



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**Bowen Energy Limited 02**

**[2009] ATP 16**

**Catchwords:**

*Independent expert's report – technical expert's report – competence of independent expert – errors in valuation – independence of directors – association – disclosure of material information – 3% creep - minimum bid price - market bid - decline to make a declaration*

*Corporations Act 2001 (Cth), sections 12, 602, 611, 621(3), 636, 638*

*Re Matine Ltd and Others (1998) 28 ACSR 268*

*ASIC Regulatory Guide 111 Content of expert reports*

*Boulder Steel Limited [2008] ATP 24, Goldlink IncomePlus Limited 02 [2008] ATP 19, Bowen Energy Limited 01 [2007] ATP 22, St Barbara Mines Limited 02 [2004] ATP 13*

**INTRODUCTION**

1. The Panel, Peter Hay, Vickki McFadden and Mark Paganin (sitting President), declined to make a declaration of unacceptable circumstances in relation to the affairs of Bowen. The Panel was not satisfied on the information provided that unacceptable circumstances existed in relation to the expert's report. The Panel was also not satisfied that there was sufficient evidence to conclude that the independent directors of Bowen were not independent such as to constitute unacceptable circumstances. Lastly the Panel was not satisfied that there was material information in relation to Bowen's assets that had not been disclosed to the market or that there was enough evidence to infer that Bhushan and Savni are associates.

2. In these reasons, the following definitions apply.

Bhushan	Bhushan Steel (Australia) Pty Ltd, a wholly owned subsidiary of Bhushan Steel Limited.
Bowen	Bowen Energy Ltd
expert	WHK Horwath Corporate Finance Limited
expert's report	Independent expert's report by the expert dated 23 July 2009
independent directors	Mr Neil Stuart and Mr Mark Sheppard
Macrae	Macrae Holdings (WA) Pty Ltd
Savni	Savni Holding Limited, a Mauritius incorporated entity
technical expert	Mr Robert Pyper of Minnelex Pty Ltd
VALMIN code	Code for the technical assessment and valuation of mineral and petroleum assets and securities for independent expert reports

3. In these proceedings, the Panel:

- (a) adopted the Panel's published procedural rules and
- (b) consented to parties being represented by their commercial lawyers. The applicant was not legally represented.

