



Australian Government

Takeovers Panel

**Reasons for Decision
Bullseye Mining Limited 02
[2018] ATP 20**

Catchwords:

Shareholder approval – convertible notes – options – related party – frustrating action – potential control effect – coercive effect – voting exclusions – independent expert’s report - declaration – orders – undertakings

Corporations Act 2001 (Cth), sections 195, 207, 210, Chapter 2E, section 249D, Part 2J.3, sections 602, 602(c), 606, items 7 and 9 of section 611, 623, 657A, 657D

ASIC Regulatory Guide 76: Related Party Transactions

Panel Guidance Note 12 – Frustrating action

Bullseye Mining Limited [2018] ATP 16, Merlin Diamonds Limited [2016] ATP 18, Billabong International Limited [2013] ATP 9, MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, RCL Group Limited [2012] ATP 2, Bridgewater Lake Estate Pty Ltd [2006] ATP 3, Pasminco Ltd (Administrators Appointed) [2002] ATP 6

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

INTRODUCTION

1. The Panel, Richard Hunt (sitting President), Rory Moriarty and Neil Pathak, made a declaration of unacceptable circumstances in relation to the affairs of Bullseye Mining Limited. The application raised disclosure and control issue concerns in relation to a capital raising transaction involving the issue of convertible notes and a gold prepayment funding proposal with a related party. The Panel declared the circumstances unacceptable having regard to, among other things, the effect on potential control of the terms of the convertible notes. The Panel ordered that Bullseye obtain shareholder approval for the transaction that satisfies certain procedural and disclosure requirements. The Panel also accepted an undertaking restricting a director of Bullseye voting on future board resolutions relating to the transaction.

2. In these reasons, the following definitions apply.

Applicant	Hongkong Xinhe International Investment Company Limited
Bullseye	Bullseye Mining Limited
Default Option	an unlisted option to subscribe for an ordinary share in Bullseye on the terms set out in the Notes Deed
Gold Prepayment Deed	Gold Prepayment Deed dated 18 July 2018 between Bullseye and Saghtar Holdings Limited

Takeovers Panel

Reasons - Bullseye Mining Limited 02
[2018] ATP 20

IBC	has the meaning in paragraph 9 below
Lender	has the meaning in paragraph 5(b) below
Mullan Transaction	transactions contemplated by the Notes Deed and the Gold Prepayment Deed as described in paragraph 5 below
Note	a convertible note in Bullseye issued under the Notes Deed
Noteholder	the holder of a Note
Notes Deed	Deed Poll dated 17 July 2018 by Bullseye in favour of each person who is a Noteholder
Notice of Meeting	the notice of general meeting of Bullseye to be held on 17 September 2018 and related explanatory memorandum
RDG	Resource Development Group Limited (ASX code: RDG)
Red 5	Red 5 Limited (ASX code: RED)
Takeover Bid	an off-market takeover bid by Opus Resources Pty Ltd, a wholly owned subsidiary of Red 5, for all Bullseye shares
Transferee	has the meaning in paragraph 50 below
Wu Proposal	has the meaning in paragraph 7 below

FACTS

3. Bullseye is an unlisted public company with more than 50 members. It has a portfolio of gold mining projects in Western Australia.
4. On 19 February 2018, Red 5 announced its intention to make the Takeover Bid.
5. On 19 July 2018, Bullseye lodged a third supplementary target's statement in relation to the Takeover Bid disclosing, among other things, that it had:
 - (a) agreed to conduct a new capital raising through the fully underwritten issue of convertible notes to various sophisticated and professional investors to raise up to GBP£15,000,000 and that the underwriter was Mr Desmond Mullan and
 - (b) entered into the Gold Prepayment Deed and associated agreements with entities associated with Mr Mullan (the **Lender**) by which the Lender would advance up to A\$100,000,000 to be repaid by Bullseye via the delivery of future physical gold ounces to the Lender (equal to a value of A\$100,000,000 plus accrued interest and fees).
6. Mr Mullan is the father of Bullseye executive director, Ms Dariena Mullan.

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

7. On 20 August 2018, Bullseye issued the Notice of Meeting that included two inter-conditional resolutions to approve the Mullan Transaction. Other resolutions included resolutions for an alternative funding proposal from Bullseye director, Mr Wu Qiyuan (the **Wu Proposal**) (which was noted as being withdrawn)¹ and for the removal and appointment of directors relating to two separate requisitions pursuant to section 249D.² One requisition sought the removal of Mr Wu from the board and the other requisition was from Mr Wu and Fountain Enterprise Int'l Co., Limited for the removal and replacement of the other three directors.
8. The Notice of Meeting indicated, in effect, that Bullseye was seeking shareholder approval of the Mullan Transaction in accordance with the Panel's frustrating action policy³ to give Bullseye shareholders a choice between the Takeover Bid and the Mullan Transaction.
9. The Bullseye board established an independent board committee (**IBC**) to consider, among other matters, the Mullan Transaction. The IBC excluded Mr Wu and included Ms Mullan as a member. Following consideration by the IBC and the Bullseye board, and while acknowledging that Mr Mullan is deemed to be a related party of Bullseye, the Bullseye board resolved that shareholder approval was not required under Chapter 2E (related party transactions) because the arm's length exception applied.⁴
10. On 7 September 2018, following the application to the Panel, Bullseye lodged a sixth supplementary target's statement providing additional disclosure in relation to the Mullan Transaction, notwithstanding that the directors⁵ "*affirmed their belief that the Notice of Meeting was sufficient for shareholders to make an informed decision*" about the resolutions.
11. On 10 September 2018, Bullseye lodged a seventh supplementary target's statement disclosing that on 7 September 2018 it had entered into a binding term sheet with RDG in relation to a joint venture that involves the proposed disposal of 30% of Bullseye's interest in certain of its tenements to RDG.
12. Prior to the general meeting held on 17 September 2018, in accordance with an undertaking given to the Panel (see paragraph 16 below), Bullseye withdrew the resolutions relating to the Mullan Transaction.

