



Australian Government

Takeovers Panel

**Reasons for Decision
Celamin Holdings NL 01R
[2014] ATP 23**

Catchwords:

Review – decline to conduct proceedings – standing – association – no error by initial Panel

Corporations Act 2001 (Cth), sections 208, 611, 657C, 657EA

Celamin Holdings NL 01 [2014] ATP 22, Mount Gibson Iron Limited [2008] ATP 4

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

INTRODUCTION

1. The review Panel, Geoff Brunson, David Friedlander and Heather Zampatti (sitting President), declined to conduct proceedings on a review application by Psons Limited in relation to the affairs of Celamin Holdings NL. The review application submitted that there were issues that the initial Panel had not adequately considered. The review Panel considered there was no reasonable prospect that it would come to a different conclusion to the initial Panel and declined to conduct proceedings.
2. In these reasons, the following definitions apply.

African Lion	African Lion 3 Limited
Celamin	Celamin Holdings NL
Polo	Polo Resources Limited
Psons	Psons Limited
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. The facts are set out in *Celamin Holdings NL 01*.¹ In brief:
 - (a) On 4 November 2014, Celamin announced the rights issue.
 - (b) Two of Celamin's largest shareholders – Polo and African Lion – and two of Celamin's directors agreed to act as sub-underwriters in an arrangement which filled their commitment in priority to other sub-underwriters.
 - (c) All sub-underwriters were entitled to receive a fee and one option for every two shares sub-underwritten, or a cash equivalent if shareholders did not approve the issue of the options.

¹ *Celamin Holdings NL 01 [2014] ATP 22*

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- (d) Celamin also offered a shortfall facility to existing shareholders and external 'sophisticated investor' applicants. Its directors reserved full discretion to allocate shortfall shares.
- (e) If no other shareholders took up their entitlements and there were no shortfall applications:
 - (i) Polo could increase its shareholding from approximately 12.73% to approximately 34.98%² and
 - (ii) African Lion could increase its shareholding from approximately 12.11% to approximately 34.88%.³
- 4. Although the initial Panel was minded to make a declaration of unacceptable circumstances, Celamin agreed to make further disclosure regarding the rights issue and this sufficiently resolved the initial Panel's issues.
- 5. Thus, on 3 December 2014, in accordance with the initial Panel's requirements, Celamin made an ASX announcement providing supplementary disclosure about the rights issue including:
 - (a) the way directors would exercise their discretion to allocate shortfall shares
 - (b) the fact that approval for conversion of the sub-underwriter options would be sought under item 7 of s611⁴ (if required) independently of listing rule approval for the issue of the options and no cash equivalent would be payable if shareholders withheld item 7 approval and
 - (c) the scenarios under which a shareholder would be diluted under the rights issue without the exercise of sub-underwriter options.
- 6. In light of this, the initial Panel declined to make a declaration of unacceptable circumstances.

APPLICATION

- 7. By application dated 5 December 2014, Psons sought a review of the initial Panel's decision. The President consented to the review.
- 8. Psons made submissions to the effect that not all issues raised in the initial application had been addressed by the Panel.⁵ Those issues included:
 - (a) insufficient continuous disclosure by Celamin, including of Psons' offer
 - (b) insider participation in a control transaction by the Celamin director sub-underwriters who voted to effect the rights issue

² This also assumed that Polo fully exercised its sub-underwriter options. On 15 December 2014, Polo lodged a notice of change of interests of substantial holder stating that it had increased its holding in Celamin to approximately 30.00%

³ This also assumed that African Lion fully exercised its sub-underwriter options. On 15 December 2014, African Lion lodged a notice of change of interests of substantial holder stating that it had increased its holding in Celamin to approximately 28.54%

⁴ All references are to the *Corporations Act 2001* (Cth)

⁵ The initial Panel's reasons had not been published at the time Psons made its review application

- (c) breach of s208 by the Celamin director sub-underwriters. Psons also submitted that this issue was raised by ASIC
 - (d) conflicts of interest and breaches of fiduciary duties
 - (e) indemnities and benefits given to sub-underwriters by Celamin directly
 - (f) a request by Mr Regan to refer alleged associations between three of Celamin’s major shareholders to ASIC and
 - (g) alleged board conduct not undertaken in good faith.
9. Psons also submitted that the Panel should address ASIC’s other concerns about the rights issue such as its broader structure and extension to foreign shareholders.
10. Lastly, Psons submitted that changes to the rights issue now resulted in breaches of the ASX Listing Rules.
11. Psons’ initial application sought final orders including that the rights issue not proceed. In its review application Psons sought an interim order preventing the allotment of shares to the priority sub-underwriters. As we have declined to conduct proceedings we make no orders.

