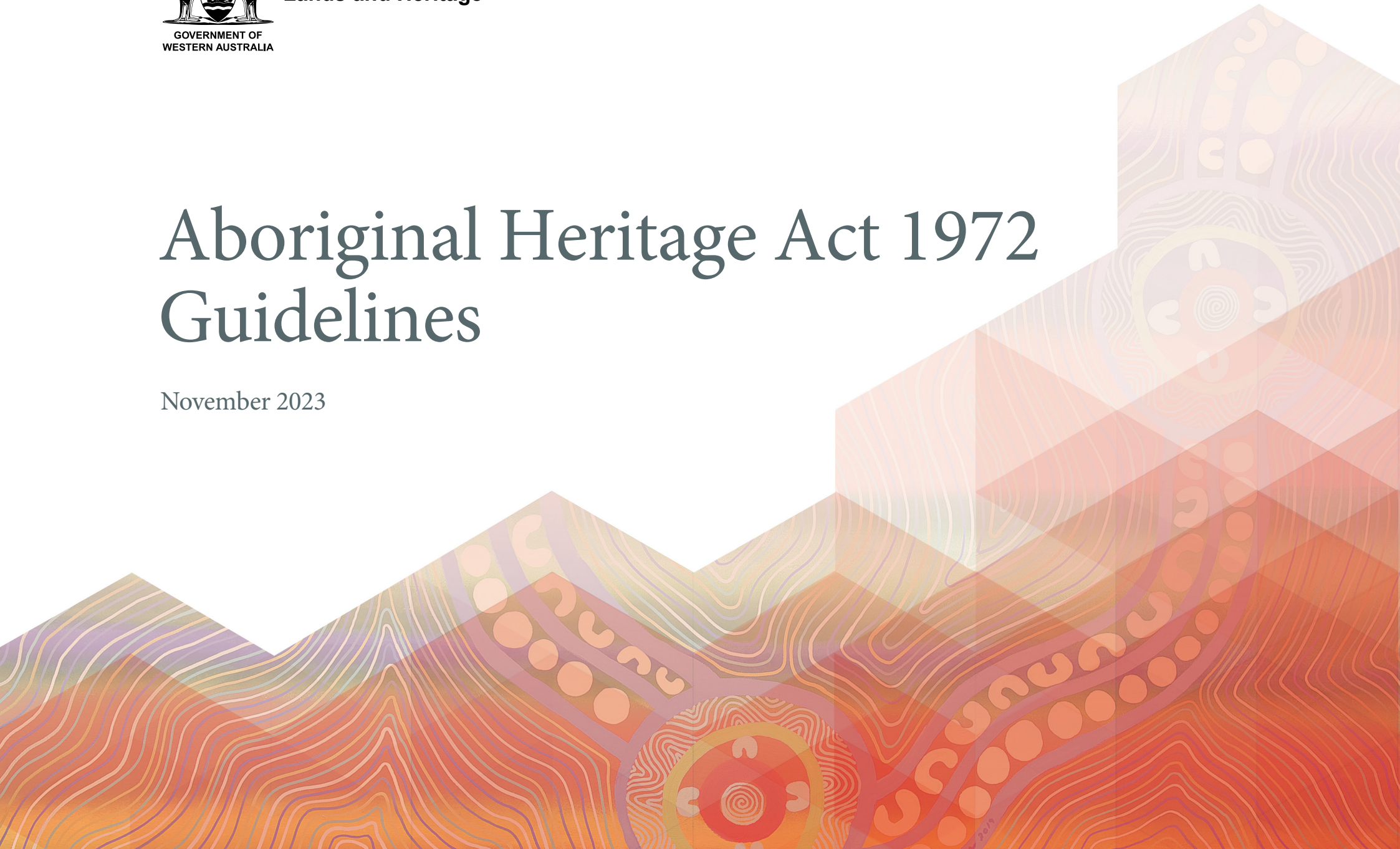




Department of **Planning,**
Lands and Heritage

Aboriginal Heritage Act 1972 Guidelines

November 2023



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The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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The purpose of these guidelines is to assist landowners to determine whether a consent from the Minister for Aboriginal Affairs is required to undertake a proposed land use that may impact Aboriginal heritage, and avoid committing an offence under the *Aboriginal Heritage Act 1972* (Act).

