



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Bullseye Mining Limited 06  
[2023] ATP 11**

**Catchwords:**

*Declaration – orders – interim orders – undertaking – disclosure – collateral benefits – equal opportunity – shareholder intention statements – bidder’s statement – target’s statement – efficient, competitive and informed market – section 602 principles – relevant interest – voting power*

*Corporations Act 2001 (Cth), sections 602, 606, 608, 611, 619, 623, 636*

*Australian Securities and Investments Commission Act 2001 (Cth), section 201A*

*Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 18*

*ASIC v Yandal Gold Pty Ltd (1999) FCA 799*

*Guidance Note 21: Collateral benefits, Guidance Note 23: Shareholder intention statements*

*ASIC Regulatory Guide 9: Takeover bids, ASIC Regulatory Guide 10: Compulsory acquisitions and buyouts*

*Bullseye Mining Limited 05 [2022] ATP 14, Bullseye Mining Limited 04 [2022] ATP 8, Bullseye Mining Limited 03 [2022] ATP 4, MYOB Limited [2008] ATP 27, PowerTel Limited 03 [2003] ATP 28*

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

**INTRODUCTION**

- The Panel, Ruth Higgins SC, Christian Johnston (sitting President) and Michael Lishman made a declaration of unacceptable circumstances in relation to the affairs of Bullseye Mining Limited. The application concerned (among other things) an alleged collateral benefit in relation to two shareholders who received shares in connection with the settlement of litigation and gave shareholder intention statements to accept into a takeover bid. The Panel declared the circumstances unacceptable as it considered that the takeover bid, settlement of the litigation and the shareholder intention statements were part of the one interconnected commercial transaction; the bidder contravened section 606<sup>1</sup> through acquiring a relevant interest in the shares of the two shareholders; and shareholders have not been provided with sufficient information about the transaction, including whether the two shareholders have been provided with a benefit that has not otherwise been provided to other shareholders. The Panel made orders including (among other things) voting and acquisition restrictions on the bidder and required that an independent expert’s report be commissioned to provide an opinion as to whether the two shareholders

<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)

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had been provided with a net benefit in connection with the takeover bid that had not been provided to other shareholders.

2. In these reasons, the following definitions apply.

<b>2020 Proceedings</b>	has the meaning given in paragraph 5
<b>2020/2021 Proceedings</b>	has the meaning given in paragraph 7
<b>2020/2021 Proceedings Settlement Deed</b>	has the meaning given in paragraph 38
<b>2021 Proceedings</b>	has the meaning given in paragraph 6
<b>2022 Proceedings</b>	has the meaning given in paragraph 10
<b>2022/2023 Proceedings</b>	has the meaning given in paragraph 13
<b>2022/2023 Proceedings Settlement Deed</b>	has the meaning given in paragraph 38
<b>2023 Proceedings</b>	has the meaning given in paragraph 12
<b>Announced Shareholder Statements</b>	has the meaning given in paragraph 14
<b>Applicant</b>	Mr Desmond Mullan
<b>ASIC</b>	Australian Securities and Investments Commission
<b>Au Xingao</b>	AU Xingao Investment Pty Limited
<b>Bullseye</b>	Bullseye Mining Limited
<b>Discussion Paper</b>	has the meaning given in paragraph 44
<b>Emerald</b>	Emerald Resources NL
<b>Emerald Offer</b>	has the meaning given in paragraph 46
<b>NBIO</b>	has the meaning given in paragraph 46
<b>Quarterly Report</b>	has the meaning given in paragraph 49
<b>Settlement</b>	has the meaning given in paragraph 14
<b>Settlement Deeds</b>	has the meaning given in paragraph 38
<b>Signed Shareholder Statements</b>	has the meaning given in paragraph 48(a)
<b>Supplementary Target's Statement</b>	has the meaning given in paragraph 107(b)

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**Xinhe**

Hongkong Xinhe International Investment Company  
Limited

## FACTS

3. Bullseye is an unlisted public company. As at the date of the application, Bullseye had approximately 155 shareholders including:
  - (a) Emerald which held approximately 57.34% of Bullseye’s issued share capital
  - (b) Xinhe which held approximately 12.58% of Bullseye’s issued share capital
  - (c) Au Xingao which held approximately 5.62% of Bullseye’s issued share capital and
  - (d) the Applicant who held approximately 3.74% of Bullseye’s issued share capital.
4. The directors of Bullseye are Mr Morgan Hart (Non-Executive Chairman), Mr Peter Gerard Burns (Executive Director), Mr Anthony Short (Non-Executive Director) and Mr Mark Clements (Non-Executive Director and Company Secretary). Mr Hart is the Managing Director of Emerald. Mr Clements is the Company Secretary and a Non-Executive Director of Emerald.
5. On 3 July 2020, Xinhe commenced oppression proceedings in the Supreme Court of Western Australia against Bullseye and three former or current directors of Bullseye, including current director Mr Burns (**2020 Proceedings**).
6. On 10 August 2021, Xinhe commenced fresh oppression proceedings in the Supreme Court of Western Australia against the same defendants as in the 2020 Proceedings (**2021 Proceedings**).
7. On 18 August 2021, the 2020 Proceedings and 2021 Proceedings were consolidated (**2020/2021 Proceedings**).
8. On 6 September 2021, the trial for the 2020/2021 Proceedings commenced in the Supreme Court of Western Australia.
9. On 7 December 2021, Emerald made a takeover offer for all of the shares in Bullseye. The Panel has dealt with a number of previous applications in relation to the affairs of Bullseye, including in relation to the 2021 takeover offer by Emerald.<sup>2</sup>
10. On 25 August 2022, Au Xingao and Xinhe commenced oppression proceedings in the Supreme Court of Western Australia against Bullseye, Emerald and five former or

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<sup>2</sup> See *Bullseye Mining Limited 03* [2022] ATP 4, *Bullseye Mining Limited 04* [2022] ATP 8 and *Bullseye Mining Limited 05* [2022] ATP 14

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current directors of Bullseye, including current directors Mr Burns and Mr Short (**2022 Proceedings**).

11. On 22 November 2022, the trial of the 2020/2021 Proceedings concluded after a total of 73 trial days.
12. On 3 February 2023, Au Xingao and Xinhe commenced fresh oppression proceedings in the Supreme Court of Western Australia against the same defendants as in the 2022 Proceedings, as well as a current director of Bullseye Mr Clements and other entities related to former or current directors of Bullseye (**2023 Proceedings**).
13. On 16 March 2023, the 2022 Proceedings and 2023 Proceedings were consolidated (**2022/2023 Proceedings**).
14. On 27 July 2023, Emerald announced a takeover offer to acquire all of the shares in Bullseye in consideration for 1 Emerald share for every 4 Bullseye shares (**Emerald Offer**) and that Emerald had received shareholder intention statements from Au Xingao and Xinhe. The announcement noted the timing for acceptance of the Emerald Offer by Au Xingao and Xinhe as being “*a date that is not earlier than 21 days after the date of this announcement*” (**Announced Shareholder Statements**). Emerald also announced that Bullseye, Au Xingao, Xinhe and “*various other parties*” had reached a final settlement of the 2020/2021 Proceedings and 2022/2023 Proceedings, as a part of the settlement Bullseye would issue 22,800,000 Bullseye shares (which represented 4.496% of Bullseye shares post-issue) to Au Xingao and all parties to those proceedings had agreed to bear their own legal costs (**Settlement**).
15. On 17 August 2023:
  - (a) Emerald’s bidder’s statement in relation to the Emerald Offer was lodged with ASIC and
  - (b) Bullseye announced on its website that, as part of the Settlement, it had issued 22,800,000 Bullseye shares to Au Xingao.
16. On 21 August 2023, the Emerald Offer opened.

## APPLICATION

### Declaration sought

17. By application dated 21 August 2023, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted that (among other things):
  - (a) Emerald, Bullseye, the Bullseye directors, Au Xingao and Xinhe were associated, and therefore had an aggregated voting power of at least 75.54% in Bullseye
  - (b) Emerald’s bidder’s statement contained certain deficiencies, including in relation to statements concerning Bullseye’s independent board committee and

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- (c) Emerald, through its control of Bullseye, had given a collateral benefit to both Au Xingao and Xinhe through the issue of Bullseye shares as part of the Settlement.
18. The Applicant submitted that the circumstances constituted a contravention of section 606 and other provisions of Chapter 6-6C and were contrary to the principles in section 602.

#### Interim orders sought

19. The Applicant sought interim orders to the effect that (among other things):
- (a) Au Xingao and Xinhe must not accept the Emerald Offer in respect of any or all of their shareholdings in Bullseye
  - (b) alternatively to the above, Emerald be restrained from processing acceptances under the Emerald Offer from Au Xingao and Xinhe and
  - (c) Bullseye and Emerald be restrained from making any statements which gave the impression that any of the directors of Bullseye were free from conflicts of interests in recommending that shareholders accept the Emerald Offer,
- pending determination of its application.

#### Final orders sought

20. The Applicant sought final orders to the effect that (among other things):
- (a) Emerald dispatch a supplementary bidder's statement (in a form approved by ASIC and the Panel) to deal with prescribed disclosures and provide withdrawal rights to Bullseye shareholders who had accepted the Emerald Offer
  - (b) Emerald be restricted from relying on item 9 of section 611
  - (c) Emerald be restricted from processing acceptances while the withdrawal rights were open to shareholders and
  - (d) Emerald extend the Emerald Offer until the withdrawal rights had lapsed.