¹ The withdrawal was accompanied by a note explaining that Mr Wu no longer promoted an issue of convertible notes having been denied access to the company's records, being the subject of an application by Bullseye to the Panel (referring to *Bullseye Mining Limited* [2018] ATP 16) and in circumstances where he was not consulted on the terms and negotiations of the Mullan convertible notes

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

³ Guidance Note 12 – Frustrating action

⁴ The Notice of Meeting refers to the IBC resolving that the arm's length exception applies. However, in the sixth supplementary target's statement, Bullseye states it was the Bullseye board and not the IBC that reached this conclusion in relation to the Mullan Transaction

⁵ Other than "*Mr Wu who was not available to attend the meeting*"

APPLICATION

Declaration sought

13. By application dated 3 September 2018, the Applicant sought a declaration of unacceptable circumstances.
14. The Applicant submitted that the Mullan Transaction had significant control implications and the process for seeking shareholder approval should comply with the principles in section 602, including that votes in favour of the Mullan Transaction by Mr Mullan and his associates be excluded. The Applicant also submitted that the Notice of Meeting failed to disclose all information material to the decision on how to vote and was deficient in other respects, including that it did not seek approval in accordance with item 7 of section 611 (acquisition of shares above 20%), Chapter 2E or Part 2J.3 (financial assistance by a company for acquiring shares in the company), and was misleading and deceptive.

Interim orders sought

15. The Applicant sought interim orders that Bullseye shareholders should not vote on the resolutions to approve the Mullan Transaction until the circumstances giving rise to unacceptable circumstances had been addressed.
16. After we determined to conduct proceedings, we advised parties that we were minded to make an interim order restraining the resolutions relating to the Mullan Transaction to be put to a vote or voted on at a meeting of the members of Bullseye pending the determination of our proceedings. Subsequently, Bullseye offered and we accepted an undertaking in lieu of the interim order (**Annexure A**). Bullseye also undertook that any resolutions in respect of the subject matter of the Mullan Transaction resolutions submitted to members would be the subject of a replacement notice of meeting.

Final orders sought

17. The Applicant sought final orders requiring, among other things, supplementary disclosure and reasonable time for Bullseye shareholders to consider the supplementary disclosure, shareholder approval under item 7 of section 611, Chapter 2E and Part 2J.3, and that Bullseye be prevented from counting votes in favour of the resolutions to approve the Mullan Transaction cast by or on behalf of Mr Mullan or his associates.

DISCUSSION

18. In light of the undertaking provided by Bullseye and the withdrawal of the Mullan Transaction resolutions from the general meeting of Bullseye, we asked parties whether we should continue to consider the application. We also asked Bullseye whether it intended to obtain shareholder approval for the issue of the Notes and the Gold Prepayment Deed and if so, on what basis.

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

19. Bullseye submitted that we should not continue to conduct proceedings because, among other things, the matters contemplated in the application were now theoretical as they principally concerned the Mullan Transaction resolutions and Bullseye had provided the supplementary information requested by the Applicant by way of its sixth supplementary target's statement. It also submitted that, in light of the undertaking, it was not clear what form the final funding arrangements with Mr Mullan would take but if terms were agreed and the Takeover Bid was still on foot, then Bullseye may need to obtain shareholder approval on the basis of the frustrating action requirement.
20. We decided to continue with the proceedings. We had concerns with the disclosure that Bullseye had provided to its shareholders to date. Among other things, the readability of the Notice of Meeting was compromised by the explanation of the Mullan Transaction being presented by way of comparison to the Wu Proposal despite the Wu Proposal resolutions being withdrawn.⁶ We also did not consider that additional disclosure in a supplementary target's statement necessarily properly supplemented the Notice of Meeting disclosure. Additionally, we were concerned that Bullseye may not put the issue of Notes to its shareholders and considered that this warranted further inquiry.

