Australian Government

Takeovers Panel

Reasons for Decision
Energy Resources of Australia Limited 02R
[2020] ATP 3

Catchwords:

Declaration – variation of orders – rights issue – underwriting – compulsory acquisition – disclosure – dispersion strategy – equal opportunity – lock-up device – need for funds – section 602 principles – unfair prejudice

Corporations Act 2001 (Cth), sections 602, 611, 657A, 657D, 657EA, 664A, 664F, 667C, Part 6A.2

Atomic Energy Act 1953 (Cth), section 41

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Glencore International AG v Takeovers Panel [2006] FCA 274, ASIC v Yandal Gold (1999) 32 ACSR 317

Guidance Note 17: Rights Issues, Guidance Note 19: Insider Participation in Control Transactions

Energy Resources of Australia Limited [2019] ATP 25, Benjamin Hornigold Limited 08R, 10R & 11R [2019] ATP 22, Warrnambool Cheese and Butter Factory Company Holdings Limited 02 [2016] ATP 11, Mildura Co-operative Fruit Company Limited [2004] ATP 5, AMP Shopping Centre Trust 02 [2003] ATP 24, Pivot Nutrition Pty Ltd [1997] ATP 1

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

INTRODUCTION

1. The review Panel, Jeremy Leibler, Bruce McLennan and Karen Phin (sitting President), affirmed the initial Panel's decision to make a declaration of unacceptable circumstances in relation to the affairs of Energy Resources of Australia Limited[1] and varied the initial Panel's final orders. The review Panel was satisfied that orders prohibiting Rio Tinto from compulsorily acquiring shares in ERA as a consequence of ERA's entitlement offer would be unfairly prejudicial to Rio Tinto and removed those orders. The review Panel considered it was appropriate to require Rio Tinto to form intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares (as a result of the Entitlement Offer and Underwriting Agreement) and for ERA to provide further disclosure of Rio Tinto's intentions to its shareholders.

2. In these reasons, the following definitions apply.

APR	the "*Annual Plan of Rehabilitation*" required under the Government Agreement
Committee	has the meaning given in paragraph 12

[1] *Energy Resources of Australia Limited* [2019] ATP 25. All references to the initial Panel are to the Panel in *Energy Resources of Australia Limited*

Credit Facility	the $100 million loan agreement dated 29 April 2016 between ERA and the Underwriter
Entitlement Offer	ERA's renounceable entitlement offer as detailed in the Entitlement Offer Information Booklet
Entitlement Offer Information Booklet	ERA's entitlement offer information booklet dated 15 November 2019
ERA	Energy Resources of Australia Limited
ERA's Managing Director	ERA's Chief Executive Officer and Managing Director, Mr Paul Arnold
Government Agreement	the Ranger Uranium Project – Government Agreement dated 12 September 1980 between ERA and the Commonwealth Government as amended and restated
Jabiluka	the Jabiluka uranium deposit or, if the context requires, the Jabiluka Mineral Lease
Jabiluka Mineral Lease	the mineral lease in respect of the Jabiluka uranium deposit
LTCMA	the Jabiluka Long Term Care and Maintenance Agreement dated 25 February 2005 between ERA, the Northern Land Council and the Mirrar Traditional Owners
Orders 8 and 9	Orders 8 and 9 of the initial Panel's orders
Peko-Wallsend	Peko-Wallsend Pty Limited
Ranger	the Ranger uranium mine
Ranger Authority	has the meaning given in paragraph 7
Ranger Project Area	the area described as such in paragraph 5
Rio Tinto	Rio Tinto Limited and Rio Tinto Plc
Rio Tinto Parties	Rio Tinto, Peko-Wallsend and the Underwriter
Underwriter	North Limited
Underwriting Agreement	the underwriting agreement dated 15 November 2019 between ERA and the Underwriter
Zentree	Zentree Investments Limited

FACTS

3. The facts are complex and are set out in detail in *Energy Resources of Australia Limited*. Below is a summary.

4. ERA is an ASX listed uranium mining and production company (ASX code: ERA).

5. ERA operates Ranger, Australia's longest continually operating uranium mine. Ranger's operational infrastructure lies within the 79 square kilometre Ranger Project Area (**Ranger Project Area**), which is located eight kilometres east of Jabiru and 260 kilometres east of Darwin in the Northern Territory of Australia.

6. ERA also holds title to the Jabiluka Mineral Lease. The Ranger Project Area and the Jabiluka Mineral Lease are located on Aboriginal land and are surrounded by, but separate from, the World Heritage-listed Kakadu National Park. In February 2005, ERA entered into the LTCMA, which obliges ERA (and its successors) to secure the consent of the Mirrar Traditional Owners prior to any future mining development of uranium deposits at Jabiluka.

7. ERA's operations on the Ranger Project Area are undertaken pursuant to an authorisation granted under s41 of the *Atomic Energy Act 1953* (Cth) (the **Ranger Authority**). The Government Agreement also affects these operations. ERA is currently processing stockpiled uranium ore following the completion of open cut mining at Ranger in 2012.

8. Under the Ranger Authority, ERA must cease processing uranium ore at Ranger by January 2021 and complete all decommissioning and rehabilitation works by January 2026.[2] ERA is required under the Government Agreement to prepare and submit to the Commonwealth Government an APR annually. Once accepted by the Commonwealth, the APR is then independently assessed and costed and an amount to be provided by ERA by way of security for ERA's rehabilitation obligations is then determined.[3]

9. Rio Tinto has voting power in ERA of approximately 68.39% through two wholly owned subsidiaries, the Underwriter and Peko-Wallsend. On 29 April 2016, ERA announced to the ASX that it had entered into the Credit Facility with the Underwriter, under which loans of up to $100 million can be made available to ERA in support of its Ranger Project Area rehabilitation obligations, should additional funding ultimately be required (subject to conditions precedent, see paragraph 16 of the initial Panel's reasons).

