



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Bullseye Mining Limited 04  
[2022] ATP 8**

**Catchwords:**

*Declaration – orders – preliminary questions - bidder’s statement – target’s statement - supplementary bidder’s statement – supplementary target’s statement – bid premia – bidder’s intentions - withdrawal rights – bid implementation agreement – unlisted public company with over 50 members – early dispatch of bidder’s statement – due diligence condition – dispatch of documents – superior proposal – no objection statement*

*Corporations Act 2001 (Cth), sections 602, 611 (item 9), 636, 638, 644*

*Guidance Note 18: Takeover Documents*

*Lincoln Minerals Limited [2022] ATP 6, Queensland Ores Limited [2009] ATP 8, Magna Pacific (Holdings) Limited 01 [2007] ATP 2, Volante Group Limited 01 [2006] ATP 2, Goodman Fielder Ltd 02 [2003] ATP 5*

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

**INTRODUCTION**

- The Panel, Karen Evans-Cullen (sitting President), Bruce McLennan and Sharon Warburton, made a declaration of unacceptable circumstances in relation to the affairs of Bullseye Mining Limited. This application followed the orders made in *Bullseye Mining Limited 03*<sup>1</sup> and concerned whether there had been adequate disclosure in the supplementary bidder’s statement and supplementary target’s statement that the Panel had ordered. The Panel considered that there were material deficiencies in the documents and correspondence. The Panel ordered, among other things, further disclosure and that shareholders who had accepted Emerald’s bid (other than Bullseye’s directors) have a further right to withdraw.
- In these reasons, the following definitions apply.

<b>Applicant or Xinh</b>	Hongkong Xinh International Investment Company Limited
<b>BIA</b>	the Bid Implementation Agreement that Emerald and Bullseye entered into on 29 November 2021
<b>Bullseye</b>	Bullseye Mining Limited
<b>Bullseye 03</b>	<i>Bullseye Mining Limited 03</i> [2022] ATP 3
<b>Emerald</b>	Emerald Resources NL

<sup>1</sup> [2022] ATP 3

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

<b>Emerald bid</b>	an off-market takeover bid announced by Emerald on 7 December 2021 for all Bullseye shares
<b>Supplementary bidder's statement</b>	Emerald's first supplementary bidder's statement lodged with ASIC on 18 February 2022
<b>Supplementary target's statement</b>	Bullseye's supplementary target's statement lodged with ASIC on 17 February 2022
<b>Xingao</b>	Au Xingao Investment Pty Ltd
<b>Xingao bid</b>	an off-market takeover bid announced by Xingao on 3 February 2022 for all Bullseye shares

## FACTS

3. Bullseye is an unlisted public company with more than 50 shareholders. Bullseye has previously submitted to the Panel that it had "339 largely unsophisticated shareholders." At the time of this application it had 392 shareholders.
4. Emerald is an ASX listed company (ASX code: EMR).
5. Bullseye is the subject of a recommended takeover bid by Emerald offering 1 Emerald share for every 3.43 Bullseye shares.
6. On 6 January 2022, Emerald declared its bid unconditional.
7. Bullseye and Emerald had entered a BIA in relation to the Emerald bid, which included exclusivity provisions. Relevantly, clause 6 of the BIA stated:  
*During the Exclusivity Period, Bullseye must not, and must ensure that each of its Related Persons do not, directly or indirectly:*  
*(b) (no talk and no due diligence) subject to clause 6.3:*  
...  
*(iii) disclose or otherwise provide any non-public information about the business or affairs of the Bullseye Group to a Third Party (other than a Regulatory Authority) with a view to obtaining, or which would reasonably be expected to encourage or lead to receipt of, an actual, proposed or potential Competing Proposal (including, without limitation, providing such information for the purposes of the conduct of due diligence investigations in respect of the Bullseye Group whether by that Third Party or another person);*
8. Clause 6.3 of the BIA contained a fiduciary out for a Superior Proposal (as defined in the BIA).
9. Xingao is an Australian subsidiary of Xinhua Zhongbao Co Ltd and a related entity of the Applicant.
10. Xingao, together with the Applicant, has voting power in 14.85% of Bullseye.
11. On 3 February 2022, Xingao, which together with Hongkong Xinhe International Investment Company Limited has voting power in 14.85% of Bullseye, announced the Xingao bid, offering \$0.31 cash per Bullseye share. The bid announcement was

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

subject to conditions, including due diligence conditions and a 40% minimum acceptance condition. The bid announcement stated that the bid consideration would be increased to \$0.35 per Bullseye share if the due diligence conditions and the 40% condition were satisfied.

12. On 7 February 2022 (on the application of the Applicant) in *Bullseye 03* we made a declaration of unacceptable circumstances and orders including that:
  - (a) Bullseye dispatch a supplementary target's statement to deal with identified disclosure issues and
  - (b) Emerald dispatch a supplementary bidder's statement to explain the orders and the withdrawal rights granted to accepting shareholders of the Emerald bid.
13. The withdrawal rights that we ordered were to be available for a period of not less than 10 trading days (in total) that met the following requirements:
  - (a) *trading in Emerald shares is available on market and not subject to any trading halt or trading suspension and*
  - (b) *the period starts from the date which is the later of the dispatch of Bullseye's supplementary target's statement and the dispatch of Emerald's supplementary bidder's statement.*
14. Also on 7 February 2022, Bullseye posted an announcement on its website that:

*The Bullseye Board notes that, after business hours on Thursday, 3 February 2022, the company received an unsolicited communication from Au Xingao Investment Pty Ltd (Xingao), a related entity of Bullseye shareholder Hongkong Xinhe International Investment Company Limited, which attached an announcement regarding an intended cash offer by Xingao for Bullseye.*
15. On 7 February 2022, Emerald announced on ASX that it had a relevant interest in Bullseye of 55.87%.
16. On 11 February 2022, Emerald announced on ASX (among other things) that it had extended the closing date of its bid to 4 March 2022.
17. On 14 February 2022, Xingao lodged its bidder's statement with ASIC.
18. On 15 February 2022, Xingao served its bidder's statement on Bullseye.
19. On 18 February 2022, Xingao sent a letter to Bullseye shareholders via its media advisers outlining the Xingao Bid.
20. Pursuant to the *Bullseye 03* orders, on 21 February 2022 Emerald announced on ASX that it had lodged with ASIC a supplementary bidder's statement dated 18 February 2022. On 21 February 2022, Bullseye put Emerald's supplementary bidder's statement on its website.
21. On 21 February 2022 Bullseye emailed its supplementary target's statement dated 17 February 2022 (as required under the *Bullseye 03* orders) to its shareholders. The covering email stated (among other things) that:

