Australian Government

Takeovers Panel

Reasons for Decision
Energy Resources of Australia Limited 04
[2024] ATP 22

Catchwords:

Decline to conduct proceedings – rights issue – effect on control – need for funds – dispersion strategy – equal opportunity – section 602 principles – compulsory acquisition

Corporations Act 2001 (Cth), sections 602, 611 item 10, 657A(2), 664A

Guidance Note 17: Rights issues

Energy Resources of Australia Limited 03 [2024] ATP 13, Energy Resources of Australia Limited 02R [2020] ATP 3, Energy Resources of Australia Limited [2019] ATP 25, Yancoal Australia Limited [2014] ATP 24

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

INTRODUCTION

1. The Panel, Teresa Dyson (sitting President), Timothy Longstaff and James Stewart, declined to conduct proceedings on an application by Zentree Investments Limited and Packer & Co Ltd in relation to the affairs of Energy Resources of Australia Limited. The application concerned ERA's 19.87 for 1 non-underwritten pro rata renounceable entitlement offer to raise up to $880 million at an offer price of $0.002 per share announced on 29 August 2024. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

2023 Offer	a $369 million 5 for 1 non-underwritten pro rata renounceable interim entitlement offer of fully paid ordinary shares in ERA at an offer price of $0.02 per share (representing a 90.2% discount to ERA's 5 day VWAP of $0.20 on 3 April 2023) that closed on 5 May 2023 with 98.5% take up of entitlements by eligible shareholders and the remainder taken up under the shortfall facility
2024 Offer	has the meaning given in paragraph 19
Applicants	Packer and Zentree
ERA	Energy Resources of Australia Limited
IBC	the Independent Board Committee of ERA
Jabiluka Lease Litigation	the court proceedings commenced by ERA in relation to the Northern Territory Minister for Mining and for Agribusiness and Fisheries' decision not to renew the Jabiluka Mineral Lease

Jabiluka Mineral Lease	the mineral lease over the Jabiluka project area (MLN-1)
MSA	has the meaning given in paragraph 13
Packer	Packer & Co Ltd
Rehab	ERA's rehabilitation of the former Ranger uranium mine area
Rio	Rio Tinto Limited or Peko-Wallsend Ltd and North Limited (the entities through which Rio Tinto Limited holds its interest in ERA), as the context requires
Zentree	Zentree Investments Limited

FACTS

3. ERA is an ASX listed company (ASX code: ERA) that operated the former Ranger uranium mine and holds the title to the adjacent Jabiluka mineral lease in the Northern Territory. ERA's current business operation is the Rehab.
4. The Applicants are shareholders in ERA. Zentree has voting power of approximately 3.04% of ERA. Packer has voting power of approximately 8.82% 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 the 2023 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[1].
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 (as at 30 June 2023) was now forecast to be $2.3 billion.[2]
11. On 12 March 2024, ERA announced that it expected further funding to be required in the second half of 2024 for the next tranche of the estimated Rehab expenditure and that this funding was 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 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.

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[1] As at 30 June 2023

[2] 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

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

14. On 29 May 2024, Zentree made an application to the Panel in relation to the potential equity raise, among other matters. The Panel declined to conduct proceedings largely on the basis that the application was premature.[3]

15. 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 and reflecting the long held wishes of the local traditional owners, the Jabiluka Mineral Lease would not be renewed.

16. On 6 August 2024, ERA, acting through the IBC, brought proceedings in the Federal Court of Australia challenging the decision not to renew the Jabiluka Mineral Lease.

17. On 9 August 2024, the Court 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[4].

18. On 26 August 2024, ERA announced that it would conduct an investor sounding process to determine interests in an equity raise to fund the Rehab and that, as part of these 'market soundings', ERA would engage with its major shareholders – including Rio and the Applicants – as well as third party investors to determine their support for a potential equity raise. ERA announced that it was looking to raise a minimum of $210 million, but "*may raise more depending upon what size offers the most beneficial terms on which ERA can obtain funding to meet its rehabilitation requirements*"[5].

19. On 29 August 2024, ERA announced a 19.87 for 1 non-underwritten pro rata renounceable entitlement offer to raise up to $880 million at an offer price of $0.002 per share (the **2024 Offer**) to fund Rehab expenditure up until approximately the third quarter of 2027. The 2024 Offer price represents an 87.8% discount to the 5-day volume weighted average price of $0.0164 prior to the announcement of the 2024 Offer. The 2024 Offer, if fully subscribed, would result in the issue of approximately 440 billion new ERA shares.