Control effect

21. The Notice of Meeting disclosed that if the Mullan Transaction was approved, *"assuming all Convertible Notes remain unconverted until maturity and accrue 8% interest per annum and are all converted at \$0.26 per share, then on conversion the Noteholders may hold a maximum interest of approximately 28.14%"*.
22. The Notice of Meeting also disclosed that Mr Mullan intended to subscribe for up to GBP£6,000,000 of the Notes and if all Notes issued to Mr Mullan were converted on maturity (on the above terms and assuming no shortfall), Mr Mullan's voting power in Bullseye would be 13.57% (or if all Notes were converted on maturity, 11.23%).
23. In the sixth supplementary target's statement, Bullseye expanded its disclosure of the control effects of the Notes to include the voting power conferred upon exercise of the Default Options. Under the terms of the Notes Deed, if there is an Event of Default (as defined in the Notes Deed), Noteholders may subscribe for Default Options equal to half the number of ordinary shares of Bullseye that they would be issued upon conversion of their Notes.
24. Bullseye submitted that, in its view, there was adequate disclosure in the Notice of Meeting in respect of Mr Mullan's voting power in Bullseye and noted that supplementary disclosure regarding the voting power conferred by the Default Options had been provided in the sixth supplementary target's statement.

⁶ A box was placed across the Wu Proposal resolutions that partly obscured the text of the resolutions. In the explanatory memorandum, references to the Wu Proposal were followed by the words "now withdrawn" and lines were placed through some text

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

25. As underwriter, Mr Mullin could be required to subscribe for all of the Notes being issued by Bullseye. Bullseye submitted that it had considered and disclosed the implications of Mr Mullin's voting power having regard to the circumstances known to the Bullseye board as to "*the plausible and reasonable outcomes in respect of conversion of the Notes*". In this regard, Bullseye referred to assurances from Mr Mullin, as disclosed in the Notice of Meeting, that the Notes would be "*sufficiently widely spread among independent third party investors*". In its submissions, Bullseye submitted that Mr Mullin "*is known amongst a wide ranging network throughout Ireland and the UK*" and "*Mr Mullin is comfortable that he can spread the Notes across interested independent parties within the Irish and UK network to subscribe for the Notes in a manner that will not breach the 20% takeovers threshold*".
26. Bullseye further submitted that there was no dispersion strategy for any shortfall based on confirmation from Mr Mullin to Bullseye "*thus far*" that he was confident in his ability to place all the Notes. However, Bullseye did not seem to be aware of who the Notes would be placed to beyond Mr Mullin's commitment to subscribe for 40% of the Notes and Mr Mullin's underwriting.
27. None of the agreements relating to the Mullin Transaction required Mr Mullin to disperse the Notes widely to independent investors. His only responsibility under the underwriting agreement (attached to the Notice of Meeting) is to subscribe for all Notes for which Bullseye does not hold valid subscriptions. It is plausible that Mr Mullin will be called upon to subscribe for some, if not all, Notes under the underwriting agreement.
28. In our view, the Mullin Transaction effectively allows Mr Mullin to determine who will receive Notes that, upon conversion, may confer voting power of approximately 28% or more in Bullseye. In addition, Mr Mullin has agreed to subscribe for 40% of the Notes and has the potential to take up to 100% of the Notes as underwriter if no other parties are issued Notes. To the extent Mr Mullin obtains voting power of at least 19% in Bullseye, the Mullin Transaction has the potential to allow him to convert Notes (and, if applicable, Default Options) over time under item 9 of section 611.⁷
29. We consider these matters to be relevant to the control effect of the Mullin Transaction. Bullseye's board has taken no steps to mitigate that effect and, in our view, the maximum potential voting power of Mr Mullin has not been adequately disclosed.

Terms of the Notes

30. The Notes Deed provides that Bullseye must not take certain actions except with the prior written consent of the Majority Noteholder (which may not be unreasonably withheld). The veto rights concern operational and financial matters including any change to the board of directors or key management of Bullseye, the

⁷ In connection with the potential control implications of convertible securities and the principles in section 602 see, for example, *Merlin Diamonds Limited* [2016] ATP 18

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

sale of assets of Bullseye representing more than 25% of Bullseye's market capitalisation, the creation of any encumbrance and the issue of any securities. The Majority Noteholder is Mr Mullan where he holds more than 20% of the Notes and, at any other time, Noteholders representing 75% or more of the aggregate amount of Notes outstanding.

31. The Applicant submitted that the veto rights have a control effect that is significant and unacceptable considering:
 - (a) the nature of the veto rights including the restrictions on raising future capital and the significant financial penalties if Bullseye takes an action without Majority Noteholder consent⁸
 - (b) the concentration of the veto rights in a single Noteholder with more than 20% of the Notes
 - (c) the nature of the person holding the veto rights being a related party of Bullseye and the father of one its directors and
 - (d) the appropriateness of the veto rights for an unlisted company in pre-feasibility phase given Mr Mullan's equity risk relative to shareholders.
32. Bullseye submitted that the veto rights do not affect the voting power of shareholders in Bullseye noting that *"the Majority Noteholder cannot determine the outcome of any Bullseye shareholder vote, but has contractual rights that are enlivened upon a change to the composition of the board and or key management"*. Quoting the Panel in *RCL Group Limited*, Bullseye submitted that *"the fact that a company enters into such arrangements in order to obtain finance is not, without more, a matter for the Panel"*.⁹ Bullseye submitted that a funder to an early stage explorer like Bullseye was entitled to seek some reasonable measure of influence over the management of that entity. It further submitted that these rights were particularly important in the context of *"the internal conflict that exists at the board level about the future direction and operations of Bullseye"*.
33. The Applicant submitted that the veto rights here have a greater potential control effect on Bullseye than the corresponding clause considered by the Panel in *RCL Group Limited*. We agree. In our view, giving Mr Mullan, a related party, these rights with only a holding of more than 20% of the Notes is highly unusual.
34. In addition to the specific veto rights provision, the Notes Deed also contained other terms that raised concerns in the circumstances.
35. Under the Notes Deed, an event is only deemed an Event of Default if it occurs without the consent of the Majority Noteholder. The consent is not qualified in any way. One Event of Default is a Change of Control of Bullseye which is defined

