

**RIO TINTO SUBMISSION TO THE PRODUCTIVITY
COMMISSION INQUIRY
INTO THE WORKPLACE RELATIONS FRAMEWORK**

March 2015

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.

Wherever Rio Tinto operates, health and safety is the first priority. All our Group businesses put sustainable development at the heart of their operations, working as closely as possible with host countries and communities, respecting their laws and customs. For Rio Tinto it is important that the environmental effects of its activities are kept to a minimum and that local communities' benefit as much as possible from operations.

The Group employs over 60,000 people globally in more than 40 countries across six continents.

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 and aluminium smelters in Queensland, NSW and Tasmania. Rio Tinto is also the major shareholder in Energy Resources of Australia (ERA) which produces uranium at the Ranger Mine in the Northern Territory.

All Product Groups have Operations in Australia. Details of the Group's activities in Australia are set out in Attachment 1.

The Group directly employs approximately 23,000 employees in Australia across these operations and its support Units.

Contact / Appearance before the Commission

Questions regarding this Submission should be directed to:

Paul Davies

General Manager Employee Relations & Business Support

Executive Summary

Rio Tinto welcomes the Government's initiative to ask the Productivity Commission to undertake this Inquiry. The effectiveness of the workplace relations framework is critical to the economic wellbeing of Australia through its contribution to strong business performance whilst ensuring a fair and reasonable safety net for employees.

This Submission is issue focused. It makes a number of Recommendations in relation to the future of the system. These Recommendations are divided into two categories, System Design Recommendations and System Application Recommendations.

System Design Recommendations focus on high level issues of a principle nature that have an impact across the structure. The issues addressed in this category are:

SD1 The Foundation of an Amended System;

There have been numerous and at times conflicting amendments to the current system. It is a system that finds itself straddling the competing elements of a conciliation and arbitration system and an enterprise bargaining system. There is a need to continue the move toward resolution of issues at an enterprise level whilst finalising a single, universal safety net.

SD2 The need for Statutory Individual Agreements;

Rio Tinto recognises and respects the decision of an employee to join or not join a trade union. We will seek to negotiate enterprise agreements with our employees and their union representatives should a majority of the relevant employee group wish us to do so.

In respecting that decision, we also recognise that the Group has in excess of 84% of its Australian workforce that have elected to work under a common law contract. Union membership in Australia has continued to decline and is now at 12 % of the private sector workforce. Any introduction of a statute based individual agreement must incorporate a transparent and robust safety net that equates with or exceeds that which applies for the establishment of an enterprise agreement.

System Application Recommendations deal with particular issues relating to the application of the current Framework and specific ways in which these current issues should be amended to improve future system operation:

SA1 *Individual Flexibility Arrangements*

Rio Tinto strongly advocates the introduction of a statute base Individual Agreement (See SD2) but recognises that it is something that generates competing views. The current IFA model has failed to provide an effective option for the business or employees (only 2.2% of Rio Tinto employees are engaged under an IFA). If the Commission decides not to recommend the introduction of a statute based individual agreement, Rio Tinto believes significant changes need to be made to the current IFA model that remove the current agreement / award oversight and allow for an IFA to be the base of an employment offer.

SA2 *Bargaining;*

The current bargaining model is generally working well. The Group has particular concerns with the current rules associated with bargaining representatives. To ensure greater transparency in bargaining, it is recommended that all bargaining representatives are subject to the same requirements that include appointment in writing, and disclosure of the names of the employees being represented.

SA3 *Industrial Action*

Rio Tinto has very limited experience with protected industrial action by employees. The Group does have a significant exposure to the business where industrial action is taken, or threatened to be taken by employees of a contractor / supplier. This can impact movement of product or critical chemicals. Of particular concern is industrial behaviour that threatens the operation of continuous processes in smelters and refineries. These processes are difficult and costly to wind back and can put at risk the effective future operation of the plant. Rio Tinto believes that an employer in these circumstances should be able to approach the FWC to effectively ensure that the third party industrial action does not cause loss or damage to the business.

SA4 *Greenfield Agreements*

There is considerable debate regarding the difficulty in finalising greenfield agreements. The delay and cost associated with this failure can place projects at risk. There is a need to implement a system that manages the negotiation process and provides for the making of a Greenfield Determination where no agreement has

been reached. The processes must recognise the criticality of time and the ability of the employer to seek an expedited determination within a stipulated timeframe.

SA5 *Adverse Action*

Applications for relief based on an alleged breach of a general protection are increasing year on year. The laws are uncertain and there are significant differences between members of both the High Court and Federal Court as to the proper interpretation of the *Fair Work Act* provisions. There are also many claims that are lodged by an employee that have no likely chance of success. Rio Tinto believes that the provisions need to be recrafted to better clarify the scope and application of the laws. The FWC should also be required to establish an initial assessment process in which the FWC member is empowered to dismiss claims that are without reasonable foundation.

SA5 *Right of Entry*

The current right of entry provisions require amendment to add balance and ensure that the process is appropriate for all employees. Rio Tinto recommends that right of entry provisions are limited to circumstances where the union is a party to an enterprise agreement or where an employee has sought assistance to address a workplace issue.

SA6 *Unfair Dismissal*

Like the concern expressed in relation to Adverse Action, Rio Tinto is concerned with the number of claims that are made that have no reasonable chance of success. The FWC should be empowered to dismiss these claims without the need for a hearing. The Act should also clearly identify the existence of a valid reason as the primary consideration that outweighs other factors. Where it is determined that a valid reason exists, reinstatement should not be a possible remedy.

Rio Tinto's Approach to Employee Relations

Rio Tinto seeks to foster an environment where employees are incentivised and encouraged to work to their potential and where individual contribution and effort is recognised and rewarded.

We seek to enhance engagement within teams through leaders having a strong relationship with the employees they lead. Leaders establish personal and team objectives that cascade down through the business in order to meet business plans. Leaders assess performance against the objectives and assist with employee development.

Leaders and employees work together to identify, assess and implement improvement initiatives as part of everyday business. As part of this process leaders and employees build a shared understanding of the business and are able to adapt in an agile way to meet business need. Leaders are accountable for the management and resolution of issues that arise with an employee and / or their team.

It is equally relevant in workplaces where some employees have sought to be represented by a union as it is where employees have not sought union representation. It is also not dependent on the type of industrial instrument/s that apply at a workplace and is equally relevant whether this is a common law contract or an enterprise agreement. The choice of industrial instrument is the result of a number of factors such as history, variations in ownership as a result of factors such as joint ventures, global impacts, the age of the business, M&A outcomes, the level of maturity in the relationship between employees and the business and employee and business preferences.

Rio Tinto respects the right of employees to belong or not to belong to a union. We do not monitor employee membership of a trade union though, in some cases, this information has been provided to the business by the employee concerned. Where an employee has chosen to belong to a union, that choice is respected.

Rio Tinto believes that the statutory employee relations system should facilitate an employer effectively engaging with their employees to identify and implement business improvements. Any barrier to an employer and employee working whether or not implemented as a system requirement would not be compatible with the need for productive, agile businesses that can successfully compete on world markets whilst ensuring fairness and dignity for employees.

