

**Aboriginal Cultural Heritage Bill 2020**  
**Submission by Friends of Australian Rock Art Inc. on 9/10/2020**  
<https://consultation.dplh.wa.gov.au/aboriginal-heritage/aboriginal-heritage-bill-2020/>

## **Introduction**

The Department of Planning, Land and Heritage (DPLH) consultation page regarding the Aboriginal Cultural Heritage Bill 2020 (the Bill) states that:

*...This new legislation will replace the outdated Aboriginal Heritage Act 1972 concluding more than two years of consultation with Aboriginal people, industry representatives, heritage professionals and the Western Australian community.*

*The Bill establishes a modern approach to protecting Aboriginal cultural heritage in Western Australia that will reset the relationship between land users and Traditional Owners and transform how Aboriginal cultural heritage is identified, managed and conserved.*

Friends of Australian Rock Art Inc.(FARA) disagrees fundamentally with the premise that the Bill's approach is modern, or that it will positively reset the relationship between land users and Traditional Owners. Instead the Bill's structure and inclusions ensure a continuation of the extreme power and resource imbalance between Indigenous groups and the generally advantaged members of the mining, industrial and agricultural sectors, as well as the State, Territory and Commonwealth Governments.

As a result, the current draft Bill will not lead to improved management or conservation of Aboriginal cultural heritage, and instead will likely insure the continuation of routine sacrificing of Aboriginal cultural heritage for mining, industry and other activities, especially those promoted by the State.

## **Background and reasons FARA is making a submission**

FARA is an independent volunteer organisation that formed in 2006 and has worked tirelessly since that time to raise awareness of the threats to cultural heritage on the Dampier Archipelago in the Pilbara, particularly the Burrup Peninsula. The petroglyphs of Murujuga are internationally recognised as unique and significant because this is the only site in the world containing direct evidence of 50,000+ years of continuous human existence. There are estimated to be more than one million petroglyphs that document the complex relationships between the Indigenous people, their country, and their survival through the changing environmental conditions leading into and out of the last glacial period through to the present.

Murujuga's cultural heritage is extremely important to the Indigenous people of this region, to Australians, and to the world, and yet it continues to be degraded by industrial emissions on the Burrup Peninsula. Furthermore, these threats are only increasing with each new industry that is approved and indeed encouraged by both State and Federal governments.

It is for these and other reasons that FARA works hard and remains totally committed to preserving the cultural heritage contained in the Murujuga petroglyphs, and the rich cultural landscape within which they are found. We are extremely concerned about the many major shortcomings of the proposed Aboriginal Cultural Heritage Bill 2020, most especially because it devolves the (significant!) regulatory burden to Local Aboriginal Cultural Heritage Services (LACHS) without appropriate training and the necessary material or financial support, and without granting them any substantive role in decision making.

As elaborated below, this proposed Bill will exacerbate the existing extremely unequal situation between local Indigenous groups and the proponents (industry, mining companies, pastoralists or governments) and will likely facilitate damage to Aboriginal Cultural Heritage (ACH).

## FARA's particular concerns about the ACH Bill 2020

- The Bill lacks minimum standards for cultural heritage protection, a requirement for heritage assessments, or a trigger for heritage surveys early in the process; each of these need to be written directly into the Bill, rather than leaving the protection of ACH to independent negotiations between unequal players
- Although the LACHS are fundamental to the new Act, the requirements for becoming a LACHS will come in future regulations; however, DPLH is not working on a strategy for LACHS creation and said it is not a priority for them
- Indigenous people know an immense amount about their country and cultural heritage; however, it is likely that some members of some LACHS will not have enough adequate training or resources to effectively play the substantial regulatory role and uphold the statutory duty that the Bill requires of them, especially when pitted against large entities (mining/industrial/agricultural) and governments
- While LACHS are supposed to be fundamental to the process, they will not have a say in management decisions – these will still be made by the Minister, advised by the ACH Council
- Although the ACH Management Code will guide the Bill, its structure has not been determined and this is not a current priority according to DPLH
- Old, existing agreements, including Section 18 approvals, can not be dissolved according to DPLH; this is particularly worrying since it is known that only one of the 461 Section 18 requests has been denied to industry/mining in the last 10 years (460 were granted); furthermore, some approvals have been given after inadequate and often rushed 'consultation', based on highly complex and technical documents that were not necessarily explained to or understood by the local Aboriginal custodians
- The important and essential concept of intangible heritage is not included specifically in the definition of 'Aboriginal place', and the definition of 'harm' should be expanded to include intangible cultural impacts and gradations of harm
- Cultural landscapes are not specifically protected according to DPLH, unless it is apart of a Protected Area (PA); however, the laborious process for applying for and prescribing a PA and lack of funding for most Aboriginal groups means that this is itself a disincentive
- The Bill needs to distinguish between Aboriginal cultural heritage of high value or significance, compared with that of less significance; more rigorous protection is required for ACH with high value or significance to particular Aboriginal people, or to the State. Importantly, significance of ACH should not be measured by/equated with gradations of land disturbance of the activities, as is currently in the Bill
- Section 100 is a fundamental flaw in the Bill as it authorises the harming of ACH for 'exempt activities' regardless of the importance of that heritage or the degree of harm; the categories of exempt activities are too broad (p. 62) and neither DPLH or the Bill explain how/why they justify allowing these activities, when the activities (including clearing native vegetation with a permit and developing a small subdivision) would not necessarily have been evaluated for their impact on cultural heritage or the site's importance to Indigenous people
- Some Aboriginal corporations are in a tenuous position with regard to Indigenous Land Use Agreements, which can cause stress and conflict within and between the Aboriginal peoples of these areas, governments and industrial/mining companies

