven's 2023 remuneration report (**Remuneration Report Resolution**) and the grant of single incentive plan awards to Whitehaven's Managing Director at the AGM (**Incentive Plan Resolution**). 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 – <u>without total shareholder return (TSR) in [Whitehaven's] structure, how can you be sure management is acting in your best interests?</u>*" (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.*"

[2] See section 249N

15. On 18 October 2023, Whitehaven announced that it had executed definitive sale agreements in relation to the Proposed Acquisition.

16. On 23 October 2023, Whitehaven sent a letter to Bell Rock noting that Bell Rock's Response was inconsistent with statements made by its representative to Whitehaven that Bell Rock's ownership was around 11% of Whitehaven shares held through a combination of physical and derivative positions.[3] In the letter, Whitehaven requested that Bell Rock either provide the details of any derivative interests which it held in Whitehaven shares, to the level required in GN 20, or confirm that it did not hold any (**Second Letter**).

# APPLICATION

## Declaration sought

17. By application dated 24 October 2023, Whitehaven sought a declaration of unacceptable circumstances. Whitehaven submitted (among other things) that:

    (a) at various times since May 2023, Bell Rock had represented to Whitehaven that it held a combined physical and derivative interest in Whitehaven shares of approximately 11% but had not publicly disclosed its interest in accordance with the requirements of GN 20 and

    (b) Bell Rock had "*deliberately misled shareholders by omission*" by stating in a letter to Whitehaven shareholders on 12 October 2023 that it "*manage[s] just under 5% of WHC stock*".

18. Whitehaven submitted that Bell Rock's non-compliance with its disclosure obligation had become more acute since 12 October 2023 as a result of Bell Rock seeking to exercise control or influence over the affairs of Whitehaven, including by:

    (a) writing the Letter to Shareholders and

    (b) launching a media campaign under the branding of "Fair Shareholder Returns" urging shareholders to vote against the Remuneration Report Resolution and the Incentive Plan Resolution and also resolutions to elect or re-elect three directors at the AGM.

19. Whitehaven submitted that Bell Rock's failure to disclose its derivative interest was (among other things) contrary to an efficient, competitive and informed market.

## Interim orders sought

20. Whitehaven sought interim orders to the effect that:

    (a) Bell Rock be required to disclose any derivative position it held in Whitehaven shares in the form required by GN 20 and

[3] Whitehaven stated, in the Second Letter, that statements to that effect were made by Bell Rock on 31 May 2023, on 5 June 2023 and on 5 October 2023

(b) the votes cast on the Whitehaven shares in which Bell Rock held a relevant interest be disregarded at Whitehaven's AGM, unless Bell Rock disclosed any derivative position it held in Whitehaven shares in accordance with GN 20 prior to the AGM.

21. Bell Rock provided preliminary submissions in relation to the interim orders, in which it submitted (among other things) that Whitehaven's request had been made too late, "*deliberately timed to seek to force disclosure or deprive Bell Rock of its rights to vote at the WHC AGM*", given:

    (a) the application "*was received for the first time at 8:16pm (Sydney time) on Tuesday 24 October 2023 and the AGM is to be held at 10:00am tomorrow, on Thursday 26 October 2023*" and

    (b) Whitehaven did not indicate any reasoning for its delay in making the application, even though it "*refers to WHC being aware of alleged representations about Bell Rock's position in WHC shares as early as 31 May 2023*".

22. Bell Rock also submitted that the interim orders sought by Whitehaven were effectively final orders as any disclosure made by Bell Rock could not be reversed, and any votes cast by Bell Rock that were disregarded at the AGM could not be unwound after the AGM had taken place.

23. In order to assist the Acting President in deciding whether to make the interim orders sought, Whitehaven was requested to explain the effect (if any) of Bell Rock voting at the AGM against the Remuneration Report Resolution and the Incentive Plan Resolution and these resolutions failing to pass.