20. ERA also announced that it had received binding pre-commitments from Rio to subscribe for approximately $760 million of the 2024 Offer, equal to 379,916,303,625 new ERA shares. Rio is not permitted under the ASX Listing Rules to participate in the shortfall facility for the 2024 Offer or to bid to acquire additional entitlements, and accordingly will not be issued any new ERA shares in excess of its entitlement under the 2024 Offer.

21. Assuming no other shareholders participate in the 2024 Offer, and any shortfall is not taken up, Rio's voting power in ERA could increase from 86.3% to up to 99.2468% of ERA following completion of the 2024 Offer.

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[3] See *Energy Resources of Australia Limited 03* [2024] ATP 13

[4] As at the date of these reasons, the position in relation to the renewal of the Jabiluka Lease Litigation and the Jabiluka Mineral Lease had not yet been finalised

[5] See ERA's Business Update Presentation dated 26 August 2024 at page 10

22. Rio Tinto has provided an intention statement to ERA that if "*Rio Tinto acquires [ERA shares] under the Offer which, when aggregated with its existing holdings, result in Rio Tinto holding 90% or more of the shares in ERA, then Rio Tinto intends to proceed with compulsory acquisition of all remaining ERA shares under Part 6A.2 of the Corporations Act and to offer a price of $0.002 per ERA share*"[6].

APPLICATION

23. By application dated 4 September 2024, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that:

    (a) the 2024 Offer is only designed to increase the voting power of Rio to 99.2% and to allow Rio compulsorily to acquire the shareholdings of nearly 10,000 minority shareholders for as low as $6 million

    (b) ERA does not need to raise capital immediately and has not established a need presently to raise the additional funds under the 2024 Offer

    (c) ERA and Rio are taking advantage of the Jabiluka Lease Litigation and making the 2024 Offer whilst ERA's future prospects are uncertain

    (d) no appropriate procedure is being followed by Rio to proceed to compulsory acquisition of the minority shareholders in ERA

    (e) 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 2024 Offer

    (f) the documents in relation to the 2024 Offer, including the Cleansing Statement issued by ERA in respect of the 2024 Offer, are misleading and deceptive and the market for ERA shares is misinformed and

    (g) the 2024 Offer has not been made under a prospectus complying with Chapter 6D[7], and it is not a "rights" offer for the purposes of section 611 item 10, as "the terms of each offer are the same" test is not met.

24. The Applicants submitted that the effect of the circumstances is that, if the 2024 Offer proceeds, Rio will increase its voting power in ERA above the compulsory acquisition threshold in section 664A, and in circumstances where:

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

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

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

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[6] See ERA's Capital Raising Presentation dated 29 August 2024 at page 20

[7] 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)

Interim orders sought

25. The Applicants sought interim orders to the effect that ERA:

    (a) delays the 2024 Offer, including any entitlements trading 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

26. The Applicants sought final orders to protect the rights and interests of minority ERA 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:

    (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 $50 million in aggregate (or at an issue price per share of less than $0.08)

    (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) each transaction or agreement between Rio and ERA entered into on or after ERA commenced to have negative "equity interest" (as defined in the ASX Listing Rules) be terminated

    (d) whilst ERA has a negative "equity interest", any new transaction or agreement pursuant to which ERA will pay Rio any money, or give Rio any asset of ERA, must not be entered or performed unless approved pursuant to the requirements of ASX Listing Rule 10.1

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

    (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 and

    (g) ERA must bear the costs of the Applicants in respect of the Panel proceedings.

DISCUSSION

27. We have considered all the material provided by the Parties but address specifically only the material we consider necessary to explain our reasoning.

Independence of the IBC

28. The Applicants submitted that Rio controls and fetters the discretion of the IBC and that "*ERA uses Independent Board Committees to create the illusion that ERA is not controlled by Rio. However, ERA's Independent Board Committees always submit to the demands of Rio.*" The Applicants submitted that in previous instances (including most recently in 2022) where the IBC disagreed with Rio, Rio ultimately caused the removal of those directors or the IBC resigned *en masse*.

