



JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA

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Friday, 10 December 2021

Hon Stephen Dawson MLC
Minister for Mental Health; Aboriginal Affairs; Industrial Relations

12th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

Via email: Minister.Dawson@dpc.wa.gov.au

Dear Minister,

We write to you in our respective capacities as Chair and Member of the Joint Standing Committee on Northern Australia to express the Committee's concerns about the WA Aboriginal Cultural Heritage Bill that is currently under consideration. In particular, we want to convey the Committee's disappointment with key provisions of the Bill and its failure to take account of recommendations of the Northern Australia Committee's final report into the destruction of the Aboriginal cultural heritage at Juukan Gorge.

First of all, we reaffirm the Committee's appreciation of the strong connection which First Nations have to this land and its tangible and intangible cultural heritage, and the need to protect that heritage in legislation across all jurisdictions.

The Committee acknowledges that the WA Aboriginal Cultural Heritage Bill goes some way towards addressing the serious deficiencies of the current Act which allowed the destruction of the cultural heritage at Juukan Gorge to occur. The Bill, however, falls far short of the reforms advocated in Recommendation 3 of the Committee's final report on Juukan Gorge, in particular the call for consistency with UNDRIP and Dhawura Ngilan, especially the principles of free, prior and informed consent. It is significant that strong opposition to the Bill has come from both First Nations stakeholders and investor groups.

There are four fundamental ways in which this Bill conflicts with the principles of free, prior and informed consent:

- Firstly, it places the due diligence assessment process in the hands of the proponents. This means that it is the proponents, and not Aboriginal people, who have the capacity to make decisions about what is, and what is not, Aboriginal cultural heritage and whether a proposed activity is likely to cause harm. This is contrary to current understandings that even minimal physical disturbance may have an impact on First Nations' cultural heritage, particularly intangible heritage.
- Secondly, the Minister has the ultimate power to decide whether an activity can go ahead if the parties cannot agree to an Aboriginal Cultural Heritage (ACH) Management Plan. The Minister can thus override traditional owners' refusal to give consent.
- Thirdly, there is no ability for parties to seek a merits review of a decision by the Minister to approve an ACH Management Plan, whereas either party can appeal a Minister's decision to suspend or cancel the approval of a Plan. This imbalance is likely to favour the proponents and denies First Nations people an important avenue to prevent the abuse of Ministerial power. The ability to seek a merits review of the Minister's approval needs to be guaranteed to traditional owners. This concept was included in the original exposure draft bill but has since been removed. This is a very significant deficiency in the current version of the Bill given the way in which Ministerial discretion has been exercised under the current Act.
- Finally, the Bill enables proponents to rely on existing section 18 permits for a further 10 years. Given the significant number of permits that have been issued, and the well-documented flaws in the current Act, an ongoing reliance on this permit system conflicts with principles of free, prior and informed consent.

The Committee is equally concerned that the removal of State Administrative Tribunal appeal rights from earlier versions of the Bill will make it impossible for First Nations people to exercise their appeal on a review of the process, or on decisions relating to the possible destruction of cultural heritage.

The Committee's final report for the Juukan Gorge inquiry recommended both increased funding for Prescribed Body Corporates (PBCs) and for the establishment of an independent fund to administer funding for these bodies. Such measures are critical for the viability of PBCs. The Committee notes that while there has been some funding put aside for Local Aboriginal Cultural Heritage Services (LACHs) in the WA budget, more would certainly be necessary to truly ensure their participation in the processes under the Bill.

The Committee also has serious concerns about the consultation process undertaken throughout the development of this Bill. The WA Government claims that this bill was co-designed in equal and genuine partnership with First Nations people, but First Nations people were not provided with the most recent version.

We conclude by drawing your attention to the national and international outrage at the destruction of Juukan Gorge. This has created a unique opportunity for structural change that should not be wasted and the Northern Australia Committee calls on the WA Government to strengthen the Bill along the lines recommended in this letter.

Sincerely,

Warren Entsch

Chair

Patrick Dodson

Member