24. Whitehaven submitted that the percentage of proxy votes cast on the Remuneration Report Resolution and the Incentive Plan Resolution to be put to the AGM the following day were as follows:

    Remuneration Report Resolution: For 58.87% Against 40.62%

    Incentive Plan Resolution: For 60.96% Against 38.50%

25. Whitehaven submitted that "*as such, the effect of votes cast on behalf of Bell Rock being disregarded may not change the likely results of those resolution (sic). However, Whitehaven notes that the current proxies were cast at a time when it submits that the market was not properly informed of Bell Rock's derivative position as required by Guidance Note 20*".

26. The Acting President considered that Whitehaven's request for interim orders was not timely and that it was unlikely that any votes cast by Bell Rock at the AGM would have any material impact on the outcome of the resolutions, given:

    (a) the percentage of proxy votes cast on the Remuneration Report Resolution and the Incentive Plan Resolution

    (b) the fact that Bell Rock's voting power was limited to its physical holding of 4.78% of Whitehaven shares and

(c) the lack of evidence around any equity derivatives held by Bell Rock resulting in the underlying shares being taken out of the market and reducing the voting pool in a way that would have a material impact on the votes cast.

27. For these reasons, the Acting President declined to make the interim orders sought by Whitehaven.

**Final orders sought**

28. Whitehaven sought final orders that Bell Rock lodge a notification under GN 20 in a form acceptable to the Panel.

## DISCUSSION

29. We have considered all the material presented to us in coming to our decision, but only specifically address that part of the material we consider necessary to explain our reasoning.

**Decision to conduct proceedings**

30. On 26 October 2023, Whitehaven released the results of its AGM, where 40.61% of the votes were cast against the Remuneration Report Resolution, constituting a first strike for the purposes of section 250U. The Incentive Plan Resolution passed with 61.50% of the votes cast in favour.

31. On 30 October 2023, Bell Rock released on the ASX the First Disclosure, stating that it was the investment manager of entities who were the taker of cash settled equity swaps in Whitehaven shares (**Swaps**). It also stated that:

(a) on that day, it had sold 35,000,000 shares and that, further to the sale, Bell Rock only had a relevant interest in approximately 0.60% of Whitehaven's shares and

(b) on a combined basis, the equity derivative positions and physical holding of Bell Rock related to approximately 5.31% of Whitehaven's shares.

32. On the same day, Bell Rock made preliminary submissions to the Panel, stating that "*[o]n a without admission basis, Bell Rock considers that its disclosure earlier today has addressed the first final order sought by Whitehaven and this has brought about a timely and efficient conclusion to the Application.*"

33. Prior to determining whether we should conduct proceedings, we asked preliminary questions to the parties seeking to establish:

(a) the implications of Bell Rock's delay in disclosing its derivative interest in Whitehaven shares

(b) whether the First Disclosure was sufficient to ensure the market was efficient, competitive and informed and what orders (if any) would be appropriate in light of the First Disclosure and

(c) the details of any changes in the long equity derivative positions and relevant interests held by Bell Rock and its associates since it first entered into the Swaps.

34. We also asked a preliminary question about the timeliness of Whitehaven's application when it had raised those same concerns as early as May 2023. We address this further below (see paragraphs 79 to 85).

35. Whitehaven submitted that, as a result of Bell Rock's delayed disclosure, Whitehaven shares had been trading "*in an inefficient and uninformed market for some time*" during which "*Bell Rock ran a campaign in which it deliberately pretended to be just an ordinary holder of Whitehaven shares – when in fact the majority of its economic exposure in Whitehaven was held via short term equity derivatives*".

36. Bell Rock submitted that the delay in disclosure had not had any "*implication or practical impact on preserving the policy of Chapter 6"* because no acquisition for control over Whitehaven's voting shares had been announced or commenced during the time that its interest was undisclosed.

