



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Bullseye Mining Limited 05  
[2022] ATP 14**

**Catchwords:**

*Decline to commence proceedings – share transfers – defeating conditions - disclosure – supplementary target’s statement – poison pill*

*Corporations Act 2001 (Cth), sections 602, 602A, 638, 1071F*

*Procedural Guidelines, Guideline 4.6*

*Nimrod Resources Limited [2019] ATP 3, Northern Energy Corporation Limited [2011] ATP 2, Village Roadshow Limited 02 [2004] ATP 12, Richfield Group Limited [2003] ATP 41, Anaconda Nickel Limited 16 & 17 [2003] ATP 15, Goodman Fielder Ltd 02 [2003] ATP 5*

<b>Interim order</b>	<b>IO undertaking</b>	<b>Conduct</b>	<b>Declaration</b>	<b>Final order</b>	<b>Undertaking</b>
<b>NO</b>	<b>YES</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>

**INTRODUCTION**

1. The Panel, Bruce McLennan, Kerry Morrow and Sharon Warburton (sitting President), decided not to conduct proceedings on an application by Au Xingao Investment Pty Ltd in relation to the affairs of Bullseye Mining Limited. The application concerned unregistered share transfers in Bullseye and disclosure by the target of information relating to Xingao’s bid conditions and other matters. The Panel considered that there was no reasonable prospect that it would make a declaration of unacceptable circumstances.
2. In these reasons, the following definitions apply.

<b>Blue Cap</b>	Blue Capital Equities Pty Ltd
<b>Bullseye</b>	Bullseye Mining Limited
<b>Emerald</b>	Emerald Resources NL
<b>Emerald bid</b>	an off-market takeover bid by Emerald for all Bullseye shares under a bidder’s statement dated 8 December 2021, as supplemented
<b>Inca</b>	Inca Minerals Limited
<b>Xingao</b>	Au Xingao Investment Pty Ltd
<b>Xingao bid</b>	an off-market takeover bid by Xingao for all Bullseye shares under a replacement bidder’s statement dated 23 February 2022, as supplemented

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### FACTS

3. Bullseye is an unlisted public company with more than 50 shareholders.
4. Emerald is an ASX listed company (ASX code: EMR).
5. Bullseye is the subject of an unconditional takeover bid by Emerald offering 1 Emerald share for every 3.43 Bullseye shares. The Emerald bid has been recommended by the directors of Bullseye, although one director, Ms Dariena Mullan (who is also an executive of Bullseye), has since changed her recommendation.
6. Xingao is an Australian subsidiary of Xinhua Zhongbao Co Ltd.
7. Xingao, together with a related company, Hongkong Xinhe International Investment Company Limited, has voting power in 14.85% of Bullseye.
8. Bullseye is the subject of a conditional takeover bid of (currently) \$0.35 per Bullseye share by Xingao.
9. On 21 April 2022, Emerald announced that it had a relevant interest in 49.29% of Bullseye.
10. Over the course of some years, there have been a number of share transfers lodged with Bullseye by its shareholders for registration, which for various reasons remain unregistered by Bullseye.
11. Bullseye has a joint venture project with Blue Cap. The JV agreement includes a 'change of control' clause. Bullseye informed Xingao that its bid potentially triggered the condition.
12. Bullseye has an agreement with Inca that includes (among other things) provision for Bullseye to first offer one of the tenements to Inca if it proposed relinquishing it. On 31 March 2022, Inca made an ASX announcement to the effect that it considered Bullseye to be in breach of the agreement.
13. On 11 April 2022, Xingao sought from Bullseye information regarding the unregistered transfers, Blue Cap's consent in relation to the change of control clause and the alleged breach of Bullseye's agreement with Inca but, at the date of the application, had not received a response.
14. On or around 19 April 2022, Ms Mullan was suspended from her duties as an executive of Bullseye.

### APPLICATION

#### Declaration sought

15. By application dated 21 April 2022, Xingao sought a declaration of unacceptable circumstances.
16. Xingao submitted, in essence, that in the context of the competing bids for Bullseye:
  - (a) Bullseye had shown a preference to facilitate the success of the Emerald bid

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- (b) Bullseye had failed to register the transfers and this had prevented the transferees from participating in either bid and, in some instances, deprived Xingao of the opportunity to acquire the shares
  - (c) there was non-disclosure by Bullseye in relation to the change of control clause in the joint venture with Blue Cap, which had the potential to operate as a 'poison pill' and affected Xingao's ability to decide on a defeating condition in its bid
  - (d) there was non-disclosure in relation to the Inca dispute, which was material information and affected Xingao considering whether a defeating condition of its bid had been triggered and
  - (e) there was non-disclosure in relation to Ms Mullan's suspension as an executive of Bullseye that was potentially material information.
17. It submitted that Bullseye was in breach of section 638<sup>1</sup> and that control of Bullseye shares was not occurring in an efficient, competitive and informed market.

