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Stephen Creese
Managing director
Rio Tinto - Australia

The Hon Chris Bowen MP
Minister for Financial Services, Superannuation and Corporate Law

Attention

Manager, Corporate Reporting and Accountability unit
Corporations and Financial Services Division
The Treasury
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Copy to:

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Email: economics.sen@aph.gov.au

6 August 2009

Dear Minister Bowen

Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009- Regulations

Rio Tinto makes this submission on the revised *Corporations Amendment Regulations 2009* ("Regulations") accompanying the *Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009* ("Bill").

Rio Tinto's key issue is that the definitions of what is or is not a "benefit" and the "circumstances" in which a benefit is given:

- do not take account of employment conditions outside of Australia;
- treat successful long-serving employees the same way as those who fail in the short term; and
- would require shareholder approval of legal entitlements such as accrued leave, accumulated superannuation balances and long service leave entitlements.

Rio Tinto believes strongly that shareholder approval should not be required to give a person their legal entitlements (arising in any country of employment) if they retire, resign, are dismissed or made redundant or die in office. Rio Tinto also objects strongly to the requirement to seek shareholder approval for a bona fide redundancy payment in line with company policy to a long serving executive made redundant in circumstances such as a cyclical downturn or a takeover.

Our specific issues with the Regulations are set out below. We have also appended examples of how the Regulations would apply to the key management personnel of Rio Tinto Limited's approximately 300 subsidiaries. As you will see, failure to obtain shareholder approval could result in the dependents of a long-serving employee who dies in office receiving less than 10% of their rightful entitlements. Depending on the timing of the death, the family may have to wait up to a year until the next annual general meeting to be awarded the entitlements (if they are ultimately approved).

1. “Benefit” includes “any kind of pension” except a “payment from a defined benefits superannuation scheme”

As an international company, Rio Tinto employs people in accordance with the employment practices and laws of various countries. The senior executives may be Australians with Australian statutory superannuation, but may equally be employed in the United Kingdom, Canada or the United States and have pension entitlements in those countries. It would make sense for the Regulations to treat such an accrued pension entitlement in the same way as superannuation in an accumulated or defined benefit fund which is governed by Australian law. In particular we see no purpose in asking shareholders to approve a pension payment to a departing executive which is a condition of their long-standing pension plan (such as an occupational pension plan approved by the UK HM Revenue & Customs) or a law of their country of employment.

2. “Benefit” includes “any superannuation contribution in excess of any charge imposed under the *Superannuation Guarantee Charge Act 1992*” by the company, its associates or through a superannuation fund “other than salary sacrifice contributions in excess of the contribution”. It also does not include “an amount paid from base salary as a salary sacrifice superannuation contribution in relation to an employee”.

Clarification is needed as to whether the superannuation included in the calculation of the “benefit” is the entire superannuation balance contributed over the period of employment or limited to the superannuation contributions made at the point of termination.

Accumulated benefits in a superannuation fund, whether or not they have been made as a result of salary sacrifice, are the property of an individual. This balance may also include amounts “rolled over” from previous employment. The accumulated benefit is held in trust by the superannuation fund trustee pending payment to the owner or transfer in accordance with its governing rules. If shareholders were to vote against a superannuation fund releasing accumulated benefits to a departing employee, we question who would be the intended recipient of the otherwise unpaid monies.

The only practical and legal position is that all superannuation and pension entitlements which have accrued over the period of employment and prior to the termination should be excluded from the calculation of the “benefit”. This would be subject to anti-avoidance provisions to protect against abuse or against hiding a large termination payment in superannuation.

In relation to company contributions, many companies pay superannuation in excess of the statutory superannuation charge of nine per cent, including to the entire workforce. It has been the practice of Rio Tinto globally and long before the *Superannuation Guarantee Charge Act* to pay superannuation contributions of up to 20% of role salary. Contributions may have been made over many years in the case of long-serving employees. Other than any such contribution made at termination, these contributions should not be included in the definition of “benefit”. Again, they are the property of the individual. We are concerned that the payment of accumulated superannuation would be subject to shareholder approval under the proposed Regulations.

3. “Benefit” would include valid legal entitlements such as accrued leave

We are also concerned that legal entitlements such as payments for accrued annual leave and accrued long service leave required under state legislation are not excluded from the definition of “benefit”. These categories of payments made to all departing employees are statutory or other legal entitlements which accrue to the person by virtue of long service or are their own personal accumulated entitlements. These are unrelated to performance and will already be provided for by the company or set aside for the person, and there is no other legal recipient for those entitlements if shareholders were to disallow the payments. For these reasons section

200H and the definition of “benefit” should be extended to clarify that these payments are excluded.

4. “Benefit” would include a bona fide redundancy payment

The Regulations would require that shareholders be asked to approve payments made in the case of bona fide redundancy.

Positions may become redundant for a variety of reasons and occur at all levels. At Rio Tinto redundancy payments are made subject to a company wide redundancy policy (as it applies in each country). In recent times we have seen senior executive positions made redundant due to company restructuring and the economic downturn or due to the industry contracting through mergers and acquisitions. These were genuine redundancies and did not relate to performance. In circumstances of genuine redundancy it is appropriate and common practice to make a redundancy payment in addition to the notice period.