37. Whitehaven also submitted that the disclosure in the First Disclosure was lacking and that "*[i]f the only consequence of Bell Rock's non-disclosure is a voluntary, defective and late notification, there is no incentive for any market participant to follow the requirements of Guidance Note 20*".

38. Bell Rock submitted that the First Disclosure was in line with GN 20 and consistent with other disclosure in the market under GN 20. It also submitted that although it had been holding a derivative interest in Whitehaven shares since 31 July 2020, until 2 March 2022 its position under the Swaps never exceeded 1% of Whitehaven's shares. Bell Rock provided, in its submissions, the fluctuations of its Long Positions under the Swaps at each month-end from 3 March 2022 to 30 October 2023, including that:

    (a) by the end of June 2023, Bell Rock's Long Position in Whitehaven shares was above 5%, at approximately 6.14% of the voting rights in Whitehaven and

    (b) Bell Rock's Long Position in Whitehaven shares had reached approximately 13.36% by the end of August 2023 and 12.92% by the end of September 2023.

39. We were concerned about Bell Rock having held such high positions in Whitehaven shares without disclosing them, particularly in light of Whitehaven's requests for confirmation in its First Letter and Second Letter, while actively seeking to engage with, and making representations to, Whitehaven shareholders in the context of the Proposed Acquisition and the AGM.

40. GN 20 states that "*[i]n considering whether timely and adequate disclosure has been made, the Panel will have regard to the requirements for substantial holder notices – that is, within 2 business days of becoming aware or, in a bid period, by 9.30 am on the next trading day.*[4]"

41. It was apparent that Bell Rock had not made timely disclosure under GN 20. We were also not satisfied that the First Disclosure was sufficient to ensure that the market for Whitehaven shares was trading on an efficient, competitive and informed basis.

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[4] Section 671B(6)

42. Bell Rock submitted that the First Disclosure was consistent with market practice and provided examples of disclosures under GN 20. The Panel has not had the opportunity to consider such market practice, as it has never received an application in relation to the current version of GN 20 prior to this matter. We also note that the level of disclosure required under GN 20 would vary on a case-by-case basis depending on the circumstances of the holder of the equity derivative positions, including whether they have a substantial holding in the relevant company and have separately lodged a substantial holding notice.[5]

43. Accordingly, we decided to conduct proceedings.

**Guidance Note 20**

44. We recognise that equity derivatives are valuable trading and risk management products and, as stated in GN 20, the Panel does not want to interfere with the market for equity derivatives where they are not used in ways that undermine the policy of Chapter 6.

45. However, the Panel also considers that a long equity derivative position may affect the market in the underlying securities. Therefore, in order to ensure (among other things) an efficient, competitive and informed market for control of the entity's voting securities, the Panel expects disclosure to be made where the Long Position of a person and their associates:

    (a) is 5% or more and

    (b) if so, changes by at least 1% or falls below 5%

    of the voting rights in an entity.[6]

46. The Panel's policy also clearly states that it expects disclosure to be made in accordance with GN 20, irrespective of whether a control transaction has commenced.[7]

47. Therefore, it is clear that, under GN 20, regardless of the fact that no control transaction had been announced or commenced with respect to Whitehaven, Bell Rock should have disclosed its position under the Swaps:

    (a) from June 2022, when its Long Position in Whitehaven shares first crossed 5% and

    (b) each time its Long Position changed by at least 1% since June 2022.

48. GN 20 also states (footnotes omitted):

> *In considering whether failure to disclose in the circumstances described above gives rise to unacceptable circumstances, the Panel will consider the effect of non-disclosure on the control or potential control of an entity and the acquisition or proposed*

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[5] Footnote 6 of GN 20 states that "*[i]n cases where a substantial holder notice is not required, details of any acquisitions of physical securities (that have not already been disclosed) should be disclosed in the same level of detail as is required under the substantial holder provisions.*"
[6] GN 20 at [9]
[7] At [9]

*acquisition of a substantial interest, and whether non-disclosure is contrary to an efficient, competitive and informed market.*

