SUPREME COURT OF QUEENSLAND

REGISTRY: **BRISBANE**

NUMBER: 14135/18

Plaintiff: **Nathan Leslie Tinkler as trustee for the Boardwalk Resources Trust**

AND

Defendant: **Whitehaven Coal Limited ABN 68 124 425 396**

CLAIM

The Plaintiff claims the following relief -

1. Damages for breach of contract in a sum to be assessed by the Court.
2. Further or alternatively, pursuant to s.236 of Schedule 2 of the Competition and Consumer Act 2011 (Cth) (the ***ACL***), damages for misleading and deceptive in such sum as assessed by the Court.
3. Interest pursuant to s.58 of the Civil Proceedings Act 2011 (Qld).
4. Costs.
5. Such other order as the Court deems fit.

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

The proceedings will be listed for an initial case conference at a date to be fixed by the judge to whom the proceeding is assigned.

CLAIM
Filed on Behalf of the Plaintiff
Form 2 Version 2
Uniform Civil Procedure Rules 1999
Rule 22

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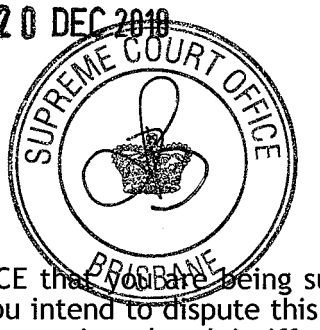
Ref: AJS:KM:20180585

ISSUED WITH THE AUTHORITY OF THE **SUPREME COURT OF QUEENSLAND**

And filed in the **BRISBANE** Registry on: 20 DEC 2018

Registrar:



To the Defendant: TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: QEII Court of Law Complex, 415 George Street, Brisbane.

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must filed a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

Representative Action

The Plaintiff brings this proceeding as a Representative Party under Part 13A of the *Civil Proceedings Act* 2011.

The Group Members to whom this proceeding relates are persons or corporations who between December 2011 and May 2012 (the ***Claim Period***) were shareholders of:

a) Boardwalk Resources Limited ABN 89 130 433 617 (***Boardwalk*** and the ***Boardwalk Shareholders***); and / or

b) Aston Resources Limited ABN 91 129 361 208 (***Aston*** and the ***Aston Shareholders***);

and

c) in or about May 2012 were issued with shares and restricted shares (the "***Milestone Shares***") in the Defendant as a result of the Defendant's merger with Aston and the Defendant's acquisition of Boardwalk on the basis that:

i. 50% of the Milestone Shares would become unrestricted upon Aston and Whitehaven obtaining the grant of mining lease and environmental approvals of 1 of Boardwalk's 4 mining projects;

ii. 100% of the Milestone Shares would become unrestricted upon Aston and Whitehaven obtaining the grant of mining lease and environmental approvals of 2 of Boardwalk's 4 mining projects;

d) have not commenced and settled any legal action against the Defendant in relation to the Milestone Shares remaining restricted.

The claims of the Plaintiffs give rise to the following substantial common issues of law or fact:

1. As at 11 December 2011, did Boardwalk have interests in 4 coal exploration projects, being the Ferndale Project, the Dingo Project, the Sienna Project and the Monto Project (the ***Boardwalk Projects***)?

2. On 11 December 2011, did the Boardwalk Shareholders and the Defendant entered into a written Share Purchase Agreement (the ***Boardwalk SPA*** and the ***Boardwalk Transaction***)?

3. What were the terms of the Boardwalk SPA?

4. Was it an implied term of the Boardwalk SPA that the parties would conduct themselves in good faith with one another so as to entitle the other to the benefit of the Boardwalk SPA (the ***Boardwalk Implied Term***).

5. On 12 December 2011, did Aston and the Defendant issued an announcement in relation to a proposed merger of the Defendant and Aston (the ***Merger***) and the proposed acquisition by the Defendant of Boardwalk which, if approved, would result in:
   a) all shares in Aston being transferred to Whitehaven;
   b) all Aston Shareholders excluding Ineligible Foreign Shareholders receiving shares in Whitehaven, including Milestone Shares (Scheme Consideration);
   c) Aston being de-listed from the Australian Stock Exchange (ASX);
   d) Aston becoming a wholly-owned subsidiary of Whitehaven;

e) the Boardwalk Transaction proceeding (subject to the other conditions of the Boardwalk SPA being satisfied)?