## Takeovers Panel

Reasons - Bullseye Mining Limited 04  
[2022] ATP 8

- (a) *Bullseye Shareholders should note that [Xingao] has not yet made a formal bid and that the only live offer currently capable of acceptance is the Emerald offer... (original emphasis) and*
- (b) *On 15 February 2022, [Xingao] sent to Bullseye a copy of the draft Bidder's Statement which it intends to send to Bullseye Shareholders and which would contain [Xingao's] formal takeover offer for Bullseye.*
22. Neither Emerald's supplementary bidder's statement nor Bullseye's supplementary target's statement disclosed the date (being 7 March 2022) on which the withdrawal rights period ended. Nor did Bullseye's email to its shareholders.
23. On 23 February 2022, Xingao lodged with ASIC a supplementary bidder's statement and replacement bidder's statement in relation to its bid.
24. On 24 February 2022, Xingao delivered its replacement bidder's statement to Bullseye.
25. On 1 March 2022, Emerald made an ASX announcement extending its bid until 18 March 2022. In the announcement Emerald disclosed a relevant interest in Bullseye of 54.7%.
26. The announcement also said:  
*Emerald notes that the withdrawal rights period will expire at 5:00pm (VWST) on Monday, 7 March 2022.*
27. On 2 March 2022, Bullseye's board met to consider the Xingao bid. It determined (with one of its directors, Ms Dariena Mullan, abstaining) that the Xingao bid did not represent a Superior Proposal as compared with the Emerald bid.
28. On 3 March 2022, Xingao announced the increase of its offer price to \$0.35 per Bullseye share, although its bid remained subject to conditions.
29. Also on 3 March 2022, ASIC consented to an abridgement of the time between lodgement and dispatch of Xingao's replacement bidder's statement.
30. On 4 March 2022, Bullseye posted a letter to its shareholders, and on the same day put the letter on its website. The letter enclosed the Xingao bid documents.<sup>2</sup>
31. The 4 March letter stated:
- (a) that Bullseye's board had met on the evening of 2 March 2022 to consider the Xingao bid
- (b) *The ultimate determination of the Board was that, as at the 2 March 2022 board meeting, the Offer does not at this point in time represent a superior proposal as compared with the Emerald takeover offer*
- (c) ***Your Board has determined that the Offer is not a superior proposal as compared to the Emerald offer*** (original emphasis)

---

<sup>2</sup> Replacement Bidder's Statement dated 23 February 2022; and Second Supplementary Bidder's Statement dated 3 March 2022.

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

- (d) ...based on the closing price of Emerald shares on ASX on 2 March of \$1.135, the Emerald offer currently equates to \$0.33 per Bullseye share, as compared with \$0.35 for the [Xingao bid]. On the face of it, this means that the value of the [Xingao bid] is marginally superior. However, the following points were considered by the Board in arriving at its ultimate decision that the [Xingao bid] is not a superior proposal: [followed by a list of 16 points] and
- (e) ... Your Board notes that [Xingao] has made various public statements to the effect that the Bullseye Board “continues to refuse to offer [Xingao] any due diligence access”. In that regard, Bullseye shareholders should be aware that, under clauses 6.2(b)(iii) and 6.3 of the BIA (when read together), Bullseye must not disclose or otherwise provide any non-public information about the business or affairs of the Bullseye Group to Au Xingao unless it has determined that the Offer constitutes a superior proposal as compared to the Emerald takeover offer. As noted above, the Bullseye Board met recently to consider whether, in all of the circumstances and based on the information currently available to them, the Offer constitutes a superior proposal for the purposes of the BIA. Following extensive deliberation, as detailed above, the Board’s position is that the Offer is not a superior proposal. On that basis, pursuant to clauses 6.2(b)(iii) of the BIA, Bullseye is not currently able to provide due diligence access to Au Xingao.
32. There was no mention in the 4 March letter that a director had abstained.
33. There was no mention in the 4 March letter that the end of the withdrawal rights period was 7 March 2022.
34. On 7 March 2022 the Bullseye board met again. At this meeting Ms Dariena Mullan was an apology.
35. On 8 March 2022, Bullseye posted on its website another letter to shareholders. The 8 March letter referred to the statement in the 4 March letter quoted at paragraph 31(e) above and said:
- Shareholders should be aware that, whilst the relevant clauses of the BIA referred to above have indeed been a critical factor in Bullseye not providing due diligence access to [Xingao], those clauses ceased to legally bind Bullseye as at 1 March 2022.*
36. The 8 March letter also said:
- (a) that the Board was not “at the present time ... prepared to provide due diligence access to [Xingao] on the basis sought by way of the Due Diligence Condition” and
- (b) *The Board considers that it would be inconsistent with its publicly announced position in support of the Emerald bid (and contrary to the spirit if not the letter of the BIA) were it to provide due diligence to Au Xingao in the current circumstances.*
37. The 8 March letter did not disclose that one of Bullseye’s directors did not participate in the decision.
38. Also on 8 March 2022, Emerald announced on ASX that:
- ... following the expiry of the withdrawal rights period at 5:00pm (WST) on Monday 7 March 2022, it has a relevant interest in 49.41% of the 445,599,851 Bullseye shares currently on issue.*

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

39. On 18 March 2022, Emerald announced on ASX that it had extended its bid to 1 April 2022. The announcement “confirmed” that Emerald had a relevant interest in 49.41% of Bullseye.
40. Also on 18 March 2022, Bullseye posted its target’s statement, dated 18 March 2022, in response to the Xingao bid on its website. Bullseye recommended that shareholders reject the Xingao bid.
41. The letter to shareholders in the target’s statement from the chairman of Bullseye said:

*As announced on 4 March 2022 and subsequently updated on 8 March 2022, the Board has considered Xingao’s Offer and unanimously (noting that one Director abstained from voting) determined that the Xingao Offer was not a Superior Proposal to the Emerald Offer. The Board has since met to consider the Xingao Offer on 16 March 2022.*

## APPLICATION

### Declaration sought

42. By application dated 28 February 2022, the Applicant sought a declaration of unacceptable circumstances.
43. The Applicant submitted, in essence, that Emerald’s supplementary bidder’s statement contained 3 material information deficiencies:
  - (a) it did not disclose to Bullseye shareholders the date on which the withdrawal rights expired
  - (b) it did not disclose to Bullseye shareholders the information they would have needed to determine for themselves the date on which the withdrawal rights expired and
  - (c) it did not disclose “Emerald’s intentions if a number of Bullseye shareholders exercise their withdrawal rights such that Emerald has a relevant interest in less than 50% of the Bullseye shares including, in particular, whether Emerald would consider accepting the Xingao offer in those circumstances.”
44. The Applicant further submitted that Bullseye’s supplementary target’s statement contained material information deficiencies.
45. It submitted that the following circumstances prevented Bullseye’s shareholders making a properly informed decision in relation to the Emerald Bid, giving rise to unacceptable circumstances:
  - (a) Emerald’s supplementary bidder’s statement deficiencies
  - (b) Bullseye’s supplementary target’s statement deficiencies
  - (c) Bullseye’s failure to disclose the Xingao’s bidder’s statement or replacement bidder’s statement to Bullseye shareholders, including whether the Xingao bid was a superior proposal (whether as defined in *Bullseye 03* orders or more generally)
  - (d) Bullseye’s failure to consent to the abridgement of time for Xingao to dispatch its bidder’s statement and

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

- (e) Bullseye's failure to provide Xingao the same due diligence access it had provided Emerald.

46. It submitted that, as a result, control of Bullseye shares was not occurring in an efficient, competitive and informed market.

