



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Bowen Energy Limited 02R  
[2009] ATP 19**

**Catchwords:**

*Review application - independent expert's report - technical expert's report - errors in valuation - deficiencies in expert's reports - VALMIN Code - independence of directors - association - disclosure of material information - market bid - declaration of unacceptable circumstances - orders - divestment - new expert's report - Bhushan Steel (Australia) Pty Ltd - Bhushan Steel Limited - Bowen Energy Limited - Savni Holding Limited*

*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*

*Bowen Energy Limited 02 [2009] ATP 16, Midwest Corporation Limited 02 [2008] ATP 15, Midwest Corporation Limited [2007] ATP 33, Universal Resources Limited [2005] ATP 6, Goodman Fielder 02 [2003] ATP 5, Namakwa Diamond Company NL 02 [2001] ATP 9*

**INTRODUCTION**

1. The review Panel, Catherine Brenner, Rodd Levy (sitting President) and Andrew Sisson made a declaration of unacceptable circumstances in relation to the affairs of Bowen. The review Panel considered that there were material deficiencies in the technical expert's report (and so expert's report) regarding some of the values found, some of the logic involved and compliance with ASIC Regulatory Guide 111 and the VALMIN Code. The review Panel is making further enquiries whether Bhushan and Savni are associates. The review Panel agreed with the initial Panel on other aspects of the application.

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, directors of Bowen
Macrae	Macrae Holdings (WA) Pty Ltd
Savni	Savni Holding Limited, a Mauritius incorporated entity
technical expert	Mr Robert Pyper of Minnelex Pty Ltd
technical expert's report	A "Revised Independent Valuation of the Coal Tenements held by Bowen" by the technical expert dated 23 July 2009
VALMIN code	Code for the technical assessment and valuation of mineral and petroleum assets and securities for independent expert reports

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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. The following facts are in addition to the facts as set out in the reasons for the initial Panel's decision in *Bowen Energy Limited 02*, which refer among other matters to the 22 June 2009 meeting and Bhushan's on-market bid.<sup>1</sup>
5. On 25 February 2008, Bowen announced that it had signed two joint ventures with Bhushan Steel Limited. The announcement disclosed that, in exchange for funding exploration costs and feasibility and commissioning costs in relation to the following of Bowen's coal tenements, the joint ventures gave Bhushan an interest of:
  - (a) 85% of EPC 1045 and 1206 (Blackwater South) and
  - (b) 90% of EPC 1001 and 1002 (West Rolleston).
6. The announcement also disclosed that:

*"In the case of the first JV [EPC 1045 and 1206], Bowen has a put option and Bhushan a call option over the interest held by Bowen. This may be converted once a mine is commissioned. The value of this option is worth \$15 million dollars (sic) for every 100 million tonnes proven to a JORC compliant Indicated and Measured resource of coking coal.*

*In the case of the second JV [EPC 1001 and 1002] the value is \$5 million for every 100 million tonnes of thermal coal proven."*<sup>2</sup>
7. On 1 September 2008, Bhushan subscribed for 1.75 million shares at 32 cents per share and on 16 September 2008 it subscribed for a further 1.75 million shares at 32 cents per share. These transactions increased its interest in Bowen to 19.91%.
8. On 12 September 2008, Bowen announced that it had signed a subscription agreement at 32 cents per share with Bhushan subject to shareholder approval. As a part of this agreement, Bowen would issue 100 million shares and 25 million call options to Bhushan for cash consideration of \$32 million. The notice of meeting attached an independent expert's report from the expert dated 6 November 2008, which included an "Independent Valuation of the Coal Tenements held by Bowen Energy" dated 10 October 2008 from the technical expert. The expert valued Bowen's shares at between 22.46 and 27.55 cents per share.
9. On 23 December 2008, Bowen announced that consideration of the subscription agreement was deferred at its annual general meeting.
10. On 19 February 2009, Bhushan exercised options to subscribe for 2,379,000 shares at 20 cents per share. This transaction increased its interest in Bowen to 22.23%. In a

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<sup>1</sup> [2009] ATP 9 at [4] to [13]

<sup>2</sup> The expert report makes it clear that the put and call option is over the second joint venture as well, see pages 16 to 17 of the expert's report

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submission to ASIC provided to the review Panel, Bhushan acknowledged that this was (inadvertently) in breach of section 606.<sup>3</sup>

11. On or about 24 March 2009, the technical expert advised the expert that he had made errors in the valuation of Bowen's coal projects for its report dated 10 October 2008, that the *"number of sub-blocks used for EPC 1045 was 240, not 279 giving too high a figure for the dollar value per sub-block"* and *"hectares have got mixed up with sub-blocks in the valuation, raising the value substantially"*.
12. On 31 March 2009, Bowen made an announcement which stated that:
  - (a) Bowen and Bhushan had agreed to terminate the subscription agreement *"in return for confirmation from Bhushan [which was given] that it will provide the required funding under the two joint venture agreements and will provide a loan facility for up to \$4 million for working capital and exploration on non-joint venture tenements with the loan to be repaid from surplus cash resources or equity provided by Bhushan through exercise of options or otherwise"* and
  - (b) *"certain calculations made in the experts report sent to shareholders were incorrect"*.
13. The announcement attached a letter from the expert dated 31 March 2009. In the letter the expert advised Bowen that the technical expert 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 expert therefore revised its valuation of Bowen shares to between 8.13 and 11.37 cents per share. The letter stated that a *"full supplementary statement has been provided to the Directors of the Company for their records to be made available to Bowen Energy shareholders, ASIC or the ASX as so required"*.

## APPLICATION

14. By application dated 3 September 2009, Macrae sought a review of the decision of the initial Panel in *Bowen Energy Limited 02*. The initial Panel declined to make a declaration of unacceptable circumstances. The President of the Panel consented to the review.
15. Macrae sought a review on the same grounds as its initial application and the additional grounds (among others):
  - (a) another expert's report valued *"Bowen's EPC 930 tenement at \$10-\$20 million with a preferred 'conservative valuation' of \$12 million, valuing Bowen's 40 per cent share at \$4-8 million, with a preferred value of \$4.8 million"*. The technical expert's report valued Bowen's 40% share of EPC 930 at \$0.9 million. Macrae submitted that the technical expert's report had *"substantially misinformed the market as to the value of Bowen's assets"*.
  - (b) the initial Panel appears to have excluded consideration of the 22 June 2009 meeting which does not do justice to the consideration of the technical expert's report, because the outcome of, and conduct at, that meeting *"caused a deficient Expert's Report to be generated and accepted by the Target in the first instance"*.

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<sup>3</sup> References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

**Interim order sought**

16. Macrae sought an interim order to the effect that “Bowen be ordered to abstain from any efforts that it is making to seek that Bowen shares be delisted from the ASX”. We were informed by Bowen’s solicitors that it was not seeking to delist Bowen shares. Therefore we considered that an interim order was not necessary.

