



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Mungana Goldmines Limited 01R  
[2015] ATP 7**

**Catchwords:**

*review application - decline to conduct proceedings - replacement investor presentation - production target - capital expenditure - misleading statements - materiality - independent expert report - technical report - scope of review*

*Corporations Act 2001 (Cth), sections 657EA, 657C, 638, 644*

*ASIC Regulations 2001 (Cth), 16(1)(a)*

*ASIC Regulatory Guide 170 - Prospective Financial Information*

*Guidance Note 18 - Takeover documents*

*Mungana Goldmines Ltd [2015] ATP 6, Gondwana Resources Limited 02R [2014] ATP 18, Minemakers Limited 02R [2012] ATP 16, Bentley Capital Limited 01R [2011] ATP 13, Leighton Holdings Limited 01, 02 and 03 [2010] ATP [13], Gloucester Coal Limited 01R [2009] ATP 9, GoldLink IncomePlus Limited 04R [2009] ATP 3, Mount Gibson Iron Limited [2008] ATP 4, Dromana Estate Limited 01R [2006] ATP 8, Austral Coal Limited 01 [2005] ATP 11, BreakFree 04(R) [2003] ATP 42, National Can Industries 01R [2003] ATP 40, BreakFree 04 [2003] ATP 39, Anzoil NL 02 [2002] ATP 21*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

**INTRODUCTION**

- The review Panel, Ron Malek, Jane Sheridan (sitting President) and Alison Watkins declined to conduct proceedings on a review application by Auctus Chillagoe Pty Ltd in relation to the affairs of Mungana Goldmines Limited. The review Panel considered that there was no reasonable prospect that it would come to a different conclusion to the initial Panel, and considered that one issue raised was a new issue that was not appropriately the subject of a review application.
- In these reasons, the following definitions apply.
  - Auctus                                      Auctus Chillagoe Pty Ltd
  - Mungana                                      Mungana Goldmines Limited

**FACTS**

- On 29 April 2015, Auctus made an off-market takeover bid for Mungana (an ASX listed company; ASX code: MUX) at \$0.135 cash per share. The bid is scheduled to close on 13 July 2015.
- The facts are set out in *Mungana Goldmines Limited 01*.<sup>1</sup> Briefly:
  - (a) On 11 May 2015, Mungana released an investor presentation to ASX that made statements in relation to its King Vol zinc project.

<sup>1</sup> [2015] ATP 6

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- (b) Auctus complained about aspects of the presentation, resulting in Mungana withdrawing and replacing the investor presentation.
- (c) On 29 May 2015, Mungana released its target's statement to ASX.
- (d) Auctus was not satisfied with the updated investor presentation and brought Panel proceedings. It submitted that the production target was materially overstated, because it assumed that all inferred and indicated resources would be extracted for mining processing, and that the estimated pre-production capex was materially understated.
- (e) The initial Panel declined to conduct proceedings. It held that Mungana had adequately rectified any misleading issues in relation to the production target, by stating that the target was aspirational, and also that Mungana had adequately rectified any misleading issues in relation to its pre-production capital expenditure by clarifying that the capex was limited to bringing the King Vol project to 'first production'. The initial Panel also said "*the statements regarding the production target and estimated pre-production capex are not material in the context of the independent expert's valuation of Mungana's shares.*"<sup>2</sup>

