



Australian Government

Takeovers Panel

**Reasons for Decision
Bullseye Mining Limited 03
[2022] ATP 4**

Catchwords:

Declaration – orders – directors’ intention statements – association – target’s statement – bidder’s statement – minimum bid price – efficient, competitive and informed market – withdrawal rights

Corporations Act 2001 (Cth), sections 602(c), 606, 608(1)(c), 611 (item 9), 621mc

GN 6: Minimum Bid Price, GN 22: Recommendations and Undervalue Statements, GN 23: Shareholder intention statements

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

INTRODUCTION

1. The Panel, Karen Evans-Cullen (sitting President), Bruce McLennan and Sharon Warburton, made a declaration of unacceptable circumstances in relation to the affairs of Bullseye Mining Limited. The application concerned (among other things) director intentions and early director acceptances, association, and disclosure issues in relation to a bid by Emerald Resources NL for all the shares in Bullseye. The Panel considered that there had been a limiting effect on potential control of Bullseye and that there were material deficiencies in Bullseye’s target statement. The Panel ordered further disclosure, that accepting shareholders have a right to withdraw, and that Bullseye directors’ acceptances be cancelled if a superior proposal is made. The Panel also ordered extension of the bid and no change to Bullseye’s board by Emerald while shareholders can withdraw. Lastly, it ordered that item 9 of section 611¹ not apply in respect of any withdrawn or cancelled acceptances.

2. In these reasons, the following definitions apply.

- Applicant** Hongkong Xinhe International Investment Company Limited
- BIA** the Bid Implementation Agreement that Emerald and Bullseye entered into on 29 November 2021
- bid** an off-market takeover bid announced by Emerald on 7 December 2021 for all Bullseye shares
- bidder’s statement** Emerald’s bidder’s statement dated 8 December 2021

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

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

Bullseye	Bullseye Mining Limited
directors' intention statements	the intention statement in relation to each Bullseye director expressed as a warranty in clause 4.4(b) of the BIA and set out in paragraph 13 below
Emerald	Emerald Resources NL
target's statement	Bullseye's target's statement dated 28 December 2021

FACTS

3. Bullseye is an unlisted public company with more than 50 members. It has a portfolio of gold mining projects in Western Australia.
4. Emerald is an ASX listed company (ASX code: EMR).
5. The Applicant is a shareholder in Bullseye. Since about 2018, it has made various offers of funding to Bullseye.
6. Since at least May 2021, Bullseye had been in discussions with Emerald in relation to a possible merger.
7. Between May 2021 and 6 December 2021 Bullseye issued shares, options and convertible notes to various parties.
8. On 29 November 2021, Bullseye and Emerald entered into the BIA. At that date, the Applicant said that Bullseye had 317,375,922 shares on issue. The combined voting power of the Bullseye directors at that date was 7.35%. The directors had voting power in:
 - (a) Peter Burns Snr – 12,662,565 shares
 - (b) Peter Burns Jnr – 6,533,131 shares
 - (c) Dariena Mullan – 4,126,000 shares
9. Also on 29 November 2021, Emerald requested, and was granted by ASX, a trading halt on ASX pending release of an announcement. This was subsequently converted into a suspension of quotation on 1 December 2021 pending release of an announcement regarding a material acquisition. It was extended on 3 December 2021 until the earlier of that announcement or 7 December 2021.
10. Between 29 November 2021 and 3 December 2021, Bullseye issued shares following conversion of convertible notes and exercise of options.
11. On 7 December 2021, Emerald announced, by a joint statement with Bullseye, its proposed takeover for Bullseye (attaching a copy of the BIA) and that Emerald had acquired a pre-bid stake of 19.45% of the current Bullseye shares on issue from 32 Bullseye shareholders on the same terms as under the proposed takeover. The

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

proposal was conditional (among other things) on minimum 90% acceptance and prescribed occurrences. At that date Bullseye had on issue 389,017,192 shares (having issued 71,641,270 shares pursuant to the issues referred to in paragraph 10).

12. Also, on 7 December 2021, the suspension of trading in Emerald shares was lifted.
13. The BIA included the following clauses:

“4.4 Recommendation of Bullseye Directors

Bullseye represents and warrants that:

- (a) *the Bullseye Board will recommend that all Bullseye Shareholders accept the Offer, subject to there being no Superior Proposal;*
- (b) *it has been informed by each of the directors of Bullseye that they intend to accept the Offer within 7 days of the Offer becoming open for acceptance with respect to all Bullseye Shares owned or controlled by that director, subject to there being no Superior Proposal; and*
- (c) *it has been informed by each of the directors of Bullseye that they will not withdraw, revise, revoke or qualify, or make any public statement inconsistent with, the recommendation in clause 4.4(a) unless a Superior Proposal emerges.”*

“Superior Proposal means a Competing Proposal which is, in the determination of the Bullseye Board acting in good faith and in order to satisfy what the Bullseye Board consider to be their fiduciary and statutory duties:

- (a) *reasonably capable of being completed taking into account all aspects of the Competing Proposal; and*
- (b) *more favourable to Bullseye Shareholders than the Takeover Bid, taking into account all terms and conditions of the Competing Proposal.”*

“Competing Proposal means any expression of interest, proposal, offer or transaction notified to the Bullseye Board which, if completed substantially in accordance with its terms, would mean a person (other than Emerald or its Related Bodies Corporate) would:

- (a) *directly or indirectly, acquire an interest or Relevant Interest in or become the holder of:*
 - (i) *20% or more of all Bullseye Shares; or*
 - (ii) *all or a substantial part of the business conducted by the Bullseye Group.*
- (a)[sic] *acquire control of Bullseye, within the meaning of section 50AA of the Corporations Act; or*
- (b) *otherwise directly or indirectly acquire or merge with Bullseye or acquire an economic interest in the whole or a substantial part of Bullseye or their businesses (including by takeover offer, scheme of arrangement, capital reduction, sale of assets, strategic alliance, joint venture, partnership or reverse takeover bid).”*

14. On 8 December 2021, Emerald lodged the bidder’s statement with ASIC.
15. On 13 December 2021, Emerald’s bid opened.

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

16. On 17 December 2021, Bullseye held its annual general meeting. At the meeting, Mr Burns Snr advised shareholders that he had already accepted the Emerald bid.
17. Also on 17 December 2021, Emerald announced that it had a 31.8% relevant interest in Bullseye.
18. On 21 December 2021, Emerald announced that it had a 42.1% relevant interest in Bullseye.
19. On 29 December 2021, Bullseye issued its target's statement. It disclosed that as at 28 December 2021, Emerald held a relevant interest in 46.09% of Bullseye's shares.
20. On 31 December 2021, Emerald announced that it had a 47.5% relevant interest in Bullseye.
21. On 6 January 2022, Emerald announced that it had a 52.85% relevant interest in Bullseye and that it had declared its bid free of conditions.