**Final orders sought**

17. Macrae did not explicitly seek final orders in its review application. However we assume that it sought substantially the same final orders as in its initial application, including reversal of acceptances and the commissioning of two new expert’s reports.<sup>4</sup>

**DISCUSSION**

18. The review proceeding is a *de novo* consideration. We have considered the matter on the information now available and exercised our own discretion.
19. We have been provided with the following material from the initial Panel proceeding:
- (a) the initial application, preliminary submissions (including from third parties<sup>5</sup>), brief and all submissions and rebuttals and
  - (b) the decision media release, decision email and the final reasons of the initial Panel.
20. As part of these proceedings we obtained the following additional materials:
- (a) the review application
  - (b) further submissions and rebuttals to our brief, supplementary brief and orders brief.

**Initial Panel’s reasons**

21. The initial Panel considered whether the technical expert’s report gave rise to unacceptable circumstances in two contexts:
- (a) whether the technical expert’s report was wrong or the technical expert had reached a conclusion that no reasonable expert could reasonably arrive at<sup>6</sup> and
  - (b) whether the disclosure in the expert’s report was materially deficient to a degree that would lead to an uninformed market for Bowen.
22. The initial Panel was not satisfied that the technical expert’s report or the expert’s report gave rise to unacceptable circumstances.
23. The initial Panel was also not satisfied that there was:

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<sup>4</sup> See *Bowen Energy Limited 02* [2009] ATP 16 at [19]

<sup>5</sup> The initial Panel received some submissions from third parties, who did not become parties to the proceeding

<sup>6</sup> *Re Matine Ltd and others* (1998) 28 ACSR 268

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- (a) enough evidence to conclude that the independent directors of Bowen were not independent such as to constitute unacceptable circumstances
  - (b) material information in relation to Bowen's assets that had not been disclosed to the market or
  - (c) enough evidence to infer that Bhushan and Savni were associates.
24. We decided to conduct proceedings in relation to the:
- (a) adequacy of the independent expert's report
  - (b) alleged association between Bhushan and Savni and
  - (c) actions of the independent directors (including as background the events of the 22 June 2009 meeting).<sup>7</sup>

#### Adequacy of the expert's report

25. The expert's report valued Bowen's shares based on both coal and non-coal assets. The technical expert valued both. The majority of Macrae's and ASIC's concerns were in relation to the technical expert's report on coal assets. While ASIC made some submissions in relation to the adequacy of the valuation of the non-coal assets, we do not make any findings in relation to them.
26. The expert's report discloses that Mr Anil Ahuja is a director of Bowen and Bhushan, and Mr Rajiv Agarwal is an alternative director of Bowen and a director of Bhushan. Therefore an independent expert's report was required under s640.<sup>8</sup>
27. The expert's report states that it has "*considered the requirements of the Corporations Act and relevant Regulatory Guides issued by ASIC*".<sup>9</sup>
28. The expert's report discusses a number of possible valuation methodologies and selects the "*fair market value of underlying net assets on a going concern basis as our primary methodology*".<sup>10</sup>
29. The expert's report states:
- (a) Bowen's "*principal assets are its exploration tenements in the Bowen and Tarong Basins in Queensland and the East Kimberley in Western Australia*"<sup>11</sup>
  - (b) "*In accordance with Regulatory Guide 112, if specialist advice is required on a particular matter for the purposes of an Independent Expert Report, the expert should retain an independent specialist to provide this advice. Therefore an independent*

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<sup>7</sup> We made it clear to the parties that, in relation to the actions of the independent directors, we were interested in the background to the events of the 22 June 2009 meeting but we were not considering overturning the results of the 22 June 2009 meeting. See also *Bowen Energy Limited 02* [2009] ATP 16 at [21] and [22]

<sup>8</sup> Section 640 provides, among other things, that if a director of the bidder is also a director of the target, the target's statement must include or be accompanied by a report by an expert that states whether, in the expert's opinion, takeover offers are fair and reasonable and gives the reasons for forming that opinion

<sup>9</sup> Page 6 of the expert's report

<sup>10</sup> Page 9 of the expert's report

<sup>11</sup> Page 27 of the expert's report

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*technical expert has been engaged to prepare a valuation of Bowen Energy's exploration assets"*

- (c) the technical expert prepared two reports, one in relation to Bowen's coal tenements and one in relation to Bowen's non-coal tenements
- (d) *"The Independent Technical Expert's Reports were prepared in accordance with" the VALMIN Code and that:*

*"We [the expert] have assessed and satisfied ourselves as to the Independent Technical Expert's professional competency, qualifications and objectivity regarding Bowen Energy and have placed reliance on their reports"*

- (e) the valuations ascribed by the technical expert have been adopted in the calculations of the expert<sup>12</sup>
- (f) the technical expert's report discloses in respect of coal tenements held by Bowen

*"At the current stage of exploration the most likely valuation is in the vicinity of \$4.6 million +/- 20% "*

- (g) the expert has, conservatively, *"adopted the high end of" the technical expert's valuation range for the coal tenements and "applied a valuation range of \$4.60 million to \$5.52 million for the coal tenements held by" Bowen and*
- (h) *"the total assessed value of Bowen Energy's exploration assets is in the range of \$5.90 million and \$7.12 million".<sup>13</sup>*

30. The expert's report incorporated the technical expert's report.

31. The expert concluded that the value of Bowen shares was in the range of 3.53 to 5.51 cents per share.<sup>14</sup> The expert considered the market value of Bowen shares on ASX, only as a cross check to its valuation, *"as the share price of thinly traded shares often does not necessarily represent the underlying business assets and liabilities because the illiquidity results in share trades at irrational share prices"*. The expert noted that the *"VWAP over the various periods to 10 July 2009 ranged between 10.9 cents to 17.2 cents"* and concluded *"we note that the recent share trading history supports our conclusion"*. While we understand that an illiquid market in shares may be an issue that goes to reliance on this valuation method, it is unclear without a much better explanation why market trading of between 10.9 and 17.2 cents supported the expert's conclusion of a share valuation at between 3.53 and 5.51 cents per share.

