6 January 2023

PGA Submission on

Aboriginal Cultural Heritage Act 2021
Phase 3 Co- Design Process

INTRODUCTION

The Pastoralists and Graziers Association of WA (PGA) is a non-profit industry organisation established in 1907, which represents primary producers in both the pastoral and agricultural regions of Western Australia.

Current membership numbers equate to 84% of all pastoral leases, excluding Indigenous and conservation leases, and 21% of broadacre producers in the agricultural regions of Western Australia. This includes grain, livestock and mixed enterprises.

The Western Australian pastoral and broadacre agriculture industries are major contributors to the agrifood sector and the Western Australian economy. Western Australia produces on average 13 million tonnes of grains each year, with this year's harvest estimated to exceed 22 million tonnes, generating more than $5 billion to the WA economy each year.

Western Australia's livestock industries contribute over $2.5 billion at the farm gate. The WA beef industry is comprised of approximately 4000 cattle businesses with a total herd of approximately two million head distributed throughout the state. By number, the largest herd are in the Kimberley region of the State, followed by the Pilbara and then Southern Rangelands. The majority of these properties are pastoral lease hold.

As an organisation which consists solely of primary producers from both the pastoral and agricultural regions, we are pleased to provide this submission outlining some of the comments and concerns our members have raised over the Aboriginal Cultural Heritage Act Phase 3 Co-design process.

BACKGROUND

The *Aboriginal Cultural Heritage Act 2021* (ACH Act) received Royal Assent on 22 December 2021 and is expected to commence in 2023. The legislation replaces the Aboriginal Heritage Act 1972, providing a contemporary framework for the recognition, protection, conservation and preservation of Aboriginal cultural heritage.

Through a three-stage co-design process, DPLH is currently developing the regulations, statutory guidelines and operational policies that will support the ACH Act. Phase One of the codesign process ran from 26 April to 27 May 2022. Phase Two ran from 19 July to 19 August, and Phase Three from 15 November to 7 December. The PGA and our Members were active participants each of the stages.

SUMMARY

In making this submission the PGA holds the following principles to guide our advocacy concerning Aboriginal Cultural Heritage (ACH):

1. The PGA acknowledges and respects the cultural and spiritual connection First Nations peoples have with country.

2. The PGA acknowledges the important contribution made by past and present agricultural freehold and pastoral lease landholders to both the Western Australian economy and to regional development, and the importance of ensuring respect for their property rights.

3. As a State-wide organisation representing landholders who manage close to 900,000 square kilometres, approximately 35 per cent of the Western Australian landscape, the PGA has a significant interest in how ACH is managed and protected, and ensuring that an effective, affordable, certain, and timely ACH framework operates in Western Australia.

A key function of the Aboriginal Cultural Heritage Act 2021 (Act) is to manage activities that may harm Aboriginal Cultural Heritage (ACH). This includes all ground disturbance on both pastoral and freehold land. The Act categorises activities that may harm ACH into three tiers and provides a corresponding authorisation process for each of the tiers.

Activity tiers reflect different levels of ground disturbance that are caused by specified activities. The activity tiers will be set out in the *Aboriginal Cultural Heritage Regulations 2022* (Regulations). For the purposes of a Due Diligence Assessment (DDA), a proponent is required to determine the tier of their activity by referring to the Activity Tables.

Where there is a risk of harm to ACH from a proposed activity, *a proponent is required to follow the authorisation pathway corresponding to the relevant activity tier*. The DDA process applies to all activities having regard to their level of ground disturbance.

Residential Lots under 1100 square metres are exempt, ***however there is no exemption for Agriculture, Pastoral or Natural Resource Management activities, all which involve some level of ground disturbance.***

Like for like activities (activities which do not cause new or additional ground disturbance provided that the proposed activity is a like for like activity or is a disturbance that is not a new or additional ground disturbance) are exempt under the regulations provided the scale, profile, and extent of the activity remains comparable with the previous activity.

However, if the proposed activity will not cause any new or additional ground disturbance but exceeds a ***like for like*** activity, (for example different materials or the use of mechanical devices, rather than handheld***) the proponent is required to undertake the relevant approval process where it may result in a risk of harm to ACH.***

A DDA needs to be completed by any person (proponent) that is proposing to undertake an activity other than an exempt activity. For the purpose of the DDA, the presence of ACH has been categorised into three groups for any given area:

a) ACH is present.
b) ACH is absent; or
c) it is uncertain if ACH is present.

Proponents, including primary producers will be required to seek an approval prior to undertaking certain activities if the activity has the potential to harm ACH. These activities relating to agriculture, pastoralism and NRM activities are identified on Addendum 2.

Under the Act proponents are required to notify and consult Aboriginal parties with regard to any proposed Tier 2 and Tier 3 activities. Where a Local Aboriginal Cultural Heritage Services (LACHS) has been appointed, the proponent is required to notify or consult the LACHS, who are able under the Act to charge fees for services to proponents to recoup costs associated with undertaking certain functions under the Act, including DDAs.

