

Hon Neil Thomson; Hon Stephen Dawson; Hon Colin De Grussa; Hon Dr Brad Pettitt; Hon Peter Collier; Hon
Wilson Tucker; Hon Dr Steve Thomas; Hon Tjorn Sibma

ABORIGINAL CULTURAL HERITAGE BILL 2021

Committee

Resumed from 9 December. The Deputy Chair of Committees (Hon Dr Sally Talbot) in the chair; Hon Stephen Dawson (Minister for Aboriginal Affairs) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

The DEPUTY CHAIR: Members, we are in committee considering the Aboriginal Cultural Heritage Bill 2021. Before I put the question, I draw members' attention to the most recent supplementary notice paper 56, issue 2.

Hon NEIL THOMSON: Continuing the conversation from our last sitting, there is a matter that I think is deserving of a little further interrogation on clause 1. I hope that consideration of clause 1 will conclude very shortly, noting the incredibly lengthy nature of this bill and the short time that we have to consider it; it is of great import for our community. We were at the point of discussing an issue that has been a lightning rod for discussion and, I suspect, part of the reason for the urgency with which this legislation is being pushed through—the issue of Juukan Gorge. I ask the minister to provide some clarity on the time lines around the government's knowledge of the matters regarding Juukan Gorge. It is an issue that has been used as a rationale for these major legislative changes. My question is: was the issue of Juukan Gorge and its significance known by the government prior to its destruction?

Hon STEPHEN DAWSON: I have to rely on my advisers. To the best of their recollection, I am told that the Puutu Kuntj Kurrama and Pinikura people informed the state a matter of days before it happened. Obviously, the proponent at that stage had a valid section 18 approval, and the advice given was that PKKP should go to the commonwealth to see what powers the commonwealth could use to intervene in the process.

Hon NEIL THOMSON: Were any efforts made by the then minister, his staff or the department to contact Rio Tinto and get an informal stay of action on that project?

Hon STEPHEN DAWSON: I cannot comment on that, honourable member. The former minister is no longer a member of cabinet or, indeed, a member of Parliament, so I am not aware of what actions either he or his office took at that time.

Hon NEIL THOMSON: I think this goes to the heart of the challenges that we face with this matter. The issue is the structural arrangement concerning the compliance around Aboriginal heritage and the previous direct line of contact that was lost when the former Department of Aboriginal Affairs was merged under the machinery-of-government changes. That department had an Aboriginal director general and it had a history of Aboriginal directors general who had very good relationships with the mining sector. I certainly contend—this has been said to me in the past by those who are in a position to know—that had something like this occurred in the past under the previous arrangements, a phone call would have been made to someone like Sam Walsh and the matter would have been dealt with. The issue we have is as much a cultural issue within the department and the minister's office as it is a legislative or legal issue. My question to the minister is: in the minister's mind, does he believe that if he were the minister and became aware of the potential terrible destruction of something of significance, a phone call to the CEO of Rio Tinto may have resulted in that significant site not being destroyed?

Hon STEPHEN DAWSON: The member is asking me a hypothetical about actions that should have been taken in the past. I note that Sam Walsh is very contrite about the actions Rio Tinto undertook at that stage. I cannot hypothesise about what might have been done in the past, but I can say that the legislation before us now is strong legislation and hopefully it will mean that another Juukan Gorge incident will not happen. I want to point out to the honourable member and put on the record that the restructure of the heritage branch of the Department of Aboriginal Affairs was completed in the second half of 2016 by the former government. That resulted in at least 10 heritage officers being offered or receiving a redundancy. That was done under the former Liberal–National government. The machinery-of-government changes following the election of the McGowan government in 2017 that resulted in the amalgamation of the Departments of Aboriginal Affairs, Planning and Lands, and the State Heritage Office resulted in the loss of one senior executive service position. The policy for the MOG changes at the time was to increase efficiencies by rationalising SES-level positions.

Hon NEIL THOMSON: I thank the minister for that clarification. I think the focus of my attention, at least, has been on the structural arrangements at the top and the line of communication with our senior players in the mining sector. This has been the subject of significant investigation, as the minister knows. The commonwealth inquired into the destruction of the 46 000-year-old Juukan Gorge caves in the Pilbara region of Western Australia. I note that recommendations were made for the commonwealth to take carriage of this. I do, for the record, minister, agree that this power should stay with the state. In that sense, I understand the difficulty the minister faces, which I commented on in my second reading contribution. I think certainly a review and reform of the Aboriginal Heritage Act is vital

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and so, in that sense, that is why the opposition is not opposing the bill and why it would probably support the bill if it had time to go through it in more detail. But I want to at least point to some separate additional comments by Mr George Christensen and Senator Dean Smith, MPs. I worked with Senator Dean Smith and he is a colleague whom I respect. I could mention it in greater detail, but their comments refer to significant cultural sites. I believe there has been some support in the community for this. Their additional comments state —

Instead of new laws and regulations, there is already an existing Federal process for the registration of significant cultural heritage sites that could be streamlined and enhanced to enable Indigenous people to list sites for protection.

We will get into those protected areas later on specific clauses, but I will just ask a general question on the inquiry and the additional comments by Senator Smith and Mr Christensen: did the Senate inquiry findings have any impact on the redraft?

Hon STEPHEN DAWSON: No, they did not, honourable member. The process for this bill has been in train for a number of years, so the government was aware of the learnings from, or the knowledge of, what happened at Juukan Gorge, and that was taken into consideration in the work that took place over the past few years, including the draft bill that went out for public consultation.

Hon NEIL THOMSON: Concluding my comments on clause 1—I understand that others may wish to comment on this—I want to raise specifically the matter of consultation and some of the misinformation that I think has been propagated about the views of various parties concerning this bill. I have a copy of the letter that I believe has been sent to the minister. I have one to be provided, if required, because I have two copies on my person here. The letter is from the Kimberley Land Council to the honourable Minister Dawson on 14 December 2021, which is today. Does the minister have a copy of that?

Hon Stephen Dawson: I do not.

The DEPUTY CHAIR: Is the member seeking to table the paper?

Hon NEIL THOMSON: Yes.

[Leave granted. See paper [986](#).]

The DEPUTY CHAIR: We will give the minister a moment to look at it.

Hon NEIL THOMSON: I draw the minister's attention to some comments in that letter and seek a response, if he is willing. In that letter, the Kimberley Land Council wrote —

The Kimberley Land Council would like to address incorrect and misleading information provided to the Legislative Council of the Parliament of Western Australia on 9 December 2021.

While discussing the Aboriginal Cultural Heritage Bill 2021 (WA), the Minister for Aboriginal Affairs made the following incorrect statement:

“I also make the point that I have not had contact, and I do not think anybody else here has had contact, with prescribed bodies corporate to say that they are not happy with the legislation” ...

That quote is attributed to Minister Dawson.

The Kimberley Land Council then proceeded to raise some important points, but the gist of this letter is that it took exception to the minister's comments. The last paragraph of that letter reads —

The KLC formally requests that you, as an elected official and Minister for Aboriginal Affairs, acknowledge the seriousness of making incorrect and misleading statements to the Parliament of Western Australia, that you make a statement to correct this as a matter of urgency, and you apologise to the Prescribed Bodies Corporates and other Aboriginal organisations whose views you have wrongly represented.

It is important to clarify this, because members may be under the misapprehension that somehow Aboriginal land councils do not play a critical role in providing advocacy on the views of prescribed bodies corporate. Appendix A lists a number of forums that were held in May 2021 in which the views presented were clearly not in support of the bill. I have only just received this letter, and I will not read out every single native title body on that list, but there are at least 15 Aboriginal corporations—for example, the Bunuba Dawangarri Aboriginal Corporation and the Karajarri Traditional Lands Association. I will not mention all the organisations on that list, but I am familiar with a number of those corporations and PBCs, and I know a number of the people involved, including the Jaru Aboriginal Corporation and Nyul Nyul PBC Aboriginal Corporation. Similarly, it lists organisations that attended forums in April 2021, including the Tjurabalan Native Title Land Aboriginal Corporation.

It is important that I clarify the KLC's position that the view expressed in a collective way through the land council has been one of opposition to the legislation. I understand the challenges for PBCs to make individual comments

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on legislation presented by government, because it is generally not in the interests of a PBC to make that kind of representation. We need to look at the historical arrangement and the significant role that the Kimberley Land Council has had in furthering land rights in Western Australia. I am concluding my comments on clause 1 at this point, so I offer the minister the opportunity to put on record his views on this letter.

The DEPUTY CHAIR: Before I give the minister the call, I remind the chamber that, as a general principle, the clause 1 debate is extremely flexible as to the limits of topics included in the debate. In my own mind, Hon Neil Thomson is pressing very close to one of those boundaries with this question. However, I point out that it is entirely up to the minister whether he chooses to answer. It is as well to occasionally remind members that although clause 1 is a broad debate, it is not without boundaries.

Hon STEPHEN DAWSON: Thanks, deputy chair. I stand by those comments that I made last week; I had not been contacted directly by any prescribed bodies corporate to express concerns about the legislation before us. In fact, the honourable member will note that some of those events took place in September 2020 when a draft bill was out for public comment. Looking back to April 2021 or indeed May 2021 when forums took place, they were again on a draft piece of legislation that has been updated since then. I stand by my comments in the statement I made last week that I had not been contacted by any of the PBCs directly on the legislation before the chamber.