32. The expert's report says:

*"With respect to the coal tenements referred to in section 8.4.1 of this Report, Bhushan holds a call option to acquire and the Company a put option to sell to Bhushan, the Company's interest in the tenements for a consideration calculated using a pre-determined formula, based on JORC compliant Indicated and Measured resources."<sup>15</sup>*

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<sup>12</sup> This is also made clear at paragraph 9.2.4 of the expert's report

<sup>13</sup> Page 29 of the expert's report

<sup>14</sup> Page 30 of the expert's report

<sup>15</sup> Page 29 of the expert's report

33. The expert does conclude that the premium offered under the bid “provides compensation for the potential value” of the joint venture agreements.<sup>16</sup> However it is unclear why the expert refers only to the options issued under the joint venture agreements and not also to Bhushan’s funding commitments. And it is unclear what proportion of the premium is attributable to the value of the joint venture agreements rather than the premium that a bid for control of a company needs to provide above the value of its assets.
34. The expert’s report also says:
- “As stated in the Independent Technical Expert’s Report on the coal tenements held by the Company....*
- ‘Given that no coal resources have yet been defined, it is not possible to determine a value of Bowen Energy’s coal assets without incorporating speculative figures and assumptions.’*
- “Accordingly, without speculation, and given the uncertain outcome and considerable further drilling costs to be incurred and resources to be Indicated and Measured under JORC, it is not possible for us to quantify the valuation impact of the mechanisms that are part of the Joint Venture Agreements.”<sup>17</sup>*
35. It is difficult to understand why the expert concluded that the joint venture agreements could not be valued while being able to put a value on the coal tenements themselves. The reason the expert gave - that the technical expert found that it was not possible to determine a value for Bowen’s coal assets without “incorporating speculative figures and assumptions” - applies equally to the coal tenements and the joint venture agreements. The asset underlying the joint venture agreements is the coal tenements. However the technical expert did provide a value for the coal tenements. He did not value the joint venture agreements.
36. For one thing, as we discuss below, Bhushan appears to have made funding commitments which would seem to place a value on the joint-venture agreements.
37. We consider that this is a material deficiency in the technical expert’s report that has not been corrected by the expert’s report.

*Access to the earlier technical expert’s reports*

38. Macrae submitted that the expert’s report should have explained the differences between the 6 November 2008 report (and the technical expert’s 10 October 2008 report) and the current expert’s report (and technical expert’s report).
39. Bowen submitted that:
- “The Independent Expert’s Report in this instance was prepared in relation to the bid. The previous report was prepared for a different purpose (in relation to the now cancelled subscription agreement). Each of these reports is accordingly, mutually exclusive.”*
40. We do not agree with Bowen’s submission. The technical expert, in the opening paragraph of its report, discloses that:

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<sup>16</sup> Page 33 of the expert’s report

<sup>17</sup> Page 29 of the expert’s report

*“This report updates the Independent Valuation of Bowen Energy Limited’s (Bowen Energy’s) coal assets previously submitted in March 2009. The status and tenure of the tenements have not been independently reviewed in this valuation.”<sup>18</sup>*

41. We infer that the March 2009 report referred to is the report mentioned in the letter from the expert dated 31 March 2009, which was mentioned in the market announcement by Bowen on 31 March 2009<sup>19</sup> but not released to the market or sent to Bowen shareholders. Bowen provided us with the March 2009 report, which is an update of the 10 October 2008 report. We do not consider it realistic to assume that Bowen shareholders should be able to:
- (a) investigate how to find the technical expert’s report in March 2009 by looking for the reference to the *“full supplementary statement”* in Bowen’s 31 March 2009 announcement (see paragraphs 12 and 13) and then request a copy of the report or
  - (b) alternatively, surmise that the technical expert’s report in March 2009 might be similar to the expert’s 10 October 2008 report (which, given the considerable difference in valuation, it is not).
42. Moreover, in our opinion, the market would be unlikely to interpret the technical expert's report as a stand-alone document given its introductory sentence and is therefore likely to be confused by the absence of proper explanation of the change in valuation from the previously issued report. Given how this report is introduced, we think it would be best practice to reconcile the values. At a minimum, the technical expert should have drawn clear links to the earlier reports.

*The technical expert’s methodology and logic*

43. The technical expert’s report valued the coal tenements on two bases – the appraised value method and the comparable transaction method. The appraised value method is described in the technical expert’s report as equating a tenement’s exploration potential *“to the cost of exploration work that is warranted to assess that potential and to include the cost of past work that has saved expenditure in the future”*.<sup>20</sup> The technical expert’s report states:

*“Since the initial valuation, about \$4M has been spent on direct exploration which has included close to 60 bore holes. A minimum \$1-2M would be needed at Blackwater South before a resource could either be defined or the possibility of finding one written off. The minimum testing of all the extensive coal projects currently held by Bowen Energy could require around between \$10 and 20M before adequate knowledge on more detailed target selection could be obtained, however this assumes positive results from all areas. An indicative value of the whole project would therefore fall between \$4M and \$8M using this approach”*.<sup>21</sup>

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<sup>18</sup> Page 1 of the technical expert’s report

<sup>19</sup> Paragraph 2 of the expert’s letter to Bowen of 31 March 2009 refers to the *“re-issued ... corrected report to us dated 10 October 2008 on 25 March 2009”*

<sup>20</sup> Page 17 of the technical expert’s report

<sup>21</sup> Page 17 of the technical expert’s report



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44. No further disclosure was provided in relation to this valuation methodology. It is not clear how the range of \$4M to \$8M logically derives from the previous information. Some further detail in relation to the appraised value methodology was disclosed in the 10 October 2008 and March 2009 reports by the technical expert. However again we consider that it would not be reasonable to expect Bowen shareholders to read the technical expert's report and the technical expert's earlier reports to obtain the necessary additional information.
45. The technical expert appeared to prefer the comparable transaction method over the appraised value method.
46. The technical expert used as a comparable transaction an acquisition in November 2007 by Bowen of all the issued shares of Kondor Holdings Pty Limited for \$2.7 million consisting of cash and a convertible note. Kondor was the holder of EPC 1045. The technical expert's report states that the transaction valued EPC 1045 at "around \$9677/sub-block". We infer that the technical expert used this \$9677/sub-block figure as a reference point and made a series of value judgements in relation to each tenement as he discloses in his report:

*"For thermal coal an appropriate figure would be around half this at \$5,500/sub-block. Drilling results that have been reported have been positive for EPC 1014 and EPC 1085 and the value of these areas has been increased by approximately 25% to \$12,000/sub-block*

*Since the first valuation, Blackwater South tenements EPC 1014 and EPC 1259 have been reduced in effective area by negative drilling, however recent interpretative work has been quite positive with a 68 sq. km area defined (23 sub-blocks), in which a number of coking coal seams appear to be present within mineable depths. On this basis the 23 sub-blocks have been increased in value \$30,000 per sub-block and the remainder reduced in value by approximately 80% to \$2000/sub-block*

*The value of Bowen Energy's holding using this method is approximately \$4.5M, as set out in the accompanying table. The value range about this figure would be about 20% as there has been very little drilling considering the size of the tenement package and no resources have yet been defined."*<sup>22</sup>

47. The accompanying table (reproduced below<sup>23</sup>) lists each tenement, the percentage interest Bowen holds, the number of sub-blocks in each tenement and the value factor per sub-block to reach a value for each holding:

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<sup>22</sup> Page 17 of the technical expert's report