APPLICATION

Declaration sought

22. By application dated 6 January 2022, the Applicant sought a declaration of unacceptable circumstances.
23. The Applicant submitted, in essence, that:
 - (a) at 7 December 2021, Emerald had voting power of 25.45% of Bullseye by reason of the pre-bid acceptances and the warranty in respect of the directors' intention statements in clause 4.4 of the BIA, thereby contravening section 606²
 - (b) at least from the time that the BIA was entered, Emerald entered into an association with each of the Bullseye directors through either (or both) a relevant agreement or acting in concert with the Bullseye directors in relation to the affairs of Bullseye
 - (c) the warranty in the BIA gave rise to unacceptable circumstances because the Bullseye directors were required to accept Emerald's offer within a period of less than 21 days after the offer opened, contrary to Panel policy and
 - (d) there were "*significant deficiencies*" in the target's statement, which had been the subject of correspondence between the parties.
24. The Applicant further submitted that:

² Unless otherwise indicated, all statutory references are to the *Corporations Act* 2001 (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

- (a) the effect of the pre-bid acquisitions was that Emerald contravened section 606
- (b) the circumstances contributed to effective control of Bullseye passing to Emerald³ and prevented any opportunity for a rival bid to be made
- (c) Bullseye shareholders were prevented from making a properly informed decision in relation to Emerald's bid
- (d) failure to disclose the BIA between 29 November 2021 and 7 December 2021:
 - (i) constituted a breach of Emerald's continuous disclosure obligations
 - (ii) *"constituted a clear contravention of the principles in section 602 of the Corporations Act because Emerald acquired control of Bullseye prior to announcement of the bid (being the acquisition of a relevant interest shares with aggregate voting power of at least 25% in that period) in circumstances where the market was not efficient, competitive or informed, contrary to the principle in section 602(a) of the Corporations Act"* and
 - (iii) gave rise to a potential contravention of section 621 because Bullseye shareholders who sold to Emerald before the bid opened received consideration in the form of Emerald shares when its share price was \$1.08, however on 13 December 2021, when the bid opened, it was \$1.07 and
- (e) the combination of the circumstances infringed the principle in section 602(c).

Interim orders sought

- 25. The Applicant sought interim orders restraining Emerald from processing any acceptances under its bid prior to the application being determined.
- 26. On 13 January 2022, Emerald offered an undertaking until the determination of the Panel proceedings not to process acceptances of, or issue Emerald shares to, accepting Bullseye shareholders (**Annexure A**). We accepted the undertaking and, accordingly, decided not to make an interim order.

Final orders sought

- 27. The Applicant sought final orders requiring (among other things):
 - (a) Bullseye to provide a supplementary target's statement
 - (b) Emerald to provide a supplementary bidder's statement
 - (c) Bullseye shares acquired by Emerald in breach of section 606 to be vested in ASIC for disposal

³ Subject to Emerald declaring its bid unconditional

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

- (d) Bullseye shares acquired by Emerald between 21 November 2021 and 7 December 2021 to be vested in ASIC for disposal and
- (e) *“Appropriate orders to address the ‘springboard’ advantage gained by Emerald both through its breach of section 606 of the Corporations Act and any other pre-bid conduct that is found to have been unacceptable, including orders analogous to those made in the Ambassador Oil and Gas Limited 01 matter.”*

DISCUSSION

Preliminary submissions

- 28. Bullseye and Emerald each made preliminary submissions to the effect that we should not conduct proceedings.
- 29. Emerald submitted (among other things) that:
 - (a) its offer was genuine, created liquidity for Bullseye shareholders and *“represents the highest all-time price for a Bullseye share”*
 - (b) the application was self-serving in that it sought to use the Panel forum to support the Applicant’s court proceedings⁴
 - (c) section 606 had not been breached as Emerald did not control the power to dispose of the shares the subject of the warranty and it was not associated with the Bullseye directors. Emerald further submitted, however, that if there was a technical breach it was *de minimus*. It submitted *“[i]f the interests of the Company and Relevant Directors were combined, this would amount to 99,013,979 shares, being 22% of the Bullseye issued share capital”* and
 - (d) the orders sought were *“highly prejudicial”*.
- 30. Bullseye submitted that it agreed with Emerald’s preliminary submission and, in addition, submitted (among other things) that:
 - (a) it is unlisted and therefore not required to comply with continuous disclosure obligations
 - (b) Emerald did not have the power to control disposal of the shares the subject of the warranty in the BIA and did not acquire a relevant interest *“in excess of 25%”* of Bullseye
 - (c) the issue of shares by Bullseye (that is, the conversion of the convertible notes and exercise of options) was not unacceptable
 - (d) the acquisition of the pre-bid stake by Emerald was not unacceptable

⁴ Bullseye submitted that it is subject to oppression proceedings in the Supreme Court of WA brought by the Applicant

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

- (e) there was no “sufficient level of information to show any association between Emerald and/or Bullseye and Bullseye shareholders”
 - (f) early acceptance of the offer by the Bullseye directors did not give rise to unacceptable circumstances and
 - (g) the target’s statement was not materially deficient.
31. Bullseye also submitted that the Applicant (with others) has “been seeking to gain control of Bullseye for a number of years.”
32. We were concerned about several issues raised in the application, including that the directors’ intention statements did not comply with Guidance Note 23 and the disclosure issues raised in the target’s statement. We decided to conduct proceedings.

Directors’ intention statements

33. The Applicant submitted that the warranty in respect of the directors’ intention statements in clause 4.4 of the BIA gave rise to unacceptable circumstances, based on Guidance Note 23, because the directors were required to accept the bid within a period of less than 21 days after it opened (absent a superior proposal). In particular, the Applicant submitted that the 7-day period referenced in the intention statement was not “expressed as a period after which a Director intends to accept. Rather, the 7 days is expressed as a period within which the Directors will accept (original emphasis)”.
34. Relevantly GN 23 provides:
- If a statement is qualified by reference to a superior proposal, it is likely to give rise to unacceptable circumstances if the shareholder accepts before allowing a reasonable time to pass for a superior proposal to emerge. The Panel considers that this is implied by the statement. The amount of time required will depend on the circumstances, but generally the Panel will consider a reasonable time to be 21 days after the offer has opened.⁵*
35. The warranty is not itself a shareholder intention statement but can be treated as such. We agree with the Applicant insofar as the warranty in the BIA conveys the implied consent of the directors to the making of the statement. The directors, having agreed to the BIA,⁶ have consented to it being made.
36. As a shareholder intention statement qualified by reference to a superior proposal, it does not comply with Panel policy in two respects:
- (a) it allows for only 7 days after the offer opened, not 21 and
 - (b) it requires fulfillment within that period, not after it.

