Rio Tinto

# SUBMISSION TO THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

## Inquiry into the Fair Work Bill 2008

**9 January 2009**

## The Inquiry

The Senate Education, Employment and Workplace Relations Committee has established an Inquiry into the *Fair Work Bill 2008*.

Rio Tinto does not seek to make a public presentation to the Committee.

## Rio Tinto Contact

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## The Rio Tinto Group in Australia

Rio Tinto is a world leader in finding, mining and processing the earth's mineral resources - metals and minerals essential for making thousands of everyday products that meet society's needs and contribute to improved living standards.

The Group's major Australian products include iron ore, coal, aluminium, copper, diamonds, uranium, salt and talc. The Group is one of Australia's largest exporters and employers and contributes significantly to the Australian economy.

Rio Tinto's mining operations are commonly undertaken at remote locations in North Western Australia, Northern Territory, North and Central Queensland and regional areas of New South Wales. Large industrial processing operations are conducted in regional industrial centres such as Gladstone, Queensland, Kwinana, Western Australia and Bell Bay, Tasmania.

## Rio Tinto Overview

Rio Tinto has been at the forefront of changes to workplace relationships as it has pursued greater productivity through improved flexibility, direct relationships with employees and initiatives to encourage people to work to their potential.

Significant progress was made in the 1990s as artificial barriers were removed and Rio Tinto operations moved to relationships that recognised contribution, effort and opportunity.

The Company currently uses all forms of statutory employment agreements provided by the *Workplace Relations Act*. The use of a form a statutory individual agreement within Rio Tinto extends for over sixteen years, having initially been used in the West Australian state system and, since 1997, the federal system.

Rio Tinto's use of the different forms of employment arrangement varies significantly across the Group and follows consideration of:

- the history of the site;
- the level of maturity of the employment relationships;
- external factors; and
- the wishes of employees.

The breakdown of employment arrangements across the Group is as follows:

| | Per cent |
|---|---|
| Australian Workplace Agreements/ITEAs | 22 |
| Employee Collective Agreements | 15 |
| Union Collective Agreements | 8 |
| Common law contracts | 55 |
| **Total** | **100** |

## The Fair Work Bill

The *Fair Work Bill* would, if passed, create a new framework for workplace relations in Australia, including new rules for:

- statutory and award based minimum standards;
- collective bargaining and the making of collective enterprise agreements;
- industrial action;
- right of entry;
- transfer of business;
- dispute resolution;
- the protection of 'workplace rights';
- resolving unfair dismissal claims.

The *Fair Work Bill* does not include:

- proposed rules relating to the registration and accountability of organisations;
- model flexibility or dispute resolution provisions for enterprise agreements;
- transitional and consequential rules relating to the operation of agreements made under the *Workplace Relations Act 1996* or its predecessors and the rights and entitlements of employers and employees covered by those agreements.

## Summary

Rio Tinto's submission deals with the following issues:

Transitional arrangements

- Before a complete assessment of the terms and impact of the Fair Work Bill can be undertaken, greater clarity about the transitional arrangements is required.
- For employers and employees with existing workplace arrangements these provisions are currently more important than the design of the new workplace relations system.

Flexibility and Agreement Making

- The Government must ensure that the new workplace relations system facilitates direct relationships between employers and employees. The ability for an employer and employee to agree to workplace arrangements through a common law contract, underpinned by the National Employment Standards and an award (including an enterprise award) will help achieve this important aim.
- To assist in achieving the intent of the legislation to provide flexibility arrangements of mutual benefit to an employer and employee, individual flexibility arrangements should be able to be agreed between an employer and prospective employee prior to the commencement of employment and should not be able to be unilaterally terminated with only 4 weeks' notice.
- Removing the ability for an employer and union to make a greenfields agreement and requiring an employer to notify all relevant unions of its intention to make a greenfields agreement will threaten the commencement and increase the costs of new projects and delay employment of new employees.
- Employees have the right to choose who represents them in bargaining. The current arrangements for the appointment of bargaining representatives should be retained to facilitate that choice, rather than the default union bargaining representative rules proposed in the Bill.
- A certain threshold of conduct should be required before a union can exercise the right to be covered by an enterprise agreement, including that the union actually represented employee/s during bargaining.
- Existing agreements which provide, on balance, terms and conditions above the National Employment Standards should not be disturbed by the commencement of the National Employment Standards on 1 January 2010.

