

Assistant Director General, Heritage Services  
Department of Planning, Lands and Heritage  
PO Box 7479 Cloisters Square  
WA 6850

31 April 2018

Dear Assistant Director General,

**Subject:** Review of the Aboriginal Heritage Act 1972 – Rio Tinto Iron Ore response to Phase 1 Consultation Paper

Thank you for providing Rio Tinto Iron Ore (**Rio Tinto**) with the opportunity to contribute to the current review of the Aboriginal Heritage Act 1972 (AHA). Meaningful Aboriginal stakeholder engagement and protection and management of Aboriginal heritage values are fundamental aspects of Rio Tinto business and approvals processes. This means our cultural heritage management processes are driven by more than simply compliance with the requirements of the AHA. However, the current Act has been in operation for over 45 years. Rio Tinto agrees that modernised legislation to identify, manage and protect Aboriginal heritage in Western Australia is warranted. The first step towards formulating sustainable and balanced change is describing and analysing the current legislation. This response is provided in that spirit to contribute to this important process.

Since 1972 when the AHA was enacted, Western Australia has experienced substantial transformation. The state has undergone significant change in the nature, scale and intensity of development, resulting in increases in both the numbers of heritage places requiring assessment and in statutory heritage applications requiring consideration for approval. Although there are certain aspects of the AHA which require revision and update, many of the perceived deficiencies of the AHA may relate to inconsistent approaches in its administration. This is an important aspect for consideration in the implementation of any changes to the legislative framework which should provide sufficient clarity to ensure consistent and effective implementation of the AHA.

The legislative context of Western Australia has also changed. Provisions within particular legislation enacted or amended subsequent to the AHA limit approval powers or amend operational processes of the AHA. Additionally, changes in the Federal space, such as with the passing of the Native Title Act (1993 Cth), have directly influenced the manner in which heritage consultation is conducted within the state. This review is an opportunity for the AHA to not only catch up to other legislation as part of a broader legal framework, but to drive Aboriginal cultural heritage protection and management within Western Australia in a manner that acknowledges and respects Traditional Owner knowledge sets, while clearly defining a process to ensure appropriate on-going economic development in the State.

## About Rio Tinto

Rio Tinto Iron Ore's heritage team is one of the largest and most experienced of its kind in the resources industry. Our professionals include qualified archaeologists, anthropologists, specialists in cultural heritage management, Geographical Information Systems, information management and community liaison, all of whom collectively facilitate the management of Aboriginal cultural heritage across our iron ore tenements and mining leases in Western Australia.

Our comprehensive cultural heritage management systems and programmes ensure appropriate protection and management of Aboriginal heritage through engagement with Aboriginal Traditional Owners, including their active participation in our cultural heritage processes.

As part of our heritage programme, we partner in the research and analysis of significant sites. This research has included archaeological excavations in rock shelters in the inland Pilbara which have revealed evidence of occupation by Aboriginal people over 40,000 years.

## Rio Tinto's response to the review

Rio Tinto Iron Ore has provided detailed responses attached structured in line with the questions posed in the *Review of the Aboriginal Heritage Act 1972 Consultation Paper* (March 2018). Responses have not been provided to Questions 1, 6 and 21. Please note that Rio Tinto also contributed to the CME industry response.

In summary, Rio Tinto is supportive of amendments to the AHA to facilitate appropriate consultation and good cultural heritage outcomes in Western Australia, through a process that provides greater consistency, transparency and flexibility while considering associated timeframes and costs.

For further information on this response please contact Ms Sam Moody (Specialist, Heritage) on 6213 1131 or via email at [sam.moody@riotinto.com](mailto:sam.moody@riotinto.com)

Yours sincerely,



Gavin Martin  
Manager, Heritage and Agreements

2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?

Rio Tinto recognises and supports the importance of appropriate consultation on Aboriginal heritage places.

In all aspects, consultation should seek to respect existing Aboriginal organisational structures. Introduction of a dispersed consultation method (e.g. registration of interest on the basis of Aboriginality following public advertising, such as is used in NSW), can have the consequence of fracturing and destabilising otherwise functional organisations. Therefore, there should be clarity provided on who must be consulted as a minimum, while leaving flexibility for proponents to consult more broadly if desired.

