



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Celamin Holdings NL  
[2014] ATP 22**

*Rights issue – association – effect on control – sub-underwriting – efficient, competitive and informed market – dispersion strategy – disclosure – need for funds – shortfall shares – standing - decline to make a declaration*  
*Corporations Act 2001 (Cth), sections 602, 606, 611, 657A*  
*Guidance Note 17: Rights issues; Guidance Note 19: Insider participation in control transactions*  
*ASIC RG 6 – Takeovers: exceptions to the general prohibition*  
*Altius Mining Limited [2012] ATP 17, Crescent Gold Ltd 02 [2011] ATP 14, Powerlan Limited [2010] ATP 2, Redflex Holdings Limited [2009] ATP 17, Dromana Estate Limited [2006] ATP 4, National Foods Limited 01 [2005] ATP 8*

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

**INTRODUCTION**

1. The Panel, Ewen Crouch AM (sitting President), Ian Jackman SC and Anthony Sweetman declined to make a declaration of unacceptable circumstances in relation to the affairs of Celamin Holdings NL. The application concerned whether a 15 for 4 renounceable rights issue partially sub-underwritten by two substantial shareholders would have an unacceptable control effect. The Panel decided not to make a declaration in light of Celamin amending aspects of the rights issue and making additional disclosure.

2. In these reasons, the following definitions apply.

- African Lion** African Lion 3 Limited
- Applicants** Psons and David Regan
- Avery** Avery International Limited
- Bourse** Bourse Securities Pty Ltd and Exelmont Pty Ltd (both Celamin shareholders)
- Celamin** Celamin Holdings NL
- Patersons** Patersons Securities Limited
- Polo** Polo Resources Limited
- Psons** Psons Limited, a Hong-Kong based company
- rights issue** renounceable 15 for 4 rights issue at an issue price of \$0.01 per share announced on 4 November 2014 by Celamin to raise up to approximately \$8.8 million

## FACTS

3. Celamin is an ASX listed company (ASX code: CNL). It carries on the business of exploration and development of resource projects in North Africa including a joint-venture in Tunisia.
4. On 3 November 2014, after discussions between Psons and Celamin, Psons put a proposal to Celamin which involved a placement to Psons for 19.99% of Celamin at 3.5 cents per share as well as a loan and further equity funding (subject to shareholder approval) totalling up to \$8 million.
5. On 4 November 2014, Celamin announced the rights issue. It was partially underwritten by Patersons, a professional underwriter, up to \$7.575 million.
6. On 5 November 2014, Psons' proposal was rejected by Celamin.
7. Polo holds 12.73% of Celamin.
8. African Lion holds 12.11% of Celamin.
9. Polo and African Lion committed to taking up their entitlements under the rights issue and agreed to act as priority sub-underwriters up to \$3 million each.
10. Celamin's Chairman, Mr Martin Broome, and its Managing Director, Mr Nic Clift, also agreed to act as priority sub-underwriters up to \$100,000 each. Mr Broome and Mr Clift do not hold Celamin shares.
11. Collectively, the priority sub-underwriters committed to contributing \$6.2 million towards the rights issue.
12. Under the terms of the sub-underwriting arrangements made by Patersons, priority sub-underwriters will have their commitments filled in priority to general sub-underwriters. An additional amount of approximately \$1.375 million has been sub-underwritten by clients of Patersons as general sub-underwriters.
13. All sub-underwriters are entitled to receive a fee plus one option (exercisable at 2 cents per share and expiring in February 2016) for every two shares sub-underwritten.
14. The offer document for the rights issue disclosed that, if approval for the issue of sub-underwriter options was not granted, Celamin was required to make an equivalent cash payment to the value of the options.
15. The offer document also disclosed that, on a fully diluted basis taking into account the full exercise of all sub-underwriter options, if no shareholders took up their entitlements, Polo could increase its holding to 34.98% and African Lion to 34.88%.
16. The rights issue included a separate offer to existing shareholders and non-shareholders to participate in any shortfall. The offer document stated that the directors did not intend to accept shortfall applications from any sub-underwriters. It also disclosed that allocation of shortfall would be "*determined in the sole and complete discretion of the Directors and the Underwriter*".