## REVIEW APPLICATION

### Declaration sought

- 5. By application dated 9 June 2015, Auctus sought a review of the initial Panel's decision. The President consented to the review on 9 June 2015.<sup>3</sup>
- 6. Although the review application did not specify, we take it that Auctus seeks to set aside the decision of the initial Panel and have the review Panel conduct proceedings and make a declaration of unacceptable circumstances in relation to the affairs of Mungana.
- 7. Auctus raised two grounds for review: materiality of the projected capital expenditure in relation to the King Vol project and errors in the specialist's report.
- 8. In respect of the former ground (ie capex), Auctus submitted that '*the initial Panel may have erred in concluding that the statements relating to Mungana's projected capital expenditure for its King Vol project were not material information to the valuation of Mungana's shares.*' It submitted that the initial Panel may have erred because:
  - (a) **Materiality of projected capital expenditure:** '*while the projected capital expenditure may not have had a material impact on the valuations in the expert reports, the projected capital expenditure is material to shareholders considering whether to accept or reject Auctus' takeover bid*' and
  - (b) **Errors in the specialist's report:** the Panel may have placed undue reliance on the opinions expressed by the independent expert and specialist who have erred in their respective valuations. It submitted that '*there is additional evidence ... relating to material errors in the Specialist's Report, which impact the Expert's*

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<sup>2</sup> [2015] ATP 6 at [20]

<sup>3</sup> s 657EA(2)

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*Report, ultimately overvaluing Mungana's shares and having the potential to affect the independent expert's conclusion that Auctus' takeover bid is not fair or reasonable'.*

9. In respect of the latter ground (ie error), Auctus submitted that there was additional evidence it wished to bring to the Panel's attention relating to a table in the specialist's report,<sup>4</sup> which detailed 'Comparative Gold Property Transactions'. Auctus submitted that two transactions (numbers 2 and 4 in the table) should not have been included, resulting in the benchmark value of A\$19.42 per resource ounce of contained gold actually being A\$13.02. It submitted that the Panel should have regard to this and to the impact this has on the valuation range for Mungana shares.

## DISCUSSION

10. In determining this matter, we have been provided with and have considered the following materials:
- (a) all the material before the initial Panel including the initial application, preliminary submissions of Mungana and rebuttal submissions
  - (b) the initial Panel's decision email and reasons for decision
  - (c) Mungana's supplementary target's statement dated 9 June 2015
  - (d) the complete specialist's report dated 27 May 2015
  - (e) the review application
  - (f) Auctus' supplementary submissions to its review application and
  - (g) Mungana's preliminary submissions to the review application.
11. Our review is a de novo hearing.<sup>5</sup> This means that we have considered the matter on the information now available and exercised our own discretion.<sup>6</sup> But for reasons discussed below we have decided not to conduct proceedings on the ground of review dealing with additional evidence that Auctus wished to bring to the Panel's attention.<sup>7</sup>

### Materiality of projected capital expenditure

12. Auctus submitted, in its initial and review applications, that the projected capital expenditure of Mungana<sup>8</sup> to bring the King Vol project into production was misleading because, among other things:<sup>9</sup>
- (a) the amount was materially understated based on Auctus' estimates and

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<sup>4</sup> Table 5-3 at page 38 of the report by SRK Consulting (Australasia) Pty Ltd dated 27 May 2015 prepared for inclusion in the expert report by Grant Thornton Corporate Finance Limited

<sup>5</sup> *Gondwana Resources Limited 02R* [2014] ATP 18 and references cited therein

<sup>6</sup> See for example, *Anzoil NL 02* [2002] ATP 21; *Gloucester Coal Limited 01R* [2009] ATP 9

<sup>7</sup> The Panel has this power: *GoldLink IncomePlus Limited 04R* [2009] ATP 3 at [14]

<sup>8</sup> The projected capital expenditure in issue concerns Mungana's Replacement Production Target

<sup>9</sup> Auctus had also submitted that a reasonable basis for the pre-production capital expenditure had not been disclosed, which Mungana had disputed. This aspect was not raised again by the review application

