



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Energy Resources of Australia Limited  
[2019] ATP 25**

**Catchwords:**

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

*Corporations Act 2001 (Cth), sections 602, 606, 611, 615, 657A, 657D, 664A, 664F, 667C, Chapter 2E, 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*

*Guidance Note 4: Remedies General, Guidance Note 7: Lock-up devices, Guidance Note 17: Rights Issues, Guidance Note 19: Insider Participation in Control Transactions*

*Yancoal Australia Limited [2014] ATP 24, Billabong International Limited [2013] ATP 9, MacarthurCook Property Securities Fund 01 & 02 [2012] ATP 7, Multiplex Prime Property Fund 03 [2009] ATP 22, Mildura Co-operative Fruit Company Limited [2004] ATP 5, Anaconda Nickel Limited 02, 03, 04 & 05 [2003] ATP 4, Pivot Nutrition Pty Ltd [1997] ATP 1*

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

**INTRODUCTION**

- The Panel, Amy Alston, Ron Malek (sitting President) and Neil Pathak, made a declaration of unacceptable circumstances in relation to the affairs of Energy Resources of Australia Limited (ERA). The application concerned a pro-rata, renounceable entitlement offer of 6.13 ERA shares for every 1 ERA share held, to raise up to approximately \$476m to fund ERA’s Ranger Project Area rehabilitation obligations (fully underwritten by a wholly owned subsidiary of Rio Tinto). The Panel considered the Entitlement Offer and Underwriting Agreement unacceptable in light of a combination of factors. The Panel recognised that ERA was in a unique set of circumstances, but the Panel considered the facts of the matter, when viewed in totality, led to the circumstances being unacceptable. The Panel made orders (in effect) that ERA must make supplementary disclosure, Rio Tinto cannot compulsorily acquire shares in ERA as a consequence of the Entitlement Offer without shareholder approval, a particular clause of the Underwriting Agreement relating to ERA’s Jabiluka mine is void and of no effect and, without the consent of the Panel, the Underwriter cannot terminate or not comply with its obligations under the Underwriting Agreement as a consequence of the orders.

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

2. In these reasons, the following definitions apply.

APR	the “ <i>Annual Plan of Rehabilitation</i> ” required under the Government Agreement
Committee	has the meaning given in paragraph 21
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
Peko-Wallsend	Peko-Wallsend Pty Limited
Ranger	the Ranger uranium mine
Ranger Authority	has the meaning given in paragraph 6
Ranger Project Area	the area described as such in paragraph 6
Rio Tinto	Rio Tinto Limited and Rio Tinto Plc
Rio Tinto Parties	Rio Tinto, Peko-Wallsend and the Underwriter
TERP	theoretical ex-rights price
Underwriter	North Limited
Underwriting Agreement	the underwriting agreement dated 15 November 2019 between ERA and the Underwriter
Zentree	Zentree Investments Limited

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

## FACTS

### Overview of ERA

3. ERA is an ASX listed uranium mining and production company (ASX code: ERA).
4. Rio Tinto has voting power in ERA of approximately 68.39% through two wholly owned subsidiaries, the Underwriter and Peko-Wallsend. ERA's Managing Director as well as other senior ERA executives are employees of Rio Tinto seconded to ERA. Zentree is the second largest shareholder in ERA and has voting power in ERA of approximately 16.5%.
5. ERA operates Ranger, Australia's longest continually operating uranium mine.
6. Ranger's operational infrastructure lies within the 79 square kilometre Ranger Project Area, which is located eight kilometres east of Jabiru and 260 kilometres east of Darwin in the Northern Territory of Australia. 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.
7. ERA is currently processing stockpiled uranium ore following the completion of open cut mining at Ranger in 2012. 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.
8. The Ranger Project Area also contains the Ranger 3 Deeps uranium oxide ore body. Following a decision of ERA in 2015 not to progress the Ranger 3 Deeps project to a full feasibility study, which was announced to the ASX at that time, the Ranger 3 Deeps project remains under care and maintenance. In order to fully develop the Ranger 3 Deeps project, ERA would require an extension to the Ranger Authority.
9. ERA also holds title to the Jabiluka Mineral Lease. According to ERA's 2018 Annual Report, Jabiluka is a large, high quality uranium orebody of global significance and remains one of ERA's key assets. As at 30 June 2019, Jabiluka had a carrying value on ERA's balance sheet of approximately \$90m. 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.
10. 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.
11. Each year, ERA is required under the Government Agreement to prepare and submit to the Commonwealth Government an APR. 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. The independent costing assessment is required to show among other things:
  - (a) the estimated cost of the work necessary to rehabilitate the Ranger Project Area (without contingency and in net present value terms, calculated by discounting

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

the dollar cost of the rehabilitation over five years using appropriate bond and inflation rates to be agreed between ERA and the Commonwealth at the time of each estimate) and

- (b) the total amount of the security to be provided by ERA, being an amount equal to the estimated cost of the work necessary to rehabilitate the Ranger Project Area plus a reasonable contingency allowance not exceeding 10 per cent of the estimated cost.
12. There is a process for ERA to accept or dispute the independent costing assessment once it has been completed by the independent assessor.
  13. As at the date of the application, the APR security amount required by the Commonwealth was \$410m, and for this the Commonwealth accepted both cash from ERA and bank guarantees. The cash portion was \$76m and the balance was represented by (uncalled) bank guarantees provided by ERA.
  14. ERA submitted that it expects the Commonwealth to increase the APR security amount substantially, given the significant increase in ERA's rehabilitation provision as announced by ERA to the ASX on 8 February 2019 (see paragraph 25 below – ERA's rehabilitation provision increased from \$526 million at 31 December 2017 to \$830 million at 31 December 2018). ERA must increase the security within 21 days of it accepting the independent costing assessment or the completion of the dispute procedure set out in paragraph 12. The dispute procedure can take up to 60 days.

#### **Background chronology**

15. On 11 June 2015, ERA announced to the ASX that it had decided that the Ranger 3 Deeps project would not proceed to a final feasibility study given the then current operating environment.
16. 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. ERA announced the following as the key conditions precedent for draw down of the facility:
  - (a) ERA has exhausted all cash reserves (except for cash that is required to be held as security with the Commonwealth)
  - (b) ERA has taken all reasonable steps to monetise its assets (other than certain specified assets including in relation to the Ranger Project Area and the Jabiluka Mineral Lease) and
  - (c) ERA is solvent at the time of drawdown.
17. 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. ERA engaged the Rio Tinto Growth & Innovation Projects group to assist in preparing the draft feasibility

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

study on its behalf (though this was not made public by ERA).<sup>1</sup> ERA had previously foreshadowed the preparation of the closure feasibility study to increase the level of certainty regarding the continued execution of ERA's rehabilitation program between 2018 and 2026.

18. Between October 2018 and August 2019, Rio Tinto received at least 13 presentations and 1 memorandum from its financial adviser in relation to possible transactions with ERA, including detailed analysis regarding potential entitlement offers and the take-up required to prevent Rio Tinto from reaching 90% (see paragraph 58 for further details), as well as the cost to acquire remaining minorities.
19. On 5 December 2018, Rio Tinto provided ERA with what it described in its board minutes as a 'comfort letter' (see paragraph 126(c) for further details), 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 Ranger and the assumption of rehabilitation obligations.
20. On 6 December 2018, ERA announced to the ASX an update on the preliminary findings of the Ranger Project Area closure feasibility study. The announcement stated that:
  - (a) *"the preliminary findings highlighted an increase in the estimated cost of the rehabilitation program, with a likely rise in ERA's rehabilitation provision from \$512 million to \$808 million, an increase of \$296 million"* and
  - (b) *"Rio Tinto has advised ERA it will work with ERA and its other shareholders and stakeholders with the objective of ensuring that ERA is in a position to meet in full the likely future rehabilitation requirements of the Ranger Project Area. ERA and Rio Tinto are engaged in active discussions on various options to manage this process, including possible funding solutions"*.
21. 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).
22. The Committee was delegated all of the powers and authorities of the ERA board in respect of (among other things):
  - (a) evaluating, negotiating and, if the Committee considered it to be in the best interests of ERA, approving any proposed agreement with Rio Tinto in relation to any proposed funding support agreement with Rio Tinto (including entering into any funding support term sheet and subsequent binding agreement with Rio Tinto) and

---

<sup>1</sup> The closure feasibility study was subject to independent review by a global engineering firm and further review and audit as part of the general audit of ERA's end of year accounts

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (b) authorising any member of the Committee or any executive of ERA without a material personal interest in the matter to:
- (i) negotiate any proposal on behalf of ERA with Rio Tinto or
  - (ii) to engage any adviser or expert on behalf of ERA,  
subject always to the direction of the Committee.
23. The ERA board also resolved (among other things) that the Committee would report to the ERA board on the progress of the discussions on a regular basis and would inform the ERA board promptly of any major developments.
24. The ERA board also considered that the Committee should have regard to the following protocols in respect of its consideration of any proposed funding support agreement with Rio Tinto:
- (a) executives of ERA were permitted to assist the Committee in its consideration of any proposed funding support agreement with Rio Tinto and
  - (b) executives of ERA could engage with executives of Rio Tinto in discussing the terms of any proposed funding support agreement with Rio Tinto. However, those executives would have no authority to agree any terms with Rio Tinto, except where the Committee gave its prior approval to the specific matter to be agreed with Rio Tinto.
25. 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<sup>2</sup> based on the preliminary findings)*”<sup>3</sup>, an increase of \$305m (with rounding).
26. On 11 July 2019, Rio Tinto provided ERA with a letter which stated that “*a Rights Issue is now the only funding option which remains open for further discussion between Rio Tinto and ERA*” (please see paragraph 126(e) for further details).
27. On 25 July 2019, ERA announced to the ASX 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.*

---

<sup>2</sup> Referred to in paragraph 20

<sup>3</sup> The closure feasibility study was subject to independent review by a global engineering firm and further review and audit as part of the general audit of ERA’s end of year accounts

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

28. On 23 September 2019, ERA submitted applications to ASIC for the approval of a foreign holder nominee for the purposes of s615<sup>4</sup> and certain relief in connection with the Entitlement Offer.
29. 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.
30. On 13 November 2019, ASIC approved the foreign holder nominee for the purposes of s615 and granted certain relief in connection with the Entitlement Offer.
31. On 15 November 2019, ERA and the Underwriter executed the Underwriting Agreement and ERA announced the Entitlement Offer to the ASX.

#### **Purpose of the Entitlement Offer and terms of the Underwriting Agreement**

32. The Entitlement Offer is a pro rata renounceable entitlement offer to raise approximately \$476m, fully underwritten by the Underwriter. The Entitlement Offer Information Booklet disclosed that:
  - (a) the offer price of \$0.15 represents a 38% discount to ERA's 10-day VWAP up to the day prior to the announcement of the Entitlement Offer
  - (b) *"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"*
  - (c) *"expenditure on Ranger rehabilitation is not expected to generate any direct financial return for the Company" and*
  - (d) *"while the rehabilitation spend occurs progressively over the rehabilitation period, the rehabilitation obligation is definite and must be taken into account by the ERA Board when assessing ERA's present solvency. In addition, ERA has no assurance that Rio Tinto's support for a renounceable entitlement offer will remain available in the future" and therefore "ERA has concluded that its ability to continue as a going concern is dependent on fully addressing the funding shortfall at this time".*
33. The Entitlement Offer included a number of features with the potential to minimise any control impact and facilitate dispersion of the shortfall to other shareholders:
  - (a) the entitlements are renounceable
  - (b) ERA shareholders who take up their entitlement in full may apply for additional shares through a shortfall facility
  - (c) ERA appointed a broker to invite applications from institutional and/or sophisticated investors for any shortfall shares not taken up pursuant to the shortfall facility, at an issue price that is not less than \$0.15 (allocated via a shortfall bookbuild) and

---

<sup>4</sup> 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)

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (d) ASIC granted relief from Chapter 6 to enable ERA shareholders to participate in the shortfall facility even if by doing so the number of shares issued to them would result in the takeover law threshold under s606 being exceeded.
34. The Underwriting Agreement contains a number of undertakings from ERA in favour of the Underwriter. Relevantly:
- (a) ERA may use the “*Rehabilitation Funds*” only for a permitted purpose (effectively remediation of the Ranger Project Area, head office costs and related matters) and apply those funds only after (effectively) all other cash funds have been exhausted (other than the “*Growth Assets*”). The “*Growth Assets*” comprise, effectively, the Jabiluka Mineral Lease and \$20m (plus any premium over \$0.15 received by the broker appointed to manage the shortfall bookbuild)
  - (b) the cash portion of the “*Growth Assets*” can be used as the ERA board decides from time to time, but ERA cannot deal with or create any new economic or legal interest in the Jabiluka Mineral Lease (or any interest, proceeds, assets or returns generated from it), without the prior written consent of the Underwriter (not to be unreasonably withheld or delayed having regard to certain matters<sup>5</sup>) and
  - (c) ERA must amend its board charter to reflect the undertakings in the Underwriting Agreement.
35. The undertakings in the Underwriting Agreement effectively continue until the substantial completion of the Ranger Project Area rehabilitation obligations (currently required to be completed by January 2026 under the Ranger Authority). The undertakings cease earlier if ERA ceases to be a subsidiary of Rio Tinto or the Underwriting Agreement is terminated.
36. The Underwriter’s exposure under the Underwriting Agreement is approximately \$150m and the amount to be contributed by the Underwriter and Peko-Wallsend through the Entitlement Offer (via subscribing for their entitlements and in addition to the Underwriter’s underwriting exposure) is approximately \$326m.

## APPLICATION

### Declaration sought

37. By application dated 18 November 2019, Zentree sought a declaration of unacceptable circumstances. Zentree submitted that, if the Entitlement Offer (and underwriting) proceeded, Rio Tinto would increase its voting power in ERA from 68.39% to as high as 95.57%, above the compulsory acquisition threshold in s664A.
38. Zentree submitted that the effect of the circumstances was that:

---

<sup>5</sup> Being “the Issuer’s assurance that (i) such dealing with the Jabiluka Growth Assets will not compromise the LTCMA; and (ii) the Issuer is satisfied that any incoming counterparty (which need not be named) to such dealing has the capacity and intention to fulfil, comply with and be bound by the terms of the LTCMA.”

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (a) the acquisition of control by Rio Tinto was not taking place in an efficient, competitive and informed market
- (b) minority shareholders were not receiving a reasonable and equal opportunity to participate in the benefits accruing to Rio Tinto and
- (c) shareholders had not been given enough information to enable them to assess the merits of the Entitlement Offer and underwriting.

#### Interim orders sought

39. Zentree sought interim orders that ERA:

- (a) delay the offer period for the Entitlement Offer (and trading of the entitlements)
- (b) be prevented from closing the offer period for the Entitlement Offer and
- (c) be prevented from issuing any new shares to any person in connection with the Entitlement Offer (until no earlier than 7 days after the date of determination of Zentree's application),

pending determination of Zentree's application.

#### Final orders sought

40. Zentree sought final orders that:

- (a) the Entitlement Offer be cancelled and any subscription moneys be refunded
- (b) the Underwriting Agreement be terminated without any liability or penalty to ERA
- (c) ERA be restrained for a period of 12 months from the Panel's decision from entering into any transaction or issuing shares to any person if to do so might result in a person obtaining voting power in ERA of more than 20%, or a person with voting power above 20% increasing its voting power, except where the person has first obtained the approval of shareholders of ERA in accordance with item 7 of s611 and
- (d) ERA bear the costs of Zentree in respect of the Panel's proceedings.

## DISCUSSION

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

#### Decision to conduct proceedings

42. We received preliminary submissions from ERA and the Rio Tinto Parties each expressing the view that we should not conduct proceedings.

43. ERA submitted (among other things) that ERA has an immediate and genuine need for the funds proposed to be raised under the Entitlement Offer, the amount is justified in light of the purpose of the raising, the Entitlement Offer has been structured to comply with the Panel's guidance and the company has no viable alternative funding proposal.