⁵ Guidance Note 23: Shareholder intention statements, at [10(c)], which is qualified in a way not relevant here

⁶ The version attached to Emerald’s ASX announcement is unsigned, but the announcement is a joint statement and no submission was made that any directors did not agree

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

37. An objective of GN 23 is that such statements should not inhibit the acquisition of control over voting shares taking place in an efficient, competitive and informed market. In this case, not only the statements, but the resultant actions taken by the directors, had a clearly limiting effect on the ability of a competing superior proposal to come forward.
38. The offer opened on 13 December 2021. For at least some of the shares they controlled, one director accepted a day later, one two days later and the third on 21 December. Bullseye submitted that *"Bullseye's Chairman, Peter J Burns, accepted the Bid for three separate parcels of shares controlled by him on 14 December 2021, 16 December 2021 and 17 December 2021 respectively. Such acceptance was consistent with the wording included in the BIA which stated that the directors would accept the bid within 7 days."* (original emphasis)
39. These actions were taken despite the qualification 'unless a Superior Proposal emerges.' No reasonable time was allowed for one to emerge. While the Guidance Note acknowledges that 21 days will not always be required, here the time frame was unacceptable in two ways – the 7 days was too short and the 'requirement' to accept within that time compounded the problem. Indeed, even an intention statement that provided for a longer time, if it said that the acceptance was to happen within that time, would be potentially problematic.
40. Emerald submitted that it *"proposed the 7-day period to give the Bid legitimate momentum and prospects of success."* This is a legitimate objective but not if it results in preventing any real prospect of a competing proposal coming forward. Of course, Emerald as the bidder may not want to see such a proposal, but it cannot ensure that this is the case. And Bullseye, as the target, cannot exclude it.
41. Emerald also relied on a submission that there had been no superior proposal received at the date of its submission. In our view this is not to the point, and in any event may prove why the warranty and directors' actions give rise to unacceptable circumstances.
42. Emerald also took issue with the motives of the Applicant, as did Bullseye. Again, we think this is not to the point. Past interactions with the Applicant may have coloured Bullseye's thinking in respect of the desirability of Emerald's bid or the urgency with which it needed to happen. Bullseye submitted that in the view of the directors *"the Emerald takeover offer is extremely attractive and in the best interests of Bullseye and all of its shareholders."* However, the risk is too high that a potential competing proposal is stymied. That is not in the best interests of shareholders.
43. Bullseye further submitted that *"Bullseye and its directors consider the possibility of an alternative offer to be extremely unlikely particularly given Bullseye has received no other genuine approaches or offers"* since an approach in 2018. This may also be so, but does not justify taking steps, as was done, that had the effect of limiting the ability of a superior proposal emerging.
44. As ASIC noted in its submission *"astute readers could have observed from section 4.4(b) of the BIA that Bullseye's directors intended to accept Emerald's offer within 7 days of the offer opening, subject to there being no superior proposal. However, as the BIA was released*

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

publicly on 7 December 2021, this only provided an extra 5 days for a competing bidder to formulate a proposal prior to the offer opening on 13 December 2021."

45. We consider that the warranty that the directors of Bullseye intended to accept the Emerald bid within 7 days of its opening, and the Bullseye directors' acceptance of the Emerald bid within that timeframe, had a limiting effect on the ability for a competing proposal for Bullseye to be made.

Section 606 and association

46. The Applicant submitted a potential contravention of section 606 may have occurred because:

- (a) *"As a consequence of the Bid Implementation Agreement, Emerald acquired a relevant interest in all of the shares held by the Bullseye directors pursuant to section 608(1)(c) of the Corporations Act by reason of Emerald having power to control the exercise of a power to dispose of those shares."*
- (b) from the time of entry into the BIA, Emerald entered an association with each of the Bullseye directors through either (or both) a relevant agreement or acting in concert with the directors in relation to the control of Bullseye and
- (c) based on the timing of the issue of shares, if Emerald acquired its pre-bid stake before Bullseye issued the additional shares between 29 November 2021 and 3 December 2021, then instead of 19.45% of Bullseye, Emerald's percentage would be more than 20%.

47. GN 23: Shareholder intentions statements states (at [9], footnotes omitted) that:

In examining a shareholder intention statement, the Panel is concerned with whether the statement has an effect that precludes, or might preclude, the opportunity for a competing proposal. For example, a shareholder intention statement could potentially create a relevant interest in the shares the subject of the statement or support an inference of association which might contravene the Act and undermine the policy of Chapter 6. If it did, it would likely give rise to unacceptable circumstances.

48. As noted above we consider that the directors' intention statements and their subsequent acceptances into the Emerald bid did not comply with GN 23 and had a limiting effect on the ability for a competing proposal for Bullseye to be made. In light of our conclusion and on the information provided, we consider that we do not need to consider further whether there were any contraventions of s606.

Section 621

49. The Applicant submitted that section 621 had been "potentially contravened" because pre-bid shareholders received Emerald shares when Emerald's share price was \$1.08 but it was \$1.07 when the bid opened.

50. As noted in Guidance Note 6,⁷ the Panel does not take a technical approach to this issue. Here, the same scrip was provided to pre-bid shareholders and accepting shareholders. We did not pursue this issue further.⁸

Disclosure of the BIA

51. The Applicant submitted that Emerald's failure to disclose the execution of the BIA between 29 November 2021 and 7 December 2021 constituted a breach of Emerald's continuous disclosure obligations, and constituted "*a clear contravention of the principles in section 602 of the Corporations Act because the Bid Implementation Agreement constituted a proposed control transaction...*".
52. Emerald submitted that, because its securities were placed in a trading halt, then into suspension, "*During this time, trading in Emerald's securities has not occurred on an uninformed basis. In Emerald's view, the disclosure approach which was followed complies with the spirit, intent and purpose of the Listing Rules and in particular, Listing Rule 3.1.*"
53. Emerald submitted that it had not told ASX that the BIA had been entered when it sought the suspension.
54. Bullseye submitted that there was no contravention of section 602 or unacceptable circumstances because:
- (a) between 29 November 2021 and 7 December 2021, there were only a small number of transfers of Bullseye shares between family members or friends of the transferors and
 - (b) there was no trading in Emerald shares as a result of the trading halt and suspension during this period.
55. ASIC submitted that "*Assuming that Emerald entered into the BIA on 29 or 30 November 2021, this appears to be a lengthy period of time for Emerald to finalise the relevant announcement.*"
56. The reason given by Emerald for placing its securities in a trading halt (then in a voluntary suspension) was pending a material acquisition. This, it turns out, was a reference to the pre-bid stake. Emerald submitted that the reason it did not announce the BIA earlier was "*Until such time as arrangements were complete for the acquisition of the Pre-bid stake, Emerald was not in a position to advise the market of the Bid.*" It is unclear why.
57. As ASIC submitted, in response to Emerald's submission that its desire to secure a pre-bid stake was the reason for not announcing the BIA on the date of its execution, "*this reasoning does not appear to explain why a trading halt was relevant in relation to Emerald securities (rather than Bullseye securities) in these circumstances, or why the BIA could not be announced where the 'material acquisition' referred to was in fact a different acquisition, being Emerald's acquisition of a pre-bid stake of Bullseye securities*".

⁷ Guidance Note 6: Minimum Bid Price, at [9]

⁸ Indeed, the Applicant submitted that this issue may not be the most significant in the context of the other issues addressed in the Brief.