⁸ Bullseye's failure to comply may lead to redemption of the Notes at a premium of either 10% or 15% of the face value of the Notes depending on the circumstances

⁹ [2012] ATP 2 at [21]

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

as where more than 30% of Bullseye shares come under the control of a person (acting alone or together with its associates) who did not have that control on the date of issue of the Notes. Upon an Event of Default, a Noteholder can request redemption of the Notes at a 15% premium to face value. In addition, as noted above at paragraph 23, the Noteholder may also subscribe for Default Options which, if exercised, would increase the voting power of the Noteholder.

36. We consider the significant financial penalty triggered upon a Change of Control not sanctioned by the Majority Noteholder likely to deter potential control transactions for Bullseye and inhibit the acquisition of voting shares taking place in an efficient, competitive and informed market.¹⁰
37. Redemption at a premium to face value of 10% is also triggered if the conversion of any Notes would result in a breach of any law without the approval of a governmental agency or Bullseye shareholders, and such consent or approval is not obtained. If shareholder approval is required upon conversion of the Notes, say under item 7 of section 611, we consider the penalty premium to have a coercive effect on shareholders.
38. The Notes issue was also conditional on a first ranking security over Bullseye's mining leases to be shared *pari passu* between Noteholders and Mr Mullan as Lender under the Gold Prepayment Deed. In addition to further restricting the ability of Bullseye to obtain additional funding in the future (including to pay any redemption amount), given Bullseye's capacity to pay cash in the event of redemption, the security rights put at risk Bullseye's assets. They also have a deterrent effect on potential control transactions.
39. The effect on potential control of the terms of the Notes and the Majority Noteholder rights, in combination, exceeds what in our experience would be usual in the circumstances, and there are no measures to disperse that effect.
40. While individual terms of the Notes may not be unacceptable on a standalone basis, we consider that the combined effect of the above circumstances are unacceptable particularly when considered in the context of surrounding factors – the Takeover Bid, the disagreement among shareholders (as evidenced by the attempted board spills and the Wu Proposal) and the involvement of Ms Mullan in the decision making process.

Involvement of Ms Mullan in the decision making

41. Given Ms Mullan's familial relationship to Mr Mullan, we queried Ms Mullan voting at the board level (including as a member of the IBC) in relation to the Mullan Transaction and, in particular, the decision to rely on the arm's length

¹⁰ A similar finding was made in *Billabong International Limited* [2013] ATP 9 at [38]

exception¹¹ in determining whether member approval was needed to give a financial benefit to a related party.

42. Bullseye submitted that, for purposes of section 195, Ms Mullan had disclosed to the board that while Mr Mullan is her father, she had no material personal interest in the Mullan Transaction, she considered that she had no conflict in relation to the matter and the board unanimously supported this view at its meeting on 16 July 2018. In rebuttal, Mr Wu submitted that he did not support the view that Ms Mullan had no conflict in relation to the matter at the board meeting in question.
43. ASIC submitted that it was incumbent on, and the responsibility of, the directors of Bullseye to be mindful of both actual and perceived conflicts of interest when undertaking their duties as directors. ASIC submitted that it considers there is significant potential for a conflict of interest to arise, or be perceived to arise, in circumstances where a director of a company, who is a direct relative of a third party the company proposes to transact with, is involved in the decision-making process to approve the transaction.
44. We do not find it necessary to decide whether Bullseye was entitled to rely on the arm's length exception in section 210 in relation to the Mullan Transaction. The requirements of Chapter 2E are not normally the Panel's concern, but where (as we have found above) a related party transaction has an effect on control or potential control, they may be. If so, there may be overlap between the policy of Chapter 2E of protecting the interests of a public company's members by requiring member approval for giving financial benefits that could endanger those interests¹² and that underlying some of the provisions of Chapter 6.¹³ Mr Mullan was a related party as a result of his relationship to Ms Mullan. Given that, for Ms Mullan to participate in deciding whether member approval is required risks undermining that policy. Consequently, Ms Mullan's involvement in that decision making process was a relevant factor in our consideration of the matter.

Type of shareholder approval

45. The Applicant submitted that the Notice of Meeting was deficient because it did not seek shareholder approval in accordance with item 7 of section 611, Chapter 2E or Part 2J.3. We do not find it necessary to decide whether Chapter 2E or Part 2J.3 approval is required. However, we did consider whether item 7 approval was appropriate.
46. Bullseye submitted that item 7 approval was unnecessary because no person would breach section 606 as a result of the issue of the Notes. Bullseye quoted the Panel in *Bridgewater Lake Estate Pty Ltd* which stated, in relation to a holding of

¹¹ Section 210

¹² Section 207

¹³ For example, section 602(c), item 7 of section 611 and section 623. Similarly, see *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 at [73]

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

convertible notes in Bridgewater, “that if and when concerns about actual unacceptable circumstances arise as a result of future or proposed conversions, an application to the Panel should be made at that time”.¹⁴ Based on the assurances from Mr Mullan regarding the expected dispersion of the Notes, Bullseye submitted that it had no reason to believe at this time that any Noteholder would breach section 606 upon conversion of the Notes.