- There needs to be real incentive for proponents of development to actively explore solutions which avoid harming ACH; this could be done with a more flexible enforcement regime of civil penalties or obligations for compensation when ACH is damaged, rather than criminal prosecutions which have a higher burden of proof. Flexible but strict enforcement options would provide real financial incentives that would encourage proponents to actively minimise the potential for harm to ACH; if cultural heritage is inadvertently harmed or lost, in spite of adherence to protection protocols, then it should be appropriately compensated
- Given the lack of adequate or ongoing secure funding for LACHS, as identified in the Bill, there is a real possibility that some Indigenous groups will be pressured into accepting management plans that do not adequately protect ACH, or that the Bill would lead to further division between Aboriginal groups, allowing political and industrial interests yet more opportunity to 'divide and rule' resulting in some decisions being based on financial incentives rather than preserving and protecting the cultural heritage
- Indigenous people have expressed their concerns about the proposed Bill (<https://www.abc.net.au/news/2020-09-08/juukan-gorge-repeat-possible-under-proposed-wa-law-leaders/12639846>), and while some advisers were consulted, DPLH admitted that the team who drafted the Bill lacked people with cultural authority – this is inadequate at a time when we know the potential for devastating 'mistakes' to be made relating to the destruction of irreplaceable cultural heritage
- Heritage professionals, including prominent members of the archaeological, anthropological and legal communities who have worked for and with Indigenous groups, have expressed their deep concerns about the Bill's inadequacies and shortcomings (<https://australianarchaeologicalassociation.com.au/aaa-news/>) – ignoring their experience seems inappropriate, arrogant and foolhardy, and the Bill may breach Australia's obligations under international conventions

## **Recommendations and suggested amendments to the AHA Bill 2020**

The Bill should be amended to:

- include a specific definition of 'interests of the State' beyond the social and economic benefit listed as the main criteria (section 9); a Bill purportedly designed to protect Aboriginal cultural heritage must also include the cultural, spiritual and historical values, particularly of Indigenous people, in the interests of the State
- compel the Minister to state in writing the specific grounds for his or her opinion when they decide that a matter is or is not in the interest of the State, and that all records are publicly available at the time the decision is announced
- ensure that the ACH Council advising the Minister is comprised of cultural heritage professionals and Indigenous people with proficiency in the management of Aboriginal cultural heritage, as with the disbanded Aboriginal Cultural Material Committee; it is also imperative that representatives of relevant Aboriginal groups and organisations are consulted about the composition of the Council
- empower the ACH Council to refuse to consider a permit application if consultation with affected people, or the expression of their views, has been restricted in any way
- include a base level of Government funding to LACHS to enable them to meet their regulatory responsibilities, if the proponent does not provide acceptable resources
- include provisions that prohibit the enforcement of contractual restraints, made through previous agreements, that restrict Indigenous people from objecting to proposals by mining,

industrial and other companies that may damage Aboriginal cultural heritage; this would include prohibiting the enforcement of 'gag clauses' imposed on Indigenous people

- require the Minister to decline any ACH management plan if the relevant Aboriginal people have been prevented/constrained from speaking because of a contractual gag
- specifically state that an ACH management plan which incorporates an existing heritage or native title agreement does not 'give' informed consent and does not imply agreement to the management plan; Indigenous parties would be able to withhold agreement to the proposed plan when they are concerned about the impact on cultural heritage, and still have the right to object to the approval of a plan
- require consultation (Section 108) by the ACH Council with the relevant LACHS prior to deciding whether to issue an ACH permit; importantly local Aboriginal people should be able to present new sites of significance that have been identified after an ACH permit was granted, for consideration in matters of applying for protection orders against possible damage to cultural heritage
- amend and strengthen Sections 102 and 103 to include basic procedural safeguards and to clarify the role of ACH permits where an ACH management plan is in place, so that a permit may not be issued and essentially permit harm to ACH by superseding the agreed plan; the Minister should not have the power to authorise an (additional) management plan where there is already an approved plan in place
- change the definition of 'Minimal Impact' so that section 101 does not apply to any high value ACH and only includes those activities that do not disturb ground; in addition, the CEO should be required to consult directly with the appropriate LACHS and provide reasons as to whether activities have been deemed 'minimal impact'; there should be NO impact on significant ACH sites
- ACH management plans as described in the Bill (especially sections 130, 134, 140 and 147) should be tightened up so that proponents are required to provide detailed examples of economic and other detriment that would be caused if they are not permitted to harm ACH, and that the Minister must have this information and consider it before evaluating whether to authorise an ACH management plan; the Minister should be obligated to give serious regard to the ACH Council's recommendation, and the Minister's decision should be reviewable by the State Administrative Tribunal
- The Aboriginal custodians of an ACH site should have the final decision over whether a project that will damage the ACH should proceed or not

**We need to ensure that the State's regulatory burden and responsibility is not devolved to Indigenous people unless they are given sufficient technical assistance, financial resources, and real decision-making power – otherwise, they will be disempowered from preserving their cultural heritage under the guise of 'greater flexibility and self-determination'.**

**In summary, FARA does not support the Government's draft ACH Bill 2020 and urges a major rewriting to include these and many other suggested amendments so that Aboriginal Cultural Heritage is truly protected and preserved into the future for the benefit of Indigenous people and all Australians. There is ample evidence that the 1972 Bill enabled damage to Aboriginal cultural heritage in WA (<https://auspublaw.org/2020/09/sorry-not-sorry-the-operation-of-was-aboriginal-heritage-act/>) – it is time to draft and pass a stronger bill that will protect and defend our shared cultural heritage, as concerned Australians and the world called for after the recent Juukan Gorge debacle. A longer consultation period and more comprehensive Indigenous involvement would have assisted this process and shown that the Western Australian Government is indeed acting in good faith.**