*Example 1: A Panel is more likely to find unacceptable circumstances if the taker with a long position over 5% (which has not been disclosed) has attempted to exercise control or influence over the entity or proposes a control transaction after the time that disclosure should have been made in accordance with paragraph 16.*

49. In considering whether Bell Rock's failure to disclose was unacceptable, we considered the following:

    (a) how long Bell Rock's position had remained undisclosed contrary to GN 20, and the extent of Bell Rock's position in Whitehaven shares over that period

    (b) whether Bell Rock's failure to disclose had been deliberate

    (c) whether Bell Rock had attempted to exercise influence over Whitehaven while its position remained undisclosed and

    (d) whether the subsequent disclosure and sell down[8] by Bell Rock addressed any unacceptable circumstances.

50. We address these matters below.

**Period of non-compliance**

51. Bell Rock submitted that, on 10 June 2022, its position in Whitehaven shares under the Swaps first crossed 5%, at 5.126% of the voting rights in Whitehaven, and remained undisclosed.

52. Between 10 June 2022 and the First Disclosure, Bell Rock's undisclosed Long Position changed by at least 1% on the following dates:

    (a) on 30 June 2022, to 6.137%

    (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%

    (g) on 30 June 2023, to 13.041% (including a 4.774% relevant interest in Whitehaven shares) and

    (h) on 19 October 2023, to 9.891% (including a 4.781% relevant interest in Whitehaven shares).

[8] As per the First Disclosure and the Second Disclosure

53. Under GN 20, market participants are expected to make timely disclosure, specifically within 2 business days of becoming aware of the information, consistent with the requirements for substantial holder notices.

54. We consider that Bell Rock's failure to disclose its combined physical and derivative position in Whitehaven in accordance with GN 20 in a timely way meant that the market was not informed for some time of persons who have substantial interests in Whitehaven, and the extent of their holding, prior to Whitehaven's AGM.

55. Bell Rock submitted that it was not in the public interest for the Panel to make a declaration of unacceptable circumstances because "*the delay in disclosure did not have any impact on an efficient, competitive and informed market for Whitehaven shares prior to Whitehaven's annual general meeting and there has been no adverse impact on the control or potential control of Whitehaven nor has there been a proposed acquisition of a substantial interest in Whitehaven during the relevant time period*".

56. Whitehaven submitted that Bell Rock's submission "*misses the obvious*", being that "*[o]ne of the key purposes of Chapter 6 of the Corporations Act, as set out in section 602(b), is to ensure that the shareholders and directors of a company 'know the identity of any person who proposes to acquire a substantial interest in the company'.*"

57. Section 602A clarifies that (in effect) a reference to "substantial interest" is not to be read as being limited to an interest that is constituted by a relevant interest in securities, a legal or equitable interest in securities, or a power or right in relation to the company or its securities. The reference to "substantial interest" in Chapter 6 was broadened to ensure that the acquisition of equity derivatives (among other instruments) is included, as set out in the relevant explanatory memorandum[9]:

> *The definition is intended to ensure that the term 'substantial interest' is broad enough to encompass new and evolving instruments and developments in takeovers and to deter avoidance of the purposes of the takeovers law.*

58. The Panel has previously stated that, even where there is no control transaction on foot, a lack of disclosure that is more than historic may be contrary to section 602 and unacceptable.[10]

59. We consider that, as a result of Bell Rock's failure to disclose its Long Position in accordance with GN 20, the holders of shares in Whitehaven did not know the identity of persons who acquired a substantial interest in Whitehaven, contrary to the section 602 principles.

**Deliberate failure to disclose**

60. Whitehaven submitted that Bell Rock was on notice that it had disclosure obligations under GN 20 since July 2023 and that it continued to increase its Long Position, reaching as high as approximately 13.36% without informing the market.