System Design – SD1 - The Foundation of an Amended System

The employee relations system in Australia is significantly different to that in place in all other countries in which Rio Tinto operates. History played a significant part in its development as the *Commonwealth Conciliation and Arbitration Act* (the 1904 Act) was substantially influenced by the industrial disputes and strike action of the 1890s. The establishment of a highly centralised system in which employee remuneration and conditions were determined by industrial arbitration was meant to ensure that the industrial dispute witnessed in the period leading up to Federation was avoided.

To facilitate effective operation of the system, trade unions and employer associations were formally recognised and regulated by statute. They provided the support structure for the system in applications to vary awards and appearances in test and national wage cases, whilst at a lower level acting for individual members to achieve settlement of a dispute.

This centralised system became entrenched and continued to operate in much the same way until the 1990s. Collective bargaining however designed, described or observed elsewhere, had no place in the Australian system. Employers facing a labour market need to increase employee wages did so by implementation of an over award payment. Whilst at times such agreements were reduced to writing, this lacked the sophistication of current agreements. These agreement processes for over award benefits assisted rather than weakened the effective operation of the centralised system as they provided a measure of flexibility that enabled local issues to remain outside of the regimented centralised process.

In 1993, the *Industrial Relations Reform Act 1993* (the 1993 Act) introduced the most significant change to the Australian industrial relations system since the enactment of the 1904 Act. For the first time, collective bargaining was given a prominent place in the system. It was a first step in the change from a highly centralised system to a decentralised system based on workplace bargaining.

Changes implemented since 1993 have differed, sometimes significantly, but they have all asserted the prime enterprise focus of the system with enterprise bargaining rather than arbitration being at the system's apex. Whilst enterprise focus is asserted, it is worth noting that *"achieving productivity and fairness through an emphasis on enterprise –level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"* is the sixth of seven Objects of the *Fair Work Act*.

Past legislative changes have also asserted that awards must continue to provide a safety net for employees, whilst being simplified and reduced in number.

Rio Tinto believes that the numerous and at times conflicting changes to the statutory system that have been implemented over the past two and a half decades have further

increased the uniqueness and complexity of our system. The current system is neither a conciliation and arbitration system nor a collective bargaining system of the like that exists in many countries around the globe. Australia has a form of hybrid system that seeks to straddle both system types and in doing so ensures that it lacks transparency and adds restrictions particularly as parts of one system interact and influence the others (e.g. FWC 4 yearly review of modern awards).

The Fair Work Ombudsman has also raised issues with inconsistency between the National Employment Standards and provisions in some Modern Awards.

Whilst it could be argued that it was appropriate to retain the award system at the initial point of implementation of an enterprise focused bargaining system, Rio Tinto questions whether employees have access to a fair and transparent safety net when it requires an employer to potentially implement:

- the National Employment Standings;
- a number of awards (the award modernisation process undertaken by the Fair Work Commission (FWC) in 2008 – 2009 resulted in 122 modern awards). Rio Tinto believes that it has employees covered by 9 of these awards);
- an enterprise agreement; and
- the possibility of an Individual Flexibility Agreements.

This is the actual current circumstance faced by a number of Rio Tinto businesses and their employees.

Rio Tinto believes that the process of finalising a fair and transparent safety net needs to be regarded as a process in transition. The process of moving to a true enterprise based system, having started, needs to be completed. The system needs a single system based safety net that is universal and consistently applied.

This is not something that can be undertaken by statutory change alone. The then Minister initiated the Modern Award Review by a Ministerial Reference to the FWC. Rio Tinto believes that a similar but more focused action needs to occur in order that the process moves forward and that the nature of the system is simplified and more transparent. It needs to determine one set of universal minimum safety net entitlements and obligations that would apply to all award covered employees.

The existing modern awards would be reviewed against the universal standards. Any variation from the universal standards would need to be justified based on specific industry circumstances and approved by a Full Bench of the FWC.

System Design – SD2 - Individual Agreements

Rio Tinto has a very large and diverse Australian workforce. We employ in excess of 23,000 people who work across almost all states and territories. Our employees live and work in a wide variety of locations in city and in regional areas. We are also one of the nation's largest employers of Indigenous Australians.

Rio Tinto has had and continues to have broad experience in dealing with our employees on an individual basis who have elected to have an individual employment relationship with the business. This experience has been gathered over a period in excess of 25 years.

We have also had widespread experience in Australia and in other countries in negotiating collective agreements with employees and with the unions to which they are a member.

Rio Tinto remains willing to negotiate enterprise agreements with our employees and their union representatives should a majority of the relevant employee group wish us to do so.

Set out below is the breakdown of employment instruments that apply to Rio Tinto's Australian workforce:

Employment Instrument	No of Employees	% of Employees
Common Law Contracts Award Free	8,489	36.6
Individual Contract Modern Awards	10,960	47.3
Fair Work Act Enterprise Agreements	3,214	13.9
Individual Flexibility Agreements	520	2.2
Total	23,183	100.0

As can be seen from this table, 84% of employees are engaged under an individual agreement either as an award free employee or under an individual contract underpinned by a modern award.

Given the nature of their current employment arrangements, these employees (subject to there being a majority in support), could, at any time, seek to negotiate an enterprise agreement with the relevant Rio Tinto business. To date, they have not sought to do so.

Whilst there have been a number of enterprise agreements made under the provisions of the *Fair Work Act*, this represents a relatively low percentage of our total workforce. These agreements are also focused in a particular industry (such as coal) or a particular occupation (such as Train Driver). This is seen in the following table:

Product Group	No of Agreements	Sites	Status
Coal & Copper	5	Hunter Valley Operations	Current
		Mount Thorley / Warkworth	Current
		Bengalla	Under Negotiation
		Hail Creek	Under Negotiation
		Kestrel	Under Negotiation
Iron Ore	1	Pilbara Train Operations	Current
RTA Bauxite & Alumina	1	Gove	Current
Pacific Aluminium	1	Bell Bay	Current

Given the extent to which individually based employment arrangements are used within our business it is Rio Tinto's view that the future statutory system should not compel an employee on a common law contract to enter into or become bound by any form of collective system agreement.

Rio Tinto submits that our experience of employees favouring an individual agreement / contract needs to be considered in conjunction with the declining level of union membership. As union membership has continued to decline over time, now being down to 12% of the private sector workforce (ABS630.0), there is a large and growing number of employees who are not seeking to enter an enterprise agreement as the basis of their employment.

Rio Tinto believes that an employee in this category should (if they wish to) be able to seek a statute based Individual Agreement. Employees entering such an agreement with their employer must have fair and robust protection of their employment arrangements.

We recognise that there has been particular concern in the past that employees under individual agreements suffered unfairness, particularly when compared to employees engaged under a collective agreement. Rio Tinto recognises these concerns and believes that individual agreements need to have fair and robust safety net arrangements that mirror or exceed those available for employees under enterprise agreements.

Proposed amendments

Rio Tinto submits that a strong case exists for the re-introduction of an appropriately structured Individual Statutory Agreement.

In proposing this form of agreement, Rio Tinto believes that it is critical that the employee safety net be transparent and robust.