10. On 11 January 2018, ERA announced to the ASX by way of a quarterly operations review that a closure feasibility study in respect of the Ranger Project Area commenced during the period October 2017 – December 2017.

11. Between October 2018 and August 2019, Rio Tinto received advice from its financial adviser in relation to possible transactions with ERA (see paragraphs 18 and 58 of the initial Panel's reasons). On 5 December 2018, Rio Tinto provided ERA with what it described in its board minutes as a 'comfort letter', which stated that Rio Tinto intended to continue engaging with ERA to develop a formal commitment to ERA to ensure ERA can meet its commitments which may include supporting a rights issue to raise sufficient funds to meet ERA's rehabilitation obligations or the acquisition of

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[2] The Ranger Project Area also contains the Ranger 3 Deeps uranium oxide ore body, see paragraph 8 of the initial Panel's reasons

[3] See paragraphs 11 - 13 of the initial Panel's reasons

Ranger and the assumption of rehabilitation obligations (see paragraphs 19 and 126(c) of the initial Panel's reasons).

12. On 30 January 2019, the ERA board resolved to establish a committee in order to further progress ERA's engagement with Rio Tinto regarding funding options or transactions (**Committee**). The Committee comprised those ERA directors who were considered by the ERA board to be independent from Rio Tinto (being Messrs Peter Mansell (ERA's chairman), Paul Dowd and Shane Charles).[4]

13. On 8 February 2019, ERA announced to the ASX the finalisation of the Ranger Project Area closure feasibility study. The announcement stated that "*the approval and implementation of the closure feasibility study had resulted in an increase in ERA's rehabilitation provision from $526 million at 31 December 2017 to $830 million at 31 December 2018 (previously estimated to be $808 million in ERA's 6 December 2018 announcement based on the preliminary findings*[5]*)*", an increase of $305m (with rounding). ERA submitted to the initial Panel that it expected the Commonwealth to increase the APR security amount substantially, given the increase in the ERA rehabilitation provision following the finalisation of the Ranger Project Area closure feasibility study.

14. On 25 July 2019, ERA announced to the ASX[6] that:

    "*Following extensive discussions regarding a number of potential funding options, Rio Tinto has advised ERA that it is only willing to provide additional financial support to ERA via a renounceable entitlement offer undertaken by ERA. In that event, subject to the offer's terms, Rio Tinto has indicated it would subscribe for its 68.4% entitlement of new shares. Rio Tinto has also offered to underwrite the balance of a renounceable entitlement offer (on terms to be agreed) if an alternative underwriting solution is not available to ERA. ERA is considering the size, structure and terms of any potential renounceable entitlement offer, having regard to the interests of ERA as a whole.*"

15. On 22 October 2019, the Underwriter and Peko-Wallsend held board meetings respectively approving (among other things) the entry into the Underwriting Agreement and its subscription for its full entitlement.

16. On 15 November 2019, ERA and the Underwriter executed the Underwriting Agreement and ERA announced the Entitlement Offer. The Entitlement Offer is a pro-rata, renounceable entitlement offer of 6.13 ERA shares for every 1 ERA share held to raise up to approximately $476 million. The Entitlement Offer Information Booklet disclosed (among other things, see paragraph 32 of the initial Panel's reasons) that "*the net proceeds from the Entitlement Offer, together with ERA's existing cash resources and expected future cash flows, will be used primarily for the purposes of funding rehabilitation of the Ranger Project Area*".

17. The Underwriting Agreement contains a number of undertakings from ERA in favour of the Underwriter, including regarding the use of funds raised by the

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[4] For further information about the Committee, see paragraphs 22 – 24 of the initial Panel's reasons
[5] As announced by ERA on 6 December 2018 (see paragraph 20 of the initial Panel's reasons)
[6] After receiving a letter from Rio Tinto dated 11 July 2019, see paragraph 26 of the initial Panel's reasons

entitlement offer for rehabilitation and that ERA will not deal with or create any new economic or legal interest in the "*Jabiluka Growth Assets*", without the prior written consent of the Underwriter (not to be unreasonably withheld or delayed). The undertakings effectively continue until the substantial completion of the rehabilitation obligations (currently required to be completed by January 2026).[7]

18. Zentree, the second largest shareholder in ERA with voting power in ERA of approximately 16.5%, applied to the Panel. On 11 December 2019, the initial Panel made a declaration in *Energy Resources of Australia*. The initial Panel considered that:

    (a) the Entitlement Offer:

        (i) was highly dilutive and required shareholders to invest substantial additional capital to avoid dilution and therefore minority shareholders were unlikely to participate and

        (ii) in conjunction with the Underwriting Agreement and in isolation, was a proposal under which a person would acquire a substantial interest in ERA

    (b) Rio Tinto sought to consolidate control and acquire ERA

    (c) insufficient measures were taken to ensure the independence of the Committee and potential conflicts of interest were not sufficiently managed

    (d) the terms of the Underwriting Agreement affected aspects of the management of ERA and dealings with a major asset of ERA over the medium to long term

    (e) aspects of the disclosure in the Entitlement Offer Information Booklet should have more closely reflected the disclosure in a document required for a control transaction regulated by Chapter 6[8] (for example, intentions statements) given the potential for Rio Tinto to increase its voting power in ERA above 90% and

