



Australian Government

Takeovers Panel

# MEDIA RELEASE

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No: TP20/05

Monday, 20 January 2020

## Energy Resources of Australia Limited 02R – Review Panel Decision

The review Panel has affirmed the decision of the initial Panel to make a declaration of unacceptable circumstances in *Energy Resources of Australia Limited* (Annexure A) and varied the initial Panel's orders (Annexure B).

The review Panel was satisfied that orders prohibiting Rio Tinto<sup>1</sup> from compulsorily acquiring shares in Energy Resources of Australia Limited (**ERA**) as a consequence of ERA's entitlement offer would be unfairly prejudicial to Rio Tinto and therefore removed those orders.

The review Panel considered it was appropriate to require Rio Tinto to form intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares (as a result of the entitlement offer and underwriting agreement) and for ERA to provide further disclosure of Rio Tinto's intentions to its shareholders. The review Panel also considered it was appropriate to further extend the entitlement offer timetable by 15 business days for ERA shareholders to consider the additional disclosure.

The sitting Panel was Jeremy Leibler, Bruce McLennan and Karen Phin (sitting President).

The Panel will publish its reasons for the decision in due course on its website [www.takeovers.gov.au](http://www.takeovers.gov.au).

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<sup>1</sup> Rio Tinto Limited and Rio Tinto PLC



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## **ANNEXURE A**

### **CORPORATIONS ACT SECTION 657A**

#### **DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

##### **ENERGY RESOURCES OF AUSTRALIA LIMITED**

##### **CIRCUMSTANCES**

1. Energy Resources of Australia (**ERA**) is an ASX listed company. Rio Tinto Limited and Rio Tinto Plc (**Rio Tinto**), through two wholly-owned subsidiaries, have voting power in ERA of approximately 68.4%.
2. On 15 November 2019, ERA announced a pro-rata, renounceable entitlement offer of 6.13 ERA shares for every 1 ERA share held to raise up to approximately \$476 million to fund ERA's Ranger Project Area rehabilitation obligations.
3. The entitlement offer is fully underwritten by North Limited, a subsidiary of Rio Tinto (**Underwriter**) pursuant to an underwriting agreement dated 15 November 2019. Rio Tinto also committed to subscribe for its entitlement in full.
4. If no other shareholders take up their entitlements, Rio Tinto would acquire voting power in ERA of approximately 95.6% in reliance on item 10 of section 611 of the *Corporations Act 2001* (Cth) (**Act**).
5. The underwriting agreement contains a number of undertakings from ERA in favour of the Underwriter, including regarding the use of funds raised by the entitlement offer for rehabilitation and that ERA will not deal with or create any new economic or legal interest in the "Jabiluka Growth Assets", without the prior written consent of the Underwriter (not to be unreasonably withheld or delayed).
6. The undertakings effectively continue until the substantial completion of the rehabilitation obligations (currently required to be completed by January 2026).
7. In January 2019, the ERA board resolved to form a committee comprising three directors independent of Rio Tinto to have and exercise all powers of the ERA board in relation to evaluating, negotiating and if thought fit approving any

proposed agreement with Rio Tinto in respect of any proposed funding support agreement with Rio Tinto (the **committee**).

8. An executive director that was not independent of Rio Tinto attended each meeting of the committee and was involved in those meetings as a member of management. The full ERA board was kept apprised of and discussed the committee's progress and matters within the committee's mandate and ultimately approved the entitlement offer on 14 November 2019. No minutes were produced for any of the committee's meetings.
9. The Panel considers that:
  - (a) the entitlement offer:
    - (i) is highly dilutive and requires shareholders to invest substantial additional capital to avoid dilution and therefore minority shareholders are unlikely to participate and
    - (ii) in conjunction with the underwriting agreement and in isolation, is a proposal under which a person would acquire a substantial interest in ERA
  - (b) Rio Tinto sought to consolidate control and acquire ERA
  - (c) insufficient measures were taken to ensure the independence of the committee and potential conflicts of interest were not sufficiently managed
  - (d) the terms of the underwriting agreement affect aspects of the management of ERA and dealings with a major asset of ERA over the medium to long term
  - (e) aspects of the disclosure in the entitlement offer information booklet should have more closely reflected the disclosure in a document required for a control transaction regulated by Chapter 6 of the Act (for example, intentions statements) given the potential for Rio Tinto to increase its voting power in ERA above 90% and
  - (f) the alternatives available to ERA were limited by what would be accepted by Rio Tinto in such a way as to limit the ability of ERA to address its need for funds otherwise than by the entitlement offer.

## **EFFECT**

10. It appears to the Panel that:
  - (a) the entitlement offer is likely to result in Rio Tinto becoming entitled to proceed to compulsory acquisition (where it may acquire 100% of ERA) without undertaking a takeover bid

- (b) as far as practicable, the holders of the ordinary shares in ERA, other than Rio Tinto, do not have a reasonable and equal opportunity to participate in benefits ultimately accruing to Rio Tinto through the entitlement offer and the underwriting agreement
- (c) the terms of the underwriting agreement grant Rio Tinto, through the Underwriter, effective control over aspects of the management of ERA and dealings with a major asset of ERA over the medium to long term, inhibiting the acquisition of control over ERA taking place in an efficient, competitive and informed market and
- (d) the holders of shares in ERA have not been given enough information to enable them to assess the merits of the entitlement offer, causing the holders of shares in ERA to make investment decisions on the basis of inadequate information and the market for control of ERA shares to not be efficient, competitive and informed.

## CONCLUSION

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

## DECLARATION

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

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



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**ANNEXURE B**

**CORPORATIONS ACT  
SECTIONS 657EA AND 657D  
VARIATION OF ORDERS**

**ENERGY RESOURCES OF AUSTRALIA LIMITED 02R**

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

**THE PANEL ORDERS**

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

1. Including the words “(including as varied)” after the words “these orders” in Order 3.
2. Including the word “review” before “Panel” in Orders 3 and 10.
3. Deleting Orders 8 and 9 and replacing them with “Order 8 deleted” and “Order 9 deleted” respectively.
4. Including a new Order 10A as follows:
  - 10A. ERA must immediately take all action necessary, in relation to the Entitlement Offer to:
    - (a) suspend trading in new shares on a deferred settlement basis for not less than 15 business days from and including 21 January 2020 and
    - (b) postpone by not less than 15 business days the following dates:
      - (i) the close of the Entitlement Offer and
      - (ii) all subsequent dates listed in the Entitlement Offer timetable in ERA’s ASX announcement dated 13 January 2020.
5. Including a new Order 10B as follows:

- 10B. ERA must make an announcement on the ASX as soon as possible after the date of the variation of these orders regarding the adjustments to the Entitlement Offer timetable and the effect of the variation of these orders.
6. Including a new Order 10C as follows:
- 10C. ERA must within 5 business days from the date of the variation of these orders dispatch an Additional Supplementary Statement to ERA shareholders in a form approved by the review Panel which discloses:
- (a) the effect of the variation of these orders and
  - (b) Rio Tinto's intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares as a result of the Entitlement Offer and Underwriting Agreement.
7. Including a new Order 10D as follows:
- 10D. ERA must provide the review Panel with a draft of the Additional Supplementary Statement within 2 business days from the date of the variation of these orders.
8. Including a new Order 10E as follows:
- 10E. Rio Tinto must:
- (a) as soon as practicable but in any event within 2 business days from the date of the variation of these orders, form intentions regarding compulsory acquisition in the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares as a result of the Entitlement Offer and Underwriting Agreement and
  - (b) along with North Limited, do all things necessary to assist ERA in the preparation of the Additional Supplementary Statement, including but not limited to providing information regarding Rio Tinto's intentions, as required under Order 10C(b).

9. Including the following new definitions in Order 11:

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

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