#### Interim orders sought

18. Xingao sought an order restraining Emerald from processing any acceptances under its takeover bid in relation to any of the shares the subject of the unregistered transfers.
19. On 1 May 2022, Emerald provided an undertaking that, until 2:00pm (WST) on 6 May 2022, it would not process any acceptances under its off-market takeover bid in relation to any of the shares the subject of the alleged unregistered transfers as outlined in the application (**Annexure A**).
20. Accordingly, we did not make an interim order.
21. As part of its request for an interim order, Xingao offered to provide, if required, an undertaking not to process any acceptances under its bid on the same basis. We did not require Xingao to provide an undertaking.

#### Final orders sought

22. Xingao sought final orders, including:
- (a) that Bullseye register the unregistered share transfers
  - (b) that Bullseye disclose whether any other share transfers that had been lodged with it remain unregistered and the reasons why they remain unregistered
  - (c) that Bullseye provide a supplementary target's statement and

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<sup>1</sup> 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)

- (d) *Such further orders as the Panel considers appropriate with reference to applicable Takeovers Panel decisions and Guidance Notes concerning the frustrating actions and information deficiencies identified in this application.*

## DISCUSSION

### Preliminary submissions

23. Bullseye made a preliminary submission that some matters had previously been considered by the Panel in *Bullseye Mining Limited 03*<sup>2</sup> and *Bullseye Mining Limited 04*<sup>3</sup> and only four new matters were raised:
- (a) Unregistered transfers - Bullseye submitted that some of the transfers were “*being actively considered*” in court proceedings between Bullseye and Xinhe (and associated parties), and some were from several years ago and “*and it is unclear whether the purported transferees have a legitimate entitlement to be registered as the holders of those shares.*” Bullseye also submitted that it was only aware of one instance of an acceptance of the Emerald bid in relation to shares the subject of a disputed acceptance, relating to 213,260 shares. Bullseye was taking steps “*to seek to ascertain the legitimacy of the transfer and thereby confirm whether this is a matter to be addressed and, if so, any relevant remedial action which should be taken*”.
  - (b) Blue Cap change of control clause - Bullseye submitted that the clause was a standard provision in a JV of this type, that it was reasonable for Blue Cap to determine whether it was prepared to consent to disclosure, and Xingao should have anticipated that the agreement would contain such a provision. Thus, it was for Xingao to decide on its bid conditions, and to determine whether those conditions were capable of being satisfied, and this was not a matter for the Panel.
  - (c) Inca dispute - Bullseye submitted that the value of the entire suite of tenements (including those the subject of dispute) was low, Bullseye having paid \$44,000 for them, and Bullseye had previously queried Inca as to the materiality of its market announcements.
  - (d) Suspension of Ms Mullan as an executive - Bullseye submitted that “*Although Ms Mullan is suspended in her capacity as an executive she continues to be required to perform duties as directed by the Bullseye Board, including necessary technical work in her role as a geologist.*” It submitted that this was not a matter appropriate for the Panel to be concerned with.
24. Emerald made a preliminary submission submitting, in effect, that many of the disputed share transfers occurred some time ago and the Courts were a more appropriate forum to consider the issue of the disputed transfers.
25. Ms Mullan made a preliminary submission in which she addressed two matters overlapping with Xingao’s application, namely, the unregistered transfers and her

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<sup>2</sup> [2022] ATP 4

<sup>3</sup> [2022] ATP 8

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suspension as an executive of Bullseye. Ms Mullan identified a further two unregistered share transfers not identified in the application.