Hon COLIN de GRUSSA: I have a few questions about the application process for different levels of activity. I thought I might ask them all at clause 1, rather than going through them individually in the bill. We will get them out of the way now, if the minister is okay with that.

Hon Stephen Dawson: Fire away. I might at some stage say it is more appropriate to deal with them elsewhere.

Hon COLIN de GRUSSA: Okay. We might be able to get these out of the way at this point. My questions are around the whole process. On the website is a helpful flowchart—I am sure the minister has a copy of it—that outlines the process for proponents for the different types of activities. I guess my questions are around the determination of whether Aboriginal cultural heritage is present. Under stage 1, if an activity is an exempt activity and it is not in a protected area, the proponent can go off and do their thing; however, if it is in a protected area, the activity cannot proceed. That is fairly simple. For tier 2 and tier 3 activities, which will be defined in the regulations, although they are loosely defined in the bill, a proponent must go to stage 2 of the process, and the first question is: is Aboriginal cultural heritage present? If the proponent knows that it is present, they will move to stage 3, which is to work with the local Aboriginal party to progress that application. The question for me concerns when they do not know whether Aboriginal cultural heritage is present. How will that determination be made? How will they find out?

Hon STEPHEN DAWSON: I am told that that process will be stepped out in the due diligence guidelines that are yet to be worked on. That commitment falls under the commitment to co-design the next phase of the process, which is the regulations but also the various documents or guidelines that need to be in place before the legislation is enacted. That is all to be worked out with the various stakeholders who have an interest in the issue.

Hon COLIN de GRUSSA: I thank the minister. I guess that is how I had it in my head—that part of that co-design process will be on how to determine whether ACH is present. I imagine that that, in itself, will be quite a job, given that a significant part of the state has not been surveyed. The government has committed \$10 million in funding in the budget for the local Aboriginal cultural heritage services. If it is observed through this process that a significant body of work needs to be done in this area, as well as when the LACHS consult with parties to progress their applications, will consideration be given to providing additional funding? Has that contingency been planned for; and, if so, is there any known quantum for that?

Hon STEPHEN DAWSON: I thank the honourable member; it is a good question. The \$10 million is about capacity building and starting the process. Once we have undertaken the co-design process, we will be in a better position to work out exactly what is needed. It may require further consideration by cabinet and by the Expenditure Review Committee of cabinet. The \$10 million will start us off. Where we get to from here will depend on what might be needed next.

Hon COLIN de GRUSSA: I thank the minister. It is likely that there will be a quite significant increase in work in this space, given the changes in the bill. One other aspect of this, of course, is the determination of tier 2 and tier 3 activities and what will be prescribed. I guess that will be part of the co-design process as well. My question, though, is around the definitions in the bill of moderate and high levels of soil disturbance. A moderate level of disturbance to a strawberry farmer might be different from a moderate level of disturbance to a large mining company. Is that going to be clearly defined so that we are absolutely certain that certain activities that have already been undertaken on various pieces of land can continue? For example, if we look in the agriculture space at what one farmer might consider to be a fairly destructive process such as spading or deep ripping or something like that, will that be allowed to continue?

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Hon STEPHEN DAWSON: Yes, honourable member; the intention is that they will be clearly defined because, as the member said in his example, what is good for one farmer might not be good for another. It is fair to say that there are a variety of views amongst the Aboriginal organisations across the state that have had different levels of interaction with section 18 of the Aboriginal Heritage Act. Therefore, there is quite a body of work to be done as part of this co-design process—to work out exactly what is in and what is out. But once we have it, the intention is to have it clearly defined so that stakeholders are aware of what is in and what is out. At any stage, there is under the bill the opportunity for someone to write to the CEO if they are ever not sure about the clarity of something.

Hon Dr BRAD PETTITT: I start with a question around the United Nations Committee on the Elimination of Racial Discrimination. Is the minister aware of the correspondence that was sent on 3 December 2021?

Hon STEPHEN DAWSON: I am aware that a piece of correspondence is floating around. Neither I nor my office have been sent a copy of the correspondence from the UN. I am aware, though, that a piece of paper is floating around that media organisations have that refers to someone called “Excellency”. It is obviously not me, because no-one has ever called me excellent! However, no-one has sent our office a letter from the United Nations.

Hon Dr BRAD PETTITT: I have this letter here. I seek leave to table it. That might be a useful thing to have.

[Leave granted. See paper [987](#).]

The DEPUTY CHAIR: Honourable member, do you want to continue with your questioning or do you need to wait until the minister has seen the letter?

Hon Dr BRAD PETTITT: I will continue. Thank you. Could I ask for the chair’s guidance at this point. Is it appropriate to jump to a different topic?

The DEPUTY CHAIR: Yes, absolutely.

Hon Dr BRAD PETTITT: I will come back to that once the minister has that letter.

The DEPUTY CHAIR: As long as it addresses the question that clause 1 do stand as printed.

Hon Dr BRAD PETTITT: Yes, and I will seek the chair’s guidance on that matter as someone who is new to this process.

My next questions are around the Aboriginal Cultural Heritage Bill co-design task force. My first question is: what are the criteria and qualifications that the minister will use to set members of this task force?

Hon STEPHEN DAWSON: The thinking on the co-design task force thus far is that it would have a male and female chair, representatives of the Aboriginal community—a male and female Aboriginal person. It would have a person representing industry and a person representing government. There would also be the capacity to co-opt other people. The likelihood, though, in our early thinking, is that there would potentially be a series of subcommittees, and the intention then is to do the consultation in tandem with the prescribed bodies corporate. Essentially, we would ask a prescribed body corporate whether it was willing to host a consultation session on its land and, if it was agreeable to that, we would go out and hold the consultation session there, and do that across the state.

The intention also is to do similar consultation sessions, if I can call them that, with other key stakeholders; for example, Hon Steve Martin mentioned farmers in his contribution. Certainly, the intention is to do it with groups like the farmers and others who would have a key interest. We will also ensure that we consult again with those stakeholders that have been part of the consultation process so far. For those who have made submissions on the journey thus far—the intention would be to re-talk to those people.

Hon Dr BRAD PETTITT: Is there a time line for creating this co-design task force?

Hon STEPHEN DAWSON: The intention is to start early in the new year. I have written to a number of Aboriginal representatives of the existing advisory committees that report to me—for example, the Aboriginal Cultural Material Committee, the Aboriginal Lands Trust and the Aboriginal Advisory Council of Western Australia—to ask whether a member of those organisations would be willing to be on the reference group. I have not yet received correspondence back from them. We have also started to think about who might be on the reference group from industry or from the state government, but there have been no decisions on that. I think we were keen to have the bill pass this place first and then put some more thinking into it over the next few weeks and start early in the new year, noting of course that depending on where people are in the state, the law might affect them differently, so we have to take those complexities into consideration, too.

Hon Dr BRAD PETTITT: This is my last question on the co-design. Obviously, there has been a range of voices on this bill, and some people have been quite publicly opposed to elements of it. I think that some people are concerned about how they might be involved in that co-design process and whether they will be represented on this task force. I am seeking some comfort that they will be.

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Hon STEPHEN DAWSON: Honourable member, I am not quite sure I heard the question. Let me paraphrase it. If the member is asking whether those people who have been against the bill thus far will be excluded from the process, the answer is no.

Hon Dr BRAD PETTITT: Yes. I am seeking an assurance that they will be involved and will be invited to be part of that co-design.

Hon STEPHEN DAWSON: The intention is absolutely to involve everybody who wants to be involved. Although some people might not have been happy with the process thus far, the intention is still to include them over the next phase of the journey. If the bill passes this place, it will become law, and the intention is to then talk to everybody about the law, the regulations and the guidelines and how they might work, so absolutely.

Hon PETER COLLIER: The minister does not need to respond to this, but it is a point that I raised earlier and something that I feel very strongly about. I am very conscious of the fact that when we move through a bill of this calibre, people are very vocal, particularly those who are opposed to the bill, and that has been quite evident with the progress of this bill thus far. We are hearing an enormous amount from the people who are opposed to this bill. As the minister can imagine, on this side of the chamber, we have been inundated, and this is another example. That does not for a moment suggest that there are not people who are supportive of the bill; I am sure there are. But, having said that, I think I will give the minister some gratuitous advice, which he can ignore if he likes. As we know, Aboriginal heritage is an extraordinarily sensitive issue throughout the state, particularly for First Nations people, and this is absolutely vital. If this is going to get across the line—I am not just talking about the raw numbers in five hours' time or whenever we vote, and we will not be opposing the bill anyway; I am talking about the establishment of the regulations and the reference group et cetera—I am pleased to hear what the minister has just said, which is that those who are opposed to the bill will be engaged in the decision-making process and the consultation phase.

If the minister can get that out there, I think he will go a long way to winning over a lot more people. There has been consultation, and I acknowledged in my second reading contribution that there has been significant consultation, but a lot of people are still feeling alienated. If the minister can somehow overcome that barrier, dare I say it, that will go a long way to placating the concerns—in a number of instances, very emotional concerns—that this bill will in fact extinguish the views of Aboriginal people. If the minister can do that, good fortune to him, and the bill might just achieve what it is hoped it will achieve. If the minister can do that, please, sing it from the rafters and let people out there who are opposed to the bill know that they can be part of the next phase and the consultation.

Hon STEPHEN DAWSON: The point is well made and it is certainly my intention to do that. Should the Aboriginal Cultural Heritage Bill 2021 pass this place, I intend to write to all the organisations that have been involved thus far, and go further afield advising of the process moving forward and encouraging them to be involved.

