

KIMBERLEY LAND COUNCIL

ABN 96724252047 ICN 21



24th November 2021

To the elected Members of the Parliament of Western Australia,

Urgent request – Vote no to the Aboriginal Cultural Heritage Bill

The Kimberley Land Council (KLC) is writing to request your urgent intervention in the passage of the *Aboriginal Cultural Heritage Bill 2021* (WA) through the Parliament of Western Australia.

On November 17, 2021, the KLC was shocked to witness the introduction of the amended Aboriginal Cultural Heritage Bill despite widespread condemnation from Aboriginal people and heritage experts across the State and country.

We were further dismayed by the WA Government's actions in releasing the amended Bill less than 24 hours before its introduction to Parliament, as well as the suspension of normal parliamentary processes to fast-track the Bill through the Legislative Assembly.

As this legislation continues to be debated we ask that you consider both its content and the fundamentally flawed process that has led to its introduction to the WA Parliament.

The KLC does not support the Aboriginal Cultural Heritage Bill and we call on you, our elected representatives, to hear the voices of Aboriginal people and vote in accordance with our wishes.

The KLC formally requests that you:

- Vote no to the Aboriginal Cultural Heritage Bill.
- Refer the Aboriginal Cultural Heritage Bill for further investigation by the appropriate Standing Committee.
- Address as a matter of public record, misinformation about the purported benefits of the Bill (see pages 2 & 3).

At this critical moment for heritage and culture, we implore you to hear our concerns and fight on our behalf to protect Aboriginal heritage and culture.

This Bill will not prevent further tragedies like Juukan Gorge. Ignoring the wishes of Traditional Owners is a lost opportunity when commitment for change, and a better future for Aboriginal people, has never been more important.

Yours sincerely

Anthony Watson

Chairman

Kimberley Land Council

**GETTING BACK COUNTRY.
LOOKING AFTER COUNTRY.
GETTING CONTROL OF OUR FUTURE.**

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Aboriginal Cultural Heritage Bill - The Facts

Failure to embed Free Prior and Informed Consent

Free Prior and Informed Consent means that Traditional Owners can say “no” and this will be respected. Under the proposed legislation, if Traditional Owners fail to reach agreement with a proponent then the Minister has final say. The Minister can override the wishes of Traditional Owners and impose the terms of an Aboriginal Cultural Heritage Management Plan over the concerns and objections of Traditional Owners. The proposed legislation does not meet the international standard of Free Prior and Informed Consent.

No right to say no

The *Aboriginal Cultural Heritage Bill* will give every other party, other than Traditional Owners, the control over decision making about Aboriginal cultural heritage. The Aboriginal Cultural Heritage Bill gives Traditional Owners the right to say “yes” to impacts on cultural heritage but no right to say “no”.

- Proponents control decisions about cultural heritage if they assess their proposal as “exempt” or “tier 1”.
- The ACH Council controls decisions about cultural heritage if proponents assess their proposal as “tier 2”.
- The Minister ultimately controls decisions about cultural heritage if proponents assess their proposal as “tier 3”.

Rebranding Section 18

Under the current Aboriginal Heritage Act, Section 18 allows the Minister to approve damage or destruction to Aboriginal cultural heritage. The new Aboriginal Cultural Heritage Bill also includes the same mechanism, and expands on the ways that Aboriginal cultural heritage can be damaged or destroyed without the approval of Traditional Owners. If the Aboriginal Cultural Heritage Bill is made into law, entire categories of activities will be exempt from approval before damaging, destroying or impacting on cultural heritage. This is in fact a step backwards from the current law, which prohibits all impacts on cultural heritage without approval.

- The new ‘section 18’ process has been rebranded as an ‘ACH Permit’ and an ‘ACH Management Plan’.
- Under the new law, proponents, the ACH Council, and the Minister make decisions on whether or not an activity can occur if it impacts Aboriginal cultural heritage. The only parties who are not afforded any role in the decision making under the new law (other than the role of ‘agreeing’ to management plans) are Traditional Owners.

Burdensome agreement making

The Bill mandates a process that forces Traditional Owners to engage with proponents and imposes an obligation on PBCs (if they are a Local Aboriginal Cultural Heritage Service) to use “best endeavours” to reach agreement, even if they do not want their cultural heritage impacted. This process is very similar to the right to negotiate process under the *Native Title Act*, and will compel Traditional Owners and their representative organisations to take part in forced negotiations for the benefit of a third party, without any clear commitment on how PBCs and LACHS will be funded. If agreement is not reached the Minister



can impose an Aboriginal Cultural Heritage Management Plan over the concerns and objections of Traditional Owners.

Protected Area limitations

Protected Areas cannot be made over areas already covered by a Section 18 application, ACH Permit or ACH Management Plan. As a result, areas that are already impacted by proponents' activities can't be protected. For areas of unallocated Crown land that have recognised exclusive possession native title, the Minister for Lands has been given the same rights as a private landowner under the Aboriginal Cultural Heritage Bill. This diminishes and erodes the standing of native title holders, who are not given the same status as "landowners" under the Bill.

Loss of rights of review

The proposed Aboriginal Cultural Heritage Bill does not include rights of appeal to the State Administrative Tribunal for decisions of the Minister in relation to an Aboriginal Cultural Heritage Management Plan or other critical decisions that affect significant rights. The consultation draft Bill released in September 2020 included these rights of review, as do most modern laws in Western Australia and other Australian jurisdictions. The State Administrative Tribunal [website](#) lists 159 Western Australian laws that include a right of appeal or review to the State Administrative Tribunal, including the *Aboriginal Heritage Act 1972*, the *Heritage Act 2018*, *Petroleum and Geothermal Energy Resources Act 1967*, *Petroleum and Geothermal Energy Safety Levies Act 2011*, *Petroleum Pipelines Act 1969*. The abandonment of these rights in the Bill introduced into Parliament will have significant impacts on the ability of some of the State's most disadvantaged citizens to access justice.

Ineffective consultation

Throughout the consultation process, Traditional Owners have consistently stated that they do not want a new law that allows Government to make the final decision on whether or not cultural heritage is damaged or destroyed. Consultation should mean concerns are listened to, not ignored. Genuine engagement does not involve including people in a process only to exclude them from the outcome.

Unclear regulation process

There is currently no detail as to what the "co-design" process will look like or who it will involve. Given the flawed consultation process so far, we have zero confidence that any future consultation or co-design will respect the views and concerns of Traditional Owners.

For further KLC resources and information please refer to:

[Punturr Punturr Statement](#)

[KLC media release 17 November 2021](#)

[Letter to UN Special Rapporteur on the Rights of Indigenous Peoples](#)