



Australian Government

Takeovers Panel

**Reasons for Decision
Bullseye Mining Limited
[2018] ATP 16**

Catchwords:

Decline to conduct proceedings – association – board spill – unlisted company – requisition notice – takeover bid – target’s statement disclosure – extension of time – late submission

Corporations Act 2001 (Cth), sections 606, 611 (item 9), 657C(3)

Dragon Mining Limited [2014] ATP 5

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

INTRODUCTION

1. The Panel, Richard Hunt (sitting President), Rory Moriarty and Neil Pathak declined to conduct proceedings on an application by Bullseye Mining Limited in relation to its affairs. The application concerned whether two Bullseye shareholders, who had made separate requisitions to call and arrange a general meeting to consider resolutions to replace directors, were associates with each other and other Bullseye shareholders. The Panel considered there was an insufficient body of material to justify the Panel making further enquiries as to whether the requisitioning shareholders were associated with other Bullseye shareholders that would result in an acquisition of a relevant interest in breach of s606.¹

2. In these reasons, the following definitions apply.

Bullseye	Bullseye Mining Limited
Fountain	Fountain Enterprise Int’l Co., Limited
Mr Wu	Wu Qiyuan
Takeover Bid	An off-market takeover bid by Opus Resources Pty Ltd, a wholly owned subsidiary of Red 5 Limited (ASX:RED), for all Bullseye shares
Xinhe	Hongkong Xinhe International Investment Company Limited

FACTS

3. Bullseye is an unlisted gold mining company with over 50 members. It is currently the subject of the Takeover Bid, that is scheduled to close at 5pm (Perth time) on 31 August 2018.

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

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4. On 19 July 2018, Bullseye lodged a third supplementary target's statement, which disclosed that:
 - (a) it had entered into a gold repayment deed and associated agreements with entities associated with Mr Desmond Mullan, agreed to conduct a fully underwritten capital raising of convertible notes to raise up to £15,000,000 (to be underwritten by Mr Mullan) and agreed to issue 767,297 Bullseye shares as partial payment for drilling services and
 - (b) the above transactions would be put to shareholders for approval at a general meeting because they may give rise to a right of termination under the Takeover Bid.
5. Mr Mullan is the father of Ms Mullan, a director of Bullseye.
6. On 23 July 2018, Bullseye received separate requisitions from Mr Wu (a director of Bullseye who has voting power of 4.62% in Bullseye) and Fountain (who has voting power of 5.18% in Bullseye) under s249D to call and arrange a general meeting to consider resolutions to remove the other Bullseye directors and appoint Mr Brett Clark and Mr Yiyang Qiu as directors. Mr Yiyang Qiu is the son of a director of Xinhe (who has voting power of 21.74% in Bullseye).

APPLICATION

Declaration sought

7. By application dated 27 July 2018, Bullseye sought a declaration of unacceptable circumstances. Bullseye submitted (among other things) that:
 - (a) Mr Wu failed to disclose to Bullseye, for the purpose of preparing its target's statement, that he has a relevant interest in Fountain's Bullseye shares
 - (b) Mr Wu and Fountain are associates with a number of other Bullseye shareholders, including Xinhe, resulting in a breach of s606 and
 - (c) it was concerned that the aggregate holding of the associated shareholders of 35.54% gave Mr Wu "*an undisclosed and impermissible level of control over Bullseye*".
8. Bullseye submitted that the effect of the circumstances included that persons who are seeking to acquire a substantial interest in Bullseye² would be unaware that there was a 35.54% control parcel and Bullseye shareholders should be aware of all relevant circumstances before voting in relation to resolutions for approval of the transactions referred to in paragraph 4 and the resolutions requisitioned by Mr Wu and Fountain referred to in paragraph 6.

Interim orders sought

9. Bullseye sought interim orders to the effect that each of the shareholders it submitted were associates be restrained from (a) acquiring or disposing any Bullseye shares

² Including Opus Resources Pty Ltd, noting the Takeover Bid had a minimum acceptance condition of 90%. Red 5 later advised that Opus Resources Pty Ltd intended to waive the minimum acceptance condition if it obtained a relevant interest in at least 50% of all Bullseye shares on issue

(including accepting the takeover bid) and (b) voting Bullseye shares collectively over 20% pending determination of its application. The President considered Bullseye's request and decided not to make interim orders, noting that the next meeting of Bullseye shareholders was scheduled for 24 August 2018 and Bullseye could seek an urgent interim order from the Panel if it received share transfer forms from persons it submitted were associated.

Final orders sought

10. Bullseye sought a final order to the effect that 15,216,817 Bullseye shares held by Fountain and 13,560,000 Bullseye shares held by Mr Wu Qiyuan be vested in ASIC for sale. Bullseye also sought final orders to the effect that the shareholders it submitted were associates not acquire further Bullseye shares for 6 months, not be permitted to take into account any vested shares for the purposes of the creep exception in item 9 of s611 and disclose their voting power in Bullseye.

