



Aboriginal Cultural Heritage Act 2021

DETERMINING 'SUBSTANTIALLY COMMENCED'





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1. Purpose

Throughout Western Australia there are existing valid consents to impact Aboriginal cultural heritage (ACH) that have been issued by the Minister for Aboriginal Affairs (Minister) under section 18 of the *Aboriginal Heritage Act 1972* (1972 Act). These section 18 consents are for projects that may be in varying stages of development, from not yet being commenced, to completed.

Under the *Aboriginal Cultural Heritage Act 2021* (Act), section 18 consents for which notice was given prior to 23 December 2021 (historical section 18 consent) are valid for 10 years from the date the Act comes into effect unless the Minister forms the opinion that the purpose for which the consent was granted has been *substantially commenced*. This document sets out the criteria that may be considered by the Minister in making that determination

2. Legislative Context

2.1 Aboriginal Heritage Act 1972

Under section 18(2) of the 1972 Act, any landowner may submit a notice to the Aboriginal Cultural Material Committee (ACMC) to use the land for a purpose which will result in the alteration, damage, removal, destruction or concealment of any Aboriginal site(s) on the land. The ACMC makes a recommendation to the Minister as to whether or not the Minister should consent to the use of the land for that purpose. The Minister may consent or decline the notice for the use of the land for that purpose. If the Minister grants consent, the owner of the land can lawfully excavate, destroy, damage, conceal or in any way alter any Aboriginal site(s) subject to any conditions of the consent.

Historically, section 18 consents have generally only been granted for the life of the project or a discrete part of the project unless otherwise stated in the conditions of the consent.

2.2 Aboriginal Cultural Heritage Act 2021

Under the Act, historical section 18 consents issued under the 1972 Act will expire at the end of 10 years from transition day with two exceptions:

1. if the section 18 consent is no longer in force [s. 319] including:
 - (a) if consent has expired in accordance with its terms; or
 - (b) the purpose has been achieved; or
 - (c) the owner of the land cannot be found or has voluntarily surrendered the consent; or
2. if the Minister decides that it will not expire [s. 325(2)].

A historical section 18 consent is a section 18 consent the notice for which was given to the ACMC on or before 22 December 2021.

Transition day is proposed to be 1 July 2023.

The Minister may only make a decision that the consent will not expire if the Minister forms the opinion that the purpose specified in the section 18 consent has been *substantially commenced* [s. 325(3)].

3. Scope

The criteria that can be considered by the Minister in determining whether the purpose of historical section 18 consent has substantially commenced are required to be set out in regulations. This document sets out the criteria that Minister will need to consider and which the holder of a historical section 18 consent will need to address.



The criteria below are draft provisions that will be the subject of regulations and are subject to change as part of the regulation drafting process.

4. Requirements

Criteria for determining whether purpose has been substantially commenced

For the purposes of section 325(3) of the Act, the criteria to apply in determining whether the purpose for which land the subject of an historical AH Act section 18 consent may be used, as specified in the consent, has been substantially commenced include the following —

- (a) whether the land is being used for the purpose specified in the consent;
- (b) whether relevant licences, permits and approvals have been obtained to use the land for the purpose specified in the consent, including —

[NB: these subparagraphs will set out a list of licences, permits and approvals and the provisions under which they are obtained];
- (c) whether any of the following activities have been undertaken in relation to the land in preparation for the purpose specified in the consent —
 - (i) clearing or other site works to support the construction of key infrastructure;
 - (ii) construction of new roads, tracks, trails, pathways or parking areas to service key infrastructure;
 - (iii) installation of new services including power, water, sewer or telecommunications services to service key infrastructure;
- (d) whether activities referred to in paragraph (c) have been undertaken in relation to any other land in connection with a larger project of which the purpose specified in the consent forms a part.

5. Acronyms and definitions

1972 Act	<i>Aboriginal Heritage Act 1972</i>
ACH	Aboriginal cultural heritage
ACMC	Aboriginal Cultural Material Committee
Act	<i>Aboriginal Cultural Heritage Act 2021</i>
Council	Aboriginal Cultural Heritage Council
Minister	Minister for Aboriginal Affairs



Appendix 1 – Relevant Legislation

Aboriginal Heritage Act 1972

Section 17 Offences relating to Aboriginal sites

A person who —

- (a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or
- (b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site, commits an offence unless he is acting with the authorisation of the Registrar under section 16 or the consent of the Minister under section 18.

Aboriginal Cultural Heritage Act 2021

319. Section 18 consents no longer in force

A 1972 Act section 18 consent is **no longer in force** and has no further effect —

- (a) if the consent has expired in accordance with its terms, the 1972 Act or this Act, as is relevant; or
- (b) if the purpose specified in the consent has been achieved; or
- (c) if the owner of the land the subject of the consent cannot be identified or found, or no longer exists; or
- (d) if the owner of the land the subject of the consent has voluntarily surrendered the consent to the Minister; or
- (e) if the consent is an historical 1972 Act section 18 consent that has expired in accordance with section 325(1).

320. Expiry of historical section 18 consents

- (1) An historical 1972 Act section 18 consent expires at the end of the period of 10 years beginning on transition day (**expiry day**) unless —
 - (a) it is no longer in force on expiry day; or
 - (b) subsection (2) applies.
- (2) An historical 1972 Act section 18 consent does not expire under subsection (1) if —
 - (a) an application in relation to the consent has been made to the Minister no later than 12 months before expiry day; and
 - (b) the Minister makes a decision in accordance with subsection (3) that the consent the subject of the application will not expire on expiry day; and
 - (c) the Minister gives the owner of the land the subject of the consent written notice of that decision before expiry day.
- (3) A decision under subsection (2)(b) can only be made if the Minister forms the opinion that the purpose for which the land the subject of the consent may be used, as specified in the consent, has been substantially commenced.
- (4) Transitional regulations may be made about —
 - (a) the manner in which applications referred to in subsection (2)(a) may be made; and
 - (b) the criteria to apply under subsection (3) in determining whether the purpose for which land the subject of an historical 1972 Act section 18 consent may be used, as specified in the consent, has been substantially commenced; and
 - (c) the giving of notice, including the persons to be notified, about decisions made under subsection (2)(b).
- (5) A decision by the Minister under subsection (2)(b) can be delegated under section 301 only to the Council.