Hon WILSON TUCKER: My line of questioning is on the topic of free and informed consent. I note the minister's comments in the Committee of the Whole house last Thursday, and I quote from *Hansard* —

The bill will enshrine the United Nations Declaration on the Rights of Indigenous Peoples' principles of free prior informed consent in its agreement-making process.

I have a letter from the International Indian Treaty Council, which wrote to the Premier asking him to halt the passage of this bill because the council believes that the bill does not meet the criteria of “free, prior and informed consent” and is inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples. Is the minister aware of this letter?

Hon STEPHEN DAWSON: I am not and I ask that the member table it so that the house can have it and we can discuss it if the member desires to ask further questions on it.

Hon WILSON TUCKER: I seek leave to table the letter.

[Leave granted. See paper [988](#).]

Hon WILSON TUCKER: I probably should have kept the letter.

The DEPUTY CHAIR: Can I make a suggestion, honourable member?

Hon WILSON TUCKER: Sure.

The DEPUTY CHAIR: If you have other questions, move on to them and see that somebody makes sure when the attendant comes back with the documents that you get a copy.

Hon WILSON TUCKER: I have a question on the co-design process for the regulations. How does the minister define co-design?

Hon STEPHEN DAWSON: How do I define it? It certainly is and has been my commitment to the various stakeholders since very early on when I took on the role of Minister for Aboriginal Affairs that the next phase of the

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process, the regulation making process, will be by co-design. That does not mean that everybody will agree but it is certainly about everybody having the conversation. We know from the legislation before us that various elements will need further work—for example, the issues Hon Colin de Grussa raised in his questions today about the activity tier levels. They are issues screaming out to be worked on by the various stakeholders.

The intention is to sit down with the stakeholders, to advise them of the most pertinent issues that need to be co-designed and to work with them, as I indicated, and where appropriate have sessions on their land and talk through the issues with them. It is a genuine intention to sit down together, talk through the issues and work out how we might suggest the regulations are formed. I note, of course, as I am now well aware having been in the role for the last few months, that we will never get agreement on everything. But the intention is to have the conversations to get feedback and move forward with as many people as possible to make sure this legislation and the regulations are the best possible and work for as many people across the state as possible.

Hon WILSON TUCKER: Thank you, minister, for the explanation. Will the minister take forward any tenets or principles as he conducts the co-design process to come up with the regulations?

Hon STEPHEN DAWSON: There is no document per se, honourable member, but as the Minister for Environment for the past four years, I am well used to being involved in co-design processes with traditional owners on, for example, the creation of new marine parks or new national parks. We have done that, and I think, for the most part, for Aboriginal organisations or Aboriginal people who have been involved in those processes, they have been very good. It has been a genuine kind of respectful process that we have sat down on country with people and talked through the issues. Experts in the area have talked to people and then we have moved along together. It is my intention to do similar things for the regulation co-design process of this bill.

I have that letter, by the way, so if the honourable member wants to ask me a question on it, he can.

Hon WILSON TUCKER: I have one more question on the co-design. Given the definition the minister has given, will any key performance indicators or outcomes be incorporated to measure the effectiveness of this co-design process to ensure that there is an equal weighting of industry and Indigenous stakeholders?

Hon STEPHEN DAWSON: There are no KPIs as such. How will I be happy? I will be happy if as many people as possible participate in the process and we can come to an agreement on what the regulations will look like. That will make me happy and that will be a KPI that I would like to be judged on. Noting, though, as a number of honourable members, including those who have come before me as Minister for Aboriginal Affairs, have noted in this place, it is often very hard to make everybody happy. But we will try to make as many people as possible happy.

Hon WILSON TUCKER: Coming back to the letter from the International Indian Treaty Council that was tabled, it states the organisation's concerns —

- The Bill's design and consultation process, including a failure to involve Indigenous peoples in Western Australia in a co-design process consistent with Article 3 and Article 32 of UNDRIP.
- Lack of free, prior and informed consent, leaving ultimate decision-making to the responsible Minister where there is no agreement between Indigenous groups and proponents and is inconsistent with Article 32 of UNDRIP.
- Lack of safeguards within the Bill to ensure that significant cultural heritage will not be subject to destruction, instead this is left to be determined by the responsible Minister in circumstances already described, which is inconsistent to Indigenous peoples' right to maintain, control, protect and develop their cultural heritage consistent with Article 31 of UNDRIP. The Minister's decision includes consideration of an 'in the interests of the State' test, which threatens to prioritize economic drivers before protection of significant cultural heritage and, thus, risks racially discriminatory decision-making.
- No review or appeal rights for Aboriginal peoples where a decision is made to destroy their cultural heritage and is inconsistent with obligations to provide effective mechanisms for just and fair redress, which is inconsistent with Article 32.

This letter was addressed to the Premier. Is the minister aware of whether the Premier has read the letter and whether he is planning to respond to the letter?

Hon STEPHEN DAWSON: Until the honourable member brought the letter to my attention today, I was not aware of it. The copy of the letter the honourable member has given me has who it is from but not who it went to, so I am not aware of the letter. I am sure it is always the case that any correspondence that is sent formally to the government's email or indeed via the postal system ordinarily would get a response.

Hon WILSON TUCKER: Does the minister have a response to the issues outlined and concerns raised in the letter that I just read?

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Hon STEPHEN DAWSON: The issues the honourable member has raised relate to various clauses in the bill, and I am happy to talk to those issues when we get to those clauses. I am not going to generally do it now. I will make the point that the United Nations Declaration on the Rights of Indigenous Peoples states —

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Notwithstanding what is in the article, it says at the very end that if something impinges on the sovereign rights of a state, it is open to government to take a different course. I make that point. If the member has questions on particular clauses of the bill, we will deal with them when we get to those clauses.

Hon WILSON TUCKER: The Yamatji Marlpa Aboriginal Corporation is going to host a cultural heritage protection co-design strategy workshop with representatives from industry, traditional owners and prescribed bodies corporate from around the state. I believe an invitation was also extended to the minister. Is the minister planning on attending the workshop?

Hon STEPHEN DAWSON: My focus is on passing the bill before us now. If I pass this bill, I will think about the next phase of consultation. I am not aware of anyone from government going to the workshop. I am aware of a piece of correspondence that has come to my office. Can I say, I have been distracted dealing with other things, including this legislation, and my diary for January has not yet been worked out.

Hon WILSON TUCKER: Does the minister acknowledge that there could be a benefit in Indigenous groups and industry bodies getting together to formalise what co-design means to ensure that there is balance in the decision-making of the regulations?

Hon STEPHEN DAWSON: The honourable member is asking me for an opinion; I am not going to give an opinion today. However, certainly, our intention in creating a task force is to ensure that the various organisations—indeed, Aboriginal organisations have disparate views on this issue—are involved in the process. If other organisations want to organise conversations or meetings about Aboriginal cultural heritage and regulations, that will be up to them to organise. But we will create a state-run process. That is the commitment that I have to make to ensure that we get the regulations right and there is a proper co-design process.

Hon Dr BRAD PETTITT: I return to the letter that was tabled sent to Her Excellency Ms Sally Mansfield, the permanent representative of Australia to the United Nations Office in Geneva, from the vice-chair of the Committee on the Elimination of Racial Discrimination, Marc Bossuyt. I appreciate that the minister has only just seen that two-and-a-bit-page letter, but perhaps I can start by asking whether the government engaged with the UN Committee on the Elimination of Racial Discrimination at any time during the drafting of this legislation?

Hon STEPHEN DAWSON: No, it did not. But, of course, the UN Committee on the Elimination of Racial Discrimination could have participated in the process, particularly last year, when the draft legislation was released and a public comment period was undertaken. Of course, no correspondence was received from any UN committee on the legislation, to the best of my knowledge.

Hon Dr BRAD PETTITT: It is a long letter so I will not read it all, but I draw the minister's attention to the fourth paragraph on page 2, which provides a summary and states —

According to the information received, the discretionary power attributed to the Minister of Aboriginal Affairs and the absence of effective remedies and legal redress for Aboriginal peoples to challenge his decisions will maintain the structural racism of the cultural heritage legal and policy scheme, which has already led to the destruction of Aboriginal cultural heritage in Western Australia.

It is a serious matter when the UN writes to the Australian representative on this basis. Clearly, there is a high level of concern. The letter goes on to encourage the state party—which I read to be the WA government—"to consider engaging with the United Nations Expert Mechanism on the Rights of Indigenous Peoples". Will the McGowan government engage with the UN Expert Mechanism on the Rights of Indigenous Peoples on these bills?

Hon STEPHEN DAWSON: No; it is not our intention to engage with the United Nations. Australia, of course, is a sovereign nation and a signatory to various agreements, and it is appropriate for the United Nations to engage with the Australian government.

I make the point that removing gag clauses, as this legislation does, certainly is not what the member just read out. Under this legislation, Aboriginal people will decide what is important cultural heritage to them and there will be informed consent as part of this legislation. First of all, I do not know who this person is and I am not confident that this person has read the bills before the Parliament. It is certainly my intention to proceed with the legislation

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before us now, as is. But, of course, the next phase of the journey is the co-design process. If the United Nations wants to get involved in the co-design process in little old Western Australia, well, good on it. I will be happy to consider that at that stage.