26. Ms Mullan also raised new matters not in the application, namely:
- (a) that Bullseye had facilitated the transfer of Bullseye shares to Emerald as part of Emerald's acquisition of its pre-bid stake, despite being aware that some of the shares had been sold (at the time representing 0.98% of the issued share capital of Bullseye)
  - (b) that Bullseye's chairman had accepted the Emerald bid in respect of some shares without the prior approval of "Funders" who had advanced the purchase price for the shares and who claimed beneficial ownership of them (representing 0.5%)
  - (c) despite an understanding that Mr Desmond Mullan had with Bullseye as to a \$0.20 conversion price for convertible notes he held, Bullseye had *"unilaterally and without any valid reason, proceeded to thereafter convert those convertible notes at a conversion price of \$0.26, resulting in Mr Mullan being issued 2,202,686 fewer shares than he is entitled to"* and
  - (d) it was appropriate for the Panel to order that her acceptance of the Emerald bid be cancelled *"in light of the actions taken by the Bullseye directors, other than Ms Mullan, to frustrate any other bid for Bullseye which may compete with the Emerald offer."*
27. Ms Mullan submitted that Bullseye had *"engaged in a series of actions constituting frustrating action which has:*
- (a) *inhibited the acquisition of control of Bullseye from being able to take place in an efficient, competitive and informed market;*
  - (b) *deprived certain beneficial owners of shares in Bullseye the opportunity to have a reasonable and equal opportunity to participate in any other offer for Bullseye (other than the Emerald offer); and*
  - (c) *potentially will deprive such owners of the opportunity to exercise voting rights attached to their shares in relation to resolutions to remove and replace directors of Bullseye."*

#### **Conduct proceedings?**

28. We have considered all the material but address specifically only that part of the material we consider necessary to explain our reasoning.
29. For the following reasons we have decided not to conduct proceedings.

#### *Unregistered transfers*

30. The issues around many of the unregistered transfers appear to be before the Supreme Court of Western Australia, or the District Court in Western Australia, in ongoing proceedings. As early as 2003, the Panel said that it *"will generally not*

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*commence proceedings on an issue on which the Court has jurisdiction and has already commenced proceedings.”<sup>4</sup>*

31. This is consistent with the Panel’s Procedural Guidelines, which note that a factor in deciding whether to conduct proceedings is whether the circumstances are the subject of court proceedings.<sup>5</sup>
32. It is not clear exactly in what context these transfers are under consideration in the court proceedings. It is sufficiently clear that we should not risk affecting those proceedings by our inquiry into the issues and making any orders.
33. Even if those proceedings relate to a different issue, we think that the question of the unregistered transfers in this case is better dealt with in court, and there is specific provision for that in the Corporations Act.
34. Section 1071F states, relevantly, that if a person who has authority to register a transfer of securities refuses or fails to register a transfer, the transferee may apply to the Court for an order under the section. The section then provides that:
  - (2) *If the Court is satisfied on the application that the refusal or failure was without just cause, the Court may:*
    - (a) *order that the transfer or transmission be registered; or*
    - (b) *make such other order as it thinks just and reasonable, including:*
      - (i) *in the case of a transfer or transmission of shares – an order providing for the purchase of the shares by a specified member of the company or by the company; and*
      - (ii) *in the case of a purchase by the company – an order providing for the reduction accordingly of the capital of the company.*<sup>6</sup>
35. In our view the same can be said of the remaining unregistered transfers. They equally could be pursued by the relevant transferees in court proceedings.
36. In short, given the number of competing claims and the historical nature of the unregistered transfers, and the existence of court proceedings already, we think a court would be better placed to obtain the evidence and deal with the claims.
37. We note the potential for at least some of these matters to be out of time from the point of view of the Panel’s jurisdiction, depending on how a Panel might establish which are the relevant circumstances and when they first arose. No application was made for an extension of time. One of the factors to be considered when deciding whether to conduct proceedings is whether the application is out of time and, if not, whether it is timely.<sup>7</sup> For this reason as well we are not inclined to conduct proceedings on this issue.

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<sup>4</sup> *Richfield Group Limited* [2003] ATP 41 at [9]

