Australian Government

Takeovers Panel

Reasons for Decision
Energy Resources of Australia Limited 03
[2024] ATP 13

Catchwords:

Decline to conduct proceedings – rights issue – effect on control – section 602 principles –premature application

Corporations Act 2001 (Cth), sections 602, 611 item 7, 657C(3), 664A

Energy Resources of Australia Limited 02R [2020] ATP 3, Energy Resources of Australia Limited [2019] ATP 25, McAleese Limited [2016] ATP 13, CuDeco Limited [2015] ATP 11

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

INTRODUCTION

1. The Panel, Robin Bishop (sitting President), Louise Higgins and Jeremy Leibler, declined to conduct proceedings on an application by Zentree Investments Limited in relation to the affairs of Energy Resources of Australia Limited. The application concerned a potential capital raising announced by ERA on 12 March 2024. The application also concerned conduct by ERA and Rio Tinto Limited, which has voting power of 86.3% of ERA, that the applicant submitted was part of an unacceptable strategy by Rio to achieve 100% ownership of ERA. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

ERA	Energy Resources of Australia Limited
IBC	the Independent Board Committee of ERA
MSA	has the meaning given in paragraph 13
Potential 2024 Equity Raise	the potential material equity raise to fund ERA's next tranche of Rehab expenditure, as announced by ERA on 12 March 2024
Rehab	ERA's rehabilitation of the former Ranger uranium mine area
Rio	Rio Tinto Limited
Zentree	Zentree Investments Limited

FACTS

3. ERA is an ASX listed company (ASX code: ERA) that operated the former Ranger uranium mine and held the title to the adjacent Jabiluka mineral lease in the Northern Territory.[1] ERA's current business operation is the Rehab.

4. Zentree is a shareholder in ERA with voting power of approximately 2.99% of ERA.

5. Rio is a shareholder in ERA with voting power of 86.3% of ERA.

6. In February 2022, ERA disclosed that the revised total cost of completing the Rehab was forecast to be approximately between $1.6 billion and $2.2 billion.

7. On 4 April 2023, ERA announced a $369 million renounceable entitlement offer to fund part of the Rehab expenditure.

8. In August 2023, ERA disclosed that its Rehab provision was forecast to be $1.446 billion[2].

9. In September 2023, ERA announced that the total Rehab costs were expected to "*materially exceed the previously estimated range of $1.6 billion to $2.2 billion*".

10. In December 2023, ERA announced that the Rehab provision was now forecast to be $2.3 billion[3].[4]

11. On 12 March 2024, ERA announced that it expects further funding to be required in the second half of 2024 for the next tranche of the estimated Rehab expenditure and that this funding is currently expected to be addressed in the form of a material equity raise in 2024.

12. ERA also announced on 12 March 2024 that the IBC had appointed advisers in relation to the Potential 2024 Equity Raise (or other funding options for the Rehab expenditure) and that the IBC had not yet determined the structure, size, pricing and timing of any potential equity raise.

13. On 3 April 2024, ERA announced that it had appointed Rio to manage the Rehab under a new management services agreement (**MSA**).

APPLICATION

14. By application dated 29 May 2024, Zentree sought a declaration of unacceptable circumstances. Zentree submitted that:

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[1] On 26 July 2024, the Northern Territory Minister for Mining and for Agribusiness and Fisheries announced that, based on advice from the Commonwealth government and Minister, the Jabiluka mineral lease would not be renewed. ERA, acting through the IBC, brought proceedings in the Federal Court of Australia challenging these decisions. The Court has made an interim order to stay the decision to refuse to renew the Jabiluka Mineral Lease, the effect of that decision and its enforcement or execution, pending further order of the Court. Accordingly, as at the date of these reasons, the position in relation to the renewal of the Jabiluka mineral lease had not yet been finalised

[2] As at 30 June 2023

[3] As at 30 June 2023

[4] ERA has noted that the cost estimates and provisions referred to in these reasons were subject to qualifications and disclosures, and more detailed information concerning these matters were contained in ERA's financial statements during the relevant periods

(a) Rio has been executing an inappropriate strategy for almost 10 years to achieve 100% ownership of ERA, noting in particular the use of equity raises designed for Rio to fund most of the moneys raised and increase its share ownership percentage including the 2020 equity raise for $476 million[5] and the 2023 equity raise for $369 million

(b) the behaviour of Rio and ERA has been designed to permit Rio to commence a compulsory acquisition process at a very low price per share

(c) minority ERA shareholders will not have enough information to assess the merits of the Potential 2024 Equity Raise as they have no visibility or explanation for the supposed Rehab cost increase and

(d) minority ERA shareholders do not have a reasonable and equal opportunity to participate in the substantial benefits that will accrue to Rio as a result of the Potential 2024 Equity Raise.