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

58. Moreover, Bullseye has admitted that transfers took place during that time, albeit only a few.
59. In particular, we asked about whether Bullseye shareholders who sold as part of Emerald's pre-bid stake were informed about the proposed bid. Emerald submitted that each was provided with a share transfer agreement which referenced the BIA.
60. Emerald is a listed company with continuous disclosure obligations. We leave to ASX the issue of Emerald's compliance with the listing rules.
61. Bullseye is an unlisted company and its shareholders do not have the benefit of continuous disclosure. Moreover, its shareholders are not subject to the constraint on trading in Bullseye shares that attends a listed company in a trading halt or suspension.
62. It is all the more important therefore that all shareholders in Bullseye are given timely information about a matter as significant as a bid, and not just (as it happened) those shareholders who sold into the pre-bid stake.
63. Equally important is that the delay in disclosure made it less likely that there would be time for a superior proposal to emerge.
64. We were also concerned that the announcement of the BIA did not disclose that Bullseye directors intended to accept the Emerald bid within 7 days of the offer opening in the absence of a superior offer, leaving readers to gain this information only by reading the attached, detailed BIA.
65. Bullseye had submitted to us that it had "339 largely unsophisticated shareholders". Given this, we consider that Emerald and Bullseye should have disclosed prominently in the announcement full details of the Bullseye directors' intentions.
66. We consider that the delay in announcing the BIA and Emerald acquiring its pre bid stake after signing of the BIA and before it was announced had an effect on competition.

Target's statement disclosure

67. The Applicant submitted a panoply of disclosure issues in the target's statement. Prior to its application, the Applicant raised the issues in a letter to Bullseye's solicitors, in which it identified at least 19 concerns.
68. We focussed on the following matters:
 - (a) the statement "*the Offer represents the highest all-time price for a Bullseye Share*"
 - (b) disclosure in relation to the North Laverton Gold Project
 - (c) disclosure of production targets and drilling results and
 - (d) financial disclosures.
69. We also considered issues around disclosure of the BIA.

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

Highest price

70. The Chairperson's letter on page v of the target's statement stated that *"the Offer represents the highest all-time price for a Bullseye Share"* and *"the Offer provides a substantial premium for your Bullseye Shares."*
71. Our concern is that the statement about price does not assist shareholders to understand the basis for the statement so that they can make an informed decision about the bid.
72. The bidder's statement disclosed that the Emerald scrip consideration valued *"each Bullseye Share at \$0.30 per share, based on the VWAP of Emerald Shares as traded on the ASX for the 30 calendar days from 27 October 2021 to 26 November 2021 (being \$1.03)"*. The target's statement disclosed exactly the same valuation of the scrip consideration.
73. Bullseye submitted that, in relation to previous transactions:
- (a) *"Since the inception of Bullseye in February 2006 the highest price that a Bullseye equity share has been subscribed for and allotted is \$0.30 and the highest price that a Bullseye share has traded between arm's length third parties is \$0.31 per share"*.
 - (b) *"During the last 12 months the price at which Bullseye has issued shares has ranged from \$0.20 to \$0.27 and the highest trading price for Bullseye shares in the last two months has been \$0.287 for a small parcel of approximately 100,000 shares"*.
74. The Applicant submitted that:
- The register discloses a number of transfers of shares in Bullseye at \$0.31 per share between March 2019 and March 2021. The register also shows numerous transfers at \$0.30 per share in the period from 16 November 2017 through to 20 October 2021 (not including the Emerald's pre-bid acquisitions registered on 6 December 2021). The register also discloses that Bullseye's Chairman himself subscribed for Bullseye shares at \$0.30 per share in the period between 13 September 2018 and 10 April 2019, by way of exercise of options.*
75. Bullseye submitted that *"Based on the current imputed value for a Bullseye share under the Emerald offer as at the date of these submissions (and having regard to Emerald's last trading price on ASX of \$1.14 per share), the offer provides shareholders with an opportunity to obtain a value of \$0.33 per share and supports the statement that is it the highest all-time price for a Bullseye Share."*
76. We do not agree with this submission. The statement by Bullseye cannot be justified by the simple expedient of picking a good time to make the calculation. As ASIC submitted in rebuttal *"Regardless of the subsequent rise in value of the Offer consideration, the statement may have been misleading at the time it was made (as the Emerald share price closed at \$1.065 the day before the Target's Statement was released)."*
77. Apart from that, our concern is that the statement lacks an explanation of any account taken by the directors of a premium for control. It is simply a bald statement that the offer price *"represents the highest all-time price for a Bullseye Share"*. Perhaps the statement is not even accurate (see next paragraph). But regardless, we would expect directors to consider, or explain why it is not appropriate to consider, whether (and what) control premium in the case of an offer for 100% of

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

the company is applicable when making an assessment of the offer price under a bid.

78. Similarly, there is no explanation of what account was (if any) taken by the directors of the acknowledged previous arm's length acquisition of Bullseye shares that exceeded the value of the bid consideration at the time the bid was announced.
79. Lastly, in this respect, there is no description provided of how the directors undertook their peer company valuations and arrived at their valuation of Bullseye.
80. Bullseye submitted, in effect, that the peer comparisons were made *"having regard to the enterprise and asset values of several entities which are broadly comparable with Bullseye. Importantly, those peer comparisons do not take into account specific risks associated with Bullseye..."*.
81. Details should have been included in the target's statement. The statement is not, in effect, materially different to a recommendation, or at least in our opinion would be so regarded by shareholders, and Guidance Note 22⁹, by analogy, makes it clear that the reasons should be given.
82. Accordingly, in our view the statements *"the Offer represents the highest all-time price for a Bullseye Share"* and *"the Offer provides a substantial premium for your Bullseye Shares"* do not provide shareholders with enough information to consider the merits of the Emerald proposal.

North Laverton Gold Project and JORC compliance

83. The target's statement disclosed that:

Bullseye Shareholders are currently subject to uncertainty and risks arising from the development of Bullseye's North Laverton Gold Project. The risks currently faced by Bullseye Shareholders with regards to the North Laverton Gold Project include labour shortages and inflationary pressures being experienced in the Western Australian labour market, as well as the associated challenges of establishing a team with the required skills and experience to develop the North Laverton Gold Project into an operating mine.

84. The Applicant submitted that the target's statement failed to disclose the details of the risks associated with the North Laverton Gold Project. The Applicant also submitted that other disclosures in relation to the project were deficient including:
 - (a) financial effect of gold processing at Bungarra
 - (b) estimates of production, revenue, cost or profit from expected 8,640 ounces of gold production and
 - (c) drilling and mine planning information and cost, revenue or profit from expected 17,000 ounces of gold production.

