



Environmental Defenders Office

Our Ref: S6074

11 December 2023

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CONFIDENTIAL AND PRIVILEGED

Dear Ms Smith

Complaint regarding Whitehaven Coal Limited: potential misleading or deceptive conduct and breach of continuous disclosure obligations

1. We act for a shareholder in Whitehaven Coal Ltd, Clare Smith.
2. Our client is concerned about certain statements made by BHP Group Ltd (ASX: BHP) (**BHP**) and Whitehaven Coal Ltd (ASX: WHC) (**Whitehaven**) to the Australian Securities Exchange (**ASX**), in August and October 2023 (**the Statements**), regarding the sale by BHP of the Blackwater and Daunia mine to Whitehaven. Importantly, the Statements did not disclose with clarity that the sale included an undeveloped asset known as Blackwater South. This was important for several reasons including; the significant investment required to seek approval for and develop the asset which is considered a separate development from both an approvals and operational perspective.
3. A summary of the Statements made by BHP and Whitehaven are contained in **Annexure A**.
4. For the reasons that follow, our client considers that BHP and Whitehaven's omissions or silence on the relevant information until after the sale on the inclusion of Blackwater South

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may constitute misleading or deceptive conduct in contravention of section 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**) and/or section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

5. Further, our client considers that BHP and Whitehaven's statements may also contravene its continuous disclosure obligations under section 674 of the Corporations Act and/or or Australian Securities Exchange (**ASX**) Listing Rule 3.1.
6. As such, our client requests that:
 - (a) Australian Securities and Investments Commission (**ASIC**) investigate whether BHP and/or Whitehaven has engaged in misleading or deceptive conduct in contravention of the Corporations Act and/or ASIC Act;
 - (b) ASIC investigate whether BHP and/or Whitehaven has contravened its continuous disclosure obligation under section 674 of the Corporations Act and/or ASX Listing Rule 3.1; and
 - (c) ASX require BHP and/or Whitehaven to issue a corrective announcement in relation to the relevant statements.

Background

7. On 18 October 2023, BHP and Mitsubishi Development Pty Ltd (**MDP**), each owning a 50% interest in the joint venture operating the Blackwater and Daunia metallurgical coal mines in the Bowen Basin in Queensland (**Joint Venture**), announced they were divesting from the Joint Venture. A sale agreement was entered into with Whitehaven to purchase the two operating mines for US\$4.1 billion, with completion to occur in June 2024. The sale included the operating control, current reserves of 183Mt at Blackwater and 67Mt at Daunia and future environmental liabilities and rehabilitation obligations. The joint venture continued to operate the mines until completion of the sale agreement.¹
8. Until the sale, Blackwater was one of nine metallurgical coal mines operated by the joint venture in Queensland. It is one of the longest coal mines in the Southern hemisphere with a strike length of 80km, operating since 1967, producing both metallurgical coal and a small amount of thermal coal. In 2023 it produced around 5,055 kt of coal per annum and currently has approval to operate until 2047.
9. Daunia mine is a smaller mine run by the joint venture that opened in 2013 and is approved to operate until 2031. It produced around 1,989 kt of metallurgical coal per annum in 2023, but has approval to mine 4 million tonnes per annum of coal.
10. The Blackwater South Coking Coal project (**Blackwater South**) has been declared a coordinated project and is currently undergoing an EIS with the Queensland Government. The proposal contemplates a greenfield metallurgical coal mine requiring \$1 billion of investment, with a yield of up to 8 million tonnes of product per annum for approximately 90 years for steel production. It is an open cut mine that will commence construction in 2029

¹ [BHP announces divestment of Blackwater and Daunia.](#)

and operate until 2119.² While BHP has indicated it doesn't intend to proceed with the project due to changes to royalties in Queensland, the EIS remains on exhibition and has not been withdrawn.

11. The Initial Advice Statement for Blackwater South states³:

Whilst located adjacent to the existing BMA operations at the Blackwater Mine, the Project is considered a separate development, from both an approvals and operational perspective.

Whitehaven's relevant statements

12. Whitehaven made a number of key statements to the ASX as follows:

- On 18 September 2023, Whitehaven confirmed it was participating in a sales process in relation to the Daunia and Blackwater metallurgical coal mines in Queensland.⁴
- On 18 October 2023, Whitehaven confirmed it was acquiring the Daunia and Blackwater Coal mines.⁵

13. Whitehaven's ASX announcement on 18 October 2023⁶ justifies the acquisition with strategic rationale including a statement that "The Assets are attractively located in Queensland's Bowen basin with a range of improvement and growth options including opportunities to increase production and materially expand the life of mine ("LOM") at Blackwater." When read with the map located on page 8 of the ASX announcement (see Appendix B), references are made to indicate it may include the Blackwater South proposed expansion, and there is a reference to shares in South Blackwater Coal Pty Ltd.