Where a company policy applies broadly to employees, it would be inappropriate to discriminate against long-serving executives who are made redundant. For example, a senior executive may have a 12 month notice period and receive an additional payment based on a company policy reflecting 25 years service to the company (say of 50 weeks). Under the terms of the Bill, a long-serving executive cannot be paid any more than one who has worked for the company for a very short period.

We believe that, subject to a company’s redundancy policy being of wide-ranging application across the company, in the case of genuine redundancy, senior executives should be entitled to their benefits under the terms of that policy without this being included in the calculation of the termination “benefit”. Taxation Ruling TR 2009/2 provides guidance as to when a payment made to a person whose employment is terminated qualifies for treatment as a genuine redundancy payment under section 83-175 of the *Income Tax Assessment Act 1997* (Cth). A genuine redundancy payment is one ‘received by an employee who is dismissed from employment because the employee’s position is genuinely redundant’.

Excluding payments for a genuine redundancy from the calculation of “benefit” would be consistent with the government’s stated objective of curbing excessive “golden handshakes”. Termination payments to chief executives or chief financial officers are of greatest interest, yet these positions are most unlikely to be subject to a genuine redundancy (other than as the result of a takeover).

Redundancy payments are structured to compensate long serving employees. Under a policy which applies to the workforce generally, a short term ‘poor performer’ would not receive a significant amount. Furthermore, a payment made at the end of a fixed period of employment cannot normally be a genuine redundancy payment. Termination “benefits” would still include payments in lieu of notice and all other ex gratia payments.

Concluding comments

The crux of the Bill is in the definition of termination “benefit” and “base salary”. Neither are defined other than by reference to the new Regulations. This submission is made in response to an offer by you to a limited group to provide comments on the new Regulations within an exposure period of only nine working days. The new Regulations are not, to our knowledge, available publicly and a number of industry groups and experts have had to access them indirectly. We suggest that this rushed approach is less than ideal in developing laws and regulations of the Commonwealth. These new Regulations ought to require a Regulation Impact Statement to enable proper review and consultation. We do not accept that the “Government’s prior announcement to progress reforms in this area” or the suggested “post implementation review” justifies by-passing this important democratic process.

The Senate Economic Legislation Committee ought to have the opportunity to review the Bill with the Regulations to fully examine the proposed regime. For that reason I am forwarding this submission to the Committee.

Yours sincerely



Stephen Creese
Managing director
Rio Tinto Australia

EXAMPLES OF THE APPLICATION OF THE PROPOSED REGULATIONS

1. Subsidiary director retrenched after 25 years service

Company Payments

Contractual Notice Payment (3 months)	\$87,500	
Redundancy Payment	\$364,600	1/2 month's remuneration per year of service to a maximum of 30 years
Pro Rata Bonus Payment (ie 6 months)	\$37,500	

Leave Entitlements

Annual Leave (75 days accrued)	\$101,000
Long Service Leave (121 days accrued statutory entitlement)	\$230,200

Superannuation & Insurance

Defined Superannuation Benefit	\$1,060,000
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Share-Based Payments / Awards

Share Option Plan 2007	\$0	Deferred until performance period complete
Management Share Plan 2007	\$78,420	Subject to accelerated vesting on retrenchment
Mining Companies Comparative Plan 2007	\$0	Payment deferred until performance period complete

Total entitlements on Retrenchment \$1,959,220

Amounts not subject to shareholder approval

One year's base salary	\$275,000
Defined superannuation benefit	\$1,060,000

Amount forfeited without shareholder approval \$624,220

ASSUMPTIONS			
		<u>Total Annualised Remuneration</u>	
Age at Termination	50	Role Salary	\$250,000
Years of Service	25	Motor Vehicle	\$25,000
Termination date	30-Jun-09	"Base salary"	\$275,000
		Annual Bonus (Target)	\$75,000
		Superannuation (at 20%)	\$57,500

2. Subsidiary director dies after 25 years service

Company Payments

Contractual Notice Payment (3 months)	\$87,500
Pro Rata Bonus Payment (ie 6 months)	\$37,500

Leave Entitlements

Annual Leave (75 days accrued)	\$101,000
Long Service Leave (121 days accrued statutory entitlement)	\$230,200

Superannuation & Insurance

Accumulated Superannuation Benefit (defined contributions scheme)	\$1,270,000
Life insurance from superannuation	\$1,600,000
Rio Tinto Death & Disability insurance payment	\$250,000

Share-Based Payments / Awards

Share Option Plan 2007	\$31,755
Management Share Plan 2007	\$78,420
Mining Companies Comparative Plan 2007	\$94,020

Total entitlements on Death \$3,780,395

Amounts not subject to shareholder approval:

One year's base salary \$275,000

Amount forfeited without shareholder approval **\$3,505,395**

ASSUMPTIONS			
		<u>Total Annualised Remuneration</u>	
Age at Termination	50	Role Salary	\$250,000
Years of Service	25	Motor Vehicle	\$25,000
Termination date	30-Jun-09	"Base salary"	\$275,000
		Annual Bonus (Target)	\$75,000
		Superannuation (at 20%)	\$57,500