Australian Government

Takeovers Panel

Reasons for Decision
Energy Resources of Australia Limited 05R
[2024] ATP 24

Catchwords:

Decline to make a declaration – rights issue – effect on control – need for funds – procedural fairness – equal opportunity – section 602 principles – compulsory acquisition

Corporations Act 2001 (Cth), sections 602, 657A, 657EA, 658A, 664A, 664E and 664F

Corporations Regulations 2001 (Cth) regulation 6.10.01

Australian Securities and Investments Commission Act 2001 (Cth), section 199

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16(2)(c)

Takeovers Panel Procedural Rules 2020, rules 18 and 22(1)

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Guidance Note 2: Reviewing Decisions, Guidance Note 17: Rights issues

Energy Resources of Australia Limited 04 [2024] ATP 22, Re Webcentral Group Ltd 02R [2020] ATP 26, Strategic Minerals Corporation NL 06 [2020] ATP 8, Energy Resources of Australia Limited 02R [2020] ATP 3, Energy Resources of Australia Limited [2019] ATP 25, Benjamin Hornigold Limited 08R, 10R & 11R [2019] ATP 22, Re Pacific Energy Limited [2019] ATP 20, Re GBST Holdings Limited [2019] ATP 15, InvestorInfo Ltd [2004] ATP 6, Normandy Mining Limited 03 [2001] ATP 30

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

INTRODUCTION

1. The review Panel, Robin Bishop (sitting President), Elizabeth Hallett and Jeremy Leibler, declined to make a declaration of unacceptable circumstances in relation to the affairs of Energy Resources of Australia Limited. The application concerned the proposed $880 million 19.87 for 1 renounceable entitlement offer announced by Energy Resources of Australia Limited on 29 August 2024. After considering the further submissions from the parties, the review Panel reached similar conclusions to the initial Panel. The review Panel was not satisfied that the circumstances were unacceptable.

2. In these reasons, the following definitions apply.

2024 Offer	has the meaning given in paragraph 12
Applicants	Packer & Co Ltd and Zentree Investments Limited
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 decision not to renew the Jabiluka Mineral Lease
Jabiluka Mineral Lease	the mineral lease over the Jabiluka project area (MLN-1)
Rehabilitation	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

FACTS

3. The facts are set out in detail in the initial Panel's reasons for decision in *Energy Resources of Australia Limited 04*[1]. Below is a summary.

4. ERA is an ASX listed company (ASX code: ERA) with operations in the Northern Territory. It operated the former Ranger uranium mine and holds the title to the adjacent Jabiluka Mineral Lease. ERA's current business operation is the Rehabilitation.

5. The Applicants are shareholders in ERA. Zentree Investments Limited has voting power of approximately 3.04% of ERA. Packer & Co Ltd has voting power of approximately 8.82% of ERA.

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

7. In December 2023, ERA announced that the Rehabilitation provision as at 30 June 2023 was forecast to be $2.3 billion. This followed an announcement by ERA in September 2023 that its Rehabilitation costs were expected to materially exceed the previous forecast range of $1.6 billion to $2.2 billion.

8. On 12 March 2024, ERA announced that:

   (a) it expected further funding to be required in the second half of 2024 for the next tranche of the estimated Rehabilitation expenditure and that this funding was expected to be addressed in the form of a material equity raise in 2024 and

   (b) the IBC had appointed advisers in relation to the potential equity raise (or other funding options for the Rehabilitation expenditure) and that the IBC had not yet determined the structure, size, pricing and timing of any potential equity raise.

9. On 26 July 2024, the Northern Territory Minister for Mining and for Agribusiness and Fisheries announced that the Jabiluka Mineral Lease would not be renewed.

10. 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.

[1] [2024] ATP 22

The Court subsequently made an interim order to stay the decision to refuse to renew the Jabiluka Mineral Lease pending further order of the Court[2].

11. On 26 August 2024, ERA announced that it would conduct 'market soundings' with its major shareholders and third party investors to determine their support for a potential equity raise to raise a minimum of $210 million to fund the Rehabilitation.