#### Interim orders sought

47. The Applicant sought interim orders that, prior to the application being determined:
- (a) Emerald be restrained from processing acceptances under its bid and
  - (b) the date for expiry of the withdrawal rights be extended,
- in order to preserve the status quo.
48. Bullseye submitted in relation to the extension of withdrawal rights that the circumstances addressed in the Panel's declaration of unacceptable circumstances had been addressed.
49. Xingao submitted that the disclosure issues were "*directly relevant*" to decisions about withdrawal and it would be prejudiced if the withdrawal rights closed and the Panel subsequently made orders requiring further disclosure.
50. We had considered making interim orders to restrain the processing of acceptances and the appointment of Emerald nominees to the Bullseye board, but did not need to do this as Emerald offered an undertaking to the same effect (**Annexure A**).
51. We had invited Emerald to extend the withdrawal rights but it declined to do so "*on the basis it has already complied with the Panel orders made on 7 February.*"
52. Bullseye submitted for completeness that it "*would be inappropriate and unreasonable for the Panel to contemplate*" interim orders that extended the withdrawal rights.
53. We considered that withdrawal rights could be provided as a final order if we found unacceptable circumstances and that the freeze on processing acceptances would be sufficient to ensure that that remedy was available to us.

#### Final orders sought

54. The Applicant sought final orders, including that:
- (a) Bullseye provide a supplementary target's statement, including disclosures that comply with section 638 of the Corporations Act<sup>3</sup>
  - (b) Emerald provide a Supplementary Bidder's Statement, including disclosures that comply with section 636 of the Act and
  - (c) the date for expiry of the withdrawal rights be extended.

---

<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)

## DISCUSSION

### Preliminary submissions

55. Bullseye made a lengthy preliminary submission, in which it submitted that Xingao and Xinhe were acting together and should be treated as one entity for the purposes of the application, even though they are represented by different legal advisers.
56. We permitted each of them to be a party and accepted submissions from each.
57. The balance of Bullseye's preliminary submissions were directed to the merits of the application. Among other things, Bullseye submitted that its supplementary target's statement was not misleading, and had been reviewed by ASIC and the Panel, neither of whom had had any objection.
58. It also submitted that its supplementary target's statement was not misleading because it had no obligation to:
  - (a) bring Xingao's bidder's statement to the attention of its shareholders, and in any event Xingao's bidder's statement contained material information deficiencies or
  - (b) inform its shareholders about the "hypothetical" of withdrawals resulting in Emerald's shareholding in Bullseye falling below 50% and Emerald accepting the Xingao offer (leaving accepting shareholders who did not withdraw holding Emerald shares when Emerald no longer had control over Bullseye's assets).
59. Bullseye seemed to be equating the 'no objection' to an approval of the content of the supplementary target's statement, which it was not.<sup>4</sup>
60. Bullseye further submitted that its decision not to consent to the abridgment of time for early dispatch of Xingao's bidder's statement could not operate to prevent Bullseye shareholders making a properly informed decision in relation to Emerald's bid and was a matter for the directors.
61. Lastly it submitted that it was "*a matter for Bullseye's board, in its sole and absolute discretion, and in the discharge of its directors' duties, to determine whether a takeover proposal is a "superior proposal" to Emerald's bid.*"
62. Xingao submitted that it "*accepts that the determination of whether the Xingao offer is a "Superior Proposal" as defined in the Bullseye 03 Orders is a matter for the Bullseye Board. But it is a determination the Board (i) must make and (ii) it must do so acting in good faith and in satisfaction of their fiduciary duties.*"
63. Emerald made a preliminary submission denying material deficiencies in its supplementary bidder's statement. It submitted that the Panel should decline to conduct proceedings because:

---

<sup>4</sup> As noted in *Lincoln Minerals Limited* [2022] ATP 6 at [67] the provision of a 'no objection' confirmation by the Panel should not be taken as a sign of the Panel's endorsement of the content and disclosure of the document concerned. The same applies to any provision of a 'no objection' confirmation by ASIC



## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

- (a) the period of withdrawal rights offered under the supplementary bidder's statement was clear, noting that the wording mirrored the Panel's orders and at the time of lodgment Emerald did not know when dispatch of the supplementary statements would be completed and
- (b) there was adequate disclosure of the risk of its bid closing with it holding a relevant interest of 50% or less in Bullseye, noting that the Xingao bid was "*highly conditional.*"

#### Conduct proceedings?

##### *Preliminary questions*

- 64. On Thursday, 3 March 2022, before deciding whether to conduct proceedings (and before making interim orders), we asked a series of preliminary questions because we considered the situation was fluid and not altogether clear (noting that Emerald had disclosed that the withdrawal rights under the *Bullseye 03* orders were due to expire on Monday, 7 March 2022).
- 65. The questions we asked were directed, among other things, to:
  - (a) why Bullseye had not put the Xingao replacement bidder's statement on its website when it received it, or come to a view on whether the bid was a superior proposal, or whether it was misleading for Bullseye on 21 February 2022 to have emailed its shareholders that Xingao had not yet made a formal bid (see paragraph 21) and
  - (b) how Bullseye had valued the Emerald bid, and its references to premium.
- 66. Bullseye submitted that it considered that Xingao's bidder's statement contained material deficiencies. It had proposed publishing when it received the replacement bidder's statement.
- 67. Moreover, it submitted that it should only publish with an explanation of the directors' views on the documents and on the Xingao bid generally. This it did on 4 March 2022.
- 68. Bullseye submitted it was "*Xingao's primary responsibility to ensure that its bidder's statement was put in front of Bullseye shareholders.*"
- 69. Xingao submitted that the failure by Bullseye to publish its replacement bidder's statement (and not inform its shareholders whether the Xingao bid was superior, or at least potentially superior) amounted to unacceptable circumstances because (for one thing) it was material information for shareholders deciding whether to exercise withdrawal rights from Emerald's bid.
- 70. Further, Xingao submitted that "*Publishing relevant information now would not cure the unacceptable circumstances because it would not give the Accepting Shareholders sufficient time to consider the new information prior to the expiry of the withdrawal rights, noting also that Monday is a public holiday in Western Australia.*"
- 71. The Applicant submitted that the declaration and orders in *Bullseye 03* were directed at facilitating an auction for control, which the failure to publish was at odds with; and publishing, and stating whether the Xingao bid was superior, at such a late stage in the withdrawal rights process was not enough.

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

72. The Bullseye board had met on 2 March 2022 to consider the Xingao bid. The delay in publishing until 4 March is unexplained.
73. Xingao's bid also contained a condition requiring Bullseye to grant it due diligence access. We asked Xingao why this condition was included.
74. Xingao submitted that Bullseye could withhold such information "*as related directly to the Supreme Court proceedings*", and the BIA did not prevent access to a "Competing Proposal" that "*may reasonably be expected to result in the Competing Proposal becoming a Superior Proposal*".
75. Bullseye submitted that the board was not able to provide due diligence access to Xingao under clause 6.2(b)(iii) of the BIA given the Bullseye board's position that the Xingao bid was not a "superior proposal." Bullseye disclosed this to its shareholders in its 4 March 2022 letter. However, somewhat paradoxically, Bullseye also submitted that:

*We understand that the relevant provisions of the BIA expired on 1 March 2022 but were clearly applicable throughout February 2022.*
76. Emerald submitted that there was no obligation to grant due diligence, and the condition amounted to an option for Xingao to proceed with its bid or not.
77. Lastly, we asked about the funding statement in Xingao's replacement bidder's statement, particularly around risks associated with the equity funding part of the funding. Bullseye had raised this issue.
78. Xingao submitted that it "*does not have any reason to doubt that its parent company is, and will continue to be, able to fund the Equity Funding as and when required.*"
79. Having considered the answers to our preliminary questions, we decided to conduct proceedings. In terms of the Panel's procedural guidelines, we were satisfied that some, perhaps most, of the claims would give rise to unacceptable circumstances if established.
80. There are many moving parts, including conditions in the Xingao bid, imminent closure of the Emerald bid, withdrawal rights, and claims of material information deficiencies. This makes it even more difficult for Bullseye shareholders. Added to this is the fact that Bullseye is an unlisted company, so there is no market "lead" which could help inform them.
81. On 8 March 2022, after we notified the parties that we intended to conduct proceedings but before issuing our brief, Bullseye released a second letter to shareholders on its website (see paragraphs 35 to 37) which disclosed that the BIA clauses referred to in the 4 March letter "*ceased to legally bind Bullseye as at 1 March 2022*".