Each LACHS is able to charge proponents according to a fee schedule that has been endorsed by the Aboriginal Heritage Council. These guidelines recognise two specific roles that a LACH may designate for which fees may be charged:

- LACHS Heritage Officer (LHO)
- LACHS Senior Officer (LSHO)

The designation of these positions does not prevent a LACHS from charging proponents for other positions within it, including the Chief Executive Officer, Chief Operating Officer, or Heritage Manager, or for charging fees to proponents for other service providers including but not limited to:

- Elders
- Knowledge holders or other cultural authorities (Aboriginal Consultants or Senior Aboriginal Consultants)
- Heritage professionals
- Legal professionals
- Negotiation specialists
- Engineering and land use professionals, and
- Any other service providers considered necessary to provide expert advice necessary for a LACHS to undertake its functions that the Council considers reasonable and are consistent with the fees established by the guidelines.

The PGA notes that there is no ability for proponents to negotiate the Fees set down by a LACHS, and also notes that according to the consultation draft that "*in regional and remote areas, and above the 26th parallel, 20% should be added to fees".*

Where a LACHS has not been appointed, a proponent will need to notify the native title party as well as knowledge holders.

When undertaking a DDA, the first step will be to use the ACH Site Directory, which will contain prescribed information about ACH that is located throughout the State. This will include information about ACH previously held on the Register of Aboriginal Sites throughout the administration of the *Aboriginal Heritage Act 1972*, as well as records of new ACH as they are submitted. It is important to note that large sections of the State have not yet been surveyed, or not surveyed comprehensively, and therefore there may be no record of the ACH that exist in these areas.

If a search of the Directory for a given area returns no ACH listed, it must not be presumed that ACH is not located in the area nor that a proposed activity will not result in harm to ACH.

In undertaking a DDA, a proponent needs to assess whether the proposed ground disturbing activity risks harm being caused to ACH. This includes areas of previous ground disturbance where there may continue to exist:

- previously unknown or undisturbed subsurface material (particularly ancestral remains)

- intangible ACH as associated with sacred beliefs, ritual and ceremonial use and social values which continue to be protected by the Act.

ISSUES

The PGA is concerned that there are no clearly delineated boundaries and consistent structures within the proposed frameworks and there is no certainty which will allow agriculture freehold and pastoral lease landholders to proceed with their business as usual while complying with the Act.

There is no clarification over:

- How the Act interacts with and impacts on native title legislation and agreements
- How the Act interacts with other legislation, such as the *Environmental Protection Act 1986* (EP Act) and the *Land Administration Act 1997* (LAA).
- Whether there is room for flexibility to adapt the structure of permits and management plans to different contexts, such as pastoralists and emergency services.
- Costs and funding for activities that are not associated with the development of ACH management plans.

Primary producers and pastoralists need to know how much time it will take and what it will cost. They need clearly quantified thresholds for activities throughout the tiers, solid indicators for what constitutes ACH, and accessible, responsive databases of heritage and contact details.

There is no limit on the cost of permits and consultation, which are all borne by the proponent, and no ability for the proponent to negotiate, nor any dispute recourse. Further it is proposed that a 20% surcharge is placed on fees in regional and remote areas and above the 26th parallel.

Given that neither agriculture nor pastoral activities exempt, and occur on lots in excess of 1100 square meters, the imposition of a surcharge on regional, remote, and north of the 26th parallel, places an unfair financial impost on many primary producers and pastoralists.

Unlike other regional proponents, such as mining or resource companies, which are dominated by multinational corporation with large profit margins, most farming and pastoral operations are family owned and ran and operate at significantly reduced profitability.

There are no limits on the timeframes of consultation to ensure minimal disruption to business processes. There are many factors, including cultural, technological distance, geographical and weather that can impact availability of Aboriginal stakeholders and knowledge holders.

There is also no clarification over what happens if a proponent received no response within

the allocated timeframes to attempts to contacts LACHS or knowledge holders. Will this lack of a response equate to consent, or will it require Ministerial approval.

There is some risk the Act could be used to gain advantage or leverage in a dispute on the basis of an allegation that insufficient Due Diligence was undertaken, and harm resulted to ACH. This will potentially generate significant compliance burdens for the State and also administrative and cost burdens to both Traditional Owners and pastoral lease and/or agriculture freehold landholders.

Further in the current environment, there will almost be daily occurrences for both pastoral lease and agriculture freehold landholders where an unplanned activity needed to occur that would trigger, at a minimum, due diligence obligations. Activities required in emergency situations are unplanned and usually conducted as needed to address the relevant emergency as a matter of immediate urgency.

Given the proposed 5-month timeframes for obtaining ACH permits and the proposed 5 months to 1 year timeframe for finalising ACH management plans, as currently proposed, unplanned activities, including emergency-based activities will be considered onerous and often problematic, given that most emergency-based activities are already undertaken under other existing legislative mechanisms that provide for immediate action.