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- (b) the disclosure *'has given the misleading impression to investors that Mungana considers the total capital required by the company prior to King Vol coming into production is less than \$40 million.'*
13. Auctus submitted that the projected capital expenditure was material information to shareholders, even if it had no material impact on the expert's valuation of Mungana shares.
14. This was because one had to have regard to the *'dilutionary effect of a future capital raising of between 129% to 289% of Mungana's market capitalisation (pre-takeover bid).'* Auctus' figures of 129% and 289% were based on Mungana's market capitalisation of approximately \$31 million prior to the announcement of the bid, Mungana's estimate of projected capital expenditure of approximately \$40 million and Auctus' estimate of projected capital expenditure of up to \$89.9 million.
15. Auctus submitted that the risk of significant dilution of shareholdings was *'real and substantial'* because Mungana's major shareholders, who hold 72.16%, had no foreseeable ability to participate in future funding of Mungana because they were in liquidation. Therefore, fundraising would need to be sourced from third parties.
16. Auctus further submitted that the projected capital expenditure was material because it was forecast financial information, which may not be reflected in a current valuation of a company's shares. Auctus quoted ASIC *Regulatory Guide 170 – Prospective Financial Information* in support of its submission that such information may be material to shareholders.
17. RG 170 says:
- Our regulatory experience has identified inherent dangers in disclosing prospective financial information. Some examples include:*
- (a) ...
- (b) the inherent potential to mislead by disclosing prospective financial information based on hypothetical circumstances or unreasonable assumptions.*
- In addition, research has shown that:*
- (a) the release of prospective financial information by management has a significant effect on share prices (indicating that buy/sell decisions are influenced by prospective financial information) ...<sup>10</sup>*
18. Mungana submitted, in preliminary submissions to the review application, that the dilutionary effect was overstated by Auctus, had been disclosed and had been adequately considered by the expert.
19. Mungana also submitted that it was clear from the updated investor presentation that the projected capital expenditure estimate did not include ongoing company costs given that the estimate was framed as an estimate in relation to the King Vol project and was followed by a cross-reference to an appendix which explained that it

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<sup>10</sup> ASIC *Regulatory Guide 170: Prospective financial information*, [170.3] – [170.4]

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comprised the estimated cost for *'mine establishment and development ... and the processing requirements'*.

20. We accept, as Auctus submitted, that the materiality of the projected capital expenditure should not be determined solely by reference to its impact on the valuation of Mungana shares.<sup>11</sup>
21. However, we do not think that Auctus has established materiality at this time. The potential dilutionary effect of the projected capital expenditure, whichever view is taken of the amount, cannot be established now. It is not possible at this time to assess if, and to what extent, dilution might occur when it comes time to fund the projected capital expenditure. Future funding will depend on the appetite of the shareholders at the time (who may be different from today's shareholders) and the availability of alternative options, such as debt.
22. We also note that the projected capital expenditure did not change the independent expert's conclusion that Auctus' offer is *'not fair and not reasonable'*. The expert said that the specialist had undertaken its valuation *"based on the existing JORC-compliant mineral resources only"*, and made no reference to either projected capex or the replacement production target. Nor was the directors' recommendation to reject the bid changed.
23. As for the information being forecast financial information, we do not consider the disclosures regarding the projected capital expenditure to be materially misleading in this case. The disclosures could have been better,<sup>12</sup> the information being in various places that needed to be read together, but when taken as a whole we do not consider the disclosures to be materially misleading.  
*Disclosure of projected capital expenditure*
24. There is a subsidiary point regarding who should make supplementary disclosure in relation to the projected capital expenditure, if such disclosure is necessary.
25. The initial Panel noted a difference of opinion between Auctus and Mungana in relation to Mungana's projected capital expenditure. The initial Panel said that *'it is open to Auctus to express its view on Mungana's estimated pre-production capex in, for example, a supplementary bidder's statement.'*
26. Auctus submitted in its review application that the burden of correcting a misleading statement should not lie with Auctus and that it was *'Mungana's obligation to ensure its misleading statements relating to projected capital expenditure for the King Vol project are corrected by [Mungana] issuing a supplementary target's statement to its shareholders.'*
27. Where there has been materially deficient disclosure by a party, it is not a satisfactory answer to say that it is open to another party to correct that deficiency by making its own disclosures; nor do we think the initial Panel was suggesting that. In this case, however, we do not consider the disclosure in relation to the projected capital

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<sup>11</sup> *Austral Coal Limited 01* [2005] ATP 11 at [38]

<sup>12</sup> *Guidance Note 18 – Takeover documents*, [10]-[11]

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expenditure to be materially misleading to shareholders (for the reasons given above), so the question of who can, or should, make further disclosure does not arise.