29. The Applicants submitted that, given the IBC's lack of independence from Rio, the Panel should put no weight on the existence of the IBC and the fact that ERA and the IBC arranged separate advisors.

30. The Panel in *Energy Resources of Australia Limited* [2019] ATP 25 and *Energy Resources of Australia Limited 02R* [2020] ATP 3 previously found that the independence of the IBC was potentially compromised due to insufficient measures being taken to ensure the independence of ERA's IBC and potential conflicts of interest were not sufficiently managed.

31. We asked the IBC a number of preliminary questions in relation to the independence of the IBC, including:

    (a) what measures were taken to ensure the independence of the IBC and to manage potential conflicts of interest, including ensuring that the IBC received independent advice free from any influence from Rio-affiliated persons (including ERA employees seconded from Rio)

    (b) whether protocols were in place to ensure the independence of the IBC and

    (c) whether there were any restrictions on the scope of the matters the IBC could consider, the measures the IBC could consider or employ to address the funding requirements of ERA or the powers available to the IBC.

32. The IBC submitted that extensive steps were taken to ensure the independence of the IBC and to manage any potential conflicts of interest, including:

    (a) the appointment of independent financial and legal advisers for the IBC

    (b) the adoption of detailed conflicts protocols in relation to the independence of the IBC and managing conflicts of interests and related party transactions

    (c) ensuring that the IBC was delegated all the powers, authorities and discretion of the full ERA board with respect to any transaction or proposal and

    (d) limiting the involvement of ERA management and employees seconded from Rio to the maximum extent possible.

33. Based on these submissions, we were comfortable that appropriate measures were taken to ensure the independence of the IBC and that potential conflicts of interest were sufficiently managed. We considered there was nothing to suggest that a deeper enquiry as to the independence of the IBC was warranted in the circumstances.

Need for funds

34. The Applicants submitted that, ERA's need for, and timing of, the 2024 Offer is contrived and that, in the Applicants' opinion, ERA has sufficient financial resources to meet its liabilities that are due and payable. The Applicants submitted that ERA accordingly does not require equity capital at this time.

35. The Applicants further submitted that ERA has sufficient funds to continue the Rehab on current forecasts until the end of the 2024 calendar year, and that ERA does not require funding until such time as the Jabiluka Lease Litigation is determined, or at least until 30 June 2025.

36. The Applicants also submitted that ERA will not breach its minimum cash requirement of $50 million by Q4 of 2024[8] and that ERA does not require the funding previously announced by ERA, being $210 million by Q4 of 2025 or $880 million by Q4 of 2027.

37. In response, the IBC submitted that:

    (a) ERA has no income generating or readily saleable assets

    (b) ERA has a considerable net deficit (negative net assets)

    (c) ERA has pressing obligations in respect of the Rehab for which it requires further capital

    (d) ERA's cash position as at 31 August 2024 was $97 million and

    (e) having regard to ERA's Rehab obligations, and in the absence of a funding solution, ERA is expected to breach its minimum cash reserve of approximately $50 million in November 2024 and deplete its cash resources completely by the end of 2024 or early 2025.

38. The IBC further submitted that, to meet its Rehab obligations, ERA needs to continue to enter into new contracts for future rehabilitation work, and entry into these contracts requires access to, and certainty of, funding.

39. The IBC also submitted that a further deferral of Rehab expenditure by pausing critical path activities would result in:

    (a) disproportionate increases in both costs and operational risks, while only creating an additional one month of operation above minimum liquidity levels and

    (b) delays to critical Rehab work (e.g. in relation to Pit 3 capping and water treatment), which would lead to schedule delays, a material increase in the project and business risk profile, and would likely increase overall project costs by an estimated $60 million.

40. The IBC submitted that the Applicants' statement that "*ERA has access to further funds of up to $522 million, as of 30 June 2024, which is held with the Commonwealth as a provision against the Rehabilitation*", is not true, as ERA's access to those funds requires

[8] As stated in ERA's Business Update dated 26 August 2024

the approval of the Commonwealth, which has been sought by ERA and refused by the Commonwealth.

41. The Applicants also submitted that the timing of the 2024 Offer is contrived and that ERA and Rio are taking advantage of the Jabiluka Lease Litigation and making the 2024 Offer whilst ERA's future prospects are entirely uncertain. The Applicants submitted that "*[it] is impossible for an investor to assess the prospects of ERA without knowing the outcome of [the Jabiluka Lease Litigation]*" because the outcome of the Jabiluka Lease Litigation is integral to ERA's future prospects.