15. Zentree submitted that the effect of the circumstances is that, if the Potential 2024 Equity Raise proceeds, Rio will likely increase its voting power in ERA above the compulsory acquisition threshold in section 664A[6], and in circumstances where:

(a) the Potential 2024 Equity Raise may breach Chapter 6 depending on its structure

(b) the acquisition of control by Rio is not taking place in an efficient, competitive and informed market (section 602(a))

(c) ERA shareholders will not have been given enough information to enable them to assess the merits of the Potential 2024 Equity Raise (section 602(b)(iii)) and

(d) minority shareholders will not receive a reasonable and equal opportunity to participate in the benefits accruing to Rio (section 602(c)).

Interim orders sought

16. Zentree sought interim orders to the effect that ERA:

(a) delays the Potential 2024 Equity Raise and

(b) be prevented from issuing any new shares to any person

until no earlier than 7 days after the date on which the application is determined.

Final orders sought

17. Zentree sought final orders to protect the rights and interests of minority shareholders by preventing Rio and its associates from passing the compulsory acquisition threshold in respect of ordinary shares in ERA in certain circumstances. These included orders to the effect that:

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[5] See *Energy Resources of Australia Limited* [2019] ATP 25 and *Energy Resources of Australia Limited 02R* [2020] ATP 3

[6] Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

(a) ERA be restrained for a period of 12 months from the date of the Panel's decision (unless it obtains approval under item 7 of section 611) from:

(i) undertaking any transaction or issue of shares that results in a person with voting power above 20% increasing its voting power, or alternatively

(ii) allowing Rio to underwrite any ERA equity offering, or ERA undertaking any equity offering to either raise more than $200 million in aggregate (or at an issue price per share of less than $0.10)

(b) ERA must publicly release certain information in relation to the Rehab (including feasibility reports and a copy of the MSA) and the right of veto given over mining Jabiluka

(c) ERA and Rio must take certain actions in relation to each transaction or agreement between Rio and ERA since ERA commenced to have negative "equity interest" (as defined in the ASX Listing Rules), including to disclose publicly details of such transactions and agreements

(d) ERA and Rio must not enter into any agreements or arrangements whereby Rio can fetter any decisions of the ERA board

(e) ERA must commence a sale process for Jabiluka and accept any offers to buy Jabiluka above a specified price received before the end of 2025 and

(f) Rio must not cast any votes at general meetings for the appointment or reappointment of any "independent" directors of ERA whilst Rio controls ERA.

DISCUSSION

18. Zentree was concerned that a Potential 2024 Equity Raise based on the increased Rehab provision will result in Rio's voting power in ERA increasing above the compulsory acquisition threshold of 90%.

19. Zentree submitted that the costs and forecast costs of the Rehab have constantly increased, to the long-term benefit of Rio, and have never been adequately disclosed to the market.

20. Zentree also submitted that Rio effectively controls ERA's business and fetters the discretion of the ERA board. Zentree submitted that the most recent example of Rio's interference with ERA is the appointment of Rio as the manager of the Rehab under the MSA.

21. Zentree further submitted that minority ERA shareholders will not have enough information to assess the merits of the Potential 2024 Equity Raise, and the market remains uninformed, because ERA has not publicly disclosed any information regarding the Rehab forecasts or feasibility or otherwise any explanation for the increased Rehab costs forecast.

22. Zentree also submitted that minority ERA shareholders have not been given a reasonable or equal opportunity to participate in benefits flowing to Rio, which will include the enhancement of Rio's reputation with governments and indigenous bodies, ERA's tax losses and franking credits and entitlement to returns from ERA's unspent Rehab monies and security deposits.

23. Zentree submitted that there is no reason why ERA cannot pursue multiple and phased funding alternatives for the Rehab liabilities, especially considering that a significant portion of the forecast Rehab funding requirement is not needed until after 2027. Zentree also submitted that there is no urgent need for funding for the Rehab as it does not need to be completed immediately.