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

44. The Rio Tinto Parties submitted (among other things) that the Entitlement Offer is necessary to fund rehabilitation and has a variety of features to ameliorate control effects and that if Rio Tinto becomes entitled to proceed with compulsory acquisition that will be as a result of other shareholders not supporting the Entitlement Offer. The Rio Tinto Parties also submitted that the market is fully informed, including in relation to key issues, risks, alternatives and Rio Tinto's intentions.
45. In our view, the application raised concerns that warranted consideration so we decided to conduct proceedings on all matters, recognising that timing was tight.

#### Interim orders

46. ERA submitted that the interim orders sought by Zentree were unnecessary because the Panel should be able to make a decision on the matter before the end of the offer period if the Panel decided to conduct proceedings.
47. The Rio Tinto Parties made a substantially similar submission (in effect).
48. We initially considered that it was appropriate not to make interim orders for the reasons submitted by ERA and the Rio Tinto Parties.
49. However, during the course of the proceedings it became clear to us that we were unlikely to make a decision before the end of the offer period and asked for further submissions in relation to whether the offer timetable should effectively be deferred for at least 5 business days.
50. Zentree supported such an interim order and submitted that a longer deferral would not prejudice ERA.
51. ERA submitted that an extension to the timetable would diminish the effectiveness of the Entitlement Offer's dispersion strategy, in particular as it would mean that the shortfall bookbuild would be conducted very close to Christmas. ERA did, however, accept that additional time may be needed for the proceedings and submitted that its strong preference was for us to extend the timetable by as short a period as possible.
52. The Rio Tinto Parties submitted that it would be optimal if the timetable were to remain unchanged, or any extension was for a period of less than 5 business days. However, the Rio Tinto Parties submitted that they would not object to an order deferring the timetable for a period of not more than 5 business days (including an order preventing termination of the Underwriting Agreement on that basis).
53. ASIC submitted that a short delay to the offer timetable may be appropriate to allow the status quo to be maintained and prevent the occurrence of mischief that could not be conveniently reversed by final orders (if any).
54. On 4 December 2019, we decided to make interim orders effectively deferring the offer timetable for 5 business days in order to maintain the status quo (Annexure A).
55. In making the interim orders we had regard to the matters in Guidance Note 4: *Remedies General*. In particular, we considered the strength of the application and the need to maintain the status quo pending our determination of the application. We sought to defer the close of entitlement trading, but as a practical matter were unable

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

to do so due to ASX's systems. We considered that no prejudice arose as the market had been properly informed of the interim and final orders sought by Zentree and so was trading on an informed basis.

#### Rio Tinto's consideration of the Entitlement Offer

56. In its application, Zentree submitted that the Entitlement Offer was intended to result in Rio Tinto owning in excess of 90% of the shares in ERA so that Rio Tinto could move to compulsory acquisition.
57. If no new ERA shares were taken up under the Entitlement Offer by any person other than Peko-Wallsend and the Underwriter, Rio Tinto's relevant interest in ERA would increase from 68.39% to approximately 95.57%. In order for Rio Tinto to have a relevant interest of less than 90% post-Entitlement Offer, approximately 20.48% of all new ERA shares offered to shareholders other than Peko-Wallsend and the Underwriter would need to be subscribed for. Given the size of Zentree's holding, in the absence of its participation, the participation of other shareholders would need to be substantial to meet this threshold (20.48% of all new ERA shares equates to 42.73% of all entitlements held by persons other than Peko-Wallsend, the Underwriter and Zentree).
58. We asked the Rio Tinto Parties what advice Rio Tinto had received in the past 18 months in relation to supporting ERA and potential funding options. In response we were provided with board and investment committee minutes, financial advice and certain other documents and correspondence which the Rio Tinto Parties considered material.<sup>6</sup> For the purpose of our reasons, we consider the following events and documents relevant:
- (a) on 29 August 2018, the Rio Tinto investment committee met and noted a paper outlining the background and strategic options for Rio Tinto in managing its interest in, and exposure to, ERA. The paper stated that "*the aim is to manage Rio Tinto's reputational exposure, explore paths to alternate ownership structures which aligns the management of the rehabilitation with the risk Rio Tinto bears – while respecting the rights and interests of all ERA shareholders and stakeholders*". The paper outlined the following options:
    - (i) maintain the status quo (noting that "*Rio Tinto's balance sheet reflects 100% of the ERA rehabilitation provision, however Rio Tinto is unable to utilize income tax losses accruing under the current part-owned ERA structure*")
    - (ii) acquire minority shareholdings (noting that "*ERA's equity value remains inflated (against Rio Tinto's view) and the value in moving to full ownership is potentially offset by leakage to minorities to secure their agreement*")
    - (iii) purchase Ranger from ERA (noting that "*this option gives full and direct control of rehabilitation, an ability to utilize new tax losses from rehabilitation*")

---

<sup>6</sup> Excluding various legal advice in relation to which the Rio Tinto Parties claimed client legal privilege

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

*expenditure (valued at \$95-100m<sup>7</sup>, resolves funding issues for ERA and excludes Jabiluka as a contentious value issue for minorities") or*

- (iv) divest Rio Tinto's shareholding in ERA
- (b) on 4 October 2018, Rio Tinto's financial adviser produced a presentation in respect of a potential ERA entitlement offer, which included an analysis showing that the take-up required to prevent Rio Tinto from reaching 90% increased as the offer price discount to TERP increased. TERP, or the theoretical ex-rights price, is the theoretical price of a company's shares following a rights issue and is calculated using the issue price, the number of shares to be issued and the market price and the number of shares on issue prior to the rights issue. The offer price discount was a point of difference between ERA and Rio Tinto during the Entitlement Offer and Underwriting Agreement negotiations and is discussed further below
- (c) on 1 November 2018, Rio Tinto's financial adviser produced a detailed presentation in respect of a "Project Emu" workshop, analysing the then-current position of ERA, stakeholders, transaction options and tactics. The transaction options analysed were to:
  - (i) "buy Ranger from ERA"
  - (ii) "acquire minorities, demerge Jabiluka"
  - (iii) "acquire minorities"
  - (iv) "rights issue" (with two negatives being that "tax losses generated by ERA will remain trapped and unutilised by [Rio Tinto] unless compulsory acquisition" and "compulsory acquisition threshold of 90% will not be reached by [Rio Tinto] if Zentree takes up its rights")
  - (v) "amend and extend Credit Facility"
  - (vi) "alternative non-Rio Tinto funding" or
  - (vii) "divest Rio Tinto shares"
- (d) on 11 November 2018, the Rio Tinto investment committee met, with one of the papers setting out four funding options (in order of Rio Tinto's preference below):
  - (i) Rio Tinto to purchase the Ranger mine with all assets and liabilities attached (with ERA to compensate Rio Tinto for taking on the rehabilitation task through cash, uranium stockpiles and all other ERA assets excluding Jabiluka and ERA's tax losses)
  - (ii) Rio Tinto to participate in a rights issue (with a likelihood that Rio Tinto would underwrite it)

---

<sup>7</sup> We note these amounts were calculated prior to the increase in the rehabilitation provision following the Ranger closure feasibility study

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

(iii) Rio Tinto to acquire minorities in ERA (if a less dilutive opportunity presented once the market has absorbed any disclosure on ERA's revised closure cost) or

(iv) expand and extend the Credit Facility.

The paper noted that Rio Tinto's "preference between [(i) above] and [(ii) above] is not strong at this stage, and depends on factors such as the extent of minority shareholder take-up in a rights issue and the agreed 'price' for Ranger".

The paper also disclosed that one objective (of several) was that "if full control of Ranger or ERA cannot be attained, then seek to increase influence over key operating and rehabilitation decisions of ERA" and one of the next steps was for Rio Tinto to "continue to engage with ERA management and the ERA board in relation to additional funding options for ERA on the basis of [the above]"

(e) on 17 January 2019, Rio Tinto's financial adviser produced a presentation in respect of "Transaction Summary Options" setting out that "commercial considerations mean that alternative structures are preferred over an acquisition of Ranger". The potential structural options identified were as follows:

(i) "take-out of minority shareholders"

(ii) "underwritten [ERA] rights issue + compulsory acquisition"

(iii) "take-out of minorities + spin-out of Jabiluka"

(iv) "take-out of minorities with underwritten proposal at lower price alternative" or

(v) "spin-out of Jabiluka + underwritten [ERA] rights issue + compulsory acquisition".

The advice noted that "upon the announcement by [ERA] of the completion of the Ranger rehabilitation feasibility study ... should the ERA share price appropriately reflect its liabilities, take-out structures will become more viable"

(f) on 22 January 2019, Rio Tinto's financial adviser produced a presentation analysing, in an ERA entitlement offer context, a number of pro-forma control scenarios, discount scenarios, the correlation between size and discount and Zentree's recovery price

(g) on 30 January 2019, Rio Tinto's financial adviser produced a presentation analysing a number of precedent entitlement offers, precedent compulsory acquisitions and Zentree's possible response scenarios (the Committee was also established on this date, as set out in paragraph 21). The precedent compulsory acquisitions analysis looked at the independent experts' valuation approaches and the implications for ERA and noted there were "[quoted market price] valuation implications following [a] highly dilutive rights issue"

(h) on 2 February 2019, Rio Tinto's financial adviser produced a "cost to acquire" presentation setting out the cost to acquire ERA in a number of raising size and response scenarios (including the maximum take-up by minorities in those scenarios that would still permit Rio Tinto to reach 90%). The presentation

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

noted that *“assuming Zentree is diluted to below 10%, then the total investment of funds required by [Rio Tinto] to move to 100% ownership of [ERA] is relatively insensitive to issue price”*

- (i) on 11 February 2019, Rio Tinto’s financial adviser produced a memorandum setting out the arguments in favour of using TERP as the benchmark against which any discount should be measured and other factors relevant in determining the terms/structure of an ERA rights offer and the pricing of any issue
- (j) on 13 February 2019, the Rio Tinto investment committee met and the minutes disclose it *“reviewed a summary of the pros and cons of four potential funding options and agreed with the conclusion that a renounceable rights issue fully underwritten by Rio Tinto remained as the only realistic option”*. The minutes also noted that *“the funding option had been discussed and agreed in principle by ERA, although the quantum and final pricing terms remained to be defined”*; we were provided with limited material evidencing these discussions or the agreement but were provided with an unsigned draft term sheet dated 20 December 2018 between the Underwriter and ERA in respect of an entitlement offer to raise money (of an amount not stated) solely for the purpose of undertaking Ranger Project Area rehabilitation, fully underwritten by the Underwriter. A paper noted that:
  - (i) *“following a due diligence review by Rio Tinto of potential funding options, it is recommended that Rio Tinto support a renounceable rights offer ... entailing a commitment to participate ... and to fully underwrite non-Rio Tinto shareholder participation in the offer”*
  - (ii) *“in the event of a low rights offer issue price (2 cents – 5 cents per share), to provide a meaningful discount to TERP, the number of new shares issued may be very large (10-25 billion .... with a ratio of new shares to SOI of between 19:1 to 49:1) ... a high offer price potentially sets a benchmark at which Rio Tinto may elect to acquire non-Rio Tinto shareholders after a rights issue”* (emphasis added)
  - (iii) *“if 100% ownership can be secured, a wholly owned ERA subsidiary would deliver a more efficient governance and cost structure, allow ERA to be delisted from the ASX and deliver direct control of the Ranger rehabilitation task. Rehabilitation costs may be fully deductible to Rio Tinto once brought into the Rio Tinto Limited consolidated tax group”* and
  - (iv) *“a transaction(s) which delivers full ownership of ERA equity offers the lowest Net Present Cost (NPC) solution. The most favourable outcomes are achieved through a two-step process, involving Rio Tinto first underwriting and participating in a rights issue, then acquiring the remaining non-Rio Tinto owned shareholdings, after dilution, via a compulsory acquisition or scheme of arrangement offer”*
- (k) on 17 February 2019, Rio Tinto’s financial adviser produced a presentation setting out two options: an ERA entitlement offer plus general compulsory acquisition and a take-out of minority shareholders. The presentation noted

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

that “a proposal to underwrite an [ERA] entitlement offer is the most cost effective option and retains flexibility to change (prior to launch) depending on the [ERA] and Zentree response” and that an entitlement offer plus compulsory acquisition would be a “less expensive option than a minority take-out at market pricing”

- (l) on 22 February 2019, Rio Tinto’s financial adviser produced a transaction flowchart containing two options: an entitlement offer plus general compulsory acquisition and a take-out of minority shareholders via a scheme of arrangement. The flowchart had a number of pivot points to the ‘take-out’ option, including where if Zentree indicates “a selling price acceptable to [Rio Tinto]” and “if [the Rio Tinto] underwriting proposal has been made public, share price reaction could increase attractiveness of take-out”
- (m) also on 22 February 2019, Rio Tinto’s financial adviser produced a presentation analysing several post-entitlement offer options. The presentation advised that, should Rio Tinto have less than 90% at the conclusion of the offer, Rio Tinto could do nothing (the rationale being that shareholders “have chosen to follow their money so may not be willing sellers in the near term ... Rio Tinto will have a high degree of influence over the company in any event ...”) or launch an acquisition of minorities via a scheme of arrangement. The presentation also advised that “several factors suggest that Rio Tinto will acquire close to 100% of [ERA] under an entitlement offer, unless Zentree decides to invest ~A\$50m”
- (n) on 25 February 2019, the Rio Tinto board met and noted that a range of funding options had been evaluated and a renounceable rights issue, fully underwritten by Rio Tinto, remained the only realistic option. The minutes noted that “Rio Tinto is seen in the eyes of the public and many key stakeholders as being intrinsically linked with ERA and able to ensure that ERA, as a majority owned subsidiary, fulfils its rehabilitation obligations at Ranger ... not participating in a funding solution for ERA was accordingly not considered feasible”
- (o) on 25 March 2019, Rio Tinto’s financial adviser produced a presentation in respect of a communications strategy workshop for “Project Emu”
- (p) on 26 March 2019, Rio Tinto had an internal discussion that involved the Rio Tinto executive with ultimate responsibility for the transaction seeking to “understand how he can get more management control” of ERA. Later that day, Rio Tinto emailed its Australian legal advisers requesting (by the end of that day) a succinct summary regarding how Rio Tinto could get more management control of ERA
- (q) on 27 March 2019, the Rio Tinto investment committee endorsed the Ranger closure feasibility study and approved a proposal for Rio Tinto to commit up to \$550m (an amount highly likely to be sufficient to obtain 100% ownership of ERA) to an ERA entitlement offer to fund Ranger rehabilitation and to request board approval. The minutes noted the investment committee had previously reviewed a summary of the pros and cons of four potential funding options and agreed with the conclusion that a renounceable rights issue fully underwritten by Rio Tinto remained the only realistic option and was the recommended path

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

forward. A paper was attached in similar form to the one presented at the 13 February 2019 investment committee meeting, but the statement in relation to the effect of a low offer price (see paragraph 58(j)(ii)) had been strengthened to read “*a high offer price sets the floor at which Rio Tinto may elect to subsequently make a takeover offer to non-Rio Tinto shareholders, once the offer has completed, thereby increasing the cost of executing a minority acquisition*” (emphasis added)

- (r) on 8 April 2019, the Rio Tinto board approved:
  - (i) the Ranger closure and rehabilitation project execution plan and cost estimate as detailed in the closure feasibility study and
  - (ii) Rio Tinto’s participation in, and underwriting of, a renounceable rights issue undertaken by ERA with a total financial commitment of up to \$550m and approved a delegation of authority to approve the final offer terms. This was the final Rio Tinto board approval received in respect of the Entitlement Offer.

