



Aboriginal Heritage Act 1972 (WA) guidelines

Overview of the Act and Section 18 consent

Foreword

The Western Australian Government is committed to the protection and preservation of Aboriginal cultural heritage in WA. Many Aboriginal places and objects remain significant in the lives of Aboriginal people today and contribute to an understanding by the whole community of our place and history. Aboriginal heritage is acknowledged nationally and internationally for its educational, aesthetic, social, historical and scientific value. The preservation of places and objects is therefore of benefit to all Western Australians. Many Aboriginal sites are fragile and can be hard to identify; nevertheless, they have survived for thousands of years. However, once they are damaged or destroyed they are lost forever.



The *Aboriginal Heritage Act 1972* was enacted to ensure that all Aboriginal cultural heritage within Western Australia could be properly protected and preserved. In recent years, Western Australia has experienced strong economic growth, particularly in the resources sector, placing increasing pressure on Aboriginal cultural heritage sites.

The commitment to protecting Aboriginal heritage needs to be balanced with the general interest of the community. As Minister for Indigenous Affairs, I am required by the Act to ensure that the general interest of the community plays its part in the decisions I make for the protection and preservation of Aboriginal heritage.

The Government is dedicated to ensuring the *Aboriginal Heritage Act 1972* is applied in a transparent and consistent manner and the principles of procedural fairness are applied in the administration of the Act.

This guideline outlines the policy position of the Government as well as the legal framework within which the Act is administered. It is intended to give clarity to all parties to ensure that the objects of the *Aboriginal Heritage Act 1972* can be properly fulfilled. It is intended that this guideline will be reviewed in light of judicial reviews and decisions.

A handwritten signature in blue ink, appearing to read 'Kim Hames'.

Hon Dr Kim Hames JP MLA
DEPUTY PREMIER
MINISTER FOR INDIGENOUS AFFAIRS

Disclaimer

This guideline is intended to provide clarity to users of the *Aboriginal Heritage Act 1972*. It is not binding on the Government.

The advice contained in this guideline is not intended to be legal advice. People should always obtain their own legal advice on the meaning and application of the *Aboriginal Heritage Act 1972* to their own particular circumstances.

As a general rule, a level of flexibility is employed in the application of the *Aboriginal Heritage Act 1972*. Any questions regarding the Act can be put to the Registrar of Aboriginal Sites at the Department of Indigenous Affairs.

Glossary

ACMC	Aboriginal Cultural Material Committee
Department	Department of Indigenous Affairs
Minister	Minister for Indigenous Affairs
Register	Register of places and objects
Registrar	Registrar of Aboriginal Sites
SAT	State Administrative Tribunal

Legal Context

Introduction

The *Aboriginal Heritage Act 1972* identifies three statutory entities which are responsible for identifying, protecting and preserving Aboriginal cultural heritage in WA:

- The Aboriginal Cultural Material Committee is established under s. 28(1) and is given the task of evaluating the significance of Aboriginal sites which have been located and making recommendations about their protection;
- The Minister for Indigenous Affairs (“the Minister”) has responsibility for the overall administration of the *Aboriginal Heritage Act 1972* and his or her duties are specified in s. 10 of the *Aboriginal Heritage Act 1972* ; and
- The Registrar of Aboriginal Sites (the Registrar) is appointed pursuant to s. 37 by the Chief Executive Officer of the Department of Indigenous Affairs (the Department) and plays an important role in maintaining the Register of Aboriginal Sites and assisting both the Minister and the ACMC.

Each of these entities has a distinct and different role to play in the preservation of Aboriginal cultural heritage.

Role of the Aboriginal Cultural Material Committee

The ACMC consists of:

- persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which will assist the ACMC in relation to the recognition and evaluation of the cultural significance of matters coming before the ACMC;
- a person with specialised experience in the field of anthropology;
- three ex-officio members (s. 29) being the Director of the Museum, the Chief Executive Officer of the Department and an authorised officer from the department that administers the *Land Administration Act 1997*; and
- a Chairman appointed by the Minister from among the members.

