## ABORIGINAL HERITAGE LEGISLATION AMENDMENT AND REPEAL BILL 2023

*Committee*

Resumed from 12 October. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

**Clause 2: Commencement —**

Progress was reported after the clause had been partly considered.

**The DEPUTY CHAIR (Hon Dr Brian Walker)**: I bring to members' attention supplementary notice paper 125, issue 3, which will apply from clause 10.

**Hon NICK GOIRAN**: When the bill was last considered by the Committee of the Whole House, we were considering in particular clause 2(b) on page 2 of the bill. This provision covers the commencement of the bill, specifically the commencement of part 3. Members will note that division 1 of part 3 will commence on the day after assent. It is my expectation that assent day could happen as early as this week, and preferably so. Division 1 of part 3 will commence the day after assent. Part 2 is the provision that will repeal the Aboriginal Cultural Heritage Act 2021 and regulations made under that ill-fated act. Curiously, the part dealing with the repeal or tearing-up of that law will happen on a date in the fullness of time—specifically, on a date fixed by proclamation by the government.

During interrogation of clause 2 late last week, it became clear that the government was saying that this must happen by 31 December this year. Although the government has said that it must happen at that point, this bill does not express the same thing, as it will allow it to happen on any day, including after 31 December 2023. I asked the Leader of the House what would happen in the event that the government did not do this by 31 December this year, and we were told, quite shockingly, that the outcome could be that on 1 January 2024, Western Australia would be left with none other than the Aboriginal Cultural Heritage Act 2021. This is the very act that has caused all the problems and concerns, and a record e-petition. It is fair to say that neither the government, the opposition nor any fair-minded Western Australian wants the Aboriginal Cultural Heritage Act 2021 still in place on 1 January 2024. If I can say this, even Hon Dr Brad Pettitt, for example, does not want that to happen. He and I have a different view of where this whole policy area should go, but I do not know of anyone, whether on the left or right of politics, who thinks the Aboriginal Cultural Heritage Act 2021 should be in place on 1 January 2024; yet, the government insists on a clause that will allow that to happen. The concern is that if it were to occur, it would not even be possible for the government to make amendments to the 1972 act because, as the Leader of the House drew to our attention late last week, it would not exist anymore. That is why the government says this all needs to happen by 31 December 2023. I asked the Leader of the House during the adjournment period of the last few days to ask the government to consider whether we could, at the very least, amend clause 2 to make part 2 expressly come into effect no later than 31 December 2023. I hasten to add that I am not making a case for things to take that long; I think they are already taking too long. This should happen immediately, but the government says it is not ready. That is the brutal reality: after all these weeks and months, the government is not even ready for the repeal to happen today. That is why it does not say this will happen on the day after assent. The government says it needs some time. My recollection is that the Leader of the House indicated that the government's anticipated time line would be early November, that that is the date the government is working towards, but this clause does not say that. My question is: has there been an opportunity to take any advice about how clause 2 might be amended to better reflect the intention of government?

**Hon SUE ELLERY**: No, the government is not of a mood to change the words. I entirely understand the point the member made throughout the course of his contribution to the debate on this clause on Thursday afternoon, which was quite extensive. I reiterate the points I made on Thursday: irrespective of the point the member makes, it is in no-one's interest that we do not proceed to take all the steps that need to be taken before 31 December. That is in nobody's interest, and we do not intend to do that. For reasons that I know the member has found frustrating—he expressed a view about parliamentary counsel— we are not able to make those changes.

**Hon NICK GOIRAN**: The government can make those changes but it chooses not to. With regard to this notion articulated last week that parliamentary counsel is following some form of convention, I draw to the attention of members a bill introduced by this government—or if we want to be technically correct, the McGowan Labor government; perhaps it could be considered to be the previous government—the Bail Amendment Bill 2022. The commencement clause is quite interesting. It reads —

> This Act comes into operation as follows —
>
> (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent (***assent day***);
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> (b) sections 9 and 10 — on the day after assent day;
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> (c) the rest of the Act — on the 28th day after assent day.

That is very specific: the rest of the Bail Act will happen 28 days after assent. Therefore, there is no good reason that parliamentary counsel cannot assist the government in preparing a form of words to give effect to what the government says needs to happen. The government says that this must happen by 31 December 2023, and yet that is not the case here. I do not think, charitably, that there is any intention whatsoever by the Cook Labor government to delay this legislation until 1 January 2024; I do not think that at all. I do not think something shifty is going on on the part of government. But, less charitably, incompetence could occur between now and 1 January 2024, and due to that we would find ourselves on that date in the entirely unsatisfactory situation of being left with the Aboriginal Cultural Heritage Act 2021. Why would that be the case? It would be simply because the government refused to move a form of words, now, this afternoon, when there is this opportunity, on 17 October 2023, to make sure that that definitely does not happen. There is no form of words provided by parliamentary counsel or sought by the government to make sure this definitely does not happen. In the meantime, after everything that has occurred we are expected just to trust the government. That is effectively what we are being told this afternoon: let us move off clause 2 as quickly as possible so we can get to Hon Dr Brad Pettitt's amendments at clause 10, and in the meantime we should just trust that the government will do the right thing. This government has proved that it cannot be trusted in this policy area. We were vilified by the Premier of Western Australia for raising concerns in June. Even when Hon Neil Thomson tabled an e-petition with a record number of signatures, it was treated with contempt and arrogance by the Premier of Western Australia. It was not until early August that reluctantly, begrudgingly, he had to come forward and say that he would repeal this law.

Now it is 17 October 2023 and the law still has not been repealed. Most Western Australians think this has already been done. After all that, we are being asked to trust this government, with the government saying, "Leave it with us, don't worry about it, we've got it all under control. This will definitely happen by 31 December 2023." Who will make sure that happens? Will it be Minister Buti? Will he be responsible for making sure this definitely happens by 31 December 2023? We cannot leave it to him. He is the guy who said everything was running smoothly. He was part of the cohort who said that there were no problems here. Now we will leave it to him—we are expected to trust him because the government refused to move an amendment of a few words to clause 2 to effect its intention. I have made the point. I know the minister has heard the point, I know she understands the point and I know there is nothing further that she can reasonably do in these circumstances. My final question is: if a member moves an amendment to give effect to the government's intention—that is, this happens by 31 December 2023—will the government support it?

**Hon SUE ELLERY**: No, honourable member, for the reasons I outlined extensively on Thursday afternoon and briefly today.

**Clause put and passed.**

**Clauses 3 to 8 put and passed.**

**Clause 9: Act amended —**

**Hon NICK GOIRAN**: Does clause 8 contain any Henry VIII provisions?

**Hon SUE ELLERY**: In a sense it is a regulation-making power. Arguably, yes, it contains a Henry VIII provision.

**Hon NICK GOIRAN**: This chamber, as the Leader of the House is aware, has a longstanding view with regard to Henry VIII clauses. What is the justification for their inclusion at this time?

