



Department of **Planning,
Lands and Heritage**

Consultation policy for section 18 applications

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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1. Policy intent

The intent of this policy is to outline the expectations of the State Government and the Minister for Aboriginal Affairs for consultation to be undertaken with Aboriginal people prior to submitting an application under section 18 and section 16 of the *Aboriginal Heritage Act 1972* (Act). If consultation in accordance with this policy is not undertaken, the Minister or the Registrar of Aboriginal Sites (Registrar) may defer making a decision on an application until appropriate consultation is carried out.

2. Legislative context

The Act provides for the preservation of places and objects customarily used by or traditional to Aboriginal people.

It is an offence under the Act to harm an Aboriginal site unless a person acts with the consent of the Minister under section 18 or the authorisation of the Registrar under section 16 of the Act.

A landowner may apply (referred to in the Act as ‘give notice’) under section 18 to the Aboriginal Cultural Heritage Committee (Committee) where they require the use of the land for a purpose which is likely to harm an Aboriginal site as defined under section 5 of the Act.

The Committee and the Minister are required to assess notices given under section 18 seeking consent to use the land.

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.

The Committee is required to consider and form an opinion as to whether there is any Aboriginal site on the land that is the subject of the application, evaluate the importance and significance of any such site, and make a recommendation to the Minister as to whether consent to the use of the land should be granted and recommend any conditions which should be attached to that consent.

In deciding whether to grant consent, the Minister is required to consider the Committee’s recommendation and have regard to the general interest of the community, with special consideration being given to the interests of the relevant Aboriginal people affected.

The 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 generally relates to research activities only. Similar considerations apply to section 16 applications as they do to section 18 applications.

3. Consultation guiding principles

Consultation is essential to understand the importance and significance to Aboriginal people of any Aboriginal sites and obtaining their views on the likelihood and extent of harm by the proposed land use, which assists the Committee and the Minister in performing their statutory functions when considering notices submitted under section 18.

The Minister and the Committee acknowledge 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 of that heritage; and
- are best placed to provide information as to how activities may impact their heritage.

Aboriginal heritage surveys are one mechanism to identify and evaluate Aboriginal sites and objects and can be undertaken where considered appropriate as part of the consultation process. It is up to the parties to determine and agree whether a survey is required.



4. When consultation should occur and purpose of consultation

Before submitting a section 18 application, the landowner should consult with the relevant Aboriginal people. Early engagement and consultation can help identify ways to minimise and avoid harm to, or disturbance of, Aboriginal sites, including potentially removing any need for a section 18 consent.

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

- the location, importance and significance of any Aboriginal heritage;
- strategies for the protection and management of any Aboriginal heritage; and
- comments on the section 18 application, including any objection, support and/or any suggested conditions and mitigation strategies.

5. Consultation standards

Good practice consultation with Aboriginal people, including through their representatives and organisations where applicable, includes:

1. Full disclosure of information relevant to the application in relation to possible impacts on Aboriginal heritage, such as sites or objects.
2. Information on any feasible alternative locations or any feasible alternative methods as to how the landowner may undertake the proposed purpose, which may have alternative or lower impacts on the Aboriginal sites or objects.
3. Providing the opportunity for those being consulted to respond to the information provided and have that response considered and advice provided as to whether and how it's been addressed.
4. Obtaining knowledge of the location of all Aboriginal sites and objects, including the significance and importance of those sites or objects, in the application area. Certain information may not be appropriate to be shared or recorded for cultural reasons.
5. Respecting Aboriginal traditions, cultural protocols and obligations, including taking reasonable steps to make contact and allowing sufficient time for genuine consultation to occur. This may include using multiple contact methods (e.g. phone and email) and providing a reasonable time for responses, noting that Aboriginal organisations may have multiple competing demands from section 18 applicants.

6. Providing a culturally appropriate space for the respectful exchange of information between the parties. Relevant advice should be sought from the Aboriginal people as to what is culturally appropriate consultation.
7. Use of a consultation framework where requested by the Aboriginal people being consulted and practicable for the landowner to do so. A consultation framework can be used where the parties identify more detailed consultation is required having regard to matters such as the scope and complexity of the proposed land use, the number and characteristics of Aboriginal sites and the potential harm. It can include matters such as methods of communication, timeframes, any meetings required and response times.

6. Who is to be consulted?

Consultation may occur with:

1. the native title party (as defined in the Act¹) for the application area; and
2. other Aboriginal people who have knowledge and rights in relation to the Aboriginal sites within the application area, who are not

¹ 'Native title party' is defined in the Act to mean:

- (a) regional corporations (established by the South West Settlement and Yamatji Nation ILUAs);
- (b) registered native title bodies corporate (also known as Prescribed Bodies Corporate – PBCs);
- (c) registered claimants; or
- (d) a body prescribed in the Aboriginal Heritage Regulations 1974 (being the four Native Title Representative Bodies as well as Murujuga Aboriginal Corporation and Badimia Land Aboriginal Corporation).



members of the native title party (sometimes known as knowledge holders).

The Department of Planning, Lands and Heritage (Department) can provide advice as to any other relevant Aboriginal people for the application area who are not members of the native title party.

There is the potential for different views to be expressed by the relevant Aboriginal people through the consultation process or to the Committee directly. Where this occurs, it will be for the Committee and ultimately the Minister to determine the relative weight to be given to alternate views. What is important is that there is the opportunity for the relevant Aboriginal people to provide those views, either through the consultation process or to the Committee directly.

7. Supporting documentation

Supporting documentation that demonstrates the level of consultation which has been carried out should be submitted as part of the section 18 application. This may include, for example:

1. copies of correspondence between the parties;
2. any presentations given;
3. minutes of any meetings held between the parties; and
4. relevant Aboriginal heritage survey reports.

Where proponents have in good faith sought to undertake consultation but have not been able to do so, it is recommended the Department be contacted for advice as to how to proceed. Advice may relate to alternative means of consultation or obtaining relevant information. Records can also be submitted which demonstrate attempts to undertake consultation and any issues encountered.

Where sufficient information has not been provided, the Committee may deem it necessary to seek further information from the landowner who gave the notice. The statutory period within which the Committee is required to make a recommendation to the Minister does not include the period from when the Committee made such a request to when a response is provided to the Committee, subject to the 14 day maximum period within which the landowner is required to respond. The Committee may extend the time limit but only once in any particular case.

The Committee may also seek information directly from any relevant Aboriginal people. The statutory period within which the Committee is required to make a recommendation to the Minister is not affected by the Committee seeking information directly from any relevant Aboriginal people.

8. Other consultation considerations

- Giving clear explanations about how information gathered through consultation will be incorporated into the landowner's decision-making process.
- Respecting cultural protocols by undertaking consultation in the manner requested by the relevant Aboriginal people being consulted, where feasible and practicable to do so.
- Using a range of methods to undertake culturally appropriate consultation where feasible and practicable to do so, and recognising that English may not be the first language for the Aboriginal people being consulted.
- The section 18 assessment process includes a procedural fairness mechanism, where the Department (on behalf of the Committee) provides the opportunity for the relevant Aboriginal people to have a say on the proposed land use and suggested conditions.

18. Further information

For more information, please refer to:

1. [Aboriginal Heritage Act 1972 Guidelines](#)
2. [Amended Act](#)
3. [Webpage](#)
4. [ACHknowledge portal](#)