⁹ Guidance Note 22: Recommendations and Undervalue Statements

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

85. The Applicant also submitted that there were other deficiencies in the target's statement, including, in relation to section 6.2(d) of the target's statement headed 'NLGP gold deposits':
- (a) the section "*refers to a JORC resource from 2018 but the Target's Statement does not include a competent person's statement in relation to that resource*" and
 - (b) in relation to the Bungarra deposit, "*no information has been provided as to the extent to which the 2018 resource has been depleted*".
86. The Applicant also submitted that, as Emerald had undertaken due diligence, Emerald must (or should) have been aware of the matters raised. It submitted that the disclosure in the bidder's statement was therefore deficient.
87. Thus the Applicant submitted "*the crux of the matter is that both bidder and target have failed to provide any meaningful information (being information to which both bidder and target are privy) in relation to the assets, mining and exploration activities and financial position and prospects of Bullseye (an unlisted public company) since Bullseye's Annual Report for the year to 30 June 2021, in circumstances where very significant exploration and mining activities, and financing and fundraising transactions, have occurred since 30 June 2021, and equally very significant mining and exploration activities are proposed for 2022.*"
88. We did not pursue the line of inquiry into the disclosure in the bidder's statement. It is sufficient to focus on the target's statement.
89. While the Panel matter has been progressing, ASIC has been reviewing the target's statement. Its preliminary review identified the following "key matters":
- (a) "*references to mineral resource estimates that are not fully compliant with the JORC Code 2012;*
 - (b) "*insufficient detail provided in relation to drill results, technical studies and mine planning at the North Laverton Gold Project;*
 - (c) "*insufficient and incomplete financial information provided; and*
 - (d) "*the lack of a clear reasonable basis for various statements made.*"
90. Bullseye submitted that all material risks in relation to the North Laverton Gold Project had been adequately disclosed in the target's statement. We do not agree. While Bullseye responded to the issue raised by the Applicant in these terms – "*The JORC-compliant Mineral Resources estimated at Boundary, Stirling and Bungarra and referred to in the Target's Statement were reported by Bullseye for the first time in 2018 and are publicly available*" – shareholders are entitled in the target's statement to get a detailed update of what has taken place. It is in any event not reasonable to assume that all the shareholders are the same as in 2018.
91. Under s638(1) a target's statement must contain all the information shareholders and their professional advisers would reasonably require in making an informed assessment of whether to accept a bid, unless, pursuant to s638(1A), it is not reasonable for those persons to expect to find such information in the target's statement and it is not known to any of the directors. Here the latest information

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

was known and, in our view, is reasonable for a shareholder (or their adviser) to expect it.

92. Of course, we fully expect that Bullseye will resolve all the disclosure issues raised by ASIC to ASIC's satisfaction. And as ASIC is pursuing its review of the target's statement and is aware of the issues raised by the Applicant, we have not felt it necessary to take most of the matters further. We leave it to ASIC to make its decision on the materiality of, and need for disclosure in relation to, many of the issues raised.
93. We agree with ASIC's assessment and are satisfied that the target's statement:
- (a) does not adequately describe the progress of Bullseye's North Laverton Gold Project, or provide details of the risks associated with it and
 - (b) provides insufficient disclosure of production targets and drilling results and discloses mineral resource estimates that are not fully compliant with the JORC Code 2012. On this issue we also agree with ASIC that, while Bullseye is not obligated to comply with the JORC code, *"companies preparing target's statements should generally follow industry reporting practice, to ensure that shareholders have the information they need to make an informed decision in response to the offer."*

Financial disclosures

94. The Applicant raised a concern about the disclosure of financial information in the target's statement. It wrote to Bullseye saying:

"Section 6.6 of the Target's Statement includes an unaudited consolidated statement of financial position and profit and loss to 30 November 2021 which discloses the following material matters have occurred since 30 June 2021:

- (a) a substantial increase in the 'JV Loan' disclosed as a current asset;*
- (b) a substantial increase in trade and other payable;*
- (c) a substantial increase in borrowings;*
- (d) a substantial increase in share capital; and*
- (e) a loss of over \$3,000,000 for the five-month period.*

While some of these matters have been referred to as subsequent events in Bullseye's 2021 Annual Report, there is no information in the Target's Statement to enable these to be reconciled and the significant part year loss was not referred to as a post balance date event in the Annual Report."

95. The Applicant also raised a concern about the conversion of convertible notes.
96. Bullseye provided a consolidated statement of financial position with the key variances explained, and other responses to issues the Applicant had raised, which the Applicant correctly described as additional information.
97. In our view the target's statement does not provide adequate financial information of subsequent events to Bullseye's 2021 Annual Report and therefore shareholders

do not have enough information to make an informed assessment of the Emerald proposal.

Timing of pre-bid acquisitions

98. The issues raised by the Applicant regarding section 606 and disclosure of the BIA (and, we note in passing, the potential risk of insider trading) are a salient reminder to potential bidders (and targets) about the proper management of share acquisitions in the context of a potential bid.

DECISION

Declaration

99. We think that the following, when taken as a whole, had a limiting effect on the ability for a competing proposal for Bullseye to be made, namely:
- (a) the warranty that the directors of Bullseye intended to accept the Emerald bid within 7 days of its opening
 - (b) the acceptance of the Emerald bid within that timeframe by each of the directors
 - (c) the delay between signing of the BIA and the announcement that it had been entered into and
 - (d) Emerald acquiring its pre bid stake after signing of the BIA and before it was announced.
100. We also think that Bullseye agreeing to early dispatch of Emerald's bidder's statement and the deficiencies in disclosure that we have found, given that Bullseye is an unlisted company, added to the limiting effect.
101. For the reasons discussed above, we consider that Bullseye's target's statement contains material deficiencies. Given that Bullseye is unlisted, and not subject to continuous disclosure requirements, adequate disclosure to shareholders at the time of a control transaction taking place is particularly important for Bullseye shareholders, any potential rival bidder and the market for corporate control.
102. Accordingly, it appears to us that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Bullseye or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bullseye
 - (b) having regard to the purposes of Chapter 6 set out in section 602 of the Act and

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

- (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 or of Chapter 6A, 6B or 6C of the Act

103. We made the declaration set out in **Annexure B** and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

104. Following the declaration, we made the final orders set out in **Annexure C**.

105. Under section 657D the Panel is empowered to make 'any order'¹⁰ if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 7 February 2022.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We do not consider that our orders do so. They are directed essentially at further disclosure and allowing accepting shareholders to reconsider their decisions in the light of the additional disclosure we have required. They also require that Emerald's bid be extended and acceptances not be processed in the interim.¹¹ The latter orders maintain the status quo while the former orders address the unacceptable circumstances. While the orders may affect the success of Emerald's bid, they are not unfairly prejudicial in our view, noting that Emerald and Bullseye had cooperated in the making of the bid.
- (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 28 January 2022 when the Panel sent the parties a supplementary brief on declaration and proposed orders, and again on 4 February 2022 when proposed final orders were drafted and comments on technical issues invited.
- (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. We consider that our orders do so for the reasons above. Moreover, we required the withdrawal rights to be available once the required information was provided and then to run for at least 10 trading days (in total), so that shareholders can assess Emerald's scrip offer when considering whether to exercise the right.

106. We ordered that Emerald's bid be extended, so that Bullseye shareholders have enough time to consider their options. For similar reasons we ordered that there be no change to Bullseye's board by Emerald while shareholders can withdraw.

¹⁰ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

¹¹ These two orders were offered by Emerald in an undertaking, but it was simpler to make them as orders since there are other orders being made

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

Moreover, clause 2.4 of the BIA requires Bullseye, if Emerald acquires more than 50% of Bullseye's shares and the bid is unconditional, to take steps to ensure that Emerald's nominees form a majority of directors on the Bullseye board. If that change took place, and then withdrawals reduced Emerald's holding below 50%, there would have been a change in Bullseye's situation that may not be recovered.

107. Lastly, we ordered that item 9 of section 611 not apply in respect of any withdrawn or cancelled acceptances. The purpose of this order is to remove the possibility that Emerald could simply acquire (or re-acquire) shares in Bullseye to the same percentage as it had before acceptances were withdrawn or cancelled.
108. We were not asked to, and did not, make any costs orders.

