

16 May 2008

Mr Mick Geaney
Assistant Director, Licensing
Economic Regulation Authority
Level 6, Governor Stirling Tower
197 St Georges Terrace
PERTH
WA 6000

Dear Mr Geaney

Draft Recommendation Report: Review of Water Services Licences

Rio Tinto Iron Ore WA (RTIO) appreciates the opportunity to comment on the Draft Report. Please find our submission enclosed. An electronic version was sent to your office on 16 May 2008.

RTIO is supportive of the objective of simplifying the administration and management of the licensing system. However, the submission notes that unless the Review recognises the proposed changes to be incorporated in the immanent Water Services Bill and appropriately synchronises its recommendations with the new legislation, there is a danger that the objectives of clarity, consistency and minimisation of compliance costs may not be achieved.

The submission also refers to the recently supplied Draft Water Services Operating Licence for Hamersley Iron. Specifically, we are concerned about a mismatch between the reporting periods for both asset management reporting and the operational audit in the Draft Licence and the period agreed in correspondence from the ERA dated 23 August 2007. It appears that the agreed period still falls within the bounds envisaged by the ERA for both of these in the Draft Report. Your response to this specific issue would be greatly appreciated.

Should you require any further information about the submission, please contact Damian Stevens, Engineering Manager, Pilbara Iron on 08 9143 5508 or damian.stevens@riotinto.com; or Mike Harold, Principal Advisor Water Policy, RTIO Expansion Projects on 08 9366 5641 or mike.harold@riotinto.com.

Yours sincerely

Dennis B Gibson
General Manager Water Resources
RTIO Expansion Projects

Bennie Smith
A/General Manager Utilities
Pilbara Iron

RIO TINTO

IRON ORE

**Submission to The
Economic Regulation Authority**

***Draft Recommendation Report: Review of Water
Services Licences***

16 May 2008

1. Rio Tinto Iron Ore and water

Rio Tinto Iron Ore (RTIO) has operations and projects on five continents. It is the world's second largest iron ore producer and contributes 22% of seaborne iron ore trade. RTIO is headquartered in Perth.

RTIO in the Pilbara operates three ports, eleven mines, and owns, operates and maintains one of the largest privately owned heavy freight rail networks in the world. RTIO also includes a Hismelt plant in Kwinana, Western Australia, which is a revolutionary process that converts iron ore fines into high quality pig iron.

Since 2003 RTIO has committed over US\$7.5 billion in the Pilbara and further investment is planned. RTIO's current investment and expansion program will see us effectively double export capacity to 220 Mtpa by 2009, ramping up to 320 Mtpa capacity by 2012. We have also provided a roadmap towards achieving global production of more than 600 Mtpa, of which the Pilbara could produce 420 Mtpa.

In 2006, RTIO produced 150.1 million tonnes¹ of iron ore from its Pilbara mines, representing approximately 61% of total iron ore exports from Australia in 2006. In 2007 RTIO produced 163.6 million tonnes² from its Pilbara operations.

RTIO is a significant contributor to Australia and Western Australia's economic health, contributing approximately US\$5.8 billion in export revenue in 2006. In Western Australia RTIO has approximately 6,500 employees and a contracting workforce of over 6,000³.

RTIO is acutely aware of the need to carefully balance economic, social and environmental considerations to ensure our ongoing success. Our aim is to deliver more value from our business with less impact on the environment and the community. This commitment to sustainable development is formalised within a corporate governance framework that is underpinned by RTIO's statement of business practice, *The Way We Work*.

RTIO's creation of the position of General Manager Water Resources supported by five dedicated water managers is clear recognition of the importance of water resource management as a key part of our commitment to sustainable development both in WA and across our global operations. In addition, RTIO employs more than 20 Hydrogeologists, over 10% of Western Australia's expertise in this field.

In WA, RTIO sources approximately 90% of its water needs through self-supply. Future access to ore bodies depends on our good performance and reputation in managing water responsibly and sustainably now and into the future.

RTIO (through Hamersley Iron Pty Ltd) is a licensed Water Service provider, providing potable water and wastewater services to Dampier, Tom Price and Paraburdoo and in this capacity will be directly effected by any changes to the structure and content of water services licences. In addition, a key element of RTIO's Water Strategy is to engage in the broader policy debate and the development of policy in the State at a strategic level.