1. Introduction

Aboriginal culture is the oldest living cultures in the world, requiring recognition, protection, preservation and management.

An Aboriginal site is defined by section 5 of the Act to mean:

- (a) any place of importance where persons of Aboriginal descent have left any object, or have used, in connection with the traditional cultural life of the Aboriginal people, past or present;
- (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- (c) any place which is, or was, associated with Aboriginal people and which is of historical, anthropological, archaeological or ethnographical importance to the State; and
- (d) any place where objects to which the Act applies are stored.

For the purposes of these guidelines, “Aboriginal sites” includes both:

- (i) Aboriginal sites which have been assessed by the Aboriginal Cultural Heritage Committee (Committee) as meeting the definition of an Aboriginal site under section 5 of the Act and are shown as ‘registered Aboriginal sites’ on the Aboriginal Cultural Heritage Inquiry System (ACHIS); and
- (ii) Aboriginal heritage places about which information has been provided to the Registrar of Aboriginal Sites (Registrar) within the

Department of Planning, Lands and Heritage (Department), or to the landowner, but which has not yet been assessed by the Committee against section 5 (these are shown as ‘lodged places’ on ACHIS).

Until lodged places have been assessed by the Committee against section 5, it is recommended that they be treated as places that the Act might apply to in order to avoid any unintended breaches of the Act.

It should be noted that the Act protects all Aboriginal sites including sites about which the Department does not hold any information (see Step 1 on page 2).

It has been unlawful to harm Aboriginal heritage for more than 50 years. A person who excavates, destroys, damages or conceals or in any way alters any Aboriginal site commits an offence. It is also an offence to alter, damage, remove, destroy, conceal or deal with in a manner not sanctioned by relevant custom, or assume possession, custody or control of any object on or under an Aboriginal site.

Under section 18 of the Act, landowners (as defined in the Act) can apply for consent to use the land for a purpose which would be likely to damage, destroy or in any way alter an Aboriginal site, or would otherwise be an offence under section 17 of the Act.

A ‘landowner’ includes a lessee from the Crown, and the holder of any mining tenement or mining privilege, or of any right or privilege under the *Petroleum and Geothermal Energy Resources Act 1967* and the holder of a licence under the *Water Services Act 2012* giving rights or powers in respect of the land.



Approval of the Registrar under section 16 of the Act can also be sought where it is proposed to excavate or remove any thing from an Aboriginal site. This approval often relates to research activities only. The same considerations outlined below generally apply to applications for a section 16 approval.

If a person is in the process of carrying out an activity and identifies that there is a risk of harming an Aboriginal site, they should stop the activity immediately and contact the Department for advice. This could help them avoid committing an offence under the Act.

2. Purpose

These guidelines provide practical guidance to assist landowners where their proposed use of land may require a section 18 consent from the Minister for Aboriginal Affairs (Minister), and in understanding the requirements for a section 18 consent, including requirements for reporting new information.

These guidelines also assist landowners in how to prepare an application for a section 18 consent.

They should not be taken to limit the information which a landowner can provide to the Committee. Landowners should obtain their own professional, legal and other advice on the application of the Act to their particular circumstances.

3. What landowners need to do

The potential for land to contain Aboriginal sites varies across Western Australia. The level and amount of previous land use may be relevant in determining whether a person is likely to breach section 17 of the Act.

Particular landforms are more likely to contain Aboriginal sites and objects. These include rock outcrops and shelters, waterways, coastal waters and other water sources, and foreshores and dunes. Please refer to 'Types of Aboriginal heritage and relevant landscape features' at Appendix 1 for more information on the types of landscape features which are more likely to contain Aboriginal sites and objects.

In assessing whether a proposed land use may affect Aboriginal sites or objects, it is recommended that a landowner take the following steps:

Step 1: Assess the likelihood of there being an Aboriginal site on the land

- There are a number of ways to assess whether the land has, or may have, Aboriginal sites or objects.
 - **Registered Aboriginal sites and Aboriginal heritage places**
Registered sites and Aboriginal heritage places can be found on ACHIS at www.wa.gov.au/aboriginal-heritage. ACHIS also includes a directory of Aboriginal

heritage surveys that may indicate whether or not Aboriginal places or sites are present or identify specific areas that should be avoided.