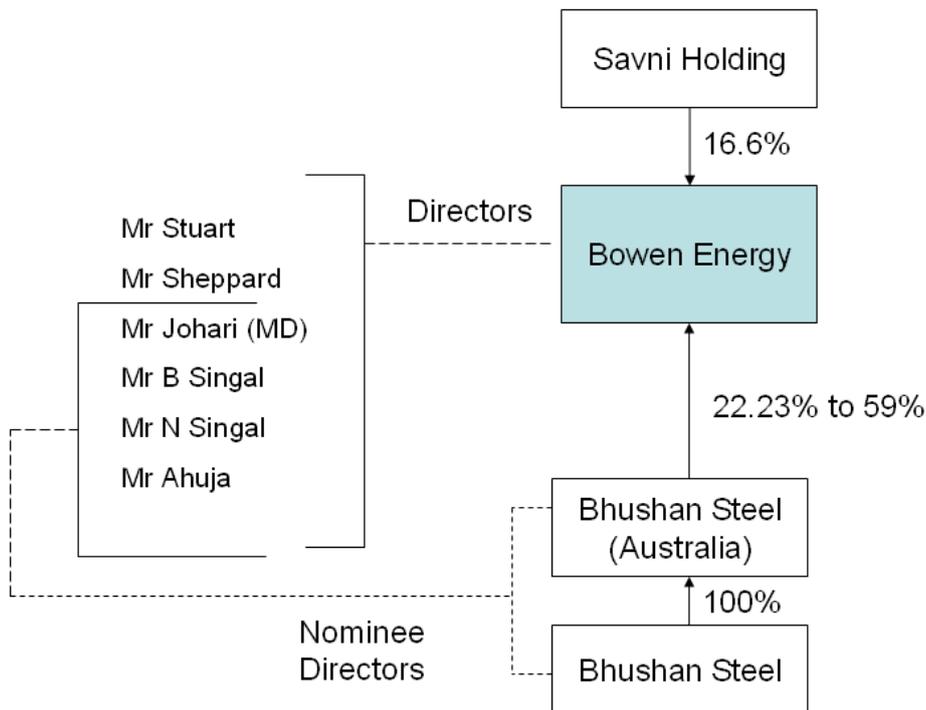
## FACTS

4. Bowen is an ASX listed company (ASX code: BWN). It has 81,680,338 shares and 55,486,170 listed options on issue.
5. On 9 April 2009 a meeting was requisitioned, among other things, to remove 6 directors of Bowen and appoint 2 new directors. Another director had resigned. The meeting was held on 22 June 2009. All resolutions failed. Certain proxies were declared invalid. A further requisition in similar terms was received by Bowen the next day. That meeting is scheduled for 8 September 2009.<sup>1</sup>
6. The directors of Bowen are Neil Francis Stuart (chairman), Mark Sheppard, Neeraj Singal, Anil Ahuja, Brij Bushan Singal and Nittin Johari.
7. Messrs Singal, Singal, Ahuja and Johari are nominees of Bhushan. Mr Ahuja is a director of Bhushan. Bowen's company secretary, Glenn Merchant, is a director and company secretary of Bhushan.
8. On 9 July 2009 Bowen's shares closed on ASX at 12.5 cents.
9. On 10 July 2009 Bhushan made an on-market bid for Bowen at 14 cents per share. Bhushan disclosed a relevant interest in 22.3% of shares in Bowen. According to Bowen,<sup>2</sup> Bhushan currently holds approximately 59.6% of the shares in Bowen.
10. Bowen's independent directors' unanimously recommended that shareholders accept the Bhushan offer.
11. On 24 July 2009 Bowen released its target's statement. The statement included the expert's report. The expert valued Bowen's shares at between 3.53 cents and 5.51 cents per share and concluded that the Bhushan offer was fair and reasonable.
12. Bowen had previously released an independent expert's report, dated 6 November 2008, for an issue of shares to Bhushan. The expert who prepared the current expert's report also prepared that report. The expert valued Bowen shares at 22.46 to 27.55 cents per share. However, on 31 March 2009 that report was corrected. The expert advised Bowen that the technical expert (also engaged for the current expert's report), who had been engaged to value exploration tenements under the VALMIN Code for use in the 2008 report, had made two errors. The effect was to reduce the value of the coal tenements from \$15.9 million to \$4.9 million (each plus or minus 20%). The revised value of Bowen's shares under the 2008 report was 8.13 to 11.37 cents.
13. The following diagram summarises the board positions in Bowen and Bhushan and the relevant shareholdings in Bowen:

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<sup>1</sup> In the application Macrae noted that the scheduled date for this meeting was outside the deadline under s249D(5)

<sup>2</sup> Bowen released on ASX an announcement on 1 September 2009 detailing, among other things, its "top 22 holdings"



## APPLICATION

14. By application dated 18 August 2009, Macrae sought a declaration of unacceptable circumstances. It submitted, against the background of the meetings to remove directors, that Bowen shareholders were basing their decisions whether or not to accept the bid on:
  - (a) a recommendation made by directors who have an interest in the bid succeeding (because they will keep their positions)
  - (b) an independent expert's report that is questionable and may have been influenced by Bowen directors. The report is questionable, Macrae submitted, because:
    - (i) given the errors, the expert should not have been engaged
    - (ii) the expert had been directed to talk down the prospects of the tenements
    - (iii) the valuation methodology employed was not good practice, and ignored comparable transactions and the likelihood of identifying deposits and
    - (iv) a main value driver, South Blackwater Project, had been underestimated.
15. Macrae submitted that the effect of the circumstances was that the directors had not fulfilled their duties, Bhushan would gain control of Bowen in an uninformed market, and shareholders had not been given enough information to assess the merits of the bid.
16. Before the Panel decided to conduct proceedings, Macrae provided the Panel with further submissions, including that Bhushan and Savni, a 16% shareholder in Bowen, were associates. Macrae submitted that this meant that Bhushan and Savni had,

before the bid was announced, accumulated an interest in Bowen of approximately 38% in breach of s606.