24. ERA submitted that the IBC is considering funding options available for ERA and that the terms of the funding option have not been finalised, although work to finalise such terms have been in progress. ERA therefore submitted that, as of the date of these proceedings, there is no capital raising in respect of which unacceptable circumstances could be declared.

25. The IBC submitted that it has not determined the structure, size, pricing and timing of any Potential 2024 Equity Raise and that the IBC is carefully considering all available options to mitigate the control effect of any Potential 2024 Equity Raise and to ensure that it is in the best interests of ERA.

26. The IBC submitted that Zentree will be at liberty to bring a separate application in the future if and when details of the Potential 2024 Equity Raise are announced.

27. The IBC also submitted that the application is intended to frustrate the IBC's ability to discharge its duties to ERA to conduct a proper process to identify and assess options for the Potential 2024 Equity Raise.

28. Rio submitted that, so far as Rio is aware, no decision has yet been made by the IBC to launch an equity raise, nor have the structure or terms of any Potential 2024 Equity Raise been finalised. Rio submitted that the application is therefore premature because the circumstances have not yet commenced and there is no certainty that they will arise.

29. Zentree provided additional submissions in response to the preliminary submissions of ERA, the IBC and Rio. While they were out of process[7], we decided to receive them after we formed the preliminary view that we should not conduct proceedings. Zentree submitted, among other things, that the application is not premature because:

    (a) the circumstances that are unacceptable are occurring now and the actual announcement of the Potential 2024 Equity Raise by ERA will simply be another step in the unacceptable circumstances

    (b) Australia's takeover policy is not designed only to protect the market at the time of a new capital raising but rather is intended to protect the integrity of investment decisions made every day

    (c) if the Panel doesn't intervene promptly, the unacceptable circumstances will continue to worsen and

[7] See Rule 20(2) of the Takeovers Panel Procedural Rules 2020

(d) minority and potential new investors in ERA cannot make fully informed investment decisions today, because of Rio's ongoing control actions and ERA's withholding of full and necessary information from the market.

30. In *McAleese Limited* [2016] ATP 13, the Panel considered an entitlement offer announced by McAleese, which McAleese had not yet launched or released the prospectus for. The Panel noted at [29]-[31] that:

> *[30] As a result, we are not in a position to assess whether the entitlement offer, underwriting arrangements or notice of meeting may give rise to unacceptable circumstances because of a structural issue, disclosure deficiency or other feature.*
>
> *[31] In these circumstances, we consider it premature to conduct proceedings in relation to the entitlement offer and underwriting arrangements. Havenfresh, or any other shareholder, is free to make an application if they consider that the entitlement offer, underwriting arrangements or notice of meeting gives rise to unacceptable circumstances when those details become available.*

31. Similarly, in *CuDeco Limited* [2015] ATP 11 the Panel considered that an application made in relation to a rights issue announced but not yet launched was premature.

32. While ERA has announced its expectation that further funding will be required and that it expects this funding to take the form of a material equity raise, no decision has been made by the IBC to launch an equity raise, nor has the size, structure or terms of any potential funding transaction been finalised and announced by ERA.

33. We consider that the application is premature because the key circumstance underlying the application, being ERA's potential capital raising, had not yet commenced and there is no certainty that unacceptable circumstances will arise.

34. While the circumstances alleged by Zentree to be unacceptable are more akin to a shareholder oppression claim than circumstances that fall within the Panel's jurisdiction, some of them could be relevant to whether unacceptable circumstances exist if ERA conducts an equity raise. However, whether unacceptable circumstances will arise in that event would need to be determined at that time.[8]

DECISION

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

Orders

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

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[8] The circumstances alleged by Zentree also raised a question of whether it is necessary for us to extend time under section 657C(3) for the making of the application. Given our decision, we did not need to address this question.

Takeovers Panel

Reasons - Energy Resources of Australia Limited 03 [2024] ATP 13

Robin Bishop
President of the sitting Panel
Decision dated 18 June 2024
Reasons given to parties 26 August 2024
Reasons published 28 August 2024

Advisers

Party	Advisers
Zentree Investments Limited	Piper Alderman
Energy Resources of Australia Limited	Ashurst
The Independent Board Committee of Energy Resources of Australia Limited	Herbert Smith Freehills
Rio Tinto Limited	Allens