

27 February 2018

Native Title Unit  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Sir/Madam

### **RESPONSE TO THE NATIVE TITLE ACT 1993 (CTH) REFORMS OPTIONS PAPER**

Rio Tinto welcomes the opportunity to comment on the Attorney-General's Department proposed review of the *Native Title Act 1993* (Cth) (**Native Title Act**), and the November 2017 Options Paper for proposed reforms (**Options Paper**).

Consistent with the Government's view, Rio Tinto considers that statutory reform has the potential to enable native title holders to better unlock the economic development opportunities that accompany the recognition of native title, and that reform is necessary in some cases to provide certainty for all actors in the native title system.

Rio Tinto supports the submissions that have been made by the Mineral Council of Australia and the Chamber of Mines and Energy (WA).

This Rio Tinto submission is meant to be read in conjunction with the MCA and CME submissions. The observations and recommendations in this submission are derived from Rio Tinto's long-term and comprehensive engagement with Traditional Owners across Australia.

#### **About Rio Tinto**

Twenty two years ago, a new direction for engagement with Indigenous Australians was deliberately set for Rio Tinto. Rio Tinto broke with convention as the first miner to grasp the spirit of reconciliation and move to understand and apply the newly introduced Native Title Act. It was the right thing to do and resulted in more effective engagement with Aboriginal and Torres Strait Islander people.

Rio Tinto now has more than 30 land use agreements with Indigenous groups spread across Australia. For Traditional Owners, those agreements acknowledge connection to country and provide a sustainable economic foundation; for Rio Tinto, they provide certainty to be able to plan and operate our business for the long term. Our agreements are world-leading and intergenerational, having been derived from extensive dialogue, bipartite research and considerable goodwill from all parties during complex and often tough negotiations. In collaboration with the Centre for Social Responsibility in Mining at the University of Queensland, some of our agreement experience has been publicly shared in the Rio Tinto publication *Why Agreements Matter*: [http://www.riotinto.com/documents/Rio\\_Tinto\\_Why\\_Agreements\\_Matter.pdf](http://www.riotinto.com/documents/Rio_Tinto_Why_Agreements_Matter.pdf)

#### **COMMENTS AND RECOMMENDATIONS**

In relation to the proposals and questions raised in the Options Paper, this submission provides additional comment in respect of three areas:

1. Option E6 regarding the disregarding of historical extinguishment over national, state or territory parks;
2. General commentary on proposals that are designed to "perfect" perceived gaps between the native title system and the existing legal system; and

3. General commentary on the large number of proposals to increase regulation and governance requirements of PBCs.

### **Support for disregarding historical extinguishment over National, State and Territory parks**

Item 6 in Attachment E of the Options Paper proposes the introduction of a new section in the Native Title Act allowing for historical extinguishment over areas of national, state or territory parks to be disregarded, where the parties agree, for the purpose of making a native title determination. It is anticipated that by disregarding such historical extinguishment, more land will be available for positive determinations of native title and to provide additional economic benefits to Traditional Owners.

This proposal was initially included as part of the suite of amendments contained in the *Native Title Act Amendment Bill 2012* (Cth) which did not ultimately proceed. Rio Tinto understands that proposal E6 is proposed to operate with the consent of all parties, and submits that it is appropriate that this includes parties who hold or who previously held interests in the relevant area.

In most cases the granting, vesting or reserving of land by the Commonwealth, States or Territories for the purposes of environmental conservation, for example as a national park, is inconsistent with native title and extinguishes any native title that exists in the relevant area. Interests have been granted on the basis that native title had been extinguished.

Rio Tinto supports the principles in proposal E6 in the Options Paper, and notes that further consideration must be given to how third party interests will be preserved where extinguishment is disregarded and how compensation obligations and entitlements may be affected by any proposal to disregard historical extinguishment over these areas. Further consideration must also be given to the application of any amendment to existing determinations.

The right to compensation (for impacts on native title by valid and invalid acts) already exists in the Native Title Act. However, until the judgements in *Timber Creek* (the Ngaliwurru and Nungali Peoples' native title compensation claim in the Northern Territory), there has been no judicial guidance on how native title compensation would be assessed by Australian courts.