To achieve this aim, Rio Tinto proposes that the following levels of safety net protection apply to the making of an IA:

- Where no enterprise agreement exists at the site - the same safety net that would apply to the making of an enterprise agreement;
- Where an enterprise agreement exists at the site and that enterprise agreement would, except for the making of an IA, apply to the individual's employment – that the IA be no less favourable in an overall sense than the application of the Enterprise Agreement.

Once made, an employer would be required to lodge the IA with the FWC for approval. If the employee is a high income earner, that is earning in excess of the income limit under the Unfair Dismissal regime, the agreement would be lodged and formally recorded with the FWC but not be subject to an approval process.

System Application Recommendation – SA1 - Individual Flexibility Arrangements (IFAs)

Rio Tinto has outlined in this Submission (See SD2) its strong support for the introduction of a statute based Individual Agreement. We believe that the approach outlined would meet the needs of business whilst ensuring employees are protected by a robust safety net.

We recognise that the introduction of an Individual Agreement will not be supported by all those making submissions to this Inquiry. We urge the Commission, notwithstanding this opposition to recommend the inclusion of such an Agreement. Notwithstanding our view, we recognise that the Commission may choose not to support the approach we urge and, in that circumstance, we believe it is important to make a submission on necessary and critical changes to the current IFA model should that be retained.

Only 2.2 per cent of the Group's Australian workforce has entered an IFA. We understand that Rio Tinto's experience with the take-up of IFAs matches that of other employers. They are not widely sought after by employees.

The Rio Tinto take-up has overwhelmingly been in the Hunter Valley.

Currently the Act provides that IFAs may be offered to an employee in accordance with the terms set out within a modern award (s144) or an enterprise agreement (s202). The Act also provides the protection that an IFA cannot be offered as a condition of employment to a prospective employee (s341(3)).

We believe that the current drafting of the Act creates unnecessary complexity that results in the low take up of IFAs. Discussing the terms of a potential IFA with a prospective employee as the basis for their employment is, in our view, no more complex than asking that potential employee to understand the impact of an enterprise agreement or a modern award that might impact their employment or determine the safety net.

This inability to offer and discuss an IFA with a prospective employee makes little sense and does not appear to be consistent with meeting the needs of that individual or building a trusting relationship between employer and employee at these initial stages of a relationship. Being open with a prospective employee about an IFA and its content is the appropriate way in which trust is built between that employee and their employer.

Instead we would propose that an employer should be free to hold discussions with potential employees about both employment options, namely the award / EBA or an IFA. Candidates are then free to discuss their individual situation with the employer and select which option best meets their needs.

Additionally, we are concerned to ensure that employees and employers are not prevented from considering and reaching agreement on any suitable solutions to flexibility requests. To address this Rio Tinto believes that the procedures for entering into an IFA should be removed from EBAs and Awards and incorporated into the Act. We also believe that, in order to maximise the ability of employers and employees to consider and agree on flexibility arrangements, there should be no restrictions on the terms of an award or enterprise agreement that can be modified by an IFA. In keeping with this it would appear appropriate that an IFA clause, without restriction as to the terms that can be varied by an IFA, be adopted as part of the Act (or alternatively as mandatory rather than a negotiated or determined part content of awards and agreements). The current ability in enterprise agreement negotiations to introduce restrictions on the terms an IFA should be removed.

Finally we suggest that the attractiveness of IFAs to both employers and employees is significantly diminished by the rules governing their termination. In particular the ability of either the employee or the employer to unilaterally cancel an IFA on short notice (no more than 28 days where an enterprise agreement applies) creates an unacceptable level of uncertainty. It is Rio Tinto's experience that, in order to accommodate requests for flexibility, a range of changes to work and workplaces may be required. This can include changes to:

- the allocation of tasks
- the hours worked by other employees
- the number and type of employees in a team or location
- production schedules
- technology
- the timing of meetings
- the provision and availability of facilities and services for employees including accommodation, messing and transportation.

Implementing changes to support flexibility in the workplace, and any later reversal of these changes when an IFA is terminated, can therefore be costly, time consuming and cause disruption to production and other employees. The validity and significance of these factors as considerations for employers considering flexibility requests generally is already reflected in the act (s65(5A)). It is Rio Tinto's view that providing greater certainty about the term of an IFA will increase the willingness of businesses to support flexibility and implement the changes necessary to give effect to this in individual cases. Improved certainty could easily be realised by adopting a termination mechanism based on the process that is successfully used for enterprise agreements, that is an IFA must specify a nominal expiry date not more than four years after it commences operation but that it can also be terminated by agreement at any time.

In suggesting the changes detailed above Rio Tinto is cognisant of the concerns from unions and some commentators that IFAs should be targeted at achieving flexibility but not used as

a tool to erode conditions or circumvent safety net provisions in the Act or awards. In our view sufficient protections exist within the Act to ensure that these fears are not realised. The Act provides extensive protections for employees that ensure the process is open and transparent and does not result in freedom of choice being removed. These protections include:

- an IFA must be in writing
- the employee must be better off overall
- the employee must genuinely agree the terms of the IFA
- the IFA must be about permitted matters
- the IFA cannot include unlawful terms
- the IFA forms part of the award or enterprise agreement and does not replace coverage of the source instrument
- employment cannot be made conditional on the candidate agreeing to the IFA; and
- employees under the age of 18 years must have a parent or guardian sign the IFA.

In summary Rio Tinto recommends:

1. That the current provisions in the *Fair Work Act* (ss144 and 202) dealing with the inclusion of clauses in modern awards and enterprise agreements that deal with IFAs be replaced with a standard IFA clause in the statute. This provision should provide for the making of IFAs without restriction as to the award or agreement terms that can be varied by an IFA, be adopted as part of the Act (or alternatively as mandatory content into awards and agreements) and that the current ability in enterprise agreement negotiations to introduce restrictions on the terms an IFA can modify be removed. The new clause should include a notation that for the purposes of these provisions “an employee” includes a potential employee and “an employer” includes a potential employer.
2. That the Act be amended to only allow for the termination of an IFA:
 - upon an agreed end date specified in the IFA (being a date not more than four years after the commencement of the IFA); or
 - when mutually agreed by the parties.
3. That a new IFA provision be incorporated into the Act to remove all restrictions on the terms of an award or agreement an IFA can vary and prevent restrictions being introduced during enterprise agreement negotiations.

System Application – SA2 - Bargaining

The Bargaining Model

Rio Tinto recognises and respects the right of its employees to choose to bargain collectively and has agreed to bargain with employees where it has been satisfied that a majority of employees genuinely desire that to occur. The Group has considerable experience in collective bargaining and the making collective agreements with its employees. This includes bargaining under the Good Faith Bargaining provisions of the Act.

Since the commencement of the Act we have successfully negotiated agreements at eight sites across our Iron Ore, Coal and Aluminium operations. Each of those agreements was negotiated with unions acting as a bargaining representative for a portion of our employees. Individual employees have also represented themselves and/or others as bargaining representatives.

While each of the agreements was achieved without resort to industrial action, we are also wary that the bargaining process presents a reasonable risk of loss to employees or damage to the business if agreement is not reached and industrial action takes place. Our experience has been that the bargaining process involves significant organisational resources and can be a major distraction for both employees and the business throughout the process.

We are also observing in other workplaces that the broadening of matters which bargaining can address has led to some intractable disputes involving industrial action which is a concern (for example, at Qantas and BMA Coal).