### Interim orders sought

17. Macrae sought interim orders to the effect that:
- (a) Bhushan cease acquiring Bowen shares, on-market, off-market or by exercise of options
  - (b) Bhushan extend its bid and
  - (c) Bowen not make any payments to Bhushan and Bhushan not act to affect Bowen's financial position and solvency.
18. We did not make any interim orders. At this late stage of the bid we did not think it was necessary to interfere and stop acquisitions. We did not see any need to do that because the acceptances can be reversed if appropriate, for example by a divestiture order. We accepted a submission from Bhushan that it would be unfairly prejudiced if forced to extend its bid. The third interim order sought did not seem to be appropriate as we had no information about the financial requirements of Bowen, or why such an order was necessary to maintain the status quo.

### Final orders sought

19. Macrae sought final orders to the effect that:
- (a) in respect of the meeting held 22 June 2009, Bowen honour the votes and proxies received at the meeting, the Chairman not direct undirected or discretionary proxies against the resolutions, and the directors be removed or appointed as appropriate
  - (b) the transactions executed on-market by Bhushan in relation to the takeover be reversed, or Bhushan dispose of those shares, or "any shares acquired under unacceptable circumstances, whether by way of exercising options, by way of association or by way of issue by Bowen be disposed of to bring Bhushan's ownership (direct and by association) under 20%"
  - (c) two additional independent expert's reports be commissioned, with access to any documentation they require to derive a valuation for Bowen's assets and shares and
  - (d) Bowen release to the market and issue to shareholders a letter explaining the events arising from the deliberations of the Panel.

## DISCUSSION

### Issues considered

20. We commenced proceedings in relation to the following issues raised by the application:
- (a) the adequacy of the expert's report
  - (b) actions of the independent directors

- (c) disclosure of information to the market and
  - (d) alleged association between Bhushan and Savni.
21. We declined to commence proceedings in relation to the general meeting issue. In *St Barbara Mines Limited 02* the Panel said:
- “...the Panel is generally reluctant to intervene in general meeting matters as they are not typically the type of “control” issue which concerns the Panel.”*<sup>3</sup>
22. The Panel’s power to declare circumstances to be unacceptable having regard to their effect on control or potential control of a company was intended to be exercised by reference to the policy aims of chapter 6.<sup>4</sup> The issue raised by the applicant here related to the handling of proxies at a general meeting and in our view is not linked, or at least no link has been made out, to the acquisition of control in voting shares in Bowen. In any event, we were told by Bowen that, even if the disputed proxies had been accepted (ie votes in favour of the resolutions) at that meeting, those resolutions would have been defeated.
23. Macrae submitted that the events of this meeting initiated the bid and led to the commissioning of (as Macrae submitted) an expert of questionable competence and independence and ultimately an uninformed market for Bowen shares. We examine this below.
24. To the extent that Macrae also submitted that the events that took place at the meeting were designed to maintain control of the Bowen board to subsequently allow the takeover at a lower price, this was not established to the level needed to warrant proceedings being conducted. For these reasons we declined to conduct proceedings on this issue.

