The Aboriginal Cultural Heritage Act 2021 (Act) will repeal the Aboriginal Heritage Act 1972 (1972 Act).

Part 14, Division 2 of the Act includes transitional provisions to move from the old to the new system including providing for the expiration of previous consents granted under section 18 of the 1972 Act.

Section 18 consents 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 if the Section 18 consent is no longer in force [s319]; or
2. if the Minister makes a decision that they will not expire [s325(2)].

The Minister may only extend a consent if the Minister forms the opinion that the purpose specified in the consent has been substantially commenced [s325(3)].

What is being Co-designed?
The purpose of this co-design process is to define ‘substantially commenced’ as it relates to historical section 18 consents that were previously granted under the 1972 Act.

About this Fact Sheet
This Fact Sheet includes information relevant to the co-design process for defining ‘substantially commenced’ and is designed to include information that will provide relevant context and information relating to the requirements under the Act. Appendix 1 to this document provides all the relevant sections of the Act.

A set of questions to assist with the co-design process are found on page 3 of this fact sheet.
Who does the definition of ‘substantially commenced’ affect?
Defining ‘substantially commenced’ has the potential to affect proponents who have been granted section 18 consents to undertake works and the consent has not expired or otherwise ceased to have effect. A section 18 consent will no longer be in force 10 years after transition day unless the Minister makes a determination that works associated with the purpose of the consent have “substantially commenced”.

If the Minister is of the view that the works associated with a section 18 consent have not been substantially commenced, then the section 18 consent will cease to have effect. If the proponent continues to want to undertake activities that may harm ACH, they will require an approved or authorised ACH management plan or the granting of an ACH Permit (depending on the tier of the activity).

Aboriginal people are also likely to have an interest as to whether or not a project subject of a section 18 consent has substantially commenced. In many instances the section 18 consent may have been granted in circumstances where appropriate consultation with Aboriginal people did not take place.

Considerations
Below are some of the matters that should be considered when co-designing the definition of ‘substantially commenced’:

- This process only applies to 1972 Act consents given for section 18 notices submitted prior to the day the Act received Royal Assent, being 22 December 2021.
- The Minister can only make a decision that the consent will not expire on expiry day if an application is made to the Minister more than 12 months before the consent is due to expire and if the Minister forms the opinion that the purpose of the section 18 has been substantially commenced.
- The Minister must notify the owner of the land subject of the section 18 consent of his decision prior to the expiry of the authorisation.
- This power of the Minister can be delegated to the ACH Council.
- There exists throughout Western Australia thousands of valid section 18 consents for projects that are in varying states of progress, from having been completed to not yet being commenced, owing to a range of factors that include stages of forward planning, economic circumstances and changes in priorities and operational needs among others.
Co-design questions
To assist the co-designing the definition of ‘substantially commenced’, your views are being sought to the following questions.

1. What factors should be considered in determining whether the purpose of a section 18 consent has ‘substantially commenced’?

2. What kind of evidence can/should be provided for these factors in order to satisfy this requirement?

3. Is it only the proponent who can demonstrate whether the project has substantially commenced or can/should other parties also be able to have a view? If other parties are also able to have a view, what kind of evidence should they be able/expected to provide.
### Appendix 1. Sections of the Act relevant to ‘Substantially Commenced’

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<th>Section</th>
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| **Section 319** | **AH Act section 18 consents no longer in force**  
An AH 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 AH 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 AH Act section 18 consent that has expired in accordance with section 325(1). |
| **Section 325** | **Expiry of historical AH Act section 18 consents**  
(1) An historical AH 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 AH 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 AH 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 ACH Council. |