
Rio Tinto Limited

**Submission to the
Trade Practices Act Review**

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1. Executive Summary

Rio Tinto proposes that:

- dual listed companies be treated as related bodies corporate for the purposes of the TPA;
- unincorporated joint ventures in which one party has more than a 50% interest be treated as related bodies corporate for the purposes of the TPA;
- an exception to the prohibition on exclusionary provisions be introduced for joint ventures;
- the current exception to the prohibition on price fixing for joint ventures be clarified;
- arrangements in relation to exports be exempt from the TPA, without any requirement for notification to the ACCC.

1.1 Introduction

Rio Tinto is a leading international mining group.

Rio Tinto comprises two listed parent companies - Rio Tinto Limited, incorporated in Australia and Rio Tinto plc, incorporated in England and Wales combined in a dual listed companies structure ("DLC"). The Rio Tinto DLC is explained further in section 2 below.

Rio Tinto wishes to draw to the Committee's attention certain technical problems the *Trade Practices Act (TPA)* creates, particularly for the resources sector, and to suggest possible solutions to those problems.

A short summary of each of the amendments to the TPA that Rio Tinto suggests is set out below.

1.2 Dual Listed Companies

The TPA currently contains an exception to the prohibitions on price fixing and exclusionary provisions where the only parties to an arrangement are related bodies corporate.

In recent years a number of significant mergers have been effected using a DLC structure, including Rio Tinto itself, BHP/Billiton and GKN/Brambles. In broad terms under a DLC structure two companies form a single economic enterprise contractually without one company acquiring more than 50% of the other company. As a consequence, dual listed companies are not "related bodies corporate" as currently defined in the TPA. Given that DLC companies are in economic substance part of the same corporate group, the definition of related body corporate should be expanded to include dual listed companies.

1.3 Unincorporated joint ventures

Currently if one holding company holds more than 50% of two incorporated joint venture companies, those joint venture companies will be related bodies corporate. The two joint venture companies could therefore reach agreement on price without breaching the prohibition on price fixing, notwithstanding the existence of other shareholders in each. If,

however, a holding company held a greater than 50% interest in two unincorporated joint ventures, the two unincorporated joint ventures (and the participants in them) would not be related bodies corporate and could not reach agreement about price without potential breach of the prohibition on price fixing. Rio Tinto submits that the incorporated or unincorporated form of joint ventures should not dictate whether an agreement between those joint ventures breaches the TPA. Unincorporated joint ventures in which one party has a greater than 50% interest in each of the joint ventures should be treated as related bodies corporate for the purposes of the TPA.

1.4 Exclusionary provisions and joint ventures

At present there is a significant risk that many standard arrangements between joint venturers may breach the per se prohibition on exclusionary provisions. Rio Tinto submits that there should be an exception to the per se prohibition on exclusionary provisions for arrangements between joint venturers. If the exception applies, the joint venture arrangements should still be subject to the general substantial lessening of competition test in Section 45.

1.5 Price fixing and joint ventures

There is already an exception to the per se prohibition on price fixing for the joint setting of price by joint venturers. As currently drafted, the exception is limited and, on one technical interpretation, it would not apply to most resources joint ventures. In Rio Tinto's view the drafting of the exemption should be expanded to ensure standard resources joint ventures are covered.

1.6 Exports

Rio Tinto submits that arrangements in relation to exports should be exempt from the Act, without any requirement for notification to the ACCC.

2. Dual Listed Companies (DLCs)

Dual listed companies are in substance part of the same economic group. However, because this is achieved by contract, rather than by one company owning the other, dual listed companies are not “related bodies corporate” as that term is currently defined in the TPA. Rio Tinto submits that the definition of “related bodies corporate” should be expanded to include dual listed companies.

2.1 Introduction

The per se prohibitions on price fixing agreements and agreements containing exclusionary provisions do not apply where the only parties to the agreements are “related” to each other: *Section 45(8)*. Section 4A of the TPA contains definitions of subsidiary, holding company and related. Section 4A(5) provides:

Where a body corporate:

- (a) is the holding company of another body corporate;
- (b) is a subsidiary of another body corporate; or
- (c) is the subsidiary of the holding company of another body corporate,

that first mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.

In broad terms, one company will be the “holding company” of a “subsidiary” if it controls the composition of the board of directors, controls more than half the votes or holds more than half the shares, of the subsidiary. The Section 4A definitions are very similar to the equivalent definitions contained in the *Corporations Act*.