Rio Tinto wishes to address three aspects of the current bargaining model.

Majority Support Determinations

The Act does not prescribe a process for the determination of whether majority support exists. Where applications for Majority Support Determinations are contested, FWA must therefore embark on an examination of the evidence to hand to determine whether that is the genuine desire of a majority of employees. Rio Tinto's experience is that the lack of certainty in relation to this process means that the evidence collected may take a range of forms and may include a number of deficiencies, such as being undated or being collected over an extended period, that reduce its probative value.

Rio Tinto recommends:

The Act should define the formal process to be utilised to establish whether the majority of the workforce genuinely wants to enter bargaining with an employer. This should take the form of an anonymous ballot, with a clearly worded question, run by an independent party or run by the employer at the direction of the FWC.

Bargaining Representatives

Our experience has been that the operation of provisions relating to the appointment and role of bargaining representatives can present an impediment to effective and fair bargaining. In this respect we submit that the provisions require adjustment to ensure they are operating as intended to enhance fair and transparent bargaining.

Effective and fair good faith bargaining requires openness and transparency. In our view, the current default bargaining representative process is not transparent and impedes effective and fair bargaining.

Currently, the Act provides for a two tiered process for the identification of bargaining representatives. Under this process unions are given “default” bargaining status in relation to their members but all other bargaining representatives are required to be nominated in writing by the employee(s) they represent. Our experience has been that this has led to practical issues during bargaining.

Without the requirement for an employee to proactively nominate a union as a bargaining representative, or for a union bargaining representative to disclose the identities of the members it is seeking to represent, other bargaining representatives (being other employees or their nominated representatives or the employer) have no knowledge of the number of employees or sections of the workforce that a union is representing. Further to this, whilst a union’s rules may grant it coverage over all or part of a workforce, it is not possible to determine whether a proposed Agreement will cover any union members and therefore whether a union has standing to act as a default bargaining representative at all.

In these circumstances, where it is unclear what portion of the workforce a union is representing, it is not possible for the employer and non-union bargaining representatives to determine the extent to which different proposals raised over the course of a negotiation will impact on employees represented by a particular union. This creates unnecessary tension between bargaining representatives and is especially problematic where proposals have different relevance to or variable impacts upon different portions of the workforce. It also leads to the inappropriate circumstance where claims may be put forward and pursued on a non-representative or non-collective basis that does not correlate with the true bargaining position or wishes held by the majority of employees. This is not consistent with a good faith bargaining process.

All other bargaining representatives are required to disclose who they are representing in the bargaining process. This same requirement should be applied equally to unions who are seeking to act as bargaining representatives. Any suggestion that this information should be secret to protect members from discrimination is hollow as there are significant employee protection provisions contained in the Act that deal with any such discrimination.

Rio Tinto makes the following recommendations:

The Act should provide that:

1. All bargaining representatives, including unions, should be proactively nominated by an employee or employees to be covered by the proposed Agreement. Prescribed forms could be created under the Regulations to facilitate this occurring; or alternately
2. All bargaining representatives must supply a list of the individuals they seek to represent to the employer and all other bargaining representatives; or alternately
3. A union seeking to act as a default bargaining representative must apply to the FWC at the commencement of the bargaining period and provide evidence that it represents a specified number of workers in certain classes of occupations to be covered by the proposed agreement. Once the FWC is satisfied that this information is correct, it could then issue a certificate verifying the information to be provided to the employer and other bargaining representatives. The certificate would confirm for all parties involved in negotiations that the union is the default bargaining agent for a specified number of employees without the need to disclose identities.

Good Faith Bargaining Provisions

Rio Tinto's view is that, in order to realise the maximum benefit for all parties, bargaining needs to be conducted in a respectful and productive environment. We recognise the important role that the Act's good faith bargaining requirements play in creating and maintaining an environment that supports this.

In our view an appropriate good faith bargaining system should meet the following key attributes:

1. Have equal application to all parties;
2. Be limited to process matters and not deal with outcomes;
3. Provide a capacity for a bargaining party to challenge another's adherence to the process and have proportionate consequences where non adherence is proven; and
4. Support freedom of association.

We believe that all of the above key attributes are effectively met under the existing regime. Further to this we consider that an ability to talk directly to employees about matters that impact them is an important aspect of a positive employment relationship and should not be impinged by bargaining processes. In this regard we are supportive of decisions that reinforce this ability and do not support any change to the system that would negatively impact that (see *LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442 and *AFMEPKIU v HJ Heinz* [2009] FWA 322).

When considering our own experiences we have found that, where they apply, the existing provisions have supported agreement being reached on each occasion. In particular the requirements set out at s228 of the Act have provided a balanced and fair bargaining process which has assisted negotiations without presenting an impediment to reaching agreement.

In their current formulation the requirements set out in s228 of the Act apply to the process of negotiation only and (we believe correctly) do not seek to mandate or regulate negotiation positions or outcomes including the content of proposals or the type, format or content of the Agreement under negotiation. In light of this focus on procedure and given the benefits we have observed in relation to the efficient and productive conduct of negotiations Rio Tinto proposes that the existing good faith bargaining requirements should be retained.

System Application – SA3 - Industrial Action

Since the commencement of the *Fair Work Act* in 2009 a number of protected action ballot orders have been granted and ballots conducted during enterprise bargaining at Rio Tinto's businesses. Despite this neither our employees nor the company have taken any protected industrial action during this period.

The company has, however, been exposed to industrial action as a third party on numerous occasions. This includes industrial action taken by the employees of our contractors, suppliers and service providers.

Due to the potential for industrial action to cause loss and potentially serious damage to employees, employers and third parties, Rio Tinto considers it to be a very serious matter. Accordingly and regardless of who engages in it, we treat any threatened or actual industrial action that has the potential to impact our business very seriously. Our preference is to resolve these via constructive dialogue and negotiation. We believe industrial action should be the option of last resort.

Taking of industrial action before bargaining has taken place

The period of time around the commencement of bargaining is often, by its very nature, a time of uncertainty where employers, employees and their representatives consider and develop their positions. It can also be marked by a number of disagreements about scope of a proposed agreement and indeed whether bargaining should commence at all. This is recognised by the Act, which provides a number of mechanisms to resolve disputes at the preliminary stages of bargaining. These include majority support determinations, scope orders and good faith bargaining orders.

Despite these statutory mechanisms, in the *JJ Richards* case ([2012] FCAFC 53) the Full Court of the Federal Court upheld the right of employees to take protected industrial action in support of a proposed agreement in circumstances where bargaining under the act had not commenced.

It is Rio Tinto's view that, in light of the fact that the Act provides for less confrontational and arguably more effective methods of resolving preliminary disputes and forcing parties to the bargaining table, allowing for protected action to occur at this early stage is not necessary. Protected Industrial Action connected to disagreements as to the commencement or scope of bargaining, or the conduct of bargaining representatives, should only be allowed to occur after the specific remedial provisions of the Act are accessed. Allowing protected action before this reduces the relevance of these provisions and appears to be at odds with the stated objective of the Act to achieve "productivity and

fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”. Accordingly industrial action should not be able to be taken before these steps have been utilised.