## APPLICATION

17. By application dated 7 November 2014, Psons sought a declaration of unacceptable circumstances. Psons submitted that:
- (a) The directors and underwriter retained sole and complete discretion as to the placement of shortfall shares and applicants were not guaranteed to receive shares under the shortfall facility.
  - (b) The priority sub-underwriting arrangements would result in the priority sub-underwriters' commitments being unnecessarily filled in priority to other sub-underwriters, making the acquisition of control by them highly likely.
  - (c) The rights issue did not satisfy the requirements of item 10 of s611.<sup>1</sup>
  - (d) The Chairman and Managing Director approved the rights issue, which constituted unacceptable insider participation in a control transaction. As well, Celamin did not disclose to its shareholders the proposal from Psons to invest at 3.5 cents per share.
  - (e) Celamin had an agreement with each of African Lion and Polo under which they were entitled to appoint nominee directors. These were relevant agreements within the meaning of s12(2)(b), with the effect that Celamin was an associate of each of African Lion and Polo and had voting power in its own shares of 24.84%.
18. Psons submitted that the effect of the circumstances was that:
- (a) the priority sub-underwriters could result in their collective voting power increasing from 24.8% to over 71%
  - (b) the acquisition of control by the sub-underwriters would occur in a market that was not efficient, competitive and informed
  - (c) shareholders had not been given a reasonable and equal opportunity to participate in benefits of the rights issue and
  - (d) there would be a breach of s606 if shares were issued to Polo or African Lion because Celamin's voting power would increase without the benefit of a s611 exemption.

### Interim orders sought

19. Psons sought interim orders to the effect that rights trading be halted and that the opening and closing dates of the offer be delayed.
20. The President declined to make interim orders. She considered that halting rights trading was problematic because it had commenced before the application was made and there had already been one trade.
21. On 14 November 2014, Celamin announced that it had extended the closing date of the offer and rights trading. This provided us with time to consider the application without needing to make any interim order.

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<sup>1</sup> All references are to the *Corporations Act 2001* (Cth)

**Final orders sought**

22. Psons sought final orders to the effect that the rights issue not proceed. Alternatively, Psons sought an order that it not proceed with related party sub-underwriters or without shareholder approval (with the proposed sub-underwriters excluded from voting).

**DISCUSSION**

**Preliminary submissions**

23. Mr David Regan, a non-executive director of Celamin and Celamin's largest shareholder, made preliminary submissions (among others) to the effect that:
- (a) he supported Psons' application
  - (b) the rights issue was problematic for a number of other reasons including 'lock-outs' of alternative offers and 'highly problematic' indemnities for sub-underwriters and
  - (c) there were undisclosed associations between certain Celamin shareholders.
24. Celamin also made preliminary submissions (among others) to the effect that:
- (a) Psons had no legitimate interest in the affairs of Celamin and that Psons' approach was incomplete and subject to further negotiation
  - (b) Celamin was not an associate of either Polo or African Lion
  - (c) the rights issue satisfied all of the elements of item 10 of s611 and
  - (d) Celamin was in need of funds and the structure of the rights issue had been agreed after considering a number of options and advice from its professional advisers.