6. On 12 December 2011, did Aston and the Defendant released a written Investor Presentation, "Creating a leading independent Australian Coal Company" (the ***Investor Presentation***)? If so, did the Investor Presentation provide:

(a) at page 10:

"Whitehaven acquisition of Boardwalk Resources

Acquisition of Boardwalk Resources in exchange for 85.89m Whitehaven shares (not eligible for Whitehaven special dividend)

- *An additional 34.02m shares issued with restrictions subject to certain project development milestones being met (Milestone Shares)*

Boardwalk Resources shareholders or a nominee to contribute A$150m in cash to Boardwalk Resources which will be used for the ongoing development of its assets"

(b) at page 20 in relation to the Sienna Project, the next stage drilling program was to commence in second quarter of 2012 to define a "JORC" resource;

(c) at page 20 in relation to the Dingo Project, stage 3 drilling program planned for completion in March 2012 targeting a JORC resource in May 2012;

(d) at page 20, in relation to the Monto Project, drilling program planned for completion in April 2012 - further defining existing exploration target;

(e) at page 20, in relation to the Ferndale Project, stage 3 of the drilling program for the Ferndale Project is planned for completion in 2012 with the object to define the resource by May 2012;

(f) at page 21, in relation to the Dingo Project, stage 3 drilling would be completed in March 2012;

(g) at page 22, in relation to the Sienna Project, further drilling in the second quarter of 2012 was expected to comprise 52 open holes and 30 cored holes;

(h) at page 23, in relation to the Ferndale Project, stage 1 was expected to be completed by March 2012 and state 2 upon completion of bankable feasibility study or total exploration expenditure of $25,000,000;

(i) at page 24, in relation to the Monto Project, drilling was planned for completion in April 2012 further defining the existing exploration target.

7. Between approximately 12 December 2011 and March 2012, did the First Plaintiff (for Boardwalk and Aston), Aston (by its officers, Mark Vaile, Tony Haggarty and Philip Christensen) and the Defendant (by its officers, John Conde and Allan Davies) attend and appeared at a series of investor roadshows at which the Investor Presentation was presented to Aston shareholders and representatives for Aston shareholders (the ***Roadshows***)?

8. At the Roadshows:

(a) Was the Investor Presentation was distributed;

(b) Did the First Plaintiff, Aston and the Defendant (by their representatives as outlined above) state:

(i) the Boardwalk Projects were continuing to be developed and would obtain environmental approvals and mining lease approvals for at least 2 of the Boardwalk Projects within 1 to 2 years;

(ii) if the Boardwalk Transaction and the Merger proceeded, the First Plaintiff would be injecting $150,000,000 into Boardwalk for the purpose of progressing the Boardwalk Projects and bringing them into operation;

(iii) the injection of funds (being the $150,000,000) would allow the Boardwalk Projects to be pursued after the Merger without impacting on Whitehaven's bottom line;

(iv) the injection of funds (being the $150,000,000) would result in the Milestone shares becoming unrestricted in the near future and the First Plaintiff would not be investing such significant monies into Boardwalk if this were not the case.

9. By virtue of the Investor Presentation and the statements made at the Roadshows (as identified immediately above), did the Defendant represented to the Plaintiffs and Boardwalk and Aston Shareholders that:

(a) the First Plaintiff would be injecting $150,000,000 into Boardwalk if Merger proceeded and these funds would be applied to the development of the Boardwalk Projects including obtaining environmental approvals and mining lease approvals;

(b) those environmental approvals and mining lease approvals for at least 2 of the Boardwalk Projects were likely to be obtained in 1 to 2 years and this would result in the Milestone shares becoming unrestricted;

(the ***Boardwalk Projects Representation***).

10. To the extent that at the Roadshows the First Plaintiff and/or the Aston representatives made statements to the effect of those identified at sub-paragraph 8(b) immediately above, and the representatives of the Defendant remained silent in response, did the Defendant by its silence further represented those matters described at paragraph 9 above (the ***Silence***).

11. On 9 March 2012, did Aston and the Defendant issued a written Scheme Booklet proposing the Merger. If so, did the Scheme Booklet provide:

(a) at page 4, Aston (by its Chairman Nathan Tinkler) recommended to Aston Shareholders that they vote in favour of the Merger;

(b) at page 5, Aston (by its independent directors) recommended to Aston Shareholders that they vote in favour of the Merger;

(c) at page 6, Whitehaven (by its Chairman John Conde) advised Aston Shareholders that Whitehaven's Board of Directors unanimously supported the Merger;

(d) at part 5.8.1, Whitehaven represented to Aston Shareholders as follows:

"Boardwalk Transaction summary

....

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

A$150 million cash to Boardwalk if the Scheme becomes Effective, which will include the amount of any loans made to Boardwalk by BRI after 11 December 2011 to assist in funding Boardwalk's operations."