### **Independent expert’s report**

25. Criticism of the expert’s report by Macrae and ASIC was restricted to the analysis contained in the technical expert’s report that was attached to, and relied upon in, the expert’s report.
26. We considered whether the technical expert’s report gave rise to unacceptable circumstances in two contexts. Firstly, we considered whether the expert’s report was wrong or the expert reached a conclusion that no reasonable expert could reasonably arrive at.<sup>5</sup> We were not so satisfied. Secondly, we considered whether the disclosure in the expert’s report was materially deficient to a degree that would lead to an uninformed market for Bowen shares. We were not so satisfied.
27. Our reasons are explained below.

*Whether the expert’s report was wrong etc*

### **Information considered by the technical expert**

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<sup>3</sup> *St Barbara Mines Limited 02* [2004] ATP 13 paragraph 9

<sup>4</sup> *Bowen Energy Limited 01* [2007] ATP 22 paragraph 30

<sup>5</sup> In *Re Matine Ltd and Others (1998) 28 ACSR 268* Santow J said that the applicant had to demonstrate that the expert’s opinion was “so manifestly unreasonable that no competent professional person in their position could honestly have held those views or was based upon an assumption of a material fact which was false.”

28. Macrae submitted that the technical expert had not considered all relevant information. In particular Macrae submitted that the technical expert did not:
- (a) inspect all of Bowen's exploration results data as required by the Valmin Code
  - (b) inspect data that exploration companies typically produce by analysing exploration results using three-dimensional modelling software
  - (c) take into account the successful exploration and mining by other companies of neighboring tenements
  - (d) take into account current market conditions, including the premiums that foreign companies are currently willing to pay for coal resources
  - (e) extend his analysis to the quality of the coal deposits in Bowen's tenements and
  - (f) consider relevant recent transactions in coal.
29. The technical expert appears to be qualified in the field of evaluating and assessing exploration properties. We consider it was up to him to request the information that he considered necessary to assess the value of the assets. We were therefore concerned to ensure that the independent directors of Bowen provided the expert with any information that he requested.
30. Bowen submitted that the independent directors had done so. Bowen also submitted that the information set out in Macrae's submission was not necessarily information that the technical expert would consider relevant to his enquiries. It also submitted that it does not have access to the three dimensional modelling software referred to above.
31. We were not convinced that any of the alleged deficiencies in the expert's report would have a material effect on the overall conclusion reached. Macrae's submissions centred on whether the expert should have used other measures. On this, experts can differ.
32. Nor was it established that the independent directors had withheld any information sought by the technical expert. As submitted to us, we were not satisfied that the technical expert clearly had not considered, or was not provided with, all relevant information required by him to conduct his enquiries.
33. The technical expert states in his report that he did not doubt the authenticity of the information provided to him and had not carried out a "total audit" of the available information. ASIC submitted that it was concerned about the absence of a "total audit" and that the technical expert had placed undue reliance on the information. Bowen submitted that the technical expert had satisfied himself of the quality of the data provided, that it was consistent with his expectations as an expert and that if he had any concerns about the information he would have raised them with the company.
34. RG 111 states:

*"[ASIC] do not expect an expert to conduct an audit of the subject matter of the report. If an expert cannot satisfy itself that it is reasonable to rely on otherwise material information, it should say this in its report with an explanation."*<sup>6</sup>

35. Macrae also submitted that the technical expert had not applied any critical analysis to the information provided and had relied too heavily on ASX releases by Bowen. Macrae submitted that this was a breach of the VALMIN code and that it was clear that the technical expert did not have "checks and balances" in place.
36. We were not provided any evidence that the technical expert had not critically analysed the information provided to him or that there was any reason for him not to be satisfied as to its reliability. We note that he had analysed the assets on a tenement by tenement basis. Had ASIC conducted any enquiries that revealed any evidence of failure to properly analyse information and assess its reliability, it would have provided that to us.