Proposed amendment

The Act should be amended to clearly prohibit protected action ballot orders from being granted until after formal negotiation meetings have commenced and if a bargaining party is not bargaining in good faith, until Good Faith Bargaining Orders have been issued.

Stopping or Suspending Industrial Action

Rio Tinto is a diverse business with operations in mining and minerals processing. Many of our sites utilise complex and large scale industrial processes. These processes often utilise specialist equipment and installations that are designed for continuous operation. Disruption to our processing facilities, including disruption to the flow of materials into and out of them, has the potential to cause significant and potentially irrevocable damage to our facilities, plant and equipment and thereby threaten the viability of the individual businesses that own and operate them. In light of this these facilities and businesses are particularly vulnerable to suffering unreasonable damage as a result of industrial action taken by other employers or their workforces.

The most recent example of a time when Industrial Action threatened to cause significant damage to one of our businesses occurred in November and December 2014. At this time Gladstone Ports Corporation was in negotiation with marine pilots for a new enterprise agreement. In early November the union representing the pilots (the Australian Maritime Officers Union) were granted a protected action ballot order. The subsequent ballot authorised the taking of industrial action in a variety of forms. The authorised action, if taken, had the potential to disrupt shipping into and out of the port of Gladstone, which would in turn impact on Rio Tinto’s businesses, in particular our Queensland Alumina Limited (QAL) and Yarwun refineries in Gladstone and our bauxite mining operations in Weipa. Rio Tinto operates a fully integrated supply chain across these businesses. The continuous shipment of raw materials into (bauxite and caustic soda) and out of (alumina) the Gladstone Port is critical to ensuring the ongoing and stable operation of the refineries. Alumina refineries are complex, and any disruption to the refining process (such as ongoing interruptions in the supply of inputs) has the potential to give rise to significant process safety risks. Any failure to maintain the continuous supply of inputs to the refineries poses the additional risk of serious and irrevocable damage to the refineries, with the possible result that they may become permanently inoperable. Prolonged interruptions in shipping could also cause a slowdown in the production at the Weipa mining operation (given stockpile constraints). These are in addition to the purely commercial impact of shipping

disruption, being the potential for increased demurrage and inability to satisfy customer supply obligations.

In its current form s426 of the act provides third parties with an ability to apply to have industrial action suspended. To be successful the applicant is required to demonstrate that the industrial action is threatening to cause it significant harm and that the action is adversely affecting the employer or employees to be covered by the agreement. In Rio Tinto's view there are two issues with these provisions.

1. Third parties are not in a good position to collect or lead evidence as to whether industrial action is adversely affecting the employer or employees to be covered by the agreement. This situation is exacerbated where the parties to the proposed agreement are hostile to a third party's attempts to have action suspended. We further note that this requirement seems to be at odds with the intention of s426 which concerns prevention of damage to third parties that may conceivably occur where there is little or no adverse impact on the parties to the bargaining.
2. The provision does not provide any flexibility to implement solutions that avert the potential for damage, beyond complete suspension of the action. In the case discussed above the damage could be averted if the industrial action was suspended only to the extent that it affected shipping into and out of the refineries. By allowing the FWC to make more moderate orders (in circumstances where they are warranted and will be effective) the damage to the third party can be avoided without unduly impinging on the rights of negotiating parties to take protected industrial action.

The act should be amended to:

- Delete s426(2) and its requirement to establish adverse impact on the employer or employee parties to a negotiation; and
- Retain the requirement in s426(1) that the commission *must* make an order but grant the commission a discretion to consider orders other than suspension.

System Application – SA4 - Greenfield or Project Agreements

Greenfield Agreements have been part of the Australian industrial relations system for an extended period. They enable the negotiation of an agreement for a genuine new business enterprise before any employees are engaged.

The advantage to an employer is that the finalisation of an agreement can deliver known costs, protection from industrial action for the duration of the agreement and an absence of managerial distraction that comes with agreement negotiation during the operational stage. Potential employees benefit by knowing the wage and benefit package when considering employment on the Project.

Whilst Rio Tinto's exposure to Greenfield Agreements could be extensive, it is primarily limited to the construction of new mines or processing plants. In this circumstance, Rio Tinto is the client and the employer party to the potential greenfield agreement is the contractor or contractors undertaking the construction.

The Group has not used greenfield agreements to establish employment conditions for the Operations employees at a new mine. The Group business responsible for the operation of the mine or plant offers employment under a common law contract to existing Group or new employees. Where that business believes that a different form of employment instrument such as an enterprise agreement would be appropriate, this is established in conjunction with the workforce once they are employed.

By definition, greenfield agreements need to be finalised before any employee is employed. At times, a greenfield agreement is necessary to achieve final approval for the project to proceed.

The nature of greenfield agreement negotiations substantially changes the bargaining dynamics. Time (including schedule) and cost are key issues for effective project delivery. Unions participating in the negotiation of a greenfield agreement can utilise time and delay as a far more effective industrial weapon than strike action. In doing so, there is also no loss to a workforce but significant potential loss to the business.

There is considerable public debate regarding the appropriate model for the future negotiation of a greenfield agreement. In most part this commentary results from the behaviour of some unions and the extent of losses that may be incurred if major projects such as a mining or gas projects are delayed due to the failure to reach a greenfield agreement. Whilst the size of the loss to these projects attracts media attention, delay and significant cost to small or medium size employers can be just as significant to their operating circumstances.

Rio Tinto believes that a new system needs to be implemented to facilitate an effective process for the establishment of employment arrangements for new enterprises or projects.

The following principles are proposed. They seek to recognise and provide for a way in which failure to agree on the terms of a greenfield agreement can be resolved with expediency where this is required.

PROPOSED PRINCIPLES FOR ESTABLISHMENT OF GREENFIELD AGREEMENTS

1. An employer or employers establishing or proposing to establish a genuine new enterprise may use a common law contract or any of the employment instruments provided by the Act.
2. An employer may instigate negotiations with a union for a Greenfield Agreement. The negotiating parties must be able to demonstrate that the union(s) involved is able to represent at least 50 per cent of the anticipated workforce within the scope of the proposed agreement.
3. Good faith bargaining obligations apply to the negotiating parties.
4. A negotiating party may apply to the FWC for conciliation. A party making an application for conciliation must be able to demonstrate that it has been genuinely seeking to reach agreement.
5. Conciliation will be for a maximum period of 21 days. The negotiating parties may agree to extend conciliation for a further maximum period of 21 days. At the end of the conciliation period(s), the FWC member must, within two days, provide to each party a record of the final status of the negotiations, identifying the terms as agreed and not agreed.
6. Where conciliation has occurred in accordance with this procedure and agreement has not been reached, the employer may make application for a Greenfield Determination.
7. Applications for a Greenfield Determination will be heard by a Full Bench.
8. The Determination application may include an application for an expedited hearing having regard to factors that include but are not limited to:
 - The size and economic significance of the project;
 - The impact on job creation, project viability and schedule; and
 - The public interest

Where the Commission grants an expedited hearing, the Full Bench must hear and determine the matter within 6 weeks of the Application being made. The Full Bench may delegate one FWC member to investigate and report as a means of facilitating final determination by the Full Bench within the finalisation timeframe.