## DISCUSSION

21. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

#### Interim order

22. The Applicant submitted in its application that it was seeking interim orders on an urgent basis in order to protect the rights and interests of minority Bullseye shareholders *“by ensuring that Emerald does not obtain a special-majority level of control in Bullseye prior to the Panel having had an opportunity to consider the serious matters raised”*.
23. In relation to the Applicant's proposed interim order that Bullseye and Emerald be restrained from making any statements which gave the impression that any of the

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directors of Bullseye were free from conflicts of interests in recommending that shareholders accept the Emerald Offer, Bullseye submitted (among other things) that:

- (a) in line with market practice, the target's statement would include standard disclosure regarding any interests of the members of the independent board committee and
  - (b) the interim order would not protect the rights and interests of minority Bullseye shareholders, as it *"would have no impact on Emerald's ability to obtain a special-majority level of interest."*
24. Emerald submitted that the Applicant had unreasonably delayed making the application and that the interim order restricting Au Xingao and Xinhe from accepting the Emerald Offer in respect of any or all of their shareholdings in Bullseye went beyond preserving the status quo.
25. Having regard to the submissions of Bullseye and Emerald, and the fact that Au Xingao and Xinhe had already provided shareholder intention statements in the context of a live takeover bid, the substantive President of the Panel decided to make a narrower interim order restraining Emerald from processing any acceptances received from Au Xingao and Xinhe under the Emerald Offer in order to preserve the status quo pending the determination of the proceedings (see Annexure A).
26. The substantive President considered that an interim order regarding future statements by directors of Bullseye was premature and unnecessary to preserve the status quo.

#### Undertaking

27. Following receipt of the application:
- (a) on 28 August 2023, Au Xingao and Xinhe accepted the Emerald Offer
  - (b) on 1 September 2023, Emerald lodged a supplementary bidder's statement with ASIC
  - (c) on 5 September 2023, Bullseye lodged its target's statement with ASIC, including an independent expert's report opining on the Emerald Offer and
  - (d) on 14 September 2023, Emerald declared the Emerald Offer unconditional.
28. Due to the fact that Emerald had declared the Emerald Offer unconditional while proceedings were ongoing, we sought submissions on a proposed interim order to the effect that Emerald must not process any acceptances received in relation to the Emerald Offer. The proposed interim order was broader than the earlier interim order made by the substantive President, in so far as it applied to acceptances received from any shareholder under the Emerald Offer (as opposed to the earlier interim order which only applied to acceptances received from Au Xingao and Xinhe). The Applicant, Bullseye and Emerald provided submissions on the proposed interim order.

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29. The Applicant supported the proposed interim order on the basis that Emerald had declared the Emerald Offer unconditional on 14 September 2023 despite knowing that Panel proceedings were ongoing.
30. Bullseye submitted that its general position was that “*any process or procedure relating to the control of the company (such as Emerald’s current takeover for Bullseye) should take place in a timely, efficient and fully-informed manner, with as little uncertainty, external intervention or prolongation as possible.*”
31. Emerald made submissions on the proposed interim order to the effect that the Panel should not seek to affect the right of minority Bullseye shareholders to accept the Emerald Offer. However, Emerald also submitted that it would be willing to give an undertaking to the same effect as the proposed interim order.
32. Accordingly, and having had regard to the submissions of the parties including Emerald’s offer of an undertaking, we accepted the undertaking from Emerald not to process any acceptances received under the Emerald Offer without the Panel’s consent pending the determination of the proceedings (see Annexure B).

#### **Interconnected commercial transaction**

33. Following consideration of the issues raised in the application, we had concerns in respect of a number of the allegations raised by the Applicant and as such, we sought submissions from the parties on a range of matters that we considered warranted further investigation, including (among other things):
  - (a) the interconnected nature of the Emerald Offer, the Settlement and the shareholder intention statements
  - (b) details of the formulation of the Emerald Offer
  - (c) details of the formulation and negotiation of the Settlement, including whether the Settlement was contrary to the equality principle in section 602(c) and Guidance Note 21: Collateral Benefits (even though, given the Settlement was agreed prior to the commencement of the offer period under the Emerald Offer, section 623(1) did not technically apply) and
  - (d) details of the formulation and negotiation of the shareholder intention statements, including whether the shareholder intention statements were contrary to Guidance Note 23: Shareholder intention statements.
34. Au Xingao and Xinhe were provided with numerous opportunities to provide submissions on those matters throughout the proceedings (despite the fact that they were not party to the proceedings), but they declined to do so on each occasion.
35. For the reasons discussed below, we agree with the substance of the Applicant’s submissions, that the Settlement and Emerald Offer were part of an interconnected commercial transaction.

#### *Negotiation of the settlement*

36. Bullseye, Emerald and Xinhe, as well as certain former and current directors of Bullseye, had been involved in the 2020/2021 Proceedings and the 2022/2023

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Proceedings. Those extensive litigation proceedings related to claims of oppression (as well as other claims) by Xinhe.

37. On 18 July 2023, Bullseye held a board meeting to consider Bullseye entering into settlement deeds with respect to the 2020/2021 Proceedings and 2022/2023 Proceedings.
38. On 26 July 2023, the relevant parties to those proceedings agreed to the Settlement and settlement deeds with respect to the 2020/2021 Proceedings (**2020/2021 Proceedings Settlement Deed**) and the 2022/2023 Proceedings (**2022/2023 Proceedings Settlement Deed**) were signed (together, the **Settlement Deeds**).
39. Clause 2.3 of the 2020/2021 Proceedings Settlement Deed provided “*[b]y the date that is the earlier of, 21 days after execution of this Deed, or the Register Date in respect of the Takeover Offer, Bullseye shall procure that the Settlement Shares are allotted and issued to AU Xingao...*”. Xinhe, Au Xingao and Bullseye (but not Emerald) were party to the 2020/2021 Proceedings Settlement Deed. The 22,800,000 Bullseye shares that formed part of the Settlement were issued to Au Xingao on 17 August 2023.
40. The 2022/2023 Proceedings Settlement Deed was, in substance, conditional on the 2020/2021 Proceedings Settlement Deed. Clause 2.1 of the 2022/2023 Proceedings Settlement Deed stated that “*[s]ubject to the Old Proceedings Consent Orders being filed and made by the Supreme Court, in full and final settlement of the New Proceedings Claims made by the Plaintiffs against the Defendants or by the Defendants against the Plaintiffs...the Parties agree to settle the New Proceedings*” (with “Old Proceedings” referring to the 2020/2021 Proceedings and “New Proceedings” referring to the 2022/2023 Proceedings). Xinhe, Au Xingao, Bullseye and Emerald were all party to the 2022/2023 Proceedings Settlement Deed.
41. The Applicant submitted the following in relation to the Settlement:
  - (a) the Settlement was ultimately “*a component of a control transaction under which Emerald has unlawfully increased its relevant interests from approximately 60% to 75.54%*” and “*was an inducement for Au Xingao and Xinhe to accept the Emerald Offer*”
  - (b) the value of the shares issued in the Settlement should be deemed to be \$12,882,000, based on the implied value of the Emerald Offer of \$0.565 per Bullseye share. Based on that valuation, the Settlement was “*an extremely high settlement amount having regard to the nature of the claim by Xinhe and Au Xingao against Bullseye and is materially dilutive to Bullseye shareholders*” and the shares “*have been issued for an improper purpose and in a manner that is contrary to the principles in section 602*” and
  - (c) the Settlement negotiation “*was led by the Chairman of Bullseye, Morgan Hart, who is the Managing Director of Emerald*” who was “*hopelessly conflicted*” with regards to the Settlement.
42. Bullseye provided lengthy submissions relating to the history of the parties, the 2020/2021 Proceedings, the 2022/2023 Proceedings and the Settlement negotiations. In particular, Bullseye submitted the following:



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- (a) Bullseye spent approximately \$7.7 million in legal fees in the 2020/2021 Proceedings and assumed that “*Xinhe’s legal costs would not be less than that, and may possibly be well in excess of that figure*”, and spent a further approximately \$90,000 in legal fees in the 2022/2023 Proceedings
- (b) prior to receipt of the valuation provided in the independent expert’s report detailed below, the value of the 22,800,000 shares issued as part of the Settlement should not be based on the implied value of the Emerald Offer given that takeover bids often include a significant premium over market value, and as such, the price at which Bullseye shares were most recently issued should be used (which at the time of the submission was approximately \$0.29 per Bullseye share, which would value the shares issued in the Settlement at approximately \$6,612,000 in aggregate)
- (c) subsequently, the independent expert’s report provided for the purposes of Bullseye’s target’s statement opined that the Emerald Offer was fair and reasonable and assessed that the fair market value of a Bullseye share prior to the Emerald Offer and on a controlling interest basis was in the range of \$0.047 and \$0.091 with a midpoint value of \$0.067 (and on that basis, Bullseye submitted that the value of the shares issued in the Settlement would be in the range of approximately \$1,070,000 to \$2,070,000 in aggregate)
- (d) in relation to the 2022/2023 Proceedings, Au Xingao and Xinhe asserted that their aggregate shareholding had been diluted as a result of alleged conduct of Bullseye with respect to capital raisings conducted by the company and, on that basis, Xinhe had calculated its loss and damage for lost opportunity at between \$14 million and \$22.4 million
- (e) the number of shares to be issued as part of the Settlement was negotiated following discussions concerning increasing the aggregate holding of Au Xingao and Xinhe to 19.99% to “*make good*” their loss identified above, with Bullseye negotiating that back down to 19% (noting that, as a result of entitlement issues undertaken, the aggregate holding of Au Xingao and Xinhe was ultimately diluted to 18.20%) and
- (f) Mr Hart and Mr Clements attended Settlement negotiations on behalf of Bullseye, with Settlement communications largely conducted and led by Mr Hart.

43. Emerald submitted that:

- (a) the Settlement, and the issuance of shares, was “*principally*” negotiated by Bullseye
- (b) Emerald “*has been supportive of Bullseye to pursue options for the settlement of various legal matters involving Bullseye*” and
- (c) Emerald had incurred legal fees of approximately \$15,000.