- **Consultation with Aboriginal people**
Information about the Aboriginal heritage for a particular area is best obtained through consultation with the relevant Aboriginal people. This step is of particular importance in informing a section 18 application. More information on consultation is provided below and in the Consultation Policy for section 18 applications. Consultation may result in avoiding the need for section 18 consent by planning activities to avoid any Aboriginal heritage present.

If required, the Department can be contacted for assistance.

Step 2: Consider potential for any harm to that Aboriginal site

- Landowners should consider whether any Aboriginal sites or objects on the land may be harmed by the proposed land use. This extends to excavation, destruction, damage, concealment or alteration of an Aboriginal site.

Step 3: Determine the nature and level of the potential harm

- Landowners should consider the level of harm to any Aboriginal site on the land, such as whether any potential harm to the site would be minimal, partial or total.



- The type of activity and level of harm may mean an alternative approval, such as approval under Regulation 10 of the Aboriginal Heritage Regulations 1974, is all that is required.

4. What happens if there is an Aboriginal site?

If the landowner's risk assessment determines that there is an Aboriginal site that is likely to be harmed by the intended land use, it is the landowner's responsibility to seek approval and obtain a section 18 consent - or alternative approval - before commencing any work on the land that may harm the Aboriginal site.

5. How do landowners start a section 18 application?

A landowner needs to give a section 18 notice to the Committee via the Registrar using the online ACHknowledge portal. The notice [or application] seeks the Minister's consent for the use of land for any purpose that may excavate, damage, destroy, conceal or alter an Aboriginal site on the land, or otherwise be a breach of section 17 of the Act.

The purpose and geographical location of the land use needs to be included in the notice.

Applicants are advised to contact the Department to discuss their proposed activity before submitting a section 18 notice.

6. Timeframes

Timeframes apply to the application process which commence upon the giving of a valid section 18 notice to the Committee.

A pre-lodgement discussion with heritage officers at the Department is strongly encouraged to verify that the proposed activity warrants a section 18 notice, as opposed to some other form of regulatory approval or no approval required, and to ensure that the application when lodged is complete.

An application that is missing details or requires further information may result in stop-the-clock provisions being applied thereby impacting the capacity of the Department and the Committee to process in a timely manner.

More information is available at www.wa.gov.au/aboriginal-heritage.

7. Who can and cannot give notice for a section 18 consent?

The applicant must be either:

- the owner of the land (as defined in the Act); or
- a person authorised by the landowner to submit the section 18 notice on their behalf.

An applicant who is not the landowner and who cannot supply, evidence of authorisation from the landowner, cannot submit an application.

8. What information needs to be included in an application?

A section 18 notice:

- needs to clearly describe the elements of the proposed project, activity or works and any consultation that has been undertaken with the relevant Aboriginal people; and
- where applicable, should describe the measures that will be adopted to avoid or minimise harm to the Aboriginal sites or objects on the land or outline why harm to the Aboriginal sites or objects cannot be avoided.

The application fields will guide applicants regarding what information is required, including the following:

- contact details;
- details of the owner of the land and/or applicant. An applicant who is not the owner of the land must include authorisation by the landowner to undertake the purpose described in the application;
- maps of the land;
- details of the purpose (the proposed use of the land);
- final versions of any Aboriginal heritage survey reports. Draft reports will not be accepted;
- details for all newly recorded Aboriginal sites or objects and all existing Aboriginal sites that have new information recorded;



- spatial information must be provided for the land and each of the Aboriginal sites and objects on the land. Shapefiles must be GDA94;
- details of the consultation undertaken with Aboriginal people; and
- potential harm and management responses.

9. Who do I need to consult with before lodging an application?

The Minister and the Committee recognise that Aboriginal people:

- have deep spiritual connections to the land and cultural obligations to care for their country;
- are the primary source of information about the existence and value of their heritage and are best placed to have input into the assessment of the cultural significance; and
- are best placed to provide information as to how activities may impact their heritage.

Consultation is important to understand the heritage values of any Aboriginal sites or objects and to obtain the views of Aboriginal people as to the impacts of the proposed land use on those values. This assists the Committee and the Minister in performing their statutory functions when considering section 18 notices. The Minister is also required to have regard to the general interest of the community in deciding whether to grant consent.