**Hon SUE ELLERY**: This is not a new argument to the honourable member. Transitional regulation-making powers of a broad nature are not unique to this bill. A similar provision was included in section 336 of the 2021 act. The broad transitional regulation-making power provisions in proposed section 71 are tailored to the specific scenarios that might arise under this bill as we repeal the 2021 act and transition to the improved 1972 act. It will allow any such transitional matters to be properly address as required. There may not be occasion to even rely upon some of the regulation-making powers given the short period within which the 2021 has been in effect; however, we cannot preclude that possibility and so it is there to provide the opportunity if we need to.

**Hon NICK GOIRAN**: It appears that one of the things that clause 8 allows for is the continuation of the 2021 act. We see this at proposed section 71(3)(i), but it also seems to give some opportunity for the 2021 act to continue, with specified modifications. What modifications does the government intend to make to the 2021 act that would be enforced during the transitional period?

**Hon SUE ELLERY**: Firstly, the power to make transitional regulations is a power to deal with the issues of a transitional or savings nature insofar as they are necessary or convenient to support the transition from the 2021 act to the 1972 act. It will not authorise regulations that simply enable the provisions of the 2021 act to be re-enacted. The scope of the power has to be read in light of the fact that the purpose of the bill is to repeal the 2021 act and an express provision does that. The regulation power cannot be read to override that repeal. The power is further limited to what is necessary or convenient for dealing with transitional matters, what will be considered transitional

changes and is limited with the passage of time. I understand some examples were provided in briefings to members before we began the debate. Proposed section 71(3)(i) provides for the making of transitional regulations that provide for the 2021 act or a specified provision to continue as though the 2021 act had not been repealed. There are examples of proposed regulations, for example the Aboriginal Heritage (Transitional Provisions) Regulations 2023 that are made pursuant to this proposed paragraph. Regulation 30(4) states —

> On and after repeal day, section 197(1) of the 2021 Act —

Which concerns other persons carrying out remediation if an order is contravened —

> continues to apply in relation to the contravention as if the 2021 Act had not been repealed, and an authorisation may be given in relation to the contravention accordingly.

Another example is regulation 46, which states —

> Section 303(5) of the 2021 Act continues to apply on and after repeal day in relation to disclosures of information made before repeal day as if the 2021 Act had not been repealed.

**Hon NICK GOIRAN**: My understanding is that the proposed transitional regulations have already been drafted and some form of consultation has been undertaken in respect of those draft transitional regulations. Is a copy of the draft transitional regulations able to be provided to the chamber at this time? Is that one and the same as what will be the transitional regulations?

**Hon SUE ELLERY**: I am advised that consultation on those closed last week. Feedback was provided and whether we need to change anything is being worked on now. I am not in a position to table a document. The consideration of that feedback has not been completed yet.

**Hon NICK GOIRAN**: The concern is that proposed section 71(3)(i) will enable the government, without limitations. Proposed section 71(3) states —

> … transitional regulations may …
>
> (i) provide for the 2021 Act, or a specified provision of the 2021 Act, to continue to apply (with or without specified modifications) to, or in relation to, a specified matter or thing as if the 2021 Act had not been repealed;

There are proposed draft transitional regulations in the public arena, but we do not know whether that will be the same as what will ultimately be the transitional regulations that include the possibility of a very substantial Henry VIII power that has been provided in clause 8. I acknowledge what the minister has said, that consultation concluded at the end of last week and it is currently being worked on. Is there some sort of time frame or a time line that we are working towards here? I acknowledge that last week we said that we are working towards early November. Has anything happened over the last few days or this consultation process that concluded on Friday that would have changed that time line?

**Hon SUE ELLERY**: I am advised that we are sticking with the same time line. I tried to get an indication of the extent of the feedback and whether we were contemplating something radically different from what had been proposed in the consultation draft. I am advised that no, there is no substantive deviation. There might be some changes in language, but there is no substantive deviation.

**Hon NICK GOIRAN**: Thank you for at least providing that comfort. In that same clause, we see at proposed section 71(3)(c) that it will be possible for transitional regulations to —

> provide for the substitution of a specified person or body for another specified person or body as a party to any proceedings;

Why is this substitution regulatory power needed?

**Hon SUE ELLERY**: Proposed section 71(3)(c) provides for the making of transitional regulations that will —

> provide for the substitution of a specified person or body for another specified person or body …

We had in mind that the repeal of the 2021 act would mean that certain bodies established under the act would be abolished and there may be a need for parties to proceedings to be substituted. For example, proposed regulation 31(2) provides for any —

> … proceedings under section 197(2) of the 2021 Act may be continued or commenced by the Minister.

This will be in substitution for the minister under the 2021 act.

**Hon NICK GOIRAN**: Are any such proceedings on foot at the moment?

**Hon SUE ELLERY**: No.

**Hon NICK GOIRAN**: It does not seem like it is really necessary. I could understand the necessity for it if proceedings were on foot. Further to that, we see at proposed section 71(3)(d) that transitional regulations may —

> provide for proceedings and remedies that might have been commenced by, or available to or against, a specified person or body to be commenced by, or to be available to or against, another specified person or body;

I take it that no such proceedings and remedies are on foot there.

**Hon SUE ELLERY**: Correct, honourable member.

**Hon NICK GOIRAN**: Minister, again I think five lines of the bill could be struck out given there is no necessity for them. That said, proposed section 71(3)(e) also provides for transitional regulations to —

> provide for the transfer of, or the creation of interests in, specified property, rights or liabilities;

Will there be any limitations on this transfer power?

**Hon SUE ELLERY**: Not unlike the answer that I gave previously, we had in mind that the repeal of the 2021 act would mean that certain bodies established under the act will be abolished and property and assets may need to be transferred to a person or entity.

**Hon NICK GOIRAN**: That was what was in mind; there may be a need for it. Is that intended to occur?

**Hon SUE ELLERY**: Is the member asking whether there is a need for it?

**Hon Nick Goiran**: Yes.

**Hon SUE ELLERY**: No, honourable member.

**Hon NICK GOIRAN**: I wonder who gave the instruction to include these provisions if there is no need for them. It only frightens the horses to be telling Western Australians in the statutes that we are giving governments the possibility of having a regulation-making power to transfer property in the creation of interests and rights and liabilities and then we say, "Well, actually we are not intending to do anything like that." Why include it?

Minister, proposed section 71(3)(f) also provides for transitional regulations that may —

> provide for the modification of specified agreements or other instruments;

What agreements or instruments does the government intend to modify?

**Hon SUE ELLERY**: That provides for the making of transitional regulations that will provide for the modification of specified agreements or other instruments. An example of a transitional regulation made pursuant to this paragraph is proposed regulation 51. That regulation provides —

> If, on or after repeal day, a written law or document refers to the *Aboriginal Cultural Heritage Act 2021* the reference is taken, if the context permits, to be a reference to the *Aboriginal Heritage Act 1972*.