Consultation regarding heritage matters should be with Aboriginal stakeholders who have the right to speak for country, i.e. people who have significant interest in the area, place or object (Traditional Owners). In regions with determined Native Title interests, it should be the role of the PBC/RNTBC to identify individual members to be consulted with and to collectively represent the full membership during review of statutory applications.

In regions where Native Title interests have yet to be determined, consultation should be undertaken with any Native Title claimant group which has successfully passed the registration test.

In areas where there are no registered Native Title Claimants, consultation should be with recognised Traditional Owner groups.

We endorse and reiterate the statement in the CME response that Aboriginal stakeholders are consulted regarding heritage management matters, whilst the Minister retains decision making authority with regard to land use.

3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?

Rio Tinto is unaware of any recent instance in which an honorary warden has been appointed. The Act appears to be functioning without the appointment of honorary wardens.

Updated legislation should include processes which foster agreed and negotiated outcomes between Aboriginal people and other interested parties. Rio Tinto suggests that honorary wardens should only be required if all other avenues of negotiated outcome have failed.

4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?

#### **ACMC**

We note that the legislated requirement for an appointed member with specialised experience in anthropology is often unfulfilled. We believe an experienced anthropologist is a necessary

member for the ACMC.

While the functions of the ACMC as legislated are clear, the ability of the committee to fulfil these functions is severely restricted by limitations arising from the ACMC meeting only once a month. We suggest that either some of the functions of the ACMC should be delegated to the Department administering the Act (and that Department be appropriately resourced); or the ACMC should establish regional “sub-committees” with delegated authority to fulfil certain functions (i.e. assessing significance and importance of heritage places within the meaning of the Act for that region). We suggest consideration of any matter related to land use or impacts to heritage sites (current s16/s18 processes) should be retained by a central ACMC, and there should be appropriate mechanisms to ensure consistency and clarity of process.

#### **Minister for Aboriginal Affairs**

Rio Tinto submits that it is appropriate for the Minister to retain the decision making authority with regards to consents under the Act, given the importance of these decisions and associated implications for land use in the State.

#### **Registrar of Aboriginal sites**

The legislated functions of the Registrar are clear however the scale of the workload is reasonably beyond the capacity of one role. Rio Tinto therefore submits that the ability for the Registrar to effectively delegate powers or duties should be considered and clarified to allow effective delegation where appropriate.

5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?

While section 5 adequately describes places and sites which should be protected under the Act, the use of the value terms “importance” and “significance” in identifying a site within the meaning of s5(a) creates unnecessary subjectivity and therefore uncertainty regarding applicability of the Act and regulatory requirements. This has led to a lack of clarity and consistency in the assessment of similar sites by DPLH assessment officers.

Further guidance, clearly defining criteria by which a place’s significance and importance are to be assessed (potentially accompanied by carefully considered and consulted on explanatory notes describing the meaning of identified criteria) would assist to provide certainty and consistency for all interested parties.

7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?

Rio Tinto is supportive of provisions for Declaration of a Protected Area being retained, in recognition that some places and sites are of outstanding importance and need of protection.

8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?

Rio Tinto is supportive of revised legislation setting out a specific process for managing Aboriginal Ancestral (skeletal) remains. Rio Tinto recognises that Ancestral remains are highly

significant to Aboriginal people, and that prompt consultation with the Registrar (or Department) and the appropriate Aboriginal group is necessary. Rio Tinto is also supportive of guidelines being developed, listing all stakeholder parties (including Office of the State Coroner and Western Australian Police Force) and outlining an appropriate process of notification.

If provisions regarding Aboriginal ancestral remains are considered for inclusion in revised legislation, Rio Tinto also suggests that the potential for different processes to be appropriate for in situ remains and accessioned remains is considered.

## 9. What sort of activities that may affect an Aboriginal site should require consent or authorisation?

Activities requiring s16 authority and s18 consent are generally considered appropriate. However, the broad language in s18 may capture low impact activities that are unlikely to affect Aboriginal heritage values. Rio Tinto therefore submits that it would be worthwhile providing further clarity, particularly through the recognition of what low impact activities do not require approval or consent. This would provide greater certainty to proponents and the Department as to when it would be unnecessary use of Departmental, ACMC and Ministerial resources to consider a particular site and proposed activity. The current language of the Act is values based and subjective and on that basis we suggest it is important that the legislation provides clarity on what would constitute unacceptable disturbance.