#### Valuation methodology

37. The technical expert used two primary valuation methodologies. One was the comparable transaction method. In his description of how a comparable transaction is selected, he stated:  
*"Such a transaction should be between parties dealing at arms length. The date of the comparable transactions should be as close as possible to the property's valuation date as the time-related factors can affect the value."*<sup>7</sup>
38. The technical expert used as a comparable transaction a 2007 agreement between Bowen and Kondor Holdings Pty Limited under which Bowen was to acquire all the shares in Kondor. ASIC submitted that it had concerns because the transaction occurred over 2 years ago and couldn't reasonably be considered to be at arm's length.
39. Bowen submitted that the technical expert considered there were no other relevant or available transactions. This is a matter for the technical expert in the absence of the transaction chosen being clearly inappropriate and an alternative transaction being clearly appropriate. Bowen also submitted that different opinions between experts did not necessarily indicate the superiority of one expert's opinion over another. We agree. ASIC only submitted that the choice was 'potentially misleading'. Macrae submitted that the technical expert should look at transactions involving, and market valuations of, other resources companies. Macrae submitted that Bandanna Energy Limited was the "closest peer", but included others such as Northern Energy Corporation Limited, Caledon Resources plc and Rey Resources Limited. However no further information was provided in relation to the transactions that it was submitted should have been looked at, and in any event this is a matter of opinion and experts may differ in their opinions. It was not established that the alternatives submitted as more appropriate by Macrae were clearly more appropriate value indicators or that the Kondor transaction was clearly inappropriate. It is not clear

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<sup>6</sup> Paragraph 77

<sup>7</sup> p14 of the technical expert's report on coal tenements held by Bowen

what the technical expert was to take from the market valuations of the identified entities.

40. Macrae also submitted that an alternative valuation methodology should have been used that took into account other 'commercial arrangements' such as a put option held by Bowen to sell to Bhushan its interest in joint ventures it had entered into with Bhushan. The technical expert stated that Bowen's coal assets could not be valued without speculation because coal resources had yet to be defined. On this basis the expert's report explains that the put option was not relied on to estimate value. We consider it is up to the expert to decide which valuation methodology it uses in assessing the value of Bowen's shares. As outlined above, a different view as to the appropriate valuation methodology does not demonstrate that the expert's judgement was wrong.
41. We were not satisfied that the technical expert's report was wrong or that the technical expert had reached a conclusion that no other reasonable expert could reasonably have arrived at. Reliance on the technical expert's report by the expert therefore does not lead us to conclude that the expert's report was wrong or that the expert reached a conclusion that no other reasonable expert could reasonably have arrived at.
42. On 31 March 2009 Bowen issued a funding and exploration update to ASX. Included in the update was a paragraph that identified that calculations in the expert's report of 6 November 2008 were incorrect. The update attached a letter dated 31 March 2009 from WHK Howarth Corporate Finance containing amended calculations. The errors came to notice when a shareholder contacted Mr Pyper of Minnilix Pty Ltd (the technical expert).
43. Macrae also submitted that the technical expert should not have been engaged because, given the errors disclosed on 31 March 2009, he was of questionable competence. Bowen submitted that the errors should not be a factor precluding his appointment. It submitted that the errors were of a "mathematical" or "clerical" nature, and had been identified, rectified and disclosed to the market. While we did not make any finding as to whether the errors were merely "mathematical" or "clerical" (we note that the technical expert himself described the errors in an email as a "monumental mistake"), we do not consider that the technical expert's competence is questionable simply because of the errors. Arguably the market was misinformed during the period between the release of the November 2008 report and its correction on 31 March 2009, but this is not a matter for us in these proceedings. The correction has now been publicly disclosed.

*Disclosure in the expert's report*

44. Macrae submitted that the technical expert's report was deficient because of several breaches of the VALMIN code. One of these alleged breaches was the use of the Kondor transaction as a value indicator as discussed above. Best practice would be for the technical expert to describe the compared transaction in the appropriate context. In this case, this would involve making the transaction's age and the absence of arm's length terms clear. However we were not provided with any evidence that

this has caused the market for Bowen shares to be uninformed and are not satisfied that the market is uninformed by reason of this lack of context.