RTIO therefore welcomes the opportunity to provide comments on the *Draft Recommendation Report: Review of Water Services Licences* and submits the

¹ Total production (100%)

² Total production (100%)

³ RTIO Media Statement 16 March 2008.

following comments to the ERA for consideration. It is also noted that the *Draft Water Compliance Reporting Manual* was released by the ERA in conjunction with the Recommendations Report, and recognising that there are some areas of direct overlap, comments provided in this submission should also be considered with regard to the *Draft Water Compliance Reporting Manual*.

2. Key Issues for RTIO on the Draft Report

The key issues for RTIO with regard to the *Draft Recommendation Report: Review of Water Services Licences* are as follows:

With regard to general comments on the Draft Report:

- RTIO considers that it would be appropriate for the ***Review of Water Services Licences to be finalised following the passage of the Government's proposed Water Services Bill***, in order to maintain clarity and consistency, and to minimise compliance costs to licensees;
- RTIO considers that **recommendations for policy change or for new legislative powers** are more appropriately considered in the context of policy and legislative changes rather than in this Draft Report.

With regard to specific comments on relevant Draft Report recommendations:

- RTIO considers that it is critical to establishing clarity for the licensee that the **definitions** used within the licence align to, and are consistent with, those used in the principal legislation. There is no evidence provided in the Draft Report to suggest that this process of alignment has been undertaken;
- Regarding **non-exclusivity of operating areas** (Recommendations 3 and 53), RTIO stresses the need for:
 - impacts on the financial and technical capacity of incumbent providers to be closely considered alongside the financial and technical capacity of the new provider when considering a new licence in or adjacent to an existing licensed operation; and
 - an open and transparent consultative process prior to such a decision. Written submissions to this process, as well as a fully documented account of the ERA's licensing decision and the reasons for it should be published and subject to an appropriate appeal mechanism.
- Regarding the proposal for a **MoU with the Department of Health for potable drinking water** (Recommendations 15), RTIO does not support this recommendation in the absence of key information regarding the proposed MoU with the Department of Health, the process involved and the relative merits of the MoU arrangements over the current form of regulation of this aspect of licensing. RTIO strongly recommends that both the ERA and the Department of Health initiate discussions on this proposal with licensees before the ERA makes any changes to licences in this regard.
- Regarding **information powers** (Recommendations 20), RTIO considers that it is inconsistent with the approach taken elsewhere in the Draft Report to retain and broaden the clause regarding information, when a clear and equivalent power already exists under s51 of the *Economic Regulation*

Authority Act 2003. RTIO notes the importance of retaining powers in the Act regarding information considered to be commercial in confidence.

- RTIO believes that the Authority needs to consider the following issues with regard to the **proposed compliance clause** (Recommendation 32), before it can determine its response to the recommendation in the Draft Report:
 - What legislation is regarded as “applicable legislation”?
 - What is the reason for the Authority assuming this role?
 - How would the Authority be made aware of these breaches?; and
 - Does the ERA have the authority and expertise to apply and regulate all the statutory powers included by the change?
- RTIO seeks further clarification on whether the Authority intends to apply the clause on **terms and conditions of customer contracts** (Recommendation 33) to Hamersley Iron.
- RTIO strongly considers that that the proposed new clause to enable the Authority to **direct a licensee to publish any information it considers relevant** (Recommendation 51) is likely to result in high and unpredictable compliance costs if this proposed power is left unspecified and open-ended. Any power to direct the publishing of information needs to clearly and expressly provide for:
 - Defined, ongoing, pre-agreed requirements to publish; and
 - An appropriate right of appeal against a direction to publish information (such as to the State Administrative Tribunal).
- RTIO does not support the recommendation that **annual fees** be introduced for water services licences (Recommendation 51). RTIO considers that there is no obligation or policy imperative for the introduction of such fees and that their introduction would be counter to the Review's objective of reducing the regulatory burden and compliance costs on business.