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[9] Explanatory memorandum for the Corporations Amendment (Takeovers) Bill 2007 at [3.4]
[10] *Tribune Resources Ltd* [2018] ATP 18 at [68]

61. We agree. By no later than July 2023, when Whitehaven sent the First Letter to Bell Rock, Bell Rock was aware of its disclosure obligations under GN 20. Instead of complying with GN 20, Bell Rock deliberately kept its position undisclosed. In our view, this is unacceptable.

**Attempt to exercise influence**

62. Bell Rock submitted that its campaign with regards to the AGM was to address a perceived failure of management to protect shareholder value and that "*Bell Rock has never attempted to exercise control over Whitehaven nor has it ever proposed a control transaction*".

63. Whitehaven submitted that Bell Rock's submission omitted the relevant reference to exercising "*influence*" over an entity as stated in GN 20 and submitted that "*[i]t is untenable to suggest that in running an activist campaign at an AGM (including via mailouts and a campaign website) was not an attempt to exercise control or influence over Whitehaven*" (footnote omitted).

64. Bell Rock submitted that its interactions with Whitehaven shareholders was not "*enhanced or dependent on the holding of a long position under the Swaps given that any shares acquired by the writer to hedge its position were not able to be voted by Bell Rock*". In fact, in a separate submission it stated that "*had Bell Rock's long position been public at the time it made its request for resolutions and when it communicated with shareholders, Bell Rock's efforts might have been more fruitful and carried more weight*".

65. It is difficult to know what the market would have done if the market had been aware of Bell Rock's Long Position in Whitehaven shares and we do not believe it would be productive to speculate. In any event, we are satisfied that Bell Rock's campaign to Whitehaven shareholders ahead of the AGM was an attempt to exercise influence over Whitehaven at a time where it should have disclosed its Long Position but instead presented itself as "*a long-term strategic investor*" managing "*just under 5% of [Whitehaven] stock*"[11]. This is contrary to the policy set out in GN 20.

**Subsequent disclosure and sell down**

*Subsequent sell down*

66. On 10 November 2023, after we had issued our brief, Bell Rock released the Second Disclosure on the ASX, disclosing that, on 8 November 2023[12], "*following the closing of part of the Swaps*" Bell Rock's Long Position fell below 5%, to approximately 4.995% of Whitehaven's shares (with an unchanged 0.598% relevant interest in Whitehaven shares).

67. Bell Rock submitted that "*[g]iven Bell Rock's GN20 disclosures on 30 October 2023 and 10 November 2023, and the fact that it now has an aggregate interest in Whitehaven of less*

[11] In the Letter to Shareholders (see paragraph 14)

[12] Bell Rock later submitted that its disclosure on 10 November 2023 erroneously noted that Bell Rock's long position in respect of Whitehaven fell below 5% on 8 November 2023 when in fact it fell below 5% on 7 November 2023, this error being the result of a miscalculation as to the time differences between the United States and Australia

*than 5%, we believe that Whitehaven's 24 October 2023 application to the Panel…no longer serves any meaningful public interest purpose*".

68. Whitehaven submitted that Bell Rock having subsequently sold down its position was not a relevant factor in the Panel's determination as to whether to make a declaration of unacceptable circumstances and that "*[a]ny market perception that a party can acquire a substantial interest, not disclose it, use it for an intended purpose and then sell it without consequence sets a terrible standard for future market behaviour.*"

69. We agree with Whitehaven's submission. Bell Rock's subsequent sell down did not address the unacceptability of the historical lack of disclosure, particularly in light of:

    (a) how long Bell Rock had held a position under the Swaps over 5% of the voting rights in Whitehaven without disclosing it in accordance with GN 20

    (b) the First Letter and Second Letter notifying Bell Rock of its disclosure obligations under GN 20 and

    (c) Bell Rock soliciting Whitehaven shareholder support at the AGM.

