



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Altius Mining Limited  
[2012] ATP 17**

**Catchwords:**

*Rights issue – non-renounceable – underwriting – sub-underwriting – potential control impact – shortfall facility – deficient disclosure – association – decline to make a declaration*

*Corporations Act 2001 (Cth), sections 602, 606, item 10 of section 611, item 13 of section 611, section 657A*

*ASIC Regulatory Guide 159: Takeovers, compulsory acquisitions and substantial holdings*

*Guidance Note 17: Rights Issues*

*Powerlan Limited [2010] ATP 2, Redflex Holdings Limited [2009] ATP 17, Mount Gibson Iron Limited [2008] ATP 4, Dromana Estate Limited 01 [2006] ATP 4*

Interim order	IO undertaking	Conduct	Declaration	Final order	FO undertaking
No	No	Yes	No	No	No

**INTRODUCTION**

1. The Panel, Guy Alexander (sitting President), Elizabeth Bryan and Andrew Sisson, declined to make a declaration of unacceptable circumstances in relation to the affairs of Altius Mining Limited. The application concerned a 1-for-1 pro-rata non-renounceable rights issue which was fully underwritten by Foxfire Capital Pty Ltd, an entity controlled by Mr John Zee (a director of Altius). Further disclosure to shareholders by Altius and amendments to the structure of the rights issue satisfied the Panel's concerns.
2. In these reasons, the following definitions apply.

Altius	Altius Mining Limited
Cleansing Notice	the notice under section 708AA(2)(f) <sup>1</sup> given by Altius on 16 August 2012
Foxfire	Foxfire Capital Pty Ltd, the underwriter of the Rights Issue
Offer Document	the offer document by Altius dated 3 August 2012 regarding the Rights Issue
Rights Issue	the 1-for-1 pro-rata non-renounceable rights issue to raise approximately \$5.19 million announced by Altius on 2 August 2012
Underwriting Agreement	the underwriting agreement between Altius and Foxfire dated 31 July 2012

<sup>1</sup> Unless otherwise indicated, references are to the *Corporations Act 2001 (Cth)*

