

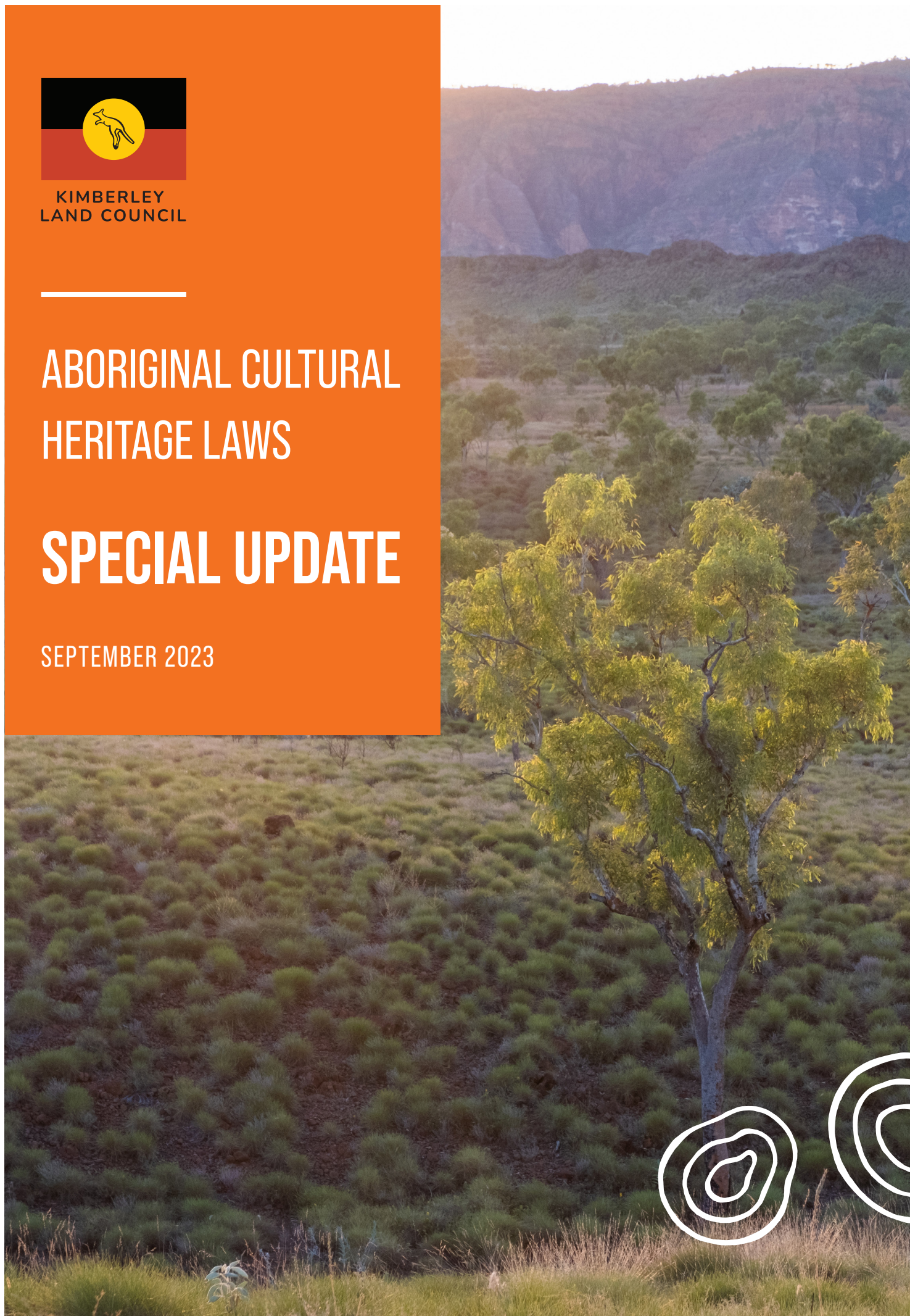


KIMBERLEY
LAND COUNCIL

ABORIGINAL CULTURAL HERITAGE LAWS

SPECIAL UPDATE

SEPTEMBER 2023



WA set to repeal ACH Act

Over the last five years, the WA Government has led a process to develop new cultural heritage protections. As part of this process, a new law was developed – the **Aboriginal Cultural Heritage Act 2021** (ACH Act).

The KLC and many other Aboriginal groups did not support the ACH Act because it did not provide strong enough protection for cultural heritage. The WA Government did not listen to the KLC and other Aboriginal groups and pushed ahead to make the Act law.

The ACH Act was passed by Parliament in December 2021 and after that the KLC and PBCs spent a lot of time preparing for the Act and trying to influence the design of its guidelines and regulations, which contained a lot of detail about how the Act would operate.