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#### *Negotiation of the Emerald Offer*

44. In March 2023, Emerald “began to formulate a discussion paper addressing a framework of issues to be considered by the relevant parties in the formulation of a possible takeover offer following a settlement of litigation” (**Discussion Paper**).
45. In May 2023, the Discussion Paper was agreed in principle between Emerald, Au Xingao and Xinhe. Paragraph 2 (‘Court Action(s)’) of the Discussion Paper stated (among other things) that the “[c]ontemplated terms of settlement are as follows:
- (a) “payment by Bullseye to Xinhe which will be satisfied by the issue of new Bullseye shares to Xinhe;
  - (b) an off-market takeover bid being made by Emerald for all of the remaining shares in Bullseye”,
- and referred at Paragraph 3 (‘Takeover Offer’) to a “[t]ruth in takeover statement by Xinhe supporting and accepting the Takeover Offer subject to any third party making [sic] superior offer”.
46. On 24 May 2023, Bullseye received a non-binding indicative offer (**NBIO**) from Emerald in relation the Emerald Offer. Paragraph 6 of the NBIO stated that the Emerald Offer would include the following “key terms and conditions” (among others):
- (a) “receipt of a formal consent Court order for the Proposed Settlement on terms satisfactory to Emerald”
  - (b) “Xinhe and Au Xingao to provide a shareholder intention statement in a form acceptable to Emerald confirming their intention to accept Emerald’s Offer in respect of all Bullseye shares they hold or control, subject to the required statutory carve-outs” and
  - (c) “subject to a minimum acceptance condition of Emerald acquiring a relevant interest in approximately 75.56% of Bullseye (being Xinhe and Au Xingao acceptance of the Offer for all their shares in Bullseye following completion under the Proposed Settlement)”.
47. On 25 May 2023, Bullseye held a board meeting to establish an independent board committee comprising Mr Burns and Mr Short to consider the NBIO and the Emerald Offer.
48. On 26 July 2023, being the same day on which the Settlement Deeds were signed:
- (a) the shareholder intention statements were signed by each of Au Xingao and Xinhe, as well as Emerald, noting that the timing for acceptance of the Emerald Offer by Au Xingao and Xinhe for the shares they control and for 22,800,000 shares to be issued to Au Xingao was, in the absence of a superior proposal, “the date that the Offer is first open for acceptance” (**Signed Shareholder Statements**) and
  - (b) a bid implementation agreement between Emerald and Bullseye with respect to the Emerald Offer was signed, which included (at Schedule 2) a minimum acceptance condition of 75.56% and a ‘no regulatory action’ condition (which

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expressly excluded “an application to, or a decision or order of, or action or investigation by, ASIC or the Takeovers Panel”).

49. On 31 July 2023, Emerald released a quarterly report (**Quarterly Report**), which (among other things) announced that the bid implementation agreement had been signed, as well as the following:
- (a) “[f]urther to the Offer, Emerald announced that Bullseye, Hong Kong Xinhe International Investment Company Limited (“Xinhe”), Au Xingao Investment Pty Ltd (“Au Xingao”) and various other parties had reached a final settlement” of the 2020/2021 Proceedings and 2022/2023 Proceedings and
  - (b) “[f]urther to the Settlement, Xinhe and Au Xingao have provided Emerald with shareholder intention statements which confirm that, in the absence of a superior proposal, they intend to accept the Offer in respect of all Bullseye shares they control on a date that is not earlier than 21 days after the announcement date”.
50. On 17 August 2023, Emerald’s bidder’s statement was lodged with ASIC and included the same conditions as set out in the bid implementation agreement.
51. Two aspects of the Emerald Offer, being the shareholder intention statements from Au Xingao and Xinhe, and the minimum acceptance condition, are discussed in further detail below.

#### Shareholder intention statements

52. In June 2023, Emerald provided drafts of shareholder intention statements in relation to acceptance of the Emerald Offer by Au Xingao and Xinhe. The terms of the draft shareholder intention statements were negotiated via email between Emerald, Au Xingao and Xinhe during June and July 2023 through their respective legal representatives.
53. In its application, the Applicant submitted that Au Xingao and Xinhe had ultimately given shareholder intention statements to Emerald such that the minimum acceptance condition in Emerald’s bidder’s statement would be satisfied on acceptance of the Emerald Offer by Au Xingao and Xinhe.
54. Emerald submitted that the shareholder intention statements were the subject of negotiation over a period of approximately 4 months and provided copies of various communications between the legal representatives of Emerald, Au Xingao and Xinhe evidencing the exchange of drafts of the shareholder intention statements including the following:
- (a) on 16 June 2023, the legal representative for Emerald emailed the legal representative for Au Xingao and Xinhe requesting “to discuss the timing of issue of the settlement shares and how this ties into any proposed bid for Bullseye” as it had been “the subject of some recent discussions involving Emerald and Bullseye on the settlement process”
  - (b) on 10 July 2023, the legal representative for Emerald emailed the legal representative for Au Xingao and Xinhe noting that “Emerald remains supportive

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*of the proposed settlement and keen to progress with its bid intentions on the terms proposed”*

- (c) on 14 July 2023, the legal representative for Emerald emailed the legal representative for Au Xingao and Xinhe noting, in relation to the shareholder intention statements, that the *“proposed timing for acceptance has been updated so to be consistent with the issue of settlement shares process contemplated under the Deed of Settlement”* and
- (d) on 20 July 2023, the legal representative for Au Xingao and Xinhe emailed the legal representative for Emerald noting that Au Xingao and Xinhe *“will not be signing intention statements until the litigation Settlement Deeds and Consent Orders have been signed by all other parties, your client has signed the intention statements, and you [sic] client has confirmed it will release the ASX announcement immediately on receipt of the intention statements”*.

55. As noted above, the Signed Shareholder Statements were executed on 26 July 2023 and exchanged as between Emerald and each of Au Xingao and Xinhe, being the same day as the bid implementation agreement and the Settlement Deeds were signed. The Announced Shareholder Statements were released to the market on 27 July 2023.
56. We consider that the circumstances surrounding the negotiation and execution of the Signed Shareholder Statements, and the announcement of the Announced Shareholder Statements, are consistent with our findings set out in further detail below.<sup>3</sup>

#### Minimum acceptance condition

57. The Applicant submitted in its application that *“the 75.54% minimum acceptance condition exactly matches...the combined holdings of Bullseye shares held by Emerald, Xinhe and Au Xingao following the issuance of the Settlement Shares.”*<sup>4</sup>
58. Bullseye submitted that it is open for a bidder to set the threshold for a minimum acceptance condition and to waive such a condition if it is minded to do so. Bullseye also submitted that *“it is not unusual for bidders to include a 90% minimum acceptance condition in takeover bids made in the Australian context”* and that *“[t]he fact that Emerald has chosen to set the threshold for satisfaction of its minimum acceptance condition at 75.54% means that it is more likely that such condition would be capable of being satisfied, which in turn would give greater certainty of outcome for all Bullseye shareholders”*.<sup>5</sup>

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<sup>3</sup> See paragraphs 61 and 62

<sup>4</sup> It is noted that the combined holding of Emerald, Au Xingao and Xinhe at the time was 75.54%, but the minimum acceptance condition was expressed to be 75.56% as detailed in Emerald’s bidder’s statement. However, it is also noted that there were discrepancies between certain of Emerald’s announcements regarding the minimum acceptance condition – for example, while Emerald’s bidder’s statement and the bid implementation agreement stated that the minimum acceptance condition was 75.56%, Emerald’s announcement of the Emerald Offer on 27 July 2023 stated that the minimum acceptance condition was 75.54% and Emerald’s announcement that the Emerald Offer had been declared unconditional on 14 September 2023 was based on Emerald acquiring a relevant interest in 75.54% of Bullseye shares

<sup>5</sup> As above

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59. Emerald submitted that the Panel should not draw any inference from the fact that the minimum acceptance condition seemed to be informed by the combined shareholdings in Bullseye of Emerald, Au Xingao and Xinhe as “[t]he Settlement and Emerald Offer are separate transactions.” Emerald also submitted that the “inclusion of a minimum acceptance condition was proposed by Emerald as a customary deal protection mechanism in the event of there being a superior proposal” and that it had the ability at any time to waive any condition of the Emerald Offer.
60. We consider that the formulation of the minimum acceptance condition (in conjunction with the Signed Shareholder Statements) further supports our findings set out below.<sup>6</sup>

#### *Effect of commercial transaction*

61. Having regard to the material before us, we consider that there is sufficient material to infer that the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds (including the Settlement) are interconnected and part of the one commercial transaction. In particular, we note the following:
- (a) the terms and conditions of the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds, along with other documents including the Quarterly Report the NBIO and the Discussion Paper evidence that the Emerald Offer, the Signed Shareholder Statements and the Settlement were interconnected, for example:
    - (i) the Discussion Paper contemplated, in May 2023, that the Settlement would include an off-market takeover bid being made by Emerald and a shareholder intention statement would be provided by Xinhe in relation to that takeover bid
    - (ii) the NBIO contemplated that the Emerald Offer would be subject to the Settlement, receipt of shareholder intention statements from Au Xingao and Xinhe, and a minimum acceptance condition linked to “Xinhe and Au Xingao acceptance of the Offer for all their shares in Bullseye following completion under the Proposed Settlement”
    - (iii) the Emerald Offer and bid implementation agreement reflected the minimum acceptance condition as contemplated in the Discussion Paper and NBIO
    - (iv) the Signed Shareholder Statements, and the negotiation of those statements, evidenced the agreement between Emerald and each of Au Xingao and Xinhe for Au Xingao and Xinhe to accept the Emerald Offer and be issued additional Bullseye shares as part of the Settlement as contemplated in the Discussion Paper and NBIO and
    - (v) although Emerald was not a party to the 2020/2021 Proceedings Settlement Deed, the 2022/2023 Proceedings Settlement Deed (to which

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<sup>6</sup> See paragraphs 61 and 62

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Emerald was a party) was effectively conditional on the 2020/2021 Proceedings Settlement Deed

- (b) the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds (including the Settlement) appeared to have been negotiated concurrently based on the email correspondence between the legal representatives of Au Xingao, Xinhe and Emerald,<sup>7</sup> and also appeared to be effectively interconditional and
  - (c) Mr Hart, as Managing Director of Emerald and Chairman of Bullseye, had a significant role in the negotiation of the Settlement and we are not persuaded by the submissions that Emerald did not have any active role in the Settlement given Mr Hart's presence in those negotiations.
62. We also consider that Bullseye shareholders have not been provided with sufficient information about the connection between the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds (including the Settlement).

