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**NATIONAL INDIGENOUS AUSTRALIANS AGENCY
MINISTERIAL INFORMATION REQUEST**

MB23-000236

Date Sent to Minister's Office: 07/07/2023

MINISTER: Linda Burney

Issue: Information Brief – Western Australia Heritage Act 2021 ^{s22(1)}
s22(1)

Response:

Your office has requested information on:

- The intersection between the *Aboriginal Cultural Heritage Act 2021* (Western Australia (WA)) and Commonwealth First Nations heritage protection.
- s22(1)
- WA heritage laws and Prescribed Body Corporate (PBC) resourcing, and the PBC Steering Committee's work plan.

The National indigenous Australians Agency (NIAA) consulted with the Attorney General Department, Department of Climate Change, Energy, the Environment and Water (DCCEEW) and internally in NIAA in providing this response.

Key Points:

The Intersection between the Aboriginal Cultural Heritage Act 2021 (WA) and Commonwealth First Nations heritage protection

- The Commonwealth has a limited role in First Nations heritage protection, as the primary responsibility rests with state and territory governments.
- There is no direct linkage between *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (the ATSIHP Act) and the *Aboriginal Cultural Heritage Act 2021 (WA)* (the Act).
 - However, where the Act does not provide effective protection for an Aboriginal cultural area or object in Western Australia, the Commonwealth Minister for the Environment is able, under the ATSIHP Act, to make an emergency declaration to provide protection for a 'significant Aboriginal area', upon an application by an Aboriginal person/persons or their representatives.
- There has been a marked increase in ATSIHP Act applications since the destruction of highly publicised sacred sites (DCCEEW advise that exact data on applications is not readily available).

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Aboriginal Cultural Heritage Act 2021 (WA)

- The Act came into effect on 1 July 2023, three months after the publication of regulations and guidelines. Key changes to the Act include:
 - a new Aboriginal Cultural and Heritage Council (to replace the current Aboriginal Cultural Materials Committee) and establishes Local Aboriginal Cultural Heritage Services (LACHS) to negotiate agreements with land users.
 - removing the controversial section 18 approvals process that granted permission for damaging cultural heritage without consultation with Traditional Owners.
- The Act, which replaces the previous *Aboriginal Heritage Act 1972 (WA)*, was passed in December 2021. The process to reform the previous Act commenced in 2018 and involved three years of stakeholder consultations. The WA Government has also committed to a review of the new regulations following 12 months of them being in operation.
- The WA Government has made some last-minute changes, including delaying the commencement of the more prescriptive survey requirements to July 2024.
 - Proponents with existing surveys less than a decade old will have until July 2024 to secure an agreement with the relevant Aboriginal Party that no updated assessment is required.
 - Surveys older than 10 years that did not include input from a First Nations body will not need to be redone, provided they have subsequently been endorsed by the appropriate First Nations group.

s22(1)

s22(1)

Western Australian heritage laws and PBC resourcing

- The Act was designed to align and complement governance structures under the *Native Title Act 1993 (Cth)* by prioritising PBCs to be designated as LACHS.
- Under the Act, PBCs will be given the option to opt-in and become LACHS. However this may increase obligations on PBCs, and put pressure on already limited resources.
- Even where PBCs do not elect to opt-in to become LACHS, this change in legislation will introduce new entities to the space, with whom the PBCs will need to engage. This will require investment of more PBC time and resources.

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- In April 2023, the WA Government announced it would invest \$77 million over the next four years to support the new Aboriginal cultural heritage system. When established, LACHS will be funded up to \$300,000 each year to provide resourcing and capacity to meet the anticipated service level requirements from proponents, native title holders, Aboriginal communities and individuals.
 - Currently, the WA Government does not widely contribute to PBC operations in the state (except in areas where alternative settlements have been finalised). This represents an increase in funding for the sector. However, given the expanded remit of PBCs under the legislation, and already identified funding shortfall, it is not yet known if the funding provided will be sufficient.

Australian Government Funding

- The Australian Government currently invests around \$125 million per year in the native title sector through the Indigenous Advancement Strategy. This includes funding of \$32 million in 2022-23 to support and build the capacity of PBCs.
- Funding goes to Native Title Representative Bodies and Service Providers (NTRB/SPs), PBCs, settlements, research and training providers including the AIATSIS Native Title Research Unit and the National Native Title Council (NNTC), and additional resourcing for the Office of the Registrar of Indigenous Corporations to support PBCs.

NTRB/SPs

- NIAA funds a national system of 14 NTRBs/SPs to provide assistance to native title claimants and holders under the Native Title Act 1993.
- This includes four NTRBs/SPs in Western Australia, with annual funding in 2022-23 totalling \$35 million.
- PBC Basic Support is also provided through NTRBs/SPs to help PBCs meet their basic compliance obligations.
- NTRBs/SPs apply on behalf of PBCs as part of their annual funding applications and throughout the year as required. Not all PBCs receive or need Basic Support Funding, but all are eligible. In 2022-23 \$4,290,380 basic support funding was provided in Western Australia.
- Through this model, PBCs receive an average of \$50-80,000 per year under PBC basic support, and can apply for additional capacity building funding.

WA NTRBs/SPs 2022-23 IAS – Native Title funding profile

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PBC Capacity Building

- The PBC Capacity Building program, administered by the NIAA, provides grant funding to support PBCs to generate economic benefits through the effective and sustainable management of their land. Around 95 projects have been funded nationally since the program began in 2015, valued at almost \$50 million.
 - This includes \$11.13 million to support 29 projects in WA since the program began. In 2022-23, 10 projects were funded valued at \$3.6 million across the next three years.