42. Given the materiality of the Jabiluka Mineral Lease and the outcome of the Jabiluka Lease Litigation to ERA's future prospects, we asked the IBC a preliminary question as to how the IBC weighed up the timing and prospects of the upcoming Jabiluka lease litigation (e.g. by seeking external legal advice on the prospects) against ERA's need for funding and the strategies available to ERA to meet its rehabilitation obligations.

43. The IBC submitted that it received privileged legal advice about the likely timing and prospects of success in the Jabiluka Lease Litigation. The IBC submitted that it had carefully considered the merits of waiting but determined that given the urgency of ERA's funding requirement, the uncertainty of the timing of any judgment, the continued objections of traditional owners and uncertainty of the ultimate outcome (even if the Jabiluka Lease Litigation initially results in a judgment in ERA's favour), delaying a capital raising until such time as a judgment was received was not a practicable approach.

44. The IBC further submitted that, in light of the proceedings on foot in relation to the Jabiluka Mineral Lease, even once it had determined that the 2024 Offer was likely the only practicable solution, the IBC carefully considered all reasonably available options to delay the 2024 Offer until the outcome of those proceedings was known. These options included requesting permission to draw down on the rehabilitation fund held on trust by the Commonwealth Government and multiple requests for an interim credit facility from ERA's major shareholder, Rio. The IBC submitted that all of these requests were rejected.

45. *Guidance Note 17: Rights issues* (**GN 17**) sets out the Panel's approach to rights issues. GN 17 sets out the Panel's view that "*where there is a clear need for funds that has not been contrived, a rights issue resulting in a control effect will generally not be unacceptable (in the absence of other issues) provided the rights issue is structured appropriately and an appropriate dispersion strategy has been put in place.*"[9]

46. In our view the submissions and material supported the conclusion that ERA had a genuine need for funds and that the 2024 Offer was not contrived. While we acknowledge that the need for funds is not a safe harbour,[10] on the submissions and materials provided there was nothing that suggested to us the IBC's decision to proceed with an equity capital raising in the circumstances was unreasonable.

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[9] *Guidance Note 17: Rights issues* at [10]

[10] See *Guidance Note 17: Rights issues* at [12]

47. We note that it is not particularly common for companies to raise equity capital for expenses in the medium to long term, in circumstances where the company has no income generating or readily saleable assets, rather than undertaking separate capital raisings closer to the time when those expenses become due and payable. However, we had sympathy for the IBC's submission that it would be impractical, expensive and disruptive to conduct separate smaller capital raisings to fund the Rehab, particularly in ERA's current circumstances and noting the limited commitments from ERA's shareholders[11], and we consider that to do so would have added additional costs and risks.

Structure of the Capital Raise

Alternative sources of funding

48. The Applicants submitted that the IBC did not genuinely explore other alternatives to the 2024 Offer prior to announcing the 2024 Offer.

49. The Applicants submitted that it would be more appropriate for ERA to pursue alternative courses of action to delay the need for funding, such as rescheduling a proportion of Rehab expenditure to ensure outgoings are restricted to ERA's available funds of $128 million (at 30 June 2024). The Applicants submitted that the IBC should then in tandem submit a more "*modest and appropriate*" request to draw down on the rehabilitation fund held on trust by the Commonwealth Government.

50. The IBC submitted that, in consultation with its advisers, it considered all reasonably available alternative funding solutions to the 2024 Offer, including control transactions, equity, debt, asset sales and a drawdown from the rehabilitation fund held on trust by the Commonwealth Government. The IBC submitted that it nevertheless determined that the 2024 Offer was the only practicable solution to ERA's urgent funding needs.

51. As noted above, the IBC also submitted that all of its requests (i) to draw down on the rehabilitation fund held on trust by the Commonwealth Government and (ii) for an interim credit facility from Rio, were rejected.

52. The IBC submitted that, prior to launching the 2024 Offer, the IBC engaged three brokers and Highbury Partnership (the IBC's financial adviser) to undertake an extensive market sounding process by contacting over 90 investors to determine interest (including from the Applicants) in an equity raise seeking to raise a minimum of $210 million to fund a portion of the Rehab and for feedback on an appropriate price and size that offered the most beneficial terms on which ERA could obtain funding to meet its rehabilitation obligations, to successfully launch an equity raise.