*Inadequate First Disclosure and Second Disclosure*

70. Whitehaven submitted that Bell Rock's First Disclosure was lacking in the following respects:

    (a) it did not list the fluctuations in Bell Rock's combined physical and derivative position from the time the 5% threshold was first crossed in accordance with GN 20

    (b) it failed to include details of the acquisitions of physical securities to the same level of detail required under the substantial holder provisions, contrary to the requirements in GN 20

    (c) it only included an average strike price and it was therefore "*impossible to the [sic] understand the range of reference prices at which Bell Rock acquired economic interests in Whitehaven*" and

    (d) it did not include details as to Bell Rock's power to control decisions in relation to the Swaps or the relationship between Bell Rock and each of the takers listed on the First Disclosure.

71. It also submitted that the Second Disclosure did not address the above disclosure deficiencies as it was limited to the disclosure of a further decrease in Bell Rock's Long Position.

72. Bell Rock submitted that "*public disclosure of historical positions is not necessary given that public disclosure of its position has been made… and that in the circumstances historical disclosure would not make the market more efficient, competitive and informed.*" However, Bell Rock also submitted that, if "*the Panel nonetheless considers that retrospective disclosure is still required*", it was willing to make further disclosure of its historical positions when it crossed 5% and each time there was a 1% change.

73. Bell Rock submitted that it was prepared to provide an undertaking to make revised disclosure in the form of the draft corrective disclosure submitted to the Panel and the parties which ultimately included, among other things:

    (a) Bell Rock's combined physical and derivative position in Whitehaven shares for each date on which it crossed 5% and, thereafter, moved by at least 1% (**Threshold Date**)

    (b) the low Swap share reference price and high Swap share reference price as well as the per-share strike price for each Threshold Date

    (c) details of the acquisitions of physical shares, including the details of each acquisition and the price paid for each share and

    (d) information about how Bell Rock exercised control over the physical shares and a copy of the agreement conveying this control (albeit redacted).

74. Whitehaven submitted, referring to footnote 6 of GN 20, that "*[t]he clear policy intent underpinning GN20 is that if there has been an acquisition of physical securities requiring disclosure in connection with a GN20 filing, that disclosure should be to the same standard as would have been required under the substantial holding provisions*". It submitted that, on that basis, Bell Rock's draft corrective disclosure continued to be defective as it did not meet all the requirements under Part 6C.1 and was contrary to the Court's decision in *New Ashwick & Anor v Wesfarmers*[13]. Whitehaven also submitted that Bell Rock applied "*an extremely narrow interpretation of GN20 to the effect that Bell Rock is not required to disclose the details of its associates unless those associates have a relevant interest*".

75. While we acknowledge Bell Rock's willingness to cooperate with the Panel and the parties to resolve the issues by submitting draft corrective disclosure, it did not address all of our concerns, including with respect to:

    (a) the level of redaction of the managed account agreement that was proposed to be provided in support of Bell Rock's disclosure and

    (b) the lack of disclosure around the ultimate controller of Bell Rock and the other entities listed on its corrective disclosure.

76. We agree that where documents provided in support of disclosure requirements are heavily redacted, this does not sufficiently protect the rights or interests of shareholders and market participants[14] where the information that ought to be disclosed would reasonably and materially assist the market.[15]

77. Footnote 6 of GN 20 states that "*… In cases where a substantial holder notice is not required, details of any acquisitions of physical securities (that have not already been disclosed) should be disclosed in the same level of detail as is required under the substantial holder provisions. Such disclosure would need to be repeated in a further substantial holder*

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[13] (2000) 18 ACLC 742 at 750 at [36]
[14] *PM Capital Asian Opportunities Fund Limited 01* [2021] ATP 17 at [109]
[15] *Austar United Communications Limited* [2003] ATP 16 at [29] in footnote 5

*notice if one is required*." Accordingly GN 20 requires that, where physical shares have been acquired, the details of any such acquisitions should be disclosed in the same level of detail as is required under the legislation. It is not as clear whether GN 20 requires disclosure of all the associates of the taker of an equity derivative or whether disclosure of associates is required if the taker of an equity derivative acquires physical securities (as would be the case if disclosure was required under the substantial holder provisions). However, we consider that for disclosure under GN 20 to be useful to the market, at least the ultimate beneficiary of the equity derivative (and any physical securities) needs to be disclosed.