<sup>23</sup> Page 18 of the technical expert's report

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Project	Holding	Status, % Interest Bowen	Value Factor/Sub	Value Bowen's Share \$x1000
Blackwater South	EPC1045	Granted 15%, 199 Subs	\$2,000	60
	EPC1045	Granted 15%, 23 Subs	\$30,000	103
	EPC1206	Granted 15%, 54 Subs	\$9,677	78
	EPC1259	Granted 100%, 18 Subs	\$2000	36
East Middlemount	EPC930	Granted 40%, 240 Subs	\$9,677	929
	EPC1014	Granted 100%, 26 Subs	\$12,000	312
	EPC1085	Granted 100%, 3 Subs	\$12,000	36
West Rolleston	EPC1001	Granted 10%, 35 Subs	\$5,500	19
	EPC1002	Granted 10%, 63 Subs	\$5,500	35
	EPC1084	Granted 100%, 26 Subs	\$5,500	143
	EPC1187	Granted 100% 300 Subs	\$5,500	1650
Tarong	EPC1083	Granted 100%, 213 subs	\$5,500	1171
TOTAL				4573

48. The technical expert concluded that at “the current stage of exploration the most likely valuation is in the vicinity of \$4.6 million +/- 20%”.<sup>24</sup>
49. No proper explanation is given for why the uplift or decrease in sub block value is chosen. While the report includes narrative on the projects, how that translates into a specific increase or decrease in value is not explained. We consider that Bowen shareholders would have difficulty understanding the reasoning of the technical expert. We consider that another expert would have difficulty replicating the results.
50. Macrae submitted, in its review application, among other matters, that:
- (a) the technical expert only applied one method of valuation and an expert is required to “use a number of different methods in arriving at his valuation” and
  - (b) other methods of valuation provided higher valuations of Bowen’s coal assets. One of a number of examples Macrae provided was the book value method, noting that the expert’s report disclosed the book value of Bowen’s exploration assets of \$10.617 million.<sup>25</sup>
51. Bowen reiterated its preliminary submission to the initial Panel that, among other things:

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<sup>24</sup> Page 18 of the technical expert’s report

<sup>25</sup> Page 26 of the expert’s report

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- (a) the results of drilling were *“not at a sufficient level to contemplate an inferred resources at this stage, let alone being at ‘proven’ status”*
- (b) the use of book value was inappropriate given the results of drilling and downgrades and
- (c) any comparison to neighbouring tenements were *“also irrelevant as it is near impossible to determine similarities between tenements in terms of coal quality, depth, structural problems and continuity”*.

52. We think the technical expert should have:

- (a) considered a broader range of valuation methods and comparable transactions
- (b) explained clearly why the comparable transaction method was preferred over the appraised value method, or indeed any other method
- (c) not simply used only one transaction (from 2007) as a reference point to value to the tenements under the comparable transaction method and
- (d) not simply modified the value per sub-block figure for each tenement without any adequate explanation.

53. Macrae submitted that the technical expert did not include a number of possible values, including the *“value of any Joint Venture commercial mechanisms that have value such as call or put options on assets, loans, funding commitments by Bhushan and projects that Bowen is ‘free-carried’”*.

54. We asked Bowen why the technical expert did not place any value on the two joint venture agreements which required Bhushan Steel Limited, among other things, to fund exploration costs and feasibility and commissioning costs in relation to EPC 1045, 1206, 1001 and 1002. Bowen submitted that:

- (a) the joint venture agreements *“were already in place well before the time of the on-market bid announced on 10 July 2009”*
- (b) the joint venture agreements were considered by the expert in formulating its fair and reasonable opinion
- (c) the commercial mechanisms in the agreements were dependent on several contingencies including but not limited to continued drilling, if commercially justified, having an Indicated and Measured JORC compliant resource and the commissioning of a mine
- (d) the *“drilling results have lead (sic) to significant downgrades to initial estimates”*
- (e) *“the potential value, if any, relating to the agreement is not possible to be accurately assessed due to the highly speculative nature of the economic viability of the tenements, as well as the highly contingent nature of the terms and conditions of the agreements”*
- (f) *“Bowen’s retained interests in the underlying tenements were included in the independent technical expert’s report”* and
- (g) the expert *“advised that they performed sensitivity analysis whereby even if the value of the joint venture arrangements were significantly more than the 15% and 10% holdings, it had no material impact”* on the expert’s conclusion.

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55. Macrae submitted in response to Bowen's submission that the value of the joint venture agreements should be estimated, otherwise Bowen has sold 85% of EPC 1045 and 1206 and 90% of EPC 1001 and 1002 for no consideration. We agree with the logic behind Macrae's submission. If Bhushan is prepared to pay for the 'farm-in' leaving Bowen with a free-carried interest of 10% or 15%, then it is reasonable to expect that the 'farm-in' has a value. It may be the equivalent of the free-carried interest, or some other value, but it should not be ignored. To do so values it at zero. And if (for example, because the area is found to have no prospectivity) it is worth nothing, that should be clearly explained.
56. Moreover, it would be reasonable to assume that the joint venture agreements could be a relevant comparable transaction where Bowen sold 85% of EPC 1045 and 1206 and 90% of EPC 1001 and 1002 for fair value. That value could be assessed in the same way as the parts of those tenements that remain with Bowen.
57. Another way of putting this is that we consider that it was likely that Bhushan made an assessment of the value of the tenements when it entered into the joint venture agreements and that the consideration it gave in entering those agreements should reflect what those tenements were worth.
58. We consider that the technical expert should have considered these possibilities and disclosed whether this was an appropriate way to value the joint venture agreements or explain why it wasn't. Not to do so constitutes a material deficiency in the technical expert's report.
59. The fact that Bhushan nominees effectively control the Bowen board makes the valuation of the joint venture agreements particularly important for shareholders.
60. We consider that the absence of a valuation of the joint venture agreements by either the technical expert's report or the expert's report is a material deficiency in the reasoning and conclusions of both reports.
61. The Kondor transaction was the sole transaction used as a comparable transaction. It concerned one tenement, was not recent and was not at arm's length according to submissions. To use it was inconsistent with the technical expert's description of Comparable Transaction Methodology. Moreover, having used it he needed to be much more explicit in explaining its weaknesses.
62. We consider that the absence of analysis of alternative valuation methodologies and comparable transactions, the way one transaction was used in applying the comparable transactions methodology across many tenements and the failure to take into account the value of the joint venture agreements constitute material deficiencies in the technical expert's report and result in material deficiencies in the conclusions of the expert.
63. They are also evidence of non compliance with ASIC Regulatory Guide 111 and the VALMIN Code.