45. The expert's report did not detail the reasons for the decline in the value of Bowen's shares compared to the revised valuation published on 31 March 2009. No doubt such information would have helped a shareholder in deciding whether or not to accept the bid. No doubt, particularly given the errors, a reconciliation would be the clearest way to fully inform shareholders. No reference was made to the prior valuation or the errors made in it and subsequently disclosed on 31 March. There was no reconciliation explaining how the financial results detailed in the report contributed to the devaluation.
46. Bowen submitted that the devaluation was due to factors such as cash expenditure, impairment losses, a reduction in the value of assets available for sale and a higher level of trade payables and accruals. It submitted that this was disclosed in the report. These details were disclosed through the financial information in sections 8 and 9 of the expert's report.
47. Given that shareholders have been provided with three significantly different valuations by the same expert, it would have been preferable to provide a reconciliation to the past valuations, including an explanation of how the errors made by the technical expert affected the November 2008 valuation and an explanation (as provided to us in submissions) of why the valuation disclosed on 31 March 2009 was downgraded to the valuation in the current report. However, there was information which generally informed shareholders as to why the expert reduced the valuation and further the report is a stand-alone document and therefore reference to past valuations are not necessarily relevant. We were not provided with any evidence that information about the errors or a reconciliation (although no doubt helpful) would have had a material effect on, or altered, the conclusion of the expert's report. Accordingly, while an explanation would have been desirable, we do not consider that the lack of one renders the expert's report deficient to a degree that would give rise to unacceptable circumstances.
48. We were not satisfied that the above issues, either individually or in aggregate, rendered the disclosure in the expert's report so deficient as to lead to an uninformed market for Bowen shares that would give rise to unacceptable circumstances.

#### **Independence of directors**

49. Macrae submitted that the independent directors were aligned to the bid because, if the bid succeeded and Bhushan acquired control of Bowen, the resolution to remove the board would fail.
50. Macrae submitted that the handling of the 22 June meeting and the subsequent requisition on similar terms was the event that initiated the bid and "confirmed the alliance of all directors to Bhushan". He pointed to the declaration of proxies as invalid and the last minute appointment of Mr Johari (a Bhushan nominee to the Bowen board) as chairman of the meeting. We do not consider Bhushan appointing its nominees to the Bowen board necessarily evidences any link between Bhushan and the non-associated directors.

51. Macrae also submitted that the independent directors' response to the bid on 14 July (prior to the target's statement) evidenced the independent directors' alignment to the bid. Firstly, Macrae submitted that the announcement responding to the bid was delayed. We note that the bid was announced on a Friday and the announcement in response was made on the following Tuesday. This is not a significant delay. Secondly, Macrae submitted that the announcement did not (and should have) told shareholders to take no action until the independent directors had considered the merits of the bid. There is no requirement for target directors to make such a statement. A target's decision not to make such a statement does not establish an alliance between the independent directors and the bidder.
52. The announcement in response to the bid also referred to the expert's 31 March 2009 valuation, which was lower than the offer price. Macrae submitted that there were obvious indications that this valuation was unreliable because of the errors made by the expert and that its use indicated that the independent directors were aligned to the bid. We note that the errors referred to were made by the technical expert. As outlined above, we were not persuaded that the errors (which corrected the November 2008 valuation so as to bring about the March 2009 valuation) made the March 2009 valuation unreliable. Bowen also submitted that the expert was appointed on the basis of its familiarity with Bowen and the resultant time and cost savings. We were not provided with any evidence to suggest that the expert was not independent of Bowen or Bhushan.
53. In response to the Macrae submission that the independent directors were not independent of Bhushan, Bowen submitted that:
  - (a) it received legal advice on the issue of independence and handling of the bid. The advice recommended that protocols be implemented to preserve the independence of the independent directors
  - (b) an independent board committee, made up of the independent directors and advisers, was formed to deal with the response to the bid, with protocols adopted as advised
  - (c) Glenn Merchant, Bowen's company secretary and a Bhushan director, was not part of the committee
  - (d) there was no dialogue between the independent directors and the remainder of the board in relation to the bid and
  - (e) the non-independent directors were invited to attend the board meeting which approved the target's statement (one non-independent director attended), but were not invited to comment and abstained from voting.
54. Bowen provided documents to support its submissions. These included copies of the legal advice and board minutes evidencing the committee's discussions regarding the bid. The advice detailed the protocols to be put in place. According to the board minutes the independent directors confirmed that the protocols were put in place and followed, and that the independent directors had been "solely responsible for the preparation of the target's statement to the exclusion of the other directors."