9. The Full Bench decision must release its decision within the designated timeframe. Reasons for its decision can follow in the ordinary course.
10. The Greenfield Determination must include the matters agreed by the parties. In considering what, if any, other terms should be included in a Greenfield Determination, the Full Bench must take into account:
 - The merits of the claim;
 - The terms of other agreements applicable on the Project as outlined in the proposed scope of the Determination;
 - The impact of the claim in relation to project viability and delivery, with specific reference to cost, employment and project schedule;
 - The public interest including the likely impact of the employment market and potential flow on to other Projects;
 - The bargaining conduct of the parties.
11. A union that has not been a negotiating party is not entitled to be heard in relation to the terms of the Determination.
12. A Greenfield Determination will apply for a period of four years unless a shorter period has been agreed between the negotiating parties.

System Application – SA5 - Adverse Action Provisions

Rio Tinto supports provisions that provide protection for employees against adverse action as a result of industrial activity and unlawful discriminatory conduct. We therefore consider it appropriate for provisions to be included in the Act in a balanced manner to provide appropriate protection for employees, while allowing employers to properly manage inappropriate conduct.

However, the laws must be simple to understand and apply by those that have to comply and operate under them (ie, all businesses across the economy). Rio Tinto's concern with the current legislative provisions is that:

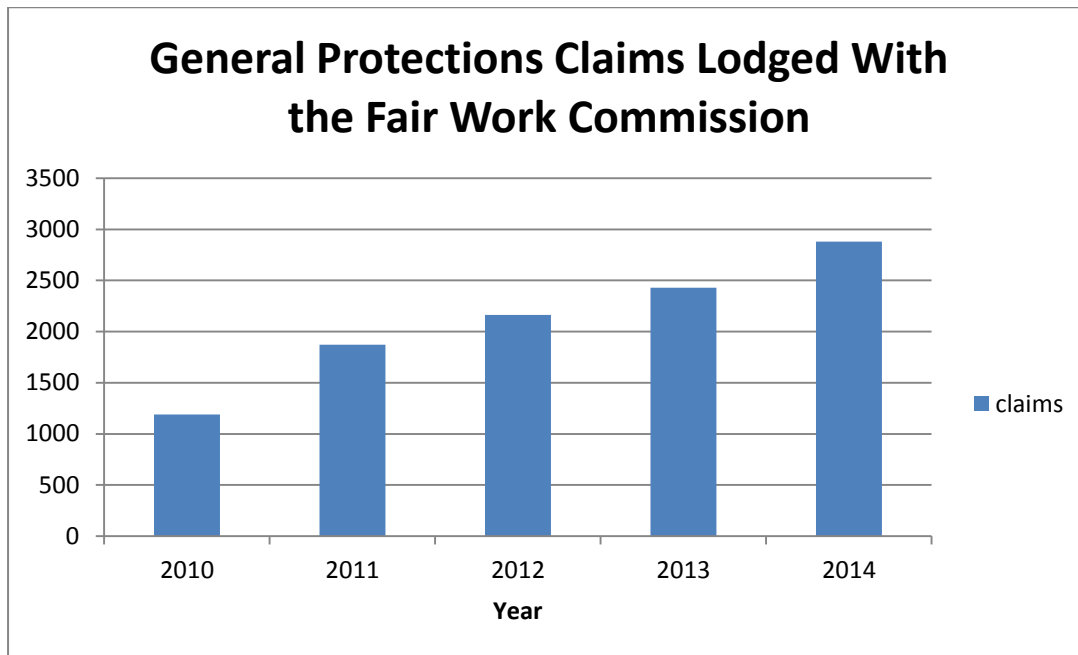
- (a) the scope and application of the laws are simply too vague and uncertain; and
- (b) in a number of respects they unnecessarily duplicate and overlap discrimination laws that apply under Federal and State discrimination legislation.

The vagueness and uncertainty leads to increased and costly litigation which would be unnecessary or simple to resolve if the laws were certain. In our experience the laws have resulted in speculative claims being made seeking "go away" money. This process is encouraged by the:

- system process which firstly involves Fair Work Commission conciliation that strongly encourages resolution of the dispute at the early stage. While the benefits of resolving disputes early are understood, the system does encourage risk free speculative claims; and
- uncertainty of the laws coupled with a reverse onus of proof and inconsistent judicial application.

In their current state, these provisions lead to increased costs, and impact time and resources required to manage normal workplace practices and respond to claims thereby negatively impacting productivity.

The Fair Work Commission's Annual Report statistics support the claim that these provisions are leading to increased litigation year on year in the table below:



Rio Tinto has been the respondent to a number of claims that are completely devoid of merit. Unfortunately given the uncertainty in application of the law as well as the process for progressing claims, they cannot be ignored and must be responded to. Rio Tinto submits that the Fair Work Commission should have a screening process to assess whether claims are made on a reasonable basis. Where there is an excessive delay in time in making the claim, a lack of information provided to support the claim, or the information provided with a claim demonstrates it obviously has no reasonable prospects of success, the Fair Work Commission should be empowered to dismiss it before an employer is required to respond.

An example of such a claim is the matter of *Rajiv Lal v Rio Tinto Technology and Innovation Ltd* [2014] FWC 4875. In that case Mr Lal was properly made redundant in 2008. Some 6 years later he was reading a newspaper and claimed that an article in it referred to an area he used to work in that had been reinvigorated many years later so he made a general protections claim complaining about his dismissal 6 years earlier. Nothing included in the application indicated that there was a reasonable basis for a 6 year delay, or that the claim was made on any reasonable basis or had any reasonable prospect of success. The Fair Work Commission is not empowered to simply dismiss the claim despite it being completely hopeless. Therefore the employer was put to the time and expense of responding to the claim to have it dismissed.

Under the system Mr Lal is entitled to appeal. In this case he did appeal the decision and the employer was then put to further wasted time and expense of responding to the appeal. Nothing prevents this type of situation being repeated.

Rio Tinto submits that the Fair Work Commission should be empowered to proactively “screen” applications to ensure claims have been made in time upon a reasonable basis before an employer is required to respond. Additionally, if a party chooses to appeal a

decision they should first be able to demonstrate that their case has reasonable prospects of success before the other party is put to the cost and expense of responding to the appeal.

In support of the claim that the adverse action laws are uncertain, Rio Tinto relies on continued judicial disagreement about their application and interpretation. One example is the case of *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41 (16 October 2014). It is apparent that throughout the different Court and appeal levels there was simply no common view as to why action was taken and whether it was in breach of the *Fair Work Act*.

- In the High Court
 - 3 Justices said the action was not taken because of a prohibited reason
 - 2 Justices said the action was taken because of a prohibited reason
- In the Full Federal Court
 - 2 Judges said the action was not taken because of a prohibited reason
 - 1 Judge said the action was taken because of a prohibited reason
- In the Federal Court
 - 1 Judge said the action was taken because of a prohibited reason

This shows that in relation to this one fact scenario 2 Judges of the Federal Court believed the employer breached the provisions whereas 2 Judges thought the employer did not. When the High Court Justice's decision are added the outcome was that overall 5 Judges thought the employer did not breach the provisions and 4 thought the employer did breach the provisions.

We also note that 5 days prior to the initial Federal Court decision being handed down in that case, a separate Federal Court Judge reached a different conclusion in a similar fact scenario (see: *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 1201 (2 November 2012)).

