Government of Western Australia
Department of Indigenous Affairs

DIA

Aboriginal Heritage Act 1972 (WA) Guidelines

Interaction between Section 18 of the *Aboriginal Heritage Act 1972 (WA)* and Part IV of the *Environmental Protection Act 1986 (WA)*

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 sites have survived for many thousands of years but once they are damaged or destroyed they are lost forever.

The Aboriginal Heritage Act 1972 (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 it is necessary, and often a statutory requirement, to ensure that other interests, such as economic and environmental, are given proper weighting against 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.

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 (WA). 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 (WA) to their own particular circumstances.

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

Glossary

ACMC	Aboriginal Cultural Material Committee
Authority	Environmental Protection Authority
Department	Department of Indigenous Affairs
Minister	Minister for Indigenous Affairs

Legal Context

Aboriginal Heritage Act 1972 (WA)

The *Aboriginal Heritage Act 1972* provides for the recognition, protection and preservation of Aboriginal sites in Western Australia. It is an offence under s. 17 of the *Aboriginal Heritage Act 1972* to excavate, destroy, damage, conceal, or in any way alter an Aboriginal site. If an owner of land wishes to use their land in a manner which is likely to breach s. 17 with respect to any Aboriginal sites which might be on the land, they are able to apply for consent under s. 18(2) of the *Aboriginal Heritage Act 1972* . Consent has the effect of removing the criminality from any breach of s. 17 which occurs on the land.

The notice for consent must be given to the Aboriginal Cultural Material Committee. The ACMC makes recommendations to the Minister about whether the consent should be granted and if so the conditions upon which the consent should be granted, however, the Minister makes the decision as to whether consent should be granted. The Minister will then consider the recommendations of the ACMC and the general interest of the community and can:

- give consent for the land in the notice to be used for the purpose, or a specified part of the land with or without conditions; or
- wholly decline to give consent for the land to be used for the purpose that the owner has specified.

Environmental Protection Act 1986 (WA)

The *Environmental Protection Act 1986* provides for the prevention, control and abatement of pollution and environmental harm, as well as for the conservation, preservation, protection, enhancement and management of Western Australia's environment. The importance of environmental protection is demonstrated in s. 5 of the *Environmental Protection Act 1986* , which states that the provisions of the *Environmental Protection Act 1986* and its approved policies prevail over inconsistent provisions in any other law.

Part IV - *Environmental Protection Act 1986* - Environmental Impact Assessment

The *Environmental Protection Act 1986* establishes the Environmental Protection Authority (Authority) and lists its functions in s. 16 of the *Environmental Protection Act 1986* . One such function is to conduct environmental impact assessments. Under Part IV of the E*nvironmental Protection Act 1986* , the Authority is required to decide whether to assess "significant proposals" which have been referred to the Authority under s.38.

A significant proposal is one that is likely, if implemented, to have a significant effect on the environment. Any person may refer a significant proposal to the Authority. Additionally, unless another person or body has already referred the proposal, s. 38(5) of the E*nvironmental Protection Act 1986* obliges any decision-making authority which has notice of a proposal that appears to be a significant proposal to refer it to the Authority.

A decision-making authority is defined in s. 3 and includes any Western Australian public authority which has the power to make a decision in respect of a proposal. The Minister for Indigenous Affairs when exercising its powers under s. 18 of the *Aboriginal Heritage Act 1972* is considered such a decision-making authority. Once a decision-making authority has referred a proposal to the Authority, they are prevented from making a decision which could have the effect of causing or allowing the proposal to be implemented.

The Authority under s. 39A(3) or (4) must give written notice to any relevant decision-making authority as to whether or not the Authority is going to assess a proposal. Any decision-making authority that is given such a notice that a proposal is, or is going to be, assessed is prevented from making a decision by s. 41(3).

This constraint on decision-making authorities from making a decision which could have the effect of causing or allowing the proposal to be implemented is lifted:

- If the decision-making authority referred the proposal, the Authority has notified it that the proposal is not going to be assessed and the appeals process has been finalised; or
- When the Minister for Environment has served a statement on the decision-making authority permitting the decision to be made.

Decision-making authorities are then able to make a decision under their relevant legislation.

While decision-making authorities are prevented from making a decision they are still able to complete their approval process up until the stage of making the final decision. This is important as the Minister for Environment under s. 45(1) of the *Environmental Protection Act 1986* is required to reach agreement with certain decision-making authorities before deciding whether a proposal may be implemented. This is to ensure that the decision-making authorities are able to give informed input in to the implementation statement.