12. Properly understood was the reference described at sub-paragraph (d) immediately above to the funding of Boardwalk's operations with the First Plaintiff's Advance a reference to the funding of the of the necessary steps for the grant of mining leases and environmental approvals at any of the Boardwalk Projects in order to release the Milestone Shares from the Restriction Arrangements pursuant to the Boardwalk SPA and the Restriction Deed (the ***2nd Boardwalk Projects Representation***).

13. In all the circumstances, did the 2nd Boardwalk Projects Representation reinforce the 1st Boardwalk Projects Representation.

14. On 16 April 2012:

    (a) did Whitehaven shareholders vote at an extraordinary general meeting of Whitehaven to proceed with the Boardwalk Transaction;

    (b) did Aston shareholders vote at an extraordinary general meeting to proceed with the Merger.

15. On 18 April 2012, did the Federal Court of Australia approved the Merger pursuant to s.411 of the *Corporations Act*.

16. On 2 May 2012:

    (a) was the Merger was implemented;

    (b) was the Boardwalk Transaction completed.

17. Also on or about 2 May 2012:

    (a) did the First Plaintiff make payment of $84,990,968.33 to Boardwalk pursuant to the Boardwalk SPA;

    (b) were 85,890,000 Whitehaven Shares issued to Boardwalk Shareholders pursuant to the Boardwalk SPA;

    (c) were 34,020,000 Milestone Shares issued to Boardwalk Shareholders pursuant to the Boardwalk SPA;

(d) were all shares in Aston transferred to Whitehaven and Ason delisted from the ASX;

(e) were each of the Aston Shareholders issued 1.89 Whitehaven Shares for each Aston Share they previously held.

18. Since 2 May 2012, has the Defendant or Boardwalk:

(a) obtained the grant of mining leases or environmental approvals for the Boardwalk Projects;

(b) released any of the Milestone Shares from the restrictions under the Restriction Deed.

19. Further, since 2 May 2012, have the Defendant and Boardwalk failed to apply the First Plaintiff's Advance to the Boardwalk Projects in order to release the Milestone Shares from the Restriction Arrangements pursuant to the Boardwalk SPA and the Restriction Deed.

20. By failing to apply the First Defendant's Advance to the Boardwalk Projects or to otherwise apply or obtain any of the mining leases and environmental approvals for any of the Boardwalk Projects, and thereby failing to trigger the release of the Milestone Shares from the restrictions under the Restriction Deed, has the Defendant breached the Boardwalk Implied Term.

21. Were the 1st Boardwalk Representation, the Silence and the 2nd Boardwalk Representation misleading and deceptive or likely to be misleading and deceptive because:

(a) the Defendant did not within a reasonable time or at all apply the First Defendant's Advance to the Boardwalk Projects or otherwise procure the grant of the mining leases and environmental approvals necessary to trigger the release of the Milestone Shares from the restrictions under the Restriction Deed;

(b) the Defendant had no reasonable basis for making the 1st Boardwalk Representation and the 2nd Boardwalk Representation or alternatively was reckless and careless in making the 1st and 2nd Boardwalk Representations;

(c) the Defendant had no reasonable basis for the Silence or alternatively was manifestly reckless and careless in remaining silent.

22. If the Defendant had not made the 1st Boardwalk Representation and the 2nd Boardwalk Representation and had not engaged in the Silence, would the First Plaintiff not have entered into the Boardwalk SSA and the shareholders of Aston not have approved the Merger in the extraordinary general meeting on 16 April 2012.

23. In the circumstances did the Defendant breach s.18 of Schedule 2 to the Australian Consumer Law being Schedule 2 to the *Competition and Consumer Act 2011* (Cth) (the ***ACL***) by engaging in misleading and deceptive conduct.

PARTICULARS OF THE PLAINTIFF:

Name:	Nathan Leslie Tinkler as trustee for the Boardwalk Resources Trust
Plaintiff's residential or business address:	c/- Waterfront Place Level 18 1 Eagle Street BRISBANE QLD 4000
Plaintiff's solicitors name:	Ashley Stanton
and firm name:	AJ & Co Lawyers
Solicitor's business address:	Waterfront Place, Level 18 1 Eagle Street BRISBANE QLD 4000
Address for service:	Waterfront Place, Level 18 1 Eagle Street BRISBANE QLD 4000
Dx *(if any)*:	
Telephone:	+ 61 7 3708 0920
Fax:	+ 61 7 3708 0999
E-mail address *(if any)*:	ashley@ajandco.com.au