47. The Applicant submitted that Bullseye’s response was inadequate because the Notes Deed contained in effect a “‘naked no vote’ break fee”, referring to the 10% premium on face value, which is payable if shareholders do not approve conversion (see paragraph 37 above). This, it submitted, would deny Bullseye shareholders having a fair and reasonable opportunity to share in the benefits of the proposal or to vote on a fully informed basis to approve the proposed conversion.¹⁵ Alternatively, the Applicant referred to the potential ‘banking’ of convertible securities such that Mr Mullan could simply convert up to 19.9% and then convert in subsequent tranches utilising the 3% creep exception.
48. In light of the fact that the identity of the Noteholders, other than Mr Mullan, is unknown at this time and it is only expected that Mr Mullan will subscribe for Notes conferring voting power of less than 20% on conversion, it does not appear to be appropriate at this time to obtain item 7 approval. If, upon conversion of the Notes, a Noteholder will be entitled to voting power of 20% or more, item 7 approval will be necessary at that time (unless another exception to section 611 applies).
49. We nonetheless consider the effect on potential control of the terms of the Notes (including the ability of a Noteholder to ‘bank’ creep and the coercive effect of the no vote penalty, among the other circumstances discussed above) requires shareholder approval. While we have not considered the issue of the Notes from a frustrating action perspective, the existence of the Takeover Bid¹⁶ and the fact that Bullseye is in ‘play’, are relevant to our consideration of the Mullan Transaction and the effect it has on fettering the actions of Bullseye in relation to control transactions.

Transfer of Mr Mullan’s Bullseye shareholding

50. On 14 August 2018, approximately a month after the Notes Deed and Gold Prepayment Deed were signed, Mr Mullan transferred his shareholding of 13,347,900 Bullseye shares (or 4.55%) in Bullseye to a third party (the **Transferee**). In its application, the Applicant submitted that it had reason to believe that the Transferee is Mr Mullan’s brother in law and should be considered an associate of

¹⁴ [2006] ATP 3 at [96]

¹⁵ Quoting *Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 where the Panel stated (at [98]): “Chapter 6 is designed to prevent people getting control of companies by coercion, or rushed, uninformed or selective dealing”

¹⁶ Despite the effective value of the offer price being at a significant discount to the conversion price of the Notes

Mr Mullan. It further submitted that votes in favour of the Mullan Transaction by Mr Mullan and his associates should be excluded.¹⁷

51. We asked for details regarding the transfer in our brief, including asking for submissions from Mr Mullan who was not a party to the proceedings. Mr Mullan did not respond to our brief.¹⁸
52. In response to our brief, Bullseye did not provide any response to questions regarding Mr Mullan's relationship to the Transferee. However, it submitted that Mr Mullan considered it appropriate, after Mr Wu proposed the Wu Proposal, to sell his Bullseye shares and recoup his original investment taking into account the following contingencies:
 - (a) if Bullseye shareholders voted in favour of the Mullan Transaction, then Mr Mullan would have the opportunity to take up some Notes and
 - (b) in the alternative, if Bullseye shareholders voted in favour of the Wu Proposal, as well as the composition of the board as put forward by Mr Wu, then it was Mr Mullan's view that the share price of Bullseye shares would likely fall and therefore, he considered that selling his shares was an appropriate means to recoup his investment.
53. The Applicant submitted that we should draw inferences from the failure of Mr Mullan to become a party to the proceedings or to provide information requested by us. In addition to inferences regarding association, the Applicant in effect submitted that we should draw inferences regarding Mr Mullan's intentions in relation to the Mullan Transaction and acquiring control.
54. At the time of making our decision to make a declaration of unacceptable circumstances in relation to the issue of the Notes, we had not been provided with sufficient material to justify us continuing to make further enquiries regarding an association between Mr Mullan and the Transferee. However, we considered voting restrictions in connection with our consideration of orders.

DECISION

Declaration

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

¹⁷ In its sixth supplementary target's statement Bullseye included voting exclusion statements in relation to the Mullan Transaction resolutions for Mr Mullan and any shareholder to whom an offer of Notes was expected to be made and, in each case, their respective associates

¹⁸ However, see paragraph 59 in relation to submissions on orders

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

- (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bullseye and
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
56. Accordingly, we made the declaration set out in **Annexure B** and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

57. Following the declaration, we made the final orders set out in **Annexure C**. 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'¹⁹ if 4 tests are met:
- (a) it has made a declaration under section 657A. This was done on 2 October 2018.
 - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person. While we acknowledge that an independent expert's report presents a cost to Bullseye, Bullseye was willing to undertake that a report be provided unless it could convince ASIC otherwise. No submissions were made that Bullseye could not afford the cost of the report.
 - (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 25 September 2018, 8 October 2018 and 18 October 2018. We also invited RDG to make submissions in relation to our potential orders acknowledging that our orders to remedy the unacceptable circumstances may affect its interests.
 - (d) it considers the orders appropriate to protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by requiring shareholder approval is obtained for the Mullan Transaction in a manner that is analogous to Chapter 2E approval. We consider this appropriate because of the significance for potential control of the Mullan Transaction and in light of Ms Mullan's involvement in the decision making process in relation to the Mullan Transaction to date.
58. Approval analogous to Chapter 2E approval ensures that information regarding the provision of a financial benefit to a related party of Bullseye is provided to

¹⁹ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

shareholders and that no vote may be cast on any resolution by or on behalf of a related party of Bullseye to whom a financial benefit is to be given or an associate of such a related party (in this case, Mr Mullan or an associate of Mr Mullan). As explained above, item 7 of section 611 approval can be obtained (if required) at the time the Notes are converted.