12. 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 Rehabilitation expenditure up until approximately the third quarter of 2027. The 2024 Offer price represents:

    (a) a 24.4% discount to ERA's theoretical ex rights price (TERP)[3] of $0.003 as at 23 August 2024 and

    (b) an 87.8% discount to the 5-day volume weighted average price (VWAP) of $0.0164 prior to the announcement of the 2024 Offer,

    and if fully subscribed would result in the issue of approximately 440 billion new ERA shares. ERA also announced that it had received binding pre-commitments from Rio to subscribe for approximately $760 million (approximately 380 billion new ERA shares).

13. 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. Rio is not permitted under the ASX Listing Rules to participate in the shortfall facility or to bid to acquire additional entitlements.

14. Rio provided an intention statement to ERA that if it acquires ERA shares under the Offer which, when aggregated with its existing holdings, result in Rio holding 90% or more of the shares in ERA, then Rio "*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*"[4].

15. On 4 September 2024, the Applicants made an application seeking a declaration of unacceptable circumstances. The Applicants submitted (among other things) 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

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

[3] Being the theoretical price of a company's shares following a rights issue 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

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

(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 and

(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.

16. The initial Panel declined to conduct proceedings. The media release dated 25 September 2024 in relation to the decision stated as follows:

> "*The Panel considered, among other things, that ERA's Independent Board Committee took appropriate steps to endeavour to mitigate the potential control effect of the equity raise having regard to the Panel's guidance and in the context of the circumstances facing ERA. The Panel was not minded to second guess the Independent Board Committee's decisions regarding the proposed equity raise, 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.*"

APPLICATION

17. On 26 September 2024, the Applicants requested the substantive President's consent to apply for a review of the decision by the initial Panel in *Energy Resources of Australia Limited 04*[5] pursuant to section 657EA[6]. The Applicants submitted (among other things) that:

(a) "*[T]he Decision not to conduct proceedings is wrong and amounts to a denial of procedural fairness and natural justice as the Sitting Panel decided the very issues which would be determined by the Sitting Panel if it did conduct proceedings.*"

(b) Withholding consent will cause the Applicants to lose a significant investment they have made in ERA, as the 2024 Offer will proceed, Rio will be issued 379,916,303,625 new shares in ERA and all of the minority investors will be diluted to less than 1%.

18. Each of the IBC and ERA made out of process submissions to the effect that the Acting President should decline to provide consent, including because allowing a review to proceed would cause a further delay to the 2024 Offer which is likely to prejudice ERA and its shareholders.

19. Having regard to the relevant factors in the Panel's guidance[7], and in particular the importance of the dispute underpinning the request for consent, the Acting President granted her consent to the review of the decision. The Acting President took into account the submissions received from the IBC and ERA but considered that these

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[5] [2024] ATP 22

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

[7] See *Guidance Note 2: Reviewing Decisions* at [29]

did not change her view that this was a matter where consent to a review was warranted.

DISCUSSION

20. We have considered all the materials but address specifically only those we consider necessary to explain our reasoning.

Decision to conduct proceedings

21. Each of ERA, the IBC and Rio made preliminary submissions that we should decline to conduct proceedings noting in particular their concerns regarding a further delay to the entitlement offer and highlighting ERA's urgent need for capital. The IBC submitted that ERA is expected to breach its internal minimum cash buffer of $50 million in November. ERA attached with its submissions a graph showing ERA's spend profile which was consistent with the IBC's submission.

22. The role of a review Panel is to conduct a *de novo* review.[8] The Applicants had only two business days to make the review application,[9] and did not have the initial Panel's reasons for its decision. We were not satisfied that the initial or review applications were frivolous or vexatious.[10] We considered that it was appropriate in the circumstances of this matter to conduct proceedings. We took into account the preliminary submissions referred to above concerning the alleged urgency of ERA's need for funds.

23. The Applicants noted in their review application that it may be appropriate for the Panel to seek ERA's agreement not to relaunch the 2024 Offer. However, in light of an ASX announcement by ERA of 27 September 2024 in relation to the review application, which stated that the IBC "*will advise of a revised Entitlement Offer timetable after the outcome of the Review Application is known*", we did not consider this to be necessary.

24. When we decided to conduct proceedings, we had seen all the materials before the initial Panel but had not seen the initial Panel's reasons for decision (which were still being prepared). We considered it was appropriate to wait for the initial Panel's reasons to be available before we issued our brief, so that parties would have the opportunity to consider and make submissions on those reasons. Accordingly, we informed parties that we had decided to conduct proceedings on Friday, 4 October 2024 and that a brief would be issued separately. On Monday, 7 October 2024 we received a copy of the initial Panel's reasons. We sent the brief to the parties later that day.