While the Timber Creek judgement and appeal judgement are informative, the nature of the compensable acts in that case are limited. Much more case law is required to provide real guidance to industry on native title compensation.

In the above context, Rio Tinto supports E6, and welcomes the opportunity to comment further on any proposed amendments in the interests of ensuring certainty for all parties.

### **The Native Title Act forms part of the native title system, but is not the whole system**

Core to Rio Tinto's approach is that the Native Title Act is not the beginning and end of the native title system in Australia.

Rio Tinto recognises that Aboriginal and Torres Strait Islander people in Australia have been disadvantaged and dispossessed, and that they have a special connection to land and water. We understand that genuine recognition and respect is essential to working together, but that the native title claim and determination process set out in the Native Title Act is only part of the overall framework of Indigenous recognition and reconciliation. Traditional connection can be, and in most instances is, broader than native title as recognised in Australian law.

The Options Paper identifies a number of options to amend the Native Title Act and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSU Act**) to address perceived deficiencies in the Acts<sup>1</sup>, which may duplicate or seek to replace the operation of the existing Australian law. For example, principles of agency are covered by contract law, fiduciary duties by equity and good governance by

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<sup>1</sup> For example, Options A5, B1, F7, F8, F9

corporations law; additionally, in many jurisdictions, the State Attorney-General has oversight of charitable trusts on behalf of the people<sup>2</sup>.

Figure 1 provides a representation of the native title system, showing the many various components, including the Native Title Act, that comprise and influence the operation of the system.

The native title system, as it currently operates, allows Traditional Owners, States and proponents to draw from a large body of law, principles and International influences.

The system allows parties to respect the lore, custom and goals of each Traditional Owner group, the nature of the project or Future Act being negotiated and the context of that negotiation<sup>3</sup>.

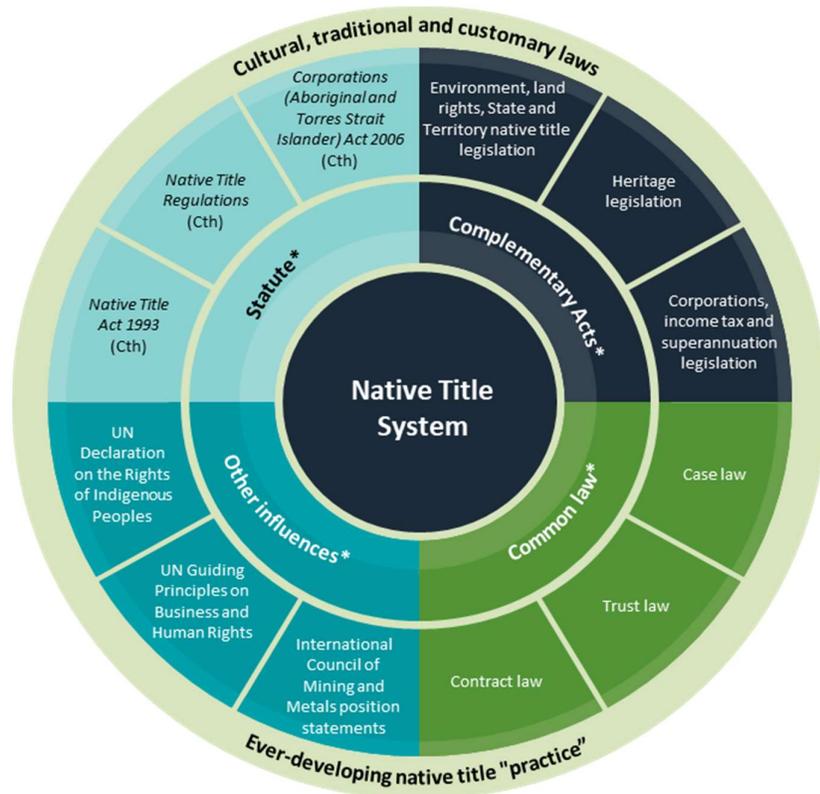
The Native Title Act is necessary to ensure that the central tenets of native title are upheld. However, attempts to codify the system risk a rigid “one-size-fits-all” approach which does not permit tailored arrangements to maximise the economic, employment and cultural opportunities for the many First Nations within Australia.