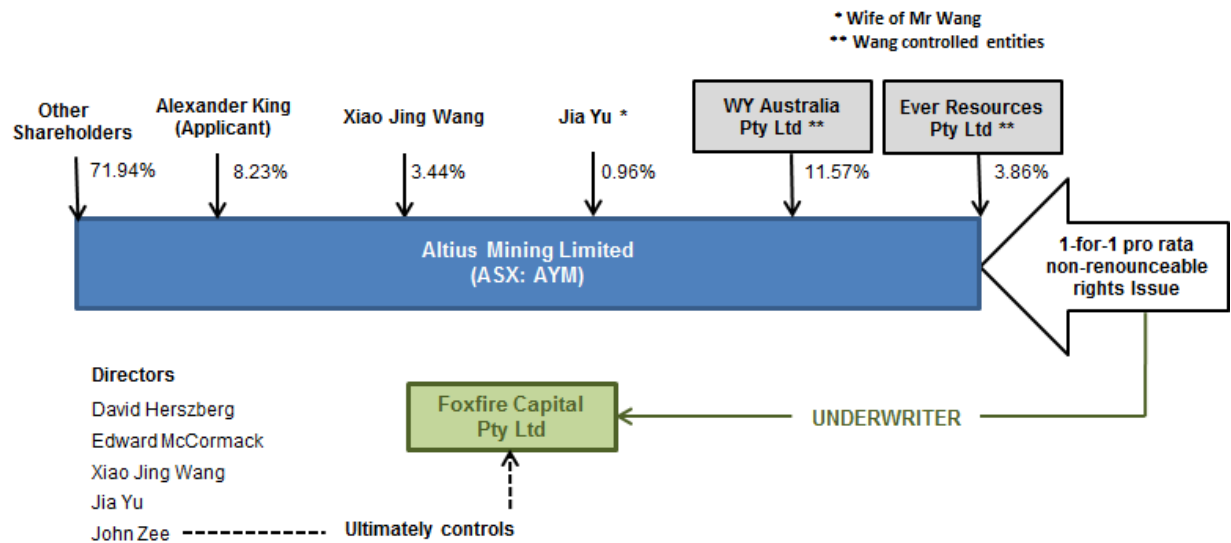
## FACTS

3. Altius is an ASX listed company (ASX code: AYM). The applicant, Alexander King, is an Altius shareholder.
4. On 25 July 2012, Altius announced that it was in the process of finalising negotiations in relation to a proposed 1-for-1 pro-rata non-renounceable rights issue to raise approximately \$5.19 million. The announcement stated that the issue price of 2 cents per share represented a discount of approximately 50% to the last closing price.
5. On 2 August 2012, Altius announced that it was proceeding with the Rights Issue and that it would be fully underwritten by Foxfire, a company controlled by and associated with Mr John Zee, a director of Altius.
6. On 3 August 2012, Altius released the Offer Document.
7. No sub-underwriters were announced. There was a shortfall facility, however, the underwriter had discretion to decide whether to issue “*all, none or part*” of any additional shares applied for under the facility. The record date was 7pm (Melbourne time) on 14 August 2012. The offer was to open on 17 August 2012 and close at 5pm (Melbourne time) on 31 August 2012. Shareholders were required to have a registered address in Australia or New Zealand to be eligible to participate.
8. On 7 August 2012, Altius released a letter to shareholders including information regarding the Rights Issue and stated that the Offer Document would be despatched to eligible shareholders in Australia and New Zealand on Friday 17 August 2012.
9. On 14 August 2012, Altius released a further letter to shareholders stating that “*over the last few months [Altius] has undergone significant change*” and that the new management of Altius had “*inherited a range of historical issues and significant challenges which were company-threatening on a range of levels; the most striking of these were the high cash burn rate and the status of the Company’s assets*”. The letter stated that management was in the process of executing and implementing a strategic plan for Altius and included a description of the plan.
10. Various structural relationships between the parties identified in the application are described below.

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## APPLICATION

### Declaration sought

11. By application dated 14 August 2012, Mr Alexander King sought a declaration of unacceptable circumstances. Mr King submitted that:
  - (a) Altius had not properly informed shareholders about:
    - (i) matters relevant to an assessment of the Rights Issue price
    - (ii) the likely effect of the Rights Issue on control of Altius
    - (iii) the situation or financial position of Altius or its need for funds
    - (iv) why the Rights Issue was non-renounceable and
    - (v) why certain overseas shareholders were excluded from participating in the Rights Issue
  - (b) Altius and Foxfire had adopted no meaningful steps to mitigate the effect of the Rights Issue on control of Altius and
  - (b) the control effect of the Rights Issue was unfairly dependent upon the way in which Foxfire exercised its discretion to allocate (or not allocate) the shortfall.
12. Mr King submitted that the circumstances were unacceptable having regard to the effect that they were likely to have on the control, or potential control, of Altius, or the acquisition by a person of a substantial interest in Altius.
13. By an addendum to the application dated 17 August 2012, Mr King submitted that Foxfire could not rely upon the exemption in item 10 of section 611 to acquire a relevant interest in voting shares in Altius in excess of 20%.

**Final orders sought**

14. Mr King sought final orders to the effect that:
- (a) Altius cancel the Rights Issue and refund any subscription monies received
  - (b) the Underwriting Agreement between Altius and the underwriter is void with no penalty or liability to Altius
  - (c) Altius be restrained from issuing any shares, other than with the approval of shareholders by special resolution, until the earlier of:
    - (i) [the outcome of an event that was not the subject of the Panel application] and
    - (ii) six months from the date of the application and
  - (d) Altius bear the costs of the proceedings.

**Amended orders sought**

15. The Panel issued a brief to the parties on 20 August 2012. Following the receipt of submissions on the brief, Mr King, in rebuttal submissions asked the Panel to consider the following amended orders.
16. Mr King sought an interim order that Altius suspend the Rights Issue until the conclusion of the Panel proceedings.
17. Mr King sought replacement final orders to the effect that:
- (a) Altius cancel the Rights Issue and refund any subscription monies received
  - (b) Altius be permitted to undertake a rights issue involving the issue of more than 20% of issued share capital of Altius during the 12 months following the Panel's decision only if:
    - (i) the rights issue is approved by shareholders
    - (ii) the notice of meeting contains certain information and is accompanied by audited accounts no older than 6 months and
    - (iii) Altius adopt a dispersion strategy including a shortfall facility, back-end book-build of shortfall shares and subordinates the entitlement of the underwriter and
  - (c) Altius bear the costs of the proceedings.