#### Panel brief

82. We issued a brief to the parties in which we asked (among other things) about:
  - (a) deficiencies in respect of the supplementary target's statement and supplementary bidder's statement, including in respect of Bullseye's letters to shareholders and its board deliberations and

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

(b) the conditions in Xingao's bid.

#### *Supplementary target's statement deficiencies by Bullseye*

83. Bullseye's supplementary target's statement did not disclose the end date of the withdrawal period. It did, though, set out the orders made in *Bullseye 03*.
84. Those orders included a way to calculate the period for withdrawal rights (being at least 10 trading days after the supplementary target's statement and supplementary bidder's statement had been dispatched<sup>5</sup>) that was designed to ensure that Bullseye shareholders had enough time and information to consider whether to exercise the withdrawal right.
85. In our view, material to the making of a decision about withdrawal, was when that right was scheduled to end. It was not included. We note that the two documents are dated on different days, and it would not have been very difficult to co-ordinate to establish the date and include it. Or Bullseye could have issued a further supplementary target's statement. Bullseye could even have issued a letter to shareholders. It did not do any of those things.
86. It was clear from the *Bullseye 03* orders what was intended to be achieved. The information was needed in our view to satisfy section 602(b)(iii).
87. In any event, even if this was not done, once the documents had been issued, such information in our view amounts to a 'new circumstance' that meets the conditions for requiring a supplementary target's statement under section 644.
88. Bullseye delayed in informing shareholders of progress in relation to the Xingao bid.
89. On 14 February 2022, Bullseye received Xingao's bidder's statement, which Bullseye considered suffered from material deficiencies. On 23 February 2022, Bullseye received Xingao's replacement bidder's statement, which Bullseye considered also suffered from material deficiencies. After ASIC had indicated that it would consent to the early dispatch of Xingao's replacement bidder's statement, Bullseye's board met on 2 March 2022 to consider Xingao's bid. On 3 March 2022, Bullseye received Xingao's second supplementary bidder's statement. On 4 March, the replacement bidder's statement and second supplementary bidder's statement were emailed to Bullseye shareholders, together with the 4 March letter.
90. Bullseye submitted that "*Bullseye directors considered it their responsibility to ensure that when Bullseye shareholders reviewed the documents, they also had an understanding of the view of the Bullseye Board on the documents.*"
91. We do not agree, to the extent that this resulted in a delay of information being provided to shareholders. In the context of the withdrawal rights period, this delay should not have occurred.

---

<sup>5</sup> Bullseye's supplementary target's statement did not disclose that the period for the withdrawal rights were for at least this 10 trading days period

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

92. The view of the Board could have been provided subsequently to the information about the bid, bearing in mind the importance of shareholders having time to consider the withdrawal right.
93. The supplementary target's statement did not include a statement of the risk that, should withdrawals result in Emerald holding less than 50% of Bullseye, Emerald might sell into the Xingao bid. If Emerald did sell, it would result in Bullseye shareholders who had accepted the Emerald bid (and not withdrawn) not having the continuing exposure to Bullseye's assets.
94. Bullseye submitted that this risk was "*a theoretical risk and there is no certainty as to whether or not this may occur.*"
95. In our view that is no answer: this is the nature of a risk.
96. Bullseye also submitted that, if we considered it important, it would disclose the risk. (It qualified this offer by saying it was without admission of unacceptable circumstances.)
97. We considered whether this risk was one that Bullseye needed to address. The issue is complicated by being dependent on the intentions of Emerald, which were not manifest. Ultimately, we decided that it is something that Bullseye should have addressed. Shareholders considering whether to exercise their withdrawal rights would, in our view, look to their board, who recommended that they should accept the Emerald bid, to consider this issue and address it.
98. One of the factors the directors considered in making their recommendation, as set out in Bullseye's target's statement dated 28 December 2021, was "*the [Emerald Offer] provides Bullseye Shareholders with the ability to continue to retain exposure to all Bullseye's existing assets.*"
99. Continuing exposure to Bullseye's assets was a feature of the Emerald bid and a part of the Bullseye board's reasons for recommending it. Shareholders considering whether to exercise their withdrawal rights would, in our view, regard this information as material to their consideration.

#### *Supplementary bidder's statement deficiencies by Emerald*

100. Emerald's supplementary bidder's statement also did not disclose the end date for the withdrawal rights or address the risk that Emerald may decide to sell into the Xingao bid.
101. Emerald submitted that the withdrawal rights period was sufficiently certain and was clearly disclosed in its supplementary bidder's statement. It submitted, in essence, that it had met the Panel's requirements in the orders, and it had received no complaints from shareholders. It also submitted that it could not have known the date at the time it issued its supplementary bidder's statement.
102. Emerald included the end date for the withdrawal rights in its ASX announcement on 1 March 2022.
103. Emerald could have done several things sooner than it did to ensure that it could provide the closing date of the withdrawal rights to shareholders in the supplementary bidder's statement. It could have co-ordinated with Bullseye – its

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

bid was a recommended bid after all; it could have issued its supplementary bidder's statement (or an announcement or further supplementary bidder's statement) immediately after the supplementary target's statement; or it could have allowed a period longer than the bare minimum required in the orders.

104. In any event, Emerald delayed disclosing the end date once it could determine it. Emerald announced the end date as part of an announcement to ASX on 1 March 2022, almost a week after it could have determined what that date was, and only a week before the end date itself.
105. We agree with the rebuttal submission of Xingao in relation to the disclosure of the end date for the withdrawal period, namely "*... the disclosure obligations in a supplementary bidder's statement (or supplementary target's statement) are not defined solely by the terms of the Panel's orders.*"
106. Emerald submitted that 23 accepting shareholders withdrew<sup>6</sup> representing 6.7% of Bullseye. Consequently, its holding in Bullseye fell to 49.41%. Emerald announced its revised holding in an announcement on ASX on 8 March 2022.
107. As for the risk, we agree with Bullseye that Emerald was not obligated to form an intention "*simply for the purposes of these Panel proceedings*", and also with Emerald that the risk was something that Xingao could have addressed for Bullseye shareholders.
108. But that does not resolve the issue. In our view Emerald should have disclosed to Bullseye shareholders whether it had any intentions in relation to accepting the Xingao Bid and, if so, what those intentions were. In the context of this bid, Bullseye shareholders were entitled to be told that much at least.

#### *Correspondence deficiencies by Bullseye*

109. On 21 February 2022, Bullseye emailed shareholders with its supplementary target's statement as had been required by the *Bullseye 03* orders. Bullseye included the statements in paragraphs 21(a) and 21(b) above.
110. Xingao submitted that both statements were misleading. In respect of the first statement, Xingao said that it had made a formal offer (although it conceded that it was not at that stage 'live'). Xingao submitted (as did Xinhe) that Xingao was obliged to carry out its proposed bid as a matter of law. (While true, we note in passing that the bid was conditional, including as to due diligence.)
111. Xingao submitted in respect of the second statement it said that its bidder's statement lodged with ASIC was not a 'draft'.
112. Bullseye submitted that the statements were not misleading, but factually correct at the time they were made. Emerald made the same submission.

