



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP18/70

Wednesday, 3 October 2018

Bullseye Mining Limited 02 - Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) in relation to an application dated 3 September 2018 by Hongkong Xinhe International Investment Company Limited in relation to the affairs of Bullseye Mining Limited (see [TP18/64](#)).

Background

Bullseye (an unlisted public company) is currently the subject of an off-market takeover bid by Opus Resources Pty Ltd, a wholly owned subsidiary of Red 5 Limited (ASX:RED).

On 19 July 2018, Bullseye lodged a third supplementary target's statement disclosing, among other things, that it had entered into two related and inter-conditional transactions: the issue of 150 convertible notes (fully underwritten by Mr Desmond Mullan) to raise up to GBP15,000,000, and a Gold Prepayment Deed constituting the grant by Bullseye to Mr Mullan (or his associate) of an option to provide AUD100,000,000 funding to Bullseye to be repaid by Bullseye via the delivery of future physical gold ounces (collectively, the **Mullan Proposal**).

Mr Mullan is the father of Bullseye executive director, Ms Dariena Mullan.

Bullseye issued a Notice of General Meeting dated 20 August 2018 that included resolutions to approve the Mullan Proposal on the basis of the Panel's frustrating action policy.

Prior to the general meeting held on 17 September 2018, in accordance with an undertaking given to the Panel (see [TP18/65](#)), Bullseye withdrew the resolutions relating to the Mullan Proposal.

Notwithstanding the withdrawal of the resolutions from the general meeting, the Panel considered the circumstances, taken as a whole, were unacceptable, particularly when considered in the context of the Red 5 offer, the involvement of Ms Mullan in the decision making process and other surrounding circumstances.

The Mullan Proposal effectively allows Mr Mullan, a related party, to determine who will receive notes that, upon conversion, may confer voting power of approximately 28% or more in Bullseye. The terms of the notes also give Mr Mullan significant veto rights with only a holding of more than 20% of the notes.

The Panel also considered certain terms of the notes may deter or block a potential control transaction, inhibit the acquisition of voting shares taking place in an efficient, competitive and informed market and have a coercive effect on shareholders if shareholder approval is required upon conversion of the notes.

The effect on potential control of the terms of the notes and the veto rights, in combination, exceeded what in the Panel's experience would be usual in the circumstances, and there were no measures to disperse that effect.

Declaration

The Panel considered that the circumstances were unacceptable having regard to their effects including on potential control or the proposed acquisition of a substantial interest in Bullseye or the purposes of Chapter 6.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Orders

The Panel is considering what final orders it will make and will publish details in due course.

The sitting Panel was Richard Hunt (sitting President), Rory Moriarty and Neil Pathak.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

Allan Bulman
Director, Takeovers Panel
Level 10, 63 Exhibition Street
Melbourne VIC 3000
Ph: +61 3 9655 3500
takeovers@takeovers.gov.au



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ANNEXURE A

CORPORATIONS ACT SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BULLSEYE MINING LIMITED 02

CIRCUMSTANCES

1. Bullseye Mining Limited (**Bullseye**), an unlisted public company with more than 50 members, is currently the subject of an off-market takeover bid by Opus Resources Pty Ltd, a wholly owned subsidiary of Red 5 Limited (ASX:RED) (**Red 5**).
2. On 19 July 2018, Bullseye lodged a third supplementary target's statement disclosing, among other things, that it had:
 - (a) agreed to conduct a new capital raising through the fully underwritten issue of convertible notes to various sophisticated and professional investors to raise up to £15,000,000 and that the underwriter is Mr Desmond Mullan and
 - (b) entered into a Gold Prepayment Deed and associated agreements with entities associated with Mr Mullan (the **Lender**) by which the Lender will advance up to A\$100,000,000 to be repaid by Bullseye via the delivery of future physical gold ounces to the Lender (equal to a value of A\$100,000,000 plus accrued interest and fees).
3. Mr Mullan is the father of Bullseye executive director, Ms Dariena Mullan.
4. Bullseye issued a Notice of General Meeting dated 20 August 2018 (the **Notice**) that included two inter-conditional resolutions to approve the two transactions described above (referred to as the **Mullan Proposal**). Other resolutions included resolutions for an alternative funding proposal from Mr Wu Qiyuan (the **Wu Proposal**) (which was withdrawn by Mr Wu) and for the removal and appointment of directors relating to two separate requisitions pursuant to section 249D.¹

