Submission Number: 35
Date Received: 22/04/2013

RIO TINTO COMMENT ON THE PROPOSED AMENDMENTS IN THE FAIR WORK AMENDMENT BILL 2013

Senate Committee on Employment, Education and Workplace Relations

House of representatives Standing Committee on Education and Employment

April 2013

Rio Tinto welcomes the opportunity to comment on the *Fair Work Amendment Bill 2013*.

1. About Rio Tinto

Rio Tinto is a leading international mining group, combining Rio Tinto plc, a London listed public company headquartered in the UK, and Rio Tinto Limited, which is listed on the Australian Stock Exchange, with an executive office in Melbourne and corporate offices in Perth and Brisbane. The two companies are joined in a dual listed companies (DLC) structure as a single economic entity, called the Rio Tinto Group.

Rio Tinto's interests are diverse both in geography and product. Most of our assets are in Australia and North America, but we also operate in Europe, South America, Asia and Africa. Our businesses include open pit and underground mines, mills, refineries and smelters as well as a number of research and service facilities.

2. Rio Tinto's operations in Australia

Rio Tinto operations in Australia include iron ore, salt and diamonds in Western Australia, coal mines in Queensland and New South Wales, bauxite mines and alumina refineries in the Northern Territory and Queensland, aluminium smelters in Queensland, NSW and Tasmania, and a copper-gold mine in New South Wales. Rio Tinto is also the major shareholder in Energy Resources of Australia (ERA) which produces uranium at the Ranger Mine in the Northern Territory.

The Group directly employs approximately 25,000 employees across these operations and its support Units. The employees are engaged under a variety of employment arrangements including collective agreements, awards and individual and common law contracts.

Introduction

The statutory industrial relations system is a critical piece of legislation for the economic wellbeing of Australia and the nation's capacity to fully benefit from the significant opportunity presented through the long term development of Asia. Its challenge is to provide a framework that contributes to strong business performance through enhanced productivity and the agility to adapt to changing business circumstances whilst ensuring a fair and reasonable safety net for employees.

The Group strongly believes that the statutory system should facilitate these outcomes by encouraging employers and employees to work together as part of normal daily business. The Fair Work Act and the Fair Work Commission must ensure that business and productivity improvement is not something to be delayed for future negotiations.

Rio Tinto is committed to establishing a direct relationship with every employee as a foundation from which to build employee engagement irrespective of the employment arrangement under which the employee has been employed. We seek to work with employees to deliver business performance and improvement whilst ensuring employee remuneration and benefits are competitive having regard to mining industry norms and are substantially in excess of the statutory minimums.

Rio Tinto does not believe that a compelling case has been made out that supports the need for the proposed amendments. Indeed, we are concerned that the Bill does not focus on necessary amendments of the current system that will:

- Enable employers and employees to work together to identify and implement business improvements;
- Provide flexibility in the system and its processes that support and enhance productivity improvement;
- Enable business to be agile and to have the ability to adapt to rapidly changing business operating circumstances; and
- Provide employees with fair and reasonable remuneration and benefits.

Suggested amendments and particular comments in relation to aspects of the Bill are made throughout the Submission. These focus on both the proposed amendments from a point of principle and drafting, given concern over the looseness of drafting a number of the amendments.

Our comments focus on Right of entry, bullying and consultation on roster changes.

Right of entry

Rio Tinto respects the right to freedom of association. This includes freedom of association for those that wish to belong to a trade union and those that do not. Accordingly the

legislation must provide for and protect both those that wish to join a trade union and those that do not. Rio Tinto does not consider that the proposed amendments strike an appropriate balance to deal with both scenarios.

Rio Tinto is strongly opposed to the proposed changes to Right of Entry provisions included in Schedule 4 of the Bill. Of particular concern is the proposed amendment to section 492 (dealing with location of discussions) and the introduction of Division 7 (dealing with accommodation and transport arrangements in remote areas).

Section 492 – Location of discussions

The proposed amendment is a significant amendment to the existing legislation which:

(a) Was not recommended by the Review Panel;
(b) Does nothing to improve productivity; and
(c) Is of benefit only to trade unions looking to increase membership but is of no benefit to employers and in many cases will be to the detriment of employee's enjoyment of breaks who do not wish to join or have any involvement with trade unions.