#### **Shareholder intention statements – application of section 606 and Guidance Note 23**

63. In addition to the Signed Shareholder Statements forming part of the interconnected commercial transaction, we consider that the Signed Shareholder Statements were entered into in contravention of section 606, and that the Signed Shareholder Statements and Announced Shareholder Statements were contrary to our guidance in Guidance Note 23.
64. The Applicant submitted that the shareholder intention statements provided by Au Xingao and Xinhe were contrary to Guidance Note 23 because (among other things), they did not allow for a sufficient period of time to accept the Emerald Offer and Au Xingao and Xinhe were bound to accept the Emerald Offer.
65. Relevantly, Guidance Note 23 states the following at paragraph 10(c) (footnote omitted):

*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.*

66. Emerald submitted that:
- (a) the intention statements provided by Au Xingao and Xinhe were consistent with the requirements of Guidance Note 23 and as such did not constitute unacceptable circumstances as the Announced Shareholder Statements *“included all the necessary details which would be required for a competing bidder to have time to formulate and make a meaningful competing bid”*
  - (b) it *“disagreed with the Panel’s position which seems to suggest its existing shareholding “limits the ability” for a superior proposal to emerge”* and *“Emerald’s current*

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<sup>7</sup> See paragraph 54 for examples of such email correspondence

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*shareholding makes this (being the emergence of a superior proposal) an unlikely outcome”*

- (c) *“[f]or the Panel to suggest that the timing for acceptance as stated in the Signed Shareholder Statements limits the ability for a superior proposal to emerge is extraordinary and is contrary to its own guidance” and “[i]n all the circumstances, there was more than a reasonable time to pass for a superior proposal to emerge” and*
  - (d) in any event, Au Xingao and Xinhe accepted the Emerald Offer 31 days after the Announced Shareholder Statements, which it submitted allowed for a reasonable period of time for a superior proposal to emerge.
67. ASIC submitted that the *“market would have understood the Shareholder Intention Statements as an intent to accept the offer no earlier than 21 days after the “announcement” of those statements (absent a superior proposal emerging in that time). That period would begin from at least 18 August 2023, which is three days before Emerald’s offer opened).”* ASIC also noted that the statement did not meet the period stipulated in Guidance Note 23.
68. We note that the timing for acceptance of the Emerald Offer by Au Xingao and Xinhe in relation to the shares they controlled (including the shares issued as part of the Settlement) under the Announced Shareholder Statements and the Signed Shareholder Statements differed as follows:
- (a) the Signed Shareholder Statements noted the timing for acceptance of the Emerald Offer as being *“the date that the Offer is first open for acceptance”* and
  - (b) the Announced Shareholder Statements noted the timing for acceptance as being *“a date that is not earlier than 21 days after the date of this announcement”*.
69. We agree with ASIC’s submission that the Announced Shareholder Statements would mean that the market would understand the timing for acceptance of the Emerald Offer by Au Xingao and Xinhe as being at least 21 days from the announcement, being 18 August 2023. As such, we are of the view that the terms of the Signed Shareholder Statements, which we consider to be the binding shareholder intention statements entered into, were not accurately disclosed to the market.
70. We also consider that, although Au Xingao and Xinhe did not accept the Emerald Offer until 28 August 2023 and Emerald’s existing shareholding in Bullseye limited the ability for a superior proposal to emerge, the timing for acceptance as stated in the Signed Shareholder Statements did not allow a reasonable time to pass for a superior proposal to emerge contrary to Guidance Note 23.
71. Further, Guidance Note 23 states that *“a shareholder intention statement could possibly create a relevant interest in the shares the subject of the statement...which might contravene the Act and undermine the policy of Chapter 6”* and that in such a case, unacceptable circumstances are likely to exist.
72. Section 608(1)(c) provides that a person has a relevant interest in securities if they have the power to dispose of, or control the exercise of a power to dispose of, the

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securities. Section 608(1) also states that “[i]t does not matter how remote the relevant interest is or how it arises.”

73. In addition, section 608(2) extends the application of ‘power’ or ‘control’ in section 608(1) to include “power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of” an ‘agreement’ (among other things). Section 9 defines ‘agreement’ in the context of Chapter 6 as meaning a ‘relevant agreement’.
74. The application of the test set out in section 608 was discussed in *MYOB Limited*<sup>8</sup> at [14] to [18] (footnotes omitted<sup>9</sup>):

[14] The definition of 'relevant agreement' in s9 refers to an 'agreement, arrangement or understanding'. The panel was satisfied that there was an understanding and did not need to determine whether other elements of the definition were also present.

[15] A person has a relevant interest in securities if (among other things) the person has power to dispose, or control the exercise of a power to dispose, of the securities. It does not matter how remote the power is or how it arises. It does not matter whether the power is indirect, informal or unenforceable. It may be express or implied. It extends to power or control that is, or can be, exercised as a result of, by means of, or by the revocation or breach of, a trust, agreement, practice or any combination.

[16] The test looks at the existence of the power, not at how it derives. As Merkel J put it:

"Although the power to exercise control may be informal, indirect and unenforceable I accept that it must involve some true or actual measure of control (that is, in the context of the extended meaning of "control" provided for in s 30(4)) over the disposal of the shares and not be "control" that is minor, peripheral, or merely hypothetical, theoretical or notional".

[17] If what is involved is an unenforceable arrangement or understanding, whether some true measure of control exists is determined on the assumption that the parties act in accordance with, rather than contrary to, their arrangement or understanding.

[18] It is clear from the language of the section, and from past court decisions, that s608 should be interpreted broadly.

75. The Panel in *MYOB Limited*<sup>10</sup> found that intention statements constituted a relevant agreement giving rise to a relevant interest in breach of section 606 on the basis that (at [33]) “the investors committed themselves to accepting the bid if Manhattan made the bid. By entering into a relevant agreement with each of the investors to accept the takeover bid, Manhattan acquired a relevant interest in MYOB shares in excess of the 20% threshold. It did so in contravention of s606.” We note that, in *MYOB Limited*<sup>11</sup>, the intention statements were not qualified by the emergence of a superior proposal or words to that effect.

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<sup>8</sup> [2008] ATP 27

<sup>9</sup> The quote from Merkel J below is taken from *ASIC v Yandal Gold Pty Ltd* (1999) FCA 799 at [73]

<sup>10</sup> [2008] ATP 27

<sup>11</sup> [2008] ATP 27



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76. Here, we consider that each of the Signed Shareholder Statements constituted a relevant agreement as between Emerald and each of Au Xingao and Xinhe which provided Emerald with the power to dispose of, or control the exercise of a power to dispose of, shares in Bullseye for the purposes of section 608(1)(c).
77. In particular, we note the following:
- (a) the shareholder intention statements were negotiated for a significant period of time between the legal representatives of Emerald and Au Xingao and Xinhe, as evidenced by the email correspondence between the legal representatives<sup>12</sup>
  - (b) the nature of the negotiations, and the context of the interconnected commercial transaction, meant that the shareholder intention statements went further than normal market practice and evidenced a relevant agreement between the parties to those statements and
  - (c) the shareholder intention statements were signed by Emerald (in addition to each of Au Xingao and Xinhe) as deeds.
78. While the shareholder intention statements were qualified by reference to a superior proposal emerging (unlike in *MYOB Limited*<sup>13</sup>), we consider that the circumstances surrounding the negotiation and execution of the shareholder intention statements as detailed above goes beyond the circumstances contemplated in Guidance Note 23 and breach section 606 by virtue of the application of section 608. In particular, given the breadth of the definition of “relevant agreement” in section 9 and the application of section 608(2), we consider that the Signed Shareholder Statements constituted relevant agreements despite the fact they were qualified by reference to a superior proposal emerging.
79. As to Emerald’s submissions regarding the impact of the timing for acceptance under the Signed Shareholder Statements on the ability for a superior proposal to emerge in light of its existing shareholding, we consider the fact that Emerald already had control of Bullseye by virtue of its relevant interest in 57.34% of Bullseye shares at the time of entry into the Signed Shareholder Statements to be a relevant factor. We consider that Emerald’s entry into the Signed Shareholder Statements with shareholders holding 18.20% of Bullseye shares in a bid where it was very unlikely that a superior proposal would emerge, meant that Au Xingao and Xinhe effectively handed over control of the disposal of their shares to a bidder who already controlled Bullseye. We also consider that this is different to shareholder intention statements given to a bidder who does not control a target company at the time of a bid but which intends to obtain shareholder intention statements for the purpose of creating momentum in connection with the bid. It did not appear to us that this was the purpose for Emerald obtaining the shareholder intention statements here, noting the context of the interconnected commercial transaction.

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<sup>12</sup> See paragraph 54 for examples of such email correspondence

<sup>13</sup> [2008] ATP 27

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80. As a result of the application of section 608, we are of the view that Emerald acquired a relevant interest in the shares held by Au Xingao and Xinhe, and therefore increased its voting power in Bullseye shares from approximately 57.34% to approximately 75.54%, in contravention of section 606.