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 have the meaning given in the relevant Chapter (as modified by ASIC)

5. The Notice indicated, in effect, that Bullseye was seeking shareholder approval of the Mullan Proposal in accordance with the Panel's frustrating action policy² to give Bullseye shareholders a choice between the Red 5 offer and the Mullan Proposal.
6. Bullseye relied on assurances from Mr Mullan that *"the Convertible Notes would be sufficiently widely spread among independent third party investors"* such that there would be no need for item 7 of section 611 shareholder approval for the conversion of the notes.
7. The Bullseye board established an independent board committee (**IBC**) to consider, among other matters, the Mullan Proposal. The IBC included Ms Mullan as a member. Following consideration by the IBC and the Bullseye board, and while acknowledging that Mr Mullan is deemed to be a related party of Bullseye, the Bullseye board resolved that shareholder approval was not required under Chapter 2E because the arm's length exception applied.
8. On 7 September 2018, following the application to the Panel, Bullseye lodged a sixth supplementary target's statement providing additional disclosure in relation to the Mullan Proposal, notwithstanding that the directors³ *"affirmed their belief that the Notice of Meeting was sufficient for shareholders to make an informed decision"* about the resolutions.
9. Prior to the general meeting held on 17 September 2018, in accordance with an undertaking given to the Panel, Bullseye withdrew the resolutions relating to the Mullan Proposal.
10. Notwithstanding the withdrawal of the resolutions, the Panel considers the circumstances, taken as a whole, will have or are likely to have an effect on the control or potential control of Bullseye that is unacceptable.
11. The Mullan Proposal effectively allows Mr Mullan to determine who will receive notes that, upon conversion, may confer voting power of approximately 28% or more in Bullseye. Mr Mullan has agreed to subscribe for 40% of the notes and has the potential to take up to 100% of the notes as underwriter if no other parties are issued notes. To the extent Mr Mullan obtains voting power of at least 19% in Bullseye, the Mullan Proposal has the potential to allow him to convert notes (and, if applicable, default options) over time under item 9 of section 611.
12. The terms of the notes provide the Majority Noteholder with veto rights over certain operational and financial matters in relation to Bullseye including changes to the board or key management of Bullseye. The Majority Noteholder is Mr Mullan where he holds more than 20% of the notes and, at any other time,

² Guidance Note 12

³ Other than *"Mr Wu who was not available to attend the meeting"*

noteholders representing 75% or more of the aggregate amount of notes outstanding. Giving Mr Mullan, a related party, these rights with only a holding of more than 20% of the notes is highly unusual.

13. The terms of the notes also include:
 - (a) as an event of default, a change of control⁴ without the prior approval of the Majority Noteholder
 - (b) upon an event of default, the redemption of the notes at a 15% premium to face value and the issue of default options (which may potentially confer a substantial interest if exercised)
 - (c) if shareholders fail to approve (if required) the issue of shares upon conversion of the notes, the redemption of the notes at a 10% premium to face value and
 - (d) the grant to noteholders of a first ranking security over mining leases of Bullseye shared pari passu with the Lender under the Gold Prepayment Deed.
14. These terms may deter or block a potential control transaction, inhibit the acquisition of voting shares taking place in an efficient, competitive and informed market and have a coercive effect on shareholders if shareholder approval is required upon conversion of the notes.
15. The effect on potential control of the terms of the Notes and the Majority Noteholder rights, in combination, exceeds what in the Panel's experience would be usual in the circumstances, and there are no measures to disperse that effect.
16. While individual terms of the notes may not be unacceptable on a standalone basis, the combined effect of the above circumstances are unacceptable, particularly when considered in the context of the Red 5 offer, the disagreement among shareholders (evidenced by the attempted board spills and the Wu Proposal) and the involvement of Ms Mullan in the decision making process.

CONCLUSION

17. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they will have or are likely to have on:
 - (i) the control, or potential control, of Bullseye or

⁴ That is, where more than 30% of Bullseye shares come under the control of a person (acting alone or together with its associates) who did not have control on the date of issue of the Notes

- (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bullseye and
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
18. The 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 Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Bullseye.

Bruce Dyer
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 2 October 2018