14. Further, the 18 October announcement includes the strategic rationale that the acquisition transforms Whitehaven into a metallurgical coal producer, in line with strategy. In particular, "Exploration planning at Blackwater in particular will focus on conversion of Resources to Reserves within the **current mine plan**".⁷ The map at page 8 which highlights areas of the Blackwater South tenements as future potential mining, there is a clear contradiction. The current mine plan does not encompass the tenements of Blackwater South.

15. The full details of the statements are contained at Annexure A.

² [Blackwater South Coking Coal project | State Development, Infrastructure, Local Government and Planning](#).

³ 19 November 2021 *Blackwater South Coking Coal Project – Initial Advice Statement* pES-1. Retrieved from <https://eisdocs.dsdp.qld.gov.au/Blackwater%20South%20Coking%20Coal/Initial%20Advice%20Statement/blackwater-south-coking-coal-project-initial-advice-statement.PDF>.

⁴ ASX Announcement *Whitehaven's response to media article* 18 September 2023 Retrieved from <https://whitehavencoal.com.au/investors/asx-announcements/>.

⁵ ASX announcement *Acquisition of Dunia and Blackwater Mines Announcement* 18 October 2023 Retrieved from <https://whitehavencoal.com.au/investors/asx-announcements/>.

⁶ See p3 <https://whitehavencoal.com.au/investors/asx-announcements/>.

⁷ Whitehaven ASX announcement 18 October 2023, p 3 <https://whitehavencoal.com.au/investors/asx-announcements/>.

16. It was not until after the agreement during the Whitehaven AGM on 26 October 2023, when questioned by shareholders that Paul Flynn, CEO of Whitehaven clarified that the sale agreement included the undeveloped coal project at Blackwater South.
17. Our client considers that by making the Statements, alone or in combination, Whitehaven represented that it was purchasing the operating Blackwater and Daunia mines from BHP and was initially silent as to whether the Blackwater South expansion project was included (the **Representations**).

BHP's relevant statements:

18. BHP made a number of key statements to the ASX as follows:
 - On 22 August 2023, BHP confirmed it was progressing its plans to sell the Daunia and Blackwater metallurgical coal mines in Queensland.
 - On 18 October 2023, BHP confirmed it was selling the Daunia and Blackwater Coal mines to Whitehaven.
19. The full detail of all of the relevant statements are contained at Annexure A.
20. On 1 November 2023, BHP also confirmed for the first time at their AGM when questioned by shareholders that the sale included Blackwater South.

Why the Statements are potentially misleading or deceptive

Relevant provisions of the Corporations Act and ASIC Act

21. Section 1041H of the Corporations Act provides:
 - (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.
22. Section 12DA of the ASIC Act provides:
 - (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.
23. The Statements were aimed at members of the public including investors or potential investors in Whitehaven or BHP, having been made publicly to the ASX and also published on their respective website. As such, the Representation was made in relation to a financial product (being Whitehaven and BHP's shares⁸) for the purposes of section 1041H of the Corporations Act, or in relation to financial services, as they relate to dealing in or issuing of

⁸ A security in the form of a share is expressly stated to be a financial product in sections 764A with 761A of the Corporations Act.

a financial product (being Whitehaven and BHP's shares⁹),¹⁰ for the purposes of section 12DA of the ASIC Act.¹¹

24. The Statements were also made in trade or commerce for the purposes of section 12DA of the ASIC Act, being external communications made in furtherance of Whitehaven and BHP's commercial interests.¹²

Alleged misleading or deceptive nature of the Statements

25. Our client considers that the Statements are potentially misleading or deceptive because, contrary to the Representation:
- (a) The information around the sale agreement indicated that Whitehaven was purchasing working coal mines with guaranteed coal reserves and work forces in place to continue mining operations with fairly guaranteed returns on any investment. There was a reference to further expansion area at the time of the sale, but as indicated above, those references did not include the future mining tenements and site area for Blackwater South expansion project or make it clear the shares in Blackwater South Pty Ltd related to that area.
 - (b) Investors in Whitehaven were not advised prior to the agreement whether it included future mining tenements, an asset that is yet to be developed and will have to go through a lengthy approval process to obtain the relevant lease to enable it to operate as a coal mine. Given the term of the approval is for 90 years there are significant risks that it will not be approved given the significant climate impacts of ongoing fossil fuel development. Objectors have rights of appeal to the Land Court and Federal approvals are also required. Last year the Land Court recommended refusal a large coal project proposed by Waratah Coal and as a result the Environmental Assessment was rejected by the Minister.¹³
 - (c) The Blackwater South project will require significant investment to both progress approvals and possible court processes before a possible return is available to

⁹ A security in the form of a share is expressly stated to be a financial product in section 12BAA(7) of the ASIC Act.