An abridged version of the 27 March 2019 investment committee paper was noted

- (s) on 21 May 2019, Rio Tinto’s financial adviser produced a presentation analysing a number of rights issue scenarios, which showed that as the discount to TERP increased, the required take-up by minorities to prevent Rio Tinto from achieving 90% increased and the price to acquire those minorities (“*assuming issue price = IER price*”) decreased
- (t) on 8 August 2019, Rio Tinto’s financial adviser produced a presentation in respect of rights issue timing considerations, which noted that “*following [ERA]’s acceptance that a rights issue is the only viable transaction structure that Rio Tinto is willing to support, it is now important to exert reasonable pressure on [ERA] to ensure the transaction is brought to a conclusion*”. In relation to timing, the presentation noted that “*it is important that the transaction is targeted for completion prior to the year end and prior to the APR process being completed, otherwise (in the absence of a funding solution) there is a risk [ERA] will be required to put a significant amount of its existing cash balance into the Commonwealth Security Deposit, which may not be extractable thereafter*”. The presentation also contained a number of different strategies of “*increasing pressure, aggression and risk*” and
- (u) on 21 August 2019, Rio Tinto’s financial adviser produced an indicative transaction timetable consistent with the 8 August presentation in that it emphasised there was “*very limited scope for timetable slippage to ensure calendar 2019 completion*”.

59. We also note the following:

- (a) on Rio Tinto’s analysis, substantial tax benefits will flow to Rio Tinto in the event it obtains 100% ownership of ERA (relative to less than 100% ownership). For instance:

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (i) as stated in the Rio Tinto investment committee paper noted at the 29 August 2018 meeting, *“the purchase by Rio Tinto of ERA or the Ranger mine would bring it into Rio Tinto’s Australian consolidated tax group and would permit future expenditure on rehabilitation to offset taxable profits generated from the consolidated tax group. The value to Rio Tinto of executing a transaction to buy ERA/Ranger declines as a result of ERA progressing expenditure on its rehabilitation program”*
- (ii) on 15 April 2019, Rio Tinto received in-principle confirmation from the ATO in relation to the deductibility of Ranger rehabilitation expenditure should ERA become wholly-owned by Rio Tinto and join the Rio Tinto consolidated tax group. Rio Tinto’s internal calculations indicated the tax benefit to Rio Tinto mitigated the cost of underwriting the Entitlement Offer. For instance, 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 meetings respectively) indicate that:
  - (A) underwriting a \$500m entitlement offer where 20% of shareholders participate would cost Rio Tinto \$400m but
  - (B) 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) and
  - (C) an acquisition of minorities at a 100% premium and funding of the rehabilitation expenditure would cost Rio Tinto \$364m and
- (b) correspondence between Rio Tinto and regulators suggests to us an intention on the part of Rio Tinto to acquire all of ERA. For instance:
  - (i) on 22 October 2019, Rio Tinto sought formal confirmation from the ATO regarding the deductibility of rehabilitation expenditure should ERA become its wholly-owned subsidiary. In the letter seeking that confirmation, Rio Tinto stated *“it is expected that, if the rights issue results in [Rio Tinto] holding more than 90% of the issued shares in ERA, [Rio Tinto] may elect to use the compulsory acquisition powers ... to become the 100% shareholder in ERA”* and that *“Rio Tinto would not be averse to acquiring ERA shares under the underwriting”* and
  - (ii) Rio Tinto sought (on 20 February 2019) and obtained FIRB approval to obtain 100% ownership of ERA.

60. In light of the materials in paragraphs 58 and 59, we put to the parties whether we should infer (from a summary of that material, which we also put to the parties) that

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

Rio Tinto sought to acquire 100% of ERA and was implementing a course of action to do so.

61. The Rio Tinto Parties submitted (among other things) that:
- (a) *“the Panel should not draw an inference that the parties were structuring a transaction for the purposes of acquiring 100% of ERA”, and that “the primary objective of Rio Tinto in participating in the Entitlement Offer is to ensure rehabilitation of the Ranger mine is adequately funded”*
  - (b) *“what is determinative for the Panel’s consideration is the authority that was granted in respect of the transaction and the fact that alternatives were considered and advice provided on them should not lead the Panel to infer that there is some ‘hidden agenda’ to pursue options which were considered in the course of determining the approved course of action”*
  - (c) the advice sought is relevant for the Rio Tinto board and Rio Tinto investment committee to consider the likely timing and costs involved with various counterfactuals and
  - (d) the FIRB application was filed at a time before the transaction structure was settled and the approval sought was to preserve optionality and *“in engaging with the ATO, it is not unusual, similar to the approach with FIRB, to seek a broader approval to avoid duplicating the consideration and approval process”*.
62. In response to other questions put to the parties, the Rio Tinto Parties submitted that:
- (a) *“the Panel should not infer from previous advice or papers to the Rio Tinto Board that gaining 100% is a primary motivating factor for the structure or Rio Tinto’s participation. In circumstances where the Entitlement Offer is required to be more than three times ERA’s market capitalisation to meet the funding requirements for rehabilitation, it is inevitable that reaching 100% would be considered as part of due consideration of the funding options available and which options may be in the best interests of Rio Tinto shareholders, to whom the Rio Tinto Board owes directors duties”* and
  - (b) *“Rio Tinto is not participating in the Entitlement Offer as a contrived mechanism to obtain control of a company that it ascribes a net negative value to, but rather to ensure that ERA can complete its rehabilitation obligations”*.
63. Zentree submitted that *“it is clear [Rio Tinto] has, however, opted for a strategy to maximise its holding in ERA to attempt to secure 100% acquisition of all assets at the lowest possible price”*.
64. ERA submitted that *“it is a question for Rio Tinto as to what its intentions are; it is not a question of what its advisers’ opinions or recommendations are”*. While we agree that taking advice does not necessarily lead to taking a decision, on the material in this matter there is more than simply taking advice, as explained in paragraph 66 below.
65. The Rio Tinto Parties submitted that: *“Extracting comments made in advices and board papers over a period of approximately 15 months, out of context, during a period in which a broad range of enquiries were countenanced as to how the funding requirements of ERA may*

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

*be met, suggests that Rio Tinto has plans for ERA which it does not have. In fact, when read in context, the extracted statements have a significantly different meaning that support due consideration by Rio Tinto, extensive commercial negotiations and an understanding of the stark realities of ERA's required funding. There is no hidden agenda or secret conspiracy to be uncovered or inferred".*

66. 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. We are prepared to infer from the materials as a whole that Rio Tinto sought to consolidate control and acquire ERA, though the following material is particularly significant to our decision:
- (a) the detailed financial analysis provided to Rio Tinto regarding the costs of Rio Tinto acquiring 100% ownership of ERA, the maximum take-up under various entitlement offer structures that still allowed Rio Tinto to proceed to compulsory acquisition and the amount of capital required to be contributed by Zentree for it to hold more than 10% in ERA
  - (b) the financial advice provided to Rio Tinto in relation to a number of possible control transaction structures
  - (c) that Rio Tinto would only have 6 months to undertake the procedures for compulsory acquisition under the general compulsory acquisition power in the *Corporations Act 2001* (Cth) if it acquired more than 90% of ERA and
  - (d) the content of the Rio Tinto investment committee and board papers (in particular the references to Rio Tinto obtaining control of ERA and the calculations of the cost of various acquisition and other structures) in conjunction with the Rio Tinto board approving funding of an amount highly likely to be sufficient to obtain 100% ownership of ERA.
67. We consider the above finding relevant in considering how the negotiations played out vis-à-vis ERA and the effect or likely effect of the announced proposal (as discussed below). We acknowledge Rio Tinto's submission that its primary objective was to ensure the rehabilitation of the Ranger Project Area was adequately funded, but such a submission is not necessarily in conflict with our finding that Rio Tinto sought to consolidate control and acquire ERA; a person can have multiple objectives and control of ERA would give Rio Tinto control over the rehabilitation process amongst other benefits.

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

68. In relation to whether we should make an inference that Rio Tinto had planned and was implementing a strategy to acquire and control ERA, the Rio Tinto Parties submitted that they “do not have the required internal approval to proceed with compulsory acquisition” and that “such approval will involve an assessment of the advantages against the limitations of proceeding with compulsory acquisition”.
69. ASIC submitted that “if the Panel finds that Rio Tinto had planned and was implementing a strategy to acquire and control ERA, it follows that there are commercial benefits – and likely few (if any) downsides – to Rio Tinto in undertaking compulsory acquisition of the remaining ERA securities”. Therefore, ASIC submitted, formal board approval should be viewed as a technicality.
70. It appears to us that there is a compelling commercial rationale for compulsory acquisition in the event Rio Tinto obtains over 90% as a result of the Entitlement Offer and, as ASIC noted, likely few (if any) downsides. In light of this, we consider that the lack of formal Rio Tinto board approval for compulsory acquisition does not negate our inference that Rio Tinto sought to consolidate control and acquire ERA.

#### **ERA’s consideration of the Entitlement Offer**

71. Given the nature of ERA’s and Rio Tinto’s relationship, including:
- (a) that ERA’s senior executives are employees of Rio Tinto seconded to ERA (including ERA’s Managing Director)
  - (b) the number of non-independent directors on the board of ERA and
  - (c) the Rio Tinto Growth & Innovation Projects group’s assistance in preparing the closure feasibility study,<sup>8</sup> which was ultimately the catalyst for the Entitlement Offer,

we were particularly cognisant of the risk of conflicts of interest compromising the independence of the negotiations with Rio Tinto. We consider ERA should have followed best practice in managing conflicts due to the actual or perceived conflicts of interest in its business.

72. After the establishment of the Committee on 30 January 2019, the Committee met 15 times between 25 March 2019 and 14 November 2019. We note that the first meeting of the Committee occurred after Rio Tinto investment committee minutes stated that ERA had already agreed with Rio Tinto in principle to a renounceable rights issue fully underwritten by Rio Tinto, and also that the first meeting occurred a number of months after the negotiation of a term sheet commenced (see paragraph 58(j) for both).
73. We were provided with agendas for 14 of those meetings and ERA’s Managing Director attended each of those meetings. We were not provided with minutes for any meetings as we were informed that they had not been prepared at the time we requested them.

---

<sup>8</sup> The closure feasibility study was subject to independent review by a global engineering firm and further review and audit as part of the general audit of ERA’s end of year accounts

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

#### *Presence of ERA's Managing Director at Committee meetings*

74. Zentree submitted that:

- (a) the presence of ERA's Managing Director at meetings relating to the terms of the Entitlement Offer and Underwriting Agreement *"would be sufficient to influence (pressure) the independent directors, given his rank and position within Rio Tinto"*
- (b) ERA's Managing Director is necessarily in a position of conflict in relation to any transaction between ERA and Rio Tinto by virtue of being an employee of Rio Tinto and an officer of ERA and
- (c) ERA's Managing Director is *"under the same insolvency and personal liability pressure as the other directors"*.

75. ERA submitted that, although ERA's Managing Director was involved as a member of management and in attendance at Committee meetings, ERA's Managing Director was not a decision maker in relation to the Underwriting Agreement and was not a member of the Committee.

76. ERA also submitted that:

- (a) *"no pressure or influence was brought to bear on [ERA's Managing Director] by Rio Tinto or by [ERA's Managing Director] on the [Committee]"* and that it *"strongly reject[ed] any inference that [ERA's Managing Director] acted contrary to ERA's interests"* and
- (b) given ERA's small management team, it was not practical to exclude ERA's Managing Director entirely from the process.

77. In response, ASIC noted it was difficult to determine what weight to place on ERA's submission that ERA's Managing Director brought no pressure or influence to bear on the Committee, given minutes of Committee meetings were not prepared. We agree.

78. While ERA's Managing Director was not formally a member of the Committee, his presence at every Committee meeting undermines the purpose of establishing an independent committee. Further, we were provided with material that disclosed he was involved in negotiations regarding the Entitlement Offer and Underwriting Agreement including with the executive at Rio Tinto ultimately responsible for the transaction. For instance, on 1 July 2019, ERA met with Rio Tinto in Perth to discuss Rio Tinto's offer to participate in a rights issue and ERA's continued exploration of alternative funding options, with ERA's Managing Director and Mr Mansell representing ERA.

79. We consider the above supports an inference that ERA's Managing Director had the practical ability to make or at least influence decisions in relation to the Entitlement Offer and Underwriting Agreement.

80. ASIC submitted that it *"would have expected any persons that may have been conflicted given their roles at Rio Tinto would not have been present at, participated in or voted on, any consideration by the [Committee] of both the Entitlement Offer and the terms of the*

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

*Underwriting Agreement*". On that basis, ASIC submitted that it was open for us to infer that it was not appropriate for ERA's Managing Director to have been involved in the negotiation of the Entitlement Offer and the terms of the Underwriting Agreement.

81. We recognise, as does ASIC, that ERA has a small management team. ASIC noted that, given this, it may have been necessary as a matter of practicality for ERA's Managing Director and other executives (with ties to Rio Tinto) to assist the Committee from time to time, but that those sorts of arrangements increase the risk that potential conflicts of interests are not sufficiently mitigated to ensure the principles in s602 are upheld.
82. We put to the parties that in *Yancoal*<sup>9</sup> independent advisers were appointed to act for Yancoal's independent board committee and asked ERA to explain why independent lawyers or financial advisers were not engaged by the Committee. ERA submitted that it is not a relevant consideration that the independent board committee in *Yancoal* appointed independent legal advisers. This submission was not explained further, and we think it is a relevant consideration given *Yancoal* is a relevant precedent for this matter (for instance, ERA's financial adviser referred to it in material provided to us).
83. ERA also submitted that the Committee did not consider it was necessary to have advisers independent of ERA as "*for all intents and purposes the [Committee] is ERA's mind and will in relation to the matters for which it has delegated authority, and [it] has no interests that conflict with the interests of ERA*". Given ERA's small management team and its submission that it was not practical to exclude ERA's Managing Director entirely from the process, we consider 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. We also don't accept that the Committee was, in practical terms, ERA's mind and will for the matters for which it had delegated authority given the discussions at the ERA board level outlined below.

#### *Board meetings*

84. We were concerned that ERA board minutes provided to us established that the ERA board was kept apprised of, and at times generally discussed, various transaction elements within the scope of the Committee's mandate. ASIC had concerns that the minutes indicated that no ERA directors considered they had any material personal interests in any of the matters discussed and submitted this may represent a further factor that increases the risk that potential conflicts of interests have not been sufficiently mitigated to ensure the principles in s602 are upheld. ASIC submitted that in such a case, it may be open for us to infer further involvements that were not appropriate.
85. ERA submitted that it was necessary and proper for the Committee to provide progress reports to the full ERA board as, in order to mitigate the risk of personal

---

<sup>9</sup> *Yancoal Australia Limited* [2014] ATP 24

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

liability for insolvent trading, each director must at all times have reasonable grounds to expect, and must expect, that the company will be able to pay its debts as and when they fall due. ERA submitted that each director has the same duty and defence regardless of whether or not he or she is independent.