    (f) the alternatives available to ERA were limited by what would be accepted by Rio Tinto in such a way as to limit the ability of ERA to address its need for funds otherwise than by the Entitlement Offer.[9]

19. The initial Panel made orders (in effect) that ERA make supplementary disclosure, Rio Tinto could not compulsorily acquire shares in ERA as a consequence of the Entitlement Offer without shareholder approval, the clause of the Underwriting Agreement relating to Jabiluka (referred to in paragraph 17 above) was void and of no effect and, without the consent of the Panel, the Underwriter could not terminate

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[7] See paragraphs 34 and 35 and footnote 5 of the initial Panel's reasons
[8] Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms defined in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)
[9] This is a restatement of paragraph 9 of the initial Panel's declaration

or not comply with its obligations under the Underwriting Agreement as a consequence of the orders.

APPLICATION

20. By application dated 13 December 2019, the Rio Tinto Parties[10] sought a review of the initial Panel's decision *"including the making of a declaration under section 657B and orders pursuant to section 657D of the Corporations Act"*.

21. The Rio Tinto Parties submitted, among other things, that:

    (a) It was incorrect for the initial Panel to have found that *"Rio Tinto sought to consolidate control and acquire ERA"*. ERA had a genuine need for funds and Rio Tinto did not seek to increase its control of ERA through the Entitlement Offer.

    (b) Orders 8 and 9 (which stated in effect that Rio Tinto cannot compulsorily acquire shares in ERA as a consequence of the Entitlement Offer without shareholder approval) were not properly made under s657D and were unfairly prejudicial to the Rio Tinto Parties.

    (c) The initial Panel's finding that *"the alternatives available to ERA were limited by what would be accepted by Rio Tinto"* is not supported by the facts and circumstances of the engagement between ERA and Rio Tinto.

DISCUSSION

22. The powers of a review Panel are set out in s657EA. Our role is to conduct a de novo review.[11] We have considered all the materials which the initial Panel had when it considered whether to make a declaration and orders. We also had the initial Panel's reasons for making its decision.

23. We have considered all the material but address only specifically that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings and interim orders

24. The review application was made prior to the Christmas/New Year period. After considering the material we decided to conduct proceedings and communicated this to the parties on 7 January 2020. At that point we had not received a copy of the initial Panel's reasons.

25. The Entitlement Offer was scheduled to close on Monday, 20 January 2020 and the suspension of trading of new shares issued under the Entitlement Offer on a deferred settlement basis was due to be lifted on Tuesday, 14 January 2020. We sought submissions from the parties on whether we should make interim orders deferring key dates in the Entitlement Offer timetable by 5 business days and preventing the

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[10] The review application and notice of appearance listed the applicants as Rio Tinto Limited, North Limited and Peko-Wallsend Pty Ltd. We assume that Rio Tinto Limited has made the application also on behalf of Rio Tinto PLC

[11] *Benjamin Hornigold Limited 08R, 10R & 11R* [2019] ATP 22 at [11] and *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

Underwriting Agreement from being terminated as a result of the proposed interim orders, other than with the review Panel's consent.

26. Zentree and ASIC submitted that we make the proposed interim orders and the Rio Tinto Parties submitted that they did not oppose them. ERA submitted, among other things, that:

    (a) further delays to completion of the Entitlement Offer significantly increased the risk that ERA would not have funds available when they are required and delays have direct costs to ERA, including interest forgone on the funds to be raised

    (b) the Entitlement Offer had already been extended by approximately 6 weeks from the original timetable and

    (c) in effect there has been sufficient disclosure to ERA shareholders if the Panel decided to allow Rio Tinto to proceed to compulsory acquisition.

27. We decided to make the interim orders (Annexure A). We considered that a 5 business day extension did not unfairly prejudice ERA and whether Rio Tinto could compulsorily acquire shares was important information for ERA shareholders in considering the Entitlement Offer.

Rio Tinto's consideration of the Entitlement Offer and disclosure

28. In paragraphs 56 to 70 of its reasons, the initial Panel discussed Rio Tinto's consideration of the Entitlement Offer and made the inference that *"Rio Tinto sought to consolidate control and acquire ERA"* (see paragraphs 66 to 70 of the initial Panel's reasons).

29. The Rio Tinto Parties submitted (among other things) that the initial Panel selectively quoted *"from the Rio Tinto Investment Committee and Board Papers which creates a negative impression of Rio Tinto's conduct"*.

30. The initial Panel put to the parties whether it should make the inference *"that Rio Tinto sought to acquire 100% of ERA and was implementing a course of action to do so"* (see paragraph 60 of the initial Panel's reasons). The Rio Tinto Parties made similar submissions to the one referred to above in paragraph 29 in response.

31. The initial Panel considered those submissions and stated, among other things, that (at paragraph 66 of its reasons):

    "The focus of our enquiries was not to uncover or infer a "hidden agenda" or "secret conspiracy". We consider that the advices and board papers provided by the Rio Tinto Parties demonstrate extensive consideration of issues surrounding ERA's funding requirements. We consider the advices sought by Rio Tinto to be appropriate in the circumstances. Nonetheless, in our view, the decision made by the Rio Tinto board on 8 April 2019 reflected the conclusion, reached over a series of months and developed through multiple internal and external advices and papers, that a renounceable rights issue fully underwritten by Rio Tinto was the only realistic option for Rio Tinto. With that being the case, the advice (whether internal or external) to the Rio Tinto board was unequivocal – unless Zentree decided to take

up its entitlement, Rio Tinto would most likely become entitled to proceed to compulsory acquisition."