Signed:

Description: Solicitor for the Plaintiff

Dated: 20 December 2018

This Claim is to be served on: Whitehaven Coal Limited

ABN 68 124 425 396

of: Level 28

259 George Street

SYDNEY NSW 2000

SUPREME COURT OF QUEENSLAND

REGISTRY: **BRISBANE**
NUMBER:

Plaintiff: **Nathan Leslie Tinkler as trustee for the Boardwalk Resources Trust**

AND

Defendant: **Whitehaven Coal Limited ABN 68 124 425 396**

STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts -

A. Introduction

1. The Plaintiff commences this proceeding as a Representative Party pursuant to Part 13A of the *Civil Proceedings Act 2011* (Qld).

2. A Group Member to whom this proceeding relates is an individual or a corporation who between December 2011 and May 2012 (the ***Claim Period***) was a shareholder of either:

   (a) Boardwalk Resources Limited ABN 89 130 433 617 (***Boardwalk*** and the ***Boardwalk Shareholders***); or

   (b) Aston Resources Limited ABN 91 129 361 208 (***Aston*** and the ***Aston Shareholders***);

   and who

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(c) in or about May 2012 was issued with shares and restricted shares (***Milestone Shares***) in Whitehaven Coal Limited (***Whitehaven***) as a result of Whitehaven's merger with Aston and Whitehaven's acquisition of Boardwalk.

(The persons who the Plaintiff represents in these proceedings will be referred to as ***Group Members***.)

3. The claims made herein are in respect of or arise out of the same, similar or related circumstances in that:

(a) the Plaintiff and Group Members were all shareholders of Boardwalk and/or Aston during the Claim Period;

(b) by virtue of a Share Sale Agreement dated 11 December 2011, the Plaintiff and those Group Members who owned shares in Boardwalk entered into an agreement to sell their shares in Boardwalk to the Defendant on certain conditions (the ***Boardwalk Transaction***).

(c) the Boardwalk Transaction was conditional on a merger between Aston and Whitehaven proceeding and being approved by the Court (the ***Merger***);

(d) if the Boardwalk Transaction and the Merger proceeded:

(i) the Plaintiff and Group Members who held shares in Boardwalk would receive "Milestone" shares in Whitehaven that would trigger and become fully paid up shares in Whitehaven upon Boardwalks' mining projects which were identified in the Boardwalk Transaction being approved;

(ii) the Plaintiff and Group Members who held shares in Aston would receive "Milestone" shares in Whitehaven that would trigger and become fully paid up shares in Whitehaven upon Boardwalks' mining projects which were identified in the Boardwalk Transaction being approved;

(e) Milestone Shares are shares in Whitehaven that become fully paid up shares upon 2 of the 4 Boardwalk Projects identified in the Boardwalk Transaction being approved;

(f) Whitehaven represented that, if the Boardwalk Transaction and the Merger proceeded, it would invest monies paid to it and Boardwalk by the Plaintiff to

invest in Boardwalk's operations and invest in its assets and thereby trigger the Milestone Shares;

(g) Boardwalk and Aston recommended to their respective shareholders that they proceed with the Boardwalk Transaction and the Merger;

(h) on 16 April 2012, the Boardwalk Transaction was approved by Whitehaven shareholders in extraordinary general meeting and Aston Shareholders approved the Merger in extraordinary general meeting;

(i) on 18 April 2012, the Federal Court of Australia approved the Merger;

(j) on or about 2 May 2012:

(i) the Merger was implemented;

(ii) the Boardwalk Transaction was completed;

(iii) the Group Members were issued with Whitehaven Shares and Whitehaven Milestone Shares;

(k) since 2 May 2012, Whitehaven and Boardwalk have failed to proceed with Boardwalk's mining projects identified in the Boardwalk Transaction and because of this have failed to trigger the Milestone Shares within a reasonable time of the Merger or at all such that all of the Milestone Shares held by Group Members remain restricted and of no value.

4. The common issues of law or fact that arise in this proceeding are set out in the Claim filed herewith.

5. As at the date of the commencement of this proceeding there are seven or more persons who are Group Members having claims against the Defendant.

6. The Group Members do not include any of the class of persons referred to in s. 103D(2) of the *Civil Proceedings Act 2011* (Qld).

B. The Plaintiff

7. The Plaintiff:

(a) is a natural person over the age of 18 years and capable of being sued;

(b) is the trustee of the Boardwalk Resources Trust (the ***BR Trust***), having been appointed on 3 March 2016 by virtue of Deed of Confirmation and Ratification - Boardwalk Resources Trust;

(c) commences and pursues this claim in his capacity as Trustee of the BR Trust.