86. We accept ERA's submission. However, the ERA board minutes evidence matters beyond noting progress reports. These matters include discussions affecting substantive aspects of the capital raising (such as size) that were within the delegated power of the Committee. The discussions are of concern given the number of directors that were not independent of Rio Tinto. For instance:
- (a) at one board meeting on 9 September 2019, following the tabling of a memorandum from ERA management, the ERA board questioned management regarding the advantages and drawbacks of relying on the Credit Facility to reduce the size of the Entitlement Offer, and at another meeting on 17 October 2019, following the tabling of another memorandum from ERA management, the full ERA board confirmed it was appropriate to retain the Credit Facility as a form of contingent funding only, and not use it to reduce the size of the Entitlement Offer
  - (b) at multiple meetings, the ERA board discussed the progress of the Underwriting Agreement, the proposed offer price and other matters and in at least one meeting, the ERA board minutes disclosed that these discussions were led by ERA's chairman and ERA's Managing Director
  - (c) in the context of a meeting on 18 June 2019 where the Entitlement Offer was discussed, the ERA board discussed whether a Jabiluka divestment process was in the best interests of ERA
  - (d) at one meeting of the ERA board on 6 December 2018, ERA's Managing Director referenced a previous discussion regarding the solvency of ERA and noted that, while management had progressed its consideration of potential funding options, directors needed to carefully consider ERA's funding position and the terms of any commitment from Rio Tinto in order to form a view regarding ERA's ongoing viability
  - (e) on 17 October 2019, the ERA board discussed various draft materials in relation to the Entitlement Offer, including a draft of the Underwriting Agreement, and were invited to pass on any feedback to ERA's company secretary and legal counsel
  - (f) on 25 October 2019, the ERA board endorsed management's assessment of the funding deficit and the proposed size of the Entitlement Offer and
  - (g) on 14 November 2019, the ERA board resolved that it was in the best interests of ERA to proceed with the Entitlement Offer on the terms set out in the materials to ultimately be released to ASX (and that those materials be approved and released to ASX) - in our view, this reduces the force of ERA's submission that the Committee was the mind and will for the matters for which it had delegated authority, particularly as minutes for the relevant ERA board

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

meeting disclosed that the decision of the Committee to proceed with appointing the Underwriter and executing the Underwriting Agreement was subject to the board resolving to proceed with the Entitlement Offer.

#### *Panel guidance and conclusions*

87. Guidance Note 19: *Insider Participation in Control Transactions* provides takeover market participants with guidance on situations where there is involvement or potential involvement by the management, directors or external advisers of a target company with a bidder.<sup>10</sup> One of the Panel's primary concerns in such a situation is to ensure that consideration by the target board and management of the proposal is undertaken free from any actual influence, or appearance of influence, from participating insiders.<sup>11</sup> However, the Panel's primary focus is to determine whether unacceptable circumstances have arisen, rather than whether there has been a breach of directors' duties or other obligations under the law.<sup>12</sup> We consider the principles set out in the Guidance Note are applicable in the circumstances of this matter involving:
- (a) directors who are employees or appointed by the controlling shareholder and
  - (b) a rights issue with a significant control effect and potentially leading to compulsory acquisition without a takeover bid or approval by an independent shareholder vote (or another process consistent with the purpose of Chapter 6).
88. Relevantly, paragraph 11 of the Guidance Note states that:
- As soon as the board of a company becomes aware or informed of a bid or potential bid for the company, in which there is, or is likely to be, participation by insiders, it should establish appropriate protocols. Normally this will involve appointing an independent board committee (IBC) consisting of those directors who are not participating insiders to oversee the application of these protocols and the process in the interests of target shareholders. Any directors who are participating insiders should not be present at, or participate in or vote on, any consideration by the board of the bid or any competing bid. (emphasis added)*
89. Given the above, we infer that it was not appropriate for ERA's Managing Director to have been involved in the negotiation of the Entitlement Offer and the terms of the Underwriting Agreement to such an extent and that insufficient measures were taken to ensure the independence of the Committee, and potential conflicts of interest were not sufficiently managed. We also would have expected ERA to have produced minutes from Committee meetings in a timely fashion to ensure an accurate record of all relevant deliberations was available (particularly given the involvement of ERA's Managing Director and other executives with relationships to Rio Tinto). ASIC made a submission to the same effect.
90. We consider the discussions at the ERA board level, in particular in regard to aspects of the Entitlement Offer and alternatives, had the potential to compromise the

---

<sup>10</sup> The Guidance Note states that the term 'bid' may include other control transactions

<sup>11</sup> Guidance Note 19: *Insider Participation in Control Transactions* at [1] and [2]

<sup>12</sup> See Guidance Note 19: *Insider Participation in Control Transactions* at [5]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

independence of the Committee and the negotiations with Rio Tinto. Given the matters noted above, we agree with ASIC's submissions above in paragraph 84. We infer that the level of involvement of ERA's Managing Director was not appropriate and that potential conflicts of interest were not sufficiently mitigated to ensure the principles in s602 were upheld.

91. Our conclusions regarding the independence of the Committee and the management of potential conflicts of interest have particular significance in light of our inference that Rio Tinto sought to consolidate control and acquire ERA and:
- (a) the outcome of the negotiations between ERA and Rio Tinto regarding the Underwriting Agreement and
  - (b) the extent to which Rio Tinto permitted ERA to address its need for funds otherwise than by the Entitlement Offer,
- which are both discussed further below.

#### Underwriting Agreement

92. Zentree submitted that certain provisions in the Underwriting Agreement substantially fetter the future discretion of the directors of ERA, and are inappropriate in a genuine equity raise underwriting. For instance:
- (a) clause 10.4 of the Underwriting Agreement prohibits ERA dealing with or creating any new economic or legal interest in the Jabiluka Mineral Lease (or any interest, proceeds, assets or returns generated from it), without the prior written consent of the Underwriter (not to be unreasonably withheld or delayed having regard to certain matters)
  - (b) other undertakings require ERA to use the "*Rehabilitation Funds*" only for a permitted purpose (effectively remediation of the Ranger Project Area, head office costs and related matters) and apply those funds only after (effectively) all other cash funds have been exhausted (other than the "*Growth Assets*" described further in paragraph 34(a)) and
  - (c) ERA must amend its board charter to reflect the undertakings in the Underwriting Agreement.
93. The undertakings in the Underwriting Agreement effectively continue until the substantial completion of the Ranger Project Area rehabilitation obligations (currently required to be completed by January 2026 under the Ranger Authority). The undertakings cease earlier if ERA ceases to be a subsidiary of Rio Tinto or the Underwriting Agreement is terminated.
94. Zentree submitted that the relevant provisions are significant controls on the business and finance of ERA, are of benefit to Rio Tinto and are of no benefit to minority shareholders.
95. We were concerned that these provisions in the Underwriting Agreement operated as a lock-up. That is, they granted the Underwriter effective negative control over certain of ERA's assets (having a control impact) and also were evidence that the

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

Underwriting Agreement was not on terms consistent with commercial underwriting, and asked the parties for submissions.

96. We consider it was appropriate to do so as the Panel's principles as to lock-up devices (see Guidance Note 7: *Lock-up devices*) "*are of general application and can be applied to any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder*".<sup>13</sup> For instance, the Panel has considered the policy in the context of financing arrangements and their potential to act as lock-up devices and agreed that "*the underlying principles supporting the policy should be construed broadly to include circumstances such as these where there is no formal bid*".<sup>14</sup> We consider the Panel's policy on lock-up devices therefore applies to a rights issue with a significant control effect and potentially leading to compulsory acquisition without a takeover bid or an independent shareholder vote (or another process consistent with the purpose of Chapter 6).
97. We were particularly concerned with clause 10.4 described above. We were concerned given Jabiluka represented ERA's only asset of note besides Ranger and the cash required to rehabilitate the Ranger Project Area. We were also concerned given the clause effectively continued until the substantial completion of the Ranger Project Area rehabilitation obligations (currently required to be completed by January 2026 under the Ranger Authority).
98. However, we also had concerns with other clauses in the Underwriting Agreement that affected the management of ERA over the medium to long term (for instance, as set out in paragraphs 92(b) and 92(c) above) as these provisions are not consistent with commercial underwriting arrangements. For instance, the undertaking requiring ERA to amend its board charter to reflect the undertakings in the Underwriting Agreement has added managerial control significance in light of another undertaking precluding ERA from incurring expenditure above a threshold unless approved by a relevant person, committee or board of ERA and the Underwriter.
99. On the other hand, we recognise that ERA's situation is unique and recognise the submissions of ERA and the Rio Tinto Parties to the effect that the funds were being provided for a specific purpose. While this may be sufficient to justify some of the undertakings affecting the management of ERA, we do not accept that it is sufficient to justify all of them.
100. During the proceedings, we were provided with material that showed that clause 10.4 of the Underwriting Agreement was a focus of the negotiations between ERA and Rio Tinto.

---

<sup>13</sup> Guidance Note 7: *Lock-up devices* at [2]. The Guidance Note also states at [1] that terms such as 'target' are used for convenience. The Guidance note sets out at [32] a number of factors for the Panel to have regard to, including the size or strategic value of the asset involved, whether the agreement was negotiated on an arms-length basis, whether the agreement is at a fair price and the length of the lock-up

<sup>14</sup> *Billabong International Limited* [2013] ATP 9 at [27]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

101. For instance, on 23 September 2019, the Rio Tinto Parties' legal advisers stated that any dealings with Jabiluka should be subject to shareholder approval for a number of reasons including that *"the Underwriter's commitment to participate in and underwrite the rights issue with the knowledge that Jabiluka is wholly owned by ERA"*. Further context was provided in submissions to us, as the Rio Tinto Parties submitted that *"ERA was not prepared to indicate whether it considered that Jabiluka would be the main undertaking of ERA and therefore falling within the ambit of Chapter 11 [of the ASX Listing Rules]"*. We have some sympathy with a response from Zentree that *"if Jabiluka is not a material undertaking of ERA for the purposes of Chapter 11 [of the ASX Listing Rules], then Rio should not get a contractual right to fetter its disposal instead"*.
102. We were also provided with documents from which we infer that ERA, during the negotiations of the Underwriting Agreement, was also concerned with the control effect of clause 10.4. For instance, one email from ERA's legal advisers to the Rio Tinto Parties' legal advisers on 23 October 2019 stated, in relation to a near-final version of clause 10.4, that:
- As we have said before, the tighter the restrictions imposed by Rio Tinto on ERA, the more reason Zentree may have to challenge the rights issue ... in this regard, ERA is concerned that the clause will potentially give Zentree another reason to complain about whether the underwriting terms impose unreasonable restrictions on ERA and have an unacceptable effect on the control of the company, or to make other claims (e.g., that the agreement does not fall within the exception in s210 of the Corporations Act and requires shareholder approval). What Rio Tinto has proposed most recently gives it a very broad discretion to veto dealings with Jabiluka, and seems to go beyond protecting Rio Tinto's interests as underwriter ...*
103. In our view, the conduct of the negotiations between ERA and the Underwriter regarding the Underwriting Agreement reinforces our inference regarding Rio Tinto's intention to consolidate control and acquire ERA.
104. Zentree submitted that:
- (a) the undertakings are nothing like genuine arm's length underwriting terms and are clearly intended to prevent ERA dealing with ERA's cash or Jabiluka contrary to Rio Tinto's interests and
  - (b) the undertakings tie the hands of ERA from being able to change strategy and negotiate different outcomes with stakeholders if they are in the interests of ERA, but not Rio Tinto.
105. The Rio Tinto Parties made a number of submissions, including that:
- (a) a disposal of Jabiluka *"to a counterparty who was not minded to comply with the LTCMA has the potential to harm Rio Tinto's interests – its reputation would be harmed, adverse commentary would reflect on its 'social licence to operate' and potential future counterparties and stakeholders may take an adverse view in conducting business with Rio Tinto"*
  - (b) *"the more specific undertakings in clause 10 of the Underwriting Agreement provide support for the ongoing obligations of ERA to implement the rehabilitation [of the Ranger Project Area]"* and

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (c) *“Rio Tinto was not prepared to provide a back-stop to [ERA’s] funding obligations where it would be open to ERA to deal with those funds or its assets in a manner inconsistent with rehabilitation or its care and maintenance obligations” and that “Rio Tinto’s position on those issues should not affect the willingness of other parties to put forward a proposal to acquire Jabiluka”.*

106. ERA submitted that:

- (a) *“ERA believes the undertakings should not unduly fetter the ERA board’s discretion as a practical matter on the basis that they are broadly consistent with the strategy adopted by the ERA board and the rationale for the Entitlement Offer”, namely successful progress on rehabilitation of the Ranger Project Area which, in ERA’s view, “is a prerequisite to support future operations and growth beyond Ranger” and*
- (b) *development of Jabiluka requires the prior consent of the Mirrar Traditional Owners, by virtue of the LTCMA, and “ERA does not expect consent to be forthcoming in the absence of successful progress on rehabilitation of the Ranger Project Area (if at all)”.*

107. ASIC submitted that it may be open for us to find that Rio Tinto’s actions through the Underwriting Agreement constitute circumstances which are unacceptable because of the ‘lock-up’ they impose on ERA and/or certain of its assets. This is because Rio Tinto’s efforts could:

- (a) *inhibit the acquisition of control over voting shares taking place in an efficient, competitive and informed market and/or*
- (b) *deny holders of ERA shares a reasonable and equal opportunity to participate in the benefits of a proposal under which a person may acquire a substantial interest.*

108. ASIC submitted that limiting ERA’s ability to deal with Jabiluka may impact on competition for ERA in terms of current or potential bidders. ASIC noted that ERA had indicated there was interest from a third party or parties in acquiring Jabiluka at some time prior to the Entitlement Offer. On the other hand, ASIC submitted that Rio Tinto has an existing controlling interest in ERA shares of 68.39%, which of itself already likely serves, to a degree, as a deterrent to control proposals by other parties.

109. ERA submitted that, given Rio Tinto already controls ERA, whether or not Jabiluka is subject to the undertakings in clause 10 of the Underwriting Agreement can have no effect on control as control of Jabiluka does not equate to control of ERA.

110. We acknowledge that control over an asset does not equate to control over a company; however, it can affect the market for the company’s shares and whether that market is efficient, competitive and informed.

111. We accept Zentree’s submission noted in paragraph 104 above that the undertakings are unlike arm’s length underwriting terms and are a fetter on the ERA board. We also accept that even though the undertakings are consistent with ERA’s current strategy, at any point in time before Rio Tinto gets to 100%, ERA could receive or develop a compelling opportunity that could result in it being in ERA’s best interests

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

to change strategy. The undertakings restrict ERA's ability to pursue such opportunities.

112. We consider Rio Tinto's desire for control and the lack of adequate independence safeguards have played out through the terms of the Underwriting Agreement. The undertakings are consistent with (and reinforce) our inference that Rio Tinto sought to consolidate control and acquire ERA and represent a way in which Rio Tinto can get "*more management control*" (see paragraph 58(p)). They are effectively a way in which Rio Tinto can exert control over ERA, even in the circumstance where Rio Tinto does not reach 90% via the Entitlement Offer or elects not to proceed to compulsory acquisition. In relation to Jabiluka, the importance of the relevant undertaking (and hence the importance of effective control over a major asset of ERA) was admitted by the Rio Tinto Parties as they submitted that "*the undertakings in clause 10.4, provide contractual commitments from ERA requiring that any dealings with Jabiluka be supported by the Rio Tinto Parties, and to ensure that the foundation of Rio Tinto's participation in the Entitlement Offer is not undermined*".
113. We are satisfied that the terms of the Underwriting Agreement grant 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. Such terms are inconsistent with a commercial underwriting arrangement.
114. We recognise that the size of Rio Tinto's existing voting power in ERA is sufficient of itself to give Rio Tinto some degree of control over ERA, but the terms of the Underwriting Agreement further increase Rio Tinto's control (via the Underwriter) and act as a fetter on the ERA board. In the context of this matter, we are satisfied that this inhibits the acquisition of control over ERA's voting shares taking place in an efficient, competitive and informed market.

