



**In the matter of Bowen Energy Limited
[2007] ATP 22**

Catchwords:

voting power – failure to disclose to market – power – association – substantial holding – decline to commence proceedings – control of assets – appointment of director – shareholder approval required – joint venture – agreement to issue shares exceeding 15% – agreement to issue shares exceeding 20% – compliance with Chapter 6 and ASX Listing Rules – directors’ duties – determine the outcome of management decisions

Corporations Act 2001 (Cth), sections 6(1), 50AA, 602, 606, 657A, 671B

ASX Listing Rule 7.1

INTRODUCTION

1. These are the Panel’s reasons for declining to commence proceedings on an application (the **Application**) to the Panel from Mr Frank Farrall (**Mr Farrall**) on 21 September 2007 in relation to the affairs of Bowen Energy Limited (**Bowen**), a listed company whose business is exploring for coal and uranium deposits.
2. Mr Farrall sought a declaration that unacceptable circumstances had resulted because agreements between Bowen and Bhushan Steel Limited had the effect of transferring control of Bowen to Bhushan Steel, without shareholder approval.

Factual Background

3. On 9 May 2007 Bowen entered into a memorandum of understanding (**MOU**) with Bhushan Steel Limited, dealing with the same matters as an Investment Agreement it subsequently entered into.
4. In an announcement dated 15 May 2007, but released on 16 May, Bowen said that it had entered into the MOU, described its terms and said the transaction was subject to it “*obtaining any necessary shareholder approval at a meeting of shareholders to be convened*”.
5. On 5 June 2007, Bowen announced an off-market takeover bid (**Rocklands Offer**) for all of the ordinary shares in Rocklands Richfield Limited (**Rocklands**), a company listed on the ASX. The Rocklands Offer was conditional on a joint venture proposal between Rocklands and China Coke and Chemical Ltd not proceeding.
6. On 13 August 2007, Bowen announced that it had entered into an investment agreement (**Investment Agreement**) with Bhushan Steel Limited and Bhushan Steel (Australia) Pty Ltd (together **Bhushan**). The announcement summarised the terms and stated that the Investment Agreement was subject to a condition precedent that “*Shareholder approval [be obtained] pursuant to Chapter 7 of the ASX Listing Rules, for securities issued pursuant to the Agreement exceeding 15% of the Company’s issued capital, if required under that rule.*”

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7. The Investment Agreement provides, *inter alia*, that:
- (a) Bowen will issue 10 million shares to Bhushan at \$0.32 per share, in four equal quarterly instalments. Each instalment after the first was conditional on the Rocklands Offer being successful (that condition appears to have been waived);
 - (b) Bowen will also issue Bhushan 2,500,000 quoted options in four equal quarterly instalments, together with the shares mentioned in paragraph (a);
 - (c) When it issues the third and fourth instalments of shares and options, Bowen will issue Bhushan another 4,000,000 and 3,500,000 unquoted options, respectively;
 - (d) All of these options have an exercise price of \$0.20 and all of them are to “mature” in or before November 2009;¹
 - (e) If Bhushan exercises more than 6,500,000 of the options, Bowen will issue it another 6,500,000 unquoted options with an exercise price of \$0.20, “maturing” 2 years after they are issued;
 - (f) Bhushan will purchase on-market 2,000,000 Bowen shares within three months after signing the Investment Agreement;
 - (g) on the allotment and issue of the first 2,500,000 shares, Bowen would appoint nominees of Bhushan as a director of Bowen and as an alternate for that director (all of these things have been done);
 - (h) Bhushan is entitled to direct Bowen to spend 75% of the money subscribed for shares by Bhushan under the Investment Agreement on exploration specified by Bhushan;
 - (i) Bhushan has a first right of refusal in relation to any agreement with a third party for the development of any of Bowen’s coal projects;
 - (j) on the allotment and issue of the first 2,500,000 shares, Bhushan is entitled to require Bowen to enter into a joint venture with Bhushan to develop any of Bowen’s coal projects, with interests held 10% by Bowen and 90% by Bhushan and Bhushan to meet all development expenses. No joint venture under this provision has been announced; and
 - (k) once a mine is commissioned on any project under joint venture arrangements, Bhushan has a call option, and Bowen a put option, to sell Bowen’s 10% interest in the joint venture to Bhushan for a consideration to be determined under a specified formula.
8. On 23 August 2007², Bowen issued to Bhushan Steel (Australia) Pty Ltd 2,500,000 shares and 625,000 options (the first tranches of shares and options to be issued under the Investment Agreement).
9. On 27 August 2007, Bhushan Steel (Australia) Pty Ltd lodged a substantial holder notice, recording a holding of 3,188,020 shares in Bowen (5.43%). It had bought