**Hon NICK GOIRAN**: Minister, the following proposed paragraph provides for transitional regulations to —

> (g) provide for a specified person or body to take possession of books, documents or other records, however compiled or stored, that are or were in the possession of another specified person or body;

Why will this power of seizure be needed?

**Hon SUE ELLERY**: An example made pursuant to this paragraph is proposed regulation 48. The regulation provides —

> At the beginning of repeal day, the records of the ACH Council become the records of the Committee and, on and after repeal day, the Committee may hold, record, use or disclose the records for the purpose of, or in connection with, performing its functions.

I note the point that the honourable member has made. Bear in mind these are transitional provisions and had to be written not knowing what might happen between 1 July and when the legislation is repealed.

**Hon NICK GOIRAN**: Thanks for the helpful explanation. In terms of this power of seizure of books, documents, records et cetera, although the wording here is very broad—one may argue, even unlimited—at this point in time, is it intended that it would apply only to the Aboriginal Cultural Heritage Council?

**Hon SUE ELLERY**: Yes, honourable member.

**Hon NICK GOIRAN**: My last question on this clause is on proposed section 71(3)(h). This provides a power for officers of the department to exercise powers under the Criminal Investigation Act 2006. Is this the retention of a longstanding power or is it a new one?

**Hon SUE ELLERY**: It is new. Examples of transitional regulations made pursuant to this paragraph can be found in part 10 of the draft Aboriginal Heritage (Transitional Provisions) Regulations 2023. For example, proposed regulation 36 provides that certain authorised officers are able to exercise a number of prescribed powers under the Criminal Investigation Act to investigate offences under the 2021 act committed before repeal date. As I said, it is to capture that period between 1 July and the repeal date.

**Hon NICK GOIRAN**: Under the 2021 act, which is in force at the moment, do departmental officers have this power under the Criminal Investigation Act 2006?

**Hon SUE ELLERY**: I am advised that specific powers were laid out and prescribed in the 2021 provisions, but a decision was made—I suspect, but I do not know, for ease of reference—to refer to the same powers within the Criminal Investigation Act 2006.

**Hon NICK GOIRAN**: At the present time, a Western Australian departmental officer has, as I gather from the minister, limited powers under the Criminal Investigation Act 2006. They are limited in the sense that there are some powers under the act that they can exercise. Would this open the door for them to be able to exercise all powers under that act?

**Hon SUE ELLERY**: I am advised that the decision was made to write it as it is in paragraph (h) to use a standardised set of powers as opposed to trying to rewrite something that was written specifically for another piece of legislation in the 2021 act.

**Hon NICK GOIRAN**: I can understand the simplicity of the form of words found here at lines 21 to 23 on page 7 of the bill, but I want to make sure that we are clear about what extra powers we will be giving departmental officers to exercise during the transitional period. I am less interested in the powers that the departmental officers have at the moment that will continue, but what are the ones that they do not currently have that they will then have as a result of this provision?

**Hon SUE ELLERY**: The powers listed were identified as being largely of a kind provided for in the 2021 act, noting however that part 10, divisions 3 and 5, of the 2021 act appear to confer broader powers on inspectors than would be available to public officers under the Criminal Investigation Act. This ensures that the authorised officers have sufficient powers to investigate offences allegedly committed under the 2021 act in the transitional period—so before repeal day. Proposed regulation 36 will provide that an authorised officer is a public officer for the purposes of the Criminal Investigation Act and can exercise specified powers—namely, the powers in part 2 concerning ancillary provisions about exercising powers; the powers in part 5, division 1, concerning powers of entry and search with an occupier's consent; the powers in section 33 concerning search powers in public open areas; the powers in section 39, except subsection 1(f), concerning the power to search for things relevant to an offence in a vehicle; the powers in part 5, division 3, except sections 43(8)(b)(ii) and 44(2)(f) and (g)(iv), concerning powers with a search warrant; the powers in part 6, concerning obtaining business records; the powers in part 7, concerning gaining access to data controlled by suspects; and the powers in part 13, concerning seized things and related matters.

**Hon NICK GOIRAN**: Is the minister reading from the proposed transitional regulations?

**Hon Sue Ellery**: Yes.

**Hon NICK GOIRAN**: Therefore, has the government telegraphed, if you like, the intent of proposed section 71(3)(h)—that is, the draft that has been provided in the public arena will not allow officers of the department to have all the suite of powers under the Criminal Investigation Act, only those ones that are listed there?

**Hon Sue Ellery**: By interjection, that is correct, honourable member.

**Hon NICK GOIRAN**: Okay. The list that the minister has helpfully provided is in the draft regulations. Noting that it is a draft, is there any intention to change anything from the draft to the final?

**Hon Sue Ellery**: By interjection, no, honourable member.

**Hon NICK GOIRAN**: Okay. Are any of the powers in the list that the minister provided in the draft more expansive than what presently exists for a departmental officer?

**Hon SUE ELLERY**: I am advised, no, honourable member.

**Clause put and passed.**

**Clause 10: Long title replaced —**

**Hon Dr BRAD PETTITT**: I rise to speak and ask some questions on clause 10, and I note that there will be an amendment coming. I am trying to understand what the thinking was around the proposed long title replacement, given that the intent of amending the 1972 act was to improve heritage protections and the rights of traditional owners and native title parties. Was any consideration given to the long title reflecting this intent?

**Hon Sue Ellery**: I'm going to have to get that repeated; I'm sorry.

**The DEPUTY CHAIR (Hon Steve Martin)**: Would the honourable member mind repeating that question, please. I am not sure whether your microphone is actually turning on. There it is now.

**Hon Dr BRAD PETTITT**: Take two! Given that the intent of amending the 1972 act was to improve heritage protections and the rights of traditional owners and native title parties, was any consideration given to amending the long title to reflect this intent?

**Hon SUE ELLERY**: No, honourable member.

**Hon Dr BRAD PETTITT**: I have a follow-up question: why not? Perhaps I can pair that with my second question: were any native title parties consulted on the long title?

**Hon SUE ELLERY**: No and no, honourable member. As I said previously, we made the decision in light of the concern that was being expressed publicly to make simple, targeted amendments to the 1972 provisions to achieve the outcome that sought to address the issues that led to the Juukan Gorge incident in the first place.

**Hon Dr BRAD PETTITT**: That does not really answer the question that I asked more generally. Why does the naming of the long title make no effort to acknowledge or recognise the importance of Aboriginal cultural heritage as a living culture? One of the parts that the 2021 act did well was to expand on that. It seems like a simple thing to do and perhaps a missed opportunity. I note that language is quite significant for how we understand heritage and obviously a new long title was planned here, so it is not as though it was not thought about, but some of those key provisions around understanding the importance of cultural heritage as a living culture seems to be missed here and I am trying to understand why.