The broad functions of the ACMC are set out in s. 39 of the *Aboriginal Heritage Act 1972*, which provides for the ACMC to:

- evaluate on behalf of the community the importance of places and objects that are said to be associated with Aboriginal persons;
- record and preserve Aboriginal tradition in relation to Aboriginal places and objects;
- recommend significant objects and places to the Minister to be preserved and managed;
- advise the Minister on any question referred to the ACMC; and
- perform the functions allocated to the ACMC under the *Aboriginal Heritage Act 1972*

Subsections (2) and (3) of s. 39 set out the criteria and primary considerations to be used by the ACMC when evaluating the importance of places and objects to which the Act applies.

Role of the Minister

Under s. 10 of the *Aboriginal Heritage Act 1972*, the Minister's role is to ensure that, as far as reasonably practicable, all places in Western Australia which are of traditional and cultural significance to Aboriginal people are properly recorded and their importance evaluated. This is to assist in the protection and preservation of Aboriginal cultural heritage.

Section 18 of the *Aboriginal Heritage Act 1972* further describes the Minister's role.

Where notice for consent to use land is submitted to the Minister, the APMC determines whether an Aboriginal site exists and makes a recommendation to the Minister as to whether or not the Minister should grant consent to the proposed use and, if so, upon what conditions, if any. The Minister must consider the recommendation of the APMC together with the general interest of the community in coming to his decision. He may consent to the use of the land, apply conditions to his consent for use of the land, or he may decline to give consent to use the land.

Role of the Registrar of Aboriginal Sites

The Registrar's statutory functions as set out in the *Aboriginal Heritage Act 1972* are to:

- administer the day to day operations of the APMC and to perform such other functions as are allocated to the Registrar by the *Aboriginal Heritage Act 1972* (s. 37(1));
- maintain a Register of all protected areas, Aboriginal cultural materials, and all other places and objects to which the *Aboriginal Heritage Act 1972* applies (s. 38);
- make recommendations to the Minister on the administration of the *Aboriginal Heritage Act 1972*; and
- give certain approvals under the Aboriginal Heritage Regulations 1974.

Section 18 Notices

The *Aboriginal Heritage Act 1972* provides for the recognition, protection and preservation of Aboriginal sites and cultural heritage in Western Australia. One important way the *Aboriginal Heritage Act 1972* protects Aboriginal sites is by making it an offence under s. 17 to excavate, destroy or damage Aboriginal sites.

Section 17 of the *Aboriginal Heritage Act 1972* makes it an offence for a person to:

- Excavate, destroy, damage, conceal or in any way alter any Aboriginal site;
- In any way alter, damage, remove, destroy, conceal or deal with an object on or under an Aboriginal site in a manner not sanctioned by relevant custom; or
- Assume the possession, custody or control of any object on or under an Aboriginal site unless the person does so with the consent of the Minister under s. 18 or with the authorisation of the Registrar under s. 16. A reference in this document to “destroying or damaging” an Aboriginal site refers to any breach of s. 17.

When notice for consent to use land is given under section 18, the ACMC is required to determine whether or not any Aboriginal sites exist on the land, to evaluate the importance and significance of any such site, and to make a recommendation to the Minister as to whether his or her consent should be given to the proposed use of the site and, if so, whether any conditions should be imposed.

The *Aboriginal Heritage Act 1972* recognises that there are times when owners of land (“owners”) may need to use their land in a way which might destroy or damage Aboriginal sites. Section 18 provides owners with a mechanism to gain consent from the Minister to use their land for specific purposes which may breach s. 17. Section 18 consent (“consent”) can be obtained to use the land for a particular purpose. However, the consent may stipulate specific conditions that must be met if the owner is to avoid possible prosecution.

Giving notice

It is not compulsory for owners to give notice for consent, however, owners may choose to give notice for consent as a precautionary measure in case they might, even inadvertently, damage or destroy an Aboriginal site. Consent has the effect of removing the criminality from any damage or destruction to Aboriginal sites located on the land. If the Minister has declined to give consent, owners are not prevented from undertaking the activities they specified in their notice. However, and very importantly, if owners have not received consent and destroy or damage any Aboriginal site they may be liable to prosecution under s. 17.