**Standing**

25. We queried whether Psons had standing to bring the application. It does not hold Celamin shares and its proposal to put capital into Celamin was rejected by the board.
26. In a preliminary submission Celamin submitted that Psons had no legitimate interest in the affairs of Celamin and the circumstances of the rights issue. It submitted that the approach from Psons was incomplete and subject to further negotiation.
27. We note s657C(2)(d) and how widely that provision and similar provisions have been interpreted. We note also that the proposal was neither a proposed takeover bid nor a scheme of arrangement, each of which would have required a decision of shareholders as to whether it should be accepted.<sup>2</sup> On the other hand, the proposal potentially involved an item 7 of s611 approval, at least for its full implementation.
28. In light of this issue, and Mr Regan being a Celamin director and shareholder who supported the application, we asked if he wished to join Psons as a co-applicant. Mr Regan agreed and adopted all aspects of Psons' application.

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<sup>2</sup> In the case of a scheme, if first agreed by the board

29. Although we did not think that Psons had standing, we did not need to make a decision, as this resolved the standing issue for our purposes.

**Rights issue**

*Item 10 of s611*

30. Psons submitted that the rights issue did not satisfy the requirements of item 10 of s611. Among other things, it submitted that:
- (a) certain shareholders in foreign jurisdictions were excluded from the rights issue offer and ASIC had not yet approved Patersons as nominee under s615 for the purposes of compliance with item 10 of s611 and
  - (b) the terms of the offers made to shareholders were not all the same because (among other things) sub-underwriters and foreign shareholders could not participate in the shortfall facility.
31. Celamin submitted that there were two separate offers being made - the pro-rata renounceable rights issue offer and the shortfall offer. Celamin submitted that it had not contended that acquisitions under the shortfall offer were exempt under item 10 of s611. Celamin also submitted that it did not intend to issue any new shares to any sub-underwriter which would result in a breach of s606.
32. ASIC submitted that it would not approve Patersons while the matter was before the Panel.<sup>3</sup>
33. Celamin proposed opening up the rights issue offer to the non-participating foreign-based shareholders in order to comply with item 10 of s611 and, on 2 December 2014, Celamin made an ASX announcement that it was opening its offer to non-participating foreign-based shareholders. It took the view that this meant that the rights issue satisfied item 10 of s611.
34. Certainly without ASIC approval of Patersons as nominee or without complying offers being made to foreign shareholders in overseas jurisdictions, Celamin's rights issue would not appear to satisfy the conditions of item 10 of s611. But beyond that, we make no comment on compliance with item 10. The general law protects shareholders under the rights issue. Therefore (unless the priority sub-underwriters are able to utilise item 10, or another, s611 exemption) Polo and African Lion will not be able to increase their respective shareholdings above 20% as a result of the rights issue.

*Structure of the rights issue*

35. Guidance Note 17 makes it clear that, in considering whether unacceptable circumstances exist, the Panel looks at the effect of the rights issue against the principles in s602 and considers a range of factors including the company's situation, the structure of the rights issue and its effect.<sup>4</sup>

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<sup>3</sup> Celamin submitted that these proceedings were the appropriate forum for all parties (including ASIC) to raise any concerns with the structure of the rights issue but we do not need to take this further

<sup>4</sup> Guidance Note 17: Rights issues at [6]

36. Celamin submitted that it had taken all reasonable steps to structure the rights issue to ensure that its benefits were genuinely accessible to shareholders and that the potential control effect of the rights issue did not exceed what was reasonably necessary for the fundraising purpose. Celamin submitted that it had addressed factors identified in Guidance Note 17 and past Panel decisions as follows:
- (a) Celamin had considered alternative funding options and sought advice from professional advisers.
  - (b) The rights issue was underwritten by Patersons, a professional and independent underwriter. The offer was sub-underwritten by numerous sub-underwriters not all of which were related parties or existing shareholders.
  - (c) The offer was '*attractively priced*' at a discount to the market price.
  - (d) The offer was renounceable.
  - (e) The ratio was set in order to achieve the level of capital raising necessary to meet Celamin's immediate financial requirements.
  - (f) Celamin had a genuine need for funds and had disclosed this in the offer document.
  - (g) The potential control scenarios and the identities of the priority sub-underwriters had been disclosed in the offer document.
37. Subject to our comments below regarding sub-underwriting and the dispersion strategy, we are generally satisfied that Celamin has structured the rights issue to address many of the factors identified in Guidance Note 17. We accept that Celamin appears to have a genuine need for funds.