With regard to other issues related to the Draft Report:

- RTIO recommends that the **Draft Water Services Operating Licence** for Hamersley Iron be amended to extend the **asset management reporting period** to 36 months, in accordance with correspondence from the ERA dated 23 August 2007;
- RTIO recommends that the **Draft Water Services Operating Licence** for Hamersley Iron be amended to extend the **operational audit reporting period** to 36 months, in accordance with correspondence from the ERA dated 23 August 2007;

The above issues are considered in detail in Section 4 and 5 of this submission.

3. Background: RTIO's role as a water service provider

As noted, RTIO (through Hamersley Iron Pty Ltd) is licensed by the ERA as a Water Service provider, providing potable water and wastewater services to Dampier, Tom Price and Paraburdoo. Pilbara Iron, a division of Rio Tinto, is the asset manager for the water supply schemes operated by Hamersley Iron.

3.1 Hamersley Iron as a potable water provider.

Hamersley Iron is classified by the ERA as a small potable water provider.⁴ Potable water for Paraburdoo and Tom Price is sourced from artesian bores, while the potable water supply for Dampier is sourced from bulk water supply from the Water Corporation.

In 2006-07, Hamersley Iron supplied a total of 3,617,077 kL of potable water to 2,402 connections via 106 kms of water supply mains⁵.

3.2 Hamersley Iron as a wastewater service provider.

Hamersley Iron is classified by the ERA as a small sewerage provider.⁶ Hamersley Iron operates a total of 85km of sewer mains, the longest sewer mains of any of the licensees classified by the ERA as small sewerage suppliers.⁷

4. General comments on the Draft Report and Review

This submission does not address all the recommendations of the Draft Report, as many of these either do not have a specific application to Hamersley Iron as a licensee, or are likely to have negligible impact.

This submission addresses the following key issues with regard to proposed changes to water services licences, as identified by the Draft Report:

- Imperative and timing of the Review of Water Services Licences;
- Matters relating to policy change and new legislative powers;
- Definitions;
- Sole provider operating areas;
- Asset management;
- Operational audit;
- Potable water quality (proposed MoU with the Department of Health);
- Information;
- Industry codes (Compliance);
- Terms and conditions of customer contracts;
- Publishing information; and
- Licence fees.

⁴ Economic Regulation Authority *Water, Wastewater and Irrigation Performance Report 2007* p27

⁵ Economic Regulation Authority *Water, Wastewater and Irrigation Performance Report 2007* p27

⁶ Economic Regulation Authority *Water, Wastewater and Irrigation Performance Report 2007* p44

⁷ Economic Regulation Authority *Water, Wastewater and Irrigation Performance Report 2007* p44

4.1 Imperative and timing of the Review of Water Services Licences.

RTIO is supportive of the objective of simplifying the administration and management of the licensing system, as this is likely to streamline and minimise the compliance costs borne by water services licensees.

RTIO notes that the Government has clearly articulated its intention to introduce new legislation in 2008, both for water services and for water resources management. The planned program of legislation reform is being developed based on significant and substantial policy changes that have taken place in water resources management over a number of years and which tie in closely to the national water reform agenda.

The extent of proposed change in the industry highlights the importance to ensure consistency in changes to policy and legislation in order to maintain clarity and confidence amongst stakeholders in the water sector.

Given the Draft Report does not clearly articulate any major imperative or urgency for the Review, it would seem pre-mature to be amending the structure, and in some cases the content of licences, without having a clear view as to the impact of impending legislative change.

The concern is that recommended changes in the Draft Report may need to be reconsidered as a result of the proposed changes to water services legislation, and this would entail compliance costs for both licensees and the Authority.

RTIO considers that it would be appropriate for the *Review of Water Services Licences* to be finalised following the passage of the Government's proposed *Water Services Bill*, in order to maintain clarity and consistency, and to minimise compliance costs to licensees.

4.2 Matters relating to policy change and new legislative powers.

In its publication *Best Practice Utility Regulation* (2007), the ERA noted a clear preference from stakeholders for a regulatory system that provides "...a clear delineation of responsibilities, with the Government being responsible for regulation/licensing policy and the Authority responsible for implementing licensing policy."⁸ Implicit in this publication was an acceptance that regulation management and regulation policy should be kept separate in the interests of best practice utility regulation.