Right of entry

- The Bill significantly expands union entry rights, contrary to the Government's commitments, pre and post election, and in the absence of any demonstrable need for change.

- Changes to the rules regarding union access to non member records are unwarranted. There is no evidence that the AIRC's approach to applications to access non member records has been unsatisfactory.
- The ability for unions to seek additional right of entry rights in enterprise agreements is unnecessary and contrary to the 'balance' the Government states has been achieved by Part 3-4 of the Bill.

Transfer of business

- The new transfer of business rules will act as a constraint on business restructuring and ongoing viability in a climate of global financial uncertainty.
- The circumstances in which a transfer of business may occur, including the focus on the transfer of an employee's 'work' rather than the transmission of an employer's 'business' are far broader than the current arrangements and will create uncertainty for business.

Workplace Determinations

- The Bill should clearly proscribe any automatic arbitrated outcome of bargaining where employees/unions inflict self harm through industrial action.

Dispute Resolution

- The requirement proposed in the Bill that all enterprise agreements include a term allowing Fair Work Australia to 'settle disputes' is unclear, particularly given the limitations on Fair Work Australia's general dispute resolution powers.
- Specifically, the Bill must be amended to clarify that it is not intended that clause 186(6) requires all enterprise agreements include a dispute resolution clause allowing Fair Work Australia (or an independent third party) to arbitrate disputes about matters arising under an enterprise agreement or the National Employment Standards absent the consent of all parties to the enterprise agreement.

The above issues are dealt with in more detail below.

## Transitional Arrangements

The *Fair Work Bill* (the Bill) provides the framework for a new workplace relations system for the majority of Australian employers and employees. The Government has announced that the new system will take effect in two stages commencing 1 July 2009 and 1 January 2010.

The Senate Education, Employment and Workplace Relations Committee (the Committee) has established an Inquiry to consider the terms and effect of the Bill.

Rio Tinto submits however that the operation and impact of the Bill and the new workplace relations system it will create cannot be properly assessed in the absence of information about how employers and employees will transition from their current arrangements to the new system.

One example of the lack of transitional details concerns right of entry. The right of entry provisions in the Bill relate to 'fair work instruments'. That is, agreements made and approved in accordance with the terms of a future *Fair Work Act*. However the Bill does not outline the right of entry rules that will apply where a union or employees are bound by awards and/or agreements made under the *Workplace Relations Act 1996* or its predecessors.

Similarly there is no guidance in the Bill about the instrument/s against which an enterprise agreement will be assessed by Fair Work Australia under the 'better off overall' test should those provisions commence on 1 July 2009. The 'better off overall' test is expressed in the Bill to include 'modern awards',[1] however the Deputy Prime Minister has announced that the National Employment Standards and modern awards will not commence until 1 January 2010.[2]

Additional matters of significant import which are not dealt with in the Bill, but which will have a direct impact on Rio Tinto's operations from 1 July 2009 include:

- the rules and process relating to the modernisation of enterprise awards and enterprise NAPSAs;
- the operation of the transfer of business rules for existing agreements;
- whether existing agreements and awards, including enterprise awards, will expire or be deemed to no longer apply at a fixed date;
- the commencement of the National Employment Standards on 1 January 2010 and how the NES will operate with respect to employees receiving remuneration and entitlements which are, on balance, above the statutory minima at that time;
- the operation of good faith bargaining and industrial action rules for employers and employees covered by workplace agreements that have not passed their nominal expiry date, or which have passed their nominal expiry date but have not been terminated or replaced; and

[1] *Fair Work Bill 2008*, clause 193
[2] Deputy Prime Minister, Second Reading Speech - Fair Work Bill, *House of Representatives Hansard*, 24 November 2007, page 6.

- clarification about the date of commencement for all Parts of the Bill.

Rio Tinto notes that the Deputy Prime Minister, in her Second Reading Speech, indicated that the *Fair Work (Transitional Provisions and Consequential Amendments) Bill* will be released in early 2009.[3]

Rio Tinto notes the short time frame between the intended date of release of the transitional legislation and the constraints that timeframe will place on future planning, compliance and the ability of the Company to advise employees of their entitlements and obligations under the new system. As submitted above, without the release of that information a complete assessment of the impact and implications of the *Fair Work Bill* cannot be made.

Rio Tinto believes that the Committee should require details of the transitional provisions for scrutiny and examination prior to passage of the Bill

## Right of Entry

The right of entry rules in the *Fair Work Bill* represent a significant and unnecessary departure from the current right of entry framework and previous right of entry rules.