53. In light of the potential control effect of the 2024 Offer described in paragraph 21, we had some concerns in relation to the IBC's decision to launch the 2024 Offer, and the terms of the 2024 Offer, in ERA's current circumstances. We asked the IBC

[11] The IBC submitted that the price and size of the 2024 Offer was the only price and size at which the IBC had received any pre-commitment or indication of willingness to participate in an offer

preliminary questions as to what extent the IBC considered rejecting Rio's pre-commitment offer and pursuing alternative strategies available to the IBC (e.g. placing ERA into administration) and whether the IBC considered the value that ERA shareholders would receive in administration *vis à vis* the value that ERA shareholders would receive through Rio's planned compulsory acquisition.

54. The IBC submitted that it considered and received privileged legal advice about the likely consequences of administration including in terms of its effects on ERA. The IBC submitted that it ultimately determined that placing ERA into voluntary administration was not in the best interests of ERA and its shareholders.

55. We consider that the IBC genuinely explored all other sensible and reasonable fundraising alternatives to the 2024 Offer. In our view, the IBC undertook an appropriate process to identify a fundraising solution that was in the best interests of ERA shareholders, including through a market sounding process and considerable negotiations with Rio over the terms of capital raising that Rio was willing to support.

56. We had sympathy for the IBC's submissions that it considered all reasonably available alternative funding solutions to the 2024 Offer and that, given the unavailability of other fundraising options, that it nevertheless determined that the 2024 Offer was the only practicable solution to ERA's urgent funding needs.

Price and size of the 2024 Offer

57. The Applicants submitted that the price of the 2024 Offer was not chosen by the IBC but was rather dictated by Rio and was designed to set expectations around Rio's foreshadowed compulsory acquisition of the remaining ERA shares.

58. The Applicants also submitted that the 87.8% discount to ERA's 5-day volume weighted average price implied by the 2024 Offer price was "*outrageous*" and unprecedented.

59. The Applicants also submitted that the 19.87 for 1 ratio used for the 2024 Offer was "*deliberately set to wipe out the minority investors.*"

60. We had some concerns in relation to the size and price of the 2024 Offer. In particular:

    (a) the size of the 2024 Offer, being an offer to raise up to $880 million at a 19.87 for 1 ratio, had the potential for a material control effect if no shareholders other than Rio participated

    (b) the 2024 Offer price of $0.002 per ERA share implied an 87.8% discount to ERA's 5-day volume weighted average price, which seemed on its face to be designed to cause the issuance of a greater number of ERA shares to raise the amount sought by the IBC and

    (c) the terms of the 2024 Offer seemed to match the terms proposed by Rio, not the terms initially preferred by the IBC per its public disclosure.

61. We accordingly asked the IBC a number of preliminary questions including:

(a) whether the IBC sought to negotiate with Rio over the size and price of the offer that Rio was willing to pre-commit for

(b) how the IBC justified the decision to proceed with an offer size of $880 million and the offer price of $0.002 per ERA share in the circumstances, noting the likely substantial dilution of ERA's minority shareholders, the significant discount applied to the offer price and the impact it would have on the amount that minority ERA shareholders receive under the compulsory acquisition process foreshadowed by Rio and

(c) how the IBC satisfied itself that the $880 million offer size was a preferred funding solution compared to the original $210 million minimum sought by the IBC.

62. The IBC submitted that, since it announced in March 2024 that it expected further funding to be required in the second half of 2024, it had engaged with Rio, the Applicants and a number of third parties in relation to possible funding solutions, including participation in an equity raise. The IBC submitted that, as part of the market sounding process, the Applicants were contacted alongside the other investors and neither indicated interest in participation nor were they willing to provide indications as to the price/size at which they would be willing to participate.

63. The IBC submitted that the IBC and its financial adviser (Highbury Partnership) at various stages sought participation from Rio for a smaller equity raise at a higher price and provided a summary of the material engagement with Rio which included numerous meetings and correspondence over several months.

64. Rio submitted that it repeatedly expressed support for the IBC pursuing options that would dilute Rio or that could be pursued independently of Rio, if the IBC could obtain alternative funding.