Hon Dr BRAD PETTITT: That was going to be my next question. Given the seriousness of the concerns that the UN mechanism has outlined, will the minister consider engaging with the United Nations on this bill and make sure that it is across the co-design process and that the co-design process is done in a way that meets the obligations and concerns outlined in this letter?

Hon STEPHEN DAWSON: Honourable member, what concerns me is why the United Nations Committee on the Elimination of Racial Discrimination is not complaining about the 1972 act—a 49-year-old piece of legislation that has not had Aboriginal people at the table.

Hon Dr Brad Pettitt interjected.

Hon STEPHEN DAWSON: It says that the bill will supersede it, but I do not think it has acknowledged that this piece of legislation will mean monumental change in how Aboriginal cultural heritage is treated and how Aboriginal people are respected. As I said, we have some ideas about the co-design process. The intention is to have a reference group. The intention is to work out with the prescribed bodies corporate on country the conversations we might have about the regulations. If other stakeholders make contact with us and say that they have a view or would like to have a say on the regulations, I am certainly open to it.

Hon Dr BRAD PETTITT: This is my last bit on clause 1. The United Nations letter is another example, along with many others that my colleagues have put forward. Unfortunately, the legislation in its current form does not have many friends. We spoke earlier about the limited number of people who support the whole bill, and I think the minister named two or three people he is aware of in that space. I recently received a copy of a letter written to the minister that refers to concerns about some of the things that were said during the debate last week when he stated that the PBCs had not written to him saying that they were not happy with the bill. The people who risk losing out under the bill have been vocal. This letter is from the representatives of some PBCs. It is quite clear that they have written to the minister about this and they certainly feel very strongly that they have been left out. I would like to table this letter in due course for the record.

The DEPUTY CHAIR (Hon Dr Sally Talbot): Member, I wonder whether you would consider tabling that piece of correspondence now to assist the minister.

Hon Dr BRAD PETTITT: I certainly would. It is on the printer now. Someone will grab it for me. I do not have a hard copy.

The DEPUTY CHAIR: Minister, that letter is on its way to you.

Hon Dr BRAD PETTITT: The reason I raise it is that I think it is very important. We have groups that feel that they have not been heard or have been misrepresented. This letter, which will be in front of the minister shortly, is very clear. Some of the groups that the minister has indicated in this chamber support the bill actually do not. It is important that this is brought to the minister's attention. There is a long list of groups that wrote to him on 6 October 2020 to highlight their concerns with the previous draft of the bill. Of course, they highlight now that the current draft of the bill is even worse than that one.

The DEPUTY CHAIR: Member, would you like to seek leave to table that document?

Hon Dr BRAD PETTITT: Yes, I would like to seek leave to table the document.

[Leave granted. See paper [989](#).]

Hon STEPHEN DAWSON: I thank the honourable member. I am now told that an email arrived at 2.34 pm with this correspondence. The member is making the same point as Hon Neil Thomson made; that is, there are people out there who do not feel they have been consulted as part of this process. I say that people have been consulted as part of this process. People might not be happy with the process or where the legislation has ended up or with certain elements of it, but I stand by those elements. I have certainly met with representatives of the Banjima Native Title Aboriginal Corporation over the past few months. They participated in consultations on the early drafting phase of the legislation. I recognise that they are not happy with the bill before us. The bill before us is the bill before us.

Honourable members can probably pull lots of these emails out of wherever. I commented last week that I recognise and I have not in the slightest tried to resile from the fact that there are groups out there who are not happy. I have also received emails today from two other groups that are linked to YMAC, or Yamatji Marlpa Aboriginal Corporation, not because they have YMAC in their name, but because officers of YMAC had used their email address to send me letters from two other prescribed bodies corporate who, as a result of my comments last week, decided that they should write to tell me that they were not happy as PBCs with the bill before us. There are people out there who are unhappy, but the bill is before us. With the greatest of respect, whatever letters people have, it is not going to change

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my view. If there are particular issues in the letters that relate to clauses of the bill, I would urge members to raise those issues at the appropriate clause.

Hon Dr STEVE THOMAS: Noting the time, I would urge members to get on with this. It is funny, is it not, that any time people do not like an outcome, they generally claim that they have not been consulted properly. When we really do not like an outcome, we try to seek an alternative umpire that is not the one that we need to go to. I cannot tell members how many people have approached me to say that the Geneva Conventions or the Nuremberg Code mean that they do not have to be vaccinated. It is not true, but obviously when people do not get the answer that they want, they try to find something else to convince the authorities that they are not the real authority. I suggest that the authority here is actually the state of Western Australia, in which the land is vested. If we make too big a fuss about that process, one day maybe everyone will decide that there is no point vesting all that land in the state and we will lose control of it to either the commonwealth or somewhere overseas.

I understand that not everybody is happy with the bill. I said in my second reading contribution that generally if everybody is a bit unhappy, the government is probably somewhere close to where it needs to be. The government needs to get on with continuing this process and delivering this legislation. If land councils are unhappy because they did not get everything that they want, guess what? That is probably appropriate. When I hear that such and such has said that they did not get everything they want, so they will go to the United Nations because that might give them what they want, I think that the United Nations generally will not do that, and it generally cannot do that, and nor should it. It should not have that power. In reality, everybody who is a bit unhappy has probably been consulted but does not like the outcome. The outcome is that the government is going to govern. If people do not like that process, unfortunately they are in the wrong place and probably in the wrong job. Can we please proceed with the remainder of the bill?

The DEPUTY CHAIR: That sounds like a cue that I put the motion that clause 1 do stand as printed.

Clause put and passed.

The DEPUTY CHAIR: I recognise that this might be slightly complex, but it would be of enormous assistance if members could indicate the clauses they wish to speak on. I recognise that several parties want to contribute to this debate. If it is not possible for you to do this now, could I request that at some stage in the next hour or so somebody presents the clauses that need to be discussed.

Hon NEIL THOMSON: Just to clarify, from my point of view, it is clauses 2 and 8.

The DEPUTY CHAIR: Thank you. I will give you the call. I just needed to put the question.

Hon Dr BRAD PETTITT: My question is on clause 11.

Clause 2: Commencement —

Hon NEIL THOMSON: Minister, I understand that a lot of work will need to be done to achieve royal assent for this bill. I would like to give the minister an opportunity to outline the time frame that is likely to occur and the conditions that will be set for the minister to take this bill to the next stage.

Hon STEPHEN DAWSON: The likelihood, honourable member, is that it could take up to 24 months for the bill to come into operation. I remain eternally optimistic in my role as Minister for Aboriginal Affairs. I would love the co-design process to commence and conclude by the end of next year, but there is then the writing of the regulations. To be realistic, it could take up to 24 months for the commencement of the legislation.

Hon NEIL THOMSON: Thanks for that. I think it is important to be stated. The regulations are one thing, but will the establishment of the bodies that will effectively govern the act be considered regarding the timing of assent? I am happy to take this question through to transitional arrangements if the minister chooses not to answer on clause 2.

Hon STEPHEN DAWSON: It is intended that the creation of the council, for example, and the other things that will need to be created as part of the act will all be done in the 24-month period.

Clause put and passed.

Clauses 3 to 7 put and passed.

Clause 8: Objects of Act —

Hon NEIL THOMSON: Clause 8(1)(c) includes one of the objects of the act, which is —

to manage activities that may harm Aboriginal cultural heritage in a manner that provides —

- (i) clarity, confidence and certainty; and
- (ii) balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community;

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The massive challenge I have had in assessing this bill has really centred around this paragraph because I do not think sufficient assessment has been done on the issue of clarity. There is a huge lack of clarity. I cannot see how we can possibly say the bill achieves it. Would it be fair to say, minister, that without the regulations, this bill is not clear?

Hon STEPHEN DAWSON: I disagree. It is a very clear bill, which steps things out sequentially. Again, I will come back to the comment made by the honourable member's leader in the other place, Dr David Honey, who said words to the effect that this is very clear legislation. As is always the case, the detail will be in the regulations, including the practicalities of how something will work. That work has yet to be done. The 1972 act did not include an objects clause. Clause 8 is a new inclusion in the legislation. This objects clause was included in the draft bill that was put out for public comment in September last year, so it has been known to the various stakeholders since at least that time. We have not had feedback, questions or concerns raised about it—far from it. The stakeholders I have spoken to think it is helpful.

Hon NEIL THOMSON: I think my honourable colleague Dr David Honey was referring to the language of the bill when he spoke about clarity. I think there is a degree of clarity in the language of the bill, but I think there are massive challenges with the materiality of the bill and its clarity. On the confidence issue, notwithstanding the minister's comments on matters of confidence, over the last few days in particular, I think we have seen a significant expression of a lack of confidence. Does the minister believe this bill achieves that confidence?

Hon STEPHEN DAWSON: I stand by what is in the bill before us. The objects clause makes the rights and responsibilities clear to all users under the bill, so I think it is a good clause to include. At the end of the day, in time to come, I think it will serve us well.

Hon NEIL THOMSON: I will make a final comment on this. I agree with the minister that the objects clause is important. I think it will stand to be tested. This is the government's legislation but I think a number of stakeholders have expressed concerns from a range of different perspectives, particularly about the way the bill has been rushed through this place. I support the objects of the bill, but for the record I do not believe that they will be achieved. The minister can take that as a comment. I conclude my comments by saying that I do not believe that this bill will achieve clarity, confidence and certainty.

Clause put and passed.

Clause 9 put and passed.