59. In response to our supplementary brief on orders, Mr Mullan provided submissions as a non-party in relation to whether the votes of both Ms Mullan and the Transferee should be excluded, in each case denying any association. In relation to the Transferee, Mr Mullan submitted that he is "*neither related by blood or law*" to the Transferee who is an independent business man. In relation to Ms Mullan, Mr Mullan submitted that they each act independently and the Panel has not explained the basis for excluding her from voting. Ms Mullan became a party to proceedings at the orders stage and made a similar submission to her father, also denying association.
60. We did not consider it appropriate, based on our limited inquiries, to decide whether Ms Mullan and/or the Transferee are associates of Mr Mullan in relation to the Mullan Transaction. In our view, this could be the subject of a new application at the time shareholder approval is sought.
61. In its submissions, ASIC raised concerns as to whether the explanatory memorandum would provide sufficient information to shareholders based on the information currently known to ASIC. Referring to ASIC Regulatory Guide 76: Related Party Transactions,²⁰ ASIC raised concerns as to whether the financial benefit could be reliably measured internally by Bullseye.
62. We also have concerns in relation to the process that the Bullseye board and IBC had run, the fact that Bullseye is unlisted and shareholders do not have the benefit of continuous disclosure and submissions by Bullseye that it relies heavily on Ms Mullan's mining expertise. In order to ensure that Bullseye shareholders have sufficient information to assess the merits of the Mullan Transaction, we require Bullseye to provide a valuation from an independent expert with the notice of meeting, unless Bullseye satisfies ASIC that the explanatory memorandum otherwise provides sufficient information.
63. In addition to the financial benefit information, we require the explanatory memorandum to disclose information regarding the dispersion of the Notes, the terms of the Notes and the control effects of the Notes as set out in our declaration.
64. Bullseye offered to provide undertakings in lieu of final orders. We acknowledge that Bullseye had withdrawn the resolutions from the general meeting held on 17 September 2018 in accordance with an undertaking and had been open to providing undertakings throughout the course of our consideration of orders. However, we consider that orders are appropriate in the circumstances. We took into account, among other things, the previous disclosures made by Bullseye in

²⁰ At RG 76.104

Takeovers Panel

Reasons - Bullseye Mining Limited 02
[2018] ATP 20

response to the matters before us (which failed to resolve matters), the lack of commitment by Bullseye to obtain shareholder approval except for frustrating action purposes (while at the same time submitting that the Takeover Bid did not represent a genuine opportunity for shareholders) and the fact that we have power to vary orders upon application (if required) to address any matters that may arise at a future time.

65. In addition to our final orders, we accepted an undertaking from Ms Mullan (**Annexure D**) that she will not vote on future board resolutions relating to the Mullan Transaction. We consider it is inappropriate for Ms Mullan to do so given that it is her relationship to Mr Mullan that makes the Mullan Transaction a related party transaction.

Richard Hunt

President of the sitting Panel

Decision dated 2 October 2018 (declaration), 22 October 2018 (orders)

Reasons given to parties 21 November 2018

Reasons published 26 November 2018

Takeovers Panel

Reasons - Bullseye Mining Limited 02
[2018] ATP 20

Advisers

Party	Advisers
Applicant	Allens
Bullseye	Corrs
Mr Wu	Bennett + Co
Red 5	HopgoodGanim
Ms Mullan	Allen & Overy



Australian Government

Takeovers Panel

Annexure A

Undertaking in favour of the Takeovers Panel

Bullseye Mining Limited (Bullseye) undertakes to the Takeovers Panel that it will ensure that the resolutions numbered 1 and 2 notified in Bullseye's notice of general meeting dated 20 August 2018 are withdrawn from the meeting of the members of Bullseye. Any resolutions in respect of the subject matter of those resolutions submitted to members will be the subject of a replacement notice of meeting.