#### **ERA's consideration of its funding requirements**

##### *Need for funds*

115. When considering a company's need for funds, the Panel looks at the company's financial situation, the amount sought to be raised and the suitability of raising capital by the relevant entitlement offer. The Panel is likely to accept the directors' decision on these issues if the decision appears to be reasonable and supported by rational reasons unless the applicant can point to something that suggests deeper inquiry may be warranted.<sup>15</sup>
116. Given the unusual nature of this matter, as noted in Zentree's application, we consider it was appropriate to conduct a deeper inquiry into ERA's need for funds.
117. ERA submitted that it had an urgent need for funds. However, need for funds is not a safe harbour.<sup>16</sup>

---

<sup>15</sup> Guidance Note 17: *Rights Issues* at [12]

<sup>16</sup> Guidance Note 17: *Rights Issues* at [12]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

118. In connection with why the funding was urgent, ERA made a number of submissions including that:
- (a) *“although the [Ranger Project Area] rehabilitation spend occurs progressively over the rehabilitation period, the existing rehabilitation obligation must be taken into account by the ERA board when assessing ERA’s ongoing solvency”*
  - (b) *“from the time that it became apparent to the ERA board that ERA will not have sufficient cash resources to fund the material increase in the cost of the rehabilitation of the Ranger Project Area, ERA has been relying on various forms of comfort provided by Rio Tinto to continue its operations”*
  - (c) *“... were it not for Rio Tinto’s offer to take up its entitlement under and to underwrite the proposed Entitlement Offer, the Board would have no real choice but to place the Company into external administration (all other things being equal). Likewise, any delay to the Entitlement Offer is likely to lead to the same result”*
  - (d) if ERA was not able to meet an increased APR security demand (see paragraph 11) because ERA did not have sufficient funding, *“the directors believe they would have no real choice but to place ERA into external administration (all other things being equal)”* and
  - (e) *“notwithstanding what others may assume or believe may occur, the ERA directors are not prepared to assume that Rio Tinto’s financial support will continue indefinitely – the directors are not satisfied that there is a reasonable basis to make this assumption, bearing in mind Rio Tinto’s letter of 11 July”* (see paragraphs 26 and 126(e)).
119. Zentree submitted (among other things) that ERA’s need for funds was not urgent as the company would have sufficient time to negotiate alternative arrangements with the Commonwealth if the Entitlement Offer was cancelled by the Panel.
120. Given the material put before us, we have some sympathy with Zentree’s submission. While on one hand the Commonwealth informed ERA that *“there is no departmental or stakeholder appetite to remove the requirement that ERA provide the Australian Government with a rehabilitation security”*, on the other hand the Commonwealth also advised ERA that it *“will not ask the Minister to adjust the security value until such time as ERA’s funding negotiations are resolved”* (emphasis the Commonwealth’s).
121. The Commonwealth’s statement above, to the effect that the APR security will not be adjusted until ERA’s funding negotiations are resolved, is consistent with:
- (a) the intentions of ERA’s management to seek this confirmation, as evidenced in ERA’s board minutes which state ERA’s management *“would continue to engage with the [Commonwealth] regarding the [Commonwealth’s] securities requirements in order to ensure that any potential increase in securities amount aligns with the resolution of the Company’s funding position”*
  - (b) the events that ultimately transpired – on 18 November 2019 (i.e. after the announcement of the Entitlement Offer), the Commonwealth advised ERA that the relevant Commonwealth Minister had approved ERA’s APR and referred it to the assessor for consideration and

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (c) the Commonwealth's previous flexibility as it acquiesced to ERA submitting its 2019 APR after the due date.
122. We also note that the potential for the capital raising and Rio Tinto's involvement have been known by ERA for an extended period of time. For instance:
- (a) on 6 December 2018, ERA announced the preliminary findings of the Ranger Project Area closure feasibility study (showing a likely increase in the rehabilitation provision of \$296m)
  - (b) on 2 November 2018, ERA provided a financial model to Rio Tinto and commenced the preparation of a data room (we were not provided with any documents evidencing the discussions leading up to this) and
  - (c) on 6 November 2018, ERA entered into a confidentiality agreement with a subsidiary of Rio Tinto, with one aspect of the "*Permitted Purpose*" being for "*the purpose of discussing contingent funding options for ERA, which may include the sale and purchase of ERA assets and liabilities*".
123. On balance, the urgency of ERA's need for funds is less clear than in other entitlement offers where the Panel has allowed a highly dilutive entitlement offer with a control effect to proceed.<sup>17</sup> We also note that material provided to us supports an inference that Rio Tinto applied significant pressure, including in relation to solvency support, to ERA throughout the negotiation of the Entitlement Offer and Underwriting Agreement (see paragraphs 140 – 148).

#### *Overview of alternative transactions*

124. ERA submitted (among other things) that no commercially viable funding solution was available to ERA and that "*despite all of ERA's efforts to procure an alternative funding solution, there is no 'Plan B'*".
125. ERA submitted that it undertook an extensive and rigorous review process to assess a number of alternative funding options. Based on the material provided to us, this process can be summarised as follows:
- (a) ERA determined that third party debt funding for rehabilitation of the Ranger Project Area was unviable
  - (b) between December 2018 and April 2019, ERA's financial adviser approached six brokers (who were again contacted in October 2019) in connection with underwriting the Entitlement Offer. None of the six expressed any interest/appetite to underwrite or sub-underwrite the offer
  - (c) Rio Tinto explored acquiring the Ranger mine but by 11 March 2019 at the latest (see paragraph 126(d)) was no longer considering the option. Following third party interest in acquiring Ranger (which was contingent on Rio Tinto funding

---

<sup>17</sup> For instance, in *Multiplex Prime Property Fund 03* [2009] ATP 22, there was a clear statement from the financiers that covenant breaches would not be waived (at [5]) and minority unitholders had "*the risk of an accelerated call hanging over their heads*" (at [47]). The Panel in that matter stated that in other circumstances "*a massively dilutive rights issue such as this may not be acceptable*"

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

some or all of the cost of rehabilitation of the Ranger Project Area), Rio Tinto ultimately informed ERA that such a transaction was not feasible or commercially acceptable from Rio Tinto's perspective

- (d) in May 2019, ERA undertook further consideration as to selling Jabiluka, following unsolicited third party interest in acquiring the asset, though ultimately concluded (on a date unknown) *"that a full sale of Jabiluka would not generate sufficient upfront proceeds to address the Ranger rehabilitation shortfall"*. This followed a series of events where Rio Tinto initially suggested it was open to a divestment of Jabiluka before seeking further control over any potential divestment:
- (i) correspondence indicates that, following a discussion between ERA and Rio Tinto some months prior to June 2019, ERA *"understood that Rio Tinto would not support any divestment of ERA's Jabiluka Mining Lease"* but at a meeting on 30 May 2019 Rio Tinto indicated its *"position with respect to Jabiluka may have changed, expressing a willingness to support, subject to satisfactory commercial terms, ERA's divestment of interests in Jabiluka"*
  - (ii) by 11 July 2019, Rio Tinto was not supportive of the proposed divestment for reasons including that *"the proceeds from any proposed sale of Jabiluka would, in our view, fail to meet ERA's rehabilitation funding shortfall by a significant margin, leaving ERA with a continuing need to undertake a rights issue. We believe that ERA shareholders would have little (if any) incentive to participate in a subsequent rights issue where the only remaining asset of ERA is the Ranger operation. Rio Tinto is not a party to the sale process for Jabiluka and therefore reserves its rights for any future resolutions put to ERA shareholders"*
  - (iii) ERA responded on 25 July 2019 confirming that, *"in parallel [to the Entitlement Offer], the ERA board will continue to assess its options regarding a potential sale of the Company's interests in Jabiluka"*
  - (iv) by 5 September 2019, Rio Tinto was actively seeking to ensure it would have (effectively) negative control over Jabiluka through an updated draft of the Underwriting Agreement with restrictive undertakings, which was queried by ERA's legal advisers on the basis that *"ERA will not be free to deal with the Growth Assets (as defined) ..."* and
  - (v) by 23 September 2019, as a compromise position, Rio Tinto's position had shifted to requiring shareholder approval for any dealings with Jabiluka (see paragraph 101). Rio Tinto ultimately managed to negotiate ERA's agreement to effectively not deal with Jabiluka without the prior written consent of the Underwriter (not to be unreasonably withheld or delayed having regard to certain matters) (see paragraph 34(b))
- (e) on 30 May 2019, ERA entered into a confidentiality agreement with Zentree (ERA's engagement with Zentree is discussed in paragraphs 149 – 161).

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (f) on 4 June 2019, Rio Tinto informed ERA that using the Credit Facility to reduce the size of the Entitlement Offer *“is not appealing to Rio Tinto or in the best interests of all ERA shareholders”*
  - (g) on 29 June 2019, (following a proposal from ERA) Rio Tinto effectively rejected a structural separation of Jabiluka on the basis of a number of threshold concerns, stating that *“as things stand, it seems difficult for us to see how the risk/reward balance would justify proceeding further with the Separation Proposal”*. On 11 July 2019, Rio Tinto confirmed that it *“does not support this option and will not participate in it”*, noting its threshold concerns
  - (h) also on 29 June 2019 in the same correspondence, Rio Tinto confirmed that an acquisition of minority shareholders by Rio Tinto was not an approach which Rio Tinto was willing to pursue
  - (i) as noted further below in paragraph 126(e), on 11 July 2019, Rio Tinto informed ERA that *“a Rights Issue is now the only funding option which remains open for further discussion between Rio Tinto and ERA”*
  - (j) on 21 August 2019, following a proposal by ERA, Rio Tinto informed ERA that it would not support a partly paid rights issue structure, which ERA had sought in order to align the fundraising with the expenditure profile (ERA also informed us that ASX advised ERA that it was not likely to grant a necessary waiver of the ASX Listing Rules to permit this structure).
126. The process by which Rio Tinto ultimately informed ERA on 11 July 2019 that it would only support a fully underwritten renounceable entitlement offer is summarised below:
- (a) on 19 November 2018, the Rio Tinto investment committee met and approved, among other things, a draft ‘comfort letter’ to be provided to ERA to provide comfort to the directors and officers of ERA that Rio Tinto will support ERA to meet its debts as and when they fall due
  - (b) on 27 November 2018, the Rio Tinto board gave in principle approval to provide the ‘comfort letter’ to ERA and delegated authority to finalise its wording
  - (c) on 5 December 2018, Rio Tinto provided a ‘comfort letter’ to ERA, which stated that:

*... Rio Tinto intends to continue engaging with ERA to develop a formal commitment to ERA to ensure that it can meet its likely future obligations. The options which Rio Tinto intends to explore with ERA with a view to securing this objective include the following (the “Funding Solutions”):*

    - (a) *Support for a renounceable rights issue to raise sufficient funds to meet the rehabilitation and other obligations.*
    - (b) *Acquisition of the Ranger mine, associated assets and cash reserves, and assumption of the rehabilitation obligations.*

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (d) on 11 March 2019, Rio Tinto provided a letter to ERA and a first draft of the Underwriting Agreement. The letter stated that *“after consideration of all pertinent factors, it is Rio Tinto’s conclusion that an ERA renounceable rights issue is the preferred, and indeed only viable, solution for ERA, to which Rio Tinto is prepared to support”*. The letter also stated that:

*It is our understanding that ERA and its advisers have already engaged with, and solicited interest in, an underwritten ERA equity raising from a number of market participants. As such, we would expect that ERA should reasonably be in a position to complete this process and advise Rio Tinto of its response to the Funding Proposal by no later than 15 March 2019 [4 days after the date of the letter].*

- (e) on 11 July 2019, Rio Tinto wrote to ERA and stated that:

*For the avoidance of doubt, after careful and deliberate consideration, the funding option which Rio Tinto is offering to ERA is participation in, and underwriting of, a Rights Issue... A Rights Issue is now the only funding option which remains open for further discussion between Rio Tinto and ERA. All other funding options for ERA, involving Rio Tinto, have been duly considered and subsequently eliminated as options which Rio Tinto does not support... This offer remains available for acceptance or rejection by the ERA Board subcommittee, albeit it is not a position which Rio Tinto is prepared to continue with indefinitely.*

127. We had concerns as to the extent to which Rio Tinto permitted ERA to address its need for funds otherwise than by the Entitlement Offer, given the Entitlement Offer is 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).
128. Zentree submitted that the Panel should infer that Rio Tinto never seriously considered, or allowed ERA to consider, alternatives as Rio Tinto *“sees an underwritten rights issue as the simplest and cheapest way to acquire ERA and its assets”*.
129. The Rio Tinto Parties submitted (among other things) that:
- (a) *“the Rio Tinto Parties validly prioritised a complete funding solution given the difficulties in securing funding for the current rehabilitation liabilities and the legitimate concern that these issues would only worsen as ERA moves through its rehabilitation closure plan”* and
- (b) the Entitlement Offer was the *“least worst”* option available to Rio Tinto in circumstances where it was being asked to substantially fund the liabilities of another publicly listed company and *“it is entirely appropriate that the Rio Tinto Parties prioritised the least costly option in accordance with their own shareholder duties and obligations, particularly in circumstances where there is no expected financial return for the considerable quantum of funds to be contributed”*.
130. ASIC submitted (among other things) that:

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (a) Rio Tinto's actions may be inferred to be consistent with an intention by Rio Tinto to acquire 100% of ERA and the implementation of a course of action to do so (and that it was open to us to draw that inference) and
  - (b) given the substantial interest Rio Tinto holds in ERA, Rio Tinto is in a position to exert some influence on ERA's decisions and potentially limit the funding alternatives available to ERA by only supporting the option most beneficial to Rio Tinto.
131. ERA also submitted, in response to a submission from Zentree, that where there is a viable funding solution available, the ERA directors believed that it would be contrary to their duties to place the company into external administration and "*the irrefutably better outcome for [ERA], its shareholders and its creditors and other stakeholders*" was for ERA to remain solvent. In contrast to that submission, ASIC (in response to a separate question asked by the Panel) submitted that seeking shareholder approval would have provided ERA shareholders with the opportunity to decide whether it is preferable to proceed with the Entitlement Offer, which may result in Rio Tinto obtaining greater than 90% of ERA's shares or, if this is indeed the case, risk ERA's insolvency.
132. As part of our inquiries into the alternatives explored by ERA, we received documents from ERA's financial adviser in relation to the potential sale of an interest in Jabiluka. The Committee considered it was prudent to investigate divesting Jabiluka after ERA received unsolicited third party interest in May 2019. Financial advice dated 17 June 2019 recommended that ERA undertake a process to seek a joint venture partner for up to 50% of Jabiluka, which could provide a number of benefits to ERA. The advice recommended a two-stage controlled auction process and identified an indicative investor universe of a substantial number of potentially interested parties.
133. Ultimately, three parties were approached by ERA (one of whom was not listed in the indicative investor universe):
- (a) one did not engage substantively
  - (b) one stated it did not have capacity to engage and
  - (c) one engaged with ERA (but ERA ended its engagement when the company contacted Traditional Owner representatives without ERA's consent, who expressed significant concerns regarding any engagement with that company and any transaction).
134. ERA submitted that, given the failure to generate any substantive interest in the asset during the preliminary phase and the reaction of the Traditional Owners, the Committee concluded that a full divestment process to a wide range of bidders was not in the interests of ERA. ERA also submitted in effect that it did not undertake a full price discovery process for Jabiluka as that would risk upsetting stakeholder sensitivities [REDACTED].

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

135. The Rio Tinto Parties submitted that the political, cultural, environmental and historical overlay in respect of Jabiluka means that it may not be an easily saleable asset with a wide investment audience in the event of any future acquisition or sale. The Rio Tinto Parties also submitted that there are inherent difficulties in developing and therefore ascribing a monetary value to Jabiluka.
136. Given the limited number of parties contacted by ERA (particularly in light of the number of potentially interested parties identified by ERA's financial adviser) and the fact that interest was in fact generated from those approaches, we infer that a comprehensive price discovery process for the value of Jabiluka did not occur. In contrast, as evidenced by the negotiations between ERA and Rio Tinto regarding the Underwriting Agreement, it was important to Rio Tinto that it have some control as to whether Jabiluka remains with ERA.
137. In relation to the Credit Facility, we queried whether it was uncommercial for Rio Tinto to not accept its use by ERA to reduce the size of the Entitlement Offer as:
- (a) via the underwriting, Rio Tinto agreed to provide up to \$476m to ERA if required
  - (b) Rio Tinto agreed to provide those funds on the understanding that the funds *"are not expected to generate any direct financial return for ERA"* - providing a portion of those funds at a later point in time via the Credit Facility would permit Rio Tinto to earn a financial return on those funds in the intervening period and
  - (c) in the event of insolvency, as a creditor Rio Tinto would be preferred to other equity holders in relation to any amounts advanced under the Credit Facility.
138. Rio Tinto submitted it would be *"uncommercial on the basis of adverse tax consequences to Rio Tinto of providing the funds via a loan and the evident challenges in ever being repaid under the terms of the [Credit Facility] (as the loan is a funding solution once all alternatives have been exhausted, and there is no cashflow from ERA to support repayments)"*.
139. 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.