Karen Evans-Cullen

President of the sitting Panel

Decision dated 7 February 2022

Reasons given to parties 4 April 2022

Reasons published 6 April 2022

Post script:

1. On 21 March 2022, the Applicant applied under section 657D(3) to vary Order 4 as made on 7 February 2022.
2. Relevantly, Order 4 provides, in summary, that if prior to the end of the withdrawal period a competing proposal for Bullseye is made and the Bullseye directors determine it is a superior proposal to the bid, the Bullseye directors' (and their associated entities') acceptances are cancelled.
3. Following the making of the Xingao Bid¹², the board of Bullseye (Ms Dariena Mullan dissenting) continued to recommend the bid. However, Ms Mullan had recommended in the Target's Statement dated 18 March 2022 in response to the Xingao Bid that Bullseye shareholders accept the Xingao Bid.
4. The Applicant sought a variation of our orders to allow Ms Mullan an ability to withdraw her acceptance of the bid.
5. The Applicant submitted that, at the time that Order 4 was made, no contemplation was given to the possibility of an individual director determining that a competing proposal to the bid was a Superior Proposal. It submitted that the determination by Ms Mullan that the Xingao Bid was a Superior Proposal was made at the first opportunity.
6. Accordingly, it submitted, allowing Ms Mullan's acceptance of the bid to stand in the face of her recommendation was inconsistent in light of our declaration of unacceptable circumstances.

¹² an off-market takeover bid announced by Au Xingao Investment Pty Ltd on 3 February 2022 for all Bullseye shares

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

7. Bullseye made a 'preliminary submission' (which we decided to accept) to the effect that it would be inappropriate for us to entertain the Applicant's application for variation, including because:
 - (a) the matter was concluded, and orders had been made, based on the circumstances at the time and
 - (b) the prospect of an individual dissenting position was foreseeable and could have been provided for in the orders and
 - (c) withdrawal¹³ could prejudice Bullseye (by causing a breach of the BIA), or Emerald.
8. Ms Mullan sought to become a party. She has an interest in the variation request and can assist us by providing information. Moreover, we would need to give her an opportunity to make submissions in any event if we were minded to vary the orders.¹⁴ Given the limited compass of this variation application, meaning that there was no need to re-open the entire matter, and for the aforesaid reasons, we accepted Ms Mullan as a party.
9. The Applicant's variation application was raised in the context of the *Bullseye Mining Limited 04* matter,¹⁵ which we also heard. We decided to consider it in these proceedings, rather than the 04 proceedings. The variation relates to orders in these proceedings and the considerations applicable in the two proceedings differ.
10. We are also minded to take a broad view of the Applicant's interest in the variation, since it is a related entity of Xingao.
11. We sought further submissions on the variation request. As there had been submissions made prior to Ms Mullan becoming a party, to ensure a fair process we asked the other parties to repeat the relevant submissions in *Bullseye Mining Limited 04* for her benefit. We also asked all the parties to answer further questions, particularly directed at whether our reasons supported varying the orders and whether there were any further submissions that parties wished to make.
12. Ms Mullan submitted that our reasons supported the variation and her acceptance of the bid should be cancelled (or permitted to be withdrawn). Her reasoning relied on the timing of events, namely the orders on 7 February 2022, the board meeting to consider the Xingao Bid on 2 March 2022, the end of the withdrawal rights period being advised to shareholders on 1 March 2022 and ending on 7 March 2022.
13. Ms Mullan submitted that the BIA was signed when only the bid (which she then supported) existed, but circumstances had since changed and, acting in good faith, she had now determined and publicly stated that, in her view, the Xingao Bid was a Superior Proposal. She submitted that it would be inconsistent with her

¹³ Submissions and rebuttals use the term withdrawal, rather than, strictly speaking, cancellation but nothing turns on this.

¹⁴ Section 657D(3)

¹⁵ *Bullseye Mining Limited 04* [2022] ATP 8

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

determination and recommendation to shareholders if her acceptance of the bid could not be cancelled or withdrawn.

14. Lastly, Ms Mullan made submissions in respect of certain other acceptances into the bid that she submitted were not properly authorised. The Applicant made reference to this in its rebuttals, saying that, if true, Bullseye's original target's statement was materially misleading. We do not take this any further. It has not been raised before and relates to new circumstances.
15. The Applicant sought to include the new material, saying "*If the Panel considers that, as a matter of proper process, these issues ought to be the subject of a separate application to vary the Orders in the manner described above, then Xinhe hereby makes that application.*" We do not think that an application in this form is sufficient.
16. The Applicant submitted that, as there is now a competitive market for control of Bullseye, we should allow Ms Mullan to withdraw her acceptance of the bid as that would help promote a competitive market; that is, presumably that it would enable her to accept the competing bid which she has now recommended.
17. We note that the Applicant's application for the variation does not include a request for a variation to require Ms Mullan to accept the Xingao Bid. It only asks, in effect, that:
 - (a) "*Ms Mullan's acceptance of the Emerald bid is cancelled; and*
 - (b) "*Ms Mullan must not accept the Emerald bid unless she subsequently determines that the bid is superior.*"
18. The Applicant also submitted that "*no contemplation was given to the possibility of individual Bullseye directors determining that a competing proposal for Bullseye was a superior proposal to the Emerald bid, with the Order instead contemplating a 'collective' determination by the Bullseye directors one way or the other.*"
19. Emerald submitted that the BIA "*representations and supporting 'truth statements'*" were relied on by it, and withdrawal now would "*set an extraordinary and dangerous precedent.*" Emerald noted that its bid was now unconditional. It also submitted that the Bullseye board still does not consider the Xingao Bid to be a Superior Proposal.
20. The Applicant submitted in rebuttals that, since the unacceptable circumstances included the BIA, an order to remedy those unacceptable circumstances would be neither extraordinary nor dangerous.
21. We agree that an order to remedy unacceptable circumstances is neither "*extraordinary nor dangerous*", but we do not think we need to vary the orders.
22. Bullseye submitted that our reasons do not support the varying of our orders, including because:
 - (a) the orders were made in response to circumstances that had arisen at the time of the application, and included the acceptance and
 - (b) Order 4 contemplated what would happen in the event of a Superior Proposal, and the order was made "*in circumstances where the Panel was fully aware of the provisions of the BIA and the way in which that document operated.*"

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

23. We agree. The orders were based on the circumstances as they existed. The directors, including Ms Mullan, chose to execute the BIA and accept Emerald's offer. They agreed to an acceptance framework that gave rise to unacceptable circumstances. Ms Mullan made her recommendation and acted at the time. The orders contemplated a situation in which the acceptances of the directors would be cancelled, and that situation has not arisen.
24. Moreover, even if we were to accede to the request for the variation, it is unclear whether the Xingao Bid is likely to become unconditional, so the revised order as requested may serve no purpose in promoting competition, although we accept that would assist Xingao to get closer to meeting its minimum acceptance condition.
25. To address this last point, Bullseye further submitted that, if we were minded to vary the order, there should be clear conditions imposed on the withdrawal right including that Xingao's Bid becomes unconditional and Ms Mullan be required to follow her recommendation and accept it. Emerald made a similar submission as to the conditions on which withdrawal should be allowed. We do not need to consider this further.
26. We do not think we should vary the order and refuse the application.