<sup>5</sup> Procedural Guidelines, Guideline 4.6

<sup>6</sup> See also *Nimrod Resources Limited* [2019] ATP 3 at fn3

<sup>7</sup> Procedural Guidelines, Guideline 4.6

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38. We also note that the percentage of shares involved in the unregistered transfers is small. A small percentage can be a substantial interest,<sup>8</sup> or can affect control. In *Village Roadshow 02*,<sup>9</sup> the Panel said:
- The threshold question is whether the Panel has power to deal with the Application at all. That is, whether it raises an arguable case that there exist unacceptable circumstances in relation to an acquisition (or proposed acquisition) of a substantial interest, or in relation to control (or potential control) of a company.*
39. The application identified some of the alleged transferees as ‘other parties’ but not all of them. The application did not clearly set out details of the unregistered transfers giving rise to the unacceptable circumstances, for instance there was no convenient list. It appeared to us from an examination of the attachments that there were also some “intermediate” transfers involved; that is, transfers to a person who then transferred the shares to another person whom it is claimed is being held out from registration.
40. Ms Mullan identified in her preliminary submission additional unregistered transfers.
41. Whether any of those transferees (other than the applicant itself and its related company) would join as parties to the application is unclear and, if they did not, our ability to obtain relevant material on which to make a decision will be significantly curtailed. Whether those transferees should have been the applicants is an issue we note but do not need to consider.
42. Moreover, even if transferees decide not to pursue the registration of the transfers in court proceedings, they may take the issue up with the corporate regulator, ASIC, as an issue of corporate governance.
43. Ms Mullan submitted that about 5 transferors had accepted into the Emerald bid without the prior knowledge and approval, and against the wishes, of the purchasers and only 2 had so far withdrawn. Under the current withdrawal period, there have been 4 withdrawals, but Ms Mullan does not know if any relate to the unregistered transfers. This is a matter between the transferors and transferees. Ms Mullan submitted that she had raised the registration of these share transfers several times with the rest of the Bullseye board.
44. In short, the issues surrounding the share transfers, involving a small percentage of Bullseye, are matters more appropriately dealt with by a court, including because there is no, or no sufficient, evidence establishing their effect on control and because the Panel is not best equipped to undertake the necessary investigations into all the surrounding circumstances of each transfer.

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<sup>8</sup> See section 602A, *Anaconda Nickel Limited 16 & 17* [2003] ATP 15 at [32]

<sup>9</sup> *Village Roadshow Limited 02* [2004] ATP 12 at [25]

*Control Clause*

45. Bullseye's target's statement included the following disclosure:

***Blue Cap JV***

*The change in control which will occur as a result of Xingao acquiring control of Bullseye would trigger an event of default by Bullseye under the BCBJV Securityholders Agreement unless Bullseye has first obtained the written consent from Blue Cap to the change of control. As at the date of this Target's Statement, Bullseye has sought consent from Blue Cap to any change of control involving Xingao acquiring control of Bullseye, but has not yet received a response in that regard.<sup>10</sup>*

46. It is a defeating condition in Xingao's bid, as summarised in the replacement bidder's statement, that "there is no change of control right in relation to Bullseye arising from the Offer during the Offer Period".

47. Xingao submitted that, despite requests, Bullseye had failed to provide an update, and that it and Bullseye shareholders "have the need and right to know with precision what assets are included in the joint venture and the status of Bullseye's request to Blue Cap for consent for the change of control (or otherwise)."

48. Bullseye submitted that no information was required to be provided to shareholders and the conditions of Xingao's bid were a matter for it.

49. We may have come to a different view if there was something to report, such as a decision by Blue Cap on consent under the clause, but we are led to believe by Bullseye's submission that there is nothing to report. In any event, we cannot see how this situation has a frustrating effect on Xingao's bid, which is already underway. We agree with Bullseye that the conditions that Xingao chooses to include in its bid are for it.

50. In *Northern Energy*,<sup>11</sup> material terms of an off-take agreement in respect of Northern Energy's Maryborough project had not been disclosed and the bidder submitted that this (and other disclosure deficiencies) meant that it was "unable to ascertain with any degree of certainty what it can justify paying", contrary to section 602(a)(i). The Panel noted that the agreement would have been reviewed by the independent expert valuing the target and therefore appeared not to be material information for the target to disclose. The Panel said:

*A condition of the bid is that Northern Energy's target's statement confirms that the price at which coal will be purchased under the off-take agreement "is equivalent to the average quarterly price for Peak Downs, Saraji and Goonyella hard coking coal adjusted for quality variations and/or penalties." The target's statement did not do this. In our view, the board was entitled not to do this. The condition, and seeking disclosure of the additional*

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<sup>10</sup> Section 11.5(a) of the Target's Statement

<sup>11</sup> *Northern Energy Corporation Limited* [2011] ATP 2



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*information in relation to the off-take agreement, appears to be a form of forced due diligence.*<sup>12</sup>

51. The bidder also argued in *Northern Energy* that non-disclosure under the off-take agreement was tantamount to putting in place a 'poison pill'. However, the Panel disagreed. It said:

*Provided directors act for proper purposes and within the Act (notably s638(1)), their use of Northern Energy's information for the company's advantage is not "tantamount to a poison pill."*<sup>13</sup>

52. With the qualification we noted above, we are not satisfied that the disclosure being sought by Xingao is material or compellable and we are not inclined to conduct proceedings on this issue.