The rationale for the related body corporate exception is presumably that companies who are members of the same corporate group are not expected by the market to compete with each other. Section 50 prohibits one company acquiring another company if that acquisition would substantially lessen competition. The unstated assumption in section 50 is that if one company acquires another those two companies will cease to compete. If an acquisition is allowed under section 50 on the basis that the acquisition will not substantially lessen competition, the related body corporate exception then allows the acquiring company and the acquired company to co-ordinate their pricing and other activities without breaching the TPA.

2.2 DLCs

As noted above Rio Tinto is a DLC, comprising Rio Tinto Limited (**RTL**) incorporated in Australia and Rio Tinto plc (**RTP**), incorporated in England and Wales.

The two companies entered into a “DLC Merger” in 1995. RTL was formerly CRA Limited. RTP was formerly the RTZ Corporation PLC. Both RTL and RTP remain as separate companies with their own shareholders. RTL is listed on the Australian Stock Exchange and RTP on the London Stock Exchange. However, pursuant to a contract called the DLC Merger Sharing Agreement, each company is required to operate (as far as possible) as if the two companies and their respective subsidiaries form a single economic enterprise.

The DLC Merger Sharing Agreement includes provisions designed to ensure that (as far as possible) the shareholders of RTL and the shareholders of RTP receive equal cash returns, on a per share basis, on their respective ordinary shares in RTL and RTP. In addition, certain shareholder voting agreements ensure that, in effect, both the RTL public shareholders and the RTP public shareholders now vote together as a joint electorate on matters affecting the shareholders of both companies in similar ways, but separately in respect of matters on which their interests may differ. The two companies also have common Boards.

Other DLCs have been formed as a means of merging companies, particularly very substantial companies, because of the significant benefits this form of merger delivers to shareholders. For example, BHP and Billiton and Brambles and GKN recently merged by way of a DLC.

2.3 Application of the related body corporate exception to dual listed companies

A DLC is an alternative way of effecting a merger between two companies. A DLC merger would be prohibited under either section 50 or section 45 if it had the effect or likely effect of substantially lessening competition in the market, in the same way that a conventional merger would, applying the same assumption that the merging companies would cease to compete after the merger had been completed.

However, because the DLC merger is achieved by contract rather than by one company owning the other, companies who merge under a DLC structure are not “related” as that term is currently defined in the TPA. As a consequence, at present the DLC parties are in effect required by the TPA to treat each other as they would a competitor. This ignores the economic reality that dual listed companies are part of the same corporate group.

Rio Tinto submits that the definition of related body corporate in the TPA should be expanded to include dual listed companies to reflect the fact that in economic substance DLCs are part of the same corporate group.

3. Unincorporated Joint Ventures

Rio Tinto submits that unincorporated joint ventures in which one company has a greater than 50% interest in each of the joint ventures should be treated as related bodies corporate.

Joint ventures may either be incorporated or unincorporated.

If a particular holding company held, say, a 51% interest in two separate joint venture companies, the two separate joint venture companies would be “related bodies corporate” as defined in Section 4A. As a consequence, the two joint venture companies could reach an agreement about price without breaching the prohibition on price fixing. This is the case even though two joint ventures may have different minority shareholders.

If, however, the same holding company held a 51% interest in two unincorporated joint ventures, the two unincorporated joint ventures (or more accurately, the various participants in the two separately constituted joint ventures) could not reach agreement about price without potentially breaching the prohibition on price fixing. Although the price fixing exception discussed above would apply with respect to pricing by each joint venture, it would not apply with respect to pricing spanning the two separately constituted joint ventures. Furthermore, because some of the participants in the two unincorporated joint ventures are not related bodies corporate, the related bodies corporate exception would also not apply so as to allow the participants in the two joint ventures to agree on price.

Rio Tinto submits that there is no economic reason why the form of two joint ventures should dictate whether an agreement between them about price is per se illegal if an unincorporated joint venture structure is used and is per se legal (not even subject to a competition test) if an incorporated structure is used.

Rio Tinto submits that this anomaly should be overcome by treating the participants in unincorporated joint ventures in which one company has a greater than 50% interest in each of the joint ventures as related bodies corporate for the purposes of the application of the prohibition on price fixing and exclusionary provisions to agreements between the two joint ventures.

4. Exclusionary Provisions and Joint Ventures

Currently there is a significant risk that a number of common joint venture arrangements may breach the per se prohibition on exclusionary provisions, including:

- an agreement between joint venturers not to supply the output of the joint venture to a particular person;
- an agreement between joint venturers to acquire goods or services for the purposes of the joint venture from one person and not another;
- an agreement between joint venture participants not to compete with the joint venture;
- an agreement giving joint venturers pre-emptive rights over each other's interests in the joint venture.