#### **Issue of net benefit – application of section 602 and Guidance Note 21**

81. In addition to the Applicant's submissions that the Settlement and the Emerald Offer were part of a broader commercial transaction, the Applicant submitted that the shares issued as part of the Settlement were *"issued for an improper purpose and in a manner that is contrary to the principles in section 602"*. While we did not consider that the Settlement contravened section 623(1), as the Settlement was agreed before the commencement of the offer period under the Emerald Offer, we enquired as to whether the Settlement nonetheless constituted a net benefit to Au Xingao and Xinhe that was not offered to other Bullseye shareholders contrary to Guidance Note 21, and whether the Settlement contravened the equality principle in section 602(c).
82. The Applicant submitted that the Settlement was contrary to the operation of an efficient, competitive and informed market because it effectively dissuaded Au Xingao and Xinhe from acting as rival bidders. The Applicant further submitted that the Settlement gave rise to unacceptable circumstances because:
- (a) it was negotiated when the Emerald Offer was contemplated, and it was linked to the Emerald Offer and
  - (b) Bullseye shareholders were not provided with an opportunity to approve the Settlement.
83. Bullseye submitted that *"having regard to the matters contained in the Panel's Guidance Note 21 – Collateral benefits (GN 21) there is no need for further investigative action to be taken in relation to this matter"* on the following bases:
- (a) section 602 sets out the purposes of Chapter 6, and that purpose is applied to various provisions such as sections 619, 623, 636(1)(h) and 636(1)(i)
  - (b) in relation to the provisions to which section 602 apply, there has been no contravention because:
    - (i) under section 619, the Emerald Offer was made on identical terms to all Bullseye shareholders and neither Au Xingao nor Xinhe was offered any consideration or benefit that was not offered to other Bullseye shareholders
    - (ii) under section 623, to the extent the Settlement constituted a benefit to Au Xingao and Xinhe, that benefit was not given during the "Offer Period" and did not operate as an inducement to accept the Emerald Offer and
    - (iii) in relation to section 636(1)(h), Emerald's bidder's statement and Bullseye's target's statement included details of the Settlement, and Emerald's bidder's statement similarly did not contravene section 636(1)(i) and

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- (c) in relation to section 602(c) itself, which is not subject to specific timing considerations, it would not be practicable to:
- (i) offer Bullseye shareholders with a reasonable and equal opportunity to participate in the Settlement consideration (given the nature of the prior litigation proceedings and negotiation of the Settlement) or
  - (ii) to have settled those proceedings on any other basis given *“the relationship between the parties was highly acrimonious and distrustful – and, as a result, clearly not one in which a settlement on less than arm’s length terms would or could ever have been possible”*.
84. Bullseye further submitted that Guidance Note 21 requires that a net benefit be assessed *“by reference to the commercial balance of advantages flowing to and from the securityholder”*. It was submitted that having regard to the circumstances surrounding the Settlement, no net benefit would be established because:
- (a) the quantum of the Settlement was not manipulated by Emerald and was not an inducement for Au Xingao and Xinhe to accept the Emerald Offer
  - (b) the issue of the Bullseye shares in the Settlement was not conditional or dependent on the outcome of the Emerald Offer
  - (c) the primary effect of the issue of the shares in the Settlement was to dismiss the 2020/2021 Proceedings and the 2022/2023 Proceedings – the fact that the collective holding of Au Xingao and Xinhe increased was only a secondary effect and
  - (d) an objective assessment of the transaction would suggest that the issue of the Bullseye shares in the Settlement was a bona fide result as between Bullseye and Au Xingao and Xinhe.
85. Emerald submitted that Au Xingao and Xinhe were not provided with anything that was not provided to all other Bullseye shareholders in connection with the Emerald Offer.
86. ASIC submitted that, even where a collateral benefit does not fall within the periods stipulated by section 623, it may still be unacceptable if it offends the equality principle in section 602 as noted in ASIC Regulatory Guide 9: Takeovers Bids. ASIC stated that it had *“no objection to the Panel following its guidance in Guidance Note 21 and determining whether there is a net benefit.”*
87. Section 602(c) states that *“as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme”*.
88. Guidance Note 21 states the following (footnotes omitted):
- [11] Under s602(c), if there is a proposal for the acquisition of a substantial interest (control transaction), then, as far as practicable, the holders of the relevant class of voting shares must all have a reasonable and equal opportunity to participate in any benefits.*

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[15] *The Panel takes the view that, prima facie, a benefit offends the equality principle if it is a net benefit. A net benefit is assessed by reference to the commercial balance of advantages flowing to and from the security holder: Powertel 03. It is assessed on a 'holistic' rather than 'atomistic' approach. If there is no net benefit, then prima facie the equality principle will not be offended (but see below on s623 and inducement).*

89. The test for determining whether a net benefit has been given has been discussed in *PowerTel Limited 03*.<sup>14</sup> Notably, the Panel said the following at [44] to [46] and [49] (footnotes omitted):

[44] *In ascertaining whether a benefit has been given (or offered or agreed to be given), the Courts and the Panel have made an assessment as to whether the total effect of the impugned transaction is to confer a benefit on a shareholder (or associate) rather than merely to isolate a beneficial factor without considering the context in which that arises.*

[45] *The leading example of this is in Sagasco v Magellan. In that case, the existence of a benefit was in effect conceded by the appellant for the purposes of the proceedings (being the premium of the price paid for Magellan US shares over the prevailing market price). It was argued that the approach ultimately adopted by the Court would involve a breach of the prohibition whenever shares were acquired and paid for earlier under a private deal than would be the case under the proposed or actual bid. The majority's response to this argument is that early payment is not to be seen in isolation from the effect of early settlement as a whole (that the shares and their rights are ceded at the earlier date). Thus, the High Court's, strictly obiter, approach to this is to look at the net effect of the transaction - not necessarily in purely economic or valuation terms, but in commercial terms. For convenience we set out the passage in full (at 403):*

*"It is argued that to construe s.698(2) as we have suggested would lead to difficulty because the mere acquisition of shares in a company, even at the same price as that later offered under a takeover scheme, would confer a benefit upon shareholders whose shares were acquired before the commencement of the takeover period in that they would receive the price at an earlier time. It is said that, as a result, s.698(2) may preclude the acquisition of shares otherwise than on the stockmarket ((6) See s.698(5)) for a period of four months before proposed takeover offers were made. For example, it is said that the sub-section may preclude a person proposing to make takeover offers from building up during that period a shareholding of the permitted percentage ((7) See s.615) by off-market acquisitions before launching the takeover scheme. We do not think that this argument can be sustained. The price paid for shares, whenever paid, is consideration for the shares and earlier payment means relinquishing the shares and the rights that go with them at an earlier date. Mere earlier payment would not, therefore, constitute a benefit for the purposes of s.698(2)."*

[46] *The approaches of Dowsett J in Primac (especially the concept of "profit", implying as it does the result of pluses and minuses), Sackville J in Ampolex (by comparing the price offered against the prevailing market price), and Hely J in Savage Resources v Pasmaenco clearly support this approach. Santow J in Boral Energy v TU Australia also*

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<sup>14</sup> [2003] ATP 28

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*appears to prefer the "net benefit" approach. Although he analyses the situation on both an "atomistic" basis and a "holistic" basis (his words), he distinctly expresses a preference for the latter (at p34).*

...

*[49] Accordingly, the balance of judicial authority (including the reasoning of the majority of the High Court in Sagasco) and the basis of the Panel decisions which have considered the issue of benefits in CA s623 supports a "net benefits" approach looking at the commercial balance of advantages flowing to or from the non-bidder from a transaction which is sought to be impugned.*

90. We have already inferred that the Settlement was part of an interconnected commercial transaction, along with the Emerald Offer. Accordingly, we consider that there is a risk that the Settlement may be a net benefit that was given to Au Xingao and Xinhe but not to other Bullseye shareholders in connection with that interconnected commercial transaction.
91. We consider that the interconnectedness of the transaction, as well as the complicated nature of the litigation proceedings and eventual Settlement, makes it very difficult for us to determine whether a net benefit has been given. The fact that we find it very difficult to determine whether a net benefit exists in this case leads us to believe that it would be even more difficult for shareholders to determine the same, which would ultimately affect their ability properly to assess the merits of the Emerald Offer. We are of the view that, given the circumstances, an independent expert would be much better placed than the Panel to assess whether there has been a benefit given to Au Xingao and Xinhe that was not otherwise provided to other Bullseye shareholders.
92. Accordingly, we have not determined whether there is a net benefit for the purposes of Guidance Note 21 and Chapter 6 but have ordered that Bullseye commission an independent expert's report to opine on this issue, as described in further detail below.<sup>15</sup>
93. In the event that the independent expert does opine that, as a result of the Settlement, Au Xingao and Xinhe obtained a net benefit, we propose to refer the matter to ASIC in accordance with regulation 18 of the *Australian Securities and Investments Commission Regulations 2001 (Cth)* for ASIC to consider further, with a view to making an application to the Panel.
94. We did not want to delay or postpone proceedings while we await a determination as to the issue of net benefit, so we consider that our order requiring an independent expert to opine on the issue, with a possible referral to ASIC to consider making a further application to the Panel, is the most appropriate course of action in the circumstances.
95. In addition, we note that section 636(1)(i) requires a bidder's statement to identify if, during the period of 4 months before the date of the bid, the bidder gave, or offered

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<sup>15</sup> See in particular paragraphs 107 and 109

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or agreed to give, a benefit to another person and the benefit was likely to induce that person to accept the bid or dispose of securities in the bid, and the benefit was not offered to all shareholders in the bid.

96. Although we have not determined whether a net benefit was given to Au Xingao and Xinhe, we are of the view that, given section 636(1)(i) and s602(b)(iii), Bullseye shareholders have not been provided with sufficient information about whether Au Xingao and Xinhe have been provided with a benefit that has not otherwise been provided to other shareholders of Bullseye.

#### Other issues raised in application

97. In its application, the Applicant also raised a number of other issues with respect to the affairs of Bullseye as follows:
- (a) the directors of Bullseye have conflicts of interest in relation to the Settlement as a result of their involvement in the Settlement and/or their positions at Emerald, and as such the statements by Bullseye and Emerald that the Emerald Offer has been recommended by an independent board committee are misleading because they give the impression that there are directors who are free from conflicts of interests
  - (b) Emerald, Au Xingao, Xinhe, Bullseye and the directors of Bullseye are acting in concert and/or have a relevant agreement in relation to Bullseye and the association has caused an aggregation of voting power for those parties in contravention of section 606 and
  - (c) no control premium has been offered to Bullseye shareholders pursuant to the Emerald Offer.
98. In relation to the issue of a control premium, we instructed parties that, based on the material before us, we would not seek to investigate the issue and therefore did not receive submissions as to whether the Emerald Offer involved a control premium. We did not consider that determining whether a control premium had been offered was relevant to our determination as to unacceptable circumstances, and it is ultimately for a bidder to determine whether a control premium should be offered or not.
99. In relation to the issues of the alleged association and conflicts of interests of Bullseye directors recommending that shareholders accept the Emerald Offer, we sought submissions on those issues and, based on those submissions, formed the view that there was not sufficient material to warrant investigating further. As such, we have not commented on those issues in these reasons as they did not form any part of the basis of our declaration of unacceptable circumstances or orders, other than where we made inferences from Mr Hart's involvement in the Settlement as detailed in our findings.