**Hon SUE ELLERY**: We wanted to put in place provisions that addressed the concerns that the 2021 framework was too confusing and concerning. We are also on a time line to achieve it, via this mechanism, before the provisions run out after 31 December. I understand the point the member is making, and I understand and accept the importance of language. But we want to implement targeted, simple amendments to address the discrepancies, if you like, and gaps that existed in the 1972 legislation that allowed the Juukan Gorge situation to happen. I understand the point that the honourable member is making, but we are actually more intent on achieving, as efficiently and quickly as we can, targeted amendments to best address the practical regime, as opposed to how something might be described in the title of the legislation.

**Hon Dr BRAD PETTITT**: In response to that, the government is changing the title and the long title of the legislation. The titles will not remain as they are in the 1972 act; there is a change before us. The proposed change to the long title will merely note that the act is "to make provision for the preservation of places and objects customarily used by or traditional to the original inhabitants of Australia". It will make that change, but it will not in any way capture best practice on how that might be best understood. The question that has not been answered is: why choose those words instead of the words that were used in the 2021 act? Those words could just as easily have come across and would give a broader understanding that would further improve the 1972 act.

**Hon SUE ELLERY**: The long title to the Aboriginal Heritage Act 1972 was previously substantially amended to reflect the fact that once the Aboriginal Cultural Heritage Act 2021 came into operation, the 1972 act would continue to operate for a limited period for very limited purposes. The current long title reflects that, including a reference to the transition day. Once the repeal of the 2021 act takes effect, the 1972 act will do much more than is currently reflected in its long title. The long title is being replaced to revert to the former long title, which more accurately reflects the purpose of the 1972 act as proposed by the amendments within this bill. One further amendment to the long title will be made, which is to remove the reference to "on behalf of the community".

**Hon Dr BRAD PETTITT**: Of course, the problem is that at the time the long title for the 1972 act was written, Aboriginal cultural heritage was reduced to objects and places and was largely for the benefit of archaeologists, not traditional owners. I find it extremely odd that we are going back to something that this government has very expressly said is out of date. It has said that time and again. I think it will be highly problematic to go back to the 1972 act, but I know that this government is committed to doing that, and I appreciate that is not something I can shift. But surely it is the job of this place and us all to make sure that if we go back to that legislation, it is as good an update of an act as it can be, and actually captures the modern and best practice understandings of Aboriginal cultural heritage.

At this point, it is probably worth noting a letter that was sent to the Premier on 14 October 2023 from Australia International Council on Monuments and Sites, copied to parliamentarians, in which it, as stated in this letter —

> … urges the Government to take the opportunity to ensure that in amending the *Aboriginal Heritage Act 1972*, the amended Act meets current best practice and will ensure effective Aboriginal heritage protection.

The letter goes on to state in very clear terms that it is Australia ICOMOS's view that the Western Australian government's proposed key amendments will help to do this, but, as I have said, it believes that the amendments do not go far enough. The letter continues —

> In our view the resultant legislation will not prevent unacceptable and widespread damage and destruction of Aboriginal cultural heritage, and will not guarantee the prevention of another incident such as occurred at Juukan Gorge.

I know that the minister keeps saying that the small number of amendments that are being made will do that, but every expert and traditional owner group from around the country from whom we have heard has said that they will not. I believe that it is beholden on this place to make a series of further amendments that will give this updated 1972 act the best chance of actually fulfilling the function that the minister outlined she wants it to achieve. That is why—I will take some guidance on the exact words that I need to use here—I would like to move proposed amendment 5/10.

**Hon Sue Ellery**: Honourable member, if you refer to the amendment on the supplementary notice paper.

**Hon Dr BRAD PETTITT**: Yes, certainly. I move —

> Page 9, lines 22 to 25 — To delete the lines and insert —
>
> **An Act to recognise the central and beneficial role that Aboriginal cultural heritage plays in the history and culture of Western Australia, and to make provision for the protection of Aboriginal cultural heritage in the interests of the traditional owners of that cultural heritage, and more generally the interests of the community.**

I think that anyone who has an interest in Aboriginal cultural heritage will understand that that choice of words from the long title of the 2021 act is far superior to the government's preferred words, which will largely reduce Aboriginal cultural heritage to archaeological places and objects. This is a modest amendment that will make an important step towards modernising a very out-of-date act, and one that I think will give some modest comfort to that. Given that the government has said that there will not be an updated act for the foreseeable future, at least the 1972 act will be updated appropriately to recognise what we all know to be true: that Aboriginal cultural heritage goes way beyond places and objects and is actually much broader than that. With that in mind, I move the amendment in my name.

**Hon SUE ELLERY**: I indicate that the government will not be supporting the amendment, in part for the reasons I have already outlined. The member proposes to amend the long title, including to reinsert references to Aboriginal cultural heritage. We have consistently said that it is our intention to reinstate the 1972 act subject to targeted amendments, the detail of which I have already canvassed a number of times, including in my second reading speech.

The member's proposed amendment to the long title appears to reflect further proposed amendments on the supplementary notice paper that we have not yet got to. We will do that when we get to the relevant clauses. The proposed amendment to the long title is not supported. It introduces terms from the 2021 act, not from the 1972 act, and seeks to reflect the purpose that is different from the long-stated and understood purpose of the 1972 act. The government's view is that the long title in the bill before us appropriately reflects what the act achieves.

**Hon NEIL THOMSON**: I rise in support of the government's position on the amendment. We will not be supporting this amendment. As the minister said, the amendment seeks to insert new terms in the bill that do not align with the 1972 act. I believe the amendment will create a level of conflict in the bill before us. The opposition has made it clear that the government should simply repeal the Aboriginal Cultural Heritage Act and go back to the Aboriginal Heritage Act. To some extent, we did not think it was necessary to change the act, although I note that some administrative changes might have been necessary, given that some amendments might have been made previously.

I will certainly not support the amendment moved by Hon Dr Brad Pettitt. For the sake of simplicity, the amendments relating to the reversion to the 1972 act should be as simple as possible so we do not create any potential conflict. Some of the other amendments listed on the notice paper to insert certain words, which we will refer to when we get to them, could create a level of confusion and conflict in the application of the law. I also want to remind all members in this place that this legislation is about places that are registered by the registrar. We can have a difference of opinion on what places are registered, how they should be registered and the processes involved. Ultimately, this does not preclude a range of interpretations but it does include wording that is consistent with the 1972 act.

**Hon WILSON TUCKER**: I seek some clarification from the minister before the chamber votes on the amendment. The last time we considered this legislation, she mentioned that consultation was undertaken with some Indigenous groups in WA as part of drafting the repeal bill. The repeal bill definition, which was the definition of "cultural heritage", which was contained in the draft bill and shared with some of the Aboriginal proponents, was updated by way of consultation. Can the minister share the original definition contained in the repeal bill before it was updated?