**DISCUSSION**

**Structure and potential control effect**

18. On 16 August 2012, Altius released the Cleansing Notice. It stated that if no shareholders took up their entitlements the Underwriter would be bound to subscribe for 259,312,685 shares representing 50% of the total issued share capital of Altius after the Rights Issue.

19. Mr King submitted that Altius and Foxfire had adopted no meaningful steps to mitigate the effect of the Rights Issue on control of Altius.
20. We asked Altius what consideration it had given to the potential control effects of the Rights Issue and what steps it had taken to minimise those potential effects. Altius submitted that it approached three professional underwriters (unconnected with any director or shareholder) in late July 2012, each of whom was unwilling to underwrite. Altius submitted that Foxfire was ultimately chosen to underwrite because it was willing to do so and it was “*capable of dispersing any shortfall because of Mr Zee’s extensive experience and client list*”. Altius also submitted that the board required a shortfall facility and sought and received assurances from Foxfire that “*it would seek to attain a good number and spread of sub-underwriters*”.
21. We consider these measures below.

#### *Underwriting*

22. Mr King submitted that no evidence had been provided that Altius had canvassed professional underwriters or financial advisers prior to engaging Foxfire as the underwriter.
23. Underwriting by a related party or major shareholder does not, of itself, give rise to unacceptable circumstances, although greater care is needed to mitigate the potential control effects.<sup>2</sup>
24. Having regard to Altius’ submissions referred to above, we are satisfied that Altius sought alternative underwriting arrangements prior to appointing Foxfire as underwriter.
25. The Underwriting Agreement required Foxfire to fully underwrite the Rights Issue. Mr King submitted that Foxfire could not rely on the exemption in item 10 of section 611 to acquire a relevant interest in excess of 20% as offers were not made to all holders of securities<sup>3</sup> (only shareholders with a registered address in Australia and New Zealand were eligible to participate). Altius had not appointed a nominee for foreign holders of securities in accordance with section 615. The exemption in item 13 was not available as the Rights Issue offer was made without a disclosure document.
26. ASIC agreed that it appeared that Foxfire was unable to rely on the exemptions in either item 10 or item 13 of section 611.
27. Altius confirmed that it did not think Foxfire could rely upon the exemption in either item 10 or item 13 of section 611 and stated:

*Foxfire has advised that it will not seek to rely on either such exception, and never contemplated that it might given its distribution capabilities.*

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<sup>2</sup> Guidance Note 17: Rights Issues at [21]

<sup>3</sup> See condition (b) of item 10 of section 611

28. On 30 August 2012, Altius announced that the rights issue was fully sub-underwritten. We remained concerned that, should the shortfall not be sufficiently distributed either under the shortfall facility or to sub-underwriters, Foxfire would be contractually required to subscribe for shares in excess of 20%. The Panel sought, and Altius provided, confirmation that even if the sub-underwriters did not perform their obligations under the sub-underwriting agreements, Altius would not issue any shares to the underwriter that would result in the relevant interest of the underwriter and its associates exceeding 20%. This satisfied our concerns.