## DECISION

### Declaration

100. It appears to us that the circumstances are unacceptable circumstances:

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- (a) having regard to the effect 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 and
- (c) because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6.

101. Accordingly, we made the declaration set out in Annexure C and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

#### Orders

102. Following the declaration, we made the final orders set out in Annexure D. We were not asked to, and did not, make any costs orders. Under section 657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'<sup>16</sup> if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 5 October 2023.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. The parties, as well as Au Xingao and Xinhe, had an opportunity to make submissions and rebuttals in response to our supplementary brief on declaration and orders dated 11 September 2023 and our second supplementary brief on declaration and orders dated 26 September 2023. Each party made one or more submissions and rebuttals on our proposed orders. In each case, Au Xingao and Xinhe declined to provide submissions and rebuttals on our proposed orders.
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances. The orders do this for the reasons given below.

103. On 11 September 2023, we sought submissions from the parties, as well as Au Xingao and Xinhe, on a range of proposed orders including:

- (a) imposing a voting restriction in relation to Bullseye shares accepted into the Emerald Offer by Au Xingao and Xinhe for a period of time – we also queried whether this order should be accompanied by a restriction on further acquisitions during the release of the voting restriction

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<sup>16</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

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- (b) requiring Bullseye to commission an independent expert to prepare a report opining on whether the Settlement constituted a net benefit to Au Xingao and Xinhe that was not offered to other Bullseye shareholders
  - (c) requiring Emerald to offer withdrawal rights to any Bullseye shareholder who had accepted into the Emerald Offer for a period of time (other than Au Xingao and Xinhe)
  - (d) requiring Emerald to extend the offer period under the Emerald Offer
  - (e) extending the restriction on Emerald processing any acceptances received from Au Xingao or Xinhe as set out in the interim order made on 22 August 2023 and
  - (f) requiring certain further disclosure by Emerald to Bullseye shareholders.
104. We received submissions from all of the parties (but not Au Xingao and Xinhe) as to the proposed orders, as well as possible other orders. In summary (among other things), the parties submitted the following:
- (a) the Applicant submitted that the proposed voting restriction was insufficient as it *“merely delays the inevitable”* outcome of Emerald acquiring an interest in over 75% of Bullseye
  - (b) Emerald submitted that an order prohibiting Emerald from acquiring additional Bullseye shares during the release of any voting restriction would be highly prejudicial to Bullseye as it would *“severely impact Bullseye’s ability to raise funds and continue to implement planned operations”* and suggested that Bullseye shareholders should not be unnecessarily prejudiced by any delay in the takeover bid
  - (c) Bullseye submitted in relation to the independent expert’s report, that such a report would not be *“practically workable or even possible”* and would be a lengthy and costly process, but accepted that the offer period under the Emerald Offer should remain open while additional information was provided to Bullseye shareholders and
  - (d) ASIC queried whether any voting restriction should apply if Emerald was to obtain a relevant interest in 90% or more of Bullseye and proceeded to compulsory acquisition but otherwise saw utility in an order prohibiting Emerald from acquiring additional Bullseye shares during the release of the voting restriction.
105. Following submissions and rebuttals, we sought submissions on revised proposed orders on 26 September 2023, which largely reflected the types of orders proposed to the parties on 11 September 2023, but also included restrictions on further acquisitions of Bullseye shares and further details in relation to the independent expert’s report (including a process involving the nomination of experts by ASIC).
106. We received submissions from all of the parties (but not Au Xingao and Xinhe) as to the revised proposed orders. The parties provided a number of submissions which largely focussed on practicalities relating to the voting and acquisition restrictions, and the commissioning of an independent expert’s report. In particular:



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- (a) Bullseye submitted that the independent expert's report should be delivered within a period of no more than 3 months from the date of engagement
- (b) Emerald submitted that the independent expert's report should be delivered within 60 days and cost no more than \$200,000 and
- (c) ASIC submitted that in relation to the process for nominating experts, it would adopt the same process set out in ASIC Regulatory Guide 10: Compulsory Acquisitions and Buyouts.

107. After considering the submissions on our proposed orders, we ordered that (in summary):

- (a) for a period of 3 years from the date of the orders, Emerald and its associates be restricted from:
  - (i) exercising voting rights in respect of certain of its Bullseye shares (excluding Emerald's voting power of 57.34% plus any percentage voting power increase resulting from acceptances under the Emerald Offer, other than the acceptances of Au Xingao and Xinhe) as calculated in the formula set out in the orders
  - (ii) acquiring additional Bullseye shares in reliance on items 9 or 11 of section 611 and
  - (iii) acquiring additional Bullseye shares under an entitlement offer in reliance on items 10, 10A or 13 of section 611 unless all other Bullseye shareholders are entitled to acquire Bullseye shares under the entitlement offer,with the above restrictions ceasing to apply if, following the time at which the withdrawal rights described below lapse, Emerald or its associates obtain voting power in Bullseye of 90% or more
- (b) Bullseye be required to prepare a supplementary target's statement (**Supplementary Target's Statement**) to include (among other things) an independent expert's report providing an opinion on whether Au Xingao and Xinhe obtained a net benefit in connection with the Emerald Offer that was not provided to other Bullseye shareholders
- (c) Bullseye shareholders who have accepted the Emerald Offer by the date of the Supplementary Target's Statement be provided with withdrawal rights until the date that is 10 business days after the date of the Supplementary Target's Statement
- (d) the Emerald Offer remain open until a date that is 10 business days after the date of the Supplementary Target's Statement and
- (e) Emerald be restricted from processing acceptances received from Au Xingao and Xinhe in relation to the Emerald Offer until the date that is 5 business days after the date of the orders.

108. We consider that the orders relating to the restriction on voting and acquisitions by Emerald are appropriate to address Emerald's contravention of section 606 by virtue

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of entering into the Signed Shareholder Statements, by effectively ensuring that Emerald is treated as it would have been had item 9 of section 611 been relied on. In relation to Emerald's submission that such orders would be highly prejudicial to Bullseye as it would "*severely impact Bullseye's ability to raise funds and continue to implement planned operations*", we included a carve out for acquisitions of additional Bullseye shares under an entitlement offer in reliance on items 10, 10A or 13 of section 611 where all other Bullseye shareholders are entitled to acquire Bullseye shares under the entitlement offer. This carve out was included to ensure that Bullseye shareholders have an equal opportunity to participate in an entitlement offer, while also ensuring that Emerald can continue to provide funding to Bullseye. We also ordered that the restrictions on voting and further acquisitions would fall away where Emerald obtains voting power in Bullseye of 90% or more.

109. In relation to the independent expert's report, we consider that our order ensures that Bullseye shareholders are able to receive an independent opinion as to whether Au Xingao and Xinhe obtained a net benefit in connection with the Emerald Offer that was not provided to other Bullseye shareholders in order to properly assess the merits of the Emerald Offer. We had regard to the submissions in relation to timing and cost implications of such an order, and as such have required that the independent expert deliver its report within 3 months of its engagement. With respect to concerns from the parties as to the ability of an independent expert to effectively opine on a net benefit, we have provided that, where an independent expert is unable to provide the opinion, it must explain why it was unable to do so in its reasons.
110. In relation to the other orders, including the Supplementary Target's Statement, withdrawal rights offered to Bullseye shareholders (other than Au Xingao and Xinhe), the extension of the offer period under the Emerald Offer and the restriction on processing acceptances received from Au Xingao and Xinhe, we consider that those orders are appropriate to protect the interests of minority Bullseye shareholders affected by the unacceptable circumstances. In relation to Au Xingao and Xinhe, given their binding acceptances as evidenced by their Signed Shareholder Statements and the context of the Settlement, we do not consider it would be appropriate for the withdrawal rights to extend to their acceptances. We also provided that Bullseye shareholders will forfeit their withdrawal rights if they dispose of any of the Emerald shares issued to them as consideration under the Emerald Offer, which we consider appropriate given the additional disclosure Bullseye shareholders will be receiving in the Supplementary Target's Statement in relation to the Emerald Offer.
111. Finally, we provided parties with sufficient opportunity to provide submissions on the orders, and such submissions were taken into account in our final orders as set out above. We also provided Au Xingao and Xinhe with an opportunity to provide submissions on the orders, however Au Xingao and Xinhe declined to do so.

**Takeovers Panel**

**Reasons - Bullseye Mining Limited 06  
[2023] ATP 11**

**Christian Johnston**

**President of the sitting Panel**

**Decision dated 5 October 2023**

**Reasons given to parties 9 November 2023**

**Reasons published 15 November 2023**

## Takeovers Panel

Reasons - Bullseye Mining Limited 06  
[2023] ATP 11

### Advisers

Party	Advisers
Applicant	Addisons
Bullseye	MPH Lawyers
Emerald	Steinepreis Paganin and Gilbert + Tobin



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657E  
INTERIM ORDERS**

**BULLSEYE MINING LIMITED 06**

Mr Desmond Mullan made an application to the Panel dated 21 August 2023 in relation to the affairs of Bullseye.

The President ORDERS:

1. Without the consent of the President or, once appointed, the Panel, Emerald must not take any steps, and must ensure that no steps are taken by any person, to process any acceptances received from Xinhe or Au Xingao in relation to the Emerald Offer.
2. In these interim orders the following terms have their corresponding meaning:

<b>Au Xingao</b>	AU Xingao Investment Pty Limited
<b>Bullseye</b>	Bullseye Mining Limited
<b>Emerald</b>	Emerald Resources NL
<b>Emerald Offer</b>	Emerald's off-market takeover bid for Bullseye set out in its bidder's statement dated 17 August 2023
<b>Xinhe</b>	Hongkong Xinhe International Investment Company Limited

3. These interim orders have effect until the earliest of:
  - (i) further order of the President or, once appointed, the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Allan Bulman  
Chief Executive  
with authority of Alex Cartel  
President  
Dated 22 August 2023**



**Australian Government**

**Takeovers Panel**

**Annexure B**

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

**BULLSEYE MINING LIMITED 06**

Emerald Resources NL (**Emerald**) undertakes to the Panel that, without the Panel's consent, it will not take any steps, and will ensure that no steps are taken by any person, to process any acceptances received in relation to Emerald's off-market takeover bid for Bullseye Mining Limited set out in its bidder's statement dated 17 August 2023 until the determination of the proceedings.