**Hon SUE ELLERY**: The definition has not changed.

**Hon WILSON TUCKER**: I was under the impression the last time we spoke that as part of the consultation phase, an amendment was taken on board and the repeal bill was updated to reflect that consultation by an Aboriginal body corporate or an Indigenous corporation in WA; I cannot remember which group was consulted. Is that not the case?

**Hon SUE ELLERY**: Yes, it was. The definition that was amended based on that feedback was "native party titles".

**Hon WILSON TUCKER**: So the definition of "cultural heritage" was not updated at all?

**Hon Sue Ellery**: No.

**Hon WILSON TUCKER**: That is the point I wanted to clarify. I thank the minister.

**Hon Dr STEVE THOMAS**: Obviously, I also do not support the proposed amendment. Far be it from me to object when the far left attempts to outweigh the left. The reality is that the legislation before the house is very carefully crafted; it is very important that the wording be taken seriously. The debate in the house is also critically important. Not just legislators but also the judiciary will potentially look at this legislation in the future and try to work out exactly what the Parliament was attempting to do. The words have been very carefully put together by the government. I think there is significant risk in all the things that Hon Dr Brad Pettit is attempting to do to change the intent of the government by throwing those words around. I think there will be significant unintended consequences in what Hon Dr Brad Pettitt is trying to do. I expect that is the intent but the reality is that we would get bogged down in a morass if we were to allow this process to go ahead. I think the government has attempted to deliver a sensible approach and it should be supported by the house.

**Hon Dr BRAD PETTITT**: In response to some of that, I think Hon Dr Steve Thomas is right. There is an attempt to create a consequence. The consequence I am trying to create is taking the risk that currently exists for cultural heritage and widening that definition so it makes sure that cultural heritage is preserved. That is the real risk. Quite clearly, I think there should be some consequences because the 1972 bill is so narrow as to be problematic. Everybody in this place except for Hon Wilson Tucker and the rest of the crossbench voted to change it. The great irony of this debate is that everybody who supported these words in 2021 is about to vote against them.

I ask for some clarification from the chair. I also have a new clause 10A. When is the appropriate time to move that?

**The DEPUTY CHAIR (Hon Steve Martin)**: The time would be after clause 10 is completed.

**Hon Dr BRAD PETTITT**: I will not say anything more on that other than to note that I will move new clause 10A shortly.

*Division*

Amendment put and a division taken, the Deputy Chair (Hon Steve Martin) casting his vote with the noes, with the following result —

Ayes (3)

| | | |
|---|---|---|
| Hon Sophia Moermond | Hon Wilson Tucker | Hon Dr Brad Pettitt *(Teller)* |

Noes (28)

| | | | |
|---|---|---|---|
| Hon Martin Aldridge | Hon Sue Ellery | Hon Steve Martin | Hon Matthew Swinbourn |
| Hon Klara Andric | Hon Donna Faragher | Hon Kyle McGinn | Hon Dr Sally Talbot |
| Hon Dan Caddy | Hon Nick Goiran | Hon Shelley Payne | Hon Dr Steve Thomas |
| Hon Sandra Carr | Hon Lorna Harper | Hon Stephen Pratt | Hon Neil Thomson |
| Hon Peter Collier | Hon Jackie Jarvis | Hon Martin Pritchard | Hon Darren West |
| Hon Colin de Grussa | Hon Louise Kingston | Hon Rosie Sahanna | Hon Pierre Yang |
| Hon Kate Doust | Hon Ayor Makur Chuot | Hon Tjorn Sibma | Hon Peter Foster *(Teller)* |

**Amendment thus negatived.**

**Hon NEIL THOMSON**: I seek some clarification. I was not going to speak on this clause, but I will now that I have had time to reflect. I note an insertion about the words "or associated therewith". I would like an explanation about who those "associated therewith" might be, given that the first part seems clear —

> **An Act to make provision for the preservation of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, …**

I wondered what "or associated therewith" means—I do not know what that means.

**Hon SUE ELLERY**: It is not new. That was there before.

**Clause put and passed.**

**New clause 10A —**

**Hon Dr BRAD PETTITT**: I move —

Page 9, after line 26 — to insert —

**10A. Section 3 inserted**

After section 2 insert:

**3. Objects of Act**

(1) The objects of this Act are as follows —

(a) to recognise —

(i) the fundamental importance to Aboriginal people of Aboriginal cultural heritage and the central role of Aboriginal cultural heritage in Aboriginal communities past, present and future; and

(ii) that Aboriginal people have custodianship over Aboriginal cultural heritage; and

(iii) the value of Aboriginal cultural heritage to Aboriginal people and the wider Western Australian community; and

(iv) the living, historical and traditional nature of Aboriginal cultural heritage;

(b) to recognise, protect, conserve and preserve Aboriginal cultural heritage;

(c) to manage activities that may harm Aboriginal cultural heritage in a manner that provides balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community; —

(d) to promote an appreciation of Aboriginal cultural heritage.

(2) In the pursuit of the objects of this Act, the following principles must be observed —

(a) the principles set out in section 3A relating to Aboriginal cultural heritage;

(b) the principles set out in section 10 relating to the management of activities that may harm Aboriginal cultural heritage.

**3A. Principles relating to Aboriginal cultural heritage**

The principles relating to Aboriginal cultural heritage are as follows —

(a) Aboriginal people should be recognised as having a living relationship with, and as being the primary custodians of, Aboriginal cultural heritage;

(b) Aboriginal people should, as far as practicable, be involved in —

(i) the recognition, protection, conservation and preservation of Aboriginal cultural heritage; and

(ii) the management of activities that may harm Aboriginal cultural heritage;

(c) as far as practicable —

(i) Aboriginal ancestral remains should be in the possession, and under the custodianship and control, of Aboriginal people;

(ii) secret or sacred objects should be in the possession, and under the custodianship, ownership, and control, of Aboriginal people;

(iii) Aboriginal ancestral remains and secret or sacred objects that are not in the possession, and under the custodianship and control, of Aboriginal people should be returned to Aboriginal people.

**3B. Principles relating to management of activities that may harm Aboriginal cultural heritage**

The principles relating to the management of activities that may harm Aboriginal cultural heritage are as follows —

(a) it should be recognised that —

(i) places, objects and landscapes have a range of different values for different individuals, groups or communities, and those values may change for an individual, group or community over time; and

(ii) those values include social, spiritual, historical, scientific, economic and aesthetic values;

(b) the range of different values for places, objects and landscapes held by different individuals, groups or communities, at particular times and over time, should be recognised and respected;

(c) places and objects exist within landscapes and should be considered in that context;

(d) 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.

What the amendment seeks to do, as with the proposed amendment to clause 10 before, is to insert some of the good parts from the 2021 act into the 1972 act. It is important and it comes back to the debate earlier about it being intended to have some potential consequence. The objects of the act can provide clarity in terms of a judicial setting. We want to be clear that what it is trying to achieve is increased accountability, both for the government and the department and for the proponents, whether they are mining companies or the like.