There is no reason why such standard joint venture provisions should be per se illegal; rather, they should be subject to the general substantial lessening of competition test in Section 45.

Accordingly, a joint venture exception should be introduced to the per se prohibition on exclusionary provisions.

4.1 Introduction

Joint ventures are a common feature of the Australian resources sector. For example, Rio Tinto is involved in joint ventures in relation to alumina refining, aluminium smelting, iron ore mining and production and coal mining to name some only. Many of Australia's most significant resources sector operations not involving Rio Tinto are also conducted by joint ventures, for example, the oil and gas fields in the North West Shelf, the Cooper Basin and

Bass Strait, the Worsley Alumina Project and the Kalgoorlie Gold Superpit Operation. By allowing risk sharing and major projects to proceed which might not otherwise be undertaken, joint ventures, particularly in the resources sector, are more than likely to be pro-competitive and beneficial to the economy.

However, the current prohibition on exclusionary provisions may make per se illegal a number of standard provisions necessary for the proper functioning of a joint venture. For the reasons discussed in more detail below, Rio Tinto submits that an exception to the per se prohibition on exclusionary provisions should be introduced for joint ventures.

4.2 Exclusionary provisions

Section 45(2) prohibits a corporation making or giving effect to a contract, arrangement or understanding containing an “exclusionary provision”. An “exclusionary provision” is defined in Section 4D essentially as a provision of a contract, arrangement or understanding made between persons, any two or more of whom are competitors, that has the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of person by some or all of the parties. Exclusionary provisions are per se illegal irrespective of their effect on competition.

Currently, the prohibition on exclusionary provisions is interpreted widely by the Federal Court in two key ways.

First, in the *South's* case¹ Merkel J held that although the ultimate purpose of the provision in question in that case was the achievement of a viable national competition, the provision's immediate purpose was to exclude any clubs in excess of the 14 selected to participate in the 2000 competition. The result of the strict application of this reasoning is that provisions entered into with the primary aim of sustaining a viable joint venture but which have the immediate effect of excluding a person, may be interpreted as exclusionary provisions.

Secondly, the Federal Court has, at least in some cases, interpreted the requirement that the restriction be aimed at “particular persons” or “particular classes of persons” very broadly to the point where it might be suggested that a class of persons may almost be defined by the fact of exclusion only.²

As a consequence, a number of standard arrangements between joint venturers are currently at risk of being held to be exclusionary provisions and hence to be per se illegal, including the following:

- (a) an agreement between joint venture participants not to supply goods or services produced by the joint venture to a particular person (on the basis that the joint venture participants may be competitors in relation to the sale of the goods or services produced by the joint venture and the agreement not to supply those

¹ *South Sydney District Rugby Football Club Ltd v News Ltd (2001) 111 FCR 456*

² See in particular *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No. 1)* [1990] 27 FCR 460. Note that a recent Full Federal Court decision in *Rural Press Limited v ACCC* [2002] FCA FC 213 indicates that a more limited interpretation of the phrase “classes of persons” may be adopted in future.

goods or services to a particular person would, by virtue of its immediate purpose, be an exclusionary provision. This would be the case even if the decision not to supply a particular person was made because the person had not invested in the joint venture facility, had not agreed to pay a price the joint venturers regarded as adequate or following a competitive tender for the sale of the joint venture's output in which the particular person was unsuccessful).

Professor Corones explains the issue as follows:

Where the joint venture participants are horizontal competitors, the Act makes it difficult for them to deny a third party access to the goods or services of the joint venture. Any such refusal is likely to be caught by the definition of "exclusionary provision" in Section 4D(1) of the Act, in which case it will automatically contravene Section 45(2)(a) or (b)(i) of the Act without any enquiry as to its economic impact or effect on competition. These provisions facilitate outsiders taking a free ride on the investment of the joint venturers.³

- (b) an agreement between joint venture participants to acquire goods or services for use in the joint venture from one person and not another (on the basis that the joint venture participants may be regarded as competitors in relation to the acquisition of goods or services - but for the joint venture they would be acquiring separately - and the agreement not to acquire goods or services from a particular person would, by virtue of its immediate purpose, be an exclusionary provision);
- (c) an agreement between joint venture participants not to compete with the joint venture (on the basis that it may be an agreement between horizontal competitors the immediate purpose of which is to restrict supply to a class of persons, being the potential customers for the goods or services concerned);
- (d) an agreement between joint venture participants to grant each other pre-emptive rights over their joint venture interests (on the basis that the joint venture participants may be competitors in relation to the sale of their joint venture interests and the immediate purpose of the pre-emptive rights may be to limit the supply of such joint venture interests by the joint venture participants to a class of persons, being those persons who may be interested in acquiring such interests)⁴.