Minor and preliminary works

It is an offence under s. 41A(1) of the *Environmental Protection Act 1986* for any person to do anything to implement a proposal which the Authority is going to assess until an implementation statement is published.

However, it is not an offence under s.41A(1) to perform work which is minor or preliminary and is done with the Authority's consent. Minor or preliminary work may include things such as signage or fencing, monitoring bores, geotechnical drilling and flora and fauna surveys.

Interaction between Part IV of the *Environmental Protection Act 1986* and s. 18 of the *Aboriginal Heritage Act 1972*

Many development proposals in Western Australia may require approval under the *Environmental Protection Act 1986* as well as involving a use of land for which an owner may wish to gain s. 18 consent under the *Aboriginal Heritage Act 1972* .

If an owner gives notice under s. 18(2) of the *Aboriginal Heritage Act 1972* and the proposal appears to be a significant proposal under the *Environmental Protection Act 1986,* the Minister for Indigenous Affairs is required to refer the proposal to the Authority unless another person has already referred the proposal. The Minister for Indigenous Affairs is then prevented from making a decision under s. 18(3) of the *Aboriginal Heritage Act 1972* that could have the effect of causing or allowing the proposal to be implemented until:

- the Authority has notified the Minister that it is not going to assess the proposal and the appeals process has been finalised; or
- the Minister for Environment has served a statement on the Minister permitting the decision to be made.

The *Environmental Protection Act 1986* only prevents the Minister for Indigenous Affairs from making a final decision. Therefore the ACMC is not prevented from making recommendations to the Minister for Indigenous Affairs before the constraint is lifted. This allows parallel processing to occur, meaning that both the environmental impact assessment by the Authority and Aboriginal heritage recommendation by the ACMC can occur at the same time.

An issue may arise when a proponent wishes to complete work which is minor or preliminary, such as geotechnical drilling, which may constitute a breach of s. 17 of the *Aboriginal Heritage Act 1972* if the proponent does not have 18 consent. Although the *Environmental Protection Act 1986* allows proponents to carry out minor or preliminary work with the Authority's consent, other decision-making authorities may still be prevented by s.41 of the *Environmental Protection Act 1986* from granting approval for the works. As such, minor or preliminary works approved by the Authority may constitute an offence under the *Aboriginal Heritage Act 1972* .

Policy Context

Parallel Processing

The ACMC and the Minister for Indigenous Affairs are committed to ensuring that parallel processing occurs in relation to proposals subject to decision-making constraint under s. 41 of the *Environmental Protection Act 1986* ("Environmental Protection Act 1986 constraint"). Parallel processing means that whilst the *Environmental Protection Act 1986* constraint is in effect the ACMC can:

- fulfil its obligations to inform itself to an appropriate standard to evaluate the importance and significance of any Aboriginal sites located on the land the subject of the notice; and
- make its recommendations to the Minister in accordance with s.18(2) of the *Aboriginal Heritage Act 1972* .

The commitment to parallel processing ensures that proponents are able to implement projects requiring approvals in a more timely manner.

Once the ACMC has made its recommendations, the Minister can consider the recommendations and the general interest of the community whilst the *Environmental Protection Act 1986* constraint is still in effect. The Minister is prevented only from giving final approval.

Once the constraint has been lifted, the Minister will generally have sufficient information to make a decision consistent with the implementation agreement.

The Minister is not prevented by the *Environmental Protection Act 1986* from refusing to give consent under s. 18 as this would not have the effect of causing or allowing the proposal to be implemented.

Procedures in the Department of Indigenous Affairs have been developed to ensure parallel processing occurs to create an efficient approvals process. DIA encourages proponents to engage early in the project planning process to get advice on whether they need to give notice under s. 18 and, if so, how best to undertake the necessary research and consultation.

Minor and preliminary works

It is generally not possible for the Minister to give consent for minor and preliminary work which has been approved by the Authority under s. 41A(3) of the *Environmental Protection Act 1986* whilst a constraint on decision making is in place. For example, it is not possible to gain s. 18 consent for ground disturbing works if the *Environmental Protection Act 1986* constraint is in place if the effect would be to cause or allow the proposal to be implemented.

Legislative amendments are being progressed to remove the constraint that exists for decision makers under s. 41 where the Environmental Protection Authority has given consent for minor or preliminary works under s. 41A(3). Once the amendments take effect, the Minister will be able to give consent to minor and preliminary work which is likely to breach s. 17 of the *Aboriginal Heritage Act 1972* f the Environmental Protection Authority has consented to such works.