32. We agree. The initial Panel provided a detailed analysis of Rio Tinto's consideration of the Entitlement Offer. It recognised that Rio Tinto was also concerned to ensure that ERA was adequately funded to meet Ranger's rehabilitation costs and the associated objective of managing its reputation.[12] In considering all the material, the initial Panel made the inference that Rio Tinto sought to consolidate control and acquire ERA and this was not in conflict with Rio Tinto's other objectives. In considering all the material, we make the same inference.

33. We accept a submission from ERA that Rio Tinto's intentions are not in isolation unacceptable but we consider it was part of the factual matrix that the initial Panel took into account.

34. Given the initial Panel made a final order effectively precluding Rio Tinto from proceeding to compulsory acquisition as a result of the Entitlement Offer and Underwriting Agreement without shareholder approval, it was unnecessary for it to consider:

    (a) *"whether, in effect, final or formal board approval was necessary for intentions to have been formulated given the facts of this matter including the extensive advice and documentation in relation to compulsory acquisition (and the benefits of it) following the Entitlement Offer*[13]*"* (see paragraph 206(a) of the initial Panel's reasons) and

    (b) *"if intentions had not been formulated, whether not formulating intentions regarding compulsory acquisition is a serious departure from the policy of s602(a) and s602(b)(iii)*[14]" (see paragraph 206(b) of the initial Panel's reasons).

35. We sought submissions on the above issues. ERA submitted that it did not believe the accepted understanding of the policy of s602 was to compel a party in these circumstances to determine its course of action to the exclusion of other courses of action. It also submitted that any *"greater clarity as to Rio Tinto's intentions is important to an informed market"*.

36. Rio Tinto submitted that:

    (a) it was willing to form the relevant intentions and disclose them

    (b) ss602(a) and 602(b)(iii) were complied with *"because the risk of general compulsory acquisition has been fully disclosed and the process, including any potential grounds of appeal, has been fully set out in the Entitlement Offer Information Booklet"* and

    (c) *"For completeness, in Mildura Co-operative Fruit Company Limited [2004] ATP 5, the Panel noted that by not formulating intentions, even where the statute did not require a bidder to do so, there was a departure from the policy of paragraphs 602(a) and (b)(iii). However the Panel took into account "the special nature of a company based on co-operative principles" and that the "ongoing trading relationship between suppliers and*

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[12] See for example paragraphs 58(a) and 58(n) of the initial Panel's reasons
[13] *Pivot Nutrition Pty Ltd* [1997] ATP 1 at [43]
[14] *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [86] – [87]

the co-operative is generally a critical issue for supplier-members" when assessing a takeover offer [at 88]. The current circumstances are clearly distinguishable. The only relationship ERA's minority shareholders have with ERA are as equity holders".

37. ASIC submitted that not formulating intentions may constitute a departure from the principles of ss602(a) and 602(b)(ii) and could, depending on the circumstances, constitute unacceptable circumstances, citing *Mildura Co-operative Fruit Company Limited*. ASIC also submitted that:

"ASIC considers that whether Rio Tinto intends to proceed to compulsorily acquire securities may be material information for investors in assessing whether to participate in the offer, particularly where the purpose of the offer is to fund payment of particular liabilities rather than fund revenue-generating activity. In this circumstance, an investor's decision to participate in the Offer may be viewed as a decision on the long-term value proposition of the company and may therefore be driven by a desire to hold those shares for a longer period of time."

38. We agree.[15] Whether a person who is likely to obtain or increase control in a company as a result of a rights issue should disclose its intentions depends on the circumstances. Where the capital raised through a rights issue is not expected to generate any direct financial return and the issuer's solvency may be at risk without support from its major shareholder, the intentions of that major shareholder are particularly relevant to a minority shareholder's decision whether to participate in the new issue. Also, the economic case for Rio Tinto to compulsorily acquire if it was able to do so was compelling.[16] We consider in this case Rio Tinto should have formed its intentions regarding compulsory acquisition.

39. We agree with the initial Panel's reasons in relation to the disclosure in the Entitlement Offer Information Booklet (paragraphs 196 to 206 of the initial Panel's reasons).

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[15] See also the Panel's discussion on a similar issue in *Warrnambool Cheese and Butter Factory Company Holdings Limited 02* [2016] ATP 11 at [26] to [33]

[16] Paragraph 59(a)(ii)(B) of the initial Panel's reasons quoted Rio Tinto's internal calculations (as provided to the Rio Tinto board and investment committee in the papers for the 8 April 2019 and 27 March 2019 respectively) that *"underwriting a $500m entitlement offer where Rio Tinto exceeds 90% and proceeds to compulsory acquisition would cost Rio Tinto $289m (given the deductibility of rehabilitation expenditure), notwithstanding that Rio Tinto would necessarily need to subscribe for a greater number of shares in that scenario and then expend further funds on compulsory acquisition. $289m is less than the Underwriter's and Peko-Wallsend's combined entitlement in a $500m entitlement offer ($342m)"*. The Rio Tinto Parties submitted updated calculations that underwriting a $500m entitlement offer where Rio Tinto exceeds 90% and proceeds to compulsory acquisition would cost Rio Tinto $340m. The Rio Tinto Parties submitted the analysis differs for a number of reasons including "*the earlier assessment was based on an assumed capital requirement of $500m; the earlier assessment assumed a lower compulsory acquisition price, given the Rio Tinto Parties had previously expected a lower entitlement offer price; and there has since been a reduction in the net value of tax deductions associated with ERA's future rehabilitation expenditure*". Under those updated calculations, there are still significant tax benefits for Rio Tinto if it can obtain 100% in ERA