Consultation with Aboriginal people will ensure the Minister and the Committee have regard to relevant information relating to:

- the location, importance and significance of any Aboriginal heritage;
- strategies for the protection and management of any Aboriginal heritage;
- comments on the section 18 application including support and/or any suggested conditions and mitigation strategies; and
- any agreement reached between the parties in relation to the undertaking of the land use and the protection and/or management of any Aboriginal sites.

More detailed information is available in the [Consultation Policy](#).

10. What is the application process?

Once an application is lodged with the Registrar, the Department reviews the application to ensure the information fields set out in ACHknowledge have been completed before assessing the application and providing it to the Committee for its consideration. The Committee must form an opinion as to whether there is an Aboriginal site on the land and evaluate the importance and significance of any such site. The Committee then makes a recommendation, including as to any conditions that could or should be imposed on the section 18 consent, to the Minister.

After considering the recommendations of the Committee, and the general interests of the community, the Minister may either consent to the use of the land or refuse consent. If the Minister consents, the Minister may choose to include conditions, such as conditions relating to the Aboriginal sites or objects, mitigation strategies or the use of the land.

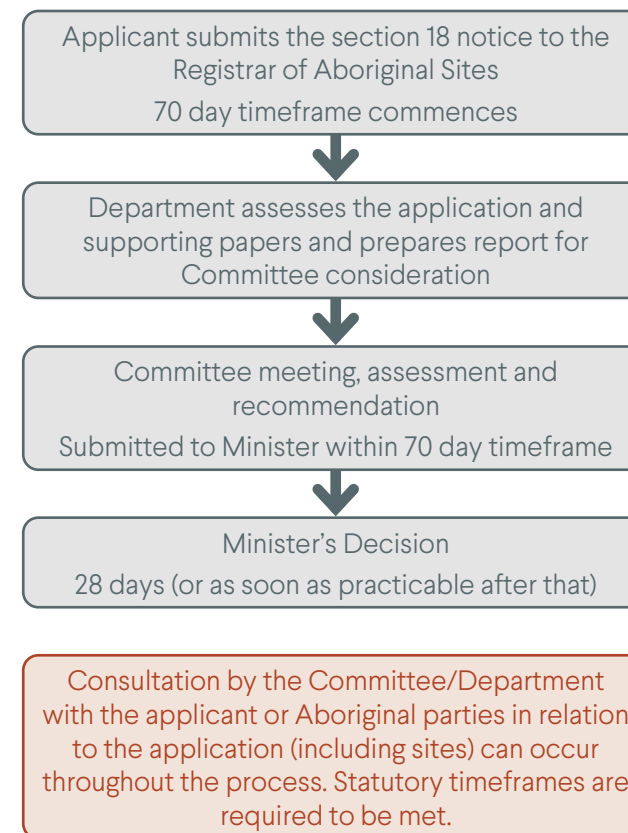


Figure 1: provides a high-level overview of the section 18 process.



11. Obligation to report sites and objects

The Act places an obligation on all persons in Western Australia to report anything that they believe may be a site or object to which the Act applies, unless they have reasonable cause to believe that the existence of the site or object in question is already known to the Registrar. This obligation does not extend to Aboriginal people acting in accordance with customary law or tradition.

The Department encourages persons wishing to report Aboriginal sites or objects to lodge relevant information via the ACHknowledge portal. This information is necessary for the Committee to be able to carry out its functions under section 39 of the Act. Alternatively, the Department can be contacted for advice.

12. How to submit a section 18 notice

The section 18 application process is administered by the Department.

A section 18 notice is lodged via the ACHknowledge portal on the Department's website www.wa.gov.au/aboriginal-heritage.

13. Application fees

The [Aboriginal Heritage \(Fees\) Regulations 2023](#) sets out fees that apply for applications under sections 16 and 18 the 1972 Act. The fees are:

- Commercial and Government proponents:
 - (i) \$256 application fee; and
 - (ii) \$5,096 multiplied by the number of proposed investigation sites for section 16 applications and identified sites and places for section 18 applications.
- Individuals, small business and not-for-profit organisations are to pay a \$256 application fee, with no fee per proposed investigation site or identified place.