28. We do agree with the initial Panel, though, that to the extent that Auctus has a different view regarding the projected capital expenditure of Mungana, whether in respect of the King Vol project or the company's capital and operating expense requirements more generally, it remains open to Auctus to express that view to Mungana shareholders in a supplementary bidder's statement.

#### Errors in the specialist's report

29. A preliminary question arises about whether this aspect of the review application is properly a matter for the review.
30. A review under section 657EA is a de novo reconsideration of the matters before the initial Panel.<sup>13</sup> As such, it is open for a review Panel to consider any new facts as they stand at the time of the review.<sup>14</sup> A review Panel is also not necessarily confined to reviewing only particular aspects of an initial application and not others.<sup>15</sup> An example of this might be a review of an association case where one connection was not found by the initial Panel and another was found, in which case it would be open for the review Panel to re-consider both aspects of the initial application.
31. Auctus' review application submitted that, following its review of Mungana's preliminary submissions to the initial application, there was '*additional evidence which Auctus wishe[d] to bring to the Panel's attention relating to material errors in the Specialist's Report, which impact the Expert's Report.*' It submitted that the errors resulted in Mungana's shares being overvalued and potentially affected the independent expert's conclusion that Auctus' offer was 'not fair and not reasonable'.
32. On one view, Auctus' submission that there are material errors in the specialist's report is a new ground. The initial application concerned misleading disclosure in the updated investor presentation. Auctus had submitted that:
- (a) the production target had been overstated. Mungana had utilised an inappropriate conversion rate to determine the Replacement Production Target disclosed in its updated investor presentation. It submitted that the assumption of 100% conversion of resource to mineable inventory was unrealistic and
  - (b) the projected capex had been understated.
33. However, Auctus is now submitting that the specialist's report included comparable transactions (for its calculation of the gold price) which should not have been included.
34. In our view this was not directly or indirectly in question in the initial application. We note that Auctus made no relevant connection between the correctness of the

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<sup>13</sup> See fn 5; Guidance Note 2 – Reviewing Decisions, at [10(a)]

<sup>14</sup> *National Can Industries 01R* [2003] ATP 40 at [21]

<sup>15</sup> *Gondwana Resources Limited 02R* [2014] ATP 18 at [27] – [28]

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methodology or calculations used in the expert reports and the conversion rate utilised or the projected capital expenditure.

35. Parties to a review under section 657EA do not have a subsequent right of review. There is potential for Mungana to be deprived of a right of review if we decide to conduct proceedings (and make findings adverse to Mungana) on the ‘new’ issue unless it is logically connected to what was complained of in the initial application. If not logically connected, the issue should be dealt with by way of a fresh application to the Panel.
36. After conducting a review, a review Panel has the power to vary or set aside the initial Panel’s decision, or it may substitute the initial Panel’s decision with its own. These powers are set out in section 657EA(4), which further states:

*In conducting the review, the Panel has the same power to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C. (emphasis added)*

37. Section 657C provides that the Panel:

*... may make a declaration under section 657A, or an order under section 657D or 657E, only on an application made under this section. (emphasis added)*