8. During the Claim Period, Boardwalk Resources Investments Pty Ltd (in liquidation) was the Trustee of the BR Trust and held, in its capacity as Trustee of the BR Trust:

(a) 96,387,500 shares in Boardwalk;

(b) 64,845,799 shares in Aston;

(c) after the Merger, held 26,678,979 Milestone Shares in Whitehaven.

9. By virtue of his appointment as Trustee of the BR Trust on 3 March 2016, the Plaintiff held and continues to hold the shares 26,678,979 Milestone Shares in Whitehaven above in his capacity as Trustee and all rights and choses in action with regard to those shares including the chose in action the subject of this proceeding.

C. The Defendant

10. Since the beginning of the Claim Period, the Defendant was and remains:

(a) a duly incorporated company capable of being sued;

(b) a "corporation' as that term is defined in section 4 of the *Trade Practices Act* 1974 (**TPA**);

(c) a "person" as that term is used in section 18 Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**).

11. At all material times the Defendant:

(a) was engaged in the business of coal production and the mining and transportation of coal;

(b) made coal (in its various forms) available to be sold and distributed to the Australian market and international coal market during the Claim Period;

(c) was a listed company on the Australian Stock Exchange (**ASX**) and engaged in the trading of commodities and derivatives on the ASX.

Announcement and proposed merger and acquisition

Boardwalk Transaction

12. As at 11 December 2011, Aston had interests in 4 coal exploration projects, being the Ferndale Project, the Dingo Project, the Sienna Project and the Monto Project (the ***Boardwalk Projects***).

Particulars

The particulars of the projects are as described at part 5.8.6 of the Scheme Booklet and in the Investor Presentation as identified in the following table:

Project	**Ferndale Project**	**Dingo Project**	**Sienna Project**	**Monto Project**
Direct interest	Right to acquire up to 50%	51% and right to acquire up to 70%	100%	100%
Basin	Sydney	Bowen	Bowen	Mulgildie
Estimated area (Ha)	3,742	25,600	10,800	29,600
Target stratigraphy	Newcastle and Wittingham coal measures	Baralaba and Burngrove coal measures	Rangal, Moranbah and German Creek coal measures	Mulgildie coal measures
Target coal type	Semi-soft coking coal and thermal coal	Hard coking coal, PCI and thermal coal	Hard coking coal, PCI and thermal coal	Thermal coal
Target mining method	Open-cut/ underground	Open-cut	Open-cut/underground	Open-cut
Exploration target (Mt)[62]	99 - 453	82 - 462	14 - 565	0 - 1,832
Rail infrastructure	Immediately adjacent to rail line	Intersected by rai line	18km by rail line	8km by rail line
Port infrastructure	Newcastle (125km away)	Gladstone (225km away)	Abbot Point (440km away) or Dudgeon Point (285km away)	Gladstone (180km away)

13. On 11 December 2011, the Plaintiff and those Group Members who held shares in Boardwalk and the Defendant entered into an agreement pursuant to which they would sell to the Defendant all of their shares in Boardwalk (***Boardwalk Transaction***).

Particulars

The agreement was in writing dated 11 November 2011 and was called Share Purchase Agreement

14. Pursuant to the Boardwalk Transaction:

(a) Whitehaven agreed to acquire all of the shares and other issued securities in Boardwalk on the terms and conditions described therein;

(b) the sale was conditional on the Merger between Aston and Whitehaven taking effect and being approved by the Court pursuant to s.411(10) of the *Corporations Act 2001* (Cth) (**Corporations Act**);

(c) as consideration for the acquisition, the Plaintiff and Group Members who held Boardwalk shares were to be issued 85.89 million Whitehaven Shares and a further 34.02 million Whitehaven Milestone Shares with rights restricted in accordance with the restriction deed comprising Annexure A to the Boardwalk Transaction (the ***Restriction Deed***);

(d) the restrictions on the Milestone Shares would cease to apply and the Milestone Shares would become fully paid up ordinary shares upon the occurrence of certain trigger events set out in the Restriction Deed including:

(i) the grant of mining leases and environmental approvals at any two of the Boardwalk Projects, whereupon restrictions on all Milestone Shares would be lifted; or

(ii) the grant of mining leases and environmental approvals for any one of the Boardwalk Projects, whereupon restrictions over 17.01 million of the 34.02 Milestone Shares would be lifted;

(e) by the business day after the date the Merger comes into effect pursuant to s.411(10) of the *Corporations Act*, the Plaintiff or its nominee was required to subscribe for the Subscription Shares (being 75,786,713 shares in Boardwalk) and make payment for the Subscription Shares (being US$150,000,000) to Boardwalk to fund its operations (the ***Payment***).