Advisers

Party	Advisers
Applicant	Bennett + Co and Allens
Bullseye	Murcia Pestell Hillard and Clayton Utz
Emerald	Steinepreis Paganin
Ms Dariena Mullan ¹⁶	Addisons

¹⁶ Ms Mullan was not a party to *Bullseye Mining Limited 03*. On 25 March 2022 Ms Mullan applied to become a party to the *Bullseye Mining Limited 03 Variation* proceedings.



Australian Government

Takeovers Panel

Annexure A

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

BULLSEYE MINING LIMITED 03

Emerald Resources NL undertakes to the Panel that, without the Panel's consent, it will not take any steps to process acceptances of, or issue any Emerald Resources NL shares to, accepting Bullseye Mining Limited shareholders pursuant to its off-market takeover bid to acquire all of the ordinary shares in Bullseye Mining Limited dated 13 December 2021 until the determination of the Panel proceedings.

**Signed by Morgan Hart, Managing Director, Emerald Resources NL
with the authority, and on behalf, of
Emerald Resources NL
Dated 13 January 2022**



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BULLSEYE MINING LIMITED 03

CIRCUMSTANCES

1. Bullseye Mining Limited (**Bullseye**) is an unlisted public company. Bullseye submitted to the Panel that it has “339 largely unsophisticated shareholders”.
2. On 29 November 2021, Bullseye entered into a Takeover Bid Implementation Agreement (**BIA**) with Emerald Resources NL (an ASX listed company - **Emerald**), relating to a proposal that Emerald would make a conditional off-market takeover bid for Bullseye, offering 1 Emerald share for every 3.43 Bullseye shares (**Emerald bid**).
3. Under clause 4.4 of the BIA, Bullseye represented and warranted that:
 - (a) *“the Bullseye Board will recommend that all Bullseye Shareholders accept the Offer, subject to there being no Superior Proposal”*
 - (b) *it had “been informed by each of the directors of Bullseye that they intend to accept the Offer within 7 days of the Offer becoming open for acceptance with respect to all Bullseye Shares owned or controlled by that director, subject to there being no Superior Proposal” and*
 - (c) *it had “been informed by each of the directors of Bullseye that they will not withdraw, revise, revoke or qualify, or make any public statement inconsistent with, the recommendation in clause 4.4(a) unless a Superior Proposal emerges”.*
4. Under clause 4.7 of the BIA, Bullseye agreed (by authority of its directors) that Emerald could dispatch its bidder’s statement *“earlier than the date for sending under item 6 of section 633(1) of the Corporations Act as contemplated in the Timetable”*. The timetable in Schedule 1 of the BIA envisaged that Emerald’s bidder’s statement would be lodged on 7 December 2021 and dispatched on 9 December 2021.
5. On 29 November 2021, Emerald requested and obtained a trading halt on its securities.
6. On 1 December 2021, Emerald requested and obtained a voluntary suspension on its securities.

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

7. On 7 December 2021, Emerald and Bullseye jointly announced¹ that they had entered into the BIA. The announcement attached the BIA. The announcement disclosed (among other things) that the Emerald bid was *“unanimously recommended by the Directors of Bullseye, who have also agreed to accept the Offer in respect of all shares they control, in each case, in the absence of a superior offer”*.
8. The announcement did not disclose that Bullseye directors intended to accept the Emerald bid within 7 days of the offer opening in the absence of a superior offer, leaving readers to gain this information only by reading the attached, detailed BIA.
9. The Panel considers that Emerald and Bullseye should have disclosed prominently in the announcement full details of the Bullseye directors’ intentions. Even more so, this is because Bullseye submitted that its shareholder base was largely unsophisticated.
10. The announcement also disclosed that *“Contemporaneously with and as part of the bid, Emerald has acquired 19.45% of the current Bullseye shares on issue from existing Bullseye shareholders on the same terms as under the Offer.”* These acquisitions occurred between 2 and 6 December 2021.
11. Also on 7 December 2021, following release of the announcement, trading in Emerald’s securities was reinstated.
12. Prior to the announcement, the highest price paid for a Bullseye share between arm’s length parties had been \$0.31 per share.
13. On 8 December 2021, Emerald issued its bidder’s statement. Emerald’s bidder’s statement disclosed (among other things) that:
 - (a) the Emerald scrip consideration valued *“each Bullseye Share at \$0.30 per share, based on the VWAP of Emerald Shares as traded on the ASX for the 30 calendar days from 27 October 2021 to 26 November 2021 (being \$1.03)”* and
 - (b) Bullseye directors own or control 23,321,696 Bullseye shares representing 5.99% of Bullseye shares on issue as at the date of Emerald’s bidder’s statement.
14. On 13 December 2021, Emerald announced that it had completed dispatch of its bidder’s statement.
15. On 14 December 2021, Bullseye’s Chairman accepted the Emerald bid in relation to one of the parcels of Bullseye shares controlled by him. All the directors of Bullseye accepted the Emerald bid within the 7-day period specified in the BIA.
16. On 17 December 2021, Emerald announced that it had a 31.8% relevant interest in Bullseye.

¹ On Emerald’s ASX announcements platform

Takeovers Panel

Reasons - Bullseye Mining Limited 03

[2022] ATP 4

17. On 21 December 2021, Emerald announced that it had a 42.1% relevant interest in Bullseye.
18. On 29 December 2021, Bullseye issued its target's statement, which disclosed (among other things) that:
 - (a) the Emerald bid *"values each Bullseye Share at \$0.30 per share, based on the VWAP of Emerald Shares as traded on the ASX for the 30 calendar days from 27 October 2021 to 26 November 2021 (being \$1.03)"*
 - (b) the value of the Emerald bid *"represents the highest all-time price for a Bullseye Share"* and
 - (c) *"Bullseye Shareholders are currently subject to uncertainty and risks arising from the development of Bullseye's North Laverton Gold Project. The risks currently faced by Bullseye Shareholders with regards to the North Laverton Gold Project include labour shortages and inflationary pressures being experienced in the Western Australian labour market, as well as the associated challenges of establishing a team with the required skills and experience to develop the North Laverton Gold Project into an operating mine"*.
19. On 31 December 2021, Emerald announced that it had a 47.5% relevant interest in Bullseye.
20. On 6 January 2022, Emerald announced that it had a 52.85% relevant interest in Bullseye and that it had declared its bid free of conditions.
21. Also on 6 January 2022, Hongkong Xinhe International Investment Company Limited made an application to the Panel for a declaration and orders in relation to the affairs of Bullseye.
22. On 10 January 2022, the Panel announced receipt of the application.
23. Also on 10 January 2022, Emerald requested and obtained a trading halt on its securities.
24. On 12 January 2022, Emerald requested and obtained a voluntary suspension on its securities.
25. The Panel considers that:
 - (a) the warranty that the directors of Bullseye intended to accept the Emerald bid within 7 days of its opening
 - (b) the acceptance of the Emerald bid within that timeframe by each of the directors
 - (c) the delay between signing of the BIA and the announcement that it had been entered into and

Takeovers Panel

Reasons - Bullseye Mining Limited 03 [2022] ATP 4

(d) Emerald acquiring its pre bid stake after signing of the BIA and before it was announced,

had a limiting effect on the ability for a competing proposal for Bullseye to be made.