Rio Tinto is of the view that, as far as practicable, the Native Title Act should deal only with those things that are specific to the recognition and interaction of native title rights and interests and otherwise operate in a manner that complements the broader Australian legal system.

### Support for Prescribed Bodies Corporate

The Options Paper references a number of issues relating to the effective operation and oversight of Prescribed Bodies Corporate<sup>4</sup>. In order to address these issues, the Options Paper proposes a number of regulatory reforms to the Native Title Act and the CATSI Act, including some that create additional record keeping<sup>5</sup> and process requirements<sup>6</sup>, with the aim of increasing good governance<sup>7</sup> of Prescribed Bodies Corporate.

Rio Tinto agrees that good governance is essential for Prescribed Bodies Corporate to effectively manage and benefit from the native title rights and interests they hold on trust or as agent for common law holders.



**Figure 1: Native title system is comprised of legislation, common law and a number of “soft law” influences**  
 (\*NB: the examples above are intended to be inclusive, rather than an exclusive list)

<sup>2</sup> For example, *Charitable Trusts Act 1967 (WA)*, *Charitable Trusts Act 1993 (NSW)* and *Trusts Act 1973 (Qld)*

<sup>3</sup> For example, does the Traditional Owner group have a number of other agreements with structures in place; does the group wish to use these or create new structures; are there already economic diversification projects that they wish to have supported?; what resources and other services are available to the group?

<sup>4</sup> Options Paper, pp 19-20

<sup>5</sup> For example, Options F7 and F8

<sup>6</sup> For example, Option F3

<sup>7</sup> Such as clear decision making processes and transparency to members

However, additional regulatory burdens on Prescribed Bodies Corporate risk adding further pressures to corporate entities that may struggle to meet their current obligations.

Rio Tinto endorses the ten principles for Australian Government policy makers as set out in The Australian Government Guide to Regulation<sup>8</sup>, and supports the first principle that “regulation should not be the default option for policy makers”.

Once native title has been recognised under the Native Title Act, the Act requires common law holders to incorporate and nominate a Prescribed Body Corporate to hold their native title<sup>9</sup>. Early investment in Indigenous corporations (including through the native title claim phase) may make the transition to Prescribed Bodies Corporate easier and more efficient for the common law holders.

Rio Tinto would welcome consideration of alternative options beyond those discussed in the Options Paper to support good governance of Prescribed Bodies Corporate and increase positive outcomes for their members, such as:

- Increased and early opportunities for capacity building and good governance training;
- Improved communication or refinement of existing advice, complaint and escalation processes available to members of Prescribed Bodies Corporate for concerns (such as questions of membership entitlement) linked to the operation of the native title system; and
- Further consideration of the Indigenous Community Development Corporation model.

Other innovative solutions may already exist in agreements that have been negotiated between Traditional Owner groups and Governments or proponents. For example, in many of Rio Tinto's more recent land access agreements, we agreed that the Traditional Owners would establish a corporation to represent their interests in the implementation of those agreements, whether or not the Traditional Owners have determined native title. It is yet to be seen whether Traditional Owners consider that this improves post-determination outcomes for their group.

It is in the interest of all parties working within the native title system to have effective Prescribed Bodies Corporate – including Traditional Owners, proponents and Governments. This is particularly true as we move to the “post-determination world”, where Traditional Owners are increasingly represented by Prescribed Bodies Corporate. Without effective representation, Traditional Owners risk missing out on the full range of economic development opportunities.

Additional regulation of itself is unlikely to build capacity and improve the effectiveness of Prescribed Bodies Corporate. Prescribed Bodies Corporate would be required to work to comply with a regulatory burden, instead of working with proponents and others to secure future investment into Australia for their communities and future generations. Without a more holistic approach, these proposals risk further delays to realising economic outcomes from native title.

## CONTACT

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Yours sincerely



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<sup>8</sup> Department of Prime Minister and Cabinet, The Australian Government Guide to Regulation, Commonwealth Government, 2014

<sup>9</sup> Section 56, Native Title Act