25. In the brief, we asked the parties (among other things):

    (a) Whether there was any further material or submission we should consider regarding or relevant to:

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[8] *Benjamin Hornigold Limited 08R, 10R & 11R* [2019] ATP 22 at [11] and *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]
[9] Section 657EA(3) and *Corporations Regulations 2001* (Cth) regulation 6.10.01
[10] Section 658A

(i) the preliminary questions asked by the initial Panel and/or responses to those questions

(ii) the initial Panel's reasons

(iii) preliminary submissions made by other parties

(iv) the document received from a minority shareholder of ERA[11] or

(v) the circumstances to which the initial application and review application relate?

(b) What matters we should take into account in determining whether it would be unacceptable if the 2024 Offer permits Rio to seek compulsory acquisition under Part 6A.2?

26. After considering parties responses to the brief, we were broadly in agreement with the conclusions and reasons of the initial Panel. We endorse and adopt those reasons except to the extent of anything inconsistent with our comments below.

Independence of the IBC

27. In relation to the independence of the IBC, the Applicants submitted that the only way we could determine whether the IBC acted in a truly independent manner would be to (among other things):

(a) review the minutes of all IBC meetings, review all notes and reports of Highbury Partnership[12], review all correspondence of the IBC or Highbury and Rio, and review all minutes of meetings and advice to Rio in connection with Rio designs for control of ERA, including related correspondence

(b) investigate and understand why the IBC appointed Rio to be the manager of the Rehabilitation and review copies of the Management Services Agreement, all drafts of that agreement, and all correspondence and minutes relating to the agreement and

(c) consider the extent Rio encouraged the actions of the Commonwealth Government and the Mirarr in relation to the Jabiluka Lease renewal and review all correspondence, minutes, advice and reports relating to the Jabiluka Lease and the Mirarr and involving Rio.

28. We were mindful that in *Energy Resources of Australia Limited* [2019] ATP 25[13] and *Energy Resources of Australia Limited 02R* [2020] ATP 3[14] it was found that the independence of the independent board committee of ERA at the time was potentially compromised and that potential conflicts of interest were not sufficiently managed. However, the IBC's submissions in response to the initial Panel's preliminary questions satisfied us that the deficiencies highlighted in these previous Panel proceedings were properly addressed, including by adopting appropriate

[11] See paragraph 65
[12] The IBC's financial adviser
[13] See [71]-[91]
[14] See [40]-[44]

conflicts protocols, a copy of which was provided with the IBC's submissions. The IBC described in detail their decision-making process, including the number of meetings held, the individuals present and how they ensured their process was free from Rio influence. We consider that ERA and the IBC took appropriate measures to ensure the independence of the IBC and that potential conflicts of interest were appropriately managed.[15]

Need for funds

29. In relation to ERA's need for funds, the Applicants submitted that the only way we could determine whether the IBC thoroughly tested and explored reducing its need for funds in the short term would be to (among other things):

    (a) review all minutes and correspondence and advice considered by the IBC to reduce or reschedule ERA's spend on Rehabilitation, including to determine whether the information and data given to the IBC on which to base its decision came from Rio or Rio conflicted persons

    (b) review all minutes and correspondence and advice considered by the IBC to challenge the cost forecasts for the Rehabilitation and accounting provisions and

    (c) review all correspondence and minutes of meetings with Rio and test exactly how robust the Rio negotiations were.

30. We do not agree. Given the previous Panel applications concerning ERA, we would expect such written documentation to be carefully prepared with the assistance of advisers. Moreover, the IBC submitted in the proceedings before the initial Panel that it is expected to deplete its cash resources completely by the end of 2024 or early 2025[16] and in our view the materials support the conclusion that ERA has a need for funds for the Rehabilitation in the short term.[17] Furthermore, it is clear from the material before us that ERA's need for funds for the Rehabilitation over the medium to longer term is very substantial. Drawing on our experience and expertise, we do not consider it likely that ERA will be able to meet that need without substantial equity capital raises. In our view, it is reasonable for the IBC to be raising as much as it can now to address the short and medium to longer term needs of ERA.