#### *Impact of pressure on the consideration of alternative transactions*

140. Our concerns were reinforced by some of the material provided to us, such as the correspondence in paragraph 126(e) and financial advice summarised in paragraph 58, which we consider supports an inference that Rio Tinto applied significant

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

pressure, including in relation to solvency support, to ERA throughout the negotiation of the Entitlement Offer and Underwriting Agreement – for instance, on 8 August 2019, Rio Tinto’s financial adviser produced a presentation that contained a number of different strategies of “*increasing pressure, aggression and risk*” (see paragraph 58(t)).

141. During the proceedings we put to the parties that Rio Tinto provided a ‘comfort letter’ to ERA on 5 December 2018 (paragraph 126(c)) only to effectively replace that letter with a more limited ‘comfort letter’ on 11 July 2019 (paragraph 126(e)).
142. The Rio Tinto Parties submitted that they “*strongly refute that the letter of 11 July 2019 is a more limited comfort letter... Rio Tinto considers that the 5 December 2018 comfort letter remains on foot*”.
143. It is not immediately obvious to us how this can be the case given the first letter proposes exploring two options and the second letter states that only one option remains open. However, it is not necessary for us to decide as we are prepared to infer that ERA understood the 11 July 2019 letter superseded the 5 December 2018 letter and was the only offer from Rio Tinto on foot. This is supported by material provided to us, such as a letter from ERA stating to ASIC that “*Rio Tinto’s offer to provide additional financial support as part of a renounceable entitlement offer underwritten by it is, for the ERA board, a “bird in the hand” that it cannot afford to let go*”.
144. ASIC submitted that, generally, it considers the application of pressure by a proposed underwriter is not consistent with the proposed underwriter’s role in underwriting the rights issue. ASIC noted that “*Rio Tinto may have wished to exert influence over ERA’s decisions in this regard for purposes other than its assumption of risk under the Underwriting Agreement*”.
145. ERA submitted that the issue at hand is whether or not the circumstances in relation to its affairs are unacceptable having regard only to the matters set out in s657A. ERA also submitted that the application of pressure by Rio Tinto “*is not an issue for the Panel*” and that “*ERA and Rio Tinto were dealing at arm’s length and each was vigorously pursuing their own respective commercial interests*”.
146. Ordinarily, we would be inclined to accept ERA’s submissions. However, the circumstances of this matter are unique given the combination of:
  - (a) ERA’s solvency concerns
  - (b) our concerns about the independence of the Committee (see paragraphs 71 – 91), Rio Tinto’s nominees on the ERA board, ERA’s senior executives being seconded from Rio Tinto and the relationship between the two companies and
  - (c) the commercial benefits to Rio Tinto of obtaining 100% ownership (relative to less than 100% ownership) (as to which, see for example paragraph 59(a)),increase the likelihood of the pressure leading to unacceptable circumstances having regard to s657A.
147. The Rio Tinto Parties submitted that, “*even if the Panel was minded to make an inference that the Rio Tinto Parties sought to, and did in fact, apply significant pressure to ERA to*

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

*conclude a transaction, the Panel should conclude that such pressure was ineffective". The Rio Tinto Parties made a separate submission that "it took months to agree pricing and that was determined by ERA, the size of the raising was determined by ERA, the undertakings involved protracted backwards and forwards discussion, and Rio Tinto had to apply commercial pressure (consistent with arm's length dealings) to seek to conclude a deal". We do not accept the Rio Tinto Parties' submission that the elements identified were set by ERA; there cannot simultaneously be months' long negotiations and one party setting the terms – in our view, the parties reached a negotiated position and so our concerns as to independence and pressure are relevant.*

148. In any event, we do not accept that the structural elements identified by Rio Tinto are the only way in which pressure can affect outcomes; it can also result in the failure to explore or adopt other strategic or funding alternatives (see, for example, Zentree's submission at paragraph 156), to adopt a strategy that would otherwise not have been adopted or to undertake a course of action sooner than it would otherwise have been undertaken (see, for example, paragraph 58(t)).

#### *Engagement with Zentree*

149. On 6 May 2019, ERA and Zentree entered into a confidentiality agreement. The "Permitted Purpose" was to facilitate discussions in relation to potential funding solutions to allow ERA to satisfy its liabilities associated with the rehabilitation of the Ranger Project Area. Between May 2019 and October 2019, ERA and Zentree engaged in limited correspondence (including meetings in Singapore in May 2019). Zentree submitted that the confidentiality agreement was executed on "the understanding that ERA would provide [Zentree] with basic information that any funder would require to assist with funding proposals. ERA never provided such information, which made it impossible for [Zentree] to assist with funding".
150. On 31 October 2019, ERA wrote to Zentree requesting confirmation by 5 November 2019 as to whether Zentree intended to take up its entitlement under the Entitlement Offer in full or in part and whether it would be prepared to underwrite the Entitlement Offer (excluding Rio Tinto's entitlements) in whole or in part on terms no less favourable to ERA than Rio Tinto's terms. ERA sent a substantially similar letter on 4 November 2019 (reserving its rights to proceed with the Entitlement Offer at any time after 5.00pm on 5 November 2019). Zentree was not informed of the size or price of the Entitlement Offer in either letter (both had been agreed between ERA and Rio Tinto).
151. Following a response from Zentree confirming the confidentiality agreement dated 6 May applied, on 5 November 2019 ERA provided Zentree with drafts of the offer materials and Underwriting Agreement and requested the same confirmations as its 31 October 2019 letter (but by 11 November). This was the first time that Zentree had been informed of the size and price of the Entitlement Offer.
152. On 11 November 2019, ERA's legal and financial advisers met with Zentree and Zentree's legal adviser in Singapore to discuss the Entitlement Offer.
153. Also on 11 November 2019, Zentree's legal adviser provided a list of requested due diligence items to ERA's legal adviser. The list included:

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (a) the final closure feasibility study
- (b) the bank guarantees supporting the APR security
- (c) the assumptions used in respect of the valuation of the Entitlement Offer
- (d) ERA's current cost of production and
- (e) the Jabiluka Mineral Lease.

154. In response, ERA's legal adviser stated on 13 November 2019 that:

*In the absence of a credible proposal from [Zentree] that involves Zentree underwriting the Entitlement Offer on terms no less favourable to ERA than those set out in the draft Underwriting Agreement provided to your client and Zentree providing satisfactory evidence that it has the financial capacity to do so, [ERA] is not prepared to make the documents and provide the information your client has asked for. In the absence of a credible underwriting proposal, the provision of this confidential and commercially sensitive information will only delay the Entitlement Offer and jeopardise the solvency of ERA. The board is not willing to allow this.*

*[Zentree] may say that it is unfair that Rio Tinto has had the benefit of the documents and information [Zentree] is seeking. However, the fundamental difference is that Rio Tinto has informed ERA that it is supportive of the Entitlement Offer and that it is prepared to commit to subscribe for its full entitlement and underwrite the Entitlement Offer. ERA also believes Rio Tinto has the financial capacity to back these commitments.*

155. We note that ERA was provided with financial advice (on 8 March 2019) that stated:

*Just prior (say 48 hours) to executing an underwriting agreement with Rio Tinto, Zentree should be approached and asked to confirm in writing that it will take up its entitlement in the offer, and provided the opportunity to participate in underwriting the shortfall; they should be instructed that in the event they cannot, Rio Tinto will be asked to underwrite the shortfall. ERA will then have an audit trail to prove that [ERA] took appropriate steps to minimise Rio Tinto's underwriting (which may be an important reference in any Takeovers Panel assessment regarding the gaining of control via the offer).*

156. Zentree submitted that no genuine attempt was made to engage with it in relation to underwriting the Entitlement Offer. Zentree submitted in support of this that:

- (a) it signed a confidentiality agreement with ERA in May 2019 but was not provided with due diligence material despite requesting it
- (b) in contrast, representatives of Rio Tinto (in its capacity as underwriter) participated in due diligence committee meetings as observers and received due diligence materials and
- (c) ERA only engaged with Zentree as a "box ticking exercise so ERA could argue before the Panel that it tried to get Zentree to underwrite".

157. Zentree also submitted that it was prepared to assist with the development of other funding solutions but was simply strung along by ERA and not given basic due diligence materials needed to assist.

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

158. ERA submitted that Zentree resisted providing any support for a realistic funding solution, even at an indicative level, and that no inference adverse to ERA should be drawn.
159. The Rio Tinto Parties submitted that there was a genuine attempt by ERA to engage with Zentree but no substantive and genuine engagement from Zentree. In the Rio Tinto Parties' submission, Zentree "*put forward no credible proposal whatsoever to support a raising or the funding obligations of ERA and was focused solely on derailing any attempt to pursue a raising*". We consider there was genuine engagement from Zentree in the form of it requesting due diligence information. It would be unusual for a commercial party to propose underwriting terms before being afforded due diligence information.
160. We consider there was a significant discrepancy between ERA's cooperation with Rio Tinto and ERA's cooperation with Zentree in arranging to underwrite the Entitlement Offer. In particular, there was a discrepancy as to the amount of due diligence information provided by ERA, which in our experience would make it difficult for Zentree to comply with requests to provide an underwriting proposal on terms no less favourable to ERA than Rio Tinto's proposal. In addition, there was a discrepancy in the extent of discussion between the parties (in the case of Rio Tinto, over many months and meetings) to develop underwriting terms.
161. We recognise that it is not unusual for there to be a difference in a company's level of engagement with its controlling shareholders vis-à-vis its other shareholders, and we also recognise the existing historical relationship between Zentree and ERA (including that Zentree made statements threatening to sue ERA and its directors, such as in an open letter from Zentree to ERA shareholders dated 31 July 2019 stating that Zentree "*fully intends to pursue its rights under s232 and s664F of the Australian Corporations Act to protect the interests of minority shareholders in this matter*"). 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.

#### **Dilutive nature of the Entitlement Offer**

162. The Panel's view is that structural matters (such as price, number of shares offered, renounceability, underwriting etc.) cannot be considered in isolation from each other and the market conditions at the time of an entitlement offer.<sup>18</sup> Accordingly, the structure of the Entitlement Offer as a whole must be assessed as part of deciding whether it gives rise to unacceptable circumstances.
163. Zentree submitted (in effect) that the size of the Entitlement Offer had been inflated to ensure greater dilution for minority shareholders and to give Rio Tinto a higher likelihood of obtaining more than 90% of ERA, and that the Entitlement Offer had been structured to make it deliberately unattractive to minority investors as a consequence of the setting of the Entitlement Offer's size, price and ratio.

---

<sup>18</sup> Guidance Note 17: *Rights Issues* at [13]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

164. The Rio Tinto Parties “*readily acknowledge[d] that the Entitlement Offer may not constitute an attractive investment proposition but this was related to the ‘use of funds’, not the size or discount of the Entitlement Offer*”.
165. As a general point, we accept that an entitlement offer is not necessarily unacceptable simply because the funds are to be used for an unattractive purpose. However, as mentioned above, it is necessary to analyse the structure of that entitlement offer as a whole.

#### *Discount*

166. Rio Tinto initially proposed to ERA that a 20% to 30% discount to TERP was appropriate, which was negotiated to a smaller discount in line with independent financial advice received by ERA. The parties negotiated the price extensively and the Entitlement Offer was ultimately priced at a discount of 38% to ERA’s 10-day volume weighted average price, which represented a discount to TERP of 8%. On the other hand, we also recognise a submission by Zentree to the effect that ERA’s share price declined over the relevant period.<sup>19</sup>
167. Zentree submitted that a large discount would not lead to increased shareholder participation due to the Entitlement Offer being structured to disincentivise minority shareholder participation.
168. The Rio Tinto Parties submitted that an even larger discount would be preferable as a discount would likely be attractive to shareholders, encouraging participation. The Rio Tinto Parties also submitted that in setting the price, the discount must be weighed against any dilutive effects, however dilution of itself does not act as a deterrence from participation.
169. ERA submitted that, while it is important to appropriately price the Entitlement Offer to sufficiently incentivise shareholders to participate, it is equally important that the offer price minimises the dilution impact on shareholders who are unable or unwilling to participate.
170. ASIC submitted that, if we are minded to infer that Rio Tinto was seeking to acquire and control ERA (which we are – see paragraph 66), it follows that pricing the Entitlement Offer at a large discount may be beneficial to Rio Tinto in:
- (a) increasing the size of the issue of securities, and thus the dilutive effect, may deter participation by minority holders and
  - (b) potentially lowering ERA’s market price and impacting on future acquisitions by Rio Tinto (or valuations prepared for those purposes).
171. In relation to ASIC’s first submission, we agree that a large dilutive effect may deter participation by minority shareholders (recognising on the other hand that a discount

---

<sup>19</sup> For instance, ERA’s share price declined from \$0.315 on 8 March 2019, the day prior to Rio Tinto providing ERA with a first draft of the Underwriting Agreement and stating that “*we consider market pricing indicates that an Offer Price at a 20%-30% discount to the Theoretical Ex-Rights Price (TERP) is appropriate*”, to \$0.245 on 14 November 2019, the day prior to the announcement of the Entitlement Offer

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

is attractive). Minority shareholders may not wish to participate given the potential for control to pass in such a circumstance; and where compulsory acquisition is likely, given the uncertainty at the time of participating as to the price that may ultimately be realised for the shares. Drawing on our commercial experience, we consider that it is unlikely that a large discount would encourage participation given ERA's circumstances and the purpose of the Entitlement Offer.

172. We also note that Rio Tinto's financial adviser provided advice that noted "*assuming Zentree is diluted to below 10%, then the total investment of funds required by [Rio Tinto] to move to 100% ownership of [ERA] is relatively insensitive to issue price*" (see paragraph 58(h) for further context) and produced an analysis showing that a greater discount to TERP would require greater participation to prevent Rio Tinto obtaining 90% (see paragraph 58(s) for further context).
173. Drawing on our commercial expertise and the material provided to us, we consider a greater discount was to Rio Tinto's commercial advantage as it would facilitate an easier path to compulsory acquisition (as greater participation would be required to prevent Rio Tinto obtaining 90%). We infer that this was a factor in Rio Tinto's desire for the Entitlement Offer to be priced at a large discount to TERP and supports an inference that Rio Tinto sought to consolidate control and acquire ERA.
174. In relation to ASIC's second submission, material provided by Rio Tinto in response to our brief supports it, as that material noted that:
- (a) "*a high offer price sets the floor at which Rio Tinto may elect to subsequently make a takeover offer to non-Rio Tinto shareholders, once the offer has completed, thereby increasing the cost of executing a minority acquisition*" (see paragraph 58(q) for further context) and
  - (b) in the context of advice from Rio Tinto's financial adviser analysing the implications of independent expert valuation approaches (and looking at four precedent compulsory acquisition transactions), there are "*[quoted market price] valuation implications following [a] highly dilutive rights issue*" (see paragraph 58(g) for further context).
175. Also drawing on our commercial expertise and the material provided to us, we consider a greater discount was to Rio Tinto's commercial advantage as it would likely decrease the price required to be offered to compulsorily acquire all ERA shares, should it be entitled to do so. We infer that this was a factor in Rio Tinto's desire for the Entitlement Offer to be priced at a large discount to TERP and supports an inference that Rio Tinto sought to consolidate control and acquire ERA.