55. We do not consider it was best practice for a non-independent director to attend the meeting at which the sole item of business was the consideration of the target's statement. For instance, the independent directors may have felt that they could not speak as freely as they otherwise would on issues in relation to the bidder and the bid. Best practice would be for a company to avoid such possibilities. However in this case we were satisfied that protocols were adopted and there was no evidence that they were not followed. We were not provided with any evidence that the non-independent director's presence at the meeting had a coercive effect on the independent directors. Mere attendance at the meeting (or non-attendance) does not decide the issue of coercion.
56. It therefore appeared to us that the independent directors of Bowen had taken steps to maintain their independence in responding to the Bhushan bid. We were satisfied that the protocols they were advised to implement were followed. We had no other evidence on which to base a conclusion that they were not independent.

#### **Non disclosure of mining results**

57. Macrae submitted that there had been significant exploration and the identification of significant resources at a key value driver for Bowen, the South Blackwater Project (of which it holds a 15% stake, the remaining 85% being held by Bhushan). Macrae submitted that information regarding this exploration and identification of resources was known to Bhushan but had been withheld from the market.
58. Macrae did not provide any evidence of this, but submitted that a third party was in possession of such evidence. We invited that third party to provide us with any evidence it had in relation to a number of issues, including whether there was information that had not been disclosed, and which should be disclosed, which would or may affect a proper valuation of Bowen. The third party did not provide any evidence to support Macrae's submission.
59. We asked Bowen whether there were any exploration reports or other material relevant to the valuation of Bowen's assets that had not been disclosed to the market (either in reliance on the exception to ASX listing rule 3.1 or otherwise). Bowen submitted that, to the best of the independent directors' knowledge, all material relevant to the valuation of Bowen's assets had been fully disclosed.
60. We therefore concluded that there was insufficient evidence to support Macrae's submission.

#### **Association**

61. Subsequent to the application, Macrae made a further submission that Bhushan and Savni, a 16% shareholder of Bowen, were associates. Macrae submitted that this meant that Bhushan and Savni had, before the bid was announced, accumulated an interest in Bowen of approximately 38%, in breach of s606.
62. ASIC submitted that it was concerned that Bhushan and Savni were associates and provided two pieces of evidence to support its concern:
  - (a) a statutory declaration from Mr Kevin Nichol. It included a transcript of a conversation between Mr Nichol (then a Bowen director) and an employee of

Abax Corporate Services Limited, the Mauritius-based management company that is the registered office of Savni. On one interpretation of the conversation recorded in the transcript, Abax said that it took instructions in respect of Savni's voting power in Bowen from Mr Johari and