The ACH Act began operating in full on 1 July this year. Just five weeks later, on 8 August, the Premier announced that the WA Government will repeal the ACH Act and bring back the *Aboriginal Heritage Act 1972* (1972 Act), with some amendments.

This decision followed weeks of negative media coverage and public criticism about the ACH Act, especially from farmers, pastoralists, developers and the WA Liberal Party. The willingness of the WA Government to listen to the concerns of these groups, and not the concerns of Traditional Owners, clearly shows the influence that other industries have ahead of us. This is extremely disappointing and means we need to consider working more closely with other sectors to get the Government to take our views seriously.





What does this mean for cultural heritage protection?

The WA Government is proposing to reintroduce the 1972 Act, with some amendments, which include:

- **Native title parties will have the same right of appeal as proponents for section 18 decisions.** A section 18 permit is a permission from the Minister to do something that will impact, damage or destroy Aboriginal cultural heritage. The appeal right for native title parties means that if a native title party (such as a PBC) does not agree with a Minister's decision to grant a section 18 permit, the native title party can ask the State Administrative Tribunal to review the Minister's decision.
- **The holder of a section 18 permit must report any new information about cultural heritage to the Minister.**
- **The Aboriginal Cultural Heritage Council, which was formed under the ACH Act, will become the Aboriginal Cultural Heritage Committee under the 1972 Act** (replacing the old Aboriginal Cultural Material Committee). This body has majority Aboriginal representation.
- **'Gag orders' constraining Traditional Owners will be banned.** This means any agreements that require Traditional Owners to give up their rights to appeal/comment will be illegal.

- **The Premier will have a new power to 'call in' any appeal to the State Administrative Tribunal.** Once an appeal is 'called in', the Premier can make the decision instead of the State Administrative Tribunal. The Premier can only call in matters that raise 'issues of State or regional importance'.

The WA Government announced it will provide support to PBCs, registered native title claimants and native title representative bodies (such as the KLC) to increase their capacity to engage with proponents on cultural heritage. The Government has also said it will carry out statewide heritage surveys over the next ten years. We don't yet have any more detail on these proposals.

The Government has already introduced the Aboriginal Heritage Legislation Amendment and Repeal Bill 2023 into Parliament. When the bill is passed by Parliament, it will repeal the ACH Act and bring back the amended 1972 Act. Until the bill is passed by Parliament, the ACH Act remains the current law. The KLC is expecting the ACH Act to be the law until at least October this year. This creates great uncertainty, and we have grave concerns that the Government will not enforce the ACH Act and proponents may therefore not comply with the current law during this period. This creates a major risk for the protection of cultural heritage in the Kimberley and across the state.

The KLC's response

In a media statement on 9 August and in a subsequent meeting with Premier Roger Cook and Minister for Aboriginal Affairs Tony Buti, the KLC has made it clear that the return to the 1972 Act should only be an interim measure, and that the WA Government must commit to developing a new, best-practice cultural heritage law with the direct involvement of Aboriginal people.

The KLC and other Aboriginal stakeholders were not consulted about the decision to revert to the 1972 Act. This disregard for the views of Aboriginal people on laws about our own cultural heritage is alarming.

For the KLC and other Aboriginal organisations, it is extremely frustrating that the WA Government has acted so quickly and definitively on the concerns voiced by farmers and pastoralists, after ignoring the voices of Aboriginal people over more than three years when we repeatedly opposed the Aboriginal Cultural Heritage Bill in 2021.

It remains a very uncertain time for the protection of cultural heritage in WA. Right now, the KLC is focusing on making sure the amended 1972 Act is as strong as possible to safeguard cultural heritage and the rights of Traditional Owners. The KLC will keep pushing for new and improved cultural heritage laws.

KEY PROBLEMS WITH THE 1972 ACT

- It has a narrow and outdated definition of cultural heritage which does not include intangible cultural heritage or cultural areas and landscapes.
- It does not give Traditional Owners the final say on matters concerning their cultural heritage. The Minister still has the power to approve damage to or destruction of cultural heritage.
- Penalties under the 1972 Act are not high enough.
- In practice, government agencies hardly ever prosecute proponents for damaging or destroying cultural heritage.



KLC POSITION

- The KLC never supported the ACH Act.

- The amended 1972 Act must only be an interim measure.

- We must still strive for new, best-practice cultural heritage laws in WA.

- Aboriginal people must be at the heart of designing and deciding on these laws.

What's going on at the national level?