*Compliance with ASIC Regulatory Guide 111 and the VALMIN Code*

64. The technical expert's report says that it has been prepared in accordance with the ASX listing rules, the VALMIN Code and ASIC RG 111 and RG 112.<sup>26</sup>
65. ASIC submitted that the technical expert's report did not comply with RG 111. We agree.
66. We consider that RG 111:
- (a) is a useful statement of the principles relating to disclosure in expert's report
  - (b) establishes principles similar to the requirements of the VALMIN Code and
  - (c) promotes an efficient, competitive informed market.
67. Paragraph RG 111.52 states that an *"expert should justify its choice of methodology or methodologies (including when the expert has used only one methodology, the basis for doing so) and describe the method or methods used in the report"*. ASIC submitted it was concerned that the technical expert's report did not comply with this requirement because among other matters:
- (a) it did not disclose whether any other transactions were considered and
  - (b) it did not provide sufficient information in relation to the appraised value method and the comparable transaction method to allow another expert to take the necessary steps to replicate the technical expert's work.
68. Paragraphs RG 111.58 to 111.60 require an expert to base its opinion on reasonable assumptions and disclose them with a requisite level of specificity and definitiveness. ASIC submitted it was concerned that the technical expert's report did not comply with this requirement because among other matters:
- (a) *"if there has been previous geological exploration and/or drilling, this has not been disclosed and there is no discussion on whether this was considered in the analysis of the coal tenements and if it was not considered, reasons were not provided"*
  - (b) there was insufficient analysis and discussion in the technical expert's report *"of how each of the individual valuation criteria....was applied to each of the tenements"*
  - (c) *"it does not fully disclose the 'proposed two year budget' for each of the tenements"*. ASIC considered this information material because it *"relates to the level of prospectivity for each of the tenements"* and
  - (d) there is no disclosure as to how some estimates of the quality of coal in the tenements was made. For example page 18 of the technical expert's report states that *"there would seem to be an excellent chance of finding in excess of 200 Mt of underground coal"* without any explanation as to how this figure was derived.
69. We also note that the expert disclosed that it had regard to RG 111 when preparing its report and the technical expert disclosed that its report was prepared in accordance with RG 111.

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<sup>26</sup> Page 3 of the technical expert's report

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70. We think the non-compliance gives rise to material deficiencies in the technical expert's report.
71. In particular we agree with ASIC that the technical expert's report does not disclose sufficiently the assumptions underlying the valuation of the coal tenements. As the Panel stated in *Goodman Fielder 02*,<sup>27</sup> an independent expert is "now expected and required to provide information about the information and assumptions used, the methods applied, the risks of error and the expertise and identity of those preparing the figures".
72. ASIC pointed to other issues of non-compliance with RG 111, for example:
- (a) non-compliance with paragraph RG 111.52 because the Kondor transaction was an appropriate comparable transaction to use given it was not an arm's length transaction and occurred over two years ago. We agree that, at the very least, the technical expert should have considered and disclosed these issues for Bowen shareholders to be able to better assess his conclusions and
  - (b) non-compliance with paragraph RG 111.63 because the expert does not provide a reference for the use of the 20% range used. We agree.
73. Macrae submitted that the technical expert's report did not comply with many of the requirements of the VALMIN Code.<sup>28</sup> ASIC submitted that, in considering whether the technical expert's report complied with RG 111.68 (relating to the requirement for expert's reports to be clear, concise and effective), it considered compliance with the VALMIN Code and agreed with some of Macrae's submissions regarding compliance with particular paragraphs of the VALMIN Code.<sup>29</sup>
74. The VALMIN Code is binding on members of the Australasian Institute of Mining and Metallurgy in the preparation of expert's reports. We think it is appropriate to consider compliance with the VALMIN Code when assessing whether an expert's report in the mining sector complies with market practice.<sup>30</sup> The Panel has previously addressed this in *Universal Resources Ltd*.<sup>31</sup> It decided that the letter in that proceeding was not an expert report, so did not need to comply with the VALMIN Code. It is clear that, if it had been an expert report, it would have been required to comply.
75. We consider that material non compliance with the VALMIN Code by the technical expert constitutes a material deficiency in the technical expert's report.
76. The purpose of the VALMIN Code is to:

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<sup>27</sup> [2003] ATP 5 at [67]

<sup>28</sup> Macrae submitted that the technical expert's report did not comply with paragraphs 17, 28, 31, 32, 34, 35, 40, 44, 49, 50, 51, 52, 58, 62, 63, 64, 68, 69, 71, 72, 73, 76, 78, 80, 97, 98 and 101 of the VALMIN Code

<sup>29</sup> ASIC submitted that it agreed with Macrae's concerns about compliance with the following VALMIN Clauses: 28, 32, 40, 44, 49, 50, 58, 62, 63, 68, 73, 78

<sup>30</sup> This is consistent with the approach the Panel has taken regarding compliance with the JORC Code (*Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves 2004 edition*, prepared by the Joint Ore Reserves Committee of the Australian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and Minerals Council of Australia). See *Midwest Corporation Limited* [2007] ATP 33 at [28], *Universal Resources Limited* [2005] ATP 6 at [17] and [18] and *Namakwa Diamond Company NL 02* [2001] ATP 9 at [19] and [20]

<sup>31</sup> [2005] ATP 6 at [26] to [28]

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*...provide a set of fundamental principles and supporting recommendations regarding good professional practice to assist those involved in the preparation of Independent Expert Reports that are public and required for the assessment and/or valuation of Mineral and Petroleum Assets and Securities so that the resulting Reports will be reliable, thorough, understandable and include all Material information required by investors and their advisers when making investment decisions.*<sup>32</sup>

77. We are of the view that the technical expert's report does not comply with the following paragraphs of the VALMIN Code:
- (a) The requirements for transparency<sup>33</sup> and that an expert "*should disclose and discuss in the Report the selected valuation method(s) used having regard to each of these factors so that another Expert could understand the procedure used, and within reasonable bounds, arrive at a similar Valuation*".<sup>34</sup> The technical expert appears to have used the Kondor acquisition as a reference point of "*around \$9677/sub-block*" and then applied his value judgment to increase or decrease the value per sub-block for different Bowen coal tenements. We think the description of how the technical expert applied his value judgment is too general for another expert to be able "*to understand the procedure used, and within reasonable bounds, arrive at a similar Valuation*".<sup>35</sup> In our view, shareholders were not given the information necessary to be able to assess the weight that should be given to the judgment, and accordingly to the valuation.
  - (b) The requirement that if "*more than one valuation method is used and, in consequence, different Valuations result, the Expert or Specialists should comment on how valuations compare and on the reason(s) for selecting the Value adopted*".<sup>36</sup> There is insufficient explanation as to why the technical expert appears to have favoured the comparable transaction method over the appraised value method or any other method.
  - (c) The requirement that the content of the report must "*contain all information which the Commissioning Entity and others likely to rely on the Report, including investors and their professional advisers, would reasonably require, and reasonably expect to find in the Report, for the purpose of making an informed decision about the subject of the Report*".<sup>37</sup> The technical expert's report does not provide sufficient information. For example, the technical expert does not disclose his view as to the value of the joint venture agreements.
  - (d) There is no disclosure that the technical expert considered whether the value should be affected by "*a premium or discount to account for such factors as market, strategic considerations or special circumstances*"<sup>38</sup> or "*high commodity prices and/or buoyant share market conditions*".<sup>39</sup>

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<sup>32</sup> Paragraph 1 of the VALMIN Code