Owners who wish to obtain consent must notify the ACMC in writing that they wish to use their land for a purpose which may breach s. 17 with regard to any Aboriginal site that may be on the land. The ACMC must then, as soon as it reasonably able, form an opinion on whether there is an Aboriginal site on the land and, if so, evaluate the importance and significance of any such site and consider any impact the proposed works may have on the site. The ACMC then makes recommendations to the Minister about whether the consent should be granted and if so the conditions upon which his consent should be granted.

The Minister determines whether the consent should be granted. The Minister will consider the recommendations of the ACMC and the general interest of the community and can:

- give consent for the land in the notice, or a specified part of the land, to be used for the purpose. The Minister may attach conditions to the consent; or
- wholly decline to give consent for the land to be used for the purpose that the owner has specified.

If necessary, the Minister is able to seek further information from the ACMC, the Registrar and the community.

The Minister cannot direct the ACMC to reconsider its recommendation but may seek clarification.

Once the Minister has made the decision, the owner must be informed immediately.

If the ACMC does not submit its recommendation, together with the landowner's notice, to the Minister within a reasonable time, under s.18(4) the Minister may order the ACMC to take steps to expedite the matter, and the ACMC shall comply with the Minister's order.

If owners are aggrieved by the decision of the Minister, they may apply to the State Administrative Tribunal for a review of the decision.

Who can give notice for s. 18 consent

To give notice for consent under s. 18, a person must:

- Be the owner of any land (see below for the extended definition of "owner") acting personally or through an agent; and
- Require to use the land for a purpose which is likely to affect any Aboriginal site which might be on the land and as such result in a breach of s. 17.

Aboriginal sites

The *Aboriginal Heritage Act 1972* provides a comprehensive list of the types of places to which the Act applies. As defined in s. 5 of the *Aboriginal Heritage Act 1972*, an Aboriginal site can be:

- Any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- Any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- Any place which, in the opinion of the APMC, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State; and
- Any place where objects to which the *Aboriginal Heritage Act 1972* applies are traditionally stored, or to any place where objects which have been taken or removed under the *Aboriginal Heritage Act 1972* are stored.

A site does not have to have been recorded on the Register of places and objects in order for it to be an Aboriginal site.

Purpose likely to result in a breach of s. 17

Section 18(2) of the *Aboriginal Heritage Act 1972* allows owners to give notice that they want to use their land for a purpose which “would be likely to result in a breach of section 17 in respect of any Aboriginal site which might be on the land.”

It is at the discretion of an owner to give notice for consent. Owners may decide they want to give notice for consent to use the land for a purpose which will certainly destroy or damage Aboriginal sites which are known to exist or that may be found to exist on their land.

Also, owners may decide to give notice for consent to use the land for a purpose which is likely to destroy or damage Aboriginal sites which are known to exist or that may be found to exist on their land.

Owner of any land

Section 18 only allows ‘the owner of any land’ to give notice for consent from the Minister.

In ss. 18(1) and (1A), the *Aboriginal Heritage Act 1972* lists certain people who can be considered owners. The list is not exhaustive and includes :

- A lessee from the Crown in relation to the land;
- An owner in fee simple;
- The Holder of any mining tenement or mining privilege in relation to the land;
- The Holder of any right or privilege under the *Petroleum and Geothermal Energy Resources Act 1967* in relation to the land;
- The holder of rights conferred under s. 34 of the *Dampier to Bunbury Pipeline Act 1997* in respect of the land or is the holder’s nominee approved under s. 34(3) of that Act;
- A Person who has authority under s. 7 of the *Petroleum Pipelines Act 1969* to enter upon the land; and
- The holder of a distribution licence under Part 2A of the *Energy Coordination Act 1994* as a result of which the person has rights or powers in respect of the land.

Scope of s. 18 consent

When an owner intends to use its land for a purpose which is likely to breach s. 17 and decides to give notice under s. 18(2), the notice must give the full details of the intended use of the land (i.e. the nature, scope and purpose of use, the exact area of land which will be used). If the Minister grants consent it will be based on the details which the owner has supplied for the Minister. If the owner, after having received the consent, uses the land in a way which departs from the details provided to the Minister, the differing use of the land would no longer be covered by the consent.