While Rio Tinto understands the judicial process involves differences in facts and opinions, and differences at different appellate levels exist, disagreements about the application and workings of the adverse action provisions appear much more prevalent.

When legal experts appointed to operate as judicial officers have so much difficulty in agreeing and applying the laws to every day workplace scenarios, the ability for the players in the system (employers, employees and unions) to confidently act and apply the law with any degree of certainty is not present. This demonstrates that the laws are not working effectively and need to be remedied.

Rio Tinto appreciates that any new law has a period of testing and clarification through the judicial process. However, these provisions also contain a broad and uncertain concept of a

“workplace right” which has led to much unnecessary litigation. Exactly what a “workplace right” is or is not is not specified in any detail in the legislation.

It is not until a Court declares an incident or event a “workplace right” that the parties have clarity (albeit then there can be disagreement about this from cases to case). This uncertainty promotes speculative litigation. Litigation to try and interpret what it means is unacceptable and unproductive and this aspect of the law also needs to be rectified to better define what a workplace right is or is not.

It is also the case that the adverse action provisions in the Fair Work Act directly overlap aspects of discrimination law at both a federal and State level. They are not completely complimentary with those laws and different bodies deal with complaints leading to unnecessary duplication and inefficient waste.

Examples of inconsistency beyond the bodies dealing with complaints include the time frame for commencing an action under the *Fair Work Act* adverse action provisions can be up to 6 years compared with 12 months under federal discrimination laws. The adverse action provisions contain a reverse onus of proof whereas the federal discrimination laws do not. There is no apparent reason for the overlap and the duplication should be removed.

In summary Rio Tinto recommends that:

- The adverse action provisions should be recrafted to better clarify the scope and application of the laws to make them simpler to understand and apply to avoid speculative claims. This includes better defining what a workplace right is or is not.
- The Fair Work Commission should have an initial assessment process and should be empowered to dismiss claims or appeals without reasonable foundation or lodged well out of time before an employer is required to respond to the claim.
- Aspects of the laws that overlap with existing discrimination laws should be repealed and left within that jurisdiction.

System Application – SA6 - Right of Entry

Rio Tinto respects the rights to freedom of association of employees throughout our operations. We enshrine freedom of association and the right of all employees to choose to belong or not belong to a union within our global code of business conduct, known as The Way We Work.

In addition to our global standards we recognise that in Australia all employers are charged with responsibility under the Act to protect Freedom of Association of their employees. Both documents require us to balance the needs of employees who choose to become members of a trade union with those that have exercised their right not to become a member.

Rio Tinto recognises and complies with its obligations under the Fair Work Act in relation to right of entry. Rio Tinto is also not opposed to unions having rights to enter workplaces recognised in law. However, Rio Tinto considers the laws must be balanced so they do not unreasonably impact on:

- productivity of an enterprise, particularly in circumstances of low union density and unions not being party to enterprise agreements in the workplace;
- an employee's right to choose not to belong to a union or have their breaks interrupted if they do not wish them to be interrupted; and
- an employer's right to appropriately manage the use of its property and determine where visitors to its operations should be entitled to meet with employees to hold discussions.

In relation to these matters the introduction of the Fair Work Act expanded union rights to enter into employer workplaces. Amendments to the Act in 2014 further expanded those rights to allow unions to determine where discussions could be held on an employer's property. Rio Tinto observes that the current legislative scheme has created issues that can negatively impact productivity of operations, use of its premises and on occasions intrude on employee's rights to enjoy their breaks uninterrupted.

Provided a union has coverage of employees within a workplace, there is very little restriction on that union if they want to enter a workplace, or where they can go when on site. This is the case irrespective of whether the union is a party to any agreements with the employer, whether any employees are members and whether any of the employees want them on site and want to meet with them.

This right extends considerable privilege to unions to enter private property that they would not otherwise be entitled to enter. Considering union membership and density is so low

and considering the development of technology and social media which provide new and alternative platforms for unions to communicate with members or potential members, the question must be posed as to whether this largely unrestricted privilege is still warranted or whether some restrictions should be placed on this privilege.

In approximately the last 4 years Rio Tinto's Pilbara based iron ore projects and operations alone have received in excess of 950 right of entry notifications to enter its premises.

Given the nature of operations and safety aspects to the work, each visit takes a degree of managerial time in coordinating and escorting officials on visits. These visits can on occasions last in excess of 3 hours at a time. This can unreasonably divert resources away from the requirements of day to day tasks and therefore create inefficiencies.

The ability to nominate a meeting venue is important for employers for a range of reasons including: ensuring safe access; managing resources such as meeting space; balancing freedom of association rights for all employees; and ensuring employees are able to enjoy their meal break uninterrupted if that is their choice.

Since the amendments that commenced in January 2014, unions have been entitled to ignore an employer's preference as to where on its premises a meeting between a visitor and its employees can be held.

In our experience unions have dictated that these meetings will occur in employee crib rooms. Previously when visits occurred away from crib rooms a majority of employees have showed no interest in taking the opportunity to hold discussions with the officials and chosen not to go and see them. Since the 2014 amendments when officials have visited crib rooms it has intruded on employees opportunity to take their break. This has resulted in some employees refusing to use their usual crib break room and enjoy the air conditioning and facilities provided and instead they have chosen to sit outside in the heat without facilities to avoid having to have discussions with officials.

The amendments that commenced in 2014 also removed the Fair Work Commission's ability to adjudicate on disputes about where visits can be held. Rio Tinto submits that nominating venues for meetings should clearly be the prerogative of the owner or occupier of the premises which can only be upset where the nominated venue is patently inappropriate.

The recommendations of the 2012 Independent Review into the operation of the Fair Work Act, commissioned by the previous Labor Government, did not recommend that crib rooms be the default location but rather concluded that the Act *"be amended to provide FWA with greater power to resolve disputes about the location for interviews"*. Rather than increase powers as recommended, the 2014 amendments removed the Fair Work Commission's powers.

To ensure balanced right of entry rights, Rio Tinto submits that the Act must:

- limit rights of entry to circumstances where the union is a party to an enterprise agreement that is in operation or where an employee has sought assistance to address a workplace issue; and
- include the ability for an employer to nominate where on the premises meetings can be held which can only be disputed if that venue is patently inappropriate in the circumstances.

System Application – SA7 - Unfair Dismissal

Rio Tinto is committed to fair dealings with its employees. We support this commitment through a series of robust internal procedures in addition to appeal mechanisms accessible by employees to reliably raise issues in the workplace including appealing a termination decision.

Rio Tinto supports the maintenance of a national legislative system that protects those individuals that are currently protected from unfair dismissal by the legislation. However, Rio Tinto observes that there are some flaws in the current system that should be remedied.

It is commonly reported by business owners that the laws are a disincentive to employ permanent employees. For the reasons set out below this is understandable. Rio Tinto observes the growth in casual and non-traditional work arrangements referred to by the Productivity Commission is likely evidence that the laws are a disincentive to permanent employment as individuals on these arrangements don't enjoy the protections from unfair dismissal that permanent employment provides.