<sup>33</sup> Paragraph 28 of the VALMIN Code

<sup>34</sup> Paragraph 32 of the VALMIN Code

<sup>35</sup> See also sub-paragraph 50(e) of the VALMIN Code

<sup>36</sup> Paragraph 32 of the VALMIN Code

<sup>37</sup> Paragraph 50 of the VALMIN Code

<sup>38</sup> Paragraph 44 of the VALMIN Code

<sup>39</sup> Paragraph 58 of the VALMIN Code

*Technical expert's report - conclusion*

78. For the reasons listed above, we conclude that there are material deficiencies in the technical expert's report.
79. The expert disclosed that it had "*assessed and satisfied ourselves as to the Independent Technical Expert's professional competency, qualifications and objectivity*". We have found material deficiencies in the technical expert's report. Accordingly we think the expert's report is materially deficient.
80. We adopt the Panel's reasoning in *Goodman Fielder 02*,<sup>40</sup> which we believe applies equally to expert's valuations as to forecasts:
- "Whether or not an independent expert is retained, ASIC policy and contemporary standards require the basis of a valuation or forecast to be set out sufficiently to allow an assessment of its reliability. The policy of ensuring that acquisitions of shares in companies take place in an informed, competitive and efficient market supports this requirement."*
81. In this case an independent expert's report was required under s640. An independent expert's report is for the protection of target shareholders. The material deficiencies in the technical expert's report, which were not dealt with by the expert in its report, lead us to the conclusion that Bowen shareholders have not been given enough information to enable them to assess the merits of the Bhushan on-market bid and the acquisition of control over Bowen shares has not taken place in an efficient, competitive and informed market (s602(b)(iii) and s602(a)).
82. Based on our experience, we think the market would not find the expert's report helpful and, because of its deficiencies, may even find it misleading or confusing.

*Other matters*

83. Like the initial Panel,<sup>41</sup> we were also concerned that the full report providing details of the correction to earlier conclusions by the expert and the technical expert, referred to in Bowen's announcement on 31 March 2009, was not provided to Bowen shareholders.
84. The original report by the expert dated 6 November 2008 (relying on the technical expert) valued Bowen shares at between 22.46 and 27.55 cents per share. The revised valuation as at 31 March 2009 was between 8.13 and 11.37 cents per share. We think that Bowen shareholders should have received the full supplementary statement referred to in the announcement and an explanation for the error. Bowen shareholders needed this information to assess the later conclusions in the most recent technical expert's report, particularly as the most recent report was described as supplemental.

**Association**

85. Before the initial Panel, Macrae submitted that Bhushan and Savni, a 16% shareholder in Bowen, were associates. The initial Panel commenced proceedings in

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<sup>40</sup> [2003] ATP 5 at [70]

<sup>41</sup> *Bowen Energy Limited 02* [2009] ATP 16 at [47]



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relation to the alleged association, but did not consider there was sufficient evidence to take this issue further.

86. An association between Bhushan and Savni may mean voting power of approximately 38%, issues around the minimum bid price rule<sup>42</sup> and a possible further breach of s606.
87. ASIC had submitted to the initial Panel that it was concerned that Bhushan and Savni were associates and submitted to us that it was concerned that certain evidence was equivocal.
88. We commenced proceedings on this issue as well.<sup>43</sup> Notwithstanding the equivocal nature of certain evidence, we were not entirely comfortable that an association could not be established. So we sought further information.
89. Our first enquiry went to the ownership of SH Niroli Holding Ltd, the sole shareholder in Savni. Despite requests as to the ownership of SH Niroli this information had not been disclosed. ASIC submitted that it wrote to the legal advisers for SH Niroli asking for confirmation that its shareholders did not have a relevant interest in the Bowen shares held by Savni. They confirmed in response that the shareholders did not have a relevant interest, *“notwithstanding sections 608(3)(b), 608(4) and 608(5) of the Act. This is because the shareholders of SH Niroli do not ‘control’ SH Niroli, as that term is defined in section 50AA of the Act...”*
90. We invited Savni to make a submission. Savni submitted that it did not consider the conclusion (that the shareholders did not have a relevant interest in any Bowen shares held by Savni) to be correct. It said that a subsequent advice to ASIC had stated that *“SH Niroli has a relevant interest in the Bowen shares held by Savni, by virtue of being associates of each other pursuant to section 12(2)(a) and also pursuant to section 608(3) of the Corporations Act 2001 (Cth) (Act).”*
91. We also asked how the board of Savni made decisions about buying or selling Bowen shares or voting. Savni submitted that under the terms of its constitution, its board of directors were entitled to make all financial management, operating and investment decisions concerning the company.
92. We also asked, if SH Niroli did not control Savni, then who did. Savni submitted that *“The board of directors of SH Niroli (as the sole shareholder of Savni) controls Savni for the purposes of section 50AA and section 608(4) of the Act.”*
93. We also asked why the shareholders of SH Niroli did not control SH Niroli. Savni submitted that *“Section 608(4) of the Act provides that, for the purposes of section 608(3)(b), a person controls a body corporate if the person has the capacity to determine the outcome of decisions about the body corporate’s financial and operating policies. Savni does not consider the shareholders of SH Niroli to have this capacity in respect of SH Niroli, but rather that the board of directors of SH Niroli has this capacity.”*
94. We do not regard these answers as satisfactorily responding to the questions.
95. In addition, we asked each of the directors of Savni:

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<sup>42</sup> On 4 June, acquisitions by Savni on market averaged 18.8 cents per share

<sup>43</sup> See *Midwest Corporation Limited 02* [2008] ATP 15 at [38]

## Takeovers Panel

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- (a) whether they were prepared to provide a sworn statement about whether there has been, or is, any association or other relationship between Bhushan and Savni and
  - (b) about who the shareholders of SH Niroli are, and who the ultimate beneficial owners of the shares in SH Niroli are.
96. One director provided a sworn statement as to paragraph 95(a). We await a sworn statement from the other director as to paragraph 95(a). We await sworn statements from each of the directors as to paragraph 95(b).
97. Bhushan submitted that it did not have any relationship or association with Savni and did not discuss Bowen with officers of Savni, SH Niroli or any other related entity before the purchase, by Savni, of a stake in Bowen. It provided an affidavit by Nittin Johari<sup>44</sup> confirming that Bhushan did not discuss Bowen with officers of Savni, SH Niroli or any other related entity before the purchase by Savni of a stake in Bowen. Mr Johari also confirmed that Bhushan did not provide any assistance, financial or otherwise, to Savni, SH Niroli or any other related entity for the acquisition of Bowen shares.
98. While we continue to pursue this factual investigation to the extent of getting answers to the questions we asked, we note the limitations of examination by correspondence. We are pursuing the answers to these and further questions, but others may have better powers and resources to pursue these issues.

