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Serving the Public Interest

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Ms Gail McGowan
Director General
Department of Planning, Lands and Heritage

Via email: AHAreview@dplh.wa.gov.au

Dear Ms McGowan

CONSULTATION – REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972*

Thank you for your correspondence of 11 March 2019 inviting a submission to the review of the *Aboriginal Heritage Act 1972* as part of the second phase of public consultation.

I support moves to strengthen activity in this area, particularly as I believe we have the potential to learn as yet unimagined things from the most ancient of cultures. It is important that Aboriginal heritage is appropriately and effectively recognised, protected and celebrated if Australians of today, as well as future generations, are to learn from our Indigenous communities.

However, it is not my normal practice to prepare submissions to legislative reviews not directly related to the role of the Auditor General, as this can undermine my independence if I choose to audit agencies in relation to the implementation of that particular legislation.

I do nonetheless draw your attention to the relevant findings of our *Ensuring Compliance with Conditions on Mining* reports tabled in the Parliament in 2011 and a follow-up in 2014.

In the September 2011 report the Auditor General found that financial returns to the State from mining activity were well managed but broader environmental and social returns were not well monitored or enforced. Weaknesses in agency practice meant that we could not give assurance that environmental protection and Aboriginal heritage conditions were being met.

Our subsequent follow-up report tabled in Parliament in November 2014, found that the then Department of Aboriginal Affairs (DAA) had introduced significant changes to the way it ensures compliance with conditions under the *Aboriginal Heritage Act 1972*.

DAA had introduced a sound audit and inspection regime for mining operators dealing with significant Aboriginal heritage sites. We found no cases in our sample where operators had failed to comply with their conditions under s18 of the Act.

DAA had also improved its information system, tracking reporting by permit holders more completely than in 2011, when we found little was done. However, the new systems had not yet been fully adopted and integrated.

At the time of this report, a major revision of the Act was expected to be put before Parliament 'soon', which was expected to increase the powers of DAA to act in cases of non-compliance, and also improve oversight. It was envisioned these amendments would increase the power of the Director General to decide on applications regarding heritage sites. In addition, it would also include fast-tracking of some approvals and substantially increased fines and penalties for non-compliance.

I have attached the specific findings from these reports at Appendix 1 and trust these will be taken into consideration when finalising the review of the *Aboriginal Heritage Act 1972*.

Where appropriate, my Office would be pleased to provide any further information to assist your consultation process and to discuss my attached comments in further detail.

Yours sincerely

CAROLINE SPENCER
AUDITOR GENERAL
29 May 2019

Attach

APPENDIX 1 – Relevant Auditor General's findings - *Ensuring Compliance with Conditions on Mining*

The following findings are relevant to the review of the *Aboriginal Heritage Act 1972*:

Ensuring Compliance with Conditions on Mining – Follow-up (19 November 2014)

(Page 22) **There is better oversight of mines with Aboriginal heritage sites, but the Department of Aboriginal Affairs needs to complete system improvements**

DAA has made some significant improvements since 2011, especially in regard to its audit and inspection of mining sites issued with permits under the *Aboriginal Heritage Act 1972*. But these improvements need to continue. This is particularly important as wide-ranging changes to the Act are expected in the near future.

DAA has increased its audit and inspection regime. In 2011 there had been practically no audits or inspections. Now the department expects to carry out 60 audits annually, 30 of which will focus on permits issued under s18 of the Act. This effort is in part resourced by the appointment in 2011 of two compliance officers. Site inspections are also carried out by staff at the department's six regional offices.

In May 2014, the department also introduced a new IT system, the Aboriginal Heritage Electronic Lodgements Program (AHELP) that tracks applications from submission through to Minister's consent. The system deals with all Aboriginal heritage sites, not just those on mining sites. This has streamlined the process of submitting and assessing statutory submissions. However, AHELP does not track an operator's compliance with Aboriginal heritage requirements throughout the life of a project. Minor system and work-flow changes to enable this would enhance DAA's oversight of all sites.

AHELP tracks 'active' s18 applications through to Ministerial consent. Once consent is given they are considered to be 'inactive'. The system is not used to monitor whether permit holders have reported on their activity as required and does not identify which projects are complete. Therefore AHELP cannot report the number of live s18 permits with conditions, or the number that have or have not complied with report back conditions.

Since 2011 DAA has improved monitoring of applications and permits. Section 18 consents with report back conditions should now be electronically flagged to ensure follow up. We found that this process relies on particular staff adding 'bring-up' dates to the record management system. Cases only re-enter the AHELP system after operators fail to reply twice to follow-up letters. This manual double handling increases risk, and fails to utilise the full benefits of the AHELP system.