65. However, the IBC submitted that:

> "*Since the earliest engagement on a potential equity raise with Rio Tinto in April 2024, Rio has not indicated any willingness to pre-commit to or participate in an entitlement offer at a price higher than a circa 90% discount to VWAP (the discount at which the 2023 Interim Entitlement Offer was conducted) , and Rio has also consistently indicated support for a raising at a price and of a size which would meet rehabilitation expenditure up until the end of 2027 (by which time the majority of Pit 3 capping and treatment of contaminated water is expected to have been completed, activities beyond 2027 and estimates of their costs being highly uncertain).*"

66. The IBC submitted that, following the conclusion of the market sounding process described in paragraph 52 above:

(a) no investor (including the Applicants) other than Rio was willing to provide any commitment, or any indication that they would participate in an entitlement offer, at any size or price and

(b) the only terms, size and price at which Rio was willing to pre-commit was an $880 million entitlement offer at $0.002 per offer share.

67. The IBC submitted that it sought analysis from ERA management and external advice from Highbury Partnership on the implications of raising different amounts of money, in particular whether a single larger raising to fund rehabilitation expenditure to the end of 2027 (when the majority of Pit 3 capping and treatment of contaminated water was expected to be complete) or a staged approach of progressively raising for 12 month periods was preferable. The IBC submitted that this analysis supported a single larger raising on the basis that this would be more efficient (in particular, by minimising costs which would be duplicative across multiple raisings, and by reducing the overall amount required to be raised due to interest accrual on the funds raised), and would reduce uncertainty for investors (given that individual initial smaller raises would not fund the rehabilitation to the completion of the key Pit 3 capping work) as well as enabling ERA to present to stakeholders as more strongly capitalised and providing ERA with greater certainty to be able to enter into longer term contracts.

68. The IBC submitted that it gave consideration to the possibility of refusing to accept Rio's preferred pricing and sizing approach and instead launching an entitlement offer at $200 million (consistent with the raise size specified in Zentree's application in *Energy Resources of Australia Limited* 03) and at an offer price of $0.02 per share (consistent with the 2023 Offer price, which was fully subscribed). The IBC submitted that, at the time of those considerations, there was no reason to believe that the Jabiluka Mineral Lease would not be renewed and that when the Northern Territory Government did not renew the Jabiluka Mineral Lease, the IBC focused increasingly on a smaller raising.

69. The IBC submitted that ultimately its commercial judgement was that conducting a smaller non-underwritten entitlement offer of circa $200 million at a higher price, without any investor having provided a pre-commitment or even indicating a readiness or willingness to participate in the offer was not a reasonably available option given the lack of support from other ERA shareholders and given Rio had also provided clear feedback that they would not support any smaller offer.

70. The IBC submitted that it also considered conducting a smaller raising (circa $200 million) at a higher price without any pre-commitment from Rio, in an attempt to encourage Rio to accept those terms. However, the IBC submitted that it ultimately considered that conducting a non-underwritten entitlement offer with no pre-commitment from Rio was too risky because:

    (a) it had the potential to be a drawn-out process (in light of the high risk of Takeovers Panel proceedings, noting the pre-emptive proceedings brought by Zentree in May 2024[12])

    (b) there was no ultimate certainty or likelihood that ERA would obtain the funds it urgently required and

[12] See paragraph 14

(c) a 'failed' entitlement offer could also lead third parties to question ERA's solvency, which might negatively affect the Jabiluka Mineral Lease renewal process.

71. The IBC submitted that, in the circumstances, it determined that it was necessary, and in the best interests of ERA, to proceed to raise capital on the basis of the 2024 Offer, with the structure of the pro-rata renounceable entitlement offer (with the back end bookbuild and shortfall facility) being designed to maximise the opportunity for other shareholders to participate.

72. The IBC submitted that "*whilst the IBC would have preferred to minimise the amount to be raised, and sought to do so, the IBC determined that the $880 million raise size was the only reasonably available option to the IBC*".

73. We consider that certain aspects of the 2024 Offer the subject of the Applicants' complaints, including size and price of the capital raising, are matters for the IBC having regard to the Panel's guidance and in the context of the circumstances facing the company.

74. While we had some concerns in relation to the price of the 2024 Offer, we note that the price of the 2024 Offer may, in the circumstances, facilitate participation by minority ERA shareholders.[13] We also note that the discount applied to the 2024 Offer price is not unprecedented; the offer price for ERA's 2023 Offer (which the Applicants participated in) was an approximately 90% discount to ERA's trading price at that time.