DISCUSSION

Standing

12. Celamin made a preliminary submission to the effect that Psons had no standing to make the initial application and therefore no standing to make a review application.
13. The test for standing under s657C(2) is that a *‘person whose interests are affected by the relevant circumstances’* can make an application to the Panel. The initial Panel did not think that Psons had standing to bring the initial application but did not need to finally decide the point because a co-applicant did have standing.⁶
14. The test for standing to bring a review application under s657EA is different. That section allows *‘a party to the proceedings in which the decision was made’* to apply for review of a Panel decision.
15. Psons was a party to the proceedings in *Celamin 01*. Therefore, in our view, it has standing to bring the review application. It might be considered curious that the tests are different, but we think this was intended to accommodate a person, for example, who became a party to the initial proceeding because of the potential for orders to affect them. That person should be able to seek a review.

Review application

Initial Panel’s reasons

16. Celamin made a preliminary submission to the effect that the reason the initial Panel apparently did not address some of the issues raised by Psons was that the initial application raised several irrelevant matters and was *‘largely ill conceived’*.

⁶ *Celamin Holdings NL 01* [2014] ATP 22 at [29]

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17. In our view, the initial Panel's reasons addressed the substantive issues raised by the initial application, including issues referred to by Psons in its review application. The reasons explained the initial Panel's decision to decline to make a declaration of unacceptable circumstances in some detail.
18. We consider that, if we were to conduct proceedings, it is unlikely we would come to a different view to that of the initial Panel. We have no indication that reopening the rights issue would result in any different outcome, and this is one basis on which we decline to conduct proceedings. Psons was able to apply for shortfall shares up to 19.9% of Celamin. This could have reduced any control effect from the rights issue and reduced the maximum potential shareholdings of Polo and African Lion to approximately 25% each (or less without the exercise of their sub-underwriter options). Absent an association between Polo and African Lion (discussed below) this approximates an equalisation of the respective holdings. Psons has not applied for any shortfall shares.

Sub-underwriter fees and options

19. We share the initial Panel's concerns regarding the shareholder sub-underwriters receiving a fee and options for the sub-underwritten portion relating to their own entitlements. This arrangement may not treat Celamin shareholders equally because the fee and options may result in the sub-underwriters effectively paying less than other shareholders for taking up their entitlements.
20. We agree with the initial Panel's articulation of the reasons why this sub-underwriting model has problems,⁷ but we accept the difficulty for small-cap companies in the mining and resources sector to raise capital in current market conditions and the importance of the capital raising by this company.

Association

21. In submissions to the initial Panel brief, Psons raised as a possibility that the priority sub-underwriters were acting in concert. However, the material provided did not demonstrate a "*sufficient body of evidence of association*"⁸ to warrant further inquiries.
22. Psons' review application stated that it would seek to provide more information going to the question of whether the priority sub-underwriters were acting in concert, however no further material was provided to us.
23. We consider there is insufficient material to warrant conducting proceedings on this issue.
24. We agree with the initial Panel's reasons⁹ in relation to the other alleged association between Celamin and Polo and African Lion under s12(2)(b) (by reason of Celamin's agreements with Polo and African Lion to make board appointments).

⁷ *Celamin Holdings NL 01* [2014] ATP 22 at [42]

⁸ *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

⁹ *Celamin Holdings NL 01* [2014] ATP 22 at [60]

Absence of suitable remedy

25. The rights issue closed on 10 December 2014. Even though there are aspects of this rights issue that are less than ideal, we agree with the initial Panel that Celamin appears to have a genuine need for funds.¹⁰ Any delay in the allotment of shares could jeopardise the underwriting and sub-underwriting arrangements and, consequently, Celamin’s financial position. At this stage in the process, it is difficult to see what suitable orders we could make to remedy any unacceptable circumstances, and this is another basis on which we decline to conduct proceedings.

DECISION

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

Orders

28. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any orders.

Heather Zampatti
President of the review Panel
Decision dated 12 December 2014
Reasons published 19 December 2014

Advisers

Party	Advisers
African Lion	N/A
Celamin	Hunt & Humphry
Psons	HWL Ebsworth
David Regan	N/A

¹⁰ *Celamin Holdings NL 01* [2014] ATP 22 at [37]