26. The Panel considers that Bullseye agreeing to early dispatch of Emerald's bidder's statement and deficiencies in disclosure given Bullseye is an unlisted company (see below) added to the limiting effect.
27. The Panel considers that Bullseye's target's statement contains material deficiencies including because it:
- (a) does not adequately describe the progress of Bullseye's North Laverton Gold Project, or provide details of the risks associated with it
 - (b) provides insufficient disclosure of production targets and drilling results and discloses mineral resource estimates that are not fully compliant with the JORC Code 2012 and
 - (c) does not provide adequate financial information of subsequent events to Bullseye's 2021 Annual Report.
28. Further, the statement in Bullseye's target's statement that the value of the Emerald bid "*represents the highest all-time price for a Bullseye Share*" is misleading as it does not take into account premium for control, or that previously an arm's length acquisition of Bullseye shares exceeded the value of the bid consideration disclosed in Emerald's bidder's and Bullseye's target's statements of \$0.30,² or detail how the directors arrived at their valuation of the company by way of peer company valuations.
29. The Panel considers that, given that Bullseye is unlisted, and not subject to continuous disclosure requirements, adequate disclosure to shareholders at the time of a control transaction taking place is particularly important for Bullseye shareholders, any potential rival bidder and the market for corporate control.
30. Bullseye's target's statement contravenes sections 670A and 638 of the *Corporations Act 2001* (Cth) (**Act**).

² Bullseye submitted that "*the announcements by Emerald and Bullseye, including the Bidder's Statement, the value attributable to the consideration under the bid offer was incorrect. In the announcements the value of the bid offer shares were determined by reference to \$1.03 per Emerald share based on Emerald's 30-day VWAP (being 30 calendar days from 27 October 2021 to 26 November 2021)*", "*Bullseye submits the attributable value should have been \$1.065*" and "*the offer provides shareholders with an opportunity to obtain a value of \$0.33 per share*".

EFFECT

31. As a result of the matters referred to:
- (a) the acquisition of control over Bullseye shares has not taken place in an efficient, competitive and informed market and
 - (b) Bullseye shareholders were not given enough information to enable them to assess the merits of the proposal.

CONCLUSION

32. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Bullseye or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bullseye
 - (b) having regard to the purposes of Chapter 6 set out in section 602 of the Act and
 - (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 or of Chapter 6A, 6B or 6C of the Act
33. 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) of the Act.

DECLARATION

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

Allan Bulman
Chief Executive
with authority of Karen Evans-Cullen
President of the sitting Panel
Dated 7 February 2022



Australian Government

Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

BULLSEYE MINING LIMITED 03

The Panel made a declaration of unacceptable circumstances on 7 February 2022.

THE PANEL ORDERS

Disclosure

1. Bullseye must dispatch a supplementary target's statement, in a form which ASIC and the Panel (through one or more sitting member) having been provided a draft does not object to, that deals with the following disclosures:
 - (a) a description of progress of Bullseye's North Laverton Gold Project
 - (b) details of the risks associated with progress of Bullseye's North Laverton Gold Project
 - (c) disclosure of production targets and drilling results and reference to mineral resource estimates that comply with the JORC Code 2012
 - (d) financial information of subsequent events to Bullseye's 2021 Annual Report
 - (e) an explanation of the account taken by directors of premium for control when making the statement in the target's statement that the value of the Bid *"represents the highest all-time price for a Bullseye Share"*
 - (f) an explanation of the account taken by directors of any previous arm's length acquisition of Bullseye shares that exceeded the value of the Bid consideration when making the statement in the target's statement that the value of the Bid *"represents the highest all-time price for a Bullseye Share"* and
 - (g) a description of how the directors undertook their peer company valuations and arrived at their valuation of Bullseye.
2. Emerald must dispatch a supplementary bidder's statement, in a form which ASIC and the Panel (through one or more sitting member) having been provided a draft does not object to, that:
 - (a) explains to shareholders the effect of the Panel's declaration and orders
 - (b) prominently advises Bullseye shareholders of:
 - (i) the right to withdraw their acceptances of the Bid

Takeovers Panel

Reasons - Bullseye Mining Limited 03
[2022] ATP 4

- (ii) how to exercise the right of withdrawal and
 - (iii) the time within which the right to withdraw is available and
- (c) offers the withdrawal rights (other than the directors' stakes), for a period of not less than 10 trading days (in total) that meet the following requirements:
- (i) trading in Emerald shares is available on market and not subject to any trading halt or trading suspension and
 - (ii) the period starts from the date which is the later of the dispatch of Bullseye's supplementary target's statement and the dispatch of Emerald's supplementary bidder's statement.

Withdrawal

3. Emerald must offer withdrawal rights to accepting Bullseye shareholders (other than the directors' stakes), which is equivalent to the right conferred by section 650E of the Act (except to the extent contemplated by these orders).

Directors' acceptances

4. If prior to the end of the period that a shareholder can withdraw acceptance under Order 2, a competing proposal for Bullseye is made which the Bullseye directors determine is a superior proposal to the Bid:
- (a) the Bullseye directors' (and their associated entities') acceptances are cancelled and
 - (b) the Bullseye directors (and their associated entities) must not accept the Bid unless the Bullseye directors subsequently determine that the Bid is superior.

Item 9

5. Emerald must not purport to rely on item 9 of section 611 of the Act by taking into account voting power in shares in respect of which acceptances are withdrawn under Order 2 or in respect of which acceptances are cancelled under Order 4.

Actions under the Bid

6. Emerald must not take any action to process any acceptances under the Bid from the date of these orders until the end of the period that a shareholder can withdraw acceptance under Order 2.
7. Emerald must extend its Bid until no earlier than 5:00pm (AEDT) on the day after the end of the period that a shareholder can withdraw acceptance under Order 2. For the avoidance of doubt, this order does not prevent Emerald further extending its Bid in accordance with the Act.
8. Emerald must not take any action to enforce clause 2.4 of the BIA, or otherwise accept an offer to nominate directors to the board of Bullseye, until the end of the period that a shareholder can withdraw acceptance under Order 2.

Takeovers Panel

Reasons - Bullseye Mining Limited 03
[2022] ATP 4

Interpretation

9. In these orders the following terms have their corresponding meaning:

Act	<i>Corporations Act 2001 (Cth)</i>
BIA	The bid implementation agreement between Emerald and Bullseye attached to the ASX announcement of 7 December 2021 by Emerald
Bid	The off-market takeover bid announced by Emerald on 7 December 2021 for all the issued ordinary shares of Bullseye
Bullseye	Bullseye Mining Limited
Emerald	Emerald Resources NL
Superior proposal	The meaning in clause 1.1 of the BIA

Allan Bulman
Chief Executive
with authority of Karen Evans-Cullen
President of the sitting Panel
Dated 7 February 2022