Clause 10: Principles relating to management of activities that may harm Aboriginal cultural heritage —

Hon NEIL THOMSON: Clause 10 relates to the principles relating to the management of activities that may harm Aboriginal cultural heritage. Again, I make the comment that the principles are important and necessary, but considerable challenges will be faced. I actually sympathise with the minister because of the challenges in specific aspects of this. I note that this clause was amended in the consultation phase. Can the minister provide the chamber with a synopsis of why the clause was amended?

Hon STEPHEN DAWSON: I am told, honourable member, that this was added in response to the feedback that was given as part of the consultation process. The suggestion was made that the inclusion of such a clause would help people navigate the legislation, if I can use those words.

Hon NEIL THOMSON: Can the minister outline the specific matter that was amended? A table of amendments was presented by the department. I am looking at my papers but I do not have the table at hand. Can the minister provide more detail on the amendment? Does the minister or his advisers have that table on hand?

Hon STEPHEN DAWSON: I draw the member's attention to clause 10(d), which states —

as far as practicable, in order to utilise land for the optimum benefit of the people of Western Australia, the values held by Aboriginal people in relation to Aboriginal cultural heritage should be prioritised when managing activities that may harm Aboriginal cultural heritage.

Clause put and passed.

Clause 11: Terms used —

Hon NEIL THOMSON: Clause 11 is an extremely large clause. I have a specific question in relation to the definition of "Aboriginal skills". What is the reason for the inclusion of "Aboriginal skills" and what does it mean? It would be helpful if the minister could provide an explanation.

Hon STEPHEN DAWSON: Honourable member, there is no definition of "Aboriginal skills" in the bill. Perhaps the member is talking about the definition of "Aboriginal tradition", which —

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- (a) means the living, historical and traditional observances, practices, customs, beliefs, values, knowledge and skills of the Aboriginal people of the State generally, or of a particular group or community of Aboriginal people of the State; and
- (b) includes any such observances, practices, customs, beliefs, values, knowledge and skills relating to particular persons, areas, objects or relationships;

Maybe that is what the honourable member is talking about; I am not sure.

Hon NEIL THOMSON: Yes, I thank the minister. There are, obviously, definitions for matters that this bill encompasses. I assume that that applies to matters pertaining to Aboriginal cultural heritage; it is not just a broad definition of the skills of Aboriginal people.

Hon STEPHEN DAWSON: It might, for example, relate to tool-making skills. For generations—for tens of thousands of years—people have made tools in a certain way, so that would be one example.

Hon NEIL THOMSON: I thank the minister for that clarification, and my apologies. It was not at all a trick question; I was just trying to understand what it meant. It is in the context of a traditional understanding. Thank you. That clarifies my point on that matter.

Hon Dr BRAD PETTITT: I also have a question on the same clause, at line 17 on page 14—the definition of “in the interests of the State”. I am trying to understand that definition. Is that a common definition that is used across multiple documents, or is it just in this legislation? How will the minister determine who gets the most benefit from those interests?

Hon STEPHEN DAWSON: There are certain ministerial decisions that must be made on the grounds of what is in the interests of the state. These include decisions on protected areas; objections to decisions made by the council in relation to Aboriginal cultural heritage permits and Aboriginal cultural heritage management plans that have been submitted for approval; Aboriginal cultural heritage management plans submitted for authorisation, including any agreed Aboriginal cultural heritage management plans that may impact Aboriginal cultural heritage of state significance; and part 7 orders.

The intention is that, for these decisions, it will be appropriate for the minister to also consider the broader interests of the state. In considering what is in the interests of the state, it will be open to the minister to consult with and seek the views of other members of executive government before making his or her decision. It will be open to the minister to consult with cabinet colleagues and the like about what is in the interests of the state.

Clause put and passed.

Clause 12: Meaning of Aboriginal cultural heritage and related terms —

Hon TJORN SIBMA: I have a couple of questions on clause 12. I take the explanatory memorandum for my reference as much as the bill itself. Should I infer that an explicit or implied hierarchy of cultural heritage is outlined in this clause? Clause 12(b) encompasses “Aboriginal place” through to “Aboriginal ancestral remains”. For the purposes of this bill, are they all given equivalent value?

Hon STEPHEN DAWSON: They are equal, honourable member.

Hon TJORN SIBMA: Is that to say that a cultural landscape is as significant for heritage purposes as ancestral remains? I can understand, on one level, how that might be the case, but viewed from another perspective, I find that difficult to reconcile—that all heritage is equal, particularly given that passages further along in the bill talk about Aboriginal cultural heritage of state significance. Somewhere, at some place, there must be a hierarchy of values or importance, but the bill does not go there. I want to get a sense of whether my thoughts on that are straight.

Hon STEPHEN DAWSON: There is no hierarchy. If the member wants me to, and if it is helpful, I can explain the thinking behind the definition of “cultural landscape”.

Hon TJORN SIBMA: Maybe, because I still have a problem reconciling what an intangible piece of cultural heritage is. I find this intensely problematic when it might be invoked in an operative sense to prohibit a development proposal of some kind. I am still struggling to understand what intangible heritage might be. Is it intangible to the degree that it connects disparate parts of—forgive my ignorance—culturally tangible pieces of heritage, be they a significant site or a sacred or secret object, or can it be invoked globally without reference to something, dare I say, concrete?

Hon STEPHEN DAWSON: I will read what my note says, honourable member. Intangible Aboriginal cultural heritage is defined as intangible elements of Aboriginal cultural heritage, including knowledge or oral expression of Aboriginal tradition. The bill will allow for intangible Aboriginal cultural heritage to be recorded on the Aboriginal Cultural Heritage Directory to support Aboriginal people in preserving it and passing it on to future generations. That could be a story or a song, for example.

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Hon TJORN SIBMA: I thought that might be the case. I wanted to understand whether, effectively, I should infer that a songline would assist me to comprehend this. Is it possible that the examples the minister provided can be harmed in any material sense and require protection? I am trying to get my head around that concept.

Hon STEPHEN DAWSON: It has to be tied to a tangible element. It cannot exist by itself.

Hon NEIL THOMSON: I appreciate the commentary on this particular issue because I was also going to ask a question about it, but I will move on to clause 12(b)(iv), which refers to the bodily remains of a deceased Aboriginal person and remains that are buried in a cemetery where non-Aboriginal persons are also buried. In making this comment, I note the alleged carnage that is occurring at Karrakatta Cemetery at the moment. Will this provision potentially impact on the consideration of the approach that is taken by the Metropolitan Cemeteries Board in any of the matters that are currently underway in our inner city?

Hon STEPHEN DAWSON: My advisers tell me, no, we do not believe so.

Hon Dr STEVE THOMAS: Is that because the definition of “Aboriginal ancestral remains” does not necessarily include a contemporary person? Maybe we could get some clarification on this. I am thinking of an Aboriginal person who is buried in a cemetery under the authority of the Metropolitan Cemeteries Board and where these certain actions are undertaken on a regular basis in the context of our local cemeteries.

Hon STEPHEN DAWSON: It could be a contemporary person; it does not have to be historical.

Hon Dr BRAD PETTITT: My line of questioning is on the same area. I am trying to understand intangible heritage. Obviously, it is included in clause 12(a), which talks about the tangible and intangible elements, and clause 12(b)(iii), which talks about a cultural landscape or a group of areas. However, in clause 12(b)(i), which talks about a single area that is an Aboriginal place, it refers only to tangible elements. Can the minister explain that to me, please?

Hon STEPHEN DAWSON: The honourable member has an amendment at clause 12 on the supplementary notice paper. His proposed change seeks to expand the definition of “Aboriginal place” to include an area within which tangible or intangible elements of Aboriginal cultural heritage are present. The current definition of “Aboriginal place” does not exclude intangible elements; it simply requires the area to contain some tangible elements of Aboriginal cultural heritage. Often, tangible and intangible elements are intrinsically linked. It is unclear what the proposed change is seeking to address. We do not support the proposed amendment because we think that the bill as it exists now takes into consideration what the member is talking about.

Hon Dr BRAD PETTITT: I am not wedded to moving the amendment, as long as I understand, but what I do not understand is why “a group of areas” explicitly mentions “tangible or intangible elements” but a single area mentions only “tangible elements”.

Hon STEPHEN DAWSON: There are protections for cultural landscapes, but they do not have the harm provisions. The harm provisions rely on a place or an element of the songline.

Hon WILSON TUCKER: Minister, to expand on “intangible” and for my edification, is an intangible element tied to a physical location?

Hon STEPHEN DAWSON: I am told for a place, yes; it has to be.

Hon WILSON TUCKER: Minister, using the example of a songline, when an area has intangible cultural heritage elements of significance, is there a provision in the bill that will exclude an area around that area? I use the example of a train line built next to a songline; it could potentially erode some of the cultural significance if it is right next to the area with intangible elements of cultural heritage. Is there a provision to exclude areas around an area with tangible and intangible significance, with a buffer zone, if you will?

Hon STEPHEN DAWSON: In that example, if the area had high cultural significance, an application could be made to make it a protected area. The protected area would exclude activities from happening in that location. In fact, I think I said in my second reading reply that both houses of Parliament would be required to overturn a protected area—that is, generally, and even in terms of the size of the protected area.