Special exemption provisions apply for Aboriginal corporations who are undertaking not-for-profit activities.

The Director General has the ability to waive, reduce or refund fees and extend the time within which to pay fees. These options will be considered on a case-by-case basis.

14. What happens if landowners become aware of new information after consent has been granted?

It is a condition on all section 18 consents that the landowner must notify the Minister within 21 days, via ACHknowledge, if the owner becomes aware of any new information about an Aboriginal site on the land that is the subject of the consent.

New information about an Aboriginal site means there is additional information that the Minister was not made aware of when the Minister made their decision, and which has come to the attention of the landowner from the relevant dates as specified on page 6.

As referred to in the Introduction, the Act protects all Aboriginal sites, including sites about which there is no information known by the Department. New information about Aboriginal heritage may relate to a new site or an existing site.

Such new information must be reported to the Minister as if it were identified prior to the section 18 application being made or considered. The section 5 criteria and threshold for new information once a consent has been granted is the same as it is when first applying for consent. The Act protects Aboriginal sites that meet section 5 and the timing of information relating to Aboriginal sites is irrelevant.



New information may typically include:

- new information about a known Aboriginal site on the land that is the subject of the section 18 consent e.g. the age of the site;
- new information about any place that the Committee – when considering the section 18 notice – determined did not meet section 5 of the Act to be an Aboriginal site, and the new information may mean the place does meet section 5 of the Act;
- new information about an Aboriginal site on the land not known at the time the section 18 consent was given.

Under the Act, a landowner who holds a section 18 consent must notify the Minister when the owner becomes aware of the new information:

- on or after 1 July 2023 – if the notice seeking consent was given to the Committee before 23 December 2021;
- on or after 23 December 2021 – if the notice seeking consent was given to the Committee on or after 23 December 2021 but before 1 July 2023;
- on or after the day on which the consent was given – if the notice seeking consent was given to the Committee on or after 1 July 2023.

Where the Minister becomes aware of new information, in having regard to the general interest of the community, the Minister may take into consideration the following factors:

- Whether the land use that is the subject of the existing applicable section 18 consent would

likely harm the Aboriginal site that is the subject of the new information.

- Whether the Minister considers that the new information:
 - if in relation to a registered Aboriginal site – changes its existing importance or significance; or
 - if in relation to a place which was previously not considered to be an Aboriginal site – now meets section 5 of the Act and is an Aboriginal site.

Where the Minister becomes aware of new information about an Aboriginal site through being notified by the landowner who holds a section 18 consent, the Minister must, having regard to the general interest of the community, do one of the following:

- amend the consent by amending the conditions to which it is subject, imposing new conditions or changing the specification of the land to which it relates;
- revoke the consent;
- revoke the consent and give a new consent; or
- confirm the consent.

Where the Minister becomes aware of new information about an Aboriginal site through any other means, the Minister may, but is not required to, do one of the above.

The Minister may also temporarily suspend the section 18 consent in part or in full while considering whether to make one of the above decisions.

15. Right of review

The applicant or a native title party in relation to the land in question can apply to the State Administrative Tribunal (SAT) for a review of the Minister's decision. This applies to both the original application and where the Minister makes a decision on new information.

The Premier can call in an application to SAT if the Premier considers that the application raises issues of State or regional importance.

To call in the application, the Premier must give a direction to the SAT President within 28 days of an application for review being lodged with SAT.

The Premier may direct SAT to:

1. refer the application to the Premier for determination; or
2. hear the application and refer it, with recommendations, to the Premier for determination.

The Premier must then determine the application within 28 days or as soon as practicable after that.

In determining the application, the Premier must do one of the following:

- (1) if the decision that is the subject of the application was to give, amend or confirm a consent:
 - (i) confirm the decision that is the subject of the application;



- (ii) amend the consent by amending the conditions to which it is subject, imposing new conditions or changing the specification of the land to which it relates;
 - (iii) revoke the consent; or
 - (iv) revoke the consent and give a new consent.
- (2) otherwise:
- (i) confirm the decision that is the subject of the application;
 - (ii) give a consent; or
 - (iii) reverse the decision.

16. Transfer of consent on change of land ownership

Section 18B of the Act allows for a consent to be transferred between landowners.