¹ Pursuant to a prospectus dated 21 March 2007, Bowen issued 56,160,004 options. The options are exercisable for one ordinary share at 20 cents on or before 27 November 2009.

² The substantial holder notice lodged by Bhushan Steel (Australia) Pty Ltd on 27 August 2007 says that the shares were issued on 23 August.

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688,020 of these shares on market and Bowen had issued the other 2,500,000 under the Investment Agreement. The notice did not have attached to it a copy of the Investment Agreement and did not disclose the relevant interest of Bhushan Steel Limited in the shares.

10. Bhushan Steel (Australia) Pty Ltd lodged further substantial holder notices dated 3 September and 25 September 2007, recording that it had increased its holding to 7.76% and then 8.14% by on-market purchases. Neither of these notices mentioned the relevant interest of Bhushan Steel Limited.
11. On 14 September 2007 Bowen:
 - (a) entered into an agreement with Bhushan pursuant to which Bhushan agreed to provide a loan facility (convertible into ordinary shares of Bowen) to fund an increase in the consideration under the Rocklands Offer (**Facility Agreement**);
 - (b) issued a supplementary bidder's statement which included a description of the Facility Agreement; and
 - (c) announced an increase in the bid consideration under the Rocklands Offer.
12. On 26 September 2007, Bowen released the full text of the Investment Agreement as an announcement to ASX.
13. Also on 26 September 2007 Rocklands shareholders voted to approve the joint venture with China Coke and Chemical Limited. In response, on the same day Bowen announced that the Rocklands Offer, the Investment Agreement and the Facility Agreement had been terminated.
14. On 27 September 2007 Bowen announced that the Investment Agreement had not been terminated (but confirmed that the Rocklands Offer and the Facility Agreement had been terminated) and said "*Bowen Energy confirms that the transactions contemplated by the Investment Agreement will be subject to the seeking of all necessary shareholder and regulatory approvals if and when Bhushan decides to either subscribe for further securities or participate in the development of the existing coal projects. This may include approvals Chapters 2E and 6 of the Corporations Act and chapters 7, 10, and 11 of the Listing rules as the circumstances may require.*"

THE PANEL & PROCESS

15. The President of the Panel appointed Nerolie Withnall (sitting President), Byron Koster (sitting Deputy President) and Heather Zampatti as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
16. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

DECLARATION AND ORDERS SOUGHT

17. Mr Farrall submitted that unacceptable circumstances existed in relation to:
 - (a) the entry by Bowen into the MOU with Bhushan on 9 May 2007;
 - (b) the disclosure made by Bowen relating to the MOU on 16 May 2007;
 - (c) the terms of the Investment Agreement;

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- (d) the failure to refer the matters dealt with in the MOU or the Investment Agreement to Bowen shareholders;
 - (e) the terms of the Facility Agreement and the lack of disclosure of those terms, particularly relating to the terms of the convertible debt under the Facility Agreement; and
 - (f) the failure by Bhushan to comply with section 671B of the Act in relation to its substantial holding in Bowen.
18. Mr Farrall sought orders:
- (a) that the issue to Bhushan on 23 September 2007 of 2,500,000 shares and 625,000 options in Bowen pursuant to the Investment Agreement be declared void;
 - (b) preventing Bowen issuing any further shares under the Investment Agreement without shareholder approval and disclosure to shareholders of the effect on the control of Bowen;
 - (c) preventing Bowen and Bhushan from relying upon any of the rights granted under the Investment Agreement or MOU without Bowen shareholder approval and disclosure to shareholders of the effect on the control of Bowen; and
 - (d) preventing Bhushan from voting their shares in favour of any shareholder approval of the MOU, Investment Agreement or Facility Agreement.