Bullseye Mining Limited
Signed by Peter Joseph Burns, Chairman

Dated: 11 September 2018



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

BULLSEYE MINING LIMITED 02

CIRCUMSTANCES

1. Bullseye Mining Limited (**Bullseye**), an unlisted public company with more than 50 members, is currently the subject of an off-market takeover bid by Opus Resources Pty Ltd, a wholly owned subsidiary of Red 5 Limited (ASX:RED) (**Red 5**).
2. On 19 July 2018, Bullseye lodged a third supplementary target's statement disclosing, among other things, that it had:
 - (a) agreed to conduct a new capital raising through the fully underwritten issue of convertible notes to various sophisticated and professional investors to raise up to £15,000,000 and that the underwriter is Mr Desmond Mullan and
 - (b) entered into a Gold Prepayment Deed and associated agreements with entities associated with Mr Mullan (the **Lender**) by which the Lender will advance up to A\$100,000,000 to be repaid by Bullseye via the delivery of future physical gold ounces to the Lender (equal to a value of A\$100,000,000 plus accrued interest and fees).
3. Mr Mullan is the father of Bullseye executive director, Ms Dariena Mullan.
4. Bullseye issued a Notice of General Meeting dated 20 August 2018 (the **Notice**) that included two inter-conditional resolutions to approve the two transactions described above (referred to as the **Mullan Proposal**). Other resolutions included resolutions for an alternative funding proposal from Mr Wu Qiyuan (the **Wu Proposal**) (which was withdrawn by Mr Wu) and for the removal and appointment of directors relating to two separate requisitions pursuant to section 249D.²¹
5. The Notice indicated, in effect, that Bullseye was seeking shareholder approval of the Mullan Proposal in accordance with the Panel's frustrating action policy²² to give Bullseye shareholders a choice between the Red 5 offer and the Mullan Proposal.
6. Bullseye relied on assurances from Mr Mullan that "*the Convertible Notes would be sufficiently widely spread among independent third party investors*" such that there would

²¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 have the meaning given in the relevant Chapter (as modified by ASIC)

²² Guidance Note 12

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

be no need for item 7 of section 611 shareholder approval for the conversion of the notes.

7. The Bullseye board established an independent board committee (**IBC**) to consider, among other matters, the Mullan Proposal. The IBC included Ms Mullan as a member. Following consideration by the IBC and the Bullseye board, and while acknowledging that Mr Mullan is deemed to be a related party of Bullseye, the Bullseye board resolved that shareholder approval was not required under Chapter 2E because the arm's length exception applied.
8. On 7 September 2018, following the application to the Panel, Bullseye lodged a sixth supplementary target's statement providing additional disclosure in relation to the Mullan Proposal, notwithstanding that the directors²³ "*affirmed their belief that the Notice of Meeting was sufficient for shareholders to make an informed decision*" about the resolutions.
9. Prior to the general meeting held on 17 September 2018, in accordance with an undertaking given to the Panel, Bullseye withdrew the resolutions relating to the Mullan Proposal.
10. Notwithstanding the withdrawal of the resolutions, the Panel considers the circumstances, taken as a whole, will have or are likely to have an effect on the control or potential control of Bullseye that is unacceptable.
11. The Mullan Proposal effectively allows Mr Mullan to determine who will receive notes that, upon conversion, may confer voting power of approximately 28% or more in Bullseye. Mr Mullan has agreed to subscribe for 40% of the notes and has the potential to take up to 100% of the notes as underwriter if no other parties are issued notes. To the extent Mr Mullan obtains voting power of at least 19% in Bullseye, the Mullan Proposal has the potential to allow him to convert notes (and, if applicable, default options) over time under item 9 of section 611.
12. The terms of the notes provide the Majority Noteholder with veto rights over certain operational and financial matters in relation to Bullseye including changes to the board or key management of Bullseye. The Majority Noteholder is Mr Mullan where he holds more than 20% of the notes and, at any other time, noteholders representing 75% or more of the aggregate amount of notes outstanding. Giving Mr Mullan, a related party, these rights with only a holding of more than 20% of the notes is highly unusual.

²³ Other than "*Mr Wu who was not available to attend the meeting*"

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

13. The terms of the notes also include:
- (a) as an event of default, a change of control²⁴ without the prior approval of the Majority Noteholder
 - (b) upon an event of default, the redemption of the notes at a 15% premium to face value and the issue of default options (which may potentially confer a substantial interest if exercised)
 - (c) if shareholders fail to approve (if required) the issue of shares upon conversion of the notes, the redemption of the notes at a 10% premium to face value and
 - (d) the grant to noteholders of a first ranking security over mining leases of Bullseye shared *pari passu* with the Lender under the Gold Prepayment Deed.
14. These terms may deter or block a potential control transaction, inhibit the acquisition of voting shares taking place in an efficient, competitive and informed market and have a coercive effect on shareholders if shareholder approval is required upon conversion of the notes.
15. The effect on potential control of the terms of the Notes and the Majority Noteholder rights, in combination, exceeds what in the Panel's experience would be usual in the circumstances, and there are no measures to disperse that effect.
16. While individual terms of the notes may not be unacceptable on a standalone basis, the combined effect of the above circumstances are unacceptable, particularly when considered in the context of the Red 5 offer, the disagreement among shareholders (evidenced by the attempted board spills and the Wu Proposal) and the involvement of Ms Mullan in the decision making process.

CONCLUSION

17. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they will have or are likely to have on:
 - (i) the control, or potential control, of Bullseye or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Bullseye and
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.

²⁴ That is, where more than 30% of Bullseye shares come under the control of a person (acting alone or together with its associates) who did not have control on the date of issue of the Notes

Takeovers Panel

**Reasons - Bullseye Mining Limited 02
[2018] ATP 20**

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

DECLARATION

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

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



Australian Government

Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

BULLSEYE MINING LIMITED 02

The Panel made a declaration of unacceptable circumstances on 2 October 2018.