The system is still heavily predicated on the payment of “go away” money to resolve claims including those that are completely devoid of any merit. Evidence of this is the sheer volume of claims that are resolved before they go to hearing. The following table extracted from the Fair Work Commission Annual Report for 2013 – 2014 shows that approximately 95% and 92% of cases were solved prior to a hearing in 2012-2013 and 2013-2014 reporting period respectively.

UNFAIR DISMISSAL – FINALISATION

Claims settled, withdrawn or determined	Number of matters	
	2012-13	2013-14
Prior to conciliation	2300	2273
At conciliation	8843	8669
After conciliation and before a conference/hearing before a Commission Member	2093	2476
Withdrawn after conference/hearing and before decision/order	49	41
By final decision/order	660	1200
Total	13 945	14 648

The system of paying “go away” money is fed by:

1. There being no significant or substantial risk for individuals making unmeritorious claims.

2. A significant growth in non-legal service providers (many offering no win no fee services) willing to pursue unmeritorious claims in the knowledge that many employers will consider it is a more productive and commercially cheaper outcome to pay “go away” money. Our experience is that many claims are lodged by non-legal representatives without the need for qualifications and without professional conduct obligations simply seeking quick settlements. Their business model appears to be based on spending minimal time working on a case and endeavouring to extract settlements quickly at conciliation hearings. In a number of instances approaches are made directly prior to conciliation by these representatives in search of a quick settlement. Claims are made on behalf of locally based employees represented by such a representative based in another State and identified simply by an internet search.

The payment of “go-away” money is a cost, it is unproductive and it is a disincentive to employment. Further legislative amendment is required to overcome this practice to fix flaws in the system. Rio Tinto submits that this process of paying “go-away” money is also encouraged because:

1. The conciliation system strongly promotes resolution of claims early. While there are benefits for all in quick resolution of disputes, the system itself promotes and encourages the payment of “go-away” money.
2. A lack of power coupled with, on occasions, unwillingness for the Fair Work Commission to dismiss completely unmeritorious claims without the need for costly and unproductive proceedings.
3. Uncertainty in outcomes created by there being too much discretion for individual Commissioners when making decisions which leads to inconsistent outcomes. In particular the Commission should not be able to put weight on unspecified “*any other matters*” referred to in the section 387(h) of the *Fair Work Act* when considering whether a dismissal is unfair. For example, when someone has been terminated for a valid reason and the procedure has been found to be fair, an individual Commissioner may still decide that it is still unfair on unspecified discretionary grounds. At times these can even be beyond an employer’s control (eg an employee’s age or future employment prospects) or for technical procedural breaches.
4. When it is determined that there is a valid reason for terminating an employee, often insufficient weight is given to that fact.

Rio Tinto submits that Australia should continue with existing protections against unfair dismissal but should improve flaws with the existing system including:

- Provide strong provisions that empower the Commission to dismiss claims made with no reasonable claims without the need for a hearing.
- Create a stronger disincentive for representatives to make and pursue claims without merit in an attempt to extract quick settlements.
- Remove the discretion of the Commission to consider “any other matters” or provide too much weight to them when considering a claim that will remove considerable uncertainty in outcomes from case to case. Alternately specify exactly what the “*any other matters*” are and what relative weight should be given to them.
- Ensure that when there is a valid reason for the termination of employment, that should be the dominant consideration that outweighs other factors.
- When it is determined there is a valid reason reinstatement should not be a possible remedy.

Attachment

Rio Tinto in Australia

Under our Group-wide organisational structure, our four product groups – Aluminium, Coal and Copper, Diamonds, Minerals and Uranium and Iron Ore – are supported by our Exploration and Technology & Innovation groups.

Argyle

Rio Tinto owns and operates the Argyle diamond mine in the remote East Kimberley region of Western Australia. The mine has been operating since 1983 and has produced more than 800 million carats of rough diamonds. It is one of the world's largest supplier of diamonds and the world's largest supplier of natural coloured diamonds.

Bell Bay Aluminium

Bell Bay Aluminium is situated on the mouth of the Tamar River, approximately five kilometres from George Town and 45 kilometres from the city of Launceston. Bell Bay Aluminium has been in operation since 1955 and was the first smelter built in the southern hemisphere. The smelter produces around 180,000 tonnes of aluminium each year.

Boyne Smelters

Boyne Smelters Limited (BSL) is the largest aluminium smelter in Australia. Located approximately 20km south of Gladstone at Boyne Island on the Central Queensland coast, BSL produces more than 570,000 tonnes of aluminium per annum.

Dampier Salt

A joint venture between Rio Tinto (68 per cent), Marubeni Corporation (22 per cent) and Sojitz (10 per cent), Dampier Salt Limited (DSL) is located in the hot, dry climate of northern Western Australia.

Energy Resources of Australia

Energy Resources of Australia Ltd is Australia's longest continually-operating uranium mine and one of the country's largest uranium producers. Uranium has been mined at Ranger for more than three decades and it is one of only three mines in the world to have produced in excess of 100,000 tonnes of uranium oxide.

Gladstone Power Station

The Gladstone Power Station is operated by NRG Gladstone Operating Services, and contributes 1,680 megawatts (6 x 280) capacity to the Queensland power grid. Rio Tinto Alcan's ownership is 42.125%, with 37.5% NRG Energy Inc, 8.25% Southern Cross GPS Pty Ltd, 7.125% Ryowa II GPS II Ltd, and 4.75% YKK GPS (Qld) Pty Ltd.

Gove Operations Bauxite Mine Alumina Refinery

The Rio Tinto Alcan Gove Operation is located on the Gove Peninsula in North East Arnhem land in the Northern Territory. The operation is situated on extensive deposits of high grade bauxite. Bauxite mining began in 1970 feeding both the Gove alumina refinery and the export market. Gove produced 8 million tonnes of bauxite in 2013, and 2.3 million tonnes of alumina. Alumina production was curtailed during 2014. Bauxite exports continue at the site.

Pilbara

Our Pilbara operations – including 15 iron ore mines, three port facilities, a 1,700 kilometre rail network and related infrastructure – are designed to respond rapidly to changes in demand, supported by our Operations Centre in Perth. In 2014, Pilbara produced 280.6 million tonnes of iron ore.

Queensland Alumina

Queensland Alumina Limited, or QAL, was commissioned in 1967 with an annual production rate of 600,000 tonnes of alumina. Today, QAL remains one of the world's largest alumina refineries, producing some 3.96 million tonnes of the world's best smelter grade alumina per year.

Rio Tinto Coal Australia

Rio Tinto Coal Australia produces both thermal and coking coal from our five operations – in the Hunter Valley in New South Wales and Queensland's Bowen Basin – for international export. In Queensland, the company operates the Hail Creek and Kestrel mines. In New South Wales, Rio Tinto Coal Australia manages Coal & Allied's operations at Mount Thorley Warkworth, Hunter Valley Operations and Bengalla.

Weipa

Rio Tinto Alcan owns and operates the Weipa bauxite mine on western Cape York Peninsula in Queensland, Australia. In 2012, the mine produced 23.7 million tonnes of metal-grade bauxite.

Yarwun

Rio Tinto Alcan Yarwun is an alumina refinery situated ten kilometres north-west of Gladstone in central Queensland. The refinery was the first greenfield refinery to be built in the western world in 20 years.