DISCUSSION

Standing

19. Despite a submission by Bowen to the contrary, the Panel considered that Mr Farrall had standing to make the Application under paragraph 657C(2)(d), in his capacity as a holder of 4.2% of the shares in Bowen.

Issues of shares by Bowen

20. Mr Farrall submitted that the agreement by Bowen to issue shares to Bhushan under the Investment Agreement was in breach of ASX Listing Rule 7.1 because it provided for an issue of shares that would exceed 15% of the issued capital of Bowen and either:
- (a) the Investment Agreement was not subject to shareholder approval under Listing Rule 7.1; or
 - (b) Bowen had already issued 2,500,000 shares to Bhushan under the Investment Agreement, without obtaining shareholder approval beforehand under Listing Rule 7.1.
21. Listing Rule 7.1 provides that a company may not issue, or agree to issue, more than 15% of the number of shares on issue 12 months before³ without obtaining shareholder approval, but is complied with if an agreement to issue shares in excess of that number is made conditional on shareholder approval (Rule 7.1.5(a)). Each

³ In Bowen's case, because it had been listed less than 12 months, the relevant number of shares is the number of shares on issue when it was listed.

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tranche of 2,500,000 shares under the Investment Agreement is about 4.6% of the relevant number of shares.

22. The Investment Agreement contains an obligation on Bowen to ensure it has the capacity under Listing Rule 7.1 to issue the shares, if required, but does not in terms make Bowen's obligation to issue the shares conditional on obtaining approval. Whether or not Bowen's obligation is conditional, compliance with the Listing Rules is a matter for ASX.
23. So far as concerns unacceptable circumstances, the Panel did not consider any contravention by Bowen of Listing Rule 7.1 would of itself give rise to unacceptable circumstances, because:
 - (a) Bowen had not issued shares to Bhushan that exceeded the 15% threshold in Listing Rule 7.1;
 - (b) Bowen will have an opportunity to obtain shareholder approval of an issue in excess of the 15% limit before the Investment Agreement requires it to make such an issue; and
 - (c) although it is not strictly an aspect of compliance, Bowen's public announcements commit it to obtaining that approval, if and when required.

Chapter 6

24. Mr Farrall submitted that the Investment Agreement should have been, but was not, conditional on compliance with Chapter 6 of the Act. The Panel cannot declare under paragraph 657A(2)(c) that circumstances are unacceptable because they constitute a contravention.⁴
25. However, the Panel did not consider that the Investment Agreement involved an existing breach of Chapter 6 of the Act, or was likely to lead to such a breach. In particular, the Panel noted that in the absence of any other transactions affecting Bowen's capital:
 - (a) Bhushan had not yet reached the 20% threshold in section 606,⁵ and would not reach that threshold, merely by subscribing for 10,000,000 shares and buying 2,000,000 shares in accordance with the Investment Agreement;⁶
 - (b) Although Bhushan would exceed the 20% threshold if it also exercised all of the options it would be issued under the Investment Agreement, it was under no obligation to do so, and many of the options (and all of the shares) are to be quoted and may be sold; and
 - (c) if Bhushan does exceed the 20% threshold in the future, it may do so in circumstances that the Panel would not consider to be unacceptable. In particular, Bowen has announced that it will seek shareholder approval for acquisitions by Bhushan above the 20% threshold, when and if necessary.

⁴ See *Australian Pipeline Limited v Alinta Limited* (2007) 25 ACLC 602.