The Review Panel considered the location of meetings in some detail. After referring to a number of submissions and case studies it concluded that sections 492 and 505 the Act "*be amended to provide FWA with greater power to resolve disputes about the location for interviews"*. The proposed amendment in making the meal or break location as the default location has, contrary to the Review Panel recommendation, stripped FWC of any power to deal with disputes about the location of discussions.

Under the proposed amendment, if an employer identified problems with the break location, or alternately a group of employees objected to the meeting taking place in the location where they enjoy their break, there is no mechanism for that grievance to be aired and no power whatsoever for FWC to intervene and deal with the dispute and nominate another suitable location for the discussions to occur.

The provisions effectively provide a union an unfettered right to utilise break areas. This will be the case where there has been an established practice on work sites of discussions being held in appropriate nominated rooms and that employees attend without any controversy. There is now no role for FWC to take into account the history of visits or the circumstances of the site in playing any role about the appropriate location for visits.

We note that there are cases where FWC has granted access to crib rooms in appropriate circumstances so the power clearly already exists and has been used by FWC. The low percentage of employees that choose to join trade unions across industry does not warrant employee breaks being intruded upon by having to become involved against their wishes in a meeting with a trade union official or present while one takes place.

The proposed amendments assume that all employees entitled to participate in discussions will be conveniently located in one break area. That is not how many modern workplaces operate including at many Rio Tinto operations where a range of employees and leaders commonly share break areas.

We foreshadow a number of problems with the proposed amendment to section 492 including:

- Presently we give employees advanced notice of a union's intention to visit and inform them of the location. Employees have a choice whether or not to visit and freely exercise that choice. Their right to exercise that choice is being removed.
- Some of the locations where breaks are taken are physically small such that it would be impossible for unwilling participants to enjoy their break in peace and not be impacted by discussions taking place. Other issues that can impact the selection of an appropriate place for meetings to be held include safety, and the interference with work
- The locations where breaks are taken are commonly used by employees who are not entitled to participate in the discussions and not eligible to join the union exercising entry. This means employees not entitled to participate in discussions will and has the potential to create demarcation disputes that don't exist under the current provisions.
- The locations for breaks are also used by management staff to take their breaks. This has the potential to lead to conflict and undesirable suggestions of intimidation by management staff being present during these discussions.

As noted, disputes about any of these matters cannot be resolved by FWC as the provision is presently drafted. We urge that section 492 be retained in its current form. Alternately, if there are to be amendments we recommend:

(a) That the employer / occupier may nominate a room in which meetings are held that is reasonably available to employees to access during their meal break; and
(b) The proposed amendments be changed so that use of the area where employees take their break is only appropriate if it is only used by employees eligible to participate in the discussions. If employees not entitled to participate in the discussions also use the break area then another area must be nominated.

Division 7 - Accommodation and transport arrangements in remote areas

Rio Tinto notes that this amendment was not part of and consideration by the Review Panel and was also not part of any recommendations made by the Review Panel. There has been no public debate or discussion in relation to inclusion of such provisions and no case to

support their inclusion at this time. Rio Tinto does not support their inclusion and urges that the proposed new Division 7 be removed.

Rio Tinto is again concerned that these provisions do not strike an appropriate balance between those that might wish to join a trade union and those that do not. They will effectively mean that holding discussions with employees only during breaks is redundant and will expose unwilling employees to unwanted discussions at their accommodation during their time away from work.

Apart from there being no case for inclusion, the drafting of Division 7 is so loose and open to broad interpretation that it is clearly foreseeable that in practice the requirements will be extended well beyond what was ever intended and what is reasonable or necessary. To avoid this outcome the provisions must be removed or at least amended to make clear the limitations on them and they should only be available in extreme scenarios.

By way of example section 521C states that accommodation arrangements apply if:

- *"... premises that are located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided.*"
- Rio Tinto notes that this amendment was not part of and consideration by the Review Panel and was also not part of any recommendations made by the Review Panel. There has been no public debate or discussion in relation to inclusion of such provisions and no case to support their inclusion at this time. Rio Tinto does not support their inclusion and urges that the proposed new Division 7 be removed.