¹⁰ ASIC Act, section 12BAB.

¹¹ The authorities support the conclusion that a public company that makes public statements that are directed to or easily accessible by its investors or potential investors, about its business likely amounts to conduct "in relation to a financial product": *Australian Securities and Investment Commission v Narain* (2008) 169 FCR 211 at [66]-[87] and *Australian Securities and Investment Commission v Fortesque Metals Group Ltd (No 5)* [2009] FCA 1586; 264 ALR 201 at [648]-[659].

¹² See, for example, *Re Ku-Ring-Gai Co-Operative Building Society (No 12) Ltd* (1978) 36 FLR 134, at 166-167 (per Deane J, Brennan J agreeing, Bowen CJ dissenting); *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511, at 516, 521 (per Heerey and Sunberg JJ, Emmett J not deciding); *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* [2008] NSWSC 1224 at [454], [468] per Hamilton J (holding that it was "clear" that representations made in an information memorandum and prospectus were made in trade or commerce).

¹³ <https://archive.sclqld.org.au/qjudgment/2022/QLC22-021.pdf>, <https://www.des.qld.gov.au/our-department/news-media/mediareleases/waratah-galilee-coal-mine-ea-refused#:~:text=The%20Department%20of%20Environment%20and,lease%20applications%20for%20the%20project.>

shareholders of Whitehaven. This is why investors legitimately raised concerns about the agreement and sought clarification at the respective AGMs.

- (d) The delay in clarification of the nature of the agreement in that month could have had an impact on shareholder's investment decisions in both BHP and Whitehaven.

Why the Statements may breach BHP and Whitehaven's continuous disclosure obligations

- 26. As a listed 'disclosing entity' for the purposes of section 111AC of the Corporations Act, Whitehaven is subject to the continuous disclosure requirements in Chapter 6CA of the Corporations Act.¹⁴
- 27. Pursuant to section 674(2) of the Corporations Act, Whitehaven and BHP are required to notify the market of information that a reasonable person would expect to have a material effect on the price or value of Whitehaven's shares. Similarly, ASX Listing Rule 3.1 requires Whitehaven and BHP to immediately notify the ASX of any information concerning the company which it is or becomes aware of, and which a reasonable person would expect to have a material effect on the price or value of its shares.
- 28. For the reasons above, our client considers that by making the Statements, Whitehaven and BHP made a false or misleading announcement.
- 29. In *ASIC v Fortescue Metals Group Ltd* [2011] FCAFC 19, the Full Federal Court held (at [181]) that making a false or misleading announcement under Listing Rule 3.1 will trigger a separate obligation under that Listing Rule and section 674 of the Corporations Act to make a corrective announcement.¹⁵
- 30. Under ASX Listing Rule 3.1B, if ASX considers that there is or is likely to be a 'false market' in an entity's securities, it may require the entity to give ASX any information it asks for to correct or prevent the false market. The ASX Listing Rules Guidance Note 8 notes that a 'false market' may arise where 'a listed entity has made a false or misleading announcement'.¹⁶ Under Listing Rule 18.8, ASX may also require an entity to do or refrain from doing any act or thing that, in ASX's opinion, is necessary to ensure or facilitate compliance with the listing rules, including to give specific information to ASX for release to the market and to update, correct or retract information previously released to the market.
- 31. We also note that giving false or misleading information to the ASX also has the potential to breach section 1309 of the Corporations Act.
- 32. Our client requests that, considering the matters raised in this letter, ASX require BHP and Whitehaven to issue a corrective announcement in relation to the Statements.

Request to investigate

- 33. For the above reasons, our client requests that:

¹⁴ Corporations Act, section 111AP.

¹⁵ Note that, in overturning the decision of the Full Federal Court, the High Court was not required to rule on this point (see *Forrest v ASIC* [2012] HCA 39, at 66).


¹⁶ ASX, 'ASX Listing Rules: Guidance Note 8' https://www.asx.com.au/documents/rules/Guidance_Note_8.pdf [5.1].

- (a) ASIC investigate whether Whitehaven and/or BHP has engaged in misleading or deceptive conduct in contravention of the Corporations Act and/or ASIC Act;
- (b) ASIC investigate whether BHP and/or Whitehaven has contravened its continuous disclosure obligation under section 674 of the Corporations Act and/or Australian Securities Exchange (**ASX**) Listing Rule 3.1; and
- (c) ASX require Whitehaven and/or BHP to issue a corrective announcement in relation to the Statements.