ERA's consideration of the Entitlement Offer

40. The initial Panel considered that:

    (a) ERA's Managing Director (who was not independent of Rio Tinto) attended each meeting of the Committee and was involved in those meetings as a member of management

    (b) given ERA's small management team and its submission that it was not practical to exclude ERA's Managing Director entirely from the process, the appointment of independent financial advisers to act for the Committee could have assisted by acting as a conduit between management and the Committee to mitigate potential or actual conflicts of interest

    (c) the full ERA board was kept apprised of and discussed the Committee's progress and matters within the Committee's mandate and ultimately approved the Entitlement Offer and

    (d) no minutes were produced for any of the Committee's meetings.[17]

41. ERA submitted (among other things) that:

    "The initial Panel took issue with ERA's management of potential conflicts. While the Panel is at liberty to set standards, the consistent undertone of the initial Panel's draft reasons is not that, in its view, there would ideally have been a greater degree of separation of the IBC but that there was wrongdoing by officers of ERA. There is no basis for such an inference."

    "The degree of separation expected by the initial Panel sets a standard for conflict management that is impractical for ERA, or any company in these circumstances, and is unnecessary to ensure independent decision making. (The standard also extends existing Panel guidance as to who is classified as a participating insider)."

42. We do not consider that the initial Panel made an inference or implied that there was wrongdoing by the officers of ERA. The initial Panel recognised that ERA has a small management team.[18] We agree with the initial Panel's reasons for concluding that the principles in Guidance Note 19 are relevant and that insufficient measures were taken to ensure the independence of the Committee and potential conflicts of interest were not sufficiently managed.

43. The initial Panel stated that the ERA board had resolved to establish the Committee on 30 January 2019 and met for the first time on 25 March 2019. We asked the parties whether ERA had made any decisions in relation to the Entitlement Offer prior to 25 March 2019 and whether we should draw any inferences in relation to this issue.

44. ERA submitted that the Committee met for the first time on 11 March 2019, no decisions were made by ERA in relation to the Entitlement Offer prior to the formation but some preparatory work was undertaken. ERA produced some

[17] See paragraphs 71 – 86 of the initial Panel's reasons
[18] See paragraph 81 of the initial Panel's reasons

material in relation to this preparatory work. We draw no additional inferences from this material.[19]

Underwriting Agreement

45. The initial Panel considered that the terms of the Underwriting Agreement granted Rio Tinto, through the Underwriter, effective control over aspects of the management of ERA and dealings with Jabiluka, a major asset of ERA, over the medium to long term and was satisfied that this inhibited the acquisition of control over ERA's voting shares taking place in an efficient, competitive and informed market.[20]

46. ERA submitted (among other things) that:

    (a) It did not object to being relieved of the constraints that the initial Panel found unacceptable.

    (b) The "*initial Panel did not give sufficient weight to the fact that the terms of the Underwriting Agreement are entirely attributable to the unique circumstances of Rio Tinto offering to fund rehabilitation obligations, that are not expected to generate any direct financial return, of an otherwise insolvent ERA*".

    (c) *"No credit nor reference was made [by the initial Panel] regarding the robust and lengthy negotiations of the Underwriting Agreement, perhaps most notably (given the initial Panel's findings) in successfully resisting Rio Tinto's request for a significantly deeper discount*".

47. We accept that the Underwriting Agreement was negotiated over a lengthy period of time. However we agree with the initial Panel's conclusions in relation to the effect of the provisions in the Underwriting Agreement regarding Jabiluka on an efficient, competitive and informed market.

ERA's interaction with Rio Tinto and Zentree

48. The initial Panel concluded (in paragraph 139 of its reasons) that:

    "*Having regard to the above, we consider that the alternatives available to ERA were limited by what would be accepted by Rio Tinto in such a way as to limit the ability of ERA to address its need for funds otherwise than by the Entitlement Offer. While we recognise that Rio Tinto is ERA's controlling shareholder and is entitled to act in its own self-interest, limiting ERA's alternatives to the Entitlement Offer results in a circumstance likely to result in Rio Tinto becoming entitled to proceed to compulsory acquisition (where it may acquire 100% of ERA) without undertaking a takeover bid or an independent shareholder vote (or another process consistent with the purpose of Chapter 6). The significance of this increases in light of our conclusion that insufficient measures were taken to ensure the independence of the Committee and potential conflicts of interest were not sufficiently managed.*"

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[19] ERA also provided minutes for the Committee meetings *"for completeness"*. They were all signed off by the chair of the Committee on 14 December 2019 (after the initial Panel made its declaration and orders). We did not take this material into account

[20] See paragraphs 92 to 114 of the initial Panel reasons, in particular paragraphs 113 to 114

49. The Rio Tinto Parties submitted that the above conclusion was factually incorrect. They submitted that:

"The alternatives available to ERA were limited by commercial reality, the size of the rehabilitation liability relative to its market capitalisation and its lack of realisable assets. There were simply no other commercially feasible funding solutions that provided a complete funding solution for ERA. The Rio Tinto Parties did not contribute to limiting the number of funding solutions available to ERA and did not prevent ERA from accessing any alternative funding solution."