Hon Dr BRAD PETTITT: I have been mulling over this one and trying to get my head around it, because I do not want to move amendments without having made the point. I am still not feeling comfortable, based on some of the advice and conversations that I have had with stakeholders that “intangible” is not included in that part of clause 12 at page 21, line 15. On the supplementary notice paper, I have given notice that I will move an amendment. I will do that. I will not bother going into a division or anything, but, for the record, I would like to move the amendment based on some of the feedback I have received, because some concerns remain amongst key stakeholders and those who are experts in this space that if the provision relating to “an area” does not contain “intangible elements”, some of those areas will have a lower level of protection. Therefore, I move —

Page 21, line 15 — To insert after “tangible” —

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or intangible

Hon STEPHEN DAWSON: I have previously spoken on this issue. The government does not support this amendment because it believes the bill has captured this issue.

Amendment put and negatived.

Clause put and passed.

Clause 13 put and passed.

Clause 14: Act binds Crown —

Hon NEIL THOMSON: I understand that this clause was added after further consultation on the 2020 bill. Is that correct?

Hon STEPHEN DAWSON: It was amended to remove a provision that the Crown could not be prosecuted.

Hon NEIL THOMSON: This is a significant provision that is worthy of further discussion. I am concerned about the mechanics of this for members of the public sector, including accountable officers, particularly those in Main Roads Western Australia, because the bill contains fairly severe penalties for breaches of the law when it comes into effect. My first question is: to what extent has the government consulted with senior members of the public service, particularly those who are likely to be held accountable? In view of the time, can the minister explain which officers may be exposed under this clause or whether it will ultimately be the responsibility of the minister of the Crown?

Hon STEPHEN DAWSON: I make the point, first of all, that the 1972 act does not bind the Crown. This clause was included after strong feedback from Aboriginal organisations. The proposed act will bind the state and the Crown and provide that the state, including its various governmental, commercial and industrial instrumentalities, will be required to comply with the proposed act and will not be immune from prosecution.

Main Roads, as the biggest user of section 18 applications at the moment, was certainly involved in conversations and consultation on the clause before us, and, generally, as part of the cabinet process, government agencies and ministers' offices were consulted. It is the strong view of government that its agencies need to be held to account for what they undertake, particularly when it will potentially impact Aboriginal cultural heritage.

Hon NEIL THOMSON: The practicalities of this are important, so I will put a hypothetical situation in which there is a breach and a prosecution and a mid-tier manager is seen to be at fault. Who would potentially be subject to the sanctions proposed under this clause?

Hon STEPHEN DAWSON: It would be a matter for the prosecuting authority to determine whom it would prosecute. The proposed act provides that prosecution under the act may be commenced by the chief executive officer of the department responsible for the administration of the act, or a person authorised by the CEO, as well as anyone who is otherwise authorised to commence and conduct the prosecution of an offence—for example, the Office of the Director of Public Prosecutions. It will be open to those undertaking the prosecution as to who might be prosecuted. I make the point that many other acts have similar provisions that bind the Crown. For example, I am told that the Public Health Act of whenever it was—probably 1902 or something; a long time ago—is one act that has such a provision.

Hon NEIL THOMSON: That is useful. I think it is worthy of a bit more consideration. Hypothetically, a manager who might be seen to be the major mover of the problem for which the prosecution has been levelled could be the one facing court.

Hon STEPHEN DAWSON: Any agency would undertake a due diligence process. Did the action taken by whomever concur with the legislation—with the law of the land? Should it not, obviously, steps would be taken to prosecute the action that was taken.

Hon NEIL THOMSON: Could there be a circumstance in which a minister of the Crown might be prosecuted for the actions of his or her agency?

Hon STEPHEN DAWSON: I was saying that it would be unlikely, but my advisers tell me that it would be possible. I make the point that it is the Public Health Act 2016, so it is more contemporary than I had first imagined.

Hon NEIL THOMSON: I am not familiar with the Public Health Act and the sanctions that it might apply. We are having a hypothetical discussion, but I think it is important given the sanctions that potentially could apply for a range of harms. It would seem that agents of the state—delegates of an accountable officer or possibly as high as a minister of the Crown—might find themselves in prison for activities that occur that relate to this law.

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Hon STEPHEN DAWSON: I think it is fair to say that anybody who breaks the law could be prosecuted for breaking that law. I will just make a further point: this clause replicates a similar provision in the Heritage Act 2018. It is included in other contemporary legislation.

Clause put and passed.

Clause 15: Act does not apply to certain objects —

Hon TJORN SIBMA: I just have a quick one. The exclusion clause that appears to permit objects currently made and preserved by the Western Australian Museum is well understood. However, will this bill provide that the Museum and, presumably, although they are not referred to in this clause, the universities to continue to acquire such objects for that purpose?

Hon STEPHEN DAWSON: I am told that this will apply only to current collections.

Hon TJORN SIBMA: Is there some instrument or forward-looking provision that will permit collections to continue? I am interested to know. I do not necessarily think that this bill will prohibit collections of the style and import that the Museum currently has, but what arrangements will the Museum operate under if it wants to continue to preserve and showcase heritage items?

Hon STEPHEN DAWSON: This exemption has been added to ensure that the proposed act does not impact the management of cultural material held by the Western Australian Museum, including the repatriation of such material. Honourable member, I am not sure under which act that it can already collect this material and display it, but, certainly, it will be able to continue to display and collect material under the bill that is before us. There are provisions later on in the bill, though, that suggest that should a traditional owner call for the repatriation of something in the collection of the Museum, that material would have to be reported.

Clause put and passed.

Clause 16: Native title rights and interests —

Hon NEIL THOMSON: I see that in the “Native title rights and interests” clause, the bill claims —

- (2) This Act is not intended to affect native title rights and interests ...
- (3) This Act must be interpreted in a way that does not prejudice native title rights and interests to the extent that those rights and interests are recognised and protected by the Native Title Act.

I think this is a good clause. I think it is important. I note, however, that throughout the bill there are quite a lot of references of other roles—for example, the definition of knowledge holders and those people who might have a role in traditional understandings about, or interests in, the cultural heritage space, and there is this hierarchy given later on. To what extent is the minister confident that this provision will not impact on native title rights and interests?

Hon STEPHEN DAWSON: I am told that my advisers are very confident, honourable member. In a contribution last week, somebody spoke about legal minds outside of Parliament and how good they were. Can I say that I am very confident in the legal minds who have been advising me over the past few weeks, and indeed months, on this legislation. I have the best of the best, and they tell me that we are confident.

Clause put and passed.

Clause 17 put and passed.

Clause 18: *Freedom of Information Act 1992* does not apply to culturally sensitive information —

Hon NEIL THOMSON: The clause is titled “Freedom of Information ... does not apply to culturally sensitive information”. I think this clause might have been amended from an earlier version of the bill. Is there a pre-existing requirement for the Aboriginal Cultural Heritage Directory to identify whether something is culturally sensitive information? In a case in which a freedom of information request is made, will it be possible for the material in that directory to be determined to be culturally sensitive in any way? Would this clause provide a requirement for the material to be listed as “culturally sensitive” prior to inclusion on the directory, which would determine the outcome of whether this clause applies?

Hon STEPHEN DAWSON: I am told that the department would clarify with the traditional owners about whether a piece of material was culturally sensitive before it would disclose anything under FOI.

Hon NEIL THOMSON: From what the minister is saying, could it be the case that when material is on the Aboriginal Cultural Heritage Directory and a freedom of information request is put forward, it is then determined at that point in time to be culturally sensitive?

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Hon STEPHEN DAWSON: The culturally sensitive nature of the material would be disclosed on the directory, but a decision would be made on whether it could be provided to a third party, for example. If it were deemed to be culturally sensitive, that information would not be provided through FOI.

Hon NEIL THOMSON: I think this goes to the heart of providing certainty for proponents, particularly when there is, unfortunately—we know that this is always going to be a sad possibility—some conflict with a local Aboriginal cultural heritage service or the Aboriginal Cultural Heritage Council. I think the issue is whether there will be some flexibility, and that will take away some of the clarity and certainty that this bill purports to achieve. My point is that I think it would be beneficial if material that is registered on that directory were to be identified as culturally sensitive or not prior to any dispute arising, if the minister understands what I am asking.

Hon STEPHEN DAWSON: The directory has yet to be designed—it will be designed as part of the process—but, for example, under the existing regime, we are aware of culturally sensitive areas. The intention is to transfer those across. When someone discloses a new site to us, I am told there will be a box to tick, essentially, to indicate to the state whether a site is culturally sensitive, and that will be acknowledged on the directory, so that material would not be disclosed through FOI.

Hon NEIL THOMSON: I restate: obviously, it is important that culturally sensitive material is protected, but there is more to this issue. I hope that in the design of this registry, maybe through the regulations, there will be some discipline in culturally sensitive areas being identified up-front as far as possible.

The other matter related to this is on the gathering of information, if the minister could just stretch the boundary a little on this clause. Would this clause affect material that a court or third party may seek to subpoena as part of a court proceeding? Would that be bound up in this? I cannot find any provision in the bill relating to court subpoenas for particular information.

Hon STEPHEN DAWSON: I am told that it is a possibility, based on the subpoena. It is a possibility.

Hon NEIL THOMSON: It is possible that it may not be provided?

Hon Stephen Dawson: No, it is possible that it may be provided.

Clause put and passed.

Clauses 19 to 23 put and passed.

Clause 24: Delegation by ACH Council —

Hon NEIL THOMSON: I seek clarification on the delegation by the Aboriginal Cultural Heritage Council. It is a fairly technical provision, as many of these are. I understand that this provision is required to give effect to the functions of those local Aboriginal cultural heritage services. Is that correct?

