



Australian Government

**Department of Climate Change, Energy,
the Environment and Water**



First Nations
HERITAGE PROTECTION
ALLIANCE

Modernisation of Cultural Heritage Protections

A co-design process on cultural heritage reforms

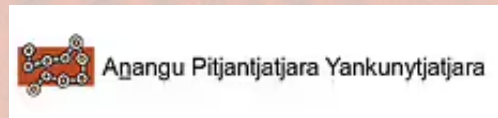
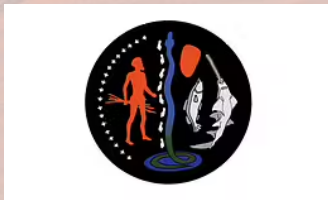
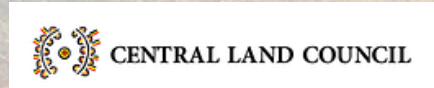
Who are we?



First Nations
HERITAGE PROTECTION
ALLIANCE

A coalition representing First Nations Peoples from across Australia, including major Native Title, Land Rights, Traditional Owner, and community-controlled organisations.

Set up after the destruction of Juukan Gorge, the aim of the Alliance is to fight for laws to better protect sacred sites and First Nations cultural heritage across Australia



What are we doing

Commonwealth
government



Australian Government

Department of Climate Change, Energy,
the Environment and Water

PARTNERSHIP

First Nations Heritage
Protection Alliance



First Nations
HERITAGE PROTECTION
ALLIANCE

The Commonwealth and the Alliance are working together to come up with **options for stronger Commonwealth laws** for First Nations cultural heritage.

Stage 1 Consultations occurred in the first half of 2022.

Focus on First Nations heritage, peak and advisory bodies, industry organisations, and state and territory governments.

Produced a '**Directions Report**' and '**Options Paper**'.

We are about to commence **Stage 2 Consultations** - these will occur nationwide, and conclude early in 2023.

These consultations will focus on **3 possible models for reform**, and we are speaking to First Nations groups around Australia asking what they think.

Commonwealth laws that protect Cultural Heritage

Commonwealth laws:

***Aboriginal and Torres Strait
Islander Heritage Protection Act
1984***
(ATSIHP Act)

If **State or Territory law has failed** to protect cultural heritage a First Nation can apply to the Commonwealth.

If the cultural heritage is of **'particular significance'** the Commonwealth can make a declaration to preserve & protect areas or objects.

Since 1984, there have been 500 applications -> **only 7 long term declarations** have ever been made.

***Environment Protection and
Biodiversity Conservation Act 1999***
(EPBC Act)

Offers protection for a defined set of **'protected matters'**, including cultural heritage **where it is of 'national significance.'**

The threshold of 'national significance' often proves an inappropriate test for First Nations cultural heritage.

Decision making power sits with the Minister for the Environment (or their delegate).

Overview of Models for reform

Consultations will focus on **3 possible approaches** for reform:

Each of the **3 models** are informed by UNDRIP rights, including the right to self-determination and free prior and informed consent.

OPTION 1:

Overarching Commonwealth Legislation

Commonwealth legislation would replace all State and Territory legislation with its own national regime based on the national standards, and ATSIHP Act would be repealed.

OPTION 2:

Commonwealth Accreditation Legislation

Commonwealth legislation would enshrine national standards with which all State and Territory legislation must comply. If State and Territory legislation does not comply, then the Commonwealth regime would apply.

OPTION 3:

Model legislation

The Commonwealth will develop model legislation, which will be passed by the Commonwealth, and each of the States and Territories will also be asked to pass it as law in their jurisdictions.

OPTION 1: Overarching Commonwealth Legislation

The Commonwealth would pass legislation replacing all State and Territory legislation dealing with First Nations Cultural Heritage.

Going forward, the States and Territories would have **no role in cultural heritage**, and it would be managed by the Commonwealth across Australia.

In WA this might mean the **Aboriginal Cultural Heritage Act 2021** would be overridden.

For the Commonwealth laws:

The **ATSIHP Act** would also be repealed

The **EPBC Act** would no longer apply to First Nations Heritage.

All of this would be replaced by **new Overarching Commonwealth Legislation**.

OPTION 1: Overarching Commonwealth Legislation

Commonwealth legislation could set up a National First Nations Cultural Heritage Body (**National Body**)