#### Size

176. We looked into the size of the Entitlement Offer given its importance in affecting the level of dilution.
177. ERA made a number of submissions in relation to the size of the Entitlement Offer, including that the amount to be raised:

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (a) was equal to the additional funding which the ERA board believed was required over and above ERA's existing cash resources and expected future cash flows from processing stockpiles at Ranger in order for ERA to be able to meet the costs of rehabilitating the Ranger Project Area (as assessed under the feasibility study and including a cumulative contingency allowance of \$79m) as well as certain business continuity costs and
- (b) was independently determined by ERA management, with support from advisers in relation to the key macro-economic assumptions which were used in the assessment of the funding shortfall.

178. The Rio Tinto Parties submitted that the size of the Entitlement Offer was fundamentally a product of the size of the funding gap and Rio Tinto did not determine the size of the raising. The Rio Tinto Parties submitted that they did not seek *"to maximise the size of the Entitlement Offer to maintain or increase control"* and that *"they accepted ERA's position as to quantum of funding notwithstanding Rio Tinto's concerns about the early use of the contingency (which suggested that the rights issue should be for a larger quantum) and the risks for realising the cost savings built into ERA's [financial] model"*.

179. We accept that ERA ultimately needs funds to rehabilitate the Ranger Project Area, and that ERA's existing cash resources and expected future cash flows from processing stockpiles at Ranger are insufficient to meet the funding task. We therefore accept that the size of the Entitlement Offer is affected by the size of the funding gap.

180. However, we also consider that:

- (a) the size of the funding gap is necessarily uncertain as it is dependent on future costs (rehabilitation and otherwise) and revenues, which can only be forecast and not known with certainty (in particular given the rehabilitation of Ranger is not scheduled to complete until 2026)
- (b) the size of the funding gap is affected by ERA's current and future business strategy (for instance, an asset sale could reduce the size of the funding gap, as could the development or acquisition of a profitable asset or business) and
- (c) to a lesser degree, the amount of the Entitlement Offer is also affected by the degree to which other potential funding sources (such as the Credit Facility) are relied upon by ERA to address the funding gap.

181. Some of the material provided to us during the course of proceedings caused us to pause to consider the appropriateness of the size of the Entitlement Offer. For instance:

- (a) there was a substantial difference in size between the amount to be raised and ERA's existing cash reserves on the one hand (\$925m) and the discounted real value of the rehabilitation provision on the other hand (\$799m), noting a submission by ERA to the effect that the expenditure will be in undiscounted nominal terms

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (b) the lack of detailed disclosure of forecast expenditure (and its timing) so as to allow market participants to assess it
- (c) the closure feasibility study was prepared with the assistance of the Rio Tinto Growth & Innovation Projects group, noting it was subject to independent review by a global engineering firm and further review and audit as part of the general audit of ERA's end of year accounts and
- (d) financial advice provided to ERA referred to lower than consensus future pricing being used in ERA's financial model, which had a material effect on the size of the funding gap, and the lack of disclosure of this future pricing so as to allow market participants to assess it.

#### *Summary of the Entitlement Offer structure*

182. Having regard to the matters above, we consider the Entitlement Offer is highly dilutive and requires shareholders to invest substantial additional capital to avoid dilution. For instance, an investor holding \$1m worth of ERA shares as at the date prior to the announcement of the Entitlement Offer would need to subscribe for approximately \$3.8m of entitlements to avoid dilution.
183. On the above basis, and given the disclosure in the Entitlement Offer Information Booklet to the effect that funds invested are not expected to generate any direct financial return, we consider minority shareholders are unlikely to participate notwithstanding the discounted offer price.

#### *Dispersion strategy*

184. Zentree submitted that the Entitlement Offer does not have an effective dispersion strategy as "*no dispersion structure could be effective when an offer is deliberately designed to be a bad investment for anyone taking up entitlements, other than Rio Tinto*".
185. ERA submitted that the critical point is that the Entitlement Offer facilitates the opportunity for dispersion. Having regard to the Panel's published guidance:<sup>20</sup>
- (a) the Entitlement Offer is renounceable
  - (b) the Entitlement Offer has an elongated offer timetable and entitlement trading period
  - (c) there is a shortfall facility and
  - (d) ASIC relief was obtained to enable existing shareholders of ERA (other than Rio Tinto) to take up any rights that other shareholders do not exercise under the Entitlement Offer, even if by doing so they exceed the takeover threshold in s606.
186. The Rio Tinto Parties made substantially similar submissions in effect, including that the solvency of ERA is a highly relevant factor.

---

<sup>20</sup> Guidance Note 17: *Rights Issues* at [7]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

187. We consider that there is, in the circumstances, a multi-faceted dispersion strategy. That said, given the Entitlement Offer may not be attractive to ERA shareholders it is not clear to us that the dispersion strategy will be effective in practice. As set out in Guidance Note 17: *Rights Issues*, whether there is a dispersion strategy is only one of the factors considered by the Panel in determining whether there are unacceptable circumstances.<sup>21</sup> For the reasons described above we think there are unacceptable circumstances irrespective that there is a dispersion strategy in place.

#### **Effect of Entitlement Offer and availability of benefits**

188. Zentree submitted in its application that Rio Tinto receives benefits from the Entitlement Offer that cannot be shared by minority shareholders, including that:

- (a) Rio Tinto acquires ERA's tax losses, franking credits and control of Jabiluka and
- (b) Rio Tinto's corporate reputation would be enhanced by the rehabilitation of Ranger.

189. Section 602(c) provides that one of the purposes of Chapter 6 is to ensure that "*as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme*".

190. For the purposes of s602(c), we are satisfied that the Entitlement Offer, in conjunction with the Underwriting Agreement and in isolation, is a proposal under which a person would acquire a substantial interest in ERA. We asked the parties whether Rio Tinto is obtaining a benefit through the Entitlement Offer and the undertakings in the Underwriting Agreement that the other holders in ERA have not had a reasonable and equal opportunity to participate in.

191. ASIC submitted that:

*The undertakings in clause 10.4 of the Underwriting Agreement regarding Jabiluka apply while the undertakings in clause 10.1 apply – that is, from the date of the Underwriting Agreement until the earliest of a set of specified events occurs. ASIC notes that these undertakings appear to apply regardless of whether or not Rio Tinto is required to take up any securities as underwriter and have thus been conferred on Rio Tinto only in return for it agreeing to accept the risk under the Underwriting Agreement.*

*In this sense, it appears that the Underwriting Agreement may confer a benefit on Rio Tinto in terms of 'locking-up' ERA's ability to deal with Jabiluka and reducing the potential of any competing party emerging for ERA or Jabiluka. This benefit would not be available to other shareholders.*

*ASIC also considers that there is a benefit to Rio Tinto in being able to increase its relevant interest to the extent that it becomes entitled to proceed to compulsory acquisition and may acquire 100% of ERA without undertaking a takeover offer or providing a control premium. Due to the structure of the rights issue and Rio Tinto's existing holding in ERA (as well as*

---

<sup>21</sup> Guidance Note 17: *Rights Issues* at [6]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

*its commitment to take up its entitlements), other holders do not have a reasonable and equal opportunity to participate in this benefit.*

192. We accept the Entitlement Offer is 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).

193. The Rio Tinto Parties submitted that:

*Here, ASIC goes beyond the direction of the Panel's question to postulate the view that a party that can move past 90% in a rights issue receives a benefit of compulsory acquisition, and that is adverse because "other holders do not have a reasonable and equal opportunity to participate in this benefit". We submit this is inconsistent with the law and confuses policy for a number of reasons:*

- (a) it is irreconcilable with section 611, item 10;*
- (b) it displaces section 615 of the Corporations Act and ASIC's role in considering control outcomes in the context of granting approval for a nominee to sell foreign holders' entitlement;*
- (c) it undermines Takeovers Panel Guidance Note 17;*
- (d) it entirely disregards the process for compulsory acquisition and protections built into that process – including disclosure, independent expert's opinion, the 'fair value proposition' and right to a court review; and*
- (e) the structure here provides full capacity for any other shareholder or investor to take up entitlements or any shortfall ahead of Rio Tinto.*

194. We accept that it is not *per se* contrary to the equality principle in s602(c) for a shareholder to participate in a rights issue (as a majority shareholder and/or as an underwriter) and be in a position to compulsorily acquire minority shareholdings as a result of the rights issue and obtain the benefits of 100% ownership. However it does not follow that s602(c) does not apply to any situation where a majority shareholder obtains such benefits.

195. The question is whether the circumstances are unacceptable having regard to whether minority shareholders in ERA have had as far as practicable a reasonable and equal opportunity to participate in any benefits accruing to the holders through the Entitlement Offer (and the Underwriting Agreement). In many rights issues, where a majority shareholder (and in many cases underwriters) may be able to compulsorily acquire following the rights issue, the rights issue complies with Guidance Note 17 and the rights issue is not contrary to s602. In this case we consider that, in light of our concerns expressed above, the holders of the ordinary shares in ERA, other than Rio Tinto, do not have a reasonable and equal opportunity to participate in benefits ultimately accruing to Rio Tinto through the Entitlement Offer and the Underwriting Agreement.

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

#### Disclosure

196. Zentree had a number of disclosure concerns with the Entitlement Offer Information Booklet, including (on the submission of Zentree) that there was no or inadequate disclosure of:
- (a) the benefits flowing to Rio Tinto
  - (b) Rio Tinto's intentions for compulsory acquisition or any of the other intentions that are mandatory in takeover transactions
  - (c) Rio Tinto's intentions around the use of tax losses, franking credits, Jabiluka or other ERA assets and
  - (d) ERA's rehabilitation cost forecast, the closure feasibility study and the Government Agreement and related arrangements (including the bank guarantees).
197. We had a number of disclosure concerns, including in relation to the comparison of nominal and real numbers in the Entitlement Offer Information Booklet and the lack of a pro forma balance sheet.
198. ERA submitted that it is market practice, rather than law or Panel guidance, that necessitated preparation of the Entitlement Offer Information Booklet (given the Entitlement Offer was made under s708AA) and that it believed the disclosure made in the Entitlement Offer Information Booklet was clear, concise and effective, and appropriate having regard to the information known to ERA and/or otherwise disclosed by ERA to the market.
199. The Rio Tinto Parties submitted that:
- (a) the disclosure required of the Entitlement Offer should be judged on its own merits as disclosure pursuant to the purposes and statutory requirements under the *Corporations Act 2001* (Cth) and applicable ASIC guidance
  - (b) the Entitlement Offer has not been structured with the intention of implementing a major control transaction and therefore disclosure along these lines is not required by law or useful for investors in making their investment decision
  - (c) as the Entitlement Offer is not a control transaction, the Chapter 6 requirements do not apply and the disclosure is not deficient
  - (d) the intentions the Rio Tinto Parties have formed in relation to the outcome of the Entitlement Offer have already been fully disclosed and
  - (e) Rio Tinto has not formed an intention as to whether it would exercise a general compulsory acquisition right, should such right arise, on completion of the Entitlement Offer and should not be required to form such intentions and to disclose them.
200. ASIC submitted that:

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (a) where a fundraising may have a significant impact on control of an entity, ASIC considers that adequate disclosure of the control effects of the offer, and underwriting arrangements if applicable, is necessary not only to satisfy the requirements of the fundraising and continuous disclosure provisions, but also the underlying principles of Chapter 6 as set out in s602(a) and (b)
- (b) where a decision about compulsory acquisition has not been made, the major shareholder should explain why such a decision has not been made and what factors it will consider in making a decision and
- (c) the level of disclosure regarding the effect of a control transaction that should be made is essentially the same, regardless of whether the fundraising takes place under a full prospectus, transaction-specific prospectus or other offer document (with a cleansing notice).

201. We agree with ASIC's submissions.

202. We consider that disclosure is of increased importance when shareholders are considering the desirability of making a further investment in a company, what the control implications of a rights issue might be and whether to take steps to protect against the dilution of their existing holding. The principle in s602(b)(iii) applies to all transactions where there is a potential change of control.<sup>22</sup>

203. In the context of this transaction, 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 (for example, intentions statements) given the potential for Rio Tinto to increase its voting power in ERA above 90%.

204. We consider the holders of shares in ERA have not been given enough information to enable them to assess the merits of the Entitlement Offer, causing the holders of shares in ERA to make investment decisions on the basis of inadequate information and the market for control of ERA shares to not be efficient, competitive and informed.

205. On the above basis, we ordered supplementary disclosure.

206. In light of our 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 us to further consider whether it was unacceptable that Rio Tinto had not formed and disclosed its intentions as to whether it would exercise a general compulsory acquisition right, should such right arise on completion of the Entitlement Offer. If we did have to consider the matter further, we would 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

---

<sup>22</sup> *Anaconda Nickel Limited 02, 03, 04 & 05* [2003] ATP 4 at [70]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

advice and documentation in relation to compulsory acquisition (and the benefits of it) following the Entitlement Offer<sup>23</sup> 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).<sup>24</sup>

#### Overall effect

207. 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<sup>25</sup> – not just one of those factors.
208. 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.
209. We recognise that ERA is also a company in a challenging position, but infer that Rio Tinto sought to consolidate control and acquire ERA. Ordinarily, that would not give rise to unacceptable circumstances. But in the unique circumstances of ERA and Rio Tinto, a situation with inherent potential conflicts, we are of the view that conflicts were not sufficiently managed. Insufficient measures were taken to ensure the independence of the Committee and potential conflicts of interest were not sufficiently managed (see paragraphs 71 – 91). In addition 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 (see paragraphs 115 to 161).
210. We consider that, despite the negotiations between the parties in relation to the Underwriting Agreement, its terms granted Rio Tinto, through the Underwriter, effective control over aspects of the management of ERA and dealings with a major asset of ERA over the medium to long term. Those terms are unusual in comparison with commercial underwriting arrangements. Accordingly those terms inhibited the acquisition of control over ERA taking place in an efficient, competitive and informed market (as discussed in paragraphs 92 to 114). We also consider that the holders of shares in ERA have not been given enough information to enable them to assess the merits of the Entitlement Offer, causing the holders of shares in ERA to make investment decisions on the basis of inadequate information and the market for control of ERA shares to not be efficient, competitive and informed (as discussed in paragraphs 196 to 206).

---

<sup>23</sup> *Pivot Nutrition Pty Ltd* [1997] ATP 1 at [43]

<sup>24</sup> *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [86] – [87]

<sup>25</sup> Guidance Note 17: *Rights Issues* at [6]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

211. As discussed in paragraphs 188 to 195, the Entitlement Offer is 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)<sup>26</sup> and as far as practicable, the holders of the ordinary shares in ERA, other than Rio Tinto<sup>27</sup>, do not have a reasonable and equal opportunity to participate in benefits ultimately accruing to Rio Tinto through the Entitlement Offer and the Underwriting Agreement.

#### Other matters

##### *Chapter 2E*

212. We sought submissions in connection with whether the Underwriting Agreement was a related party transaction that required shareholder approval under Chapter 2E.

213. The Panel has previously suggested that it might be prepared to consider Chapter 2E issues in more detail in the context of a rights issue.<sup>28</sup> However, given the conclusions we have reached regarding the Entitlement Offer and the Underwriting Agreement, we do not consider we need to deal with Chapter 2E issues here.

## DECISION

### Declaration

214. It appears to us that the circumstances are unacceptable having regard to:

- (a) the effect we were satisfied they have had, are having, will have or are likely to have on:
  - (i) the control, or potential control, of ERA or
  - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in ERA or
- (b) in the alternative, the purposes of Chapter 6 set out in s602.