15. It was an implied term of the Boardwalk Transaction that the parties would conduct themselves in good faith with one another so as to entitle the other to the benefit of the Boardwalk Transaction (the ***Boardwalk Implied Term***).

Aston Resources & Merger

16. Prior to 12 December 2011, the boards of both Whitehaven and Aston unanimously agreed to propose a merger of the two companies on condition that Whitehaven acquired the mining interests held by Boardwalk and that Boardwalk would contribute US$150,000,000 for the ongoing development of those mining interests.

17. On 12 December 2011, Aston and the Defendant issued an ASX announcement in relation to the proposed Merger and the proposed acquisition by the Defendant of Boardwalk which, if approved, would result in:

    (a) all of the 'scheme shares' held by 'scheme participants' in Aston being transferred to Whitehaven;

    (b) all Aston Shareholders excluding Ineligible Foreign Shareholders (who were scheme participants) receiving newly allotted and issued shares in Whitehaven, including Milestone Shares (the ***Scheme Consideration***);

    (c) Aston being de-listed from the Australian Stock Exchange (**ASX**);

    (d) Aston becoming a wholly-owned subsidiary of Whitehaven;

    (e) the Boardwalk Transaction proceeding (subject to the other conditions of the Boardwalk Transaction being satisfied).

18. The Merger's implementation date for the issue of Scheme Consideration to the Plaintiff and Group Members was 2 May 2011.

19. Also, on 12 December 2011, Aston and the Defendant released an Investor Presentation entitled "*Creating a leading independent Australian Coal Company*" (the ***Investor Presentation***).

20. The Investor Presentation provided, relevantly:

    (a) at page 10:

    "Whitehaven acquisition of Boardwalk Resources

    Acquisition of Boardwalk Resources in exchange for 85.89m Whitehaven shares (not eligible for Whitehaven special dividend)

    - *An additional 34.02m shares issued with restrictions subject to certain project development milestones being met (Milestone Shares)*

    Boardwalk Resources shareholders or a nominee to contribute A$150m in cash to Boardwalk Resources which will be used for the ongoing development of its assets"

    (b) at page 20 in relation to the Sienna Project, the next stage drilling program was to commence in second quarter of 2012 to define a "JORC" resource;

(c) at page 20 in relation to the Dingo Project, stage 3 drilling program planned for completion in March 2012 targeting a JORC resource in May 2012;

(d) at page 20, in relation to the Monto Project, drilling program planned for completion in April 2012 - further defining existing exploration target;

(e) at page 20, in relation to the Ferndale Project, stage 3 of the drilling program for the Ferndale Project is planned for completion in 2012 with the object to define the resource by May 2012;

(f) at page 21, in relation to the Dingo Project, stage 3 drilling would be completed in March 2012;

(g) at page 22, in relation to the Sienna Project, further drilling in the second quarter of 2012 was expected to comprise 52 open holes and 30 cored holes;

(h) at page 23, in relation to the Ferndale Project, stage 1 was expected to be completed by March 2012 and state 2 upon completion of bankable feasibility study or total exploration expenditure of $25,000,000;

(i) at page 24, in relation to the Monto Project, drilling was planned for completion in April 2012 further defining the existing exploration target.

21. Between approximately 12 December 2011 and March 2012, the Plaintiff (for Boardwalk and Aston), Aston (by its officers, Mark Vaile, Tony Haggarty and Philip Christensen) and the Defendant (by its officers, John Conde and Allan Davies) attended and appeared at a series of investor roadshows at which the Investor Presentation was provided to Aston shareholders and representatives for Aston shareholders (the ***Roadshows***) and its terms and details were expanded.

22. At the Roadshows:

(a) the Investor Presentation was distributed;

(b) the Aston and the Defendant (by their representatives as identified above) stated:

(i) the Boardwalk Projects would continue to be developed and environmental approvals and mining lease approvals would be obtained for at least 2 of the Boardwalk Projects within 1 to 2 years;

(ii) the Plaintiff would be providing US$150,000,000 to Boardwalk for the purpose of progressing the Boardwalk Projects and bringing them into operation;

(iii) the injection of funds (being the US$150,000,000) would allow the Boardwalk Projects to be pursued after the Merger without impacting on Whitehaven's bottom line;

(iv) the injection of funds (being the US$150,000,000) would result in at least 2 of the Boardwalk Projects being developed within 1 or 2 years and the Milestone shares becoming ordinary paid up shares;

(c) the Plaintiff said in his personal capacity that he would not be paying such significant monies to Whitehaven if he was not confident that the Boardwalk Projects would be brought on line quickly.