THE PANEL ORDERS

1. Bullseye must not issue any Notes unless it first obtains the approval of Bullseye's shareholders for the Transactions and:
 - (a) Bullseye does so in the way that would be required under sections 218, 219, 220, 222, 223, 224 and 225 if Bullseye sought approval under section 208(1)(a) to give a financial benefit to a related party of Bullseye under or in connection with the Transactions, but subject to the following:
 - (i) Bullseye provides to ASIC the proposed notice of meeting, explanatory statement and any other documents as would be required under section 218
 - (ii) the notice of meeting, explanatory statement and any other required documents sent to shareholders are in the same form as a draft reviewed by ASIC and to which ASIC has stated in writing it has no objection or further comments and
 - (iii) no vote is cast (in any capacity) at the general meeting on any proposed resolution required under order 1(a) by or on behalf of a related party of Bullseye to whom any such resolution would permit a financial benefit to be given or an associate of such a related party (including Mr Mullan or an associate of Mr Mullan)
 - (b) the explanatory statement discloses:
 - (i) (A) the names of the persons to whom Notes will be issued (if known after making all reasonable enquiries) or the basis upon which those persons will be identified or selected and (B) the number of Notes to be issued to each such person and the voting power that those Notes may confer upon conversion and the voting power conferred on exercise of any options that may be issued in connection with those Notes

Takeovers Panel

Reasons - Bullseye Mining Limited 02 [2018] ATP 20

- (ii) (A) the maximum number of Notes that Mr Mullan and his associates could potentially obtain, (B) the voting power that those Notes may confer upon conversion and (C) the maximum potential voting power of Mr Mullan and his associates in Bullseye including the voting power in paragraph (B) and that conferred on exercise of any options that may be issued in connection with the Notes
 - (iii) the veto rights that Mr Mullan will have if he is the Majority Noteholder (as defined in the Convertible Note Deed)
 - (iv) a full and clear description of the terms set out in paragraph 13 of the Declaration and the effect of those terms, including as set out in paragraph 14 of the Declaration
- (c) unless Bullseye satisfies ASIC that the explanatory statement otherwise provides Bullseye shareholders with sufficient information to assess the approval referred to in order 1(a) (or order 2), Bullseye provides with the notice of meeting and explanatory statement a valuation from an independent expert that satisfies *ASIC Regulatory Guide 76: Related party transactions*, as it would apply to the approval referred to in order 1(a) (or order 2).
2. If Bullseye obtains approval under section 208(1)(a) to give a financial benefit to a related party of Bullseye under or in connection with the Transactions, then order 1(a) does not apply.

Interpretation

In these orders all section references are to the *Corporations Act 2001 (Cth)* and the following terms apply:

Bullseye	Bullseye Mining Limited
Convertible Note Deed	Deed Poll dated 17 July 2018 by Bullseye in favour of each person who is a Noteholder (as defined in the document), as may be amended or otherwise replaced on substantially similar terms
Declaration	the declaration of unacceptable circumstances in relation to the affairs of Bullseye dated 2 October 2018
give a financial benefit to a related party	has the same meaning as in section 208
Gold Prepayment Deed	Gold Prepayment Deed dated 18 July 2018 between Bullseye and Saghtar Holdings Limited, as may be amended or otherwise replaced on substantially similar terms

Takeovers Panel

**Reasons - Bullseye Mining Limited 02
[2018] ATP 20**

Note

a convertible note in Bullseye issued under the
Convertible Note Deed

Transactions

transactions contemplated by the Convertible Note Deed
and the Gold Prepayment Deed

**Bruce Dyer
Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 22 October 2018**



Australian Government

Takeovers Panel

Annexure D

Undertaking in favour of the Takeovers Panel

Ms Mullan undertakes to the Takeovers Panel under section 201A of the *Australian Securities and Investments Commissions Act 2001* (Cth) that she will not in her capacity as a director of Bullseye vote on any resolution considered by the Bullseye board of directors relating to the Mullan Proposal, provided that in, giving this undertaking, Ms Mullan:

- a) makes no admission of any fact, matter or circumstance; and
- b) retains all of the rights and entitlements in respect of the Bullseye Shares held or controlled by her.

In this undertaking, the following terms have the corresponding meaning:

Bullseye Bullseye Mining Limited (ACN 118 341 736).

Bullseye Share a share issued in the capital of Bullseye.

Convertible Note Deed Deed Poll dated 17 July 2018 by Bullseye in favour of each person who is a Noteholder (as defined in the document), as may be amended or otherwise replaced on substantially similar terms.

Gold Prepayment Deed Gold Prepayment Deed dated 18 July 2018 between Bullseye and Saghtar Holdings Limited, as may be amended or otherwise replaced on substantially similar terms.

Mullan Proposal Has the meaning given to that term in the notice for the general meeting of Bullseye's shareholders held on 17 September 2018 (and as amended by the Parties' Undertakings).

Ms Mullan Ms Dariena Mullan.

Parties' Undertakings This undertaking and the undertakings provided by Mr Mullan and Bullseye on or about the date of these undertakings in favour of the Panel.

**Signed by Ms Dariena Mullan
Dated 19 October 2018**