However, in the Draft Report there appears to be some recommendations that cross over from matters relating to the better administration and management of the licensing regime to recommendations for policy change or for new legislative powers. Some recommendations advocate new powers which may require alterations to the principal Act, and it is RTIO's view that it is more appropriate for these matters to be considered as part of the package of reforms in the proposed *Water Services Bill*.

⁸ Economic Regulation Authority, *Best Practice Utility Regulation* (2007), pp7-8

RTIO considers that recommendations for policy change or for new legislative powers are more appropriately (and consistent with best practice utility regulation) considered in the context of policy and legislative changes rather than in this Draft Report.

5. Specific comments on relevant Draft Report recommendations and findings

5.1 Definitions

The Draft Report sets out definitions for numerous terms that are intended to be included in the State Government's proposed Draft Water Services Bill. RTIO understands that definitions under the proposed Draft Water Services Bill are yet to be finalised.

RTIO considers that it is critical to establishing clarity for the licensee that the definitions used within the licence align to, and are consistent with, those used in the principal legislation. There is no evidence provided in the Draft Report to suggest that this process of alignment has been undertaken.

5.2 Sole provider operating areas

Recommendations 3 and 53 concern the issues of non-exclusive operating areas and sole provider status. The following comments apply to both recommendations.

There is no indication in the Draft Report of the approach the ERA intends to use with regard to the granting of an additional licence, where this will have an impact on the financial and technical capacity of the incumbent provider. As these are the key considerations for the Authority in the initial granting of the licence under the *Water Services Licensing Act 1996*, it is critical that the impacts on the financial and technical capacity of incumbent providers be closely considered alongside the financial and technical capacity of the new provider.

For example, RTIO notes that there may be significant technical difficulty with non-RTIO providers being able to provide water or wastewater services to "customers" within our historical licence areas, particularly with regard to the provision of water services to Tom Price and Paraburdoo. In these schemes, water supplies to the towns and mines are linked. In both cases, the mine supplies can support town supplies and vice versa.

It is also critical that an open and transparent consultative process be undertaken prior to a decision being made to grant a new licence in or adjacent to an existing licensed operation. Written submissions to this process, as well as a fully documented account of the ERA's licensing decision and the reasons for it should be published and subject to an appropriate appeal mechanism.

With regard to Recommendations 3 and 53, RTIO stresses the need for impacts on the financial and technical capacity of incumbent providers to be closely considered alongside the financial and technical capacity of the new provider when considering a new licence in or adjacent to an existing licensed operation.

RTIO also stresses the need for an open and transparent consultative process prior to such a decision. Written submissions to this process, as well as a fully documented account of the ERA's licensing decision and the reasons for it should be published and subject to an appropriate appeal mechanism.

5.3 *Asset Management*

Recommendation 12 will require the licensee to comply with guidelines issued by the ERA. Audit guidelines were published by the ERA in September 2006. Hamersley Iron currently complies with these Guidelines.

The discussion of this issue indicates that the Authority may notify the licensee in writing that the asset management report can be provided more or less frequently than every 24 months. It is noted that the Draft Water Services Operating Licence for Hamersley Iron, provided by the ERA proposes a 24 month period for licence audits. However, the ERA has already granted Hamersley Iron an extension to 36 months, detailed in correspondence dated 23 August 2007.

RTIO recommends that the Draft Water Services Operating Licence for Hamersley Iron be amended to extend the asset management reporting period to 36 months, in accordance with correspondence from the ERA dated 23 August 2007.

5.4 *Operational audit*

Recommendation 13 will require the licensee to comply with guidelines issued by the ERA. Joint guidelines for reporting on operational and performance audits were published by the ERA in September 2006. Hamersley Iron currently complies with these Guidelines.

The discussion of this issue indicates that the Authority may notify the licensee in writing that the operational audit reporting requirements can be provided more or less frequently than every 24 months. It is noted that the Draft Water Services Operating Licence for Hamersley Iron, provided by the ERA proposes a 24 month period for licence audits. However, the ERA has already granted Hamersley Iron an extension to 36 months, detailed in correspondence dated 23 August 2007.