### *Inca dispute*

53. On 31 March 2022, Inca issued an ASX announcement that it had issued a dispute notice to Bullseye regarding (among other things) the forfeiture by Bullseye of a tenement. On 11 April 2022, Xingao asked Bullseye (through legal advisers) for information.
54. Xingao submitted that it had not received a response. It submitted that Bullseye's position in relation to this dispute was information that:
- (a) Xingao was entitled, and needed, to know so it could consider whether a defeating condition had been triggered and
  - (b) Bullseye shareholders were entitled, and needed, to know so they could consider the impact (if any) of the dispute on their decision whether to accept either takeover bid or retain their Bullseye shares.
55. Bullseye submitted in effect, that there was no impact: "*Bullseye submits that the Inca Minerals Dispute is not a material issue and is of little relevance to Xingao's and Emerald's takeover bids.*"
56. We accept the submission of Bullseye as to materiality.
57. We note that Xingao has not said, for either this issue or the Blue Cap issue, what it would do with its bid conditions if it had the information. It simply says it wants (and needs) the information so it can consider it.
58. Therefore, we are not inclined to conduct proceedings on this issue.

### *Suspension of Ms Mullan*

59. Xingao submitted that the suspension from executive responsibilities of Ms Mullan was a disclosure issue.

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<sup>12</sup> Ibid at [28] footnotes omitted. One of the footnotes referred to was *Goodman Fielder Ltd 02* [2003] ATP 5 in which the Panel decided that access to company information was, subject to section 638, a matter for the directors

<sup>13</sup> Ibid at [30]

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60. It submitted that, on or about 8 April 2022, Ms Mullan had stated in court that she had been suspended as an executive of Bullseye, but as far as Xingao was aware Bullseye had not made any public disclosure in relation to this issue.
61. Xingao submitted that this was “*potentially material information.*” It noted that she is “*a key executive (if not the key executive) who has up until now been responsible for overseeing all of Bullseye’s exploration and mining activities.*”
62. Bullseye submitted that Ms Mullan was required to perform duties as directed, including necessary technical work in her role as a geologist. This is not exactly an answer to Xingao’s submission, although perhaps one might infer that this means that she is ‘on call’ rather than ‘suspended’.
63. Ms Mullan disagreed with Bullseye’s submission. She submitted that she had “*been prevented from being able to undertake any technical work in her role as a geologist, and from being able to fulfill her duties as a director...*”
64. The Panel in *Bullseye Mining Limited 04*<sup>14</sup> considered that the lack of disclosure by Bullseye of its letters to shareholders dated 4 and 8 March 2022 that certain decisions of the Bullseye board were not decisions of the whole board (because in one instance Ms Mullan abstained and in the other she was absent) was a material deficiency. In this case however we accept, as Bullseye submitted, that Ms Mullan’s employment involves confidentiality issues. We do not pursue this issue further.

#### Conclusion

65. We do not think there is any real likelihood that we could resolve all the conflicting claims in this matter. Moreover, we are not satisfied that it would be in the public interest to commence a detailed inquiry, noting that there are other forums potentially more suitable. And we are satisfied that at least some of the matters raised are not matters for us.
66. In addition, the application does not, in our view, establish that Bullseye’s actions have had any frustrating effect nor have they, as Xingao submitted, “*impeded an informed and efficient market for control of Bullseye.*”
67. We also considered that the additional issues raised in the preliminary submission of Ms Mullan were not part of the application and in respect of one of them – the cancellation of her acceptance of the Emerald bid – it had been decided in earlier Panel proceedings.

## DECISION

68. 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).

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<sup>14</sup> [2022] ATP 8 at [140] to [145]

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69. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.
70. The undertaking Emerald gave is at an end.

**Sharon Warburton  
President of the sitting Panel  
Decision dated 3 May 2022  
Reasons given to parties 27 May 2022  
Reasons published 1 June 2022**

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### Advisers

Party	Advisers
Bullseye	Murcia Pestell Hillard and Clayton Utz
Emerald	Steinepreis Paganin
Ms Mullan	Addisons
Xingao	Bennett + Co



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**Annexure A**

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

**BULLSEYE MINING LIMITED 05**

Emerald Resources NL undertakes to the Takeovers Panel (**Panel**) that, without the Panel's consent, it will not process any acceptances under its off-market takeover bid to acquire all of the ordinary shares in Bullseye Mining Limited, dated 13 December 2021, in relation to any of the shares the subject of the alleged unregistered transfers, as outlined in the Panel application from Au Xingao Investment Pty Ltd dated 21 April 2022 (**Application**), including:

- a) the transfers referred to in Annexure CC to the Application; and
- b) the transfers referred to in the email from Li-Jean Chew (on behalf of Ms Dariena Mullan) to the Takeovers Panel, on 29 April 2022,

until 2pm (WST) on Friday, 6 May 2022.

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

**Emerald Resources NL**

**Dated 2 May 2022**