



## *Aboriginal Cultural Heritage Act 2021*

# **DETERMINING 'SUBSTANTIALLY COMMENCED'**

Consultation Draft





# Contents

1. Purpose.....	3
2. Legislative Context.....	3
2.1. <i>Aboriginal Heritage Act 1972</i> .....	3
2.2. <i>Aboriginal Cultural Heritage Act 2021</i> .....	3
3. Scope.....	3
4. Requirements.....	4
4.1. Determining Substantially Commenced.....	4
4.2. Ground disturbance activities have not commenced.....	4
4.3. Further Considerations.....	4
5. Terms used.....	5
Appendix 1 – Relevant Legislation.....	5

Consultation Draft



## 1. Purpose

Throughout Western Australia there are existing valid consents to impact Aboriginal cultural heritage (ACH) that have been issued 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. 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.

This document lays out the factors that may be considered by the Minister for Aboriginal Affairs (Minister) to determine whether the purpose of the section 18 consent has *substantially commenced* as required by the *Aboriginal Cultural Heritage Act 2021* (Act).

## 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 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.

### 2.2. Aboriginal Cultural Heritage Act 2021

Under the Act, 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 if the section 18 consent is no longer in force [s319] including:
  - a. if the conditions of the section 18 consent say it has expired; 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 [s325(2)].

The Minister may only make a decision if the Minister forms the opinion that the purpose specified in the section 18 consent has been *substantially commenced* [s325(3)].

## 3. Scope

This document applies to proponents seeking to demonstrate whether a project – for which a section 18 notice was given to the ACMC on or before 22 December 2021 and consent was granted – has substantially commenced, and the consent has not yet expired or otherwise ceased to have effect.



## 4. Requirements

### 4.1. Determining Substantially Commenced

Factors that can be considered by the Minister in determining whether the purpose of the section 18 consent has substantially commenced include:

- the use of the land for the purpose specified in the notice; and
- all relevant compliances, licences, permits and approvals are already in place including, but not limited to:
  - relevant permits prescribed under the *Environmental Protection Act 1986, Planning and Development Act 2005* and/or granted by the Department of Water and Environmental Regulation;
  - relevant licences granted by the Department of Mines, Industry Regulation and Safety or the Department of Biodiversity, Conservation and Attractions;
  - compliance with the *Mining Act 1978*; and
  - compliance with the *Biodiversity Conservation Act 2016*.

The following factors may be considered by the Minister to determine whether the purpose of the section 18 consent has *substantially commenced*:

- ground-disturbing activities have been completed lawfully that relate to clearing of land in preparation for commencement of the purpose of the granted section 18 consent; and
- the ground-disturbance activity that has occurred directly relates to key infrastructure\* required for the purpose of the granted section 18 consent.

\*Key infrastructure for the purpose of the granted section 18 consent (project) can include, but is not limited, to:

- land clearing – in preparation for the establishment of key infrastructure;
- site works – in preparation for construction of key infrastructure;
- construction of new roads, tracks, trails, pathways or parking areas – to service key infrastructure; and
- installation of new services such as power, water, sewer, or telecommunications – to service key infrastructure.

### 4.2. Ground disturbance activities have not commenced

If ground disturbing activities have not commenced – but the granted section 18 consent is described as a phase of a larger project – and ground disturbing activities have substantially commenced on the larger project, the section 18 consent in question may be considered to be *substantially commenced*.

### 4.3. Further Considerations

This process only applies to section 18 consents for notices submitted on or before the day the Act received Royal Assent, being 22 December 2021. The 1972 Act will no longer have effect from “transition day” (the day the Act comes into effect) except in relation to completion of a limited range of matters. Six months after transition day, the 1972 Act is repealed and the ACMC abolished.



## 5. Terms used

<b>1972 Act</b>	<i>Aboriginal Heritage Act 1972</i>
<b>ACH</b>	Aboriginal cultural heritage
<b>ACMC</b>	Aboriginal Cultural Material Committee
<b>Act</b>	<i>Aboriginal Cultural Heritage Act 2021</i>
<b>Council</b>	Aboriginal Cultural Heritage Council
<b>Minister</b>	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).

#### *325. 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.