Consent is personal to the owner who notified the ACMC under s. 18(2). Consent cannot be transferred. If an owner transfers its interest in its land to someone else (i.e. sells the land and transfers the title) the new owner cannot use the existing consent. If the new owner wants to use the land – even for the same purpose – in a manner which might breach s. 17 it will need to give notice for new consent if they wish to avoid a possible breach of s. 17.

The Minister may give his or her consent to the use of land even if the ACMC is of the view that no Aboriginal sites exist on the land. The consent continues to be valid if, for example, a previously unknown Aboriginal site is discovered when the land is being used in a way that is described in the notice to which the Minister consented.

If owners use their land in line with the terms of the consent, any resultant damage to any Aboriginal site will not constitute an offence under s.17. This applies to damage to an Aboriginal site which was previously unknown even if the ACMC has formed an opinion and recommended to the Minister that there is no Aboriginal site on the land in question.

Section 15 of the *Aboriginal Heritage Act 1972* requires that any person who knows about the existence of an Aboriginal site or discovers something which they should reasonably suspect to be an Aboriginal site must report the site to the Registrar of Aboriginal Sites or to a police officer. If a person has reasonable cause to believe that the Registrar already knows about the site, they do not need to report it.

Consent will usually provide conditions regarding the management of newly discovered places and objects.

Other authorisations

Section 16 of the *Aboriginal Heritage Act 1972* allows the Registrar to provide authorisation to excavate or remove anything from an Aboriginal site. The Registrar may also authorise someone else to enter and excavate an Aboriginal site and examine or remove anything on or under the site. The Registrar must exercise this power on the advice of the ACMC and under any conditions that the ACMC advises.

Regulations 7 & 10 provide a number of minor activities that can be authorised by the Minister, the Registrar or a delegate.

Special defence of lack of knowledge

The *Aboriginal Heritage Act 1972* creates a special defence of lack of knowledge in s. 62 for instances where someone has committed an offence. It is a defence if a person who breaches s. 17 did not know, and could not reasonably be expected to have known, that the site which they damaged or destroyed was an Aboriginal site under the *Aboriginal Heritage Act 1972*.

Assistance from the Department of Indigenous Affairs

The Department does not have any statutory functions under the *Aboriginal Heritage Act 1972*. It can provide administrative and technical support and advice to the Minister, ACMC and the Registrar in relation to Aboriginal heritage matters when requested. The *Aboriginal Heritage Act 1972* does allow for officers from the Department being delegated certain powers and/or duties by the Minister and/or the Registrar under the *Aboriginal Heritage Act 1972*.

The Department can also assist owners who may wish to give notice for s. 18 consent by:

- Searching the Register of places and objects;
- Providing advice on consulting with relevant Aboriginal people;
- Explaining how s. 18 consent can be obtained; and
- Explaining if and when s. 16 and r. 7 and r. 10 authorisations can be applied.

Policy Context

The *Aboriginal Heritage Act 1972* exists to preserve and protect places or objects that are customarily used by or traditional to Aboriginal people.

Giving notice for section 18 consent

If owners believe a proposed activity could impact Aboriginal sites located on their land they are strongly recommended to give notice to gain consent under Section 18. Where s.18 consent is sought, it should be confined to the area of activity and for a specific purpose. Owners are also recommended to consider altering their activities to completely avoid the site if there is a possibility that it could be impacted by the proposed activities. To prevent unintended damage to Aboriginal cultural heritage, owners intending to use their land for a purpose that could damage an Aboriginal site are encouraged to search the Register to help them determine if their land contains any known Aboriginal sites. Not all Aboriginal heritage sites are recorded on the Register, however, they are still protected under the *Aboriginal Heritage Act 1972*. Owners can contact the Registrar or Department for advice and assistance on ascertaining whether their land contains Aboriginal heritage sites.