What is regarded as "reasonably available" is too broad and too open to interpretation and it must be refined. We suggest that 521C be amended to read:

> *"This section only applies if rights under this Part are to be exercised by a permit holder on premises:*
> *(a) Where entry to the premises is not accessible by public road and accommodation is not available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided; or*
> *(b) Where entry to the premises is accessible by public road and commercial accommodation is not available within 4 hour's drive of the location of the premises."*

A provision also needs to be included that precludes the permit holder from exercising rights to hold discussions with employees in the accommodation areas. Those provisions must also include sanctions for a permit holder breaching these requirements which at least results in the occupier not being obligated to enter any further accommodation arrangement with the permit holder.

In relation to transport arrangements provided for by proposed section 521D, Rio Tinto is concerned that the provision is broad and open to interpretation and is not restricted as appears to be intended by the Explanatory Memorandum. This again risks the provision extending well beyond what was ever intended.

For example, 521D(1) effectively invokes the provisions when "*the premises are located in a place that are not reasonably accessible to the permit holder ...".*

The Explanatory Memorandum says the provisions would not generally apply if "*access can reasonably be achieved via travel on public roads ....*" To avoid uncertainty and the provisions extending beyond what was intended this should be reflected in the legislation. Therefore section 521D(1) would be amended to read:

> *"This section only applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place that is not accessible by public road and the only means of access is if the occupier of the premises on which the rights are to be exercised provides transport or causes it to be provided."*

In relation to the occupier charging costs for providing accommodation or travel arrangements, Rio Tinto has concern that these are identified as civil penalty provisions when in many instances it might be difficult for an occupier to identify the actual cost of providing such arrangements.

Anti-bullying measure

Rio Tinto is committed to workplace health and safety and recognises the serious effects of bullying on individuals. We are supportive of steps taken to prevent bullying in the workplace and recognise the significant research undertaken to develop the report *Workplace Bullying: We just work it to stop* (the Report).

In recognition of the detrimental impacts of workplace bullying we have adopted a firm stance against bullying within our global code of conduct, known as *The Way We Work. The Way We Work* confirms that:

> ***We respect the rights and dignity of employees throughout our own operations and those of our business partners.***
>
> *Respect is central to a harmonious workplace, where the rights of employees are upheld and where their dignity is affirmed, free of intimidation, discrimination or coercion of any kind.*
>
> *Therefore we:*
>
> - *…*

- *Forbid using inappropriate language in the workplace, including profanity, swearing, vulgarity or verbal abuse;*
- *Do not allow coercion or intimidation in the workplace;*

> *… workplace harassment is not tolerated at Rio Tinto. Workplace harassment includes threats, intimidation, bullying, and subjecting individuals to ridicule or exclusion.*

We publish *The Way We Work* in 19 different languages reflective of the countries and regions in which we operate. Like the report, we also recognise that complaint systems and strong leadership play a key role in preventing workplace bullying. To that end the organisation places a strong emphasis on leadership which is supported through development programs; setting clear behavioural expectations; and incorporating leadership and associated behaviours into our annual performance management cycle which have a direct impact on performance bonuses.

Additionally, we have established two formal complaint channels to complement our leadership focus. These programs are known as Fair Treatment and SpeakOut. Fair Treatment is an internal complaints process and SpeakOut is a whistleblowing programme to report misconduct (including bullying) operated by an independent organisation available to staff, their families and contractors and is available 24hrs a day 365 days a year.

The Proposed Amendments

Definition of Bullying

We agree that a national definition of workplace bulling is appropriate and would recommend an addition to the current proposed definition. Our experience has been that individuals experience workplace conduct in different ways, one person may consider some forms of conduct as workplace banter and joking while for another it can be unwelcome and uncomfortable. For this reason we propose that the definition include the concept of 'unwelcome'. Similar to definitions of sexual harassment the idea is to introduce a component to the definition that encourages the recipient to make it clear to the perpetrator that the behaviour is unacceptable and unwelcome. The definition would then read:

'workplace bullying is repeated, unreasonable behaviour <u>which is unwelcome</u> directed towards a worker or group of workers, that creates a risk to health of safety'.

Scope of Amendments

In establishing our own internal systems and procedures we have demonstrated our commitment to proactive measures to address workplace bullying before it is an issue. In reading the report it becomes clear that a range of proactive recommendations have also been suggested such as: establishing a national advisory service with offers self-assessment tools and guidance materials; a voluntary national accreditation system and annual employer awards; and a national accredited training program for managers, health and safety representative and inspectors to equip them with skills to identify and address workplace bullying. Rio Tinto strongly supports these measures and believes that they are a necessary foundation on which to build a framework which enhances legal remedies available to victims of bullying.