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[15] See *Energy Resources of Australia Limited 04* [2024] ATP 22 at [33]

[16] In support of this submission, the IBC cited (among other things) its "Appendix 4D and Half Year Report" (page 4) and "June 2024 Half Year Results"' (Page 3), slides 6 and 9 of the "Business Update Presentation" announced 26 August 2024 and slides 9 and 13 of the "Capital Raising Presentation" announced 29 August 2024

[17] Noting, for example, the IBC's submission in the proceedings before the initial Panel that despite having sought to defer as much expenditure as possible (including in relation to the Rehabilitation costs), ERA has fixed and committed expenditure, including in relation to committed contractual spends, employees and operational costs. Among other things, the IBC also submitted in the proceedings before the initial Panel that material costs include both critical path activities within the currently approved programme management plan and activities required for regulatory and environmental compliance and site safety, and that a further deferral of expenditure by pausing critical path activities would result in disproportionate increases in both costs and operational risks, while only creating an additional one month of operation above minimum liquidity levels

31. The IBC's submissions in the proceedings before the initial Panel also explained the uncertainty surrounding the timing and outcome of any final resolution regarding the Jabiluka Lease Litigation[18] and like the initial Panel nothing suggested to us that the IBC's decision to proceed with the 2024 Offer in the circumstances was unreasonable.

32. Accordingly, we consider that further investigation is unlikely to assist and would not be consistent with the requirement for us to decide the matter in a timely manner.[19]

Alternative sources of funding

33. In relation to the IBC's exploration of alternative sources of funding, the Applicants' submissions included that we should require evidence by way of minutes and transcripts and notes from Highbury and the other advisers involved concerning the "*so-called 'extensive' market soundings of over 90 investors*" to determine who these investors were and what was actually said to the investors and what their responses were.

34. The Applicants also submitted, with reference to a rebuttal submission of Rio from the proceedings before the initial Panel,[20] that it is not true that the Applicants would not support the terms of any equity raise by ERA and that they had only been presented with the option to pre-commit to "*an unacceptable $210 million offering with no way for the offer to create value for investors and with no diligence access*". The Applicants further submitted that they have "*constantly*" tried to engage with ERA and the IBC about alternative means of funding. The IBC did not address this submission specifically in rebuttals in these proceedings. However, the IBC did submit that it "*was disappointed that Rio would not support a smaller entitlement offer at a higher price, but at the end of the day, ERA needs to raise funds*" and that "*the Entitlement Offer was the only realistically viable basis available*".

35. It is conceivable that the IBC's engagement with the Applicants regarding support for an equity raise could have been more extensive. However, the Applicants have not indicated to us any terms on which they would be prepared to participate in an equity raise, and it is not clear to us that further engagement by the IBC would have made any difference. We recognise, and have taken into account, the fact that the Applicants have less access to relevant information than the IBC, but "*an application needs to demonstrate (by evidence and reasoning) a basis for the Panel's intervention*".[21]

36. Drawing on our experience and expertise, we are of the view that in the circumstances the IBC acted reasonably in its efforts to consider available alternative funding solutions to the 2024 Offer.

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[18] See *Energy Resources of Australia Limited 04* [2024] ATP 22 at [43]-[44]
[19] See *Australian Securities and Investments Commission Regulations 2001 (Cth), reg 16(2)(c)*
[20] Which stated that "*there are seemingly no terms of an equity raise that the Applicants would be prepared to support*"
[21] *Guidance Note 17: Rights issues* at [35]

Price and size of the 2024 Offer

37. As to the price of the 2024 Offer, the Applicants submitted that the initial Panel "*inexplicably determined that the circa 90% discount to VWAP*" is acceptable in these circumstances and that the only reasoning provided in the initial Panel's reasons for considering such a discount to be acceptable was that 90% was the same discount applied in ERA's 2023 entitlement offer which they submitted was distinguishable.[22]

38. In relation to the initial Panel accepting the IBC's submissions that conducting smaller offers without Rio's pre-commitment would be drawn out and uncertain,[23] the Applicants submitted that the review Panel must test these submissions, noting (among other things) that "*acting commercially in its own interests, Rio would never allow itself to be diluted in ERA*" and that ERA by its own admissions does not need all of the $880 million. The Applicants acknowledged that sitting Panels are often reluctant to second guess issuers' decisions relating to the need for funds, timing or quantum but submitted that this is "*not a question of second guessing, but the Panel exercising its responsibilities to investigate the basis upon which extraordinary decisions were made*".