- (b) an unsigned copy of an initial substantial holder notice from Savni stamped with: "18/04/2008 11:00 91-11-45518611 BUSHAN STEEL LTD".
63. ASIC also submitted that it considered substantial shareholding notices lodged by Savni were incomplete because they did not provide full information in relation to the ownership structure of Savni. ASIC submitted that, on the basis of this and the above evidence, it was open to the Panel to infer an association between Bhushan and Savni.
64. Bhushan submitted that the evidence provided was unreliable. It provided an email from the employee of Abax to the effect that the transcript in Mr Nichol's declaration did not reflect the conversation. Bhushan submitted that it would be highly unusual for an organisation such as Abax to discuss confidential client information with a third party without consent.
65. Bhushan also submitted that it believed the copy of the substantial shareholder notice was a fabrication by persons unknown to it. Bhushan noted that its corporate name was misspelled on the stamp and submitted that it was "simply not credible to believe that a fax emanating from its organisation would misspell its own corporate name."
66. In *Boulder Steel Limited*,<sup>8</sup> the Panel stated:
- "Issues of association are notoriously difficult for outsiders to prove, but the Panel has repeatedly stated that its starting point is that it is for an applicant to demonstrate a sufficient body of material to satisfy the Panel that association can be established"*
67. We do not consider there was sufficient evidence to take this issue further. The reliability of the evidence provided is questionable, and we were not provided with any other evidence. We also note that Savni did not accept the bid, which might have been expected of an associate "warehousing" shares ahead of a bid. Given the time that has passed, if there was any further evidence available it would have been provided by ASIC.

### Other issues

68. During the course of the matter, Macrae brought other issues to our attention, which it submitted the expert should have investigated.
69. Firstly, Macrae submitted that Bhushan had increased its shareholding in Bowen by 3% in less than 6 months, not meeting the exemption in s611 item 9. Macrae submitted that Bhushan increased its shareholding in Bowen from 19.91% to 22.23% over the course of 160 days, or 5.3 months. This is an increase of 2.32% and therefore the 3% threshold has not been reached. Even if a breach was established, it was not demonstrated to us how this amounts to unacceptable circumstances, given that the

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<sup>8</sup> Boulder Steel Limited [2008] ATP 24 paragraph 22

alleged breach had taken place in February 2009 and was not linked to the circumstances complained of in the application.

70. Macrae also submitted that the minimum bid price requirement in s621(3) should apply to the bid if Bowen and Bhushan had renegotiated an agreement under which Bhushan was to subscribe for Bowen shares at a price of \$0.32. The agreement was executed in October 2008 (over 8 months prior to the bid) and was subject to shareholder approval at the 2008 AGM in December 2008 (over 6 months prior to the bid). According to the results of the AGM in relation to the relevant resolution "it was resolved to adjourn the debate in relation to this resolution until further notice". On 31 March 2009 Bowen announced that the agreement had been cancelled.
71. Perhaps Macrae was making a technical argument that s621(3) applies because the agreement had legal effect until it was cancelled in March, within 4 months of the bid. This is not altogether clear. However, notwithstanding any possible breach (and we make no finding<sup>9</sup>), we do not consider there to be any prospect of unacceptable circumstances arising because the subscription never proceeded. It is therefore hard to see how the equality principle, on which the minimum bid price rule is based, could be offended. The Panel took a similar view in *Goldlink IncomePlus 02*:
- "Even if a contravention of s621(3) may have occurred (which the Panel did not need to consider), the Panel considered that it was unlikely to make a declaration of unacceptable circumstances in this case. In the Panel's view, the amendments made to the share sale agreement had the effect that Challenger would not receive consideration additional to that offered to GoldLink shareholders under the takeover bid. In the circumstances, it was difficult to see how the "equality principle" in s602 was offended"*<sup>10</sup>
72. For these reasons, we were not satisfied that these issues were ones that the expert should have investigated, or that otherwise could give rise to unacceptable circumstances.

## DECISION

73. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

### Orders

74. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Mark Paganin**  
**President of the Sitting Panel**

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<sup>9</sup> Note *Skywest Ltd 01* [2004] ATP 10

<sup>10</sup> *Goldlink IncomePlus Limited 02* [2008] ATP 19 paragraph 11

**Takeovers Panel**

**Bowen Energy Limited 02  
[2009] ATP 16**

**Decision dated 1 September 2009  
Reasons published 9 September 2009**