#### **Actions of the independent directors**

99. We considered the actions of the independent directors – including the events of the 22 June 2009 meeting and their response to Bhushan’s bid. Like the initial Panel, we have no evidence to suggest that the independent directors were not independent.<sup>45</sup> We also have no evidence to suggest that the actions of the directors leading up to the 22 June 2009 affected the quality of the expert’s report and technical expert’s report.<sup>46</sup>

#### **Other issues**

100. We agree with the initial Panel in relation to non disclosure of mining results<sup>47</sup> and other issues raised in the review application.<sup>48</sup>

## **DECISION**

### **Declaration**

101. It appears to us that the circumstances are unacceptable having regard to:
- (a) the effect that we are satisfied the circumstances have had on:
    - (i) the control, or potential control, of Bowen or

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<sup>44</sup> A director of Bowen and Bhushan Steel Limited

<sup>45</sup> [2009] ATP 16 at [49] to [56]

<sup>46</sup> [2009] ATP 16 at [68] to [72]

<sup>47</sup> [2009] ATP 16 at [57] to [60]

<sup>48</sup> [2009] ATP 16 at [68] to [72]

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bowen and

(b) the purposes of Chapter 6 set out in section 602.

102. Accordingly, we made the declaration set out in Annexure A.

103. We consider that it is not against the public interest to make a declaration of unacceptable circumstances. We had regard to the matters in section 657A(3).

### Orders

104. Following the declaration, we made the final orders set out in Annexure B. The orders operate to the effect that:

(a) the independent directors of Bowen must procure a report by a new independent expert (satisfactory to ASIC) to provide a valuation of Bowen as at 23 July 2009. While we made no findings in relation to the valuation of non-coal assets, the new expert's report should address these as well as the coal assets and

(b) Bhushan must divest the shares it received under its takeover offer to accepting offerees who want them back. However Bhushan will not be required to divest if the new independent expert concludes that the Bhushan takeover offer is fair and reasonable.

105. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'<sup>49</sup> if 4 tests are met:

(a) It has made a declaration under s657A. This was done on 30 September 2009.

(b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. No submissions were made that the proposed orders would be unfairly prejudicial, subject to the discussion below about the conclusion of the new expert's report.

(c) It gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 22 September 2009.

(d) It considers the orders appropriate to protect the rights and interests of persons affected by the unacceptable circumstances or any other rights or interests of those persons.<sup>50</sup> We think the orders are appropriate. Bhushan acquired shares from persons whose decision-making was affected by information deficiencies, albeit not of Bhushan's making. We have ordered that there be a new report, which will correct the information deficiencies, and that there be a divestiture order to replicate a 'withdrawal' right, so as to put shareholders back in the position they should have been in when accepting under the bid.

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<sup>49</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

<sup>50</sup> The other aspect of this test is that the Panel considers that the orders will result in the bid proceeding as if the unacceptable circumstances had not occurred. This is not relevant as the bid has ended

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106. In response to Macrae seeking an interim order in the initial Panel proceedings that the on-market bid be extended, Bhushan submitted that:

*....Bhushan does not understand what purpose such an extension would serve. The final orders sought by Macrae Holdings (WA) Pty Limited are either the unwinding of acceptances received under the bid or the forced divestment by Bhushan of the Bowen share (sic) received under the bid. If the Panel decides to conduct proceedings and if the Panel were to make final orders in the form sought the result would simply be to extend the orders to shares Bhushan acquires as a result of acceptances received during the extended offer period.*

107. We take from the submission that Bhushan accepted that the Panel might divest shares it obtained under the on-market bid and effectively give accepting Bowen shareholders the right to 'withdraw' their acceptance after the bid had ended. However, given that the initial application by Macrae was made as Bhushan's on-market bid was drawing to a close and the passage of time since the close of the bid, we are concerned that giving those shareholders who accepted Bhushan's bid the effective right to withdraw their acceptances irrespective of the conclusions of the new expert, may be unfairly prejudicial to Bhushan. Some time has since passed and Bhushan has carried the market risk on those shares.

108. Bhushan submitted that the orders should only require Bhushan to make offers to eligible shareholders to sell back relevant shares, if the new expert report concludes that Bhushan's offer was not fair and reasonable. Bowen and ASIC agreed with Bhushan's submission. Macrae did not. We accept Bhushan's submission to the extent that we have ordered that it will not be required to make offers to eligible shareholders to sell back relevant shares if the new expert report concludes that the Bhushan bid is fair and reasonable. We consider that this order appropriately balances the rights and interests of those affected by the unacceptable circumstances while not being unfairly prejudicial to Bhushan.

109. Macrae asked for costs. In the absence of extenuating circumstances it not usual for the Panel to make an order for costs. We make no order as to costs.

**Rodd Levy**

**President of the Sitting Panel**

**Decision dated 30 September 2009**

**Reasons published 9 October 2009**

**Reissued with post script on 19 October 2009**

### **Post Script**

The Panel concluded its proceedings in this matter on 19 October 2009. The Panel has referred the question of whether there is any association between Bhushan Steel (Australia) Pty Ltd and Savni Holding Limited to ASIC.



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657EA**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**BOWEN ENERGY LIMITED 02R**

**CIRCUMSTANCES**

1. On 25 February 2008, Bowen Energy Limited (**Bowen**) announced that it had signed two joint ventures with Bhushan Steel Limited (**Bhushan**).
2. In exchange for funding exploration costs and feasibility and commissioning costs in relation to the following of Bowen's coal tenements, the joint ventures gave Bhushan an interest of:
  - (a) 85% of EPC 1045 and 1206 and
  - (b) 90% of EPC 1001 and 1002.
3. On 12 September 2008, Bowen announced that it had signed a subscription agreement at 32 cents per share with Bhushan Steel (Australia) Pty Limited (**Bhushan Aust**) subject to shareholder approval. The notice of meeting attached an independent expert's report from WHK Horwath Corporate Finance (**Horwath**) dated 6 November 2008, which included an "Independent Valuation of the Coal Tenements held by Bowen Energy Limited" dated 10 October 2008 from Minnelex Pty Ltd (**Minnelex**). Horwath valued Bowen's shares at between 22.46 and 27.55 cents per share.
4. The subscription agreement was cancelled after consideration of it was deferred at Bowen's annual general meeting. Bhushan agreed to provide the required funding under the two joint venture agreements and a loan facility for working capital and exploration on non-joint venture tenements.
5. On or about 24 March 2009, Minnelex advised Horwath that it had made errors in the valuation of Bowen's coal projects for the 2008 report. Horwath advised Bowen.
6. On 31 March 2009, Bowen announced the events in paragraph 4 and that "*certain calculations made in the expert's report sent to shareholders were incorrect*". The announcement attached a letter from Horwath dated 31 March 2009, which disclosed a revised conclusion on the value of Bowen's shares at 8.13 to 11.37 cents per share. It also stated: "*A full supplementary statement has been provided to the Directors of the Company for their records to be made available to Bowen Energy shareholders, ASIC or ASX as so required.*" The supplementary statement was not disclosed.
7. On 10 July 2009, Bhushan Aust announced a market offer for all Bowen shares it did not own at 14 cents per share. It had a relevant interest in 22.23% of Bowen shares.