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**Signed by Morgan Hart of Emerald Resource NL  
with the authority, and on behalf, of  
Emerald Resources NL  
Dated 19 September 2023**



**Australian Government**

**Takeovers Panel**

**Annexure C**

**CORPORATIONS ACT  
SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**BULLSEYE MINING LIMITED 06**

**BACKGROUND**

1. Bullseye Mining Limited (**Bullseye**) is an unlisted public company. Bullseye has approximately 155 shareholders including<sup>1</sup>:
  - (a) Emerald Resources NL (**Emerald**) which holds approximately 57.34% of Bullseye's issued share capital
  - (b) Hongkong Xinhe International Investment Company Limited (**Xinhe**) which holds approximately 12.58% of Bullseye's issued share capital
  - (c) AU Xingao Investment Pty Limited (**Au Xingao**) which holds approximately 5.62% of Bullseye's issued share capital and
  - (d) Mr Desmond Mullan who holds approximately 3.74% of Bullseye's issued share capital.
2. The current directors of Bullseye are Mr Morgan Hart (Non-Executive Chairman), Mr Peter Gerard Burns (Executive Director), Mr Anthony Short (Non-Executive Director) and Mr Mark Clements (Non-Executive Director and Company Secretary). Mr Morgan Hart is the Managing Director of Emerald. Mr Mark Clements is the Company Secretary and a Non-Executive Director of Emerald.
3. On 3 July 2020, Xinhe commenced oppression proceedings in the Supreme Court of Western Australia against Bullseye and three former or current directors of Bullseye, including current director Mr Burns (**2020 Proceedings**).
4. On 10 August 2021, Xinhe commenced fresh oppression proceedings in the Supreme Court of Western Australia against the same defendants as in the 2020 Proceedings (**2021 Proceedings**).
5. On 18 August 2021, the 2020 Proceedings and 2021 Proceedings were consolidated (**2020/2021 Proceedings**).

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<sup>1</sup> As at 1 September 2023

6. On 6 September 2021, the trial for the 2020/2021 Proceedings commenced in the Supreme Court of Western Australia.
7. On 7 December 2021, Emerald made a takeover offer for all of the shares in Bullseye. The Panel has dealt with a number of previous applications in relation to the affairs of Bullseye, including relevantly in relation to the 2021 takeover offer by Emerald.<sup>2</sup> The takeover offer closed on 21 June 2022 and following the close of the offer, Emerald held approximately 59.32% of Bullseye's issued share capital.
8. On 25 August 2022, Xinhe and Au Xingao commenced oppression proceedings in the Supreme Court of Western Australia against Bullseye, Emerald and five former or current directors of Bullseye, including current directors Mr Burns and Mr Short (**2022 Proceedings**).
9. On 22 November 2022, the trial of the 2020/2021 Proceedings concluded after a total of 73 trial days.
10. On 3 February 2023, Xinhe and Au Xingao commenced fresh oppression proceedings in the Supreme Court of Western Australia against the same defendants as in the 2022 Proceedings, as well as current director of Bullseye Mr Clements and other entities related to former or current directors of Bullseye (**2023 Proceedings**).
11. In March 2023, Emerald "*began to formulate a discussion paper addressing a framework of issues to be considered by the relevant parties in the formulation of a possible takeover offer following a settlement of litigation*" (**Discussion Paper**).
12. On 16 March 2023, the 2022 Proceedings and 2023 Proceedings were consolidated (**2022/2023 Proceedings**).
13. In May 2023, the Discussion Paper was agreed in principle between Emerald, Xinhe and Au Xingao. The Discussion Paper provided (among other things) that "*[c]ontemplated terms of settlement are as follows:*
  - (a) *payment by Bullseye to Xinhe which will be satisfied by the issue of new Bullseye shares to Xinhe;*
  - (b) *an off-market takeover bid being made by Emerald for all of the remaining shares in Bullseye...*",

and referred to as part of the "*off-market takeover-bid*", a "*[t]ruth in takeover statement by Xinhe supporting and accepting the Takeover Offer subject to any third party making superior offer*".
14. On 24 May 2023, Bullseye received a non-binding indicative offer (**NBIO**) from Emerald in relation to its proposal to acquire all of the shares in Bullseye (**Emerald Offer**). The NBIO stated that the Emerald Offer would include the following "*key terms and conditions*" (among others):

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<sup>2</sup> See *Bullseye Mining Limited 03* [2022] ATP 4, *Bullseye Mining Limited 04* [2022] ATP 8 and *Bullseye Mining Limited 05* [2022] ATP 14



- (a) *“receipt of a formal consent Court order for the Proposed Settlement on terms satisfactory to Emerald”*
  - (b) *“Xinhe and Au Xingao to provide a shareholder intention statement in a form acceptable to Emerald confirming their intention to accept Emerald’s Offer in respect of all Bullseye shares they hold or control, subject to the required statutory carve-outs”* and
  - (c) *“subject to a minimum acceptance condition of Emerald acquiring a relevant interest in approximately 75.56% of Bullseye (being Xinhe and Au Xingao acceptance of the Offer for all their shares in Bullseye following completion under the Proposed Settlement)”*.
15. On 25 May 2023, Bullseye held a board meeting to establish an independent board committee comprising Mr Burns and Mr Short to consider the NBIO and the Emerald Offer.
16. In June 2023, Emerald provided drafts of shareholder intention statements in relation to acceptance of the Emerald Offer by Xinhe and Au Xingao. The terms of the draft shareholder intention statements were negotiated via email between Emerald, Xinhe and Au Xingao during June and July 2023 through their respective legal representatives.
17. On 18 July 2023, Bullseye held a board meeting to consider Bullseye entering into settlement deeds with respect to the 2020/2021 Proceedings and 2022/2023 Proceedings.

## CIRCUMSTANCES

18. On 26 July 2023:
- (a) the shareholder intention statements were signed by each of Xinhe and Au Xingao, as well as Emerald, noting timing for acceptance of the Emerald Offer by Xinhe and Au Xingao for the shares they control and for 22,800,000 shares to be issued to Au Xingao in the settlement as being, in the absence of a superior proposal, *“the date that the Offer is first open for acceptance”* (**Signed Shareholder Statements**)
  - (b) a bid implementation agreement between Emerald and Bullseye with respect to the Emerald Offer was signed and
  - (c) settlement deeds with respect to the 2020/2021 Proceedings (**2020/2021 Proceedings Settlement Deed**) and the 2022/2023 Proceedings (**2022/2023 Proceedings Settlement Deed**) were signed (together, the **Settlement Deeds**).
19. Clause 2.3 of the 2020/2021 Proceedings Settlement Deed provided *“[b]y the date that is the earlier of, 21 days after execution of this Deed, or the Register Date in respect of the Takeover Offer, Bullseye shall procure that the Settlement Shares are allotted and issued to AU Xingao...”*. Xinhe, Au Xingao and Bullseye (but not Emerald) were party to the 2020/2021 Proceedings Settlement Deed.

20. The 2022/2023 Proceedings Settlement Deed was, in substance, conditional on the 2020/2021 Proceedings Settlement Deed, as evidenced by clause 2.1 which stated that “[s]ubject to the Old Proceedings Consent Orders being filed and made by the Supreme Court, in full and final settlement of the New Proceedings Claims made by the Plaintiffs against the Defendants or by the Defendants against the Plaintiffs...the Parties agree to settle the New Proceedings...” (with “Old Proceedings” referring to the 2020/2021 Proceedings and “New Proceedings” referring to the 2022/2023 Proceedings). Xinhe, Au Xingao, Bullseye and Emerald were party to the 2022/2023 Settlement Deed.
21. On 27 July 2023, the Emerald Offer was announced, including the terms of the shareholder intention statements noting timing for acceptance of the Emerald Offer by Xinhe and Au Xingao as being “a date that is not earlier than 21 days after the date of this announcement” (**Announced Shareholder Statements**). Xinhe and Au Xingao approved the form of the Announced Shareholder Statements.
22. On 17 August 2023:
  - (a) Emerald’s bidder’s statement was lodged with ASIC (**Bidder’s Statement**) and
  - (b) Bullseye announced that, as part of the settlement of the 2020/2021 Proceedings and 2022/2023 Proceedings, Bullseye issued 22,800,000 Bullseye shares (which represented 4.496% of Bullseye shares post-issue) to Au Xingao and all parties to those proceedings had agreed to bear their own legal costs (**Share Settlement**).
23. On 21 August 2023, the Emerald Offer opened with a closing date of 22 September 2023 (unless extended or withdrawn).
24. On 28 August 2023, Xinhe and Au Xingao accepted the Emerald Offer.
25. On 1 September 2023, Emerald lodged a supplementary bidder’s statement with ASIC.
26. On 5 September 2023, Bullseye lodged its target’s statement with ASIC.
27. The Panel considers that, having regards to the material before it including:
  - (a) the terms and conditions of the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds, along with other preliminary documents including the NBIO and the Discussion Paper
  - (b) the apparent concurrent negotiating of the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds (including the Share Settlement) as evidenced in email correspondence between the legal representatives of Xinhe, Au Xingao and Emerald and
  - (c) the role of Mr Hart as Managing Director of Emerald and Chairman of Bullseye in settlement negotiations,

there is sufficient material for the Panel to infer that the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds (including the Share Settlement) are interconnected and part of the one commercial transaction.