39. In rebuttals, Rio submitted (among other things) that:

    (a) Rio have explained the rationale for their pre-commitment terms that provide ERA with funding certainty through to 2027, in a more efficient capital raising route, priced consistent with Rio's view of value and previous ERA equity raises and

    (b) as an 86.3% shareholder of a company fundraising for a liability larger than its market capitalisation, "*almost any terms (without minority participation) result in the Rio Tinto Parties acquiring more than 90% of ERA*[24]".

40. While the issue price of the 2024 Offer represents a discount of almost 90% to ERA's 5-day VWAP, we note that the issue price represents a discount of approximately 25% to ERA's TERP,[25] which we consider to be the primary measure of the discount and which in our view is not excessive. The IBC submitted in response to the initial Panel's preliminary questions that it undertook extensive efforts to negotiate with Rio to explore other terms and provided a detailed summary of its material engagement with Rio which spanned from 15 March 2024 to 27 August 2024.

41. We consider it to be within Rio's rights to decide whether or not it is prepared to support a rights issue and if so, the terms it is prepared to pre-commit to or otherwise support. It was incumbent on the IBC to explore other options and we are satisfied that it did so having regard to its submissions concerning its engagement with Rio, the market soundings process and its consideration of alternatives.

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[22] In particular, the Applicants submitted that the initial Panel's reasoning ignores that ERA's 2023 entitlement offer was "*only for $369 million, at a time when the market was assuming the Jabiluka Lease would be automatically renewed and the Rehabilitation provision was just $1,446 million versus $2,420 million today*"
[23] See *Energy Resources of Australia Limited 04* [2024] ATP 22 at [75]
[24] Relevantly, including a $210 million raise at an offer price of $0.002
[25] See paragraph 12

42. It is conceivable that notwithstanding Rio's unwillingness to pre-commit to a smaller entitlement offer at a higher price, it ultimately would have participated should such an offer have been launched in order to avoid dilution.[26] However, that is not a certainty and, like the initial Panel,[27] we had sympathy with the position the IBC found itself in. Accordingly, we consider the IBC's view that the 2024 Offer was the only practicable option available to the IBC in the circumstances to be reasonable.

Structure of the 2024 Offer

43. The Applicants submitted that the initial Panel's reasons do not discuss the Applicant's detailed analysis of why the 2024 Offer is designed to "*cosmetically comply*" with Guidance Note 17, but in substance fails to do so.[28] The Applicants further submitted (among other things) that it was not in dispute that it was Rio who designed the terms of the 2024 Offer, not the IBC, and the IBC "*caved to Rio's demands and did not say no*". In rebuttals, Rio submitted (among other things) that this was plainly a matter in dispute and that the terms of the 2024 Offer were not dictated by Rio and there were no demands to 'cave' into. Rio also submitted that it was approached to provide a pre-commitment for the 2024 Offer as were the Applicants and that Rio was simply the only party to offer any commitment.

44. The IBC submitted in the proceedings before the initial Panel that it structured the 2024 Offer to align with the guidance in Guidance Note 17, noting that the 2024 Offer included a shortfall facility, rights trading and a back-end bookbuild and noting (among other things) the attempts the IBC made to negotiate with Rio regarding the price and size of the offer, secure underwriting and engage with other strategic investors in relation to the raise. In the exceptional circumstances attending ERA, we are satisfied the IBC took sufficient steps to seek to mitigate the control effects of the rights issue in accordance with Guidance Note 17 (even though it was only able to bring some of those steps into fruition). Moreover, we agree with the initial Panel that the processes and efforts of the IBC indicate that the 2024 Offer was not designed to deliver more control to Rio.[29]

Applicants' submissions regarding further investigation

45. The Applicants submitted that the IBC's submissions in *Energy Resources of Australia Limited 04*[30] were generally accepted by the initial Panel at face value and not tested,[31] and that the review Panel should not make findings without properly investigating the IBC's submissions, without evidence that can be adduced and without considering the Applicant's submissions on that evidence.