*Priority sub-underwriting arrangements*

38. Psons submitted that the priority sub-underwriting arrangements unnecessarily and unfairly made the acquisition of control by the priority sub-underwriters highly likely.
39. Celamin submitted that the priority sub-underwriting arrangements had been proposed and negotiated by Patersons. We asked Celamin for further information from Patersons about these arrangements. Patersons advised that the structure was "*not without precedent and [was] necessary for the Company to secure support in the current calamitous resources market*". Patersons also advised that, because Polo and African Lion had agreed to act as priority sub-underwriters, the rights issue was more appealing to other potential sub-underwriters. This was because it was more likely that their commitments would be partially relieved. Lastly, Patersons stated that all sub-underwriters had been invited to the 'priority' or 'general' stream but aside from Polo, African Lion, Mr Broome and Mr Clift, no other sub-underwriters elected to become a 'priority' sub-underwriter.
40. Celamin submitted that, without the priority structure, it was uncertain whether the general sub-underwriters would be willing to continue to provide their sub-underwriting support. It submitted that this would exacerbate the potential control impact of the rights issue because there would potentially be unplaced shortfall which would otherwise have been allocated to general sub-underwriters. It also

submitted that the priority structure had resulted in a guaranteed additional \$1,375,000 being available.

41. We think the priority and general sub-underwriting arrangement is unusual. However, in the circumstances, we are satisfied that the structure and arrangements were proposed by Patersons as professional, independent broker and they do not, of themselves, constitute unacceptable circumstances. Whether that would be the case in every set of circumstances we cannot say.

*Sub-underwriter options*

42. As sub-underwriters, Polo and African Lion (and the other sub-underwriters) were entitled to fees (including options) in respect of their sub-underwritten shares, including shares taken up as part of their own entitlements. We think that shareholder sub-underwriters receiving a fee for the portion relating to their own entitlements is problematic because they are essentially assuming no risk. It may also constitute financial assistance. It is not a development we would want to see become the norm because of the risk of abuse. However, because Polo and African Lion's sub-underwriting extended to each providing over \$1.8 million additional funding more than their own entitlements, we decided on balance not to declare this unacceptable.
43. We were also concerned that it appeared Celamin would have to make an equivalent cash payment to the value of the sub-underwriter options if shareholder approval was withheld for the conversion of the options. In our view, this would potentially have a coercive effect on shareholders in deciding whether to give approval.
44. Celamin confirmed that shareholder approval for conversion of the sub-underwriter options under item 7 of s611 would be separate to, and not interdependent on, shareholder approval under ASX Listing Rule 7.1 for the issue of those options.
45. We consider that disclosure regarding shareholder approval for the issue and conversion of sub-underwriter options is inadequate and the consequences of withholding approval are unclear.
46. We required Celamin make supplementary disclosure clarifying that:
- (a) there would be separate resolutions seeking approval for the issue of the options under ASX Listing Rule 7.1 and for their conversion under item 7 of s611
  - (b) the resolutions would not be interdependent and
  - (c) if shareholders withheld their approval under item 7 of s611, Celamin would not be required to make an equivalent cash payment to the sub-underwriters and the holders of the options would need to rely on other s611 exemptions to convert their options.
47. Celamin did so on 3 December 2014 via an ASX announcement.

*Dispersion strategy*

48. Psons submitted that elements of the rights issue (including Celamin's dispersion strategy) gave the appearance of having regard to the factors in Guidance Note 17

and ASIC RG 6 but the rights issue was designed to deliver control to the priority sub-underwriters. The offer document did not set out any factors to be taken into account by directors in exercising their discretion to issue shares under the shortfall offer and there was no guarantee that any application under the shortfall offer would be successful.