The Government states that the Bill is the legislative expression of the commitments contained in two policy documents it released prior to the 2007 federal election. The first policy document did not deal with right of entry. The second document, the *Forward with Fairness Policy Implementation Plan*, included the specific commitment that '*Labor's new system builds certainty and stability into our workplaces by ensuring that: … Existing right of entry laws will be retained …*'.[4]

The Bill does not retain the current right of entry laws.

Rio Tinto submits that the Bill unnecessarily expands the opportunities for union entry to workplaces contrary to the Government's commitments to business and the electorate and in circumstance where there is no demonstrable need for change.

There is no evidence to suggest the current rules do not meet their purpose or that the introduction of a new workplace relations system will result in the right of unions to enter workplace otherwise being restricted (indeed changes to award coverage may involve expanded rights).

The proposed changes to the right of entry rules will instead create additional and unnecessary uncertainty and instability for business. For example, site managers will be forced to deal with increased union activity. In addition, the ability for unions to enter a site where they are 'entitled to represent the industrial interests' of a person means site managers will be required to become expert in union rules

[3] Deputy Prime Minister, Second Reading Speech – Fair Work Bill, *House of Representatives Hansard*, 24 November 2007, page 6.
[4] Australian Labor Party, *Forward with Fairness Policy Implementation Plan*, 28 August 2007, page 2

or find themselves in the middle of demarcation arguments between unions. In all cases this represents a distraction for site managers from managing their sites safely and productively.

**Expanded circumstances for entry to investigate a suspected breach**

The Bill provides that a union may enter premises to investigate a suspected breach of a 'fair work instrument' or the Act. However, the circumstances where such entry is protected by the Act have been expanded by allowing entry to investigate a suspected breach:

- affecting or relating to any 'person' on the premises, rather than an 'employee';
- removing the requirement that the person affected be a member of the union. Under the Bill it is sufficient that the person only be eligible to be a member;
- removing the requirement that the union be bound by a collective agreement or award if entry relates to a suspected breach of that instrument.

Rio Tinto acknowledges that a union has an interest in ensuring their members receive their entitlements and in ensuring instruments to which the union is a party are not breached. However the new rules permit and protect union entry to worksites in far broader circumstances and allow unions automatic access to information about non members without their consent.

**Expanded circumstances for entry to hold discussions**

The opportunity to enter premises for the purposes of holding discussions has also been significantly expanded:

- the requirement that employees participating in discussions carry out work covered by an award or collective agreement has been removed;
- the requirement that the union be bound by an award or collective agreement covering the employees with whom the union seeks to hold discussions has been removed;
- the requirement that employees participating in discussions be members or eligible to be members of the union has been removed;

Where a Rio Tinto operation has existing agreements and awards with particular unions, this enlarged right will disrupt those existing relationships and increase the potential for inter union disputes where none currently exist.

**Expanded access to non member records and 'employee records'**

The Bill provides that a union may access non member records when exercising the right to enter premises for the purpose of investigating a suspected breach.

The Government has not provided any reason or justification for amending the current provisions, which only allow for non member records to be accessed with approval from the Australian Industrial Relations Commission or with the employee's consent. There is no evidence that the AIRC has acted

inappropriately in determining the small number of applications for access. This limitation is a suitable means by which the privacy of non member information is protected.

Rio Tinto submits that the requirement that any document accessed must be related to the suspected breach is not sufficient protection for an employee who has made a choice, protected by industrial law, not to be a member of an employee organisation and who does not consent to their records being reviewed.

In addition, in relation to entry for OHS purposes, the Bill provides that a union may access 'employee records' of employees, as defined by the *Privacy Act*. What constitutes an 'employee record' under the *Privacy Act* is far broader than the definition of 'employment record' under the equivalent provision in the current legislation.[5] The definition includes records about the employee's performance or conduct, engagement, training or discipline, membership of a trade union (which may be a different union) or professional association, their tax or banking arrangements.

The Government has not explained why it is necessary to expand the definition so broadly in circumstances where entry is supposed to be sought for OHS purposes. It is unclear whether access to records relating to an employee's banking arrangements or performance reviews be available to unions exercising their rights to enter premises for OHS purposes.

**Expanded access to seek right of entry provisions in workplace agreements**

The objects of Part 3 – 4 of the Bill state that it is intended that the right of entry framework established under that Part balances the right of organisations to enter premises in certain circumstances, the right of employees to receive information from officials of organisations and for employers to go about their business without undue inconvenience.