34. If you would like to discuss any matters raised in this complaint, please do not hesitate to contact us at kirsty.ruddock@edo.org.au.

Yours faithfully

Environmental Defenders Office

A handwritten signature in black ink, appearing to read 'K Ruddock', with a long horizontal flourish extending to the right.

Kirsty Ruddock

Managing Lawyer

Safe Climate (Corporate and Commercial)

Annexure A:

Whitehaven announcements

Announcement	Blackwater South mentioned?
17/7/23 - INVESTOR CALL TRANSCRIPT: WHITEHAVEN COAL Q4 FY23 "June Quarterly Production"	No <i>Tony Mitchell: (Shaw and Partners, Analyst) Congratulations, Paul. Very good result. I don't think you'll answer this but I feel obliged to ask the question. Is Whitehaven interested in either Daunia and Blackwater and if so, when do you expect to find out when the whole process is going to be finished?</i> <i>Paul Flynn: Heavy must be the burden on you, Tony, to ask that question. Look, the simple answer to that is that we look at all assets that fit in the strategic crosshairs of the business. Any questions around timing or otherwise would be better directed to the person or the organisation running that process, which is BHP. We're having a look around, as I've said previously. We look at all those things that fit between those parameters. I can't really comment too much more on that. Of course, Daunia is proximate to our Winchester South; that's obviously why we would want to have a look at that but beyond that I think it's best those other questions on timing would be better directed to BHP.</i>
18/9/2023 - ASX announcement: Whitehaven's response to media article	No <i>"...Whitehaven Coal Limited (ASX: WHC) confirms it is participating in the sale process initiated by the BHP Mitsubishi Alliance (BMA) in relation to the Daunia and Blackwater metallurgical coal mines in Queensland...As communicated in Whitehaven's FY23 Results Announcement on 24 August, Whitehaven's share buy-back has been temporarily suspended while the Company is considering application of its capital allocation framework in light of growth opportunities. Whitehaven confirms that those opportunities include the Daunia and Blackwater mines."</i>
18/10/23 - Market announcement: Whitehaven Coal Limited (ASX: WHC) – Trading Halt	No <i>"WHC is seeking the trading halt pending an announcement in relation to its participation in the sale of the Daunia and Blackwater metallurgical coal mine..."</i>
26/10/23 - AGM	

BHP announcements

Announcement	Blackwater South mentioned?
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21/2/23 - Financial results for the half year ended 31 December 2022 Investor and analyst briefing Q&A transcript – Session 1	No <i>“Then maybe just a quick question regarding met coal, so BHP divested BMC and now Daunia and Blackwater are up for sale as well. Is it safe to assume that there’ll be no further divestments in met coal after these two last mines, being Daunia and Blackwater, that you’re happy with the rest of the portfolio?”</i>
21/2/23 - Financial results for the half year ended 31 December 2022 Investor and analyst briefing Q&A transcript – Session 2	No <i>“On coking coal, what you see in the announcement we’ve made today around divesting Blackwater and Daunia is very consistent with the strategy that we’ve laid out previously.”</i>
21/2/23 - News release: BHP RESULTS FOR THE HALF YEAR ENDED 31 DECEMBER 2022	No <i>“...we have initiated a process to divest the Daunia and Blackwater mines”</i>
22/8/23 - Financial results for the year ended 30 June 2023 Investor and analyst briefing Q&A transcript – Session 1	No
22/8/23 - Financial results for the year ended 30 June 2023 Investor and analyst briefing Q&A transcript – Session 2	No <i>“...we are still running a process on the divestment of Blackwater and Daunia”</i>
22/8/23 - News release: Financial results for the year ended 30 June 2023	No <i>“We continue to progress our planned process to divest the Blackwater and Daunia mines...”</i>
18/10/23 - Market announcement: BHP announces divestment of the Daunia and Blackwater	No https://announcements.asx.com.au/asxpdf/20231018/pdf/05w6fdvvz0vxbh.pdf
1/11/23 - AGM	