In each case there is no reason why such an agreement should be a per se breach of the TPA for which the participants may be subjected to pecuniary penalties of up to \$10 million. In many instances arrangements of the type described would be necessary if a joint venture is to proceed. As noted above, joint ventures, particularly in the resources sector, are more than likely to be pro-competitive.

In Rio Tinto's submission, there should be a legislative exception to the per se prohibition on exclusionary provisions for arrangements between joint venture partners in relation to the supply (or non supply) of goods or services produced by the joint venture or the acquisition (or non acquisition) of goods or services by the joint venture. The exception

³ Corones, "Joint Ventures in the Trade Practices Act", in *Joint Venture Law in Australia*, page 253-254.

⁴ Rose, "Resources Joint Ventures and the Trade Practices Act 1974" (1991) 9 *Journal of Energy and Resources Law* 95 at 108.

should also cover arrangements that are ancillary to a joint venture agreement, such as non-compete and pre-emptive rights clauses in a joint venture agreement. Rio Tinto proposes that this exception be an exception only to the per se prohibition on exclusionary provisions; the arrangements should still be subject to the general substantial lessening of competition test in Section 45.⁵

More broadly, Rio Tinto submits that consideration should be given to whether the per se prohibition on exclusionary provisions should be retained at all. It is interesting to note that the New Zealand *Commerce Act* was recently amended to insert a new Section 29(1A), providing as follows:

A provision of a contract, an arrangement, or an understanding that would, but for this subsection, be an exclusionary provision under subsection 1 is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.

5. Price fixing and joint ventures

There is currently an exception to the per se prohibition on price fixing for agreements entered into “for the purposes” of a joint venture about the price at which the joint venture parties will sell goods or services produced by them in pursuance of the joint venture. Most resources joint ventures exclude marketing from the scope of the joint venture, although commonly the joint venture participants then carry on common marketing under a separate arrangement. There is a technical argument that such separate common marketing arrangements may fall outside the price fixing exception because they are not entered into “for the purposes” of the production joint venture. The price fixing exception should be clarified to overcome this technical argument.

Section 45(2) of the TPA prohibits a corporation making or giving effect to a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition. Section 45A(1) deems a provision of a contract, arrangement or understanding to substantially lessen competition if the provision has the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services supplied or acquired by the parties to the contract, arrangement or understanding in competition with each other. Persons are regarded as being in competition for this purpose if they would be

⁵ This view is not held by Rio Tinto alone. Professor Griggs in his article “*News Limited v ARL: The Birth of Super League but the Death of Joint Ventures?*” (1997) *Competition and Consumer Law Journal* at 166, commented as follows:

There is no doubt this is an area ripe for reform. As P Corones states:

The term “exclusionary provision” has a pejorative ring to it and yet in the context of joint co-operative activity it may be neutral in competition terms.

If we accept the economic premise of competition as the best way to allocate scarce resources of society, then any decision or legislative direction which impedes this must be corrected. Absent any alteration by a subsequent court, legislative change may be appropriate.

in competition but for the provision of any contract, arrangement or understanding - *Section 45A(8)*.

The participants in a resources joint venture in many instances could each physically take production from the joint venture separately and sell that production separately. Notwithstanding their co-operation in the joint venture the joint venturers would be regarded as competitors for the purposes of Section 45A, particularly given Section 45A(8). As a consequence, prima facie any agreement between joint venturers about the price at which they will sell their respective shares of the output of the joint venture would be a per se breach of Section 45.

Importantly, however, Section 45A(2) contains an exemption in relation to pricing by joint venturers. Section 45A(2) provides relevantly:

Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at ... for the purposes of a joint venture to the extent the provision relates or would relate to:

- (a) the joint supply by two or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interest in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;
- (b) the joint supply by two or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or
- (c) in the case of a joint venture carried on by a body corporate ... :
 - (i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or
 - (ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:
 - (A) a person who is the owner of shares in the capital of the body corporate; or
 - (B) a body corporate that is related to such a person.

The existence of such an exception is, in Rio Tinto's submission, entirely appropriate. It allows parties who have joined together to share risk in relation to a project to do so by sharing risk associated with the sale of the output of the joint venture. There is, however, a very technical argument based on the drafting of the exception which, if correct, would have the effect that the exception would not apply to most, if not all, resources joint ventures in Australia. As one commentator notes:

Typically a production joint venture will provide for the participants to take and receive their proportionate share of joint venture product in kind at the completion of the extraction or, where relevant, the processing/refining stage. For various reasons, principally associated with liability and taxation, the scope of resources joint ventures does not extend to encompass joint marketing and in particular joint receipt of income. Nonetheless it is not uncommon for venturers having taken and received their product entitlement (such receipt is

commonly notional rather than actual) to enter into or give effect to arrangements or agreements for the disposal of such production.⁶

In many instances, these arrangements will involve joint sale or sale at a common price. The common sales and marketing activities are sometimes carried out by a separate company owned by the joint venture participants in their joint venture proportions. That company may either sell as the joint venture participants' agent or as principal.