23. By virtue of the Investor Presentation and the statements made at the Roadshows (as identified immediately above), the Defendant represented to the Plaintiff and Group Members that:

(a) the Plaintiff would be paying Boardwalk AUD$150,000,000 and these funds would be applied to the development of the Boardwalk Projects including obtaining environmental approvals and mining lease approvals;

(b) those environmental approvals and mining lease approvals for at least 2 of the Boardwalk Projects were likely to be obtained in 1 to 2 years and this would result in the Milestone shares becoming unrestricted;

(the ***Boardwalk Projects Representation***).

24. Further, to the extent that at the Roadshows the Aston representatives made statements to the effect of those identified at sub-paragraph 22(b) above, and the representatives of the Defendant remained silent in response, the Defendant by its silence further represented those matters described at paragraph 23 above (the ***Silence***).

25. On 9 March 2012, Aston and the Defendant issued a written Scheme Booklet proposing the Merger and setting out information for Group Members to consider when determining how to vote on the Merger.

26. In the Scheme Booklet:

(a) at page 4, Aston (by its Chairman Nathan Tinkler) recommended to Aston Shareholders that they vote in favour of the Merger;

(b) at page 5, Aston (by its independent directors) recommended to Aston Shareholders that they vote in favour of the Merger;

(c) at page 6, Whitehaven (by its Chairman John Conde) advised Aston Shareholders that Whitehaven's Board of Directors unanimously supported the Merger;

(d) at part 5.8.1, Whitehaven represented to Aston Shareholders as follows:

"Boardwalk Transaction summary

....

During the period between execution of the Boardwalk Transaction Documents and 31 March 2012, BRI will make loans to Boardwalk to assist with funding of Boardwalk's operations. Existing Boardwalk Securityholders will contribute A$150 million cash to Boardwalk if the Scheme becomes Effective, which will include the amount of any loans made to Boardwalk by BRI after 11 December 2011 to assist in funding Boardwalk's operations."

27. Properly understood the reference described at sub-paragraph (d) immediately above to the funding of Boardwalk's operations was a reference to the funding of the of the necessary steps for the grant of mining leases and environmental approvals at any of the Boardwalk Projects in order to release the Milestone Shares pursuant to the Boardwalk Transaction and the Restriction Deed (the ***Second Boardwalk Projects Representation***).

28. In all the circumstances, the Second Boardwalk Projects Representation reinforced and confirmed the First Boardwalk Projects Representation.

Completion of Boardwalk Transaction and the Merger

29. On 16 April 2012:

(a) Whitehaven shareholders voted at an extraordinary general meeting of Whitehaven to proceed with the Boardwalk Transaction;

(b) Aston shareholders voted at an extraordinary general meeting to proceed with the Merger.

30. On 18 April 2012, the Federal Court of Australia approved the Merger pursuant to s.411 of the *Corporations Act*.

31. On 2 May 2012:

(a) the Merger was implemented;

(b) the Boardwalk Transaction was completed.

32. Also on or about 2 May 2012:

(a) the Plaintiff made the Payment to Boardwalk pursuant to the Boardwalk Transaction;

(b) 85,890,000 Whitehaven Shares were issued to Boardwalk Shareholders pursuant to the Boardwalk SPA;

(c) all shares in Boardwalk were transferred to Whitehaven;

(d) 34,020,000 Milestone Shares were issued to Boardwalk Shareholders pursuant to the Boardwalk SPA;

(e) all shares in Aston were transferred to Whitehaven and Aston was delisted from the ASX;

(f) each of the Aston Shareholders were issued 1.89 Whitehaven Shares for each Aston Share they previously held.

33. As a result of the Boardwalk Transaction and the Merger the Plaintiff was issued 26,678,979 Milestone Shares in Whitehaven.

Events since the Boardwalk Transaction and the Merger

34. Since 2 May 2012, neither the Defendant nor Boardwalk has:

(a) obtained the grant of mining leases or environmental approvals for the Boardwalk Projects;

(b) released any of the Milestone Shares from the restrictions under the Restriction Deed.

35. Since 2 May 2012, the Defendant and Boardwalk have failed to:

(a) apply the Payment to the Boardwalk Projects;

(b) obtain environmental approvals and mining lease approvals with regard to any of the Boardwalk Projects;

(c) release the Milestone Shares.