---

<sup>6</sup> although one re-accepted, having withdrawn in error

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

113. ASIC submitted that the statements may be misleading. It submitted that the offer was only incapable of acceptance because the relevant time had not passed and describing the bidder's statement as a 'draft' was inaccurate.<sup>7</sup>
114. ASIC submitted that "*Given that this type of information is most likely to be read by investors, ASIC considers that the same standard of care and the same standard of disclosure should be applied to these communications as is applied to the formal target's statement.*"
115. We agree with ASIC. In our view, the two statements were inaccurate and misleading.
116. In the letter to shareholders dated 17 February 2022 as part of Bullseye's supplementary target's statement, the chairman described the Emerald bid as representing a "substantial premium." He said:
- Given that the [Emerald Offer] consideration equated to an implied value of \$0.30 per Bullseye Share as at 13 December 2021 (being the date on which the Offer opened) and an implied value of approximately \$0.31 per Bullseye Share as at 24 December 2021 (being the last trading date for Emerald shares on ASX prior to the date of the Target's Statement), it was – and remains – the view of the Board that the Offer represents a substantial premium.*
117. On 4 March 2022, in its 4 March letter, Bullseye described Xingao's bid as being "marginally superior" to Emerald's bid as set out in paragraph 31(d) above.
118. Xingao stated in its bidder's statement (lodged with ASIC on 23 February 2022) that its bid represented a premium to Emerald's bid of (among other values) 6.1%.
119. We asked Bullseye whether, in view of the statement in its supplementary target's statement, Bullseye's board considered that Xingao's bid represented a substantial premium. Our concern is with the use of the adjectives. Not unnaturally, Emerald being a listed company, its share price moves up and down. It is confusing to the target's shareholders for the bidder's price on one day to be described as a 'substantial' premium, when the next day it may not be.
120. For example, Xingao made submissions about the changing value of Emerald's share price. It submitted that "*As at close of trading on 14 March 2022, Emerald's share price had dropped to \$1.065. This implies a value for Bullseye of \$0.31 per share.*"
121. The appropriate reference date for the calculation of premium has been considered by the Panel before, albeit not in exactly these circumstances.<sup>8</sup> It is generally the date immediately before the announcement of the offer, for obvious reasons. Once a scrip bid, such as Emerald's, has been announced, the share price (or prices if both companies are listed) are affected by the announced bid. This potentially distorts the premium, making it problematic to describe it as Bullseye did.
122. In *Magna Pacific Holdings 01* the Panel said:
- The Panel accepted that a bidder may have valid reasons for choosing a date other than the date immediately prior to the announcement of its offer (**Pre-announcement date**) for the*

---

<sup>7</sup> ASIC pointed out in rebuttal submissions that the email had not been received by it as part of its review of the draft supplementary target's statement.

<sup>8</sup> See generally Guidance Note 18: Takeover Documents at [32] to [34]

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

*purpose of calculating a premium. The Panel considered, however, that where a bidder does choose an alternative date to the Pre-announcement date it would also usually be appropriate to provide a clear explanation for why it considers that the date it has chosen is more appropriate than the Pre-announcement date.*<sup>9</sup>

123. Moreover, the Panel has regarded it as undesirable to make a premium comparison for illiquid stocks.<sup>10</sup> All the more so, we think, when one of the companies is unlisted.
124. Bullseye submitted that Xingao's cash price of \$0.35 was "at a premium" but, for reasons stated, was not a "superior proposal."
125. In our view, this avoids the question.
126. In our view, information provided to shareholders in relation to the relative values and premia of the Emerald and Xingao bids was not to the standard required under a target's statement.
127. Bullseye's letter to shareholders dated 4 March 2022 noted that the Xingao bid was subject to a due diligence condition and went on to say in effect that the BIA prevented Bullseye providing due diligence access to Xingao (see the statement in paragraph 31(e) above).
128. The Applicant submitted that this statement was misleading because the exclusivity period under the BIA had ended and "*therefore as at 4 March 2022 there was no constraint in the BIA to Bullseye providing due diligence access to Xingao.*"
129. Bullseye accepts this, although it submitted that the primary purpose of the 4 March letter was to inform shareholders that the board did not consider the Xingao bid to be superior.
130. Bullseye sought to correct the statement it had made in its 4 March letter in its letter to shareholders of 8 March. In the 8 March letter it said:  
*"Shareholders should be aware that, whilst the relevant clauses of the BIA referred to above have indeed been a critical factor in Bullseye not providing due diligence access to [Xingao], those clauses ceased to legally bind Bullseye as at 1 March 2022. Accordingly, the Bullseye Board met again over the recent long weekend, on 7 March 2022, to determine the Board's current position in relation to [Xingao's] request for due diligence access."*
131. The 8 March letter then set out reasons why Bullseye was not prepared to give Xingao due diligence access. (It should be noted that it was this letter that referred to the 'spirit' of the BIA.)
132. The Applicant submitted that the 8 March letter may not have been sent to all Bullseye shareholders. We do not know whether this is so or not. It was posted on Bullseye's website. Astute followers of the two takeovers would presumably have accessed it. But, while all shareholders were sent the 4 March letter, others would not necessarily have known of the 8 March letter.

---

<sup>9</sup> *Magna Pacific (Holdings) Limited 01* [2007] ATP 2 at [46]

<sup>10</sup> *Queensland Ores Limited* [2009] ATP 8 at [15]

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

133. In any event, the 8 March letter was dated (and posted on the website) after the end of the withdrawal rights period, being 7 March. So, during the withdrawal period Bullseye shareholders had the impression from the 4 March letter that Bullseye could not give due diligence to Xingao. It should be noted that this was a condition of the Xingao bid.
134. The purpose of the orders in *Bullseye 03* was that shareholders could reconsider their acceptance of the Emerald bid in light of all material information.
135. In the 8 March letter, Bullseye made reference to the 'spirit' of the BIA. It said:  
*Bullseye is mindful that, whilst the exclusivity period under the BIA has passed, the company still remains bound by the agreement (which requires, amongst other things, that the directors continue to recommend the Emerald bid and do not change their position regarding the voting of their own shares and shares they control in favour of that bid, unless they make a determination regarding superiority which favours [Xingao]). The Board considers that it would be inconsistent with its publicly announced position in support of the Emerald bid (and contrary to the spirit if not the letter of the BIA) were it to provide due diligence to [Xingao] in the current circumstances[.]*
136. Xingao submitted that:
- (a) there is no moral obligation to comply with the spirit of the BIA, and there are legal obligations that must be complied with under the Act in respect of control transactions
  - (b) there is, therefore, no room for that spirit to override the express agreement between the parties and
  - (c) there is no justification in law or policy for giving these exclusivity restrictions any greater application than the BIA itself expressly mandates.
137. Bullseye did not offer a rebuttal.
138. We agree with Xingao's submission. In our view the reference to the 'spirit of the BIA' was apt to mislead Bullseye shareholders. Such agreements ought to be understood as limiting the actions of a target board only as far as they state expressly. To suggest otherwise is confusing, and shareholders are left unable to ascertain the limits of the restriction.
139. In our view, a material piece of information was missing. Reliance on the BIA to refuse due diligence closed off discussion for shareholders about the reasons for not granting due diligence access or the likelihood of agreement being reached to allow this condition to be satisfied.
140. Neither the 4 March letter nor the 8 March letter disclosed that the Bullseye board was not 'unanimous'.
141. In relation to the 4 March letter, Ms Dariena Mullan abstained at the Bullseye board meeting on 2 March 2022 from voting on whether the Xingao bid was superior or not, because she was not prepared. She had sent an email to the board in advance of the board meeting. We have not been provided with it.
142. Xingao submitted that the fact that an executive director was not in a position to make a determination was material information for Bullseye shareholders and



## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

should have been disclosed in the 4 March letter. We agree. The letter gives no indication that the decision was not one made by the whole board.

