



# Free, prior and informed consent in the work of the Australian Heritage Council

## Introduction

This document outlines the approach that the Australian Heritage Council (the council) takes in working with Indigenous people to obtain their free, prior and informed consent (FPIC) through the council's assessment of places for potential inclusion in the National or Commonwealth Heritage lists.

The council is the Australian Government's principal adviser on heritage matters. Its functions are defined by the *Australian Heritage Council Act (2003)* (AHC Act) and include advising the Minister for the Environment on national policies relating to heritage and assessing places for inclusion in the National and Commonwealth Heritage lists under the *Environment Protection and Biodiversity Conservation Act (1999)* (EPBC Act). The council undertakes the assessment of places that may be nominated by the public, the Minister, or of its own initiative. The council then provides recommendations to the Commonwealth Minister for the Environment as to whether those places meet the thresholds for listing and, if so, should be included in the National or Commonwealth heritage lists.

In all cases where there may be Indigenous rights or interests in a place that is nominated, the council seeks to obtain the FPIC of relevant Indigenous peoples before providing advice to the Commonwealth Minister for the Environment, as well as to obtain the views of other members of the broader Australian community on a nomination. In certain cases, this may require further time to be taken for proper engagement with Indigenous people, before the council provides advice on particular nominations to the Commonwealth Minister for the Environment. The council acknowledges that the extent of engagement may be limited by available resources.

The council recognises that determining FPIC in practice will depend on the context of the particular case. In each case, the council will seek to determine questions such as from whom FPIC should be appropriately sought, at what stage of an assessment it should be sought, what form consent could take, and how to characterise FPIC in cases where there are disagreements. Seeking FPIC will ensure that the council is effectively fulfilling its duties as well as contribute to a National and Commonwealth Heritage List which fully embraces the diversity, complexity and wonder of Australia's rich heritage.

## Definition

The elements of FPIC can be defined as follows (FAO 2021):

- Free – the consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.
- Prior – the consent is sought sufficiently in advance of any authorisation or commencement of activities.
- Informed – the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.
- Consent – collective decision made by the right holders and reached through a customary decision-making process of the communities.

## Australian Heritage Council: Approach to free prior and informed consent

The Australian Heritage Council:

- Recognises Indigenous community groups' right to give or withhold consent for the nomination and assessment of places that may include Indigenous heritage values.
- Recognises FPIC is a process and an outcome — The council recognises that seeking FPIC requires sustained and meaningful engagement throughout the life of the nomination and assessment of a place.
- In engaging with Indigenous people, will to the extent possible:
  - provide written and oral information about the heritage listing process and the effect of listing and be available to engage with communities directly on these matters
  - provide clear information on decision-making processes.
- Will encourage Indigenous communities and groups to express their views through the mechanisms provided in the EPBC Act (EPBC Act, s.324JG(1) and s.324JH(5) and (7)) as well as other means, as appropriate.
- Recognise that while there may be many Indigenous people and groups that should be heard in the assessment process, these may differ in their level of authority to speak for Country. The council recognises that authority to speak for Country is determined by Indigenous communities themselves.
- Will not require the granting or withholding of consent to be unanimous, depending on the circumstances of the case given that there may be different levels of authority between those who speak for Country.
- Will communicate the views of Indigenous people, including whether or not there is FPIC for the inclusion of the place in the National or Commonwealth Heritage List in providing its advice to the Minister for the Environment (EPBC Act, 324 JH(1)(b)).
- In fulfilling its functions, it is important to note that the council is bound by its statutory requirements set out in the AHC and EPBC Acts. The council is an advisory body to the Commonwealth Minister for the Environment, and is not itself a decision-making body. Decisions on whether to include a place in the National or Commonwealth Heritage List is ultimately a matter for the Minister for the Environment, after considering advice from the council and other matters as prescribed by the Act.

## References

FAO 2021, [Indigenous peoples: free, prior and informed consent](#), Food and Agriculture Organization of the United Nations, Rome, accessed 26 October 2021.

### Acknowledgement of Country

We acknowledge the Traditional Custodians of Australia and their continuing connection to land and sea, waters, environment and community. We pay our respects to the Traditional Custodians of the lands we live and work on, their culture, and their Elders past and present.

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