These proactive measures need to be progressed as a priority. Change to the legal framework should follow as a secondary measure. We would be particularly concerned if the legal remedy provisions are pursued in isolation of or in place of committed Government action to implement the proactive, preventative recommendations contained within the Report.

Rio Tinto believes that all actions need to focus on resolving allegations of bullying as close as possible to the workplace. This would be assisted by the statutory system requiring a person to exhaust internal systems prior to any application to access external assistance. Where no mechanisms exist then an individual could immediately access the Commission. These amendments would serve two purposes: 1) it would encourage companies to develop internal complaint systems and other support tools; and 2) it would encourage resolution at the workplace level in the first instance.

The Role of the Fair Work Commission

Rio Tinto recognises that not all employers have internal systems or that complainants believe those internal systems have not fully resolved the complaint. In these circumstances, Rio Tinto recognises that there may be a need for a person who believes they are being bullied in or associated with their workplace to have access to a tribunal with suitable powers to understand what is happening and to make appropriate orders to bring any bullying that is occurring to an end. Any such statutory provision needs to be tightly defined and limited to these two elements.

The role, dealing with and resolving allegations of bullying is very different to the general functions of the FWC and will require the exercise of particular skills and expertise.

Rio Tinto's support for FWC to take on this role is based on a statutory requirement for the Commission to establish a specialist panel of Commission members to whom matters arising

under the proposed Part 6-4B would be allocated. This would enable these FWC members to receive more comprehensive training and awareness in this area both ahead of implementation and though its ongoing operation.

Rio Tinto's experience is that some employees are reluctant to raise bullying issues because of the need to be publicly identified. Internal company systems are well placed to ensure a complainant's privacy and the privacy of the person who is the subject of the complaint. Any process to resolve these issues through use of the FWC must recognise and provide for this important issue. Public identification of parties, record of proceedings and decisions need to recognise this issue and provide for it in a way in which the identity of individuals is protected. We also recognise the need for public awareness and opportunity that the amendments provide to remove some of the stigma from those that have been the subject of workplace bullying.

While we recognise the importance of natural justice, we believe this purpose can be achieved while allowing an opportunity for both the applicant and the respondent to have their identities protected from the public record. To that end, we are recommending that FWC be empowered to obscure names when publishing decisions on application by a party to the proceeding.
Respondents should have an ability to apply to have their identities obscured. We recognise that the concept of bullying is not also understood and anticipate that claims may be made against managers or others who are seeking to address workplace issues or perform their roles of challenging poor performance at work. We therefore support the exclusion within the provision in relation to reasonable management action. Managers should be able to be supported and empowered to perform their roles without the need to be publically named in tribunal decisions. Those accused of bullying deserve the same protections as the complainant.

Consultation about changes to rosters or working hours

Changes to rosters are a normal and important part of everyday business to cater for the changing needs of the business. Good managerial practice is that an employer will talk to the employees directly affected by the change and to seek wherever possible to address issues of concern to those affected employees. This is not new and awards and agreements have long provided for changes in rosters or changes to the starting and finishing times of shifts being managed appropriately..

The extent of any change and of the number of employees directly affected by the change will vary on a case by case basis. The approach by an employer with their employees needs to appropriately recognise the key aspects of that change. Factors that need to be considered include the extent (does it impact a small group of employees or the entire

workforce?), whether employees have already been made aware of the change, whether or not the employee's contract of employment or employment instrument provides for the nature of the proposed change or the way in which such changes should be implemented. A part of that consideration where the change is significant, is the impact on employees and the extent to which impacts can be mitigated.

We are concerned that the proposed amendments in the Bill seek to apply a one size fits all approach to this issue

We recognise that circumstances may exist where a change to a roster or ordinary working works either by the nature of the change or the extent of its impact on affected employees may constitute a major workplace change. This will be a matter for determination on a case by case basis. Where it does constitute a major workplace change, we believe the existing consultation obligations provide a suitable form of statutory protection. Where the change does not constitute significant workplace change, it should be left to an employer and its employees to address at site.

At times, change is difficult for the business and for employees. Rio Tinto believes that the proposed provisions that seeks to recognise all roster changes as a major workplace change will act to further complicate and delay the effective implementation of change and risks the focus on affected employees being overtaken by the views of those not subject to change.