Rio Tinto submits that providing an opportunity for unions to seek expanded rights through bargaining for an enterprise agreement and to organise industrial action in support of such claims is unnecessary given the balance the Government claims will be struck by Part 3-4 of the Bill. This amendment is likely to result in increased industrial disputation and industrial action in trying to reach agreement about terms related to this issue which are sought to be included in new enterprise agreements.

Rio Tinto requests the Committee recommend the current right of entry rules be retained.

[5] Fair Work Bill – Explanatory Memorandum, paragraph 1979.

## Flexibility and agreement making

### Direct relationships

Rio Tinto submits that any workplace relations system must facilitate direct relationships between employers and employees underpinned by flexible and productive workplace arrangements.

Rio Tinto understands there is no single path to achieving this outcome. This is illustrated by the wide range of employment arrangements used by the Company across its business units.

Direct relationships can continue under the new workplace relations system, based upon the following models:

- Employment relationships underpinned by National Employment Standards, awards and enterprise agreements; and/or

- Employment relationships underpinned by National Employment Standards, awards (including enterprise awards) and common law contracts.

Both models meet the Government's election commitments. The second model is currently successfully used by many employers (large and small) across Australia and is favoured by employees, including a large proportion of the Rio Tinto workforce who are engaged on staff contracts, underpinned by enterprise awards, awards or agreements.

It is important that in finalising the new workplace relations system neither model is withdrawn as an option or is rendered unworkable.

### Notification requirements for greenfields agreements

Clause 175 of the Bill requires an employer seeking to bargain for a greenfields agreement to take all reasonable steps to notify 'all relevant unions' of the employer's intention to do so.

Greenfields agreements are used by employers commencing a new business, project or undertaking. The purpose of a greenfields agreement is to provide certainty in the employment arrangements for employees to be engaged in the business at a later date.

Rio Tinto has successfully negotiated a number of greenfields agreements in circumstances where the Company dealt voluntarily and successfully with a number of unions.

Rio Tinto submits that the requirement for an employer to notify all relevant unions jeopardises the making of greenfields agreements by:

- removing the ability of employers to make greenfields agreements with a union or unions of their choice. A union greenfield agreement can be

currently made with a union that is entitled to represent the industrial interests of some or all of the employees who will be employed on site;

- threatening to delay the commencement of new projects whilst an employer identifies and seeks to bargain with a the large number of unions with a right to cover work on a major mining project;

- threatening to delay the commencement of new projects should unions with industrial coverage over a workforce engage in demarcation disputes or raise other similar matters during bargaining, distracting the bargaining from the key matters of providing certainty in the terms and conditions of employees who will be employed on the site;

- the restrictions and delays will add to the costs of commencing new projects. In turn, this will delay the employment of workers at the site. These additional risks and costs that should not be imposed upon employers and potential employees.

Rio Tinto requests that the Committee recommend the Bill be amended to remove the requirement that an employer notify all relevant unions of an intention to bargain for a greenfields agreement.

It is submitted that this amendment would be consistent with the objects of the Bill and *Forward with Fairness Policy Implementation Plan*, particularly given:

- The Bill would still require a greenfields agreement be made between an employer and a union or unions and meet other procedural and substantive requirements, including that the terms and conditions are 'better off overall'; and

- the Bill would allow employees, once employed, to bargain for the next enterprise agreement with the bargaining representative of their choice.

**Union to be default bargaining representative**

Rio Tinto acknowledges that every employee has a right to be represented in bargaining for an enterprise agreement.

Under the current workplace relations system employees have the right to choose who represents them in bargaining, subject to rules regulating the suitability of bargaining representatives.

Rio Tinto submits that the current arrangements for the appointment of bargaining representatives should be retained to facilitate employee choice. The current arrangements work well for employees and employers.

**Option for unions to elect to be covered by enterprise agreement**

Clause 183 of the Bill provides that an employee organisation may give written notice to Fair Work Australia that it wants to be covered by an enterprise agreement. In accordance with the clause, this can only occur after the

agreement has been negotiated and made (following a majority vote of employees), but before it is approved by Fair Work Australia.

There are no preconditions to an employee organisation exercising this right. For example, the Bill does not require Fair Work Australia undertake any consideration of:

- whether the organisation actually participated in bargaining;
- the conduct of the organisation during bargaining;
- whether good faith bargaining notices or orders were issued in relation to the conduct of the organisation during bargaining.