38. In *BreakFree 04(R)*,<sup>16</sup> the Panel considered that these sections imposed a limitation on a review Panel’s power to consider new grounds of complaint.
39. *BreakFree 04(R)* was a review of a decision by the Panel in *BreakFree 04*<sup>17</sup> to make a declaration of unacceptable circumstances. The initial Panel had found that it was unreasonable for a bidder to withdraw its takeover proposal for BreakFree by relying on a statement released by BreakFree that the bidder was not likely to satisfy the minimum acceptance condition of its bid due to opposition from BreakFree shareholders.
40. The bidder sought a review and called into question the correctness of the statements released by BreakFree regarding the shareholder opposition. BreakFree argued that the review Panel did not have jurisdiction to consider the review because BreakFree’s initial application concerned the withdrawal of the offer; the correctness of the statements was not in issue.
41. The review Panel considered that any limitations on an initial Panel under section 657C by the words ‘*only on an application made under this section*’ applied equally to a review Panel. It said:

*It follows from the last sentence in subsection 657EA(4) that the limitation on an initial panel when dealing with the initial application imposed by subsection 657C(1) applies with equal force to a panel conducting a review of the decision by the initial panel and*

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<sup>16</sup> [2003] ATP 42

<sup>17</sup> [2003] ATP 39

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does so by reference to the initial application (rather than by reference to the application for review).<sup>18</sup> (emphasis added)

42. The review Panel noted that the Panel cannot act on its own motion to commence proceedings. It also noted that the Panel had the ability to define the scope of its inquiry through the process of deciding whether to conduct proceedings and the brief to parties. The review Panel said:

*It is not necessary or desirable for us to determine all the limits that follow from section 657C(1). However, we consider that the Panel is entirely justified in considering all the factual matters and other issues that are raised by the application and all facts and issues that are logically connected with those factual matters and other issues.*<sup>19</sup> (emphasis added)

43. Accordingly, the position taken in *BreakFree 04(R)* was that a review Panel may consider “new” issues raised in a review application provided they are logically connected with the factual matters and issues raised in the initial application. The review Panel in *BreakFree 04(R)* considered the circumstances surrounding the statements by BreakFree to be logically connected with the initial application. It said that the statements ‘*were an essential part of the factual matrix raised by the Initial Application*’ since the withdrawal of the offer was proposed in reliance of the statements.<sup>20</sup> In a sense, then, they are not truly new issues.
44. The scope of a review Panel’s power to consider “new” issues in a review application also arose in *Bentley Capital Limited 01R*.<sup>21</sup> In that case, the respondents submitted that the review application alleged a new association between a wife and husband. They submitted that the initial application only concerned an alleged association between that woman and her brother.<sup>22</sup> The respondents further submitted that the effect of the “new” allegation was to deny the respondents an opportunity for review under section 657EA if the alleged association was found to exist by the review Panel.
45. The review Panel considered that the initial application had clearly alleged an association between the woman and her husband and therefore it was an issue within the scope of the review. It commented:

*In any event, review proceedings are a de novo consideration on the merits. They are based on the facts found at the time of the review, not those before the initial Panel. We doubt that, if the alleged association was a new allegation, our inquiries should be constrained, but we do not need to decide this given our view that it was included in the initial application.*<sup>23</sup> (emphasis added)

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<sup>18</sup> [2003] ATP 42 at [41]

<sup>19</sup> [2003] ATP 42 at [47]

<sup>20</sup> [2003] ATP 42 at [48]

<sup>21</sup> [2011] ATP 13

<sup>22</sup> The initial Panel did not find the woman and her brother to be associates

<sup>23</sup> [2011] ATP 13 at [24]