DISCUSSION

Mr Wu and Fountain

11. Bullseye submitted that Fountain's holding company was 90% owned by Mr Wu's wife (with Mr Wu holding the remaining 10%) and that Mr Wu had a relevant interest in Fountain's Bullseye shares. Bullseye submitted that its target's statement did not disclose Mr Wu's additional relevant interest or his association with Fountain.
12. Mr Wu and Fountain's combined holding in Bullseye is 9.8%. Mr Wu and Fountain submitted that Mr Wu accepted that he had a relevant interest in Fountain's Bullseye shares and had failed to notice that this was not disclosed in Bullseye's target's statement. Mr Wu also submitted that he was not provided with a draft of the target's statement for approval. In light of Mr Wu's submission we consider that Bullseye is able to correct this disclosure in a supplementary target's statement.

Mr Wu/Fountain and other shareholders

13. The Panel's starting point is that it is for the applicant to demonstrate a sufficient body of material, albeit with proper inferences being drawn, to support the Panel conducting proceedings and inquiring into association.³
14. In our view there is very little material to support a conclusion that any of Mr Wu, Fountain or Xinhe are associated with any of the other persons that Bullseye submits are associates such as to lead to a breach of s606. Mr Wu negotiated and signed documents on some of those shareholders' behalf and sold shares to them. However this does not take us very far and most of these actions occurred in 2014. Bullseye submitted that a 0.94% shareholder was a personal friend of, and had a previous business relationship with, Mr Wu (and also a full-time employee of Bullseye whose primary role is to communicate with Chinese investors).

³ *Dragon Mining Limited* [2014] ATP 5 at [27]

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15. It is not unusual for there to be business relationships between shareholders of unlisted companies. Without more, we consider that this falls short of the material necessary for us to conduct proceedings.⁴
16. Bullseye provided notes which appeared to detail the impressions of Bullseye representatives regarding conversations between them and, separately, Mr Wu and representatives of Xinhe. These notes suggested that Mr Wu and Xinhe were collaborating for the purpose of obtaining a majority interest in Bullseye. Xinhe submitted that Bullseye's application does not attempt to explain the source of these documents, it was not clear who authored them and they contain "*argumentative, hearsay, speculative, irrelevant, inflammatory... content, expressions of opinion with no factual substantiation and self-serving statements*". Mr Wu/Fountain made a similar submission.
17. We consider that this material provided by Bullseye has little probative value. There are also other circumstances that may suggest an explanation that does not involve association, including:
 - (a) a meeting between Bullseye's board and representatives of Xinhe in January 2018 (before the conversations referred to in paragraph 16) where a transaction involving Xinhe and Irish parties subscribing for shares in Bullseye was discussed and
 - (b) the possible voting intentions of Mr Wu/Fountain and Xinhe to the transactions involving Mr Mullan referred to in paragraph 4.
18. Without more, we do not consider the above material, together with Mr Wu nominating Mr Yiyang Qiu (the son of a director of Xinhe) to the Bullseye board, is sufficient for us to make enquiries as to whether Mr Wu/Fountain is associated with Xinhe and whether there was any acquisition of a relevant interest in breach of s606. Bullseye's submission that unnamed persons were calling other Bullseye shareholders with offers to acquire their shares does not change our view. Without more there is little material to suggest that these unnamed persons are associated with any of the persons Bullseye submits are associates.

Other matters

19. Prior to deciding whether to conduct proceedings, we asked some preliminary questions of the parties.⁵ Xinhe's submission was approximately 11 minutes late and Mr Wu/Fountain's submission was approximately 37 minutes late. Xinhe forwarded a slightly amended submission approximately 100 minutes late. It is important for parties to provide their submissions on time. This is particularly so in matters involving allegations of association, when other parties may be concerned that one alleged associate might gain an advantage by reading the submission of another alleged associate. We decided to consider first only Bullseye's submission and Xinhe's initial submission. On that material we formed the view not to conduct proceedings. Our view did not change after reviewing the later received material.

⁴ In addition, Bullseye presumably has been aware of these dealings and relationships for some time

⁵ Including asking Mr Wu/Fountain and Xinhe for their response to the notes provided by Bullseye referred to in paragraph 16

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20. We observe that most of the structural links, that Bullseye submitted were based on material supporting an inference of association, arose in 2014 or earlier. When queried whether the application was out of time under s657C(3), Bullseye submitted that it was impossible to say when the understanding between its shareholders it alleged were associates was reached but direct evidence of its existence first emerged when Mr Wu made certain statements to Ms Mullan in May 2018. If we had decided to conduct proceedings, we would have sought submissions as to whether to extend time for Bullseye to make its application.

DECISION

21. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth). Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Richard Hunt

President of the sitting Panel

Decision dated 8 August 2018

Reasons given to parties 17 August 2018

Reasons published 21 August 2018

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Advisers

Party	Advisers
Bullseye	Corrs
Mr Wu/Fountain	Bennett + Co
Red 5	HopgoodGanim
Xinhe	Allens