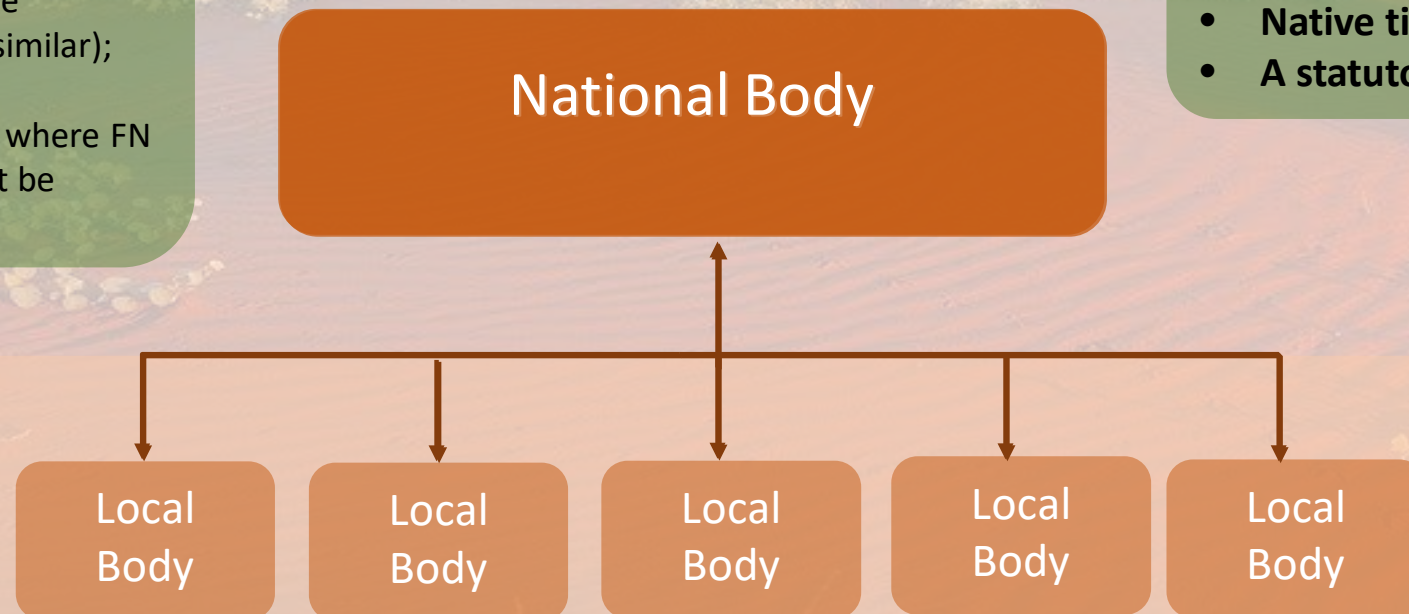
The National Body would then appoint **Local Bodies** who would be responsible for protecting cultural heritage in their area.

Local Bodies could:

- **Say 'yes'** to works going ahead under a Cultural Heritage Management Plans (or similar);
- **Say 'no'** and stop works where FN Cultural Heritage cannot be adequately protected.

Local Bodies could be:

- **Aboriginal Land Councils;**
- **Native title holders / PBCs; or**
- **A statutory authority.**



OPTION 2: Commonwealth Accreditation Legislation

Under the 2nd option, legislation in each State and Territory legislation would not immediately be repealed, and would stay in place.

Instead, the Commonwealth would set up '**National Standards**'.

The legislation in each State and Territory would be **tested against the national standards**.

What would be in the 'National Standards'?

- A requirement for developers to consult with First Nations **early in the process**, and before obtaining other approvals.
- Compliance with UNDRIP.
- Adequate resourcing of First Nations bodies.
- The right to **Free, Prior and Informed Consent**.
i.e. You can say '**yes**' or '**no**'.
- Incorporation of principles of self-determination.
- Active and real enforcement of penalties.

The *Dhawura Ngilan* Best Practice Standards may inform the National Standards.

OPTION 2: Commonwealth Accreditation Legislation

The National Standards would be overseen by a First Nations National Body.

The National Body would test each State & Territory against the National Standards, and:

If the laws in the State or Territory do meet the standards, they would be 'accredited.'

The State or Territory would **carry on as before**, and proponents would **only be required to comply with the State of Territory requirements**.

The National Authority would carry out **regular audits** to ensure the local legislation, as well as policy, continues to comply with the national standards.

If the laws in the State or Territory do not meet the standards, then:

A **default Commonwealth process** would apply (like in Option 1).

Proponents would need to **comply with both** the State and Territory process and the Commonwealth process.

The Commonwealth process would ensure that the national standards had been complied with prior to authorising any works.

OPTION 2: Commonwealth Accreditation Legislation

What would this look like in WA?

It would seem likely that:

The Aboriginal Cultural Heritage Act 2021 would not pass National Standards and either:

(i) The WA government would have to improve the Heritage Act; or (ii) The Commonwealth process would apply.

As with Option 1:

The **ATSIHP Act** would also be repealed.

The EPBC Act would no longer apply to First Nations Heritage.

“OPTION 3: “Model” legislation

Under this model, the Commonwealth would draft model legislation.

The Commonwealth would pass this legislation in the federal parliament, and then ask, or negotiate with, the State and Territory governments, so they also pass it in their parliaments.

The model legislation might introduce National Standards, but **rather than being forced on the States and Territories**, they would be asked to voluntarily adopt it one-by-one.

This process of ‘model legislation’ has been used before. Some **examples** include:

WORK HEALTH & SAFETY (WHS) LEGISLATION: In 2011, WHS legislation was developed. Before it became legally binding the Commonwealth, states and territories had to separately implement them as their own laws.

MANDATORY BICYCLE HELMET LAWS: In the 1990’s the Commonwealth developed model legislation around bike helmets, which was adopted in every state and territory.

“OPTION 3: “Model” legislation

This model could:

See stronger cultural heritage laws put in place, with the full support of the States and Territories.

However, it could take longer than Options 1 & 2, as it requires the agreement of the States and Territories.

What happens next?

Consultations

- We will complete our consultations by March 2023.
- Findings from consultations, any written submissions or other inputs will be written up in an [Options Report](#).

Options Report

- The Options Report needs to be approved by the leadership of the First Nations Heritage Protection Alliance

Minister to consider

- The Options Report will then be provided to the Minister for the Environment.

Decision

- Government decision making on new legislative regime.