78. For the reasons above, we are not satisfied that the draft corrective disclosure provided by Bell Rock was adequate and therefore we did not consider it appropriate to accept Bell Rock's undertaking in lieu of a declaration (or orders).

**Extension of time**

79. Under section 657C(3):

*An application for a declaration under section 657A can be made only within:*

*(a) 2 months after the circumstances have occurred; or*

*(b) a longer period determined by the Takeovers Panel.*

80. We sought submissions from the parties on the implications (if any) of Whitehaven's late application and on whether we should extend time under section 657C(3) for the making of the application.

81. Bell Rock submitted that "*Whitehaven had every opportunity to raise these matters with the Panel on and from 31 May 2023*" and that, despite being aware of the positions for approximately five months, it "*submitted its application just 38 hours before its AGM, when it was likely aware, given the deadline for submission of proxies that had passed, that it was likely to receive a strike on its remuneration report*" (footnote omitted).

82. Whitehaven submitted that "*the seriousness of Bell Rock's non-compliance became more acute from 12 October 2023 because of Bell Rock seeking to exercise control or influence over the affairs of Whitehaven*." It also submitted that it had raised the issue with Bell Rock in the First Letter and the Second Letter and that "*[i]t is not the role of a listed company to 'police' compliance with Guidance Note 20*" adding that "*this is not a circumstance in which tracing notices or other 'self-help' remedies allowed Whitehaven to test the veracity of Bell Rock's claimed derivative interest at any earlier stage*".

83. Whitehaven submitted that "*the circumstances which gave rise to the application are continuing and therefore to, the extent the circumstances first occurred longer than 2 months before the application was made, an extension of time under s657C(3)(b) is appropriate in order for those circumstances to be remedied*".

84. We consider that Whitehaven was not timely in its application given:

(a) it was aware that Bell Rock was seeking to solicit Whitehaven shareholders when it requested a copy of Whitehaven's register of members in June 2023

(b) it had suspected Bell Rock's non-compliance with GN 20 by no later than July 2023, when it sent the First Letter and

(c) even if the seriousness of Bell Rock's non-compliance only became more acute from 12 October 2023, Whitehaven only lodged its application on 24 October 2023.

85. This gave us pause. We consider that Whitehaven's delay in making its application reduced the effectiveness of our decision and any orders we could make. While we appreciate that it is not the role of a listed company to police compliance with GN 20 and that, contrary to suspected breaches of section 671B, there are no "self-help" remedies available to companies other than an application to the Panel, on the other hand the Panel cannot make an application of its own volition and still requires boards to be proactive when aware, or suspecting, potential lack of compliance with GN 20 or otherwise.

86. Here, Whitehaven's application related to Bell Rock's lack of disclosure. At the time of the application, there was still a lack of disclosure resulting in an uninformed market contrary to section 602. While Whitehaven may have suspected Bell Rock's non-compliance with GN 20 in the months preceding the application, the unacceptable circumstances in relation to Whitehaven should not go unremedied merely because their existence was hidden for more than 2 months.[16]

87. In *Webcentral Group Limited 03*[17], the Panel articulated the factors that are relevant in considering whether to extend time for the making of an application. We consider that the following apply:

(a) Whitehaven's application made credible allegations of clear and serious unacceptable circumstances, the effects of which are ongoing and

(b) it would be undesirable for this matter to go unheard as essential matters supporting it came to light in the lead up to the AGM and therefore, in the two months preceding the application.

88. Therefore, taking into account the principle that the Panel's discretion to extend time should not be exercised lightly, we consider that it is appropriate for us to extend time for Whitehaven's application to the date on which it was made.