ANNEXURE B: Blackwater South Coking Coal Project

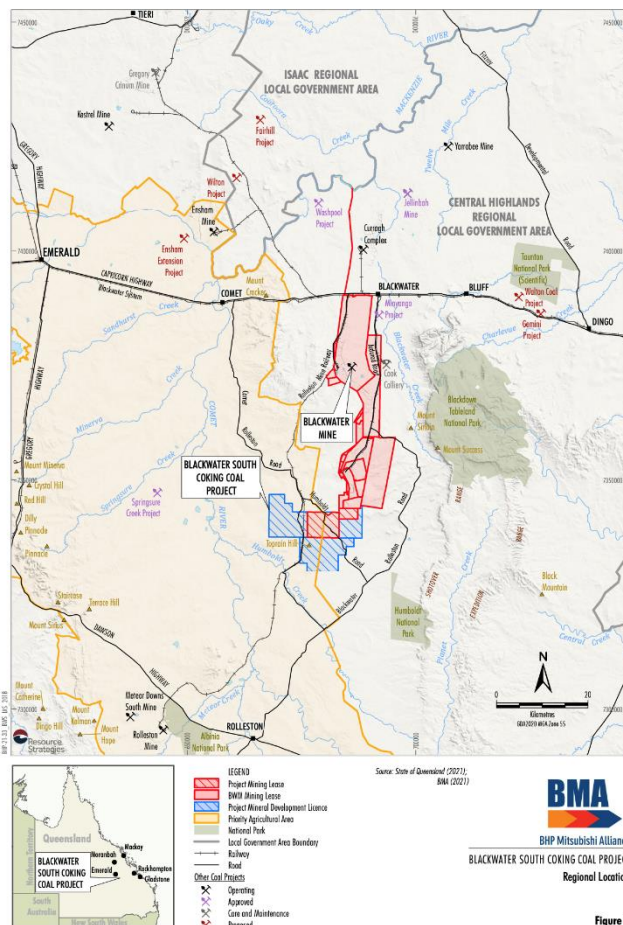
Background

On 19 November 2021, the BHP Mitsubishi Alliance (BMA) submitted the Blackwater South Coking Coal Project (**Blackwater South**) Initial Advice Statement (IAS) to the Queensland Government. The Project mining area is described as located within Mineral Development Licences 155 and 189 under Mining Leases 70167 and 70139.

The IAS describes Blackwater South as¹⁷:

Whilst located adjacent to the existing BMA operations at the Blackwater Mine, the Project is considered a separate development, from both an approvals and operational perspective.

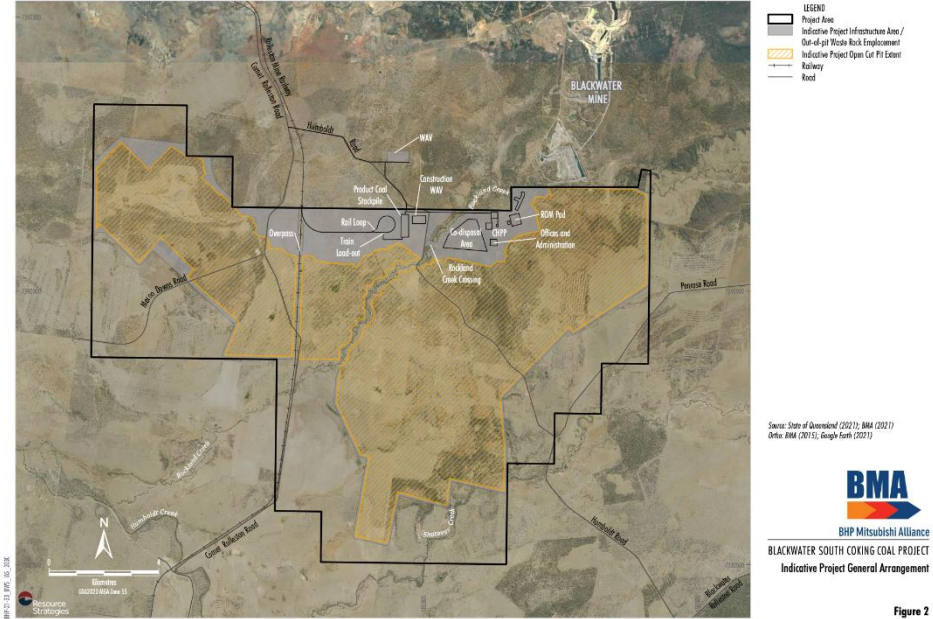
Figure 1¹⁸ shows the location of Blackwater South:



¹⁷ BMA Blackwater South Coking Coal Project Initial Advice Statement pES-1. Retrieved from <https://eisdocs.dsdip.qld.gov.au/Blackwater%20South%20Coking%20Coal/Initial%20Advice%20Statement/blackwater-south-coking-coal-project-initial-advice-statement.PDF>

¹⁸ IAS p3

Figure 2¹⁹ shows the Indicative Project General Arrangement



¹⁹ IAS p4