Hon STEPHEN DAWSON: This is about just the Aboriginal Cultural Heritage Council and its powers to delegate. Honourable member, I have just received some further advice about our last interaction. I have been advised to bring the member's attention to clause 216, which provides that information on the directory that contains culturally sensitive information must not be made available unless knowledge holders have given explicit consent. That is in addition to the earlier comment, and I have answered the one about this issue.

Clause put and passed.

Clauses 25 and 26 put and passed.

Clause 27: Minister may give directions —

Hon NEIL THOMSON: Clause 27(1) states —

The Minister may give a written direction to the ACH Council in respect of the performance of its functions, and the Council must give effect to the direction.

That is pretty clear; the minister does have that power. Subclause (2) states —

However, a direction under subsection (1) cannot be given in respect of the performance of a function in relation to any of the following —

A number of elements follow. My interest is drawn to paragraph (c), which states —

a particular application for an ACH permit or for the approval or authorisation of an ACH management plan;

I have a number of concerns about that because it refers to performance. I discussed issues around performance management. I think the success of this regime will be determined by those elements that relate to small to medium enterprises and small landowners, which I indicated in my contribution to the second reading debate were of particular importance. My concern is the performance of those bodies and the exemption; that is, “cannot be given in respect

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of the performance of a function” in relation to “a particular application for an ACH permit”. From my reading of this, it could be a major shortcoming if it impacts on the management of the permit system. Can the minister provide some background on that? How will it restrict the minister’s management of the performance of the local Aboriginal cultural heritage services, which might have a very pivotal role in the specific applications for some very minor works in the future?

Hon STEPHEN DAWSON: I can give the member an example. If the ACH council has not made its decision within the required time frame, the minister can direct the council to make the decision forthwith, essentially. The prescribed time frames are in various sections of the legislation, but if they fail to meet them, I can direct them to do that. The minister can also give directions on the performance of other Aboriginal Cultural Heritage Council functions under the proposed act. This may include promoting public awareness, understanding and appreciation of Aboriginal cultural heritage and promoting the role of Aboriginal people and the recognition, protection and preservation of Aboriginal cultural heritage and the management of activities that may harm their heritage. The minister can also direct the Aboriginal Cultural Heritage Council to provide advice about the recognition, protection, preservation and management of Aboriginal cultural heritage and any other matters relating to the exercise of the powers of the Minister for Aboriginal Affairs under the proposed act. I bring to the member’s attention clause 27(4), which states —

The Minister must cause a direction given under subsection (1) to be laid before each House of Parliament, or dealt with under section 308, within 14 days after the direction is given.

Should the minister choose to issue a direction, although there is a level of transparency around that, it will need to be brought before Parliament.

Hon NEIL THOMSON: It does not give me a lot of comfort and we will address this more at later clauses, but one of the major shortcomings, potentially, of this legislation when it is enacted will be the accountability of those local Aboriginal cultural heritage services working on behalf of the Aboriginal Cultural Heritage Council to provide timely and efficient processes for what could be quite minor activities. That has always been my major concern with this legislation. Why is there an exemption in clause 27(2)? The minister knows how difficult it is to run an approvals process; we see government do quite a bad job of that, generally. As a former Minister for Environment, I am sure the minister understands that issue and the concerns raised by members of the public when there is a lack of clarity on their approvals. Will clause 27(2) in any way limit the minister from ensuring that the permit system operates efficiently?

Hon STEPHEN DAWSON: No.

Hon WILSON TUCKER: My question is on clause 27(1), which states —

The Minister may give a written direction to the ACH Council in respect of the performance of its functions ...

How will the council’s performance be measured?

Hon STEPHEN DAWSON: I gave an example, honourable member. There will be required time frames under the act that will need to be met. For example, if the Aboriginal Cultural Heritage Council does not meet a time frame, the minister could issue a direction to say, “Make a decision quickly.” If the council does not meet the elements established under the act—the things that it needs to do under the act—it is possible that the minister could decide that it is being tardy, or whatever, and could issue a direction. But as I have also said, should a minister issue a direction, clause 27(4) sets out the process that needs to happen to make sure there is a level of transparency around this process. This clause is, generally, to ensure the council can act impartially, but provisions are built in so that if the council does not do the work it was established to do, a minister could issue a direction, but there will be transparency around that.

Hon WILSON TUCKER: The minister mentioned a time frame. Is that a time frame to make a decision on an Aboriginal cultural heritage action plan?

Hon STEPHEN DAWSON: Yes, there will be a time frame around cultural heritage management plans. There are prescribed time frames set out in clauses 119(5) and 126(5) and 150(5), but the time frames will be in the regulations. We want to consult with the various parties as part of the regulation process to work out the appropriate time frames. When that is decided in the regulations, the act will provide the power to intervene if need be.

Hon WILSON TUCKER: Other than the time frames that will be set out in the regulations, will the council be measured against any other key performance indicators?

Hon STEPHEN DAWSON: They will not be KPIs as such, but clause 22 establishes the functions of the ACH council—what the council needs to do, whether it makes recommendations, provides advice et cetera. It will also produce an annual report. Were the council to not undertake those functions as set out in clause 22, it might be frowned upon.

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Clause put and passed.

Clause 28 put and passed.

Clause 29: Annual report of ACH Council —

Hon NEIL THOMSON: I note that the ACH council will be required to produce an annual report. That is important, but I come back to the issue of accountability. Will the annual report be subject to investigation by the Auditor General just like all public sector annual reports are?

Hon STEPHEN DAWSON: Yes, it will be.

Hon NEIL THOMSON: The Financial Management Act is mentioned —

... section 61 by the accountable authority of the Department

I assume that the department in this case will be the Department of Planning, Lands and Heritage?

Hon STEPHEN DAWSON: Yes; you are correct, honourable member.

Hon NEIL THOMSON: Will the annual report include a report on the performance of local Aboriginal cultural heritage services?

Hon STEPHEN DAWSON: No; it will simply be the council's annual report. It is arguable, though, that if the council has an issue with a LACH service, for example, or wants to suspend a LACH service, which could happen if it does not undertake the required work and there are issues, the council will mention such a thing in the annual report.

Hon NEIL THOMSON: I seek the minister's leave here to ask a question about the Aboriginal Cultural Heritage Amendment Bill 2021. I prefer not to go into Committee of the Whole on that bill, so I ask the minister whether he will indulge me to ask a couple of questions here.

Hon Stephen Dawson: I certainly shall.

Hon NEIL THOMSON: We will be able to get it out of the way; that is excellent.

I note a taxation power will be implemented through the Aboriginal Cultural Heritage Amendment Bill and that local Aboriginal cultural heritage services will have significant revenue raising powers. It is my understanding from what I have read that those bodies will not be subject to the Financial Administration Act.

Hon STEPHEN DAWSON: The taxation power is about the government having the ability to impose a tax or charge a fee. I make the point that organisations are doing this work under the current act. Organisations involved in section 18s, for example, or working with mining companies, ordinarily charge fees under the Aboriginal Heritage Act. They charge heritage fees of varying orders.

Under this legislation, the intention is that LACH services undertaking that work will be able to charge a fee. What that fee will look like will need to be signed off by the Aboriginal Cultural Heritage Council. That work will have to be done as part of the co-design process. But LACH services will not be captured by the Financial Management Act; no.

Hon NEIL THOMSON: The issue of accountability obviously has caught up with the ACH council. It is great that it will be in the system and be required to report. I think that there will be major issues with regard to performance. I think the equivalency that the minister refers to regarding organisations providing advice on section 18s is probably not correct. I suggest that that equivalency will not exist because a LACH service will be able to provide permits, just like any other statutory body. This provision in clause 29 will allow for inquiry, investigation and assessment by auditors at the Auditor General's office. I see that somewhere else there is a provision in relation to the Public Sector Management Act. I think the Aboriginal Cultural Heritage Council will be subject to that act, and maybe the minister can clarify that. It depends how far he wants to go on this clause.

For the sake of trying to resolve the questions, it would be helpful if the minister could provide background on why the local Aboriginal cultural heritage services seem to be escaping some scrutiny. Perhaps he could provide a little more assessment.

Hon STEPHEN DAWSON: The LACHS—I am trying to think of the word the member said—will be scrutinised. The LACHS will be responsible to the Aboriginal Cultural Heritage Council. I mentioned the council fees and I disagree with the member about section 18 and the current fees and similarities with the legislation before us now. These external organisations are currently able to charge fees, and they do. In relation to the new scheme, LACHS will be responsible to the cultural heritage council, so if at any stage the council decides that a LACH service is not undertaking what it is supposed to be undertaking, its rights can be removed.

Clause put and passed.

Clause 30: Committees —

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Hon NEIL THOMSON: The ACH council may establish committees. Will there be any restrictions on the ACH council with regard to those committees and will those committees be able to avail themselves of the normal fees and charges that would be applied and the normal accountabilities that would be required of any statutory committee of government?

Hon STEPHEN DAWSON: Is the honourable member asking whether the committee of the council will be able to get a sitting fee?

Hon Neil Thomson: Yes, it is one of the suggestions.

Hon STEPHEN DAWSON: That is in clause 32, which states —

A member of the ACH Council, or of a committee, is entitled to be paid the remuneration and allowances determined by the Minister on the recommendation of the Public Sector Commissioner unless the member is a public service officer.