143. In relation to the 8 March letter, Ms Dariena Mullan was not present at the board meeting on 7 March 2022. The board at that meeting considered whether to grant due diligence access to Xingao and the minutes record that the board had received Ms Mullan's views on the subject, which included her reasons why due diligence might be granted.
144. Xingao submitted that the absence of an executive director from the 7 March meeting should have been disclosed to Bullseye shareholders. We agree.
145. We note that Ms Mullan had apparently not provided the rest of the Bullseye board with a reason why she was an apology for that meeting. But despite her being unavailable, she had put her views before the board. In those circumstances we agree that her absence should have been disclosed.
146. In our view, non-disclosure in the letters of 4 and 8 March that the decisions of the board referred to in each letter were not decisions of the whole board was a material deficiency.

#### *Other issues*

147. One matter the Applicant raised in its application was that failure on Bullseye's part to consent to abridgement of time for the dispatch of Xingao's bidder's statement prevented Bullseye shareholders making a properly informed decision in relation to the Emerald bid and so gave rise to unacceptable circumstances.
148. The Applicant put the argument as one of comparative fairness, in that Bullseye had consented under the BIA to early dispatch of Emerald's bidder's statement.
149. We are not persuaded that Bullseye had any obligation, in these circumstances, to consent to early dispatch, and we note that the Applicant acknowledged that Xingao's letter of request to Bullseye included the concession that "*the abridgement agreed under the BIA may have been agreed because Bullseye may have already reviewed a draft of the Emerald Bidder's Statement.*"
150. We take this issue no further.
151. The Applicant also raised in its application that Bullseye's failure to provide Xingao the same due diligence access it had provided Emerald deprived Bullseye's shareholders of the opportunity to receive a materially higher cash offer.
152. In the events that transpired, Xingao increased its bid price notwithstanding that impasse, and this is no longer an issue, at least in the terms posed.
153. Consistent with *Volante 01*<sup>11</sup> we think that a bidder is entitled to make its bid subject to conditions and the target is not under any additional obligation to disclose particular information merely because the bidder has chosen to make its bid subject to that condition. Moreover, a target is not obliged to give competing bidders equal access to information.<sup>12</sup>

---

<sup>11</sup> *Volante Group Limited 01* [2006] ATP 2

<sup>12</sup> *Goodman Fielder Ltd 02* [2003] ATP 5

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

154. We note that, in response to further questions, Bullseye submitted that it “*intends to continue to liaise with Xingao over the coming days with a view to seeing whether agreement can be reached in connection with the [due diligence] Condition.*”
155. We take this issue no further.
156. During these proceedings we were asked to vary the orders made in *Bullseye 03* in relation to any Bullseye director whose position has changed, in other words who now took the view that Xingao’s bid was a superior proposal. The only director who has taken that view is Ms Mullan.
157. Under the *Bullseye 03* orders, the Panel required a decision of the board before the acceptances of the directors were cancelled.
158. In our view it is not appropriate in the context of these proceedings to extend any withdrawal rights to any of the directors’ stakes.
159. Consideration of this issue properly belongs in the *Bullseye 03* proceedings, where a request under section 657D(3) for a variation of the orders can be made. The considerations applicable to, and parties affected by, a variation in *Bullseye 03* and an order the current proceedings may well be different.

#### *Other matters*

160. We are concerned about how the takeovers are proceeding. It is the target’s responsibility to assist its shareholders when they must make such decisions. It is their responsibility to be impartial. It is, after all, shareholders’ money.
161. That is not to say the directors cannot have a view about which of two or more competing bids they should recommend. Of course, they should form a view and express it. Shareholders look to their board for such views and boards are best placed to assist their shareholders with relevant information.
162. Indeed, directors have an obligation to state their recommendations, and reasons, in the target’s statement (or to state why they are not making a recommendation).<sup>13</sup> But they need to be clear in explaining themselves and must have a reasonable basis for holding their views.
163. The history that Bullseye has with the Applicant may have affected the clarity of its vision in this respect, but despite this history the Bullseye board needed to more carefully consider how it should respond to the competing control proposals.

## DECISION

### Declaration

164. The delays and material deficiencies in disclosure give rise in our view to unacceptable circumstances.
165. For the reasons discussed above, we consider that Bullseye’s supplementary target’s statement and Emerald’s supplementary bidder’s statement and Bullseye’s correspondence to shareholders each contain material deficiencies.

---

<sup>13</sup> Section 638(3)

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

166. As a result, in our view the acquisition of control over Bullseye shares has not taken place in an efficient, competitive and informed market, and Bullseye shareholders were not given enough information to enable them to assess the merits of either Emerald's proposal or Xingao's proposal.
167. Moreover, the actions of Bullseye and Emerald have had the effect of reducing the efficacy of the Panel's orders in *Bullseye 03*. Those orders were predicated on shareholders having enough time and information to decide whether to exercise their withdrawal rights. As explained, we do not think shareholders had enough information.
168. Accordingly, it appears to us that the circumstances are unacceptable:
- (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.
169. We made a declaration of unacceptable circumstances (**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

170. Following the declaration, we made final orders (**Annexure C**).
171. Under section 657D the Panel is empowered to make 'any order'<sup>14</sup> if 4 tests are met:
- (a) it has made a declaration under section 657A. This was done on 1 April 2022.
  - (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below we do not consider that our orders do so.
  - (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 22 March 2022 when we sent the parties a supplementary brief on declaration and proposed orders.
  - (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. For the reasons below we consider that our orders do so.

---

<sup>14</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

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

172. Our orders are directed at further disclosure and allowing accepting shareholders to again reconsider their decision about acceptance of Emerald's bid given the additional disclosure. The information deficiencies are those of Emerald as well as Bullseye. However, we think the relevant corrective disclosure can be made by Emerald and this will remedy the information deficiencies that reduced the efficacy of the previous orders.
173. And since the information was deficient in relation to the *Bullseye 03* withdrawal period (which for the avoidance of doubt, excluded the Bullseye directors' stakes) we ordered a further withdrawal period on better information.
174. We did not make an order that Bullseye must dispatch a supplementary target's statement given the information that is now available and the risk of information 'overload' for shareholders.
175. However, because many of the problem disclosures were found in the letters that Bullseye issued (and its supplementary target's statement) we did order that Bullseye must only make statements in relation to the effect of our declaration and orders by way of a supplementary target's statement. This is to obviously engage the formality and obligations in the Act, although they may have been engaged already.
176. While our orders may affect the success of Emerald's bid, they are not unfairly prejudicial in our view and, to reduce the impact of our orders, Bullseye shareholders can confirm that they do not wish to exercise their withdrawal right, and thereafter Emerald may process the acceptance.
177. The additional disclosure we require includes information from Xingao about the level of acceptances to Xingao's bid. We think Bullseye shareholders need to know how the competing bids are progressing before they decide whether they should withdraw from Emerald's bid. Therefore, we made this order affecting Xingao.
178. Lastly, we ordered that item 9 of section 611 not apply in respect of any withdrawn acceptances, as was done in *Bullseye 03* and for the same reasons.
179. We have not made any costs orders.