In the event of a change of ownership of land that is the subject of a section 18 consent, the new landowner must notify the Minister, via the Registrar¹, within 14 days of becoming the landowner and must include:

- (a) a copy of the consent;
- (b) the name and contact details of each new owner; and
- (c) the date of change of ownership.

The new landowner must give a copy of the notice to the Committee and any native title party within 28 days of the change in ownership.

The Minister:

- can amend the consent having regard to the new owner and whether the original consent and conditions still have their intended effect;
- is required to give written notice to the new owner of any amendments to the consent, and publish the decision on the Department's website; and
- at the request of the new landowner, is able to revoke the consent.

This process preserves an existing consent and allows for it to be amended to ensure it continues to have its intended effect. It does not validate or revive a consent which was not otherwise valid.

A consent and any conditions will often have been drafted broadly enough to apply to future landowners without requiring amendment - for example, a condition which requires works not to be undertaken in a designated portion of the land or reporting requirements.

If a new landowner wants to conduct a different land use, or undertake the land use in a different location, they will need to lodge a new section 18 notice.

17. Support and advice

If a landowner is unsure about whether there may be a risk of harm or whether the Minister's consent is required, they can contact the Department to discuss the situation.

Landowners are also strongly encouraged to contact the Department when preparing their section 18 notice. This will ensure that the notice includes the relevant and appropriate information the Committee and Minister will require to ensure no risk of delay.

Email: aboriginalheritage@dplh.wa.gov.au

Telephone: 6551 8002

18. Further information

For more information, please refer to:

1. [Amended Act](#)
2. [Webpage](#)
3. [ACHknowledge portal](#)

¹ Notification may occur via ACHknowledge



Appendix 1: Types of Aboriginal heritage and relevant landscape features

The following is an overview of the various types of Aboriginal sites that can be found in Western Australia. This list is not exhaustive.

Artefacts: An artefact site is a place where human activity is identifiable by the presence of a portable object/s (e.g., stone, glass, bone, shell) utilised or modified by Aboriginal people in relation to traditional cultural life past or present.

Ceremonial: A place used for a formal act or series of acts prescribed by ritual, belief in a mythological manifestation, religious belief or observance, protocol or convention that is connected with the traditional cultural life of Aboriginal people past or present.

Engraving: A motif (either figurative or non-figurative) on a rock surface produced by percussion or abrasion. Engravings are also often referred to as petroglyphs.

Fish Trap: A stone, wood, or other similar structure made by Aboriginal people for catching fish. Such structures are generally found on the coast of Western Australia, and in its lakes and rivers.

Grinding patches/Grooves: A place where grinding patches or grooves can be found. Grinding patches or grooves are smoothed areas or grooves on rock surfaces (non-portable) that have been created by grinding activity associated with food production such as seed milling, preparation of pigments, tool manufacture and/or maintenance and ritual.

Historical: A place that has historical associations with Aboriginal people and may or may not contain physical evidence of those associations.

Man-made structure: The placement or arrangement, by Aboriginal people, of stone, wood or other material made into a structure for ceremonial or utilitarian purposes.

Midden: A place where there is an accumulation of shell refuse that is derived from exploitation of a mollusc resource by Aboriginal people. Such sites may also contain artifacts, fireplaces, burnt shell and bones.

Modified or Scarred tree: A place with one or more tree(s), living or dead, that has been modified by Aboriginal people by removing the bark or wood resulting in the formation of a scar. This sort of modification was and is frequently done for the making of implements, tools or other materials that were used in traditional cultural practices.

Mythological: A place that is connected to the spirit ancestors, in their various manifestations, of the 'Dreamtime' which continues to be important and of special significance to persons of Aboriginal descent.

Painting: Places where Aboriginal people have painted on surfaces. Paintings (including daubings, drawings, stencils, prints) can be figurative or non-figurative markings or motifs on surfaces such as rocks, rock walls and trees at fixed locations that are produced by adding pigments and or mediums, such as ochre, blood, beeswax, animal fats, vegetable dyes, tree saps.

Quarry: Places where there is evidence for the extraction of stone or ochre.

Repository/Cache: A place where cultural or utilitarian objects are/were taken, or stored, by Aboriginal people, either past or present.

Skeletal material/Burial: A place where Aboriginal skeletal material is buried and/or where mortuary practices occurred.