I appreciate it is a long addition. It is something that was largely supported in this place in late 2021 and something that I argue quite strongly would make the 1972 act both more contemporary and better at protecting Aboriginal cultural heritage—some may argue, unintentionally, but I would say it has the intended consequence of capturing more Aboriginal cultural heritage for protection than the current 1972 act does. That is the point. At the moment, not having any objects of this kind in the act means that when there are cases—as there undoubtedly will be—before the courts that are trying to understand and interpret this act and what we were thinking here in 2023 when we amended the 1972 act, this will provide the clear intent of the broader cultural heritage that we were trying to protect.

It is worth going through some of it in the time that I have. I refer to the notice paper —

(1) The objects of this Act are as follows —

(a) to recognise —

(i) the fundamental importance to Aboriginal people of Aboriginal cultural heritage and the central role of Aboriginal cultural heritage in Aboriginal communities past, present and future; and

(ii) that Aboriginal people have custodianship over Aboriginal cultural heritage; and

(iii) the value of Aboriginal cultural heritage to Aboriginal people and the wider Western Australian community; and

(iv) the living, historical and traditional nature of Aboriginal cultural heritage;

It provides a much broader sense of the objects of the act, as well as —

(b) to recognise, protect, conserve and preserve Aboriginal cultural heritage;

(c) to manage activities that may harm Aboriginal cultural heritage in a manner that provides balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community; —

(d) to promote an appreciation of Aboriginal cultural heritage.

Unfortunately, the 1972 act fails to do any of those things well. By at least inserting them as a broader object, we can hopefully have a sense of the right intent. Whilst I had some reservations about some key aspects of the 2021 act, what broad agreement there was that it was far better than the 1972 act was partly because it had key objects in it about a broader understanding and protection of Aboriginal cultural heritage.

Clause 3A is important and something that I think is missing from the 1972 act. I will read from the notice paper again —

The principles relating to Aboriginal cultural heritage are as follows —

(a) Aboriginal people should be recognised as having a living relationship with, and as being the primary custodians of, Aboriginal cultural heritage;

(b) Aboriginal people should, as far as practicable, be involved in —

(i) the recognition, protection, conservation and preservation of Aboriginal cultural heritage; and

(ii) the management of activities that may harm Aboriginal cultural heritage;

Sadly, not all things are well represented in the 1972 act, should I say, but hopefully by putting those provisions in we can at least give some elevation to the principles that I hope all of us in this place would agree are absolutely correct in 2021. The fact that they are missing from the 1972 act highlights the limitations of the amended act that is before us today.

I think the insertion is worthwhile. It is one that has come to my office from traditional owner groups. I stand here proudly saying that I think it creates an important shift in how we understand it. There is a real danger that without this, we will go back to a very narrow version of Aboriginal cultural heritage which, frankly, as this government has said, is not fit for the twenty-first century. The amendment takes us at least some small way towards addressing that concern.

**Hon SUE ELLERY**: The government will oppose this amendment. I understand what the honourable member is trying to do. I understand the values that are behind it, and I share many of those same values, but this amendment cannot be supported for the following reasons. It proposes the insertion of three new clauses on almost exactly the same terms as sections 9 to 11 of the 2021 act, which deal with the objects and principles of the legislation. The objects and principles of an act outline the underlying purpose of the legislation and can also be used to resolve uncertainty and ambiguity when interpreting the legislation. Therefore, they need to be consistent with the act itself. It is not appropriate to import these clauses from a different legislative regime. These objects and principles were specifically drafted with regard to the concepts and operative provisions of the 2021 act, including the processes and other requirements of that act, which are not included in the 1972 act—some examples are values, ancestral remains and landscapes. For those reasons we will not support the amendment.

**Hon NEIL THOMSON**: The opposition will not support these amendments either, for very similar reasons to those outlined by the government today. We stress the fact that if these objects were inserted, it could create some legal conflict with the 1972 act. They could be used to interpret the law in a way that would create more uncertainty. We are not about adding uncertainty at this time, given the sequence of events that has led to the current situation. In fact, we are right now trying to create the greatest degree of certainty possible. That is not to say that at some point in the future there might not be more considered changes. That was something we counselled the government on—that is, making a simple repeal of the act and then bringing amendments that might be more considered. In saying that, I commend the government in backing the position here. We support the government's position to not support these amendments.

**Hon WILSON TUCKER**: I state for the record that I will support these amendments. They were borne out of roughly 10 years of consultation, which brought us to the point of the legislation in 2021. The government saw fit to include that definition then. As Hon Dr Brad Pettitt pointed out, the irony is that now the government is fighting against something it introduced and thought was eminently sensible in 2021. I think we can all agree that in the 1972 legislation the definition did not go far enough. We saw the ramifications of that with Juukan Gorge, and now we are dealing with some very simple and targeted amendments that in my opinion do not go far enough towards protecting our cultural heritage. I do not think the government will have any appetite to revisit the topic of cultural heritage after dealing with this bill, so this is the last opportunity we will have in WA to put something in place that will protect the cultural heritage of this state for generations to come. The 2021 definition was sensible and was borne out of years of consultation, as opposed to a number of weeks, and for those reasons I will support this amendment.

**Hon Dr STEVE THOMAS**: There have been some interesting contributions to the debate on this amendment. I suggest, Hon Wilson Tucker, that although the government's first intention with a 2021 act was borne from 10 years of consultation, Hon Dr Brad Pettitt's opportunistic use of it was borne from a few weeks and the opportunity for a media release and, as outrageous as this might seem, to determine who is the "wokest" in the chamber. I do not accept that this has taken 10 years' worth of research. The member may have missed it when the government said it got it wrong. The Leader of the House could quite reasonably say there was 10 years of consultation in this. Obviously, the Labor Party had not been in power for 10 years, but other things were going on. The government said it got it wrong and that it needed to go back to something that was sensible.

The other thing that Hon Dr Brad Pettitt might have missed, which happened on the weekend, was a vote on which people were very concerned about unintended consequences. A total of 8.5 million people expressed that concern. Not all of them did exactly that, but three million more people across Australia expressed that concern than did not. People are concerned about the unintended consequences of things that go through parliaments. They are concerned—and there will be impacts. There would be significant impacts if we were to allow the proposed amendments of Hon Dr Brad Pettitt to pass. No sensible legislator would do that. It is easy for the Greens, and it always has been, because they will never have to enact legislation and deliver outcomes in the same way that they will never have to balance a budget—I understand that. It is easy to appear more "woke" from the sides because they will never have to deliver, and I absolutely understand that. Sensible parliamentary outcomes rely on understanding what the consequences of a proposal are, and there is no way that a future government, be it Labor or Liberal,

would countenance things the consequences of which it did not understand. Therefore, it is perfectly right that the opposition joins the government in opposing the amendment.