**Karen Evans-Cullen**  
**President of the sitting Panel**  
**Decision dated 1 April 2022**  
**Reasons given to parties 17 May 2022**  
**Reasons published 20 May 2022**

## Takeovers Panel

Reasons - Bullseye Mining Limited 04  
[2022] ATP 8

### Advisers

Party	Advisers
Applicant	Bennett + Co and Allens
Bullseye	Murcia Pestell Hillard and Clayton Utz
Emerald	Steinepreis Paganin
Xingao	Bennett + Co and Allens



**Australian Government**

**Takeovers Panel**

**Annexure A**

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

**BULLSEYE MINING LIMITED 04**

Emerald undertakes to the Panel under section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth) that, without the Panel's consent, it will not take any:

1. steps, or allow any steps to be taken, to process acceptances of, or issue any Emerald shares to, accepting Bullseye shareholders pursuant to the Bid or
2. action to enforce clause 2.4 of the BIA, or otherwise accept an offer to nominate directors to the board of Bullseye,

until the determination of Panel proceedings.

For the purpose of this undertaking, the following terms have their corresponding meaning:

<b>BIA</b>	The bid implementation agreement between Emerald and Bullseye attached to the ASX announcement of 7 December 2021 by Emerald
<b>Bid</b>	The off-market takeover bid announced by Emerald on 7 December 2021 for all the issued ordinary shares of Bullseye
<b>Bullseye</b>	Bullseye Mining Limited
<b>Emerald</b>	Emerald Resources NL

**Signed by Morgan Hart, Managing Director, Emerald Resources NL  
with the authority, and on behalf, of  
Emerald Resources NL  
Dated 7 March 2022**



**Australian Government**

**Takeovers Panel**

**Annexure B**

**CORPORATIONS ACT**

**SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**BULLSEYE MINING LIMITED 04**

**CIRCUMSTANCES**

1. Bullseye Mining Limited (**Bullseye**) is an unlisted public company. Bullseye has previously submitted to the Panel that it has “339 largely unsophisticated shareholders” and now has 392 shareholders.
2. Emerald Resources NL (**Emerald**) is an ASX listed company (ASX: EMR).
3. Emerald has made a conditional off-market takeover bid for Bullseye offering 1 Emerald share for every 3.43 Bullseye shares (**Emerald Bid**). The Emerald Bid was declared unconditional on 6 January 2022. The Emerald Bid is due to close (unless extended) on 1 April 2022.
4. Bullseye and Emerald entered into a bid implementation agreement in relation to the Emerald Bid (**BIA**). The BIA included exclusivity provisions.
5. On 3 February 2022, Au Xingao Investment Pty Ltd (**Xingao**), which together with Hongkong Xinhe International Investment Company Limited has voting power in 14.85% of Bullseye, announced its intention to make an off-market takeover bid for Bullseye offering \$0.31 cash per Bullseye share (**Xingao Bid**). The bid announcement was subject to conditions, including due diligence conditions (**Due Diligence Conditions**) and a 40% minimum acceptance condition (**40% condition**). The bid announcement stated that the bid consideration would be increased to \$0.35 per Bullseye share if the Due Diligence Conditions and the 40% condition were satisfied.
6. On 7 February 2022, the Panel made a declaration of unacceptable circumstances and orders in relation to the affairs of Bullseye.<sup>1</sup> It ordered (among other things) that:
  - (a) Bullseye issue a supplementary target’s statement to deal with disclosure issues identified by the Panel and
  - (b) Emerald issue a supplementary bidder’s statement to explain the Panel’s orders and the withdrawal rights that the Panel had granted accepting shareholders of the Emerald Bid other than the Bullseye directors.

---

<sup>1</sup> Bullseye Mining Limited 03 see TP 22/12

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

7. The withdrawal rights that the Panel ordered were to be available for a period of not less than 10 trading days (in total) that met the following requirements:
  - (a) *trading in Emerald shares is available on market and not subject to any trading halt or trading suspension and*
  - (b) *the period starts from the date which is the later of the dispatch of Bullseye's supplementary target's statement and the dispatch of Emerald's supplementary bidder's statement.*
8. Also on 7 February 2022, Bullseye posted on its website that after business hours on 3 February 2022 it had received Xingao's 3 February 2022 announcement.
9. On 14 February 2022, Xingao lodged its bidder's statement with ASIC. Xingao served its bidder's statement on Bullseye on 15 February 2022.
10. On 18 February 2022, Xingao sent a letter to Bullseye shareholders via its media advisers outlining the Xingao Bid.
11. On 21 February 2022, Emerald announced that it had lodged its supplementary bidder's statement (as required by the Panel orders) with ASIC.
12. Also on 21 February 2022, Bullseye emailed its supplementary target's statement to its shareholders, the covering email stating (among other things) that:

*"Bullseye Shareholders should note that Au Xingao has not yet made a formal bid and that the only live offer currently capable of acceptance is the Emerald offer..."* and

*"On 15 February 2022, Au Xingao sent to Bullseye a copy of the draft Bidder's Statement which it intends to send to Bullseye Shareholders and which would contain Au Xingao's formal takeover offer for Bullseye".*
13. Neither Emerald's supplementary bidder's statement nor Bullseye's supplementary target's statement disclosed the date on which the withdrawal rights ended.
14. On 23 February 2022, Xingao lodged with ASIC a supplementary bidder's statement and replacement bidder's statement in relation to the Xingao Bid.
15. On 1 March 2022, Emerald made an ASX announcement:
  - (a) extending its bid until 18 March 2022
  - (b) disclosing a relevant interest in 54.7% of Bullseye
  - (c) noting that *"the withdrawal rights period will expire at 5:00pm (WST) on Monday, 7 March 2022."*
16. On 2 March 2022, the Bullseye board met to consider the Xingao Bid. It determined (with one director abstaining) that it did not represent a superior proposal as compared with the Emerald Bid.



## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

17. On 3 March 2022, Xingao announced the increase of its offer price to \$0.35 per Bullseye share (in effect removing the conditions to that increase, although the bid itself remained subject to a number of conditions).
18. On 4 March 2022, Bullseye released a letter to shareholders on its website enclosing the Xingao Bid documents and stating, in highlighted text: *“Your Board has determined that the Offer is not a superior proposal as compared to the Emerald offer.”*
19. The letter also stated *“Based on the closing price of Emerald shares on ASX on 2 March of \$1.135, the Emerald offer currently equates to \$0.33 per Bullseye share, as compared with \$0.35 for the Offer. On the face of it, this means that the value of the Offer is marginally superior. However, the following points were considered by the Board in arriving at its ultimate decision that the Offer is not a superior proposal: [followed by a list of 16 points]”*.
20. The letter also stated *“Following extensive deliberation, as detailed above, the Board’s position is that the Offer is not a superior proposal. On that basis, pursuant to clauses 6.2(b)(iii) of the BIA, Bullseye is not currently able to provide due diligence access to Au Xingao.”*
21. On 8 March 2022, Bullseye released a second letter to shareholders on its website, stating:
  - (a) the BIA clauses referred to in the 4 March letter *“ceased to legally bind Bullseye as at 1 March 2022”*
  - (b) at its meeting on 7 March 2022, the Bullseye board *“determined that, at the present time, it is not prepared to provide due diligence access to Au Xingao on the basis sought by way of the Due Diligence Condition.”* The letter did not disclose that one director was not present.
  - (c) *“The Board considers that it would be inconsistent with its publicly announced position in support of the Emerald bid (and contrary to the spirit if not the letter of the BIA) were it to provide due diligence to Au Xingao in the current circumstances.”*
22. Also on 8 March 2022, Emerald made an announcement stating, among other things, that *“following the expiry of the withdrawal rights period at 5:00pm (WST) on Monday 7 March 2022, it has a relevant interest in 49.41% of the 445,599,851 Bullseye shares currently on issue”*.
23. In relation to Bullseye the Panel considers that the following (among other things) have reduced the efficacy of the Panel’s orders and have resulted in Bullseye shareholders not having enough information to enable them to assess the merits of the Emerald and Xingao proposals:
  - (a) non-disclosure of the end of the withdrawal rights period in a supplementary target’s statement

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

- (b) the delay in informing Bullseye shareholders of progress in relation to the Xingao Bid, including the delay in providing Xingao's bidder's statement and replacement bidder's statement
- (c) Bullseye's misleading statements in the email to shareholders dated 21 February 2022 and its supplementary target's statement in relation to the status of the Xingao Bid
- (d) non-disclosure of the risk that Emerald may accept the Xingao Bid, thereby depriving Bullseye shareholders who had accepted Emerald's Bid from exposure to Bullseye's assets, which was a material information deficiency
- (e) the false and misleading statement in Bullseye's letter to shareholders dated 4 March 2022 that Bullseye was "*pursuant to clauses 6.2(b)(iii) of the BIA ... not currently able to provide due diligence.*" It was not corrected until after the expiry of the withdrawal rights
- (f) non-disclosure in the letters of 4 and 8 March that the decisions of the board referred to in each letter were not decisions of the whole board
- (g) information provided in the 4 and 8 March letters to shareholders in relation to the relative values and premia of the Emerald and Xingao Bids was not to the standard required under a target's statement
- (h) the misleading statement in Bullseye's 8 March letter to shareholders regarding the '*spirit of the BIA*'.

24. In relation to Emerald, the Panel considers that:

- (a) non-disclosure until 1 March 2022 of the end of the withdrawal rights period in a supplementary bidder's statement reduced the efficacy of the Panel's orders and resulted in Bullseye shareholders not having enough information to enable them to assess the merits of the Emerald proposal and
- (b) Emerald should have disclosed to Bullseye shareholders whether it had any intentions in relation to accepting the Xingao Bid and, if so, what those intentions were.

## EFFECT

25. As a result of the matters referred to:

- (a) the acquisition of control over Bullseye shares has not taken place in an efficient, competitive and informed market
- (b) Bullseye shareholders were not given enough information to enable them to assess the merits of Emerald's proposal and
- (c) Bullseye shareholders were not given enough information to enable them to assess the merits of Xingao's proposal.

## Takeovers Panel

Reasons - Bullseye Mining Limited 04  
[2022] ATP 8

26. 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 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) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**)
  - (c) in the further alternative, because they constituted a contravention of a provision of Chapter 6 of the Act.
27. 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 Karen Evans-Cullen**  
**President of the sitting Panel**  
**Dated 1 April 2022**



**Australian Government**

**Takeovers Panel**

**Annexure C**

**CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**BULLSEYE MINING LIMITED 04**

The Panel made a declaration of unacceptable circumstances on 1 April 2022.

**THE PANEL ORDERS**

1. Emerald must offer a withdrawal right (further to the withdrawal right previously offered to Bullseye shareholders) to accepting Bullseye shareholders, other than Bullseye's directors, for a period of not less than 10 trading days from the date of the supplementary bidder's statement referred to in order 2.
2. Emerald must dispatch a supplementary bidder's statement on the date of the supplementary bidder's statement, in a form which ASIC and the Panel (through at least one sitting member) does not object to, that:
  - (a) explains the effect of the Panel's declaration and these orders
  - (b) discloses whether it has any intentions in relation to accepting the Xingao bid and, if so, what those intentions are
  - (c) offers the further withdrawal right to accepting Bullseye shareholders, other than Bullseye's directors, for a period of not less than 10 trading days from the date of the supplementary bidder's statement referred to in this order
  - (d) includes details of how to exercise the further withdrawal right
  - (e) includes the date when the period of the further withdrawal right will end
  - (f) explains that a shareholder may confirm in writing to Emerald that the shareholder does not wish to exercise the further withdrawal right, in which case the shareholder's acceptance may be processed by Emerald
  - (g) includes instructions and a form for a shareholder to complete in relation to withdrawal and
  - (h) includes instructions and either a separate form or combined with the form referred to in paragraph 2(g) for a shareholder to complete in relation to confirmation that the shareholder does not wish to exercise the further withdrawal right.
3. Emerald must not process any acceptances under the Emerald Bid until the expiry of the period that Bullseye shareholders can withdraw their acceptances under order 1

## Takeovers Panel

### Reasons - Bullseye Mining Limited 04 [2022] ATP 8

unless that shareholder has confirmed in writing to Emerald in accordance with order 2 that they do not wish to exercise the withdrawal right.

4. Emerald must not purport to rely on item 9 of section 611 of the Act by taking into account voting power in shares in respect of which acceptances are withdrawn under order 1.
5. Emerald must not take any action to enforce clause 2.4 of the BIA, or otherwise accept an offer to nominate directors to the board of Bullseye, until the end of the period that a shareholder can withdraw acceptance under order 1.
6. Bullseye must not make any statement to its shareholders in relation to the effect of the Panel's declaration and these orders other than by way of a supplementary target's statement.
7. Xingao must within 2 trading days of the date of these orders issue a supplementary bidder's statement disclosing the number of acceptances it has received in response to the Xingao Bid and the percentage of Bullseye shares that the acceptances represent.

#### *Interpretation*

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

<b>accepting Bullseye shareholders</b>	Bullseye shareholders who accepted the Emerald Bid prior to the date of the supplementary bidder's statement referred to in order 2
<b>Act</b>	<i>Corporations Act 2001 (Cth)</i>
<b>BIA</b>	The bid implementation agreement between Emerald and Bullseye attached to the ASX announcement of 7 December 2021 by Emerald
<b>Bullseye</b>	Bullseye Mining Limited
<b>Emerald</b>	Emerald Resources NL
<b>Emerald Bid</b>	The off-market takeover bid announced by Emerald on 7 December 2021 for all the ordinary shares of Bullseye
<b>Xingao</b>	Au Xingao Investment Pty Ltd
<b>Xingao Bid</b>	The off-market takeover bid by Xingao for all the ordinary shares of Bullseye pursuant to the replacement bidder's statement and second supplementary bidder's statement dated 3 March 2022

**Tania Mattei**  
**General Counsel**  
**with authority of Karen Evans-Cullen**  
**President of the sitting Panel**  
**Dated 1 April 2022**