75. In relation to the size of the 2024 Offer, while we recognise the potential control effect due to the size of the offer (assuming no other ERA shareholders participate) we had sympathy for the IBC's submission that:

(a) the IBC engaged in considerable negotiations with Rio over the terms that Rio was willing to pre-commit

(b) conducting a non-underwritten entitlement offer with no pre-commitment from any ERA shareholders would be too risky in ERA's circumstances and

(c) it would be impractical to conduct separate smaller capital raisings to fund the Rehab, particularly in ERA's current circumstances and noting the lack of commitments from ERA's shareholders (other than Rio), and we consider that to do so would have added additional costs and risks.

76. Based on the IBC's submissions, we consider that the IBC's decisions in these circumstances were driven by rational corporate logic in light of the challenges faced by ERA.

77. It also appears that the IBC took appropriate professional advice and followed appropriate procedures to ensure its independence and to make its decisions in accordance with their respective duties as independent directors of ERA.

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[13] See *Yancoal Australia Limited* [2014] ATP 24 at [96]

78. For these reasons, we are not minded to second guess the decisions of the IBC regarding the proposed 2024 Offer, including in relation to ERA's need for funds, the timing or quantum of this need, the assessment of alternate funding sources and strategies, and the structure of the rights issue.

79. In our view, there was nothing to suggest that a further enquiry as to the IBC's decisions in this regard was warranted in the circumstances.

Structure of the 2024 Offer

80. The Applicants submitted that the 2024 Offer did not align with the Panel's guidance on the basis that there was no dispersion strategy for the 2024 Offer because "*only Rio is expected to take up the offer*".

81. The IBC submitted that the 2024 Offer has been structured to align with the guidance provided in GN 17 at [27] and that the IBC sought:

    (a) "*to raise the minimum funds urgently required (but was not able to receive any pre-commitments, other than for an $880 million equity raise)*

    (b) *to minimise the discount to recent market prices (but was not able to receive any pre-commitments other than for an equity raise conducted at $0.002 per offer share)*

    (c) *underwriting (but no potential underwriter approached was willing to underwrite)*

    (d) *strategic investors (but no investor approached was willing to invest)*

    (e) *to delay the offer (but assessed this was not a practicable solution) and*

    (f) *to structure the offer to include a shortfall facility, rights trading and a back-end bookbuild (these features have been accommodated in the [2024 Offer]).*"

82. Guidance Note 17 was rewritten in 2018 to provide market participants with "*clearer guidance about the Panel's approach to rights issues*".[14] Paragraphs 7 and 8 outline some of the ways an issuer can mitigate the potential control effects of a rights issue including (among other things):

    (a) making the rights issue renounceable and

    (b) offering a shortfall facility.

83. On the materials provided, we consider that the 2024 Offer contained a dispersion strategy (a top-up facility) in line with the Panel's guidance in GN 17. Market participants are entitled to look at the applicable rules in the Corporations Act, the guidance in ASIC's regulatory guidance and in the Panel's guidance notes, and conduct themselves accordingly.

84. We also noted that the Applicants' non-participation in the 2024 Offer could dilute the Applicants' shareholding, as is frequently the case in rights issues, and the Applicants have the ability to participate pro-rata in the 2024 Offer to prevent Rio from exceeding 90%.

[14] Consultation Paper, Guidance Note 17 – Rights issues, 23 February 2018

85. Previous instances where the Panel has considered that rights issues led to unacceptable circumstances have largely been where the Panel considered that the rights issue was designed to deliver control (or more control) to a particular person or entity. We consider that, notwithstanding the potential control effect of the 2024 Offer, the processes and efforts of the IBC indicate that the IBC's design of the 2024 Offer was not to deliver more control to Rio.

86. In our view, the IBC was aware of and actively considered the potential control effect. However, there was nothing to indicate that the IBC had not taken appropriate steps to endeavour to mitigate the potential control effect of the 2024 Offer and to maximise the fairness of the circumstances, having regard to the Panel's guidance and in the context of the circumstances facing ERA, including by incorporating a dispersion strategy in accordance with Guidance Note 17.

Compulsory acquisition

87. The Applicants submitted that, in addition, no appropriate procedure is being followed by Rio to proceed to compulsory acquisition of the minority shareholders in ERA.