For example, currently the Aboriginal Heritage Regulations provides for a simple authorisation (via the Registrar) for certain low impact activities which could be drawn on to develop a more clearly defined tiered approach.

In addition, clarity could be provided around the sequencing of approvals for proposed activities including whether a s18 consent can be relied upon for activities for which a s16 authority can be obtained.

## 10. What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?

Rio Tinto supports appropriate criteria being developed in consultation with Aboriginal stakeholders and industry.

Rio Tinto considers that principally an activity should be evaluated by reference to identified heritage values, so that it can properly be considered whether a proposed activity will modify an identified aspect of heritage significance. Any criteria should consider direct and indirect impacts to tangible and intangible heritage values.

## 11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?

Rio Tinto appreciates the difficulties and complexities with managing intangible heritage values and would be interested to be involved in any process that sought to ensure these values are considered through the heritage process in a way that can be managed effectively by proponents.

This includes consideration of dispersed, large-scale Aboriginal heritage values which may extend across several traditional areas and current tenures, for instance line-of-sight between significant points on a song-line.

**12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?**

Rio Tinto submits that the Minister should make decisions regarding consent and authorisation for proposals which impact on Aboriginal heritage values. While Aboriginal Traditional Owners are the correct people to identify heritage values within an area, the decision on the manner in which land use should proceed, balancing the maintenance of cultural heritage values and enabling appropriate state development should rest with the State represented by the Minister.

As stated in 9 above, formal incorporation of a tiered approach to approvals into an updated Act may be worth consideration to reduce resource loads placed on the ACMC and Minister.

**13. To what extent is the current section 18 application process effective and how can it be improved?**

The current s18 application process requires individuals involved to be familiar with the requirements and practical application of the provisions. The standardisation provided by the electronic HIS form and s18 Notice is considered a positive step, however more detail could be provided around the requirements for supporting information.

In relation to:

**Preparing a submission**

The requirement to be a Land Owner (or to have Land Owner authorisation) creates unnecessary difficulties and delay if a s.18 Notice is required to be lodged prior to the grant of tenure appropriate to meet the definition of Land Owner under s18 of the AHA, to allow for the timeframes associated with these processes.

Recent upgrades to AHIS have resulted in a change to the way sites are presented to public users of AHIS. Under current process, not all Other Heritage Places (OHP) are visible to the public on AHIS. Lodged OHPs are required to be subject to statutory approval process in order to use the Land, but there is no clear way to directly access this information until an application is lodged. This creates completely avoidable and costly delays to proponents during the latter stages of an approvals path. Clarification on how the Register is to be maintained and the circumstances in which a 'due diligence' defence can be relied on should be clarified.

**Consideration by the ACMC**

The functionality of the ACMC is severely limited by its infrequent sitting. The nature and scale of development in the state has grown significantly since 1972 when the AHA was enacted. While the ACMC meets for 2 days a month, this is not considered adequate to fulfil the currently legislated responsibilities of that committee.

Please refer to options included in response to question 4 which may also be relevant to this question.

### Approval Tracking

Currently administration of s18 Notices is handled by the DPLH, with additional functions associated with Ministerial sign-off sitting with the Ministers office. Tracking an approval following its consideration by the ACMC is difficult (also, there have been instances where an item was included in the Agenda for a particular ACMC meeting, was not tabled at that meeting, and no advice was provided that a delay had occurred). A live tracking system based on the s18 tracking code provided at time of submission would be useful.

14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?

In the first instance Aboriginal sites within the meaning of s.5 are afforded full statutory protection under the AHA, unless alternative statutory arrangements (under either s.16, s.18 or Aboriginal Heritage Regulations) have been granted. No immediate changes are required.

In addition to the AHA provisions, long term protection of Aboriginal sites which are not subject to alternative statutory arrangements may be managed via several different processes depending on situation. These reflect negotiated and mutually agreed processes and outcomes between Traditional Owner groups and landowners or proponents, and may include heritage protocols, legal contracts, endorsed cultural heritage management plans or Registered Indigenous Land Use Agreements. These matters are between the individual parties as they relate to negotiated outcomes agreed in response to specific activities proposed by a given land owner or business entity. Moves to link these agreements to specific sites or tenure are not recommended.

