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The Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

14 July 2009

Dear Sirs

#### **Inquiry into Employee Share Schemes**

We are writing on behalf of Rio Tinto Ltd in response to the above in order to advise you of our main concern in respect of the planned change to the taxing point of share plans for Rio Tinto employees in Australia.

Rio Tinto has some twenty thousand employees in Australia and some nine hundred internationally mobile employees globally with a significant number both into and out of Australia. Rio Tinto operates an 'all employee' share option plan, linked to a savings contract, on a global basis. The key purpose of this plan is to enable our employees to participate globally in the results of our business. In addition, and as part of the remuneration of senior employees, Rio Tinto operates, on a global basis, share option and share award plans. We therefore welcome the opportunity to respond to the recent proposals to reform the tax rules relating to the taxation of employee share schemes in Australia.

Rio Tinto is a member of, and participates in, all relevant discussion forums/industry bodies and we were therefore disappointed by the content of the Budget Announcements in May 2009. The publication of such a significant change in the tax legislation was unexpected.

It is our view that good tax legislation arises from a fully consultative partnership between the tax authorities and businesses. There should be a clear policy statement as to the purpose of any proposed changes in order that, as a business, the reasons for policy changes can be fully understood. Sufficient time should be given to ensure that any required changes to existing administration and processes can be implemented to accommodate the legislative changes and thus to ensure that businesses are fully tax compliant. We would therefore have expected and appreciated a longer period for effective consultation with large businesses on this series of proposals which will have a significant financial and administrative impact on both Rio Tinto and our employees.

Compliance with legislation is one of Rio Tinto's core business principles. To comply with changes of this nature and magnitude in respect of an area as complex as share plan taxation, the minimum requirements are:

- Clear articulated policy behind the legislation
- Detailed legislation on which we can advise; and
- Time to review, assess and adapt (if necessary) our existing share plan practices and supporting systems.

In addition to the general points set out above, we have a number of specific concerns about the proposed changes, which are described in detail below. These include:

- Clarification of the definition of what is the “*taxation point*” for employees;
- The calculation of the sourcing period for cross-border employees;
- The cessation of employment being a taxation point; and
- Changes to the refund position.

#### **Clarification of when is the “Taxing Point”**

Employees should only be taxed on remuneration benefits when they derive the economic benefit. An employee is considered to have derived or earned a benefit when the employee is able to ‘access’ those benefits, for example employees are generally taxed on cash remuneration on receipt.

Therefore share awards should only be taxable to the individual when the employee receives the award and the employee is not prohibited from selling the awards (ie for a share award this should be the actual delivery date and for options this should be the date of exercise).

The vesting date should be defined in the legislation as the date the employee physically receives the shares (“the delivery date”), where the delivery date is less than a de-minimis period ie less than 4 weeks from the exercise/vesting date.

This would be consistent with the current section 139CC which sets out the method to calculate the discount when a qualifying share or right disposed of at arm's length within 30 days or after 30 days of being acquired.

The current proposed position in the Consultation Paper leaves employees being taxed at a point in time prior to the award being actually received or the option being exercised. It is difficult to understand the policy objective of this position.

#### **Sourcing of Share Awards for Cross-Border Employees**

Rio Tinto has employees in over 45 countries and one of our main objectives is to be compliant on a global basis.

Rio Tinto uses the OECD model to calculate obligations for cross-border employees. In line with this, we therefore submit that the legislation should stipulate that when calculating the gain to be apportioned between Australia and the foreign jurisdiction the time apportionment calculations should be between



the date of grant and the "delivery date". This would make the Australian legislation consistent with other jurisdictions and would also reduce potential double taxation and cash flow issues for employees.

#### **Taxation on Termination of Employment**

Australia continues to use termination of employment as a taxing point. This is not a taxing point which is adopted generally by other countries on a global basis and is also inconsistent with the approach taken in Australia in respect of cash bonuses. It therefore should not apply to share awards and Rio Tinto therefore submits that the taxation point should be deferred until either the shares vest or the options are exercised.

#### **Changes to Refund Provisions**

Under the proposed new rules, tax paid on share awards at an earlier time is not refundable where the forfeiture or loss is the result of a choice made by the individual. As the taxing time can arise in advance of the employee being able to sell the shares Rio Tinto would recommend that the legislation makes it clear that 'a choice made by the individual' does not include options which were underwater during a period when the employee was prohibited from exercising them. Effectively, the employee never had a choice to exercise the options, given they were underwater during the exercise period.

In conclusion, Rio Tinto urges that further consultation is undertaken in relation to the changes to Division 13A, before it is legislated as Division 83A. As outlined above our key concerns are to ensure that the taxing point for employees is the point at which the employee receives value and, furthermore, that Australia's tax legislation is on a more consistent basis with other jurisdictions to avoid double taxation. We confirm that Rio Tinto would be happy to engage further with you on consultation in this area.

Yours sincerely



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