88. The Applicants submitted that the behaviour of Rio and ERA has been an abuse of regulatory procedures for the purpose and having the effect of permitting Rio to commence a compulsory acquisition process at a price per share that is a fraction of previously prevailing market prices. As noted above, the Applicants submitted that the size, price and timing of the 2024 Offer has been contrived by ERA, Rio and the IBC to allow Rio compulsorily to acquire the remaining ERA shares at a price of $0.002 per ERA share for a notional amount of $6 million in total.

89. The IBC submitted that, in respect of Rio's intention regarding the price for compulsory acquisition, the statutory process for compulsory acquisition already provides a comprehensive regime to ensure that the consideration paid is fair value, which includes an independent expert's report, court oversight and the ability for shareholders to challenge the acquirer's valuation.

90. The IBC submitted that these matters are more appropriately dealt with as part of the compulsory acquisition process should Rio acquire 90% or more of ERA and elect to proceed to compulsory acquisition consistent with their stated intention. The IBC also submitted that it will be open to minority shareholders to argue valuation issues under any future compulsory acquisition process which provides the proper forum for those issues to be ventilated.

91. We agree with the IBC's submissions that ERA minority shareholders will have the benefit of the statutory protections under Division 1 of Part 6A.2 regarding the price and terms of any subsequent compulsory acquisition by Rio. Accordingly, we did not need to consider this matter in further detail in the circumstances.

Potential orders

92. As part of our preliminary questions to the parties, we asked the Applicants whether there were any other potential remedies that they considered suitable to address their

concerns in relation to the 2024 Offer, for example an order in relation to Rio's potential compulsory acquisition.

93. The Applicants submitted that an order preventing Rio from proceeding with compulsory acquisition following the 2024 Offer would be suitable to address their concerns because "*the only reason Rio is insisting on the terms of the 2024 Offer is so it can move to compulsory acquisition, paying only $6 million, and exploit for itself all of the benefits of consolidating ERA into the Rio consolidated group*".

94. The Applicants referred to the Panel's decision in *Energy Resources of Australia Limited 02R* [2020] ATP 3, where the sitting Panel considered that an order preventing compulsory acquisition would be unfairly prejudicial to Rio, and submitted that the 2024 Offer should be distinguished from the entitlement offer the subject of previous Panel proceedings.

95. The Applicants further submitted that "*the objective of protecting rights and interests of minority shareholders affected by the unacceptable circumstances in the 2024 Offer far outweighs the prejudice, if any, suffered by Rio as a result of the order precluding Rio from proceeding to compulsory acquisition.*"

96. Rio submitted in rebuttal that a prohibition on Rio exercising a right to proceed to general compulsory acquisition, if that right were to arise, would deny Rio of a statutory right, without any clear basis for doing so.

97. Given we declined to conduct proceedings on the application, we did not consider this matter further.

Other matters

98. The application included a substantial amount of submissions that addressed various matters that appeared unrelated to the Panel's jurisdiction. In particular, a number of the circumstances alleged by the Applicants to be unacceptable were more akin to a shareholder oppression claim than circumstances that fall within the Panel's jurisdiction.

99. We consider that many of the matters raised in the application, particularly those going to issues of corporate governance and the formation and operation of contracts, are more appropriate for a court or can most appropriately be raised in other forums.

100. In our view, those matters were either not relevant to, or did not have a reasonable prospect of resulting in, a declaration of unacceptable circumstances, and our consideration of them would serve to prolong the resolution of these proceedings in a way contrary to the public interest. We accordingly decided to focus on the conception, terms and substance of the 2024 Offer, including whether the 2024 Offer contravened section 602 or whether the circumstances were otherwise unacceptable.

101. We were not persuaded that conducting a deeper inquiry into the circumstances relating to the 2024 Offer was warranted in the circumstances.

DECISION

102. 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

103. 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.

Teresa Dyson
President of the sitting Panel
Decision dated 24 September 2024
Reasons given to parties on 7 October 2024
Reasons published 10 October 2024

Advisers

Party	Advisers
Zentree Investments Limited Packer & Co Ltd	Piper Alderman
Energy Resources of Australia Limited	Ashurst
The Independent Board Committee of Energy Resources of Australia Limited	Herbert Smith Freehills (legal adviser) Highbury Partnership (financial adviser)
Rio Tinto Limited	Allens