PBC Steering Group

- A PBC Steering Group has been established, supported by the NNTC. The Group is funded from the Indigenous Advancement Strategy and aims to ensure PBCs have greater influence over Native Title policy and legislative reform. The PBC Steering Group will provide advice on the development of options in response to recommendation 7 of the Juukan Gorge Inquiry.
- The PBC Steering Group last met at the AIATSIS Summit on 8 June 2023 to discuss its work program for this year. The Group broadly agreed resourcing is the key reform priority.
- The NIAA is working closely with the NNTC to progress work to look at funding options for PBCs for the PBC Steering Group to consider. A range of options are being explored, and will consider the importance of reinforcing the role and responsibility of jurisdictions and all proponents. The NIAA is also working with the NNTC on opportunities for broader improvements and reform for the PBC sector, in response to the NNTC's PBC Futures report.
- A further update on the work of the Steering Committee and PBC reform will be included in MS23-000250.

Sensitivities

- Media outlets have reported widespread concern regarding the Act and its impact upon resourcing of PBC to effectively operated LACHS.
- There has been a recent campaign by mining, farming and pastoralist groups raising concerns about consultations and calling for a six-month delay or legislation to be scrapped. A petition with approximately 30,000 signatures has been presented to parliament. There have also been some attempts to link these concerns with the Voice referendum.
- In December 2022, in a submission to the WA Government, the WA Local Government Association had urged a delay to the commencement, warning the Act would result in higher rates and neglected firebreaks from landowners afraid of breaching the new requirements.
- Some Traditional Owner groups have raised concerns about the:
 - level of consultations on the draft Act.
 - final decision making resting with the WA Minister for Aboriginal Affairs when agreement cannot be reached by Traditional Owners and proponents.
 - lack of veto power for Traditional Owners and free, prior and informed consent in the Act.
 - lack of an independent, statutory body to oversee implementation of the Act.
- The PKKP Aboriginal Corporation has called on the WA Government to go ahead with the implementation of the Act, despite some of the shortcomings.
- On 27 October 2022, Dr Tony Buti, WA Minister for Aboriginal Affairs, wrote to you seeking additional funding for PBC operations and capacity building.
- You have reiterated to Dr Buti at subsequent meetings, that an expanded role and remit of WA PBCs under WA legislation would require input and support from the WA Government.
- You also advised that while there is some scope for the Australian Government to provide support for WA PBCs, on a case basis under the existing PBC capacity building program, the program is designed for one off-projects to build organisational capabilities and engage with opportunities to build longer-term self-sustainability.
- PBC operational and capacity building funding has also been a key topic for discussion at Native Title Senior Officers Meeting – Compensation Working Group Senior Officers Meeting and will likely be raised by the jurisdictions at the next Native Title Ministers meeting.

- In September 2021, Traditional Owners from WA belonging to the Aboriginal Heritage Action Alliance wrote to the UN Committee on the Elimination of Racism and Discrimination (UNCERD) in relation to the then proposed Aboriginal Cultural Heritage Bill 2021 (WA).
- This correspondence triggered an Early Warning and Urgent Request communication from the UNCERD to the Australian Government. The Australian government provided a response to the UNCERD on 31 March 2022. The response was coordinated by DCCEEW in most of the input from WA Government and conveyed to the UNCERD via Department of Foreign Affairs and Trade.

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Minister Linda Burney

PDR Number MB23-000236

Issue Information Brief - Commonwealth Heritage Laws

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Division/Branch PP - Closing the Gap Connection and Culture

Adviser/DLO Comments:

Return for Redraft

LIB Attachment B

Tuesday, 4 July 2023 9:57 AM

s22(1)

s22(1)

Western Australia

Responsible Minister/s: WA Minister for Aboriginal Affairs (the Hon Tony Buti MLA)

Current legislation: *Aboriginal Heritage Act 2021*

Reform updates:

- The new WA Aboriginal Heritage Act will come into effect on 1 July 2023, three months after the publication of regulations and guidelines. Key changes to the Act include:
 - a new Aboriginal Cultural and Heritage Council (to replace the current Aboriginal Cultural Materials Committee) and establishes Local Aboriginal Cultural Heritage Services (LACHS) to negotiate agreements with land users. Under the Act, PBCs will be given the option to opt-in and become LACHS. However this may increase obligations on PBCs, and put pressure on already limited resources.
 - removing the controversial section 18 approvals process that granted permission for damaging cultural heritage without consultation with Traditional Owners.
- The Act, which replaces the previous Aboriginal Heritage Act 1972 (WA), was passed in December 2021. The process to reform the previous Act commenced in 2018 and involved three years of stakeholder consultations. The WA Government has also committed to a review of the new regulations following 12 months of it being in operation.
- The WA Government has made some last-minute changes, including delaying the commencement of the more prescriptive survey requirements to July 2024.
 - Proponents with existing surveys less than a decade old will have until July 2024 to secure an agreement with the relevant Aboriginal Party that no updated assessment is required.

- Surveys older than 10 years that did not include input from a First Nations body will not need to be redone, provided they have subsequently been endorsed by the appropriate First Nations group.
- Media outlets have reported widespread concern regarding the Act and its impact upon resourcing of PBCs to effectively operate LACHS.
- There has been a recent campaign by mining, farming and pastoralist groups raising concerns about consultations and calling for a six-month delay or legislation to be scrapped. There have also been some attempts to link these concerns with the Voice referendum.
- Some Traditional Owner groups have raised concerns about the:
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 - lack of veto power for Traditional Owners and free, prior and informed consent in the Act.
 - lack of an independent, statutory body to oversee implementation of the Act.
- The PKKP Aboriginal Corporation has called on the WA Government to go ahead with the implementation of the Act, despite some of the shortcomings.

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