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[26] Although we note Rio had stated in a letter to the IBC dated 8 June 2024 that it is "*prepared to have its shareholding in ERA diluted if the material quantum of funding needed by ERA can be sourced from any parties other than [Rio]*"

[27] See *Energy Resources of Australia Limited 04* [2024] ATP 22 at [56]

[28] The Applicants also noted that they repeat their contentions from a section of the initial Application where they submitted (in summary) that the need for, and timing of, the 2024 Offer is contrived

[29] See *Energy Resources of Australia Limited 04* [2024] ATP 22 at [85]

[30] [2024] ATP 22

[31] In particular, the Applicants referred to [33], [46], [55]-[56], [76]-[78] and [86] of the initial Panel's reasons

46. In rebuttals, each of ERA, the IBC and Rio made submissions to the effect that undertaking the investigation exercise requested by the Applicants is unwarranted and would be inconsistent with the Panel's process of resolving disputes promptly by focusing primarily on commercial issues.

47. The IBC submitted that the Panel is "*not equipped, nor was it ever intended, to second guess decisions made by directors who have been advised by independent legal and financial advisers, other than in manifestly extreme cases, of which this is not one*".[32]

48. Rio submitted that "*[t]he Panel does not need to read every document and set of minutes, comb through correspondence and interrogate professional advice to accurately understand the matters at issue in relation to the 2024 Offer*" and in a footnote noted that it would be an offence to have provided false evidence as set out in section 199 of the *Australian Securities Investment Commission Act 2001* (Cth).

49. The initial Panel asked a range of preliminary questions including in relation to negotiation of the size and price of the 2024 Offer, ERA's need for funds, the IBC's consideration of alternative funding strategies, the timing of the 2024 Offer and the independence of the IBC. The IBC provided detailed responses to these questions, and as noted above we considered the IBC's submissions gave us a clear picture of the decision-making process adopted by the IBC in relation to the 2024 Offer.

50. Overall, we consider the IBC's approach to the 2024 Offer as articulated in its responses to the initial Panel's preliminary questions to be reasonable and nothing in the materials suggests to us that the IBC failed to undertake an appropriate process in relation to the 2024 Offer.

51. We agree with the submissions referred to in paragraphs 47 and 48 above. The Panel is not bound by the rules of evidence and may act on any logically probative material.[33] Sitting Panels are made up of experienced commercial people, and much of the evidence produced by either side will be uncontested. Sitting Panels will generally rely on the honesty and integrity of parties before them and those parties' professional advisers (who are highly likely to participate in Panel proceedings on a repeat basis and should therefore be particularly concerned for their credibility before the Panel) in accepting parties' submissions at face value. The Panel is reassured in this by the fact of criminal liability and sanctions for persons who provide false evidence to the Panel. Frequently, a sitting Panel will not seek corroboration of submissions unless another party provides reasonable criticism of the basis, logic or veracity of the submission.[34]

52. As noted above, the Applicants asked us to review copies of a range of underlying materials to test the basis, logic or veracity of the submissions of the IBC and the other parties. The volume of these materials is undoubtedly very large and the process of undertaking such a review would necessarily be time consuming and cause a further delay to the 2024 Offer. The IBC submitted that this process would

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[32] Citing as examples *Re Pacific Energy Limited* [2019] ATP 20 at [18], *Re GBST Holdings Limited* [2019] ATP 15 at [36] and *Re Webcentral Group Ltd 02R* [2020] ATP 26 at [39]

[33] *Takeovers Panel Procedural Rules 2020*, rule 22(1)

[34] *Normandy Mining Limited 03* [2001] ATP 30 at [58]-[60]

take weeks, if not longer, to complete. We consider that in this instance, undertaking such an investigation would not be appropriate, particularly in light of ERA's financial circumstances, unless there is a reasonable prospect that it may make a difference to our decision. We do not consider that is the case here. The Applicants have not brought to our attention any relevant material or concerns before the initial Panel or provided in these proceedings that would give us sufficient reason to second guess the IBC's submissions or find that the IBC's decision-making process was unreasonable. As noted above,[35] it is conceivable that the IBC's engagement with the Applicants regarding support for an equity raise could have been more extensive. However, we do not consider this enough of itself to justify further enquiries being made.

53. Having regard to all the materials before us and noting the steps taken by the IBC to address deficiencies that were the subject of complaints in previous Panel proceedings concerning ERA,[36] we considered there was little prospect that a review of the kind requested by the Applicants would lead us to reach a different view regarding whether there were unacceptable circumstances in relation to the affairs of ERA. Accordingly, we were not persuaded that the Applicants had established that a further investigation was warranted.