Should a site or place be assessed as being of outstanding significance, it is recommended that declaration of Protected Area is an existing and appropriate mechanism to ensure ongoing conservation and protection regardless of changes in land ownership or tenure.

15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?

In principle, enforcement of the Act should lie with the Department administering the Act. This requires appropriate oversight by a compliance function.

Rio Tinto submits that it is appropriate for the time period for commencing a prosecution to be limited to ensure compliance and enforcement activity is undertaken in a timely manner and minimise the need for retention of detailed documentation by companies for extended periods.

16. Are the current penalties under the Act adequate? If not, how can they be improved?

Financial penalties under a revised Act should be expressed in penalty units. This would bring a revised Act in line with other recent legislation within Western Australia.

17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?



Rio Tinto recognises that cultural information can be highly sensitive to Aboriginal people and supports their ability to choose whether to disclose this information to the Department or other third parties if there is no immediate threat or risk to those places or objects. However once a risk is identified to heritage values (e.g. by a proposed development) then it is in all parties' best interest to ensure that adequate information is shared in a culturally appropriate manner. This ensures that all significant elements are considered in project planning and development phases, with the aim of ensuring the best possible heritage conservation and/or management outcome.

There should be no culpability associated with unknowingly impacting heritage places where reasonable processes to consult have been followed. If there are clear cultural reasons for not sharing information, then a defence should continue to be provided, including for proponents.

18. Are the criteria for assessing the significance of sites under section 39 (2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?

Rio Tinto considers the criteria are adequate in as much as they capture a range of site types which might reasonably be considered significant and important to Aboriginal Traditional Owners. At a legislative scale they provide breadth and flexibility to identify a range of Aboriginal sites within any given landscape.

However functional interpretation of these criteria and a clear, consistent process for completing a significance assessment are completely lacking. Rio Tinto supports this matter being considered independent of legislative reform as an immediate priority of the Department.

Greater clarity on this process is supported by Rio Tinto. In particular, there is clear need for ratified Guidelines for the preparation of significance assessments to be developed. The current situation, where there is no Departmental support or guidance as to the form the significance assessment should take, has left Aboriginal informants, heritage practitioners and proponents operating in a vacuum as to the criteria which should be used to identify and assess significance and the criteria staff use to complete Departmental assessments prepared to inform the ACMC in its decision making capacity.

The current government process lacks appropriate transparency. For example, currently not all heritage places are considered sites within the meaning of s.5. The current government process results in some heritage places being recommended to the ACMC as sites within the meaning of section 5 and others not, without any guidance as to the criteria by which the place was assessed and how the Departmental recommendation was arrived at.

Further, if legislation is to continue to include value terms relative to the identification of sites (e.g. significance and importance), then clear guidelines defining what needs to be considered in assessing those values are strongly supported.

In addition, significance assessments should incorporate both Aboriginal opinion and technical specialist opinion. Criteria to be considered during a significance assessment process should be developed using criteria used at the national level as a starting point, although these could be



refined if required.

19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register?

The process to report and nominate an entry should be simple and straightforward for non-technical experts to be able to follow and undertake.

The process to assess a place should involve clear and transparent assessment against section 5 of the Act. The process to remove an entry from the Register should also involve a clear and transparent assessment of section 5 as well as inclusive consultation with affected parties (Traditional Owners, land owners).

In instances where insufficient information has been provided to inform consideration of a place within the meaning of s5 it is strongly recommended that further information be requested rather than consideration of that place progressing.

20. What do you think is missing from the Act?

Rio Tinto reiterates its support for appropriate consultation with the holders of cultural knowledge and therefore refers to its earlier response to Question 2 in respect of consultation processes and any requirement for consultation being clearly defined under the Act.

In their current form, Consents granted under s.18 are not transferable. Consistent with other approvals, it is submitted that any Consent issued under s.18 of AHA should be transferable with the underlying tenure and between related business entities if all other aspects of the approval remain consistent.

Further to this, clarity is required on the mechanism for authorisation of indirect impacts outside a proponent's tenure boundary.

Rio Tinto also notes that functional implementation of amended legislation will require:

- Administrative changes within the Department. New systems may need to be developed and must be fit for purpose.
- A clear process of change management and transitional provisions.
- Support of functional Regulations and clear Departmental guidelines.
- Adequate resourcing within the Department administering the Act.