That is just general standard stuff.

Hon NEIL THOMSON: Yes; the minister is right to point out those two clauses, clauses 30 and 32. Basically, my question is: will the ACH council be completely unencumbered in relation to the establishment of the committees? Is that correct?

Hon Stephen Dawson: Can you ask that again?

Hon NEIL THOMSON: Will the ACH council be completely unencumbered and not require the approval of the minister to establish a committee, which, from what I can gather, will effectively be a statutory committee of the ACH council?

Hon STEPHEN DAWSON: Yes, the ACH council can establish a committee without the minister signing off on it. For example, the council might decide to appoint a committee that has on it local knowledge holders about a particular area for a particular project—for example, there might be something in the East Kimberley—noting of course that the council is an overarching high-level kind of thing. The council might think that it needs some local knowledge on a particular project; and, if that were the case, it could establish a committee. As I have indicated, people could be paid for being on that committee. The committee will be required to keep minutes of meetings to the standard approved by the ACH council, and it must provide the ACH council with a copy of such minutes. It needs to be accountable to the council.

Hon NEIL THOMSON: Are there any comparable councils that have the ability to establish potentially an indefinite number of committees in order to undertake their function?

Hon STEPHEN DAWSON: I give the example of the Heritage Act, honourable member. This can be done under the Heritage Act.

Clause put and passed.

Clause 31: Procedures —

Hon NEIL THOMSON: This clause refers to “subject to the regulations”. I hope the regulations will provide a degree of clarity around this. The procedures of the Aboriginal Cultural Heritage Council will be vital to the assessment—if we go back to the annual report—of those matters. I note for the record the need for the regulations to outline the required procedures, given that those procedures might have some impact on the approvals process, particularly if there was any kind of breach or complaint from a proponent or another person, even an Aboriginal person or party within a particular region. Will the procedures be comprehensive and subject to assessment by the Auditor General, and will they be able to be utilised in the assessment of any legal challenges that might be made to any approvals that are granted?

Hon STEPHEN DAWSON: This relates to procedures around when the Aboriginal Cultural Heritage Council should hold meetings, for example. In terms of design, the clause will enable the council to determine its own procedures, but that will be subject to any relevant regulations under the proposed act. As the member is aware, the regulations will be co-designed, so those conversations will be had post the passage of the bill. In terms of the Auditor General, the decisions and minutes of the council will be transparent. Because it will be a government committee, the Auditor General could potentially look into it. As we have said previously, it will be captured by the Financial Management Act 2006. It will have around it all those levels of not only transparency, but also accountability. It will be the same as under the Heritage Act.

Hon NEIL THOMSON: This may highlight the gap. I am putting that to the minister as a question. The bit that I do not see in this bill is the ability for the ACH council to develop policies or quasi-regulations. The functions that will be performed under this bill are probably more akin to the functions of the Western Australian Planning Commission,

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for example, which has innumerable state planning policies that provide significant guidance to State Administrative Tribunal appeals, court cases and consideration by local governments. I wonder whether there is a gap here, given the role of the ACH council, or will someone else do that?

Hon STEPHEN DAWSON: I am told that there are a number of places in the bill that provide a power to deal with policies. Part 13 of the bill, division 3, subdivision 1, “Regulations”, allow for regulations to be made about the ACH council. That includes nomination, appointment, committees of the council, management of conflicts of interest, meetings and procedures. It provides also that regulations can be made about LACH services, including about reports to be provided by a LACH service about a range of things. Various places in the bill allow for regulations to be made to deal with the issue the member has raised.

Clause put and passed.

Clauses 32 and 33 put and passed.

Clause 34: Purpose of local ACH service —

Hon NEIL THOMSON: Clause 34 is a vital part on which this bill’s success will pivot. Notwithstanding the concerns that have been presented by land councils and others across the state about some of the more challenging aspects of the minister’s powers, for example of the final say and veto, this is more about the mechanics of those operating at the bottom end of the market. I have no doubt that the local Aboriginal cultural heritage services will be involved in some of the very big decisions, but one of the challenges the opposition has is the fact that this bill has been vetted quite widely with the mining sector. We have seen the tension that has caused, including the presentations and representations made by a range of sources on previous clauses. The mechanics of the local Aboriginal cultural heritage services are going to be vital for the success of the bill. I know how hard it is to efficiently operate an approvals process. The clause reads —

Purpose of local ACH service

A person designated as a local ACH service for an area of the State —

Later, I will raise the issue of the composition of these services when we get to this person —

- (a) must, as far as practicable, provide local ACH service functions for that area; and

That is straightforward, but the fees are an issue of great concern. The definition of the fee structure will be vital to make this work. Does the government anticipate that the fee structure will be based on hourly rates or on task-based outcomes?

Hon STEPHEN DAWSON: No decision has been made on that. The commitment is to co-design the fee structure as part of the co-design process. As I indicated earlier, fees are charged by organisations at the moment under the existing legislation. Fees differ in some cases as organisations in the Pilbara, for example, might charge more than organisations in the Kimberley. We need to sit down and co-design it to work out what will work for everybody. I refute the member’s earlier allegation when he said something along the lines that the mining sector was heavily consulted on this bill. That is not the case. The mining sector was not heavily consulted in the absence of consultation with everybody else. Everybody has had a chance to be consulted on this. A range of stakeholders, including some in the mining sector, are not happy with elements of the bill before us and we are seeking to make amendments. There are people out there on all sides who do not like this legislation. On the member’s particular question, the fees will be worked out as part of the co-design process.

Hon Dr BRAD PETTITT: Following on from the question about local Aboriginal cultural heritage services and their funding, the government said that funding will be provided for their establishment and capacity building. Will ongoing costs be solely based on cost recovery? How will they be funded?

Hon STEPHEN DAWSON: No; a decision has not been made about that. There is \$10 million in the budget for establishment costs and a capability amount to get them up and running. There is capacity to charge a fee under the bill, but in relation to how we might fund LACHS moving forward, a decision has not been made. I am told that clause 51 refers to the funding of local ACH services. There is a conversation to be had across government because it is fair to say that there may well be regions of the state that require more work to be done by LACHS than other regions of the state. What is needed capacity wise for a LACH service in the Pilbara, say, where there are lots of projects underway or ongoing might be different from one in the wheatbelt, for example. Those conversations have to be had as part of the co-design process.

Hon Dr BRAD PETTITT: Does the minister have a sense of many LACHS there will be in the state?

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Hon STEPHEN DAWSON: No, we do not, honourable member; it will be opt-in. I am told that there are about 80 prescribed bodies corporate around the state. It could potentially be up to that number but it is opt-in and it will be staggered. We will roll them out in particular regions before we roll them out in other areas.

Hon NEIL THOMSON: That is right; there are about 80 PBCs. We also note that LACHS can apply to individuals and part of a PBC area if that is the wishes of a PBC or the next highest group on the hierarchy, such as a claimant group or others. There is the potential, theoretically at least, for the number of LACHS to be more than 80, but it is probably likely to be fewer than 80. This is the minister's bill; it will be his law across Western Australia. Activities in the tier 1 and 2 categories, particularly those in the tier 2 category, will be impacted in ways that they have never been impacted before, notwithstanding the minister's comments about the application of the Aboriginal Heritage Act 1972. The requirement for people to make an application for activities has never been codified in this way. There will be a requirement to make application for activities that in the past did not have such a requirement. They are likely to have a minimal impact.

Given the nature of the minister's comments about not knowing yet whether it will be cost recovery, I implore the minister to ensure that the LACHS are adequately funded, particularly those that are not reliant on the large revenues that come out of our resources sector. We could end up with 24, potentially, in the Kimberley. In some parts of the Kimberley there is so little activity but a proponent for a tier 1 or 2 activity will be required to seek a permit and then pay and have it as cost recovery in order to provide support. I implore the minister to make sure that the fee set for low-level activities is reasonable, proportionate and to a large extent fixed, because if it is based on some sort of hourly rate, it will potentially be hugely problematic for the most basic activities in our economy. I implore the minister to please make sure that there is as much certainty for the smaller parts of our economy. Will the minister endeavour to protect the smaller parts of our economy—smaller businesses and landholders—in the development of regulations and fees?

Hon STEPHEN DAWSON: Honourable member, this legislation has to work for every stakeholder in the state, so my intention is to make sure, as part of the co-design process, that each of the small stakeholders and small industries that the member has spoken about are consulted. Fees have to work for everyone. In relation to me knowing that this is my bill, I am well aware of that, honourable member; it has kept me awake for most of the last eight months, and I anticipate it will continue to keep me awake for the foreseeable future. We need to make this work, and it has to work for all Western Australians. It has to work around the state. That is why there is a commitment to the co-design process—to make sure we are aware of all the issues, who it needs to work for, and to make it work.

Clause put and passed.

Clause 35: Nature of local ACH service —

Hon NEIL THOMSON: Clause 35(1) states —

A person designated as a local ACH service is not an organisation for the purposes of the *Public Sector Management Act 1994*.

This could be an individual, an organisation or a whole range of things. My concern is about the lack of accountability. What accountability mechanisms will be applied to these local Aboriginal cultural heritage services?

Hon STEPHEN DAWSON: The ACH council will have oversight of the LACHS. It will set the guidelines and be responsible for, I guess, overseeing the LACHS. There is that level of accountability and transparency there to ensure that the system works.

Committee interrupted, pursuant to standing orders.

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