215. Accordingly, we made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in s657A(3).

### Orders

216. Following the declaration, we made the final orders set out in Annexure C. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'<sup>29</sup> if 4 tests are met:

---

<sup>26</sup> For example, as would be required under a scheme of arrangement or under item 7 of s611

<sup>27</sup> References to Rio Tinto in this context include Peko-Wallsend and the Underwriter

<sup>28</sup> *MacarthurCook Property Securities Fund 01 & 02* [2012] ATP 7 at fn 26

<sup>29</sup> Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (a) It has made a declaration under s657A. This was done on 11 December 2019.
- (b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.
- (c) It gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 9 December 2019. Each party made submissions and rebuttals.
- (d) It considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by:
  - (i) ensuring ERA shareholders are provided with further disclosure in the form of a supplementary statement disclosing the effect of our orders, details of the possible increase in Rio Tinto's voting power as a result of the Entitlement Offer under different scenarios of take up under the Entitlement Offer and Rio Tinto's intentions regarding the continuation of the business of ERA, any major changes to be made to the business of ERA and the future employment of the present employees of ERA
  - (ii) voiding clause 10.4 of the Underwriting Agreement, thereby removing the 'lock-up' in relation to Jabiluka from the Underwriting Agreement and
  - (iii) in effect precluding Rio Tinto from proceeding to compulsory acquisition (as a result of the Entitlement Offer and Underwriting Agreement) under Chapter 6A.2 without shareholder approval.

217. A finding of unacceptable circumstances under s657A does not automatically mandate that a particular order be made. It is for us to exercise our "*wide discretion, as experts in the field*,"<sup>30</sup> to make orders under s657D(2) that we are satisfied are appropriate and not unduly or unfairly prejudicial by weighing the object of protecting rights or interests affected by the unacceptable circumstances against the prejudice that would flow to any person from the making of an order.<sup>31</sup>

218. We are satisfied that the rights or interests of shareholders other than Peko-Wallsend and the Underwriter have been or are being affected, or will be or are likely to be affected, by the unacceptable circumstances as discussed above. For example:

- (a) the undertakings in the Underwriting Agreement fetter the ability of the ERA board to manage the business of the company and hence affect the value of shareholders' investment and
- (b) the Entitlement Offer is likely to result in Rio Tinto becoming entitled to proceed to compulsory acquisition (where it may acquire 100% of ERA) without

---

<sup>30</sup> *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [187]

<sup>31</sup> *Glencore International AG v Takeovers Panel* [2006] FCA 274 at [124]

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

undertaking a takeover bid and without an independent shareholder vote (or another process consistent with the purpose of Chapter 6).

219. We asked the parties a number of questions in relation to the orders.

#### *Compulsory acquisition*

220. We ultimately made an order (in effect) that Rio Tinto cannot compulsorily acquire shares in ERA as a consequence of the Entitlement Offer without shareholder approval, but we note our order does not preclude Rio Tinto from compulsorily acquiring shares in ERA on another basis (for example following a takeover bid).

221. In relation to our proposed order, ASIC submitted that, *“having regard to the purposes of Chapter 6 as set out in s602, 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 (as identified in the Panel’s draft Declaration)”*. ASIC also submitted that it was difficult to identify alternative orders that would address the unacceptable circumstances we found.

222. Zentree submitted (among other things) that *“the compulsory acquisition right in the Corporations Act is a protection against greenmailers for acquirers who move to 90% in accordance with the law and the Eggleston Principles”* and that the *“right is not a reward for acquirers that get to 90% through unacceptable circumstances”*. Zentree submitted that the order in effect precluding Rio Tinto from compulsorily acquiring shares in ERA as a consequence of the Entitlement Offer without shareholder approval was *“critical”* to remedy the unacceptable circumstances.

223. We agree with ASIC’s and Zentree’s submissions. 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,<sup>32</sup> 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.

224. The Rio Tinto Parties submitted among other things that *“Rio Tinto’s decision to underwrite the Entitlement Offer, when no arm’s length underwriter was prepared to do so, was made on the basis of the agreed terms of the Underwriting Agreement and in the context where Rio Tinto would have the option to exercise the statutory rights in Part 6A.2 should they accrue”*.

225. The Rio Tinto Parties also submitted that an order precluding termination of the Underwriting Agreement in combination with an order preventing it from moving to

---

<sup>32</sup> s664F(1)

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

compulsory acquisition “*would deprive Rio Tinto of advantages that could partially offset a significant capital outlay in circumstances where Rio Tinto has made a commitment to fund liabilities in excess of its current proportional interest in ERA*”. See, for example, paragraph 59(a)(ii).

226. The Rio Tinto Parties’ submissions must be understood in the context of earlier submissions made by the Rio Tinto Parties, including:

- (a) “*Rio Tinto has not formed an intention as to whether it will exercise a general compulsory acquisition right, should such right arise ...*”
- (b) “*it is unremarkable that Rio Tinto has not made a final decision in respect of compulsory acquisition as, this is not a takeover transaction, it is a funding solution*”
- (c) “*should Rio Tinto become entitled to proceed with compulsory acquisition it will make a decision as to whether or not to proceed in light of the prevailing facts*” and
- (d) in response to a question in our supplementary brief, a list of possible factors Rio Tinto would take into account that may cause it not to proceed with compulsory acquisition.

227. We consider there is a tension in the Rio Tinto Parties’ submissions:

- (a) on the one hand, the Rio Tinto Parties in effect submitted that the compulsory acquisition right is valuable and a cornerstone of their participation in the Entitlement Offer, which further supports our inferences that:
  - (i) Rio Tinto sought to consolidate control and acquire ERA and
  - (ii) there is a compelling commercial rationale for compulsory acquisition in the event Rio Tinto obtains over 90% as a result of the Entitlement Offer and
- (b) on the other hand, the Rio Tinto Parties also in effect submitted that the Entitlement Offer is a funding solution and a decision on compulsory acquisition will be made in the future and may not be made, implicitly placing a low value on the compulsory acquisition right.

228. We consider that it is unnecessary for us to reconcile the tension in the Rio Tinto Parties’ submissions because, having regard to the balancing exercise required by s657D, in each of the above cases we consider the object of protecting the rights or interests affected by the unacceptable circumstances in this case outweighs the prejudice suffered by Rio Tinto as a result of our order effectively precluding Rio Tinto from proceeding to compulsory acquisition as a result of the Entitlement Offer and Underwriting Agreement without shareholder approval. This is because the prejudice to Rio Tinto is minimised as Rio Tinto can still proceed to compulsory acquisition. For example, Rio Tinto could proceed to compulsory acquisition with shareholder approval (which was identified by ASIC as a means of lessening any prejudice to Rio Tinto as a result of our orders), following a takeover bid under Part 6A.1 or in future under Part 6A.2 following a divestment of its shares below 90% .

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

229. The Rio Tinto Parties submitted that, given the size of Zentree's holding, Zentree could frustrate any future attempt at compulsory acquisition following a takeover bid by Rio Tinto no matter how compelling a bid for the other minority interests might be. This is because s661A(1)(b)(ii) requires a bidder to acquire at least 75% of the securities bid for prior to being able to proceed to compulsory acquisition.
230. In relation to this submission, we are not satisfied that this results in unfair prejudice to Rio Tinto as it is speculative as to Zentree's future actions.
231. As noted above in paragraph 206, it was unnecessary for us to further consider whether it was unacceptable that Rio Tinto had not formed and disclosed its intentions as to whether it would exercise a general compulsory acquisition right, should such right arise on completion of the Entitlement Offer, given our order effectively precluding Rio Tinto from proceeding to compulsory acquisition as a result of the Entitlement Offer and Underwriting Agreement without shareholder approval.

#### *Insolvency and the Entitlement Offer proceeding*

232. ERA submitted that:

- (a) an order which prevented the Entitlement Offer proceeding, or materially delayed it, would leave the ERA board with no alternative (all other things being equal) to placing ERA into external administration and
- (b) (in earlier submissions) the position of the Commonwealth, other creditors, Traditional Owners and other stakeholders would be affected by any orders that delay or prevent the Entitlement Offer proceeding or terminate the Underwriting Agreement, as ERA's solvency would immediately be put in jeopardy.

233. We considered making an order preventing the Entitlement Offer from proceeding, but ultimately declined to make such an order for reasons including ERA's submissions as to the potential prejudice that ERA's insolvency would cause to a number of stakeholders, including minority shareholders. We also had regard to ERA's submissions in making our order precluding the Underwriter from being able to terminate the Underwriting Agreement.

#### *Other undertakings*

234. We considered making orders voiding other undertakings in the Underwriting Agreement, besides clause 10.4. The Rio Tinto Parties submitted that the "*further undertakings ... are included in the Underwriting Agreement to ensure that funds raised are used in a manner consistent with the stated purpose of the Entitlement Offer to fund the Ranger Project Area rehabilitation obligations*". On balance, we declined to make those orders.

#### *Conclusions on orders*

235. Given the above, we are satisfied that the orders requiring additional disclosure in the Entitlement Offer, extending the timetable for the Entitlement Offer, precluding the Underwriter from terminating the Underwriting Agreement, and in effect

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

precluding Rio Tinto from proceeding to compulsory acquisition as a result of the Entitlement Offer and Underwriting Agreement without shareholder approval, are appropriate under s657D(2)(a). We are satisfied our other orders are similarly appropriate.

#### Costs

236. Zentree's application sought an order that ERA bear the costs of Zentree in respect of the Panel's proceedings. Guidance Note 4: *Remedies General* states that "a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way". We decided not to make a costs order.

**Ron Malek**

**President of the sitting Panel**

**Decision dated 11 December 2019**

**Reasons given to parties 13 January 2020**

**Reasons published 23 January 2020**

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

#### 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**

Zentree Investments Limited made an application to the Panel dated 18 November 2019 in relation to the affairs of Energy Resources of Australia Limited (ERA).

The Panel ORDERS:

1. ERA must immediately take all action necessary, in relation to its proposed renounceable entitlement offer to be made under ERA's entitlement offer information booklet dated 15 November 2019 (**Entitlement Offer Information Booklet**), to:
  - (a) suspend trading in new shares on a deferred settlement basis for not less than 5 business days from and including 5 December 2019 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 timetable on page 6 of the Entitlement Offer Information Booklet.
2. ERA must make an announcement on the Australian Securities Exchange as soon as possible regarding the adjustments to its renounceable 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 between it and ERA dated 15 November 2019 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 Ron Malek**  
**President of the sitting Panel**  
**Dated 4 December 2019**



**Australian Government**

**Takeovers Panel**

**Annexure B**

**CORPORATIONS ACT  
SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**ENERGY RESOURCES OF AUSTRALIA LIMITED**

**CIRCUMSTANCES**

1. Energy Resources of Australia (**ERA**) is an ASX listed company. Rio Tinto Limited and Rio Tinto Plc (**Rio Tinto**), through two wholly-owned subsidiaries, have voting power in ERA of approximately 68.39%.
2. On 15 November 2019, ERA announced a pro-rata, renounceable entitlement offer of 6.13 ERA shares for every 1 ERA share held to raise up to approximately \$476 million to fund ERA's Ranger Project Area rehabilitation obligations.
3. The entitlement offer is fully underwritten by North Limited, a subsidiary of Rio Tinto (**Underwriter**) pursuant to an underwriting agreement dated 15 November 2019. Rio Tinto also committed to subscribe for its entitlement in full.
4. If no other shareholders take up their entitlements, Rio Tinto would acquire voting power in ERA of approximately 95.6% in reliance on item 10 of section 611 of the *Corporations Act 2001 (Cth) (Act)*.
5. The underwriting agreement contains a number of undertakings from ERA in favour of the Underwriter, including regarding the use of funds raised by the 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).
6. The undertakings effectively continue until the substantial completion of the rehabilitation obligations (currently required to be completed by January 2026).
7. In January 2019, the ERA board resolved to form a committee comprising three directors independent of Rio Tinto to have and exercise all powers of the ERA board in relation to evaluating, negotiating and if thought fit approving any proposed agreement with Rio Tinto in respect of any proposed funding support agreement with Rio Tinto (the **committee**).
8. An executive director that was not independent of Rio Tinto attended each meeting of the committee and was involved in those meetings as a member of management. 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

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

entitlement offer on 14 November 2019. No minutes were produced for any of the committee's meetings.

9. The Panel considers that:
- (a) the entitlement offer:
    - (i) is highly dilutive and requires shareholders to invest substantial additional capital to avoid dilution and therefore minority shareholders are unlikely to participate and
    - (ii) in conjunction with the underwriting agreement and in isolation, is 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 affect 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 of the Act (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.

#### EFFECT

10. It appears to the Panel that:
- (a) the entitlement offer is 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
  - (b) as far as practicable, the holders of the ordinary shares in ERA, other than Rio Tinto, do not have a reasonable and equal opportunity to participate in benefits ultimately accruing to Rio Tinto through the entitlement offer and the underwriting agreement
  - (c) the terms of the underwriting agreement grant Rio Tinto, through the Underwriter, effective control over aspects of the management of ERA and

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

dealings with a major asset of ERA over the medium to long term, inhibiting the acquisition of control over ERA taking place in an efficient, competitive and informed market and

- (d) the holders of shares in ERA have not been given enough information to enable them to assess the merits of the entitlement offer, causing the holders of shares in ERA to make investment decisions on the basis of inadequate information and the market for control of ERA shares to not be efficient, competitive and informed.

## CONCLUSION

11. It appears to the Panel that the circumstances are unacceptable circumstances:
  - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of ERA or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in ERA or
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the Act.
12. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of ERA.

**Tania Mattei**  
**Counsel**  
**with authority of Ron Malek**  
**President of the sitting Panel**  
**Dated 11 December 2019**



**Australian Government**

**Takeovers Panel**

**Annexure C**

**CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**ENERGY RESOURCES OF AUSTRALIA LIMITED**

The Panel made a declaration of unacceptable circumstances on 11 December 2019.

**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 20 business days from and including 12 December 2019 and
  - (b) postpone by not less than 20 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 4 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 or not comply with its obligations under the Underwriting Agreement by reason of or as a consequence of these orders.
4. Clause 10.4 of the Underwriting Agreement is void and of no effect from the date of these orders.
5. ERA must within 8 business days from the date of these orders dispatch a Supplementary Statement to ERA shareholders in a form approved by the Panel which discloses:
  - (a) the effect of these orders
  - (b) details of the possible increase in Rio Tinto's voting power as a result of the Entitlement Offer under different scenarios of take up under the Entitlement Offer (including but not limited to a scenario where no shareholders other than Rio Tinto entities take up their entitlements)

## Takeovers Panel

### Reasons - Energy Resources of Australia Limited [2019] ATP 25

- (c) Rio Tinto's intentions regarding the continuation of the business of ERA, any major changes to be made to the business of ERA and the future employment of the present employees of ERA.
6. ERA must provide the Panel with a draft of the Supplementary Statement within 5 business days from the date of these orders.
  7. Rio Tinto and North Limited must do all things necessary to assist ERA in the preparation of the Supplementary Statement, including but not limited to the provision of information regarding Rio Tinto's intentions, as required under Order 5(c).
  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).
  10. The parties to this proceeding and ASIC have the liberty to apply to the Panel for further orders in relation to these orders.

#### Definitions

11. In these orders the following terms apply:

<b>ASIC</b>	Australian Securities and Investments Commission
<b>ASX</b>	Australian Securities Exchange
<b>Corporations Act</b>	<i>Corporations Act 2001</i> (Cth), as amended by ASIC
<b>Entitlement Offer Information Booklet</b>	ERA's entitlement offer information booklet dated 15 November 2019
<b>Entitlement Offer</b>	ERA's proposed renounceable entitlement offer as detailed in the Entitlement Offer Information Booklet
<b>ERA</b>	Energy Resources of Australia Limited
<b>Rio Tinto</b>	means Rio Tinto Limited and Rio Tinto plc

**Takeovers Panel**

**Reasons - Energy Resources of Australia Limited  
[2019] ATP 25**

**Supplementary Statement**

as referred to in Order 5

**Underwriting Agreement**

The underwriting agreement between North Limited and ERA dated 15 November 2019

**Tania Mattei  
Counsel  
with authority of Ron Malek  
President of the sitting Panel  
Dated 11 December 2019**