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46. While *Bentley Capital Limited 01R* could be taken as the Panel expressing a view that a review is not limited to issues raised in the initial application or logically connected to it, we note that the review Panel did not decide the point. We think that the comments are not necessarily inconsistent with *BreakFree 04(R)* as there was a logical connection (at the very least) in that case. Moreover, association cases often require the drawing of inferences based on partial evidence,<sup>24</sup> and the asymmetry of information inherent in association cases may warrant a broader interpretation of what is logically connected in such a case, but that is a matter for fuller consideration at another time.
47. We do not consider the correctness of the comparative table in the specialist's report to have been raised by, or to be logically connected to the facts and issues in, Auctus' initial application.
48. Auctus submitted that the "error" affected the valuation on which the initial Panel relied. This connection is tenuous. In its initial application, Auctus did not submit that deficiencies in the specialist's comparative table affected the misleading disclosure in relation to the production target or capital expenditure. Moreover, in the review application Auctus submitted that "*it has also identified material errors in the [specialist's report]*" and later that "*there is additional evidence which Auctus wishes to bring to the Panel's attention*". We take this to concede (rightly) that this is a new ground. In any event, we have not relied on the valuation in the way that Auctus submitted the initial Panel had.
49. Accordingly, we think that, to the extent that the review application made new allegations regarding any error in the specialist's report, and hence the expert report, this is not within the scope of our review. If Auctus wishes to raise new issues, a fresh application under section 657C must be made. This would preserve Mungana's right to an internal review under section 657EA if a decision was made on the new issues adverse to it. We do not think this necessarily detracts from an efficient and speedy resolution of the matter because it remains open to the President to constitute the sitting Panel with the same members as the review Panel and for that Panel to determine to hear the matter at the same time as a related matter.<sup>25</sup>
50. Even if we were to open inquiry into the expert reports, we note the high threshold set for the Panel to question the correctness of an expert report. As the Panel said in *Minemakers Limited 02R*:<sup>26</sup>
10. *The initial Panel considered that "the Panel should not undertake inquiries into the correctness of an independent expert report in the absence of strong preliminary indications of:*

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<sup>24</sup> *Dromana Estate Limited 01R* [2006] ATP 8

<sup>25</sup> *ASIC Regulations 2001* (Cth), 16(1)(a). See for example *Leighton Holdings Limited 01, 02 and 03* [2010] ATP 13 at [32]. See also *BreakFree Limited 03* [2003] ATP 38 and *BreakFree Limited 04* [2003] ATP 39 where the same sitting Panel considered both applications and provided a single set of reasons.

<sup>26</sup> [2012] ATP 16 at [10]-[11]

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- a. *a clear fault in the methodology, which would normally include non-compliance with relevant industry codes*
  - b. *statements that are plainly false and material to the conclusion*
  - c. *the expert having reached a conclusion that no reasonable expert could reasonably arrive at*
  - d. *a question mark over the independence of the expert or*
  - e. *some other basis taking the issue beyond what might be described as simply matters on which experts might disagree.”*
11. *We broadly agree with the initial Panel’s approach. However the review application pointed to potential material deficiencies in the BDO and Optiro reports, which led us to ask some questions. We also thought that it was appropriate to consider whether the disclosure in the BDO and Optiro reports were “materially deficient to a degree that would lead to an uninformed market” for Minemakers.*

#### **Production target**

51. The initial Panel considered that Mungana’s withdrawal of its production target and the re-characterisation of the statement as an ‘aspirational statement’ adequately rectified any misleading issues in relation to the production target. We agree with the initial Panel.

#### **DECISION**

52. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001 (Cth)*.
53. We make no orders, including as to costs.

**Jane Sheridan**  
**President of the review Panel**  
**Decision dated 17 June 2015**  
**Reasons published 3 July 2015**

*Postscript: On 22 June 2015, Auctus lodged a supplementary bidder’s statement broadly repeating its submissions regarding the production target, pre-production capital expenditure estimates and alleged errors in the expert reports.*

*On 25 June 2015, Auctus extended the offer period to its offer to 13 July 2015.*

*On 26 June 2015, Mungana lodged a supplementary target’s statement rejecting Auctus’ submissions regarding the production target, pre-production capital expenditure estimates and alleged errors in the expert reports.*

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### Advisers

Party	Advisers
Auctus	Hardy Bowen
Mungana	Ashurst Australia Torridon Partners