**Hon Dr BRAD PETTITT**: My first response to that is that, as someone who delivered 12 years of balanced budgets and made decisions as a mayor, I know exactly how to do that. Cheap shots like that in this place are not well planned or particularly persuasive. One point I agree with and say yes to is that, once again, these amendments are intended to have consequences. They are intended to better protect Aboriginal cultural heritage. That is the point. I am not standing here hoping they achieve nothing. I am saying that I hope that by changing this bill, by passing these amendments, when the courts are asked to make tough decisions about Aboriginal cultural heritage, they will be able to take a broader view and take into account cultural heritage that is not just about objects and look at non-tangible elements. That may provide less certainty, but the only thing certain at the moment is that the ongoing loss of cultural heritage in this state will continue. That is why I am quite happy for there to be less certainty in this regard.

Unfortunately, the government has swung the pendulum too far to correct things. Parts of the 2021 act were clearly proving unworkable, but the underwhelming nature of the very minor amendments to the very outdated 1972 act deserve to be called out. The best way to do that is with the good work that was done over 10 years. Although I did not agree with all parts of the 2021 legislation, there was some really good work done and it is important to carry it through. That is why I am happy with these amendments and I think it is consistent with what we are trying to achieve here to strengthen Aboriginal cultural heritage to support amendments of this kind.

*Division*

New clause put and a division taken, the Deputy Chair (Hon Steve Martin) casting his vote with the noes, with the following result —

Ayes (2)

| | |
|---|---|
| Hon Wilson Tucker | Hon Dr Brad Pettitt *(Teller)* |

Noes (28)

| | | | |
|---|---|---|---|
| Hon Martin Aldridge | Hon Sue Ellery | Hon Steve Martin | Hon Matthew Swinbourn |
| Hon Klara Andric | Hon Donna Faragher | Hon Kyle McGinn | Hon Dr Sally Talbot |
| Hon Dan Caddy | Hon Nick Goiran | Hon Shelley Payne | Hon Dr Steve Thomas |
| Hon Sandra Carr | Hon Lorna Harper | Hon Stephen Pratt | Hon Neil Thomson |
| Hon Peter Collier | Hon Jackie Jarvis | Hon Martin Pritchard | Hon Darren West |
| Hon Colin de Grussa | Hon Louise Kingston | Hon Rosie Sahanna | Hon Pierre Yang |
| Hon Kate Doust | Hon Ayor Makur Chuot | Hon Tjorn Sibma | Hon Peter Foster *(Teller)* |

**New clause thus negatived.**

**Clause 11: Section 4 amended —**

**Hon Dr BRAD PETTITT**: In a similar manner, I flag an amendment that seeks to replace the words "Aboriginal cultural material" with the words "Aboriginal cultural heritage". Before I do so, I genuinely want to try to understand why the 50-year-old definition has been retained and why a new updated definition, like the one in the 2021 bill, was not considered.

**Hon SUE ELLERY**: Sorry, honourable member, it took me a moment to figure that out because we are dealing with a double negative. It has a meaning elsewhere in the 1972 act. We do not want to make a change here that will cause us to have to make a series of other changes. As I have said before, we were going for simple, targeted amendments to address the issues to ensure that the regulatory regime does not allow the kind of circumstances that led to Juukan Gorge to happen again. That is why we have not gone for a comprehensive rewrite of the definition. It is about simple, targeted amendments.

**Hon Dr BRAD PETTITT**: As a follow-up to that, one of the things that the 2021 definition, which I will be proposing to insert shortly, did well was to acknowledge there is both tangible and intangible cultural heritage. What I would like to understand is if we are going to stick with the far narrower 50-year-old definition of cultural materials, which is clearly an archaeological term, how do we intend to ensure that intangible heritage, the Dreamtime and storytelling, and even massacre sites are not damaged post this repeal bill coming into force?

**Hon SUE ELLERY**: Section 5 of the 1972 act states an Aboriginal site refers to —

(a) any place of importance or significance …

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

Then paragraph (c) refers to the anthropological stuff. We say it is covered in section 5(b).

**Hon Dr BRAD PETTITT**: That is certainly not the advice that I am getting from experts in the area. I return again to this widely distributed letter to the Premier from the Australia International Council on Monuments and Sites president, Professor Tracy Ireland. It makes pretty clear that the definition of Aboriginal heritage in the 1972 act is not appropriate, and recommend to broaden the definition of Aboriginal heritage to specifically allow for areas of land and sea as places and to include intangible heritage. It is a clear recommendation from ICOMOS. It goes on to state —

> The current definitions …

The 1972 definitions —

> … are unclear and open to various interpretations, and have led in the past to important Aboriginal heritage in Western Australia not being recognised under the Aboriginal Heritage Act 1972.

What advice has the Leader of the House received to ensure that these kinds of heritage are not covered by the 1972 act? They are significant and well recognised in the 2021 act. Has the Leader of the House received specific advice that they will be protected?

**Hon SUE ELLERY**: There was no additional information other than what I have said is in section 5(b), which we say covers that. I understand the point that the honourable member is trying to make. I go back to what we were trying to do. We were trying to make it simple, with simple, targeted amendments to address the gaps that led to Juukan Gorge. We think we have it covered. The honourable member may disagree, but that is our position.

**Hon Dr BRAD PETTITT**: The point is not whether I disagree or not. The point is whether experts in this area disagree or not. The question I posed previously was what expert advice was received by the Leader of the House, given I put expert advice that the government actually will not protect cultural heritage. I also add, as I said earlier, it probably will not stop another Juukan Gorge.

I think I have made that point clearly. This is the time, deputy chair, when I will move the amendments that are printed on the supplementary notice paper at clause 11, amendments 7/11 and 8/11.

**The DEPUTY CHAIR**: Honourable member, if you want to move both amendments together, you will have to seek the leave of the house.

**Hon Dr BRAD PETTITT** — by leave: I move —

> Page 10, after line 2 — To insert —
>
> ***Aboriginal cultural material***
>
> Page 10, after line 7 — To insert:
>
> ***Aboriginal cultural heritage*** means the tangible and intangible elements that are important to the Aboriginal people of the State, recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives), as part of their traditional and living cultural heritage and includes —
>
> (a) an area that is composed of or contains tangible elements of that cultural heritage (an ***Aboriginal place***);
>
> (b) an object that is a tangible element of that cultural heritage (***Aboriginal object***);
>
> (c) a group of areas (a ***cultural landscape***) interconnected through tangible or intangible elements of that cultural heritage;
>
> (d) any bodily remains of a deceased Aboriginal person (***Aboriginal ancestral remains***), other than remains that —
>
> (i) are buried in a cemetery where non-Aboriginal persons are also buried; or
>
> (ii) have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.