The placement of such activities under a tier 2 or tier 3 category suggests that organisations like Volunteer Fire Brigades would need to obtain pre-emptive type Aboriginal Cultural Heritage (ACH) permits or management plans to account for all of these types of low level or moderate to high level ground disturbance activities over every Local Aboriginal Cultural Heritage Service (LACHS) area or equivalent area in the State.

The current Activity Tables categorises activities undertaken in compliance with section 33 Firebreak Notices as tier 1, which would place an obligation on private landowners to undertake due diligence to determine if Aboriginal heritage is present. Widening of firebreaks is currently categorised as tier 2, which requires private landowners to undertake due diligence and potentially apply for a Permit. This categorisation raises a number of issues including:

- Who will be responsible for educating private landowners about this obligation?

- What if a private landowner uses this requirement as an excuse for non-compliance with a Fire Break Notice?

- What if a private landowner applies for a Permit and due to the timeframe required, the window for undertaking the mitigation activity has passed before the activity is conducted?

- Potentially, Local Governments (and/or DPLH) could receive thousands of enquiries annually from landowners seeking advice and information about how to undertake due diligence and whether there is Aboriginal cultural heritage on their property. This

situation would be overwhelming for Local Governments and could decrease compliance with section 33 Notices/ hazard reduction notices.

- What is the impact of the Act on planned burning for the purposes of fire prevention (including under the Bushfire Notice) not within a protected area, as the Environmental Protection Act schedule 6 items (as listed under the ACH exemptions) allows for clearing, burning or other fire management works by relevant agencies or local government?

For pastoral lease landholders the protection of cultural heritage must be balanced with their legal obligations and responsibility to manage the rangelands. The Pastoral Lands Board, which oversees the implementation of the Land Administration Act on pastoral leases requires pastoralists to maintain and develop infrastructure including buildings, sheds, yards, fences, water points, firebreaks and access tracks, as well as rehabilitating degraded areas and controlling plant and animal pests.

The undertaking of pastoral operations across hundreds of thousands of hectares, including management of the rangelands in accordance with lease obligations, and ensuring the health, welfare and safety of livestock could all be placed under duress as a result of these new obligations. Given the vast area of pastoral leases and the growing scale of some cultural sites, progressing a DDA process and then managing/ mitigating impacts of pastoral activities on huge tracts of land could become unfeasible for some pastoralists.

Further the term ***Like for Like*** is vague and does not account for increases in technologies or in modern practices. It is not possible for a proponent to replace or undertake an activity that will result in the same scale, structure, profile, and extent as the previous activity. Availability of building materials, erosion, and the use of modern mechanical equipment will result in some form of variance from the original.

RECOMMENDATIONS

- **That regulations should be developed to support the legislation which exempt all activities that are Pastoral purposes as defined in the *Land Administration Act 1997*, including cultivation and grazing. All activities required of pastoral leaseholders under the LAA should be classified as tier 1 activities, requiring "due diligence" only.**

- **That regulations should be developed to support the legislation which exempt all primary agriculture and natural resource management activities including cultivation, grazing, establishing new water points and the use of mechanical devices as well as burning for both conservation and cropping purposes. All agriculture and natural resource management should be classified as tier 1 activities, requiring "due diligence" only.**

- **The list of activities should actually be simplified. The nature of uses listed, and their specificity, including handheld and machinery can lead to gaps in the system**

where certain uses are not defined or missing from the list. A far more overarching approach to the nature of uses in each tier should be defined with activities associated linked back to their relevant legislation or approved program of works.

- **There needs to be further definition and explanation on a number of terms and concepts. These include the definition of:**
    - **Ground disturbance**
    - **Minimal/low/moderate/high ground disturbance**
    - **Community utilities**
    - **Waterways - does it include the sea?**
    - **Already disturbed areas**
    - **Broader definition of mining activity**
    - **Natural ground level**
    - **Known Aboriginal Cultural Heritage**
    - **New or additional ground disturbances**

It is evident from the comments made by primary producers and pastoralists who attended the workshops that throughout the Co-design process little, if any consideration has been given to the financial impacts of these proposed regulations on the viability of WA's agricultural and pastoral industries.

With no limits on the cost or time frame of permits and consultation, which are all borne by the proponent, no ability for the proponent to negotiate, no dispute recourse, and the imposition of a surcharge on fees in regional, remote, and north of the 26th parallel areas, many primary producers and pastoralists will be unable to perform the many daily, established, and legal practices in a timely and cost-effective manner due to the costs and uncertain timeframes. This will lead to the unviability of many farming and pastoral businesses, which are the backbone of regional and remote Western Australia.

It is the PGA's strongest opinion that an independent Financial Impact Study on the impacts these proposed regulations and processes will have on regional and remote Western Australia needs to be completed before these proposed regulations are introduced.

Yours faithfully

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