The joint venture exception only applies, however, if the agreement on price is made "**for the purposes** of a joint venture ... [and relates to the sale] of goods jointly produced by those parties in pursuance of the joint venture". There is an argument that if the production joint venture agreement itself does not provide for joint marketing, joint marketing arrangements cannot be said to have been made "for the purposes of" the production joint venture. Rose explains the issue as follows:

A more significant limitation is to be found in the requirement that the contract, arrangement or understanding will be made or arrived at **for the purposes of the joint venture**. In cases where the scope of the joint venture is confined to exploration, development and production (ie so as not to include marketing) it may be difficult to contend that the arrangement is entered into for the purposes of the joint venture. Having taken its product entitlement in kind it might be thought that the party would sell (or consume) it for its own purposes. Thus the tax driven necessity to exclude marketing from the scope of the joint venture may conflict with one of the fundamental prerequisites of the exception.

Furthermore, particularly in the case where the sales company is selling as principal and not as agent, there is a technical argument that the supply is not a supply by the parties to the joint venture as required by Section 45A(2)(a).

Rio Tinto submits that the joint venture exception should be expanded to reflect the realities of resources joint venture agreements in Australia. In Rio Tinto's view, the exception should apply wherever joint venture participants reach agreement about the price at which they will sell the output of the joint venture or the price at which a company owned by them (and only by them) in their joint venture proportions will sell the output of the joint venture. As is currently the case, if the proposed expanded joint venture exception applied, then the Section 45A(1) price fixing deeming provision would not apply but Section 45 would still apply with the effect that such an arrangement would still breach the TPA if it had the purpose, effect or likely effect of substantially lessening competition in a market.

⁶ Rose, "Resources Joint Ventures and the Trade Practices Act 1974" (1991) 9 Journal of Energy and Resources Law 95 at 111.

6. Exports

Rio Tinto submits that the exemption in relation to exports should be amended by removing the requirement that arrangements must be notified to the ACCC to attract the exemption.

Section 51(2)(g) of the TPA provides an exemption from the application of certain provisions of Part IV of the TPA in relation to a provision of a contract, arrangement or understanding that relates exclusively to the export of goods from Australia or the supply of services outside Australia if accurate particulars of the provision were furnished to the ACCC before 14 days after the date on which the contract, arrangement or understanding was made.

In Rio Tinto's view, there are good policy reasons for not applying provisions of Part IV of the Act to export arrangements. The object of the Act, set out in Section 2, is "to enhance the welfare of Australians through the promotion of competition and fair trading provision for consumer protection". The Act is not concerned with the effect of arrangements on buyers located outside Australia.

Indeed, in Rio Tinto's view, an arrangement between Australian companies about, for example, the price at which they will export goods or services would not breach the TPA in any event. In order for there to be a breach of the prohibition on price fixing the parties to the arrangement must be competitors in a market in Australia in relation to the goods or services concerned. Where an arrangement is limited to exports, then the parties would not be competitors in relation to a market in Australia in relation to the goods or services concerned. Similarly, an arrangement confined to exports is most unlikely to substantially lessen competition in a market in Australia.

The existence of Section 51(2)(g) may, however, call into doubt this conclusion.

In Rio Tinto's view, export arrangements should be clearly exempted from the provisions of the TPA.

Rio Tinto notes that the competition laws of most OECD countries exclude from their coverage export arrangements that relate solely to foreign markets (see the NCC's "Review of sections 51(2) and 51(3)" at page 136).

Furthermore, in Rio Tinto's view, the requirement that the exports be notified to the ACCC serves no useful purpose, causes administrative difficulties and creates concerns for parties in relation to the confidentiality of commercial arrangements. Rio Tinto submits that Section 51(2)(g) should be amended by deleting the ACCC notification requirement. Some of the OECD countries require notification to an anti-trust authority and some do not. In Rio Tinto's view, an arrangement like that existing in Canada, where notification is not required, would best protect the national interest. Sections 45(5) and (6) of the *Canadian Competition Act* provide as follows:

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- (5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.
- (6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement:
- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
 - (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
 - (c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.