RTIO recommends that the Draft Water Services Operating Licence for Hamersley Iron be amended to extend the operational audit reporting period to 36 months, in accordance with correspondence from the ERA dated 23 August 2007.

5.5 Potable water quality

Recommendation 15 will require that, where a licence intends to provide potable water, they be required under the licence to enter into a Memorandum of Understanding (MoU) with the Department of Health, with a number of required provisions.

It is noted that the current Hamersley Iron licence requires compliance with the 1987 Drinking Water Guidelines, and Hamersley Iron complies with these requirements.

Discussions to date with the Department of Health have indicated a requirement for a drinking water management plan. Hamersley Iron has completed this requirement.

RTIO considers that the Draft Report provides limited information regarding the proposed MoU with the Department of Health, the process involved and the relative merits of the MoU arrangements over the current form of regulation of this aspect of licensing. RTIO does not support this recommendation in the absence of such information. RTIO would be concerned if this recommendation was adopted before discussions on this proposal with both the ERA and the Department of Health had taken place.

RTIO does not support this recommendation in the absence of key information regarding the proposed MoU with the Department of Health, the process involved and the relative merits of the MoU arrangements over the current form of regulation of this aspect of licensing. RTIO strongly recommends that both the ERA and the Department of Health initiate discussions on this proposal with licensees before the ERA makes any changes to licences in this regard.

5.6 Information

Recommendation 20 requires that the present information clause within the licence be broadened to include the provision of any relevant information that the Authority may require in connection with its functions under the Act. The Authority already has these powers with regard to the provision of information under Part 6 (especially s51) of the *Economic Regulation Authority Act 2003*.

Elsewhere the Draft Report recommends deletion of clauses within the licence where a clear and equivalent power exists under the Act. This has not been the approach taken with regard to information powers and it appears that this is inconsistent with the intent of the Draft Report.

RTIO notes that the ERA's information powers are broad, if its powers to report on referral are considered. It is therefore feasible that a broad power to require information may include information regarding water sources that could be considered commercial in confidence. RTIO notes that information considered to be commercial in confidence would be covered by s55 of the Act.

RTIO considers that it is inconsistent with the approach taken elsewhere in the Draft Report to retain and broaden the clause regarding information, when a clear and equivalent power already exists under the *Economic Regulation Authority Act 2003*. RTIO notes the importance of retaining powers in the Act regarding information considered to be commercial in confidence.

5.7 Industry codes (compliance)

Recommendation 32 proposes that the clause on industry codes be replaced by a new clause requiring compliance with any applicable legislation, and enabling the ERA to direct the licensee to:

- Correct the breach of any applicable legislation;
- Prevent the breach of any applicable legislation occurring again;
- Specify a time limit within which action must be taken.

This appears to be a significant increase in the ERA's compliance powers.

It is noted that the role of the existing licence is as an instrument to regulate for good service standards, not licence compliance for its own sake. The Authority therefore needs to provide more information on, and justification for, this recommendation. Specifically, the ERA should specify:

- What legislation is regarded as "applicable legislation"? Does this extend to *Health Act, Environmental Protection Act*, other water acts (eg *Country Areas Water Supply Act, Country Towns Sewerage Act*)?
- What is the reason for the Authority assuming this role?
- How would the Authority be made aware of these breaches?
- Does the ERA have the authority and expertise to apply and regulate all the statutory powers included by the change?

RTIO believes that the Authority needs to consider the following issues with regard to the proposed compliance clause, before it can determine its response to the recommendation in the Draft Report:

- **What legislation is regarded as "applicable legislation"?**
- **What is the reason for the Authority assuming this role?**
- **How would the Authority be made aware of these breaches?; and**
- **Does the ERA have the authority and expertise to apply and regulate all the statutory powers included by the change?**

5.8 Terms and conditions of customer contracts

The Draft Report notes that the discussion in section 5.33 does not relate to Hamersley Iron and a few other licensees. However, it is unclear from Recommendation 33 and the accompanying discussion whether this recommendation is intended to apply to Hamersley Iron in the future.

RTIO seeks further clarification on this issue.