**Hon SUE ELLERY**: For the purpose of the record, the government opposes both amendments. We have already had debate around amendment 7/11. We will also oppose 8/11, the second amendment moved by Hon Dr Brad Pettitt. The member proposes a new definition of "Aboriginal cultural heritage" that is largely in the same terms as the definition in the 2021 act. The policy position of the government is clear and has been made clear a number of times, including in my second reading speech. We have committed to reinstating the familiar regime of the 1972 act with targeted amendments dealing with a limited but significant range of issues. To introduce this definition would import a number of new concepts that did not exist under the 1972 act and that would be inconsistent with the 1972 act. It would also result in a shift from consideration of Aboriginal sites to Aboriginal cultural heritage, which

would be a fundamental shift, particularly when regard is given to how that term is used in the 2021 act. Adopting this definition would have a number of flow-on effects on the interpretation of the 1972 act, resulting in a completely different legislative framework. I understand the honourable member is quite up-front that that is what he wants. That is not what the government wants. That would risk reinvigorating the same concerns and confusion that led us to this bill in the first place, so both amendments will not be supported.

**Hon NEIL THOMSON**: I also rise to voice the opposition's opposition to these amendments. We support the government's position on this matter. It is absolutely vital that we get on with the job of going back to the simple and straightforward application of a familiar act that people understand, given the incredible anxiety and confusion that has been faced around the state as a result of the application of the 2021 act.

I want to add one point, because Hon Dr Brad Pettitt commented about experts. I have the same letter from the International Council on Monuments and Sites that was sent out. It asked to —

- Broaden the definition of Aboriginal heritage to explicitly allow for areas of land and sea as places, and to include intangible heritage.

The so-called experts put forward ideas about —

- Remove the generalised test of significance … 'of importance and significance' and 'of importance and special significance') …

I understand that people have a particular bent and a particular line and provide a particular perspective, but at the end of the day, it is up to the government and the opposition. I reiterate the comments made by Hon Dr Steve Thomas. It is essentially up to the Labor Party and the Liberal and National Parties, which are the ones that alternate in government and which have the serious job of making sure something works. The Minister for Aboriginal Affairs on the steps of Parliament very clearly apologised to the people gathered and said that the government got it wrong. To the broadest extent, we support the amendments in the bill, even though we would like to have seen the bill split and more time given to consider it. Broadly, we support the modest set of amendments that has been put forward in this bill by the government. We are obviously going through them, and we are hoping that today we can get to a point at which we can take away that anxiety and see this matter closed for the community, because the community has that expectation. The broad majority of the community, I believe, has the expectation that Parliament gets on with the job and repeals the 2021 act.

I think that to come back and try to effectively, by stealth, introduce those elements in the 2021 act that have been roundly rejected by the community is wrong. After some duress and after some considerable amount of unnecessary anxiety, that rejection has finally been accepted by the government. We must stick to the plan and get on with the job. Therefore, on that basis, we are not supporting the amendments.

**Hon Dr BRAD PETTITT**: I entirely expected those responses. One further thing to add, though, to respond to Hon Neil Thomson's comments, is that it is the role of government and the opposition not to create some of the least effective legislation in this country to protect Aboriginal cultural heritage, and that is what we are in danger of doing. Again, I read from the experts and the letter from ICOMOS —

> The proposed amendments do not bring the *Aboriginal Heritage Act 1972* up to a similar standard of Aboriginal heritage protection as provided by equivalent Acts in other Australian states, many of which are also considered inadequate.

To be frank, the idea that under the guise of certainty we will be happy to go back to one of the least adequate pieces of legislation is, I think, an extraordinarily large missed opportunity. I think there is a far better way of going forward on this that would protect Aboriginal cultural heritage and meet some of the concerns that I understood were heard loud and clear, from all sides of politics, about the other act. At the heart of that is the amendments that are before us, one of which would absolutely broaden the definition of "Aboriginal cultural heritage", both the intangible and the tangible, and acknowledge that it goes beyond just places and objects and also to cultural landscapes and places where there are Aboriginal ancestral remains and the like. I think it is the least that we could have done and, sadly, though, we will not do that and we will be left with some of the least competent legislation. It will not provide what I think would be considered adequate protection of cultural heritage. Nevertheless, whilst I acknowledge that these amendments will be defeated, I take pride in moving these amendments on behalf of the many groups that contacted us and asked us to move and strengthen the definition.

**Amendments put and negatived.**

**Clause put and passed.**

**Clause 12 put and passed.**

**Clause 13: Section 17 amended —**

**Hon NEIL THOMSON**: I would like to spend a bit of time on clause 13. Clause 13 is quite a simple clause, which states —

> In section 17 delete "the consent of the Minister under section 18." and insert:
>
> under a consent given under section 18(3)(a).

One has to jump around a little here to understand how all this works because the clause also refers to section 18. This interaction makes it a little less than straightforward, but the important thing is, firstly, to understand what section 17 is and how it interacts with section 18(3)(a).

Section 17, "Offences relating to Aboriginal sites", states —

> A person who —
>
> (a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or
>
> (b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site, commits an offence unless he —

It is obviously gendered language, but it is the old legislation —

> is acting with the authorisation of the Registrar under section 16 or the consent of the Minister under section 18.

What we will effectively do is leave section 16 consent to the registrar but narrow the consent to be just section 18(3)(a). Section 18 states —

> (3) Where the Committee submits a notice to the Minister under subsection (2) he shall consider its recommendation and having regard to the general interest of the community shall either —
>
> (a) consent to the use of the land the subject of the notice, or a specified part of the land, for the purpose required, subject to such conditions, if any, as he may specify …

The issue I have, which I think is worthy of some consideration, is that section 17 refers to a person who commits an offence and section 18 refers to the authorisation provision of the landholder. I will take up two lines of questioning on this. The first question is: does this mean—it may have meant this in the old legislation; it may have not been the case that anything has been changed—that there is an opportunity to further amend this for greater clarity? The second question is: does this mean that if a contractor, who has gained consent from an owner of the land under section 18(3), damages an Aboriginal site, will the contractor have committed an offence under the act?

**Hon SUE ELLERY**: I think the honourable member is jumping around a little bit. The change to section 17 will just be to provide a clear link to a consent granted by the minister under section 18(3)(a). I am happy to have a debate with the honourable member when we get to section 18 if that is when he wants to have that debate, but in section 17 all we will do is make a clear link between the two clauses.

**Hon NEIL THOMSON**: Thank you, minister. If the minister is happy to take the definition of "contractors" and "landowners" in clause 14, which will amend section 18, then I am happy to park that one. I am just making sure that we do not miss anything along the way; that is all. Section 17 refers to "a person". It does not talk about the landowner and there is no definition or clarity around that. Yes, I am jumping around because the legislation refers to about three different directions before it gets to the point, so that is fine.

Clause 13 refers to "under a consent given under section 18(3)(a)." I have had a look at the blue bill and I have tried to understand this. A lot of subsections have been added to section 18. I see the minister shaking her head.

**Hon Sue Ellery**: I'