In May 2020, Rio Tinto destroyed 46,000 year old caves at Juukan Gorge in the Pilbara, which – shockingly – was allowed under WA law. Following this, the Joint Standing Committee on Northern Australia held an inquiry. In its final report, the committee recommended that the Commonwealth Government create new laws for cultural heritage protection at the national level, and that these new national laws should include minimum standards to apply to all state and territory cultural heritage laws.

When the current Commonwealth Labor Government came into power in 2022, it promised to implement this recommendation and develop strong national cultural heritage laws.

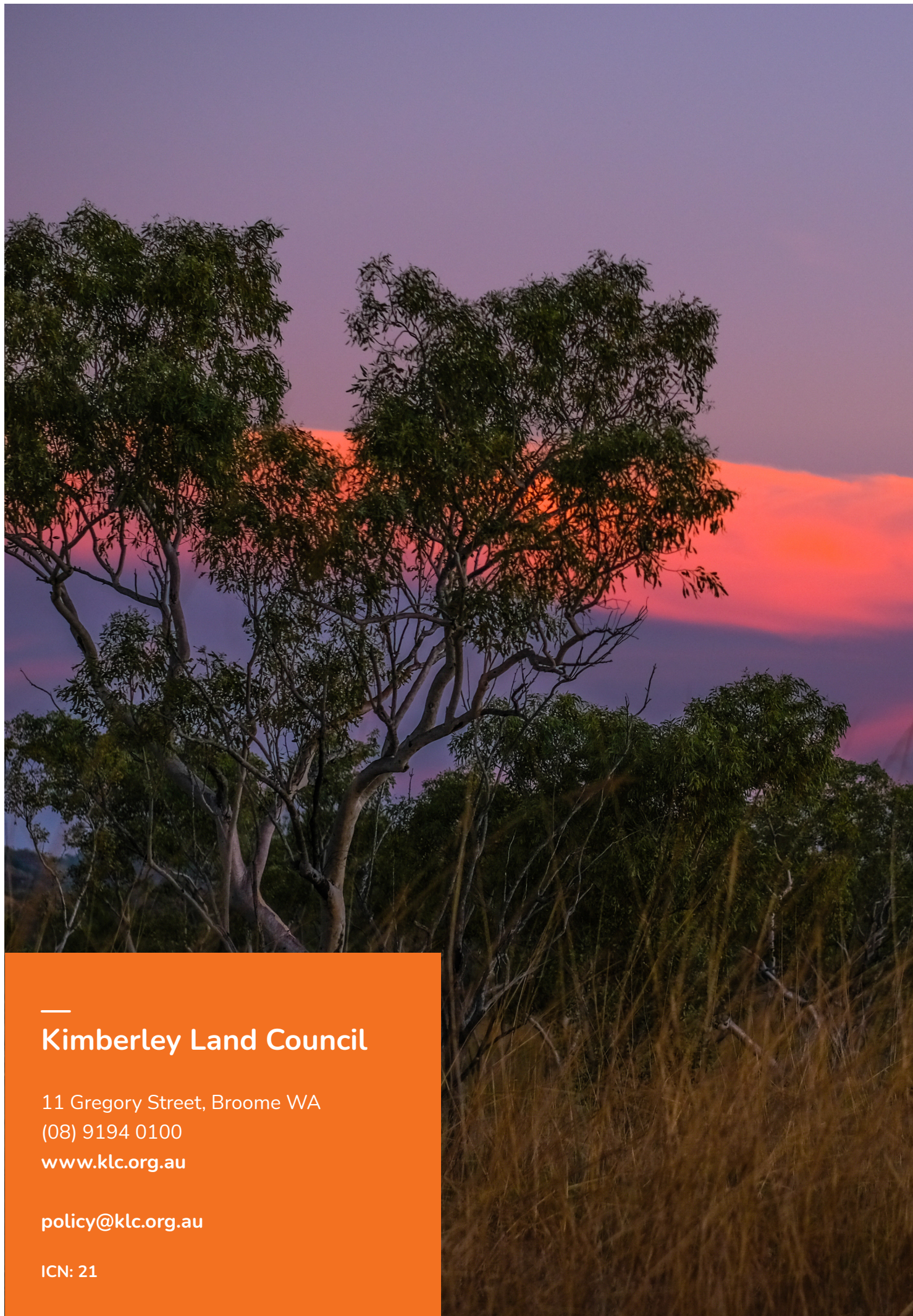
The KLC is part of the First Nations Heritage Protection Alliance, which has been working with the Commonwealth Government to try and modernise and strengthen cultural heritage protection through the development of a new national law. The KLC will continue to push for this.

Now, more than ever, Aboriginal people need the Commonwealth Government to take the lead and act in the interests of present and future generations to ensure that our unique and irreplaceable cultural heritage is not subject to ongoing destruction.



Timeline of events relating to WA's cultural heritage laws





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