The AHELP system cost $2 million to introduce but could be improved to track permits from application through their operational phase and into any audit or compliance activity. DAA has agreed to implement these practice and process changes.

DAA expects that wide-ranging amendments to the *Aboriginal Heritage Act 1972* will come before Parliament soon. In part these amendments would increase the power of the Director General to decide on applications regarding heritage sites. In addition it will include fast-tracking of some approvals and substantially increased fines and penalties for non-compliance. Improved information control will be important to manage these changes.

(Page 8 – Agency Response) **Department of Aboriginal Affairs**

The Department of Aboriginal Affairs has undertaken a significant program of reform since 2011 to improve administration under the *Aboriginal Heritage Act 1972* (AHA). This has included:

- A focus on improving transparency, accountability, efficiency and effectiveness of decision-making processes. This has resulted in significant streamlining of business processes, including the implementation of stage 1 of a new electronic lodgement and tracking system (AHELP) in May 2014. It is anticipated that further stages of AHELP will be rolled out in 2014-15 and 2015-16 including electronic tracking of proponent compliance with section 18 conditions by June 2015. This will address the recommendation of the Auditor General's follow-up audit;
- Improving the quality of information provided by and to all stakeholders with a focus on building strong partnerships with Aboriginal people, industry and all levels of government;
- Playing a more strategic role in protecting Aboriginal heritage including the establishment of a dedicated compliance team in 2011 to investigate breaches of the AHA and to monitor compliance with section 18 consent conditions; and
- Drafting of amendments to the AHA which aim to ensure that the legislation remains contemporary.

Ensuring Compliance with Conditions on Mining (28 September 2011)

(Page 22) **DIA has not effectively monitored or enforced compliance with conditions under the *Aboriginal Heritage Act 1972***

The Department of Indigenous Affairs (DIA) has not actively monitored if operators are meeting the conditions placed on them under the *Aboriginal Heritage Act 1972* (AH Act). This means that registered Aboriginal heritage sites could have been lost or destroyed without the State knowing or taking action.

As part of gaining approval to mine, proponents must meet the requirements of Section 18 of the AH Act. This Act aims to ensure that Aboriginal cultural heritage in WA is identified, managed and preserved. Some operators must develop management plans to protect identified Aboriginal heritage sites. These can be archaeological sites housing tools and rock art, or ethnological sites of spiritual, historical or other importance.

As part of administering this activity, DIA keeps a register of identified heritage sites; a register of agreed heritage plans; and a register of who must report against these plans and when. DIA has identified that there are more than 7 000 mining tenements which have heritage sites. About 800 tenements have Section 18 requirements.

We found that DIA has only undertaken inspections of heritage sites when responding to complaints it received, but has taken no enforcement action when it has found non-compliance.

Because DIA has not been actively monitoring compliance with Aboriginal heritage conditions, it does not know the actual incidence of breaches of those conditions. In the last two years, it received 28 complaints related to the impact of mining on Aboriginal heritage. Of these, 21 are either still being investigated or awaiting investigation. Three have been closed with no further action taken and one referred to the State Administrative Tribunal. Three could not be investigated because they were more than 12 months old. The complaints involved alleged removal of rock art, mining within a significant site, building infrastructure on

a significant site and failing to appropriately liaise with traditional owners. Seven cases were self-reported by operators.

DIA did not review all compliance reports required from mine operators in a timely manner. Nor did it effectively follow up those who had not provided reports. Most reports were received late or not at all.

For instance, in 2009 the Minister approved (under Section 18 of the AH Act) 114 applications to develop land on which an Aboriginal heritage site existed. The proponents of 62 of these applications were required to report to DIA on progress and heritage issues but only 28 (45 per cent) have done so. This low level of reporting and the fact that DIA does not review all the reports it receives, reduces DIA's understanding of the levels of operator compliance with conditions.

We also noted that DIA has not been inclined to take action on non-compliance with heritage conditions and that its legal capacity was somewhat restricted:

- DIA has consistently failed to follow up when operators have not submitted progress reports or taken voluntary corrective action when a Section 18 condition has been breached. Non-compliance with conditions could for example be an operator's failure to erect suitable fences to protect a heritage site or, actual damage to a site.
- DIA cannot pursue matters more than 12 months after they have occurred. Three cases in the last two years could not be acted on as a result of this limitation.
- DIA can only take formal action through the courts. It does not have authority to issue fines. However, it has the power to issue warnings and directions, but has not used these powers.

In 2010, DIA began planning for regular inspections. It has filled two permanent positions to operate a compliance unit. It also informed us that it will be seeking increased and improved enforcement powers under its planned review of the AH Act.