#### *Shortfall facility*

29. Mr King submitted that *“the effect of the rights issue is unfairly dependent upon the way in which the Underwriter exercises its discretion to allocate (or otherwise) the shortfall”*.
30. The Offer Document stated that the underwriter had discretion to decide whether to issue *“all, none or part”* of any additional shares applied for under the shortfall facility. This is unsatisfactory. The Panel has been critical of shortfall facilities that incorporate such discretion in relation to allocation.<sup>4</sup> We do not accept Altius’ submission that absolute discretion was necessary to *“reconcile any excessive applications”* and to ensure Altius complied with the ASX Listing Rules.
31. On 30 August 2012, Altius announced that:
- (a) the underwriter would only be issued shares after all applications for shortfall shares by existing shareholders had been filled
  - (b) each shareholder applying for shares under the shortfall facility would be allocated their pro-rata share of the shortfall having regard to their shareholdings at the record date and the allocation process would be repeated in rounds until either all of the shortfall has been allocated or all shortfall applications had been satisfied in full
  - (c) no shareholder would be allocated shares under the shortfall facility that would result in the relevant interest of that shareholder and its associates exceeding 20% of the issued share capital of Altius and
  - (d) any unallocated shares remaining after all shortfall facility applications were filled would be allocated by the underwriter to the sub-underwriters.
32. This satisfied our concerns.

#### *Price and renounceability*

33. Mr King submitted that the price of the Rights Issue and absence of disclosure relating to the price were designed to, and will likely, concentrate control of Altius.

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<sup>4</sup> See *Dromana Estate Limited* [2006] ATP 4 at [30]-[32], *Redflex Holdings Limited* [2009] ATP 17 at [28] and *Powerlan Limited* [2010] ATP 2 at [42]-[43]

Mr King also submitted that the fact that the Rights Issue was non-renounceable increased its potential control effect.<sup>5</sup>

34. The announcement by Altius on 25 July 2012, stated that the issue price of 2 cents per share represented a discount of approximately 50% to the last closing price.
35. Both Mr King and Altius agreed that the market price for Altius had deteriorated and the stock was illiquid. Illiquid listed securities may not have a readily accessible price comparison.
36. Altius submitted that “the directors were concerned that the rights issue offer price remain below the market price”, and that it did not seek formal advice on the price but “did confer with the underwriter, the principal of which is a stockbroker with approximately 30 years market experience”.
37. Given the changes made to the structure of the Rights Issue (see paragraphs 28 and 31) we do not think it necessary to consider this issue further.
38. We do not think non-renounceability is a significant factor given a market for the rights is unlikely.<sup>6</sup>

#### *Ineligible shareholders*

39. The Offer Document stated:

*Altius has decided it is unreasonable to extend the Offer to any shareholder with a registered address outside Australia or New Zealand, having regard to:*

- *the small number of shareholders with addresses in such other countries*
- *the number and value of the shares they hold; and*
- *the cost to Altius of complying with applicable legal and regulatory requirements in such countries.*

40. Although Mr King assumed that ineligible foreign shareholders represented 20% of the total share capital of Altius (based on his knowledge of the share register from his involvement in the Altius initial public offering), Altius confirmed that the correct figure was approximately 1.7%<sup>7</sup>, being only five shareholders. We think the control effect of the exclusion of certain overseas shareholders was therefore immaterial.

#### **Need for funds**

41. Under the section headed ‘What is the purpose of the Offer?’, the Offer Document stated:

*Altius is making the Offer to raise funds. After payment of the costs and expenses of the Offer the proceeds from the Rights Issue will be used to provide working capital and to enable*

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<sup>5</sup> See *Guidance Note 17: Rights Issues* at [16]

<sup>6</sup> *Guidance Note 17: Rights Issues* at [18]

<sup>7</sup> At 21 August 2012

*the Company to focus on its Australian mining projects. In particular, the Company intends to use the funds raised to focus on its projects represented by its two mining leases and one exploration permit in Queensland and its 12 exploration licences in NSW, and to enable the Company to identify and pursue further exploration opportunities.*