Breach of Contract

36. By failing to apply the First Defendant's Advance to the Boardwalk Projects or to otherwise apply or obtain any of the mining leases and environmental approvals for any of the Boardwalk Projects, and thereby failing to trigger the release of the

Milestone Shares from the restrictions under the Restriction Deed, the Defendant breached the Boardwalk Implied Term.

Misleading and Deceptive Conduct

37. The 1st Boardwalk Representation, the Silence and the 2nd Boardwalk Representation were misleading and deceptive or likely to be misleading and deceptive to the Plaintiff and the Group Members because:

    (a) the Defendant did not within a reasonable time or at all apply the Payment to the Boardwalk Projects or otherwise procure the grant of the mining leases and environmental approvals necessary to trigger the release of the Milestone Shares from the restrictions under the Restriction Deed;

    (b) the Defendant had no reasonable basis for making the First Boardwalk Representation and the Second Boardwalk Representation or alternatively was reckless and careless in making the First and Second Boardwalk Representations;

    (c) the Defendant had no reasonable basis for the Silence or alternatively was manifestly reckless and careless in remaining silent.

38. The Plaintiff relied on the First and Second Boardwalk Representations and the Silence in supporting the Merger and would not otherwise have done so if the true position was known to it.

39. If the Defendant had not made the First Boardwalk Representation and the Second Boardwalk Representation and had not engaged in the Silence, the Merger between Whitehaven and Aston would not have taken place.

40. In the circumstances described above at paragraphs 37 to 39, the Defendant breached s.18 of Schedule 2 to the Australian Consumer Law being Schedule 2 to the *Competition and Consumer Act 2011* (Cth) (the ***ACL***) by engaging in misleading and deceptive conduct.

Damages

41. As a result of the Defendant's breach of contract and misleading and deceptive conduct in breach of s.18 of the ACL, the Plaintiff has suffered loss and damage being the difference between the present value of the Milestone Shares held by each Plaintiff as an unrealised prospect and the value of the Milestone Shares if they had become unrestricted within a reasonable time of the completion of the Boardwalk Transaction and the Merger.

Particulars of Loss and Damage

The Plaintiff will provide further and better particulars of the loss and damage after disclosure in the proceeding and expert evidence. In the meantime the Plaintiff says the best particulars it can presently provide are that the environmental and lease approvals for at least 2 of the Boardwalk Projects would reasonably have been obtained in the period of June 2013 to June 2014 if the Defendant had applied the Plaintiff's Advance to the Boardwalk Projects and that the lost value is the lost value (including dividends) of the Milestone shares as if they had been unrestricted from this time.

42. Further, the Plaintiff has suffered loss and damage in the sum of the Plaintiff's Advance in circumstances where, but for the misleading and deceptive conduct the Merger would not have proceeded, and the Plaintiff would not have borrowed the funds necessary to make the advance.

Particulars of Loss and Damage

The Plaintiff will provide further and better particulars of the loss and damage after disclosure in the proceeding and expert evidence.

The Plaintiff claims the following relief -

1. Damages for breach of contract in a sum to be assessed by the Court.

2. Further or alternatively, pursuant to s.236 of Schedule 2 of the Competition and Consumer Act 2011 (Cth) (the ***ACL***), damages for misleading and deceptive in such sum as assessed by the Court.

3. Interest pursuant to s.58 of the Civil Proceedings Act 2011 (Qld).

4. Costs.

5. Such other order as the Court deems fit.

Signed: 

Description: Solicitor for the Plaintiff

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

Form 1
(section 16)

Service and Execution of Process Act 1992

Notice to defendant[1]

Please read this notice and the attached document very carefully

If you have any trouble understanding them you should get legal advice as soon as possible

Attached to this notice is a Claim and Statement of Claim ("the attached process") issued out of the Supreme Court of Queensland at Brisbane.

Service of the attached process outside Queensland is authorised by the *Service and Execution of Process Act 1992.*

Your rights

If a court of a State or Territory other than Queensland is the appropriate court to determine the claim against you set out in the attached process, you may be able to have the proceeding stayed by applying to the Supreme Court of Queensland at Brisbane.

If you think the proceeding should be stayed or transferred, you should get legal advice as soon as possible.

Contesting this claim

If you want to contest this claim, you must take any action set out in the attached process as being necessary to contest the claim.

If you want to contest this claim, you must also file a notice of intention to defend in the Supreme Court of Queensland at Brisbane. You have only 28 days after receiving the attached process to do so.

The notice of intention to defend must contain

- an address in Australia where documents can be left for you or sent to you.