50. The initial Panel came to its conclusion from the material before it in relation to Rio Tinto's negotiations with ERA (in particular paragraphs 124 to 148 of its reasons). We agree that Rio Tinto effectively limited ERA's funding options by only supporting the alternative most beneficial to Rio Tinto. We also recognise that Rio Tinto is entitled to act in the best interests of its own shareholders and reject funding solutions for ERA that require Rio Tinto to bear a disproportionate share of the rehabilitation costs without appropriate compensation. However, we agree with the initial Panel's conclusions in paragraph 146 of its reasons that the combination of:

(a) ERA's solvency concerns

(b) our concerns about the independence of the Committee and

(c) the commercial benefits to Rio Tinto of obtaining 100% ownership,

increase the likelihood that the pressure applied by Rio Tinto leads to unacceptable circumstances having regard to s657A.

51. The initial Panel stated in paragraph 161 of its reasons that:

"Whilst we don't need to determine this point, given the alternatives available to ERA we query the level of ERA's engagement with its second largest shareholder and whether it was sufficient in the circumstances."

52. We also do not need to determine this point. However we are less inclined to query the level of ERA's engagement with Zentree than the initial Panel.

Unacceptable circumstances

53. The initial Panel stated in paragraphs 207 and 208 of its reasons (footnote omitted)

"ERA is a company in a unique position. In considering this matter we did not look at each aspect of its circumstances, the Entitlement Offer and the Underwriting Agreement in isolation divorced from context, but rather assessed each aspect within the surrounding circumstances. This approach is consistent with Guidance Note 17: Rights issues, which states the Panel's approach is to consider the company's situation, the structure of the rights issue and the effect of the rights issue – not just one of those factors."

"Having regard to the totality of the material set out in these reasons and drawing on our commercial expertise, we consider the circumstances are unacceptable notwithstanding that the Entitlement Offer had the dispersion strategies that are recommended in Guidance Note 17."

54. We consider that the initial Panel came to its conclusion after a close examination of thousands of pages of material and did not do so lightly. We agree with the overall conclusion of the initial Panel.

DECISION

Declaration

55. For the reasons above, it appears to us that the circumstances are unacceptable as described in the initial Panel's declaration of unacceptable circumstances. Accordingly, we decline the Rio Tinto Parties review application to the extent that it relates to the initial Panel's declaration of unacceptable circumstances and affirm the initial Panel's declaration of unacceptable circumstances. In doing so, we had regard to the matters in s657A(3).

Orders

56. Orders 8 and 9 of the initial Panel's orders provide that:

> *"8. In the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares as a result of the Entitlement Offer and Underwriting Agreement, it must not lodge a compulsory acquisition notice with ASIC under section 664C(2)(a) of the Corporations Act within the period of 6 months after it becomes a 90% holder in ERA's ordinary shares."*
>
> *"9. Order 8 does not apply if ERA shareholders prospectively or retrospectively approve Rio Tinto's acquisition of relevant interests as a result of the Entitlement Offer and Underwriting Agreement in a manner equivalent to the approval required under item 7 of s611 of the Corporations Act (with necessary changes to reflect timing)."*

57. ASIC submitted that:

> *"In the absence of orders 8 and 9, ASIC does not consider that the remaining orders made by the initial Panel adequately address the unacceptable circumstances identified in the Declaration. ASIC notes that it is not clear that any alternative orders proposed by the parties in their submissions to the initial Panel are sufficient to address the unacceptable circumstances identified by the initial Panel and would result in less prejudice to minority holders."*

58. ASIC's submission in isolation does not fully reflect the Panel's power to make orders. Our role here is to protect the rights or interests of those affected, or likely to be affected by the unacceptable circumstances (see s657D(2)(a)). But this needs to be balanced by the requirement that we cannot make an order if we are satisfied that the order would unfairly prejudice any person (see s657D(1)).[21] It follows from these provisions that there may be instances when it is not possible for the Panel to remedy all the unacceptable circumstances in a given case. As stated by McKerracher J in *Eastern Field Developments Limited v Takeovers Panel*:[22]

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[21] See *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [124]
[22] [2019] FCA 311 at [187]

"…It was for the Review Panel to exercise its wide discretion, as experts in the field, to make an appropriate order under s657D(2) of the Corporations Act; an order that it was satisfied was appropriate and would not be unduly prejudicial…"

59. The initial Panel agreed with the submissions of ASIC and Zentree that, in the words of ASIC's submission "*minority holders should not be subject to having their shares forcibly acquired under compulsory acquisition in circumstances where the acquirer reached the relevant threshold under a rights issue that is constructed in an unacceptable manner*".[23]

60. The initial Panel stated in paragraph 223 of its reasons (footnote omitted):

"… We acknowledge a submission by the Rio Tinto Parties that the compulsory acquisition regime in Part 6A.2 has its own protections; but having regard to s657D, we do not accept they are sufficient in the circumstances of this matter including for the following reasons:

(a) a right to Court review can only be exercised if shareholders holding at least 10% of the shares covered by the compulsory acquisition notice object to the acquisition, so the ability of a Court to withhold approval may or may not be available and

(b) the valuation exercise undertaken under s667C is specific to the circumstances of that provision."

61. The Rio Tinto Parties submitted that given *"Zentree has an existing shareholding of 16.1%, it is evident that they will have at least 10% of the shares covered by a compulsory acquisition notice in circumstances where there is minimal take up from other minority shareholders, and therefore may lodge a notice to object. The Panel does not need to "speculate" on Zentree's future actions as Zentree's public letter dated 31 July 2019, made it clear that it adopted an unrealistic value for ERA and "fully intends to pursue its rights" under section 664F".* We agree.

62. The Rio Tinto Parties also submitted, in response to the initial Panel's comment that its orders did not preclude Rio Tinto from compulsorily acquiring shares in ERA on another basis, for example following a takeover bid, that this:

"… disregards that this right only arises when acceptances are received for more than 75% of the bid class securities (or the applicable majority vote in favour for a scheme of arrangement is secured), which would again entrench Zentree's position as a greenmailer given the anticipated size of its shareholding on a diluted basis."