⁵ As at the date of the Application, Bhushan held 4,557,020 Bowen shares out of the then 58,636,338 issued Bowen shares (being 7.8%).

⁶ This would result in Bhushan holding 12,000,000 shares out of the then 66,636,338 issued Bowen shares (being 18.0%)

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Control of Bowen's Assets

26. Mr Farrall submitted that the effect of the Investment Agreement is that “*effective control of [Bowen's] assets, funding, management and the derivation of value from [Bowen's] assets is passed to [Bhushan Steel (Australia) Pty Ltd]*”.
27. He submitted that, even if Bhushan's voting power in Bowen does not yet exceed 20%, the Investment Agreement passes effective control of Bowen to Bhushan without compliance with Chapter 6, because under it Bhushan:
 - (a) is granted the option to joint venture the development of Bowen's coal projects as Bhushan selects;
 - (b) can direct Bowen to spend on specified exploration purposes 75% of the money raised from Bhushan's subscription for shares under the Investment Agreement;
 - (c) is given the right to appoint a director to the board of Bowen; and
 - (d) is issued shares and options.
28. The Panel was not clear on what basis Mr Farrall submitted that Bhushan had failed to comply with Chapter 6 without exceeding the 20% threshold in section 606. However, the Panel considered whether unacceptable circumstances may have resulted because Bhushan had acquired some control over Bowen's assets and activities under the Investment Agreement.
29. Subparagraph 657A(2)(a)(i) gives the Panel power to declare circumstances to be unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, or are likely to have, on “the control, or potential control, of the company or another company...”. Section 50AA provides that one entity controls another entity, “if the first entity has the capacity to determine the outcome of decisions about the second entity's operating and financial policies”, without reference to the source of that capacity. Under subsection 6(1), section 50AA has effect subject to a contrary intention appearing in the Act.
30. When Parliament, by enacting subparagraph 657A(2)(a)(i), conferred power on the Panel to make declarations of unacceptable circumstances having regard to the effect of circumstances on the control or potential control on a company, it intended in the Panel's view that the Panel would do so by reference to the policy aims of Chapter 6.
31. This is supported by the way the legislation uses “associations”. Relevantly, paragraph 12(2)(b) makes one person an associate of another in respect of a company if they enter into a relevant agreement for the purpose of controlling or influencing the composition of the board or the conduct of the company's affairs, i.e. exerting control akin to section 50AA control. Chapter 6 accumulates the associates' voting power (whether in the defined or usual sense). It is this that in a relevant case makes association an issue for the Panel.
32. In the Panel's view it is unlikely that circumstances will be unacceptable by reason only that they affect control as contemplated by section 50AA without also in some way affecting voting power in the controlled company. The Investment Agreement does not concern voting power in any relevant way.

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33. Subsection 657A(3) directs the Panel to have regard to the actions of directors in the context of the reasonable and equal opportunity principle in paragraph 602(c). This does not support an inference that the Panel should be concerned with directors' conduct, except for its impact on matters otherwise of concern to the Panel.
34. The Panel considered that the effect of the Investment Agreement on Bowen's ability to exploit its assets was a question of directors' judgement in acting in the best interests of the company and subject to their fiduciary and other duties.

Control of Bowen itself

35. Even if subparagraph 657A(2)(a)(i) refers to control as contemplated by section 50AA, the Panel does not regard the degree and type of control that the Investment Agreement confers on Bhushan over Bowen's coal projects and exploration as constituting an effect on control of Bowen capable of constituting unacceptable circumstances under subparagraph 657A(2)(a)(i). In particular:
 - (a) Bowen is a mineral exploration company, and there is nothing unusual about arrangements to "farm-out" the exploitation and control of an exploration company's assets;⁷
 - (b) although the Investment Agreement is not in the usual terms of "farm-in" arrangements, the terms on which a company realises the value of its tenements are generally a matter for the directors, subject of course to their duties to the company;
 - (c) while the Investment Agreement confers on Bhushan control of certain of Bowen's assets and of part of its exploration budget, that power falls well short of the capacity to determine the outcome of most or all decisions about Bowen's operating and financial policies:
 - (i) Bhushan's existing voting power in Bowen is insufficient to allow it to dictate the composition or decisions of the board;
 - (ii) the appointment of one Bhushan nominee director to the Bowen board will not enable Bhushan to dictate decisions of the board; and
 - (iii) having regard to Bowen's financial position as reflected in its annual report for the year ended 30 June 2007, Bhushan's power to direct Bowen how to spend 75% of the issue price of shares issued under the agreement will not enable it to dictate other decisions on Bowen's operating or financial policies.