54. We also consider that some of the Applicants' concerns, including its complaints in relation to allegations that Rio has fettered the board's discretion with regard to critical business matters (including any actions regarding the Mirarr in relation to the Jabiluka Lease renewal), the Management Services Agreement entered into with Rio, and the benefits that may accrue to Rio on acquiring 100% following compulsory acquisition of ERA shares under Part 6A.2 (in the event Rio does so),[37] may be more appropriate to ventilate in other forums.

Reasonable and equal opportunity to participate in benefits

55. In their initial application, the Applicants submitted that minority shareholders do not have a reasonable and equal opportunity to participate in the substantial benefits that will accrue to Rio upon "consolidation of ERA", including:

    (a) significant reputational benefits Rio gains with governments and indigenous groups by overseeing—and enhancing—the Rehabilitation process, which strengthen its social license in Australia and ultimately benefit its other business operations

    (b) ERA's substantial tax losses and franking credits will accrue to Rio (and not be otherwise available to minority shareholders)

    (c) Rio will control ERA's mineral assets, and in particular the Jabiluka Lease (if it is retained) and

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[35] See paragraphs 34 to 35

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

[37] See paragraphs 55 to 64

(d) Rio will become entitled to ERA's unspent Rehabilitation moneys and security deposits, already equating to over $650 million as of 30 June 2024, which have been significantly funded by prior investments by minority shareholders.[38]

56. The benefits cited by the Applicants flow from obtaining 100% ownership and hence assume that Rio increases its shareholding in ERA to 90% or more following the 2024 Offer and compulsorily acquires the remaining ERA shares under Part 6A.2.

57. A similar issue was raised in *Energy Resources of Australia Limited* [2019] ATP 25.[39] The Panel stated (at [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.*"

58. There the Panel found that the holders of the ordinary shares in ERA other than Rio did not have a reasonable and equal opportunity to participate in benefits ultimately accruing to Rio through ERA's entitlement offer and the relevant underwriting agreement. However, those proceedings concerned a previous ERA capital raising which was fully underwritten by a wholly owned subsidiary of Rio and, as observed by ASIC, the underwriting agreement may have conferred a benefit on Rio (and not other shareholders) 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.[40]

59. The 2024 Offer is on the same terms for all shareholders (other than certain foreign shareholders) giving the same opportunity to participate pro-rata to their shareholdings. It is frequently the case in rights issues that not all shareholders participate and accordingly, their proportionate shareholdings will change following the closure of the offer. Shareholders invest in the knowledge that they may be diluted if they do not participate in capital raisings. We also note that, as observed by the IBC in its submissions before the initial Panel, ERA has been transparent about its need for further funds.[41]

60. The 2024 Offer is priced at a significant discount to market, which may attract shareholders to exercise their rights.[42] It will also increase dilution of those who do not participate, especially in a large issue such as this, and transfer value (assuming

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[38] The Applicants noted that those moneys are also expected to "*increased [sic] from significant portion of the 2024 Offer*"

[39] See [190]-[195]

[40] *Energy Resources of Australia Limited* [2019] ATP 25 at [191]

[41] In support of this submission the IBC cited: slide 6 of the "Capital Raising Presentation" announced on 4 April 2023, the "Quarterly Activities Report(s)" announced on 28 July 2023, 26 October 2023, 24 January 2024, and 12 April 2024, the "Appendix 4D and Half Year Report" and "June 2023 Half Year Results" announced on 31 August 2023, the "Rehabilitation Accounting Standards Update" on 12 December 2023, the "Preliminary Final Report" announced on 27 February 2024, the "Business Update Presentation" announced on 26 August 2024 and the "Capital Raising Presentation" announced on 29 August 2024

[42] See *InvestorInfo Ltd* [2004] ATP 6 at [38(c)], *Guidance Note 17: Rights issues* at [17]

the shares have value) to new shares.[43] The 2024 Offer is also renounceable[44] and potentially gives non-participating shareholders the opportunity to receive value for their rights instead (assuming there is a market for the rights).

61. The Applicants have the ability to participate pro rata in the 2024 Offer and prevent Rio from reaching the threshold to proceed to Part 6A.2 compulsory acquisition (even if no other shareholders participate). Unless the Applicants do so, or others acquire and exercise their rights, that outcome is almost inevitable.