# DECISION

## Declaration

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

90. Section 657A(2) states (among other things) that "*[t]he Takeovers Panel may only make a declaration under this subsection… if it considers that doing so is not against the public*

[16] *Austral Coal Limited 03* [2005] ATP 14 at [20]
[17] [2021] ATP 4 at [86]

*interest after taking into account any policy considerations that the Takeovers Panel considers relevant.*"

91. Guidance Note 1 provides that the public interest includes "*such things as the signal the decision may send the market and the wider investing community*".[18]

92. Here, we consider that it is in the public interest to make a declaration of unacceptable circumstances to ensure the principles underpinning our policy with regards to equity derivatives are upheld.

93. Accordingly, we made the declaration set out in Annexure A. We had regard to the matters in s657A(3).

**Orders**

94. Following the declaration, we made the final orders set out in Annexure B. We were not asked to, and did not, make any costs orders. The Panel is empowered to make 'any order'[19] if 4 tests are met:

    (a) it has made a declaration under s657A. This was done on 21 November 2023.

    (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.

    (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 16 November 2023. Whitehaven and Bell Rock both made submissions and rebuttals.

    (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this for the reasons given below.

95. On 16 November 2023, we sought submissions from the parties on proposed orders requiring Bell Rock to give to Whitehaven and ASX a corrective notice under GN 20 in a form approved by the Panel.

96. Bell Rock submitted that it was prepared to provide an undertaking to make revised disclosure under GN 20. As discussed in paragraphs 73 to 78 above, we were not prepared to accept the undertaking in lieu of orders.

97. We consider that, absent prompt disclosure under GN 20, the market is not fully informed which is contrary to the principles of section 602. We consider that it would be open to a Panel to make orders reaching beyond disclosure, including to order the cancellation of any agreement entered into in relation to the equity derivatives and, where physical shares are held, to order a voting freeze or a divestment. Given the circumstances of this matter, including the lateness of the

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[18] Guidance Note 1 - Unacceptable Circumstances at [14]

[19] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

application by Whitehaven and Bell Rock's willingness to cooperate, we do not consider it necessary to make such further orders.

98. However, we consider that such a deliberate and ongoing non-compliance with GN 20 on the part of Bell Rock ought to have clear and decisive consequences to prevent equity derivatives being used by market participants in ways that undermine the integrity of the market and the principles that underpin Chapter 6. We consider that it is important to ensure that an appropriate standard of disclosure and market conduct is set, in accordance with GN 20. In these circumstances, this required a declaration of unacceptable circumstances and orders requiring fulsome retrospective corrective disclosure in a form approved by us, to ensure we had appropriate oversight of the process and the level of disclosure.

99. We decided that it would be appropriate to consult with ASIC as to the adequacy of any draft corrective disclosure received from Bell Rock under our orders. We note that by approving Bell Rock's GN 20 disclosure under our orders we do not comment on or endorse its full compliance with the *Corporations Act 2001* (Cth) as this is not our role. Instead, we consider that we would approve any disclosure provided by Bell Rock which addressed the unacceptable circumstances and was balanced by the commercial situation.

**Ron Malek**
**President of the sitting Panel**
**Decision dated 21 November 2023**
**Reasons given to parties 10 January 2024**
**Reasons published 12 January 2024**

## Advisers

| Party | Advisers |
|---|---|
| Whitehaven | Allens |
| Bell Rock | Gilbert + Tobin |

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 position[20] in Whitehaven shares first crossed 5%, at 5.126% of the voting rights in Whitehaven, and remained undisclosed.[21]

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%

   (b) on 15 July 2022, to 7.217%

   (c) on 22 August 2022, to 8.236%

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[20] 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

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

(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 – <u>without total shareholder return (TSR) in [Whitehaven's] structure, how can you be sure management is acting in your best interests?</u>*" (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 250U[22].

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.

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).

[22] 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)

## 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**

Australian Government

Takeovers Panel

# 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**