63. Zentree submitted that:

"Zentree is not a greenmailer. It has been a shareholder in ERA for over 8 years, seen three CEOs and CFOs appointed in that period and has invested in excess of $65 million in ERA shares (not including legal costs). Zentree has had numerous meetings in Singapore with multiple CEOs and CFOs of ERA over the years, including as part of ERAs annual investor roadshows, and have been to Ranger for a site visit – this is not consistent with a greenmailer. Zentree believes in the future of uranium, especially as an alternative carbon free energy source which is now widely believed to be environmentally critical. Zentree may have a different view to Rio's stated but misleading view on the value of ERA. That does not make

[23] See paragraph 221 of the initial Panel's reasons

Zentree a greenmailer. It is not acceptable for the perpetrator of the unacceptable circumstances surrounding this Entitlement Offer to call Zentree a greenmailer."

64. The Macquarie Dictionary defines greenmail as "*the purchase of a large block of a company's shares, threatening a takeover, but actually in order to have the shares purchased at a much higher price by a group friendly to the company*". Zentree is a long term shareholder in ERA and while Zentree's and Rio Tinto's views as to the value of ERA appear to differ, we have no material to suggest that Zentree should be described as a greenmailer.

65. Zentree does, however, have considerable leverage as a shareholder with over 16% in ERA. As noted by the Rio Tinto Parties above:

    (a) if Orders 8 and 9 do not apply and Rio Tinto is entitled and allowed to proceed to compulsory acquisition following the Entitlement Offer, Zentree would be able to object and ensure that compulsory acquisition is subject to Court approval under s664F and

    (b) if Orders 8 and 9 continue to apply, it is extremely likely that Zentree would be able to prevent Rio Tinto from achieving the necessary acceptances under a takeover bid to be able to compulsorily acquire.[24]

66. It is appropriate in considering whether orders unfairly prejudice a person to consider "*the degree of culpability of the persons whose interests are affected by the orders*".[25] In considering the circumstances as a whole, including but not limited to ERA's need for funds to rehabilitate the Ranger mine and Rio Tinto's actions, we are satisfied that Orders 8 and 9 are unfairly prejudicial to Rio Tinto.

67. We asked the parties, given ERA may delist following the Entitlement Offer, whether Orders 8 and 9 of the initial Panel's orders are unfairly prejudicial to minority shareholders other than Zentree because they would be better off having their shares compulsorily acquired than holding unlisted shares in ERA.

68. Zentree submitted that it "*is a separate issue whether ERA should delist from ASX*". It submitted that:

    "Zentree's position is that ERA should not delist and it would be a breach of the directors' fiduciary duties to all shareholders, other than Rio, to delist…."

    "Nevertheless, the unfair prejudice to shareholders would be to suffer compulsory acquisition at a time when Rio has deliberately driven down the business of ERA and its share price. The issue is not the compulsory acquisition opportunity but the price at which that is effected. The current share price has declined materially as a result of the Entitlement Offer weight and discount. This results in a scenario that refers to that impacted share price as a key determinant in the compulsory acquisition. Rio was well aware of this and advice was

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[24] In the event that Zentree does not participate in the Entitlement Offer and other minority shareholders sufficiently participate so that Rio Tinto only obtains 90% voting power in ERA, Zentree's holding in ERA would be approximately 23.08% of the total number of minority shareholders' shares

[25] *AMP Shopping Centre Trust 02* [2003] ATP 24, quoting *ASIC v Yandal Gold* (1999) 32 ACSR 317, at [120] to [121]

provided to this point. As a result, all minority shareholder have been unfairly prejudiced by the construct of the whole Entitlement Offer structure and pricing. The opportunity to be compelled to sell at a significant discount is not an opportunity but rather a forced sale at a significant discount to what is reasonable."

69. The Rio Tinto Parties submitted that:

"In the disclosure of the Rio Tinto Parties' intentions in the Entitlement Offer Information Booklet, the Rio Tinto Parties note that if they acquire more than 75% of ERA as a result of the Entitlement Offer, they may "seek to engage with ERA to consider initiating discussions with ASX in respect of a voluntary delisting having regard to factors including the liquidity of the ERA Shares, the number of unmarketable parcels and ongoing listing costs." Whether ERA is delisted is ultimately a question for ERA."

"In circumstances where Zentree would control, and in accordance with its open letter dated 31 July 2019, is anticipated to block, any vote to approve the Rio Tinto Parties proceeding with general compulsory acquisition, the balance of the minority shareholders would undoubtedly be worse off if ERA were to be delisted. Unlike in a post-takeover bid scenario where a bidder holding more than 90% has the obligation to offer to buy out the minorities, there is no right under the Corporations Act for minorities to compel the Rio Tinto Parties to acquire their shares. Subsequently such shareholders would potentially be left with a highly illiquid investment in an unlisted company whose business operations in the near future will be predominately rehabilitation of a mine at the end of its life."

70. ASIC submitted that:

"Whether prejudice is caused to minority holders (and the degree of prejudice caused) by limiting the Rio Tinto parties' ability to proceed to compulsory acquisition ultimately depends on the investment needs and objectives of the particular shareholders. ASIC does not consider that it is possible to assess prejudice to minority holders in this scenario as being uniform across all holders. In this regard, ASIC notes that the protections offered by order 9, by permitting Rio Tinto to proceed to compulsory acquisition where shareholders have voted to approve that process, allows each individual shareholder to assess their own individual interests and vote accordingly."