49. The Panel has expressed the view that an unfettered discretion to allocate shortfall shares gives rise to concern.<sup>5</sup> While a general discretion may be required for listing rule purposes, there can, and should, be disclosure of the manner in which directors propose to exercise that discretion.
50. On 26 November 2014, Celamin made an ASX announcement that it proposed allocating shortfall shares on the following basis:
  - (a) first, to shareholders that had subscribed for their full entitlement, pro-rata to their relative holdings, in successive rounds to satisfy the full amount of their applications and
  - (b) second, to external applicants, pro-rata to the amount of their applications, in successive rounds.

It added that the allocation would be subject to each applicant's voting power not breaching s606 and no single applicant becoming the largest shareholder.

51. This disclosure was generally adequate. However, we could see no reason (and none was advanced) why the directors should seek to prevent a single applicant becoming the largest shareholder in Celamin if the allocation of shares to an applicant would not result in a breach of s606.
52. We required that Celamin make supplementary disclosure clarifying that, in exercising their discretion to allocate shortfall shares, directors would not prevent a single applicant becoming the largest shareholder in Celamin if allowed by law.
53. Celamin made a further ASX announcement on 3 December 2014 complying with our requirement.

*Disclosure of shareholder dilution under various scenarios*

54. The offer document for the rights issue contained a table setting out the control effect on shareholders under various take-up scenarios. It noted that this was done on a fully diluted basis taking into account the full exercise of all sub-underwriter options and that exercise of sub-underwriter options was subject to s606.
55. The submissions of Mr Regan and Bourse emphasised that, even if shareholders took up 100% of their entitlements, they would still be diluted. In their respective views, this made the rights issue unattractive to Celamin shareholders. We think that the disclosure in the offer document of the dilution under various scenarios has caused confusion among at least some Celamin shareholders; they do not appear to be aware that each of Polo and African Lion need to rely on a s611 exemption to exercise their sub-underwriter options if their respective holdings would increase above 20%.

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<sup>5</sup> *Dromana Estate Limited* [2006] ATP 4 at [30]-[32], *Redflex Holdings Limited* [2009] ATP 17 at [28], *Powerlan Limited* [2010] ATP 2 at [42]-[43], *Altius Mining Limited* [2012] ATP 17 at [30]



56. We required Celamin to make supplementary disclosure clarifying the circumstances in which a shareholder will be diluted. We required disclosure that if a shareholder took up 100% of its entitlements under the rights issue, its shareholding would be the same immediately after the rights issue and further, that while the exercise of the sub-underwriter options would cause dilution of shareholdings, a party would need to seek item 7 of s611 approval to convert their options if they would go above 20% (other than by creep).
57. Celamin made a further ASX announcement on 3 December 2014. It set out a table showing the various take-up scenarios assuming there would be no shortfall and not taking into account conversion of sub-underwriter options. The announcement also explained that an option holder would need to rely on an exemption in s611 to exercise its options if that would otherwise result in a breach of s606.

### ASSOCIATION

#### *Association between Celamin and African Lion and Polo*

58. Psons submitted that Celamin was an associate of both African Lion and Polo because it had a ‘relevant agreement’ within the meaning of s12(2)(b) with each of them in relation to board appointment rights. The effect of this was that Celamin had voting power in its own shares of approximately 24.84%. Psons submitted that, because the rights issue did not comply with item 10 of s611, any increase in Celamin’s voting power as a result of African Lion or Polo increasing their holding would be a breach of s606.
59. ASIC submitted that the respective agreements between Celamin and African Lion and Polo appeared to be relevant agreements for the purpose of controlling or influencing the composition of the Celamin board.
60. Agreements relating to board appointment rights can give rise to an association. In some instances the principle in *National Foods*,<sup>6</sup> when the Panel said that s12(2)(b) should not be read unduly widely as many agreements would be caught within the policy of the association provisions where they should not ordinarily be treated as such, may apply. We do not need to decide into which category these agreements fall in this case. The agreements (eg, as to funding), under which the company agreed to appoint board members to represent the major shareholders were not, in our view, central to the issue before us. Rather the question of association was raised to assert a technical application of the voting power provisions that in turn was argued to have an impact on the underwriting. We were not persuaded that this would likely lead to unacceptable circumstances.