62. We also note that, as was raised in the submissions in these proceedings and in previous Panel decisions[45], there are statutory safeguards in place for compulsory acquisition under Part 6A.2; the compulsory acquisition price must be at fair value, will be the subject of an independent expert's report and, if holders of 10% or more of the outstanding shares object, the acquirer of the shares must satisfy the court that the terms represent fair value.[46] Should Rio proceed to compulsory acquisition following the 2024 Offer, the Applicants would have the ability to access those safeguards.

63. We are mindful that our role with respect to Part 6A.2 may be limited. Section 602(d) is specifically confined to procedure followed as a preliminary to compulsory acquisition *under Part 6A.1*, not Part 6A.2. We have power to declare circumstances unacceptable because of contraventions and likely contraventions of Chapter 6A generally,[47] but it is the purposes and other provisions *of* Chapter 6 that we must have regard to in exercising those powers.[48]

64. Accordingly, we were not persuaded that the 2024 Offer is contrary to section 602(c) or that the matters above otherwise give rise to unacceptable circumstances.

Submission by minority shareholder of ERA

65. Prior to us issuing our brief, a shareholder of ERA holding approximately 900,000 shares requested that we receive a document as a submission in the proceedings as a non-party. The document contained submissions in relation to the 2024 Offer including (in summary) that:

    (a) the circumstances are contrary to an efficient, competitive and informed market

    (b) the 2024 Offer seems designed to consolidate Rio's control rather than providing equitable opportunities to minority shareholders

    (c) ERA has not provided enough information for minority shareholders to fully assess the impact of the capital raise, particularly regarding future rehabilitation liabilities and other strategic options

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[43] See *Guidance Note 17: Rights issues* at [17]
[44] See *InvestorInfo Ltd* [2004] ATP 6 at [38(d)]
[45] See e.g. *Strategic Minerals Corporation NL 06* [2020] ATP 8 at [43]
[46] See sections 664A, 664E and 664F
[47] See section 657A(2)
[48] See section 657A(3)(a)(i) and (ii)

(d) minority shareholders are not given a reasonable or equal opportunity to participate in the potential benefits accruing to Rio through this capital raise and

(e) Rio should be restrained from forcing a compulsory acquisition at an undervalued price.

66. The document was included with the brief and the parties were asked whether the review Panel should receive the document as a submission and were also given an opportunity to make submissions on its contents. No party objected to us receiving the document as a submission. Both the IBC and Rio submitted that the document does not raise any new circumstances or issues in relation to the 2024 Offer.

67. We decided to receive this document as a submission in the proceeding. We agreed with the IBC and Rio that it did not raise new circumstances or issues. It did not alter our view.

Breach of Procedural Rules

68. On 6 October 2024 and 7 October 2024 respectively, articles appeared in the Australian Financial Review[49] and the West Australian[50] which referred to us having decided to conduct proceedings in the relation to the review application. This had been communicated to the parties confidentially by the Panel Executive on 4 October 2024.

69. Rule 18(1) of the Panel's Procedural Rules restricts parties from disclosing any confidential information provided to it in proceedings and rule 18(2) of the Procedural Rules provides that any communication from the Panel is confidential information unless or until the Panel publishes such information.

70. Packer & Co Ltd admitted it was responsible for this clear breach of rule 18. It was submitted that Packer & Co Ltd mistakenly thought the email contained information the Panel had made public. We had little sympathy for this submission. At the time of this breach no substantive media release had been made in relation to the review application save for the standard media release of 26 September 2024 notifying that the review application had been received. We consider that Packer & Co Ltd should have taken greater care. Having regard to the nature of the leak and noting that ERA made an ASX announcement notifying the market that the review Panel had decided to conduct proceedings before trading commenced on 7 October 2024, we decided not to take further action in relation to the breach on this occasion.

DECISION

71. For the reasons above, we declined to make a declaration of unacceptable circumstances. We consider that it is not against the public interest to decline to make a declaration and we had regard to the matters in s657A(3).

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[49] Titled 'Takeovers Panel mulls rare backflip on Rio Tinto's uranium gambit'
[50] Titled 'Takeovers Panel to take another look at Rio Tinto, Packer & Co bout over $889 million uranium raising

Orders

72. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Robin Bishop
President of the sitting Panel
Decision dated 14 October 2024
Reasons given to parties 11 November 2024
Reasons published 15 November 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