RTIO seeks further clarification on whether the Authority intends to apply the clause on Terms and conditions of customer contracts to Hamersley Iron.

5.9 Publishing information

Recommendation 51 proposes that a new clause be included in the licence to enable the Authority to direct a licensee to publish any information it considers relevant in connection with the licence or the performance of the licensee's obligations under the licence. The recommended change will enable the licensee to notify the Authority and seek review of this direction where the information is considered confidential.

On the basis of the limited discussion provided in the Draft Report, it appears that the proposed clause will establish an unclear, unspecified and open-ended power that appears to be contrary to the good regulatory practice of requiring defined, ongoing, pre-agreed requirements to publish. RTIO highlights that the ERA has stated in its publication *Best Practice Utility Licensing* (2007) that "Stakeholders are likely to view any licensing arrangements that lack the consistency and predictability ... as higher risk, which then impacts on regulatory certainty..."⁹ This publication also states:

*"To minimise regulatory risk, a licensor should ensure its decisions are predictable, consistent, timely, transparent and based on effective consultation."*¹⁰

RTIO considers that the proposed change could result in high and unpredictable compliance costs if this proposed power is left unspecified and open-ended.

Furthermore, notification by the licensee to the Authority to seek review of the direction (where the information is considered confidential) does not enshrine any reasonable appeal rights with regard to the direction (such as to the State Administrative Tribunal). This is not consistent with the ERA's stated objectives for the need for "an independent, accountable and transparent statutory authority"¹¹ In addition, the ERA's publication *Best Practice Utility Licensing* notes:

*"...a licensor also needs to be accountable for its decisions. Accountability is generally achieved by making the licensor's decisions subject to review by an appropriate independent appeals body. The Authority's licensing decisions on gas and water can be appealed to the State Administrative Tribunal"*¹²

It is noted that information considered to be commercial in confidence is already covered by s55 of the *Economic Regulation Authority Act 2003*, and it is expected that this provision would apply to any information to be published at the direction of the Authority under the proposed new clause.

⁹ Economic Regulation Authority *Best Practice Utility Licensing* (2007): p7

¹⁰ Economic Regulation Authority *Best Practice Utility Licensing* (2007): p11

¹¹ Economic Regulation Authority *Best Practice Utility Licensing* (2007): p7

¹² Economic Regulation Authority *Best Practice Utility Licensing* (2007): p7

RTIO strongly considers that that the proposed new clause to enable the Authority to direct a licensee to publish any information it considers relevant is likely to result in high and unpredictable compliance costs if this proposed power is left unspecified and open-ended. Any power to direct the publishing of information needs to clearly and expressly provide for:

- **Defined, ongoing, pre-agreed requirements to publish; and**
- **An appropriate right of appeal against a direction to publish information (such as to the State Administrative Tribunal).**

5.10 Licence fees

Recommendation 51 proposes that annual fees be introduced for water services licences. The ERA recommends that the Government review the water fee structure for providers and amendment to the principal Act and relevant regulations would need to be made.

It is noted that here is no capacity under the *Water Services Coordination Act 1996* to charge an annual licence fee. A prescribed application fee only is applicable.

RTIO considers that, unlike fees and charges in relation to water resource management, which are consistent with obligations of the State under the National Water Initiative (NWI), there is no such obligation or policy imperative for the introduction of annual fees for water services licences.

This issue appears to be outside the scope of the Review and indeed counter to the Review's objective of reducing the regulatory burden and compliance costs on business.

RTIO does not support this recommendation.

RTIO does not support the recommendation that annual fees be introduced for water services licences. RTIO considers that there is no obligation or policy imperative for the introduction of such fees and that their introduction would be counter to the Review's objective of reducing the regulatory burden and compliance costs on business.

For further information in regards to this submission, please contact:

Mike Harold Principal Advisor Water Policy, RTIO Expansion Projects
on 08 9366 5641 or mike.harold@riotinto.com ; or
Damian Stevens Engineering Manager, Pilbara Iron
on 08 9143 5508 or damian.stevens@riotinto.com

Dennis Gibson
General Manager Water Resources
RTIO Expansion Projects

Bennie Smith
A/General Manager Utilities
Pilbara Iron

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