Clause 183 therefore confers an employee organisation with an important right with respect to an enterprise agreement, but no corresponding responsibilities in relation to the making of that agreement.

Rio Tinto submits that a certain threshold of conduct should be required from employee organisations before they can elect to be covered by an enterprise agreement including, but not limited to, a demonstrable attempt to participate in bargaining.

In addition, there is no requirement that an employee organisation actually be a bargaining representative to exercise the right to be covered by an agreement. This means that an employee organisation can elect to be covered by an agreement when they were not a bargaining representative at the time the agreement was made.

Due to the operation of the default representation provisions in clause 176(1)(b), a union is a bargaining representative for an employee member by default from the time the employer provides notice of representation rights to the employee. Whilst an employee who is a member of an employee organisation can, under clause 176(1)(c), appoint a different representative in writing, it appears an employee organisation will always be a bargaining representative for their members for a period during bargaining.

In these circumstances an employee organisation has the power to impose itself into an agreement struck between an employer and employee (or the chosen bargaining representative of the employee) contrary to the wishes of the parties to the agreement. In particular the wishes of an employee member where the employee has elected to nominate a different bargaining representative.

There is no sound reason for allowing a party to impose themselves on a bargain where they have not participated in the striking of that bargain. Similarly an employee organisation should not have the automatic right to elect to be covered by an agreement where that has not been agreed between the bargaining participants and approved by the employees to be covered by the agreement. This is particularly so in circumstances where in striking that bargain, all bargaining participants were exposed to good faith bargaining orders.

Rio Tinto further submits that an employee organisation should not have the right to elect to be covered by an enterprise agreement when, at the time the

agreement was approved by employees, the organisation was not a bargaining participant with respect to the relevant employees.

**Individual flexibility arrangements**

Rio Tinto currently uses all forms of statutory employment arrangements provided by the *Workplace Relations Act*. Rio Tinto has used a form of statutory individual agreement for over 16 years.

The Bill does not provide for the making of statutory individual agreements. Rio Tinto reiterates the Company's submissions to the Senate Inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* in relation to the prohibition on the making of individual statutory agreements.

The Bill provides for the making of individual flexibility arrangements under awards and collective agreements. The Government suggests that these options represent a suitable alternative to the use of statutory individual contracts to provide flexibility for employers and employees.

The flexibility offered by individual flexibility arrangements is however constrained by the inability of an employer and employee to agree individual flexibility arrangements prior to the commencement of employment. The arrangements also fail to provide certainty for employees or operational certainty for employers as they can be unilaterally terminated by either party with relatively short notice.

The restriction will impose a number of important limitations on workplace flexibility, by:

- reducing the likelihood an employee will raise matters relating to flexibility with their employer in discussions about their terms and conditions of employment so that a mutually beneficial outcome can be achieved for both parties. According to the Bill, this is the object of the provision;[6]
- adding an additional administrative burden on an employer required to amend the employee's terms and conditions of employment soon after their commencement to provide mutually agreed flexibilities;
- potentially requiring an employer to place a new employee on different (and less flexible) employment conditions than those in place for other employees;
- adding a layer of confusion and complexity to the discussions between an employer and potential employee.

Rio Tinto submits that the Bill be amended to allow for individual flexibility arrangements to be agreed prior to the commencement of employment. The safeguards that apply for the making of flexibility agreements for existing employees will operate as effectively for potential employees.

**National Employment Standards**

The Deputy Prime Minister announced on November 25 that the proposed National Employment Standards would apply to all employees, including those

[6] Fair Work Bill 2008 sections 144(1) and 202(1)(a) .

covered by workplace agreements currently in operation, from 1 January 2010.[7] It is anticipated that the full application of the NES for employees covered by existing workplace agreements will be dealt with by the transitional arrangements.

Rio Tinto notes that flexible workplace arrangements have been negotiated with employees and reflected in workplace agreements made and approved under the *Workplace Relations Act* and its predecessors. These arrangements ensure that Rio Tinto employees receive remuneration and other benefits significantly above minimum standards and industry benchmarks.

If the transitional arrangements confirm that the National Employment Standards apply in their entirety to these employees, in particular new procedural requirements associated with the entitlements in the Standards, it is likely that this will have an adverse effect on our business by:

- disturbing workplace arrangements agreed with employees and approved by an independent third party as of no disadvantage to employees against the applicable safety net;
- increasing compliance costs;
- imposing an additional burden when Rio Tinto employees receive remuneration and other benefits above current and proposed statutory and award minima.