While the *Aboriginal Heritage Act 1972* requires that notice for s. 18 consent be made in writing, it does not require a specific form to be used. For practical purposes the Department has prepared a standard form which owners are encouraged to use. The standard form provides owners with a comprehensive guide to the information required by the ACMC for discharging its obligations under the *Aboriginal Heritage Act 1972*.

When notice for consent to use land is given under section 18, the ACMC is required to determine whether or not any Aboriginal sites exist on the land, to evaluate the importance and significance of any such site, and to make a recommendation to the Minister as to whether his or her consent should be given to the proposed use of the site and, if so, whether any conditions should be imposed.

Aboriginal Cultural Material Committee

The *Aboriginal Heritage Act 1972* does not place an obligation on owners of land to consult with Aboriginal people or with any other person when giving notice for consent. However, the ACMC is obligated to inform itself to an appropriate standard to enable it to evaluate the importance and significance of an Aboriginal site. This obligation can be fulfilled through inquiry by the ACMC itself or by receiving information from owners of land.

The ACMC is obligated under the Act to ensure it affords all relevant parties procedural fairness in relation to s. 18 consent notices. In a broad sense, the ACMC will ensure its procedures are transparent and that all relevant considerations are taken in to account. This is achieved by allowing any party whose rights are affected by the subject of the notice to make a submission to the ACMC.

Given the large number of notices received by the ACMC, owners are requested to assist the consent process by providing relevant information. Owners may do this by undertaking heritage, archaeological and ethnographic surveys, by searching the Register and through consultation with relevant Aboriginal people and groups. No adverse inference will be drawn if owners are unable or unwilling to provide such information. However, providing the ACMC with this information greatly enhances its ability to inform itself to an appropriate standard, thus enabling it to make recommendations in a timely manner. The Department is able to advise owners on how to provide relevant information to the ACMC.

Where an owner believes they have consulted widely enough and would prefer the matter proceed to the next practicably available ACMC meeting, the Registrar will not deny such a request.

It is the ACMC's prerogative to decide whether sufficient information has been provided.

Consultation

There is no requirement for owners to consult with native title holders, registered native title claimants or with a prescribed body corporate, or to limit their consultation to these groups, as these bodies have no official status under the *Aboriginal Heritage Act 1972*. An owner has the right to consult only with Aboriginal individuals or to consult a wider range of people and groups.

The ACMC is not required to actively contact every affected party, but rather it must allow every affected party to make a submission. Whilst native title groups have no right to be consulted they do, most likely, have sufficient interests or standing to be afforded natural justice rights. The ACMC's duty to receive information from affected parties affords all parties sufficiently affected by the purpose of the notice the right to present their case to the ACMC and/or Minister for consideration.

While owners have the right to refuse to carry out consultation, it is not in their best interests to do so. Where an owner refuses to carry out sufficient consultation, the ACMC has no choice but to defer making a recommendation until it has carried out its own research with its very limited resources.

Disputes

The ACMC recognises that disputes with and between Aboriginal people do arise. Disputes may include competing claims between groups about who has the right to 'speak' for country, disagreements with Aboriginal communities over the suitable method of consultation, and other issues as disagreements about fees or the appointment of particular consultants. Such disagreements may make consultation for owners difficult.

Where disputes cannot be resolved by negotiation the owner should document the dispute and submit it to the ACMC. The owner should proceed and carry out research as best it can. Provided it has enough information to reasonably form an opinion the ACMC will make a recommendation. The ACMC must make a recommendation where there is a 'sufficient amount of information to form an opinion'.

Conditions

The ACMC is able to recommend to the Minister conditions which it believes should be attached to the consent. These conditions are intended to strike a balance between protecting Aboriginal heritage and allowing owners to use their land for the proposed purpose. Prior to the Minister making a decision, an owner is able to make further representations to the Minister, directly or through the Registrar, to review the conditions under which consent may be granted.

The State Administrative Tribunal

If an owner is aggrieved by a decision of the Minister, that decision can be reviewed in the State Administrative Tribunal. In addition, the *State Administrative Tribunal Act* allows the Minister to reconsider a decision and negotiate with owners under the umbrella of the SAT and make orders (in relation to the decision) by consent. This mechanism provides a fast and inexpensive manner in which to resolve matters of dispute.