71. We consider that while we do not need to decide this question, we are inclined to take a different view to ASIC – that minority shareholders in ERA are in a more vulnerable position after a delisting (if it occurs) and Order 8 may be unfairly prejudicial to them by potentially depriving them of an exit (if Rio Tinto becomes a 90% holder following the Entitlement Offer).

72. We decided to vary the initial Panel's orders to remove Orders 8 and 9 (see Annexure B). As discussed in paragraphs 34 to 38 of our reasons, we consider that Rio Tinto should have formed its intentions on the question of compulsory acquisition and there should have been disclosure of those intentions in the Entitlement Offer Information Booklet. Accordingly we also varied the orders to:

(a) require Rio Tinto to form intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares (as a result of the Entitlement Offer and Underwriting Agreement)

(b) require ERA to provide further disclosure of Rio Tinto's intentions to its shareholders

(c) further extend the Entitlement Offer timetable by 15 business days for ERA shareholders to consider the additional disclosure and

(d) extend the limitation on the Underwriter terminating or not complying with its obligations under the Underwriting Agreement to the orders as varied.

Karen Phin
President of the sitting Panel
Decision dated 20 January 2020
Reasons given to parties 11 February 2020
Reasons published 13 February 2020

Advisers

Party	Advisers
ERA	Ashurst Australia
Rio Tinto Parties	Allens
Zentree	Piper Alderman

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS

ENERGY RESOURCES OF AUSTRALIA LIMITED 02R

On 11 December 2019, the Panel made a declaration of unacceptable circumstances in relation to the affairs of Energy Resources of Australia Limited (**ERA**) under section 657A of the *Corporations Act 2001* (Cth) and orders under section 657D of that Act. Terms defined in those orders have the same meaning in these interim orders.

Rio Tinto Limited, North Limited and Peko-Wallsend Pty Ltd made an application to the Panel dated 12 December 2019 seeking a review of the Panel's decision.

The Panel ORDERS:

1. ERA must immediately take all action necessary, in relation to the Entitlement Offer, to:

   (a) suspend trading in new shares on a deferred settlement basis for not less than 5 business days from and including 14 January 2020 and

   (b) postpone by not less than 5 business days the following dates:

      (i) the close of the Entitlement Offer and

      (ii) all subsequent dates listed in the Entitlement Offer timetable in ERA's ASX announcement dated 11 December 2019.

2. ERA must make an announcement on the ASX as soon as possible regarding the adjustments to the Entitlement Offer timetable.

3. Without the consent of the Panel, North Limited must not rely on any right it may have to terminate the Underwriting Agreement by reason of or as a consequence of these interim orders.

4. These interim orders have effect until the earliest of:

   (i) further order of the Panel

   (ii) the determination of the proceedings and

   (iii) 2 months from the date of these interim orders.

Tania Mattei
Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 13 January 2020

Australian Government
Takeovers Panel

Annexure B

CORPORATIONS ACT
SECTIONS 657EA AND 657D
VARIATION OF ORDERS

ENERGY RESOURCES OF AUSTRALIA LIMITED 02R

Pursuant to sections 657EA(4) and 657D(3) of the *Corporations Act 2001* (Cth)

THE PANEL ORDERS

The final orders made by the Panel in *Energy Resources of Australia Limited* on 11 December 2019 are varied by:

1. Including the words "(including as varied)" after the words "these orders" in Order 3.

2. Including the word "review" before "Panel" in Orders 3 and 10.

3. Deleting Orders 8 and 9 and replacing them with "Order 8 deleted" and "Order 9 deleted" respectively.

4. Including a new Order 10A as follows:

   10A. ERA must immediately take all action necessary, in relation to the Entitlement Offer to:

   (a) suspend trading in new shares on a deferred settlement basis for not less than 15 business days from and including 21 January 2020 and

   (b) postpone by not less than 15 business days the following dates:

   (i) the close of the Entitlement Offer and

   (ii) all subsequent dates listed in the Entitlement Offer timetable in ERA's ASX announcement dated 13 January 2020.

5. Including a new Order 10B as follows:

   10B. ERA must make an announcement on the ASX as soon as possible after the date of the variation of these orders regarding the adjustments to the Entitlement Offer timetable and the effect of the variation of these orders.

6. Including a new Order 10C as follows:

10C. ERA must within 5 business days from the date of the variation of these orders dispatch an Additional Supplementary Statement to ERA shareholders in a form approved by the review Panel which discloses:

(a) the effect of the variation of these orders and

(b) Rio Tinto's intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares as a result of the Entitlement Offer and Underwriting Agreement.

7. Including a new Order 10D as follows:

10D. ERA must provide the review Panel with a draft of the Additional Supplementary Statement within 2 business days from the date of the variation of these orders.

8. Including a new Order 10E as follows:

10E. Rio Tinto must:

(a) as soon as practicable but in any event within 2 business days from the date of the variation of these orders, form intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares as a result of the Entitlement Offer and Underwriting Agreement and

(b) along with North Limited, do all things necessary to assist ERA in the preparation of the Additional Supplementary Statement, including but not limited to providing information regarding Rio Tinto's intentions, as required under Order 10C(b).

9. Including the following new definitions in Order 11:

Additional Supplementary Statement	as referred to in Order 10C
date of these orders	11 December 2019
date of the variation of these orders	20 January 2020
review Panel	the Panel in *Energy Resources of Australia Limited 02R*

Tania Mattei
Counsel
with authority of Karen Phin
President of the sitting Panel
Dated 20 January 2020