Rio Tinto acknowledges the Government's intention is to ensure employees who may currently not be in receipt of minimum entitlements reflected in the National Employment Standards.

However, without appropriate safeguards, the implementation of the Deputy Prime Minister's announcement may result in unintended consequences for employers who currently provide overall terms and conditions above the statutory minima in accordance with agreements made and approved under industrial law.

## Transfer of Business

If passed, the Bill would create a new framework governing transfer of business.

The new provisions shift consideration of when an industrial instrument will transmit from one employer to another from whether there has been a transmission of the business of the employer to whether the work of an employee has transferred.

In addition, the changes expand the circumstances when an agreement will transfer:

- there is no requirement that any assets of the first employer move to the second;
- a transfer of work specifically includes outsourcing or insourcing;

[7] Deputy Prime Minister, Second Reading Speech – Fair Work Bill, *House of Representatives Hansard*, 25 November 2009, page 6.

- transactions involving associated entities of the first and second employer may fall within the provisions.

Rio Tinto submits that in the current climate of financial uncertainty businesses should not be faced with unnecessary constraints when restructuring their operations to ensure their long term viability. The specific inclusion of insourcing and outsourcing is one example. The ability for instruments to transmit in the absence of a transfer of any assets from the first employer to the second is another. Similarly, the potential for an employer to be subject to a number of different employment agreements within a single enterprise will add complexity to the management of their workplace relations.

## Workplace Determinations

The Bill provides in clause 423 that Fair Work Australia may suspend or terminate industrial action if the action is causing or threatening to cause, significant economic harm to the employer and any employees who will be covered by the agreement.

One consequence of the termination or suspension of protected industrial action by Fair Work Australia in this way is it triggers Fair Work Australia's power to arbitrate the matters at issue between the parties. The arbitrated outcome will be reached outside bargaining or agreement between the bargaining participants and set out in a workplace determination.

Rio Tinto submits that clause 423 may allow employees and unions to access an arbitrated outcome of their wage claims in circumstances where protected industrial action causes self harm. The threshold is still lower given clause 423 refers to protected industrial action that 'is threatening to cause' significant harm.

Under clause 423 there is a risk that an employer will be subjected to an arbitrated outcome through no fault of their own.

Rio Tinto requests the Committee recommend that clause 423 be recast to include higher thresholds and greater protections for employers against employees using self harm to access arbitration of workplace bargaining disputes.

## Dispute Resolution

Clause 186(6) of the Bill requires that all enterprise agreements contain a term that provides for a procedure that requires or allows Fair Work Australia or an independent third party to settle disputes about matters arising under the agreement or the National Employment Standards.

Neither the Bill nor the Explanatory Memorandum provides any clarification about the meaning of the term 'settle disputes'.

Clauses 595 and 738 of the Bill set out Fair Work Australia's general dispute resolution powers. In short, these clauses provide that Fair Work Australia may only exercise powers conferred upon it by workplace parties and/or the Bill and

that Fair Work Australia cannot exercise arbitral powers, howsoever described, unless these powers are agreed by the parties.

In addition, the Government has consistently maintained that Fair Work Australia's powers to arbitrate disputes would be limited to workplace determinations and low paid bargaining.

The term 'settle disputes' is broad enough to include resolving workplace disputes by arbitration. This means that, under clause 186(6), Fair Work Australia would have the power to arbitrate disputes about a broad range of matters including, but not limited to rostering and the performance of work, the provision of amenities and individual employee grievances.

This is a breach of the Government's election commitments and does not accord with other provisions in the Bill dealing with Fair Work Australia's powers to resolve disputes. In addition, it moves attention away from resolving disputes at the enterprise level, where all workplace parties are required to take proactive steps to resolve disputes, to providing for the automatic abrogation of that responsibility to a third party.

Rio Tinto requests the Committee recommend that the model dispute resolution clause reflect the powers of Fair Work Australia to resolve disputes as set out in clause 595. That is, to use conciliation, mediation, expressing a recommendation or opinion or to exercise any other power agreed between the parties. This would not, of course, prevent parties agreeing in an enterprise agreement to provide Fair Work Australia with powers to arbitrate disputes arising under the agreement; but it would not require parties to do so.

Alternatively, if the Government's intention is that the requirements of clause 186(6) should reflect only the powers set out in clause 595, Rio Tinto submits that clause 186(6) be redrafted to remove any uncertainty about the meaning of the phrase 'settle disputes'.