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8. On 24 July 2009, Bowen issued a target's statement attaching an independent expert's report by Horwath. The report included a "Revised Independent Valuation of the Coal Tenements held by Bowen" dated 23 July 2009 from Minnelex. The report valued Bowen's shares at 3.53 to 5.51 cents per share.
9. The Bhushan Aust bid ended on 26 August 2009. Bhushan Aust disclosed in a substantial holder notice dated 17 August 2009 that it had voting power in 58.81% of Bowen.
10. There are material deficiencies in Minnelex's 23 July 2009 report regarding some of the values found, some of the logic involved and compliance with ASIC Regulatory Guide 111 and the VALMIN Code.
11. As a result of the deficiencies in Minnelex's 23 July 2009 report (and hence the expert's report) and information deficiencies, the acquisition of control over Bowen shares has not taken place in an efficient, competitive and informed market and shareholders in Bowen were not given enough information to enable them to assess the merits of the Bhushan Aust bid.
12. It appears to the review Panel that the circumstances are unacceptable having regard to:
  - (a) the effect that the review Panel is satisfied the circumstances have had on:
    - (i) the control, or potential control, of Bowen or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bowen and
  - (b) the purposes of Chapter 6 set out in section 602.
13. The review Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## DECLARATION

The review Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Bowen.

**Alan Shaw**  
**Counsel**  
**with authority of Rodd Levy**  
**President of the review Panel**  
**Dated 30 September 2009**



**Australian Government**

**Takeovers Panel**

## **Annexure B**

### **CORPORATIONS ACT SECTION 657D ORDERS**

#### **BOWEN ENERGY LIMITED 02R**

The Panel made a declaration of unacceptable circumstances on 30 September 2009.

#### **THE PANEL ORDERS**

##### **Independent expert's report**

1. Bowen Energy Limited (**Bowen**) must procure a new independent expert's report and valuation on Bowen as at 23 July 2009 on the following terms:
  - (a) a new independent expert is to be chosen by the independent directors of Bowen
  - (b) unless the new independent expert has the expertise required to value Bowen's assets, it must choose and engage a new independent technical expert
  - (c) the new independent expert and any independent technical expert must be satisfactory to ASIC
  - (d) the new independent expert and any independent technical expert is not to be associated with Bowen, Bhushan Steel (Australia) Pty Ltd (**Bhushan**), Bhushan Steel Limited, WHK Horwath Corporate Finance Limited or Minnelex Pty Ltd
  - (e) the new expert's report and any independent technical expert's report must comply with the ASIC regulatory guides on expert's reports and the code for the technical assessment and valuation of mineral and petroleum assets and securities for independent expert reports (VALMIN code)
  - (f) Bowen must make available all information reasonably requested by the new independent expert and any independent technical expert
  - (g) the new independent expert and any independent technical expert must consider, and provide detailed analysis on, the effect on the value of Bowen shares of the agreements between Bowen and Bhushan which reduced Bowen's interest in tenements EPC 1045 and EPCA 1206 from 100% to 15% and in tenements EPC 1001 and 1002 from 100% to 10%. If the independent expert or the independent technical expert decides not to take the agreements into account they must explain the reasoning in their reports
  - (h) the independent expert and any independent technical expert must consider the information in the full supplementary statement referred to in the letter of WHK Horwath to the Bowen board of directors dated 31 March 2009 and

## Takeovers Panel

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- (i) the new independent expert and any independent technical expert must certify to the Panel that they were given access to all information reasonably requested.
2. The new independent expert's report (containing any independent technical expert's report) must be released to the market within 30 business days of the date of these orders.
3. The costs of the reports, and dispatch of the expert's report (containing any independent technical expert's report) under order 8, are to be borne by Bowen.
4. Bowen must submit a draft of the expert's report (containing any independent technical expert's report) to ASIC for review.
5. ASIC must advise the Panel whether in its opinion the independent expert's report and any independent technical expert's report comply with ASIC's regulatory guides on expert's reports.

#### Offer to sell back shares accepted

6. If orders 8 to 11 apply, Bhushan must divest the shares it received under its takeover offer in accordance with these orders.
7. Orders 8 to 11 apply unless the new independent expert concludes that the Bhushan takeover offer is fair and reasonable.
8. At the same time the new independent expert's report (and any independent technical expert's report) is released to the market, Bowen must:
  - (a) send the independent expert's report (including any independent technical expert's report) to former Bowen shareholders who accepted the Bhushan takeover offer announced on 10 July 2009 (**eligible shareholders**) and
  - (b) release to the market a notice setting out:
    - (i) that Bhushan is offering the shares without disclosure to the eligible shareholders under Part 6D.2
    - (ii) that the notice is being given in accordance with these orders
    - (iii) that Bowen has complied with:
      - (A) the provisions of Chapter 2M as they apply to Bowen and
      - (B) section 674 and
    - (iv) any information that is excluded information as at the date of the notice (in accordance with the requirements of subsections 708A(7) and(8) as if the notice were a notice under paragraph 708A(5)(e)).
9. Within 5 business days of the dispatch of the expert's report to eligible shareholders, Bhushan must write to eligible shareholders (in a form the Panel does not object to):
  - (a) explaining the decision of the Panel and effect of these orders
  - (b) offering them the right to buy back the same number of shares they accepted under the Bhushan bid, or part thereof, on the following terms:
    - (i) the price is the takeover offer price of 14 cents per share



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- (ii) the offer is open for 15 business days from the date the last of the offers is dispatched
- (c) enclosing an acceptance form:
  - (i) requiring details of how many shares are to be bought back by the eligible shareholder
  - (ii) specifying the payment methods acceptable to Bhushan (which must include at least cheque) and
  - (iii) specifying that the money (in cheque or other form acceptable to Bhushan) for the shares to be bought back is to be sent to Bhushan (at an address in Australia) with the acceptance. The money is to be banked in a special purpose trust account no later than the end of the day of receipt and only released to Bhushan following transfer.
- 10. If for any reason Bhushan does not accept an application:
  - (a) within 1 business day it must provide the application and its reasons for non-acceptance to ASIC
  - (b) ASIC must, within 2 business days of receipt, make a decision on whether or not the application should be accepted and
  - (c) if ASIC is unable to make a determination as to whether the application should be accepted, ASIC must refer the matter to the Panel within 3 business days of receipt of the application from Bhushan.
- 11. By the later of:
  - (a) 5 business days of the receipt of a properly completed application (subject to ASIC or Panel review) and
  - (b) 1 business day of cleared fundsBhushan must process an off market transfer into the eligible shareholder's name.

**Alan Shaw**  
**Counsel**  
**with authority of Rodd Levy**  
**President of the sitting Panel**  
**Dated 30 September 2009**