#### *Association between Celamin shareholders*

61. Mr Regan initially submitted that Polo and Avery, a Celamin shareholder with approximately 14.12%, were undisclosed associates. He later submitted that African Lion was also an associate of Polo and Avery. Psons subsequently adopted the submissions.

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<sup>6</sup> *National Foods Limited 01* [2005] ATP 8 at [58]. See also *Crescent Gold Ltd 02* [2011] ATP 14 at [39]

62. Mr Regan provided a copy of general legal advice from McCullough Robertson dated March 2014 regarding potential associations between major shareholders of Celamin including Avery and Polo. Mr Regan also submitted a structure diagram outlining alleged relationships between various persons and entities including African Lion, Polo and Avery.
63. African Lion denied being associated with Polo and Avery. It submitted that it had not communicated with Polo during the Psons negotiations with Celamin and it had never had any communication with Avery. Polo and Avery did not become parties to our proceedings and made no submissions regarding any alleged associations.
64. After considering the available evidence, we do not think we need to make further inquiries regarding this issue.

### OTHER MATTERS

#### *Disclosure of Psons' offer*

65. Psons submitted that Celamin had not disclosed to the market that an arms' length party regarded 3.5 cents as an appropriate value for Celamin shares. It submitted that this was material market valuation information that was directly relevant to rights trading and a shareholder's decision to take up their entitlements.
66. Celamin did make some disclosure to the market about the Psons proposal although it did not initially identify Psons and did not disclose the proposed subscription price.
67. The decision to accept or reject Psons' proposal was a matter for the Celamin board and was not required to be put to shareholders for approval.
68. It is for the board of Celamin to determine whether to disclose the proposal, in accordance with its continuous disclosure obligations. In the circumstances it was not a necessary disclosure for the purposes of the rights issue. Or Psons could have made it known if it wanted.

#### *Insider participation, directors' duties and compliance with Chapter 2E*

69. Psons submitted that the participation of Messrs Broome and Clift in the board decisions to approve the rights issue constituted unacceptable insider participation in a control transaction.
70. ASIC submitted that the sub-underwriting agreements appeared to constitute the giving of a financial benefit to Messrs Broome and Clift and needed to comply with Chapter 2E. ASIC acknowledged that it was not the Panel's role to enforce Chapter 2E although expressed the view that the question was a relevant factor for the Panel to consider in determining whether the structure of the rights issue was unacceptable.
71. The Panel has expressed the view that its primary concern is to determine whether unacceptable circumstances exist in the context of a control transaction, not to determine whether there has been a breach of directors' duties or other obligations

under the law.<sup>7</sup> In the absence of an unacceptable control effect or substantial benefit accruing to the two directors as a result of the rights issue, we make no comment on these issues. We note that these issues can be pursued in another forum.

## DECISION

72. We were minded to make a declaration of unacceptable circumstances in relation to the affairs of Celamin but indicated that we would not do so if Celamin agreed to make further disclosure in relation to its rights issue.
73. For the reasons above, and given the additional disclosure Celamin has made, we have 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

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

**Ewen Crouch AM**  
**President of the sitting Panel**  
**Decision dated 3 December 2014**  
**Reasons published 12 December 2014**

## Advisers

Party	Advisers
African Lion	N/A
Bourse Securities Pty Ltd and Exelmont Pty Ltd	N/A
Celamin	Hunt & Humphry
Psons	HWL Ebsworth
David Regan	N/A

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<sup>7</sup> Guidance Note 19: Insider participation in control transactions at [5]