Disclosure of Investment Agreement

36. Mr Farrall submitted that unacceptable circumstances arose in relation to the disclosure of the Investment Agreement. In particular, Mr Farrall submitted that the failure of Bhushan Steel (Australia) Pty Ltd to provide a copy of the Investment Agreement with the notice of substantial holding it lodged on 27 August 2007 was a breach of subsection 671B(4) of the Act.

⁷ As Bowen's Managing Director put it in an announcement on 28 June, Bowen has partnered with Bhushan on the basis "We find it; they develop it."

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37. This submission may be strictly correct, but the Panel cannot declare under paragraph 657A(2)(c) that circumstances are unacceptable solely because they constitute a contravention.⁸
38. While it is important for an informed market that the terms of a relevant agreement giving rise to a substantial holding be disclosed to the market, Bowen had already disclosed a summary of the Investment Agreement on 13 August and it later disclosed the full text of the agreement on 26 September 2007. There was no submission or evidence that the failure to provide a copy of the Investment Agreement was deliberate, or had prejudiced the market or anyone in particular. In the circumstances, the deficiency in the notice did not appear to give rise to, or be likely to give rise to, unacceptable circumstances, and the Panel did not consider that it would be appropriate for it to make a declaration or orders in respect of the notice.
39. The Panel also noted that none of the substantial holder notices disclosed Bhushan Steel Limited's relevant interest in the shares, only that of Bhushan Steel (Australia) Pty Ltd. Bhushan Steel Limited's involvement was not concealed, as the Investment Agreement itself recites that Bhushan Steel Limited had nominated Bhushan Steel (Australia) Pty Ltd to take up shares under that agreement.
40. Compliance with substantial holding disclosure obligations is important to ensure an efficient, competitive and informed market. Accordingly, the Panel draws the omission to Bowen's attention.

Facility Agreement

41. Mr Farrall submitted that unacceptable circumstances existed in relation to the terms of the Facility Agreement.
42. Having regard to the announcements by Bowen of 26 and 27 September that the Facility Agreement had terminated and the absence of evidence of any adverse effects of that agreement, the Panel considered that it had not basis to conclude that the Facility Agreement had given rise to unacceptable circumstances, or was likely to do so.

Shareholder approval of the Investment Agreement

43. Bowen announced on several occasions that the transactions effected under the MOU, Investment Agreement and Facility Agreement would be subject to shareholder approval. Mr Farrall submitted that these announcements gave rise to unacceptable circumstances.
44. The Panel did not consider that the above statements misled the market. They did not imply that Bowen would obtain shareholder approval of the transactions regardless of whether approval was required under the Corporations Act or the Listing Rules. Accordingly, the Panel did not consider that the announcements gave rise, or were likely to give rise, to unacceptable circumstances.

⁸ See *Australian Pipeline Limited v Alinta Limited* (2007) 25 ACLC 602.

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DECISION

45. For the reasons set out above the Panel concluded that there was no reasonable prospect that it would make a declaration of unacceptable circumstances, and therefore, under Regulation 20 of the *Australian Securities and Investments Commission Regulations 2001*, it declined to commence proceedings in response to the Application.

Nerolie Withnall

President of the Sitting Panel

Decision dated 4 October 2007

Reasons published 16 October 2007