28. The Panel considers that by virtue of Emerald and each of Xinhe and Au Xingao entering into the Signed Shareholder Statements and agreeing to the Share Settlement:
- (a) Emerald acquired a relevant interest in the shares held by Xinhe and Au Xingao, and therefore increased its voting power in Bullseye shares from approximately 57.34% to approximately 75.54%, in contravention of section 606<sup>3</sup>, because the Signed Shareholder Statements constitute agreements as between Emerald and each of Xinhe and Au Xingao which provide Emerald with the power to dispose of, or control the exercise of a power to dispose of, shares in Bullseye for the purposes of section 608 and
  - (b) Bullseye shareholders have not been provided with sufficient information about the connection between the Emerald Offer, the Signed Shareholder Statements and the Settlement Deeds (including the Share Settlement) including whether Xinhe and Au Xingao have been provided with a benefit that has not otherwise been provided to other shareholders of Bullseye.
29. Further, although Emerald's existing shareholding in Bullseye limits the ability for a superior proposal to emerge, the Panel considers that the timing for acceptance by Xinhe and Au Xingao of the Emerald Offer as stated in the Signed Shareholder Statements did not allow a reasonable time to pass for a superior proposal to emerge contrary to its guidance on shareholder intention statements.<sup>4</sup> The Panel also considers, having regard to the material before it, including the Announced Shareholder Statements, that the terms of the Signed Shareholder Statements were not accurately disclosed to the market.

## **EFFECT**

30. As a result of the matters referred to above:
- (a) the acquisition of control over Bullseye shares has not taken place in an efficient, competitive and informed market and
  - (b) Bullseye shareholders have not been provided with sufficient information to enable them to assess:
    - (i) the merits of the Emerald Offer and
    - (ii) whether they have been given a reasonable and equal opportunity to participate in benefits accruing to shareholders of Bullseye under the Emerald Offer.

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<sup>3</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)

<sup>4</sup> See *Guidance Note 23: Shareholder Intention Statements*

## CONCLUSION

31. 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 of the Act.
32. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## DECLARATION

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

**Tania Mattei**  
**General Counsel**  
**with authority of Christian Johnston**  
**President of the sitting Panel**  
**Dated 5 October 2023**



**Australian Government**

**Takeovers Panel**

**Annexure D**

**CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**BULLSEYE MINING LIMITED 06**

The Panel made a declaration of unacceptable circumstances on 5 October 2023.

**THE PANEL ORDERS**

**Restrictions on Voting and Additional Acquisitions**

1. For 3 years from the date of these orders, Emerald and its associates must not exercise, and Bullseye must disregard, any voting rights in respect of Bullseye shares in excess of A% voting power in Bullseye (as calculated in the formula below).

$$A = B + C$$

where:

B is 57.34% plus any percentage voting power increase resulting from acceptances into the Emerald Bid (excluding the acceptances of Xinhe and Au Xingao) and

C is 3% voting power for each 6 month period following the date of these orders.

2. For 3 years from the date of these orders, Emerald and its associates must not acquire any Bullseye shares in reliance on items 9 or 11 of section 611<sup>1</sup>.
3. For 3 years from the date of these orders, Emerald and its associates must not acquire any Bullseye shares by way of a subscription under, or the underwriting of, an entitlement offer in reliance on items 10, 10A or 13 of section 611 (as applicable) unless all other Bullseye shareholders are entitled to acquire Bullseye shares under the entitlement offer.
4. Orders 1, 2 and 3 cease to apply if, following 5.00pm (AWST) on the date that is 10 business days after the date of the Supplementary Target's Statement<sup>2</sup>, Emerald or its associates obtain voting power in Bullseye of 90% or more.

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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)

<sup>2</sup> Being the time at which the withdrawal rights set out in order 8 lapse

## Supplementary Target's Statement and Independent Expert's Report

5. As expeditiously as possible, Bullseye must provide to the Panel for its approval a draft supplementary target's statement (**Supplementary Target's Statement**) which includes:
  - (a) a statement at the beginning of the document that the Supplementary Target's Statement was required by the Panel
  - (b) an explanation of the Declaration and these orders
  - (c) an independent expert's report (**Independent Expert's Report**) providing an opinion on whether, as a result of the Share Settlement, Xinhe and Au Xingao obtained a "net benefit"<sup>3</sup> in connection with the Emerald Offer that was not provided to other Bullseye shareholders and, if so, an estimate of the monetary value of the "net benefit" per Bullseye share issued to Au Xingao pursuant to the Share Settlement<sup>4</sup>
  - (d) a summary of the Independent Expert's Report and
  - (e) instructions setting out what a shareholder must do to exercise the withdrawal rights set out in order 8.
6. Within 2 business days after the date the Panel communicates to Bullseye its approval of the draft Supplementary Target's Statement, Bullseye must:
  - (a) publish the Supplementary Target's Statement on its website and
  - (b) dispatch the Supplementary Target's Statement to all Bullseye shareholders.
7. In relation to order 5(c):
  - (a) ASIC must nominate three independent experts to prepare the Independent Expert's Report.
  - (b) Bullseye must engage one of the experts nominated by ASIC (**Independent Expert**) to prepare, within 3 months after the date of engagement, the Independent Expert's Report.
  - (c) The costs of the Independent Expert's Report, and any independent legal advice that the Independent Expert considers is necessary to obtain in order to prepare the Independent Expert's Report, are to be borne by Bullseye.
  - (d) Bullseye must provide to the Independent Expert, in a form approved by the Panel, instructions for preparing the Independent Expert's Report, including an

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<sup>3</sup> See *Guidance Note 21: Collateral benefits*

<sup>4</sup> The Panel proposes to refer the matter to ASIC (under regulation 18 of the *Australian Securities and Investments Commission Regulations 2001* (Cth)) for ASIC to consider with a view to making a further application to the Panel in the event that the Independent Expert's Report opines that, as a result of the Share Settlement, Au Xingao and Xinhe obtained a "net benefit"

explanation of the meaning of “net benefit” with reference to relevant Panel guidance and Panel and Court decisions.

- (e) Bullseye must, in a timely manner, provide all assistance reasonably requested by the Independent Expert to prepare the Independent Expert’s Report, including providing the Independent Expert copies of documentation relating to the Court proceedings the subject of the Share Settlement.
- (f) If the Independent Expert is unable to provide the opinion or estimate contemplated by order 5(c), it must include in the Independent Expert’s Report the reasons why the Independent Expert was unable to provide such opinion or estimate.

### **Withdrawal Rights**

- 8. Subject to order 11, in respect of any acceptances of the Emerald Bid by Bullseye shareholders (other than Xinhe and Au Xingao) that have been received by Emerald as at 5.00pm (AWST) on the date of the Supplementary Target’s Statement, each acceptance and takeover contract entered into by such shareholders pursuant to the Emerald Bid is voidable at the election of such shareholders from that time until 5.00pm (AWST) on the date that is 10 business days after the date of the Supplementary Target’s Statement.
- 9. In relation to order 8, Emerald must:
  - (a) send a notice, the form of which has been approved by the Panel, to each such shareholder which the shareholder receives by no later than 5.00pm (AWST) on the business day after the date of the Supplementary Target’s Statement:
    - (i) advising of their withdrawal right
    - (ii) enclosing an election form and any required transfer forms for the exercise of the withdrawal right
    - (iii) advising that to elect to exercise the withdrawal right the shareholder must take the following steps:
      - (A) return the completed form to Emerald before 5.00pm (AWST) on the date that is 10 business days after the date of the Supplementary Target’s Statement and
      - (B) give Emerald any certificates and transfer documents needed to effect the return of the Bullseye Shares and any Emerald shares issued as consideration under the Emerald Bid and
  - (b) take all reasonable steps necessary to promptly give effect to the exercise of the withdrawal right.
- 10. In respect of each avoided contract pursuant to the withdrawal rights set out in order 8, the Emerald shares issued as consideration under the Emerald Bid are cancelled.

11. If a Bullseye shareholder (other than Xinhe and Au Xingao) who has accepted into the Emerald Bid disposes of any of the Emerald shares issued to them as consideration under the Emerald Bid, the shareholder is deemed to have forfeited the withdrawal rights they would otherwise be entitled to under order 8.
12. If Emerald processes an acceptance of the Emerald Bid by a Bullseye shareholder (other than Xinhe and Au Xingao), it must as soon as practicable send a notice, the form of which has been approved by the Panel, to that shareholder explaining the effect of order 11.

### **Offer Period**

13. Emerald must ensure that the Emerald Bid remains open until 5.00pm (AWST) on the date that is 10 business days after the date of the Supplementary Target's Statement.

### **Restriction on Processing Acceptances**

14. Without the consent of the Panel, Emerald must not take any steps, and must ensure that no steps are taken by any person, to process any acceptances received from Xinhe or Au Xingao in relation to the Emerald Bid until the date that is 5 business days after the date of these orders.

### **Other**

15. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.

### **Definitions**

16. In these orders the following terms apply.

<b>Au Xingao</b>	AU Xingao Investment Pty Limited
<b>Bullseye</b>	Bullseye Mining Limited
<b>Declaration</b>	The Panel's declaration of unacceptable circumstances in these proceedings dated 5 October 2023
<b>Emerald</b>	Emerald Resources NL
<b>Emerald Bid</b>	Emerald's off-market takeover bid for Bullseye set out in its bidder's statement dated 17 August 2023
<b>Emerald Offer</b>	has the meaning given in paragraph 14 of the Declaration
<b>Independent Expert</b>	has the meaning set out in order 7(b)
<b>Independent Expert's Report</b>	has the meaning set out in order 5(c)
<b>Share Settlement</b>	The issue of 22,800,000 Bullseye shares to Au Xingao in final settlement of the following proceedings:



- Hongkong Xinhe International Investment Company Limited v Bullseye Mining Limited & Ors COR 83 of 2020 in the Supreme Court of Western Australia
- Hongkong Xinhe International Investment Company Limited v Bullseye Mining Limited & Ors COR 139 of 2021 (Supreme Court of Western Australia)
- Hongkong Xinhe International Investment Company Limited & Anor v Bullseye Mining Limited & Ors COR 22 of 2023 (Supreme Court of Western Australia)
- Hongkong Xinhe International Investment Company Limited & Anor v Bullseye Mining Limited & Ors COR 159 of 2022 (Supreme Court of Western Australia) and
- Cheng v Bullseye Mining Limited CIV 1987 of 2020 (District Court of Western Australia) limited to the counterclaim made by Bullseye against Xinhe and Mr Huang

**Supplementary  
Target's Statement**

has the meaning set out in order 5

**Xinhe**

Hongkong Xinhe International Investment  
Company Limited

**Tania Mattei  
General Counsel  
with authority of Christian Johnston  
President of the sitting Panel  
Dated 5 October 2023**