42. Mr King submitted that the Offer Document included no information concerning the situation of Altius, its financial position or need for funds *“which might act as a balance against a concentration of control or the acquisition of a substantial interest”*.
43. Altius submitted that its letter to shareholders on 14 August 2012 covered these matters. Altius submitted that it currently had only about \$400,000 in accessible cash. While the accounts for Altius disclose a greater amount of cash, Altius submitted that a large amount was *“tied up in or to support security deposits and guarantees”*. Altius submitted that it had *“extensive operating and capital expenditure requirements for the next 12 months under its business plan and under obligations attaching to exploration permits and mining leases”*.
44. Altius also submitted that at this stage in the development of its projects, it did not have access to project finance. The Altius board considered share placements to professional and sophisticated investors and joint venturing of projects but decided the rights issue would be the *“fairest and most efficient”* approach. We note that a placement may have its own control implications.
45. In response, Mr King submitted that Altius had not disclosed its *“true financial position”* to the market and that it was unclear what was meant by *“accessible cash”*. Mr King also submitted that Altius had not adequately disclosed the proposed use of the funds to be raised.
46. Guidance Note 17 states that, in considering a company’s need for funds, the Panel *“is likely to accept the directors’ decision on these issues if the decision appears to be reasonable and supported by rational reasons unless the applicant can point to something that suggests deeper inquiry may be warranted”*.<sup>8</sup> We do not think deeper inquiry is warranted because submissions by Altius demonstrated a need for funds.
47. We were concerned that the market was not fully informed of the financial position of Altius, in particular, its cash position and the reference to *“accessible cash”*, especially given the cash position disclosed in the last quarter. We sought, and Altius provided, further disclosure to shareholders on 30 August 2012 regarding:
  - (a) its need for and proposed use of funds to be raised under the Rights Issue and
  - (b) its current financial position, including the distinction between accessible and non-accessible cash.
48. The further disclosure satisfied our concerns.

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<sup>8</sup> Guidance Note 17: Rights Issues at [7]



49. The closing date of the rights issue was also extended to 5pm (Melbourne time) on Friday, 7 September 2012.

**Association**

50. Mr King submitted that the Rights Issue was likely to “shift control” of Altius to Mr John Zee and Mr Xiao Jing Wang, both of whom were directors of Altius. Mr King submitted that, at the time Mr Zee was appointed to the Altius board, Mr Wang together with his wife Ms Jia Yu held two of the four board seats and under the company constitution Mr Wang, as Chair of the board, held a casting vote. Mr King submitted that Mr Zee had therefore been appointed by a “Wang-controlled board”.
51. Altius submitted that Mr Zee and Mr Wang had advised the company that they were not associates. It submitted that Mr Wang had “*identified two persons who he regarded as skilled professional directors who could add value to the company*”, one of whom was Mr Zee. It submitted that they “*are fellow directors and Mr Zee has from time to time given Mr Wang professional advice as a financial adviser and securities dealer*”. Altius also submitted that “[n]either new director regards himself as a nominee of Mr Wang in the sense that such term is used in shareholders’ agreements or joint venture agreements”.
52. Mr King did not provide any substantive evidence to support his submission that Mr Zee and Mr Wang were associates. Mr King provided the Panel with a signed statement by Mr Joe Fekete (who was a director of Altius for the first 12 days after Mr Zee was appointed as a director) which stated:
- Since Mr Zee’s appointment as a director, I never saw Mr Zee question or disagree with any decision of Mr Wang. In my presence, Mr Zee did not contribute significantly to the board meetings.*
53. We do not think that this was enough to find an association between Mr Zee and Mr Wang.
54. Altius submitted that “*Mr Zee does not regard himself as compliant with any particular person’s views, and has had reasoned debate with all other directors about various decisions to be taken by the board*”. Altius submitted that the tenure of Mr Zee and Mr Fekete on the board overlapped by an “*extremely short period*”.
55. The Panel sought, and Foxfire and Mr Zee each provided, a statutory declaration to the effect that they are not associates of Mr Wang or any sub-underwriter.
56. The Panel sought, and Mr Wang provided, a statutory declaration to the effect that he is not an associate of Mr Zee, Foxfire or any sub-underwriter.

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57. We do not think that there is “*a sufficient body of evidence of association*”<sup>9</sup> between Mr Wang and Mr Zee or evidence of any relationship between them which would suggest an association. Based on this, we decided not to pursue this issue further.

#### DECISION

58. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

#### Orders

59. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

**Guy Alexander**

**President of the sitting Panel**

**Decision dated 31 August 2012**

**Reasons published 11 September 2012**

#### Advisers

<b>Party</b>	<b>Advisers</b>
Alexander King	Addisons Lawyers
Altius Mining Limited	HWL Ebsworth Lawyers

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<sup>9</sup> *Mount Gibson Iron Limited* [2008] ATP 4 at [15]