



**Australian Government**

**Takeovers Panel**

# MEDIA RELEASE

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No: TP19/78

Wednesday, 11 December 2019

## **Energy Resources of Australia Limited – Declaration of Unacceptable Circumstances and Orders**

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 18 November 2019 by Zentree Investments Limited in relation to the affairs of Energy Resources of Australia Limited (**ERA**) (see [TP19/69](#)).

### **Background**

The following facts are in summary form (see the declaration for more background).

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%.

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.

The entitlement offer is fully underwritten by North Limited, a subsidiary of Rio Tinto (**Underwriter**) pursuant to an underwriting agreement dated 15 November 2019. The underwriting agreement contains a number of undertakings from ERA in favour of the Underwriter, which effectively continue until the substantial completion of the Ranger Project Area rehabilitation obligations (currently required to be completed by January 2026).

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**).

The Panel considers (among other things) that:

- (a) 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

- (b) the entitlement offer is highly dilutive and requires shareholders to invest substantial additional capital to avoid dilution, and therefore minority shareholders are unlikely to participate
- (c) insufficient measures were taken to ensure the independence of a committee formed to evaluate, negotiate and if thought fit approve any funding support agreement with Rio Tinto and potential conflicts of interest have not been sufficiently managed
- (d) aspects of the disclosure in the entitlement offer information booklet should have been more comprehensive given the potential for Rio Tinto to increase its voting power in ERA above 90% and
- (e) the undertakings in the underwriting agreement affect aspects of the management of ERA and dealings with a major asset of ERA (Jabiluka) over the medium to long term, inhibiting the acquisition of control over ERA taking place in an efficient, competitive and informed market.

### **Declaration**

The Panel considered that the circumstances were unacceptable:

1. having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
  - (a) the control, or potential control, of ERA or
  - (b) the acquisition, or proposed acquisition, by a person of a substantial interest in ERA or
2. in the alternative, having regard to the purposes of Chapter 6 set out in s602 of the Act.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

### **Orders**

The Panel has made orders that:

- (a) (in effect) Rio Tinto cannot compulsorily acquire shares in ERA as a consequence of the entitlement offer without shareholder approval
- (b) the Underwriter cannot rely on any right it may have to terminate or not comply with its obligations under the Underwriting Agreement by reason of or as a consequence of the Panel's orders and a clause of the underwriting agreement affecting dealings with a major asset of ERA (Jabiluka) is void and of no effect and
- (c) the entitlement offer is postponed for not less than 20 business days to enable further disclosure to be made (and ERA must make further disclosure).

The sitting Panel was Amy Alston, Ron Malek (sitting President) and Neil Pathak.  
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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## **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**



**Australian Government**

**Takeovers Panel**

**ANNEXURE B  
CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**ENERGY RESOURCES OF AUSTRALIA LIMITED**

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

**THE PANEL ORDERS**

1. ERA must immediately take all action necessary, in relation to the Entitlement Offer to:
  - (a) suspend trading in new shares on a deferred settlement basis for not less than 20 business days from and including 12 December 2019 and
  - (b) postpone by not less than 20 business days the following dates:
    - (i) the close of the Entitlement Offer and
    - (ii) all subsequent dates listed in the Entitlement Offer timetable in ERA's ASX announcement dated 4 December 2019.
2. ERA must make an announcement on the ASX as soon as possible regarding the adjustments to the Entitlement Offer timetable.
3. Without the consent of the Panel, North Limited must not rely on any right it may have to terminate or not comply with its obligations under the Underwriting Agreement by reason of or as a consequence of these orders.
4. Clause 10.4 of the Underwriting Agreement is void and of no effect from the date of these orders.
5. ERA must within 8 business days from the date of these orders dispatch a Supplementary Statement to ERA shareholders in a form approved by the Panel which discloses:
  - (a) the effect of these orders
  - (b) details of the possible increase in Rio Tinto's voting power as a result of the Entitlement Offer under different scenarios of take up under the

Entitlement Offer (including but not limited to a scenario where no shareholders other than Rio Tinto entities take up their entitlements)

- (c) Rio Tinto's intentions regarding the continuation of the business of ERA, any major changes to be made to the business of ERA and the future employment of the present employees of ERA.
6. ERA must provide the Panel with a draft of the Supplementary Statement within 5 business days from the date of these orders.
  7. Rio Tinto and North Limited must do all things necessary to assist ERA in the preparation of the Supplementary Statement, including but not limited to the provision of information regarding Rio Tinto's intentions, as required under Order 5(c).
  8. In the event that Rio Tinto becomes a 90% holder in ERA's ordinary shares as a result of the Entitlement Offer and Underwriting Agreement, it must not lodge a compulsory acquisition notice with ASIC under section 664C(2)(a) of the Corporations Act within the period of 6 months after it becomes a 90% holder in ERA's ordinary shares.
  9. Order 8 does not apply if ERA shareholders prospectively or retrospectively approve Rio Tinto's acquisition of relevant interests as a result of the Entitlement Offer and Underwriting Agreement in a manner equivalent to the approval required under item 7 of s611 of the Corporations Act (with necessary changes to reflect timing).
  10. The parties to this proceeding and ASIC have the liberty to apply to the Panel for further orders in relation to these orders.

## Definitions

11. In these orders the following terms apply:

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



ERA	Energy Resources of Australia Limited
Rio Tinto	means Rio Tinto Limited and Rio Tinto plc
Supplementary Statement	as referred to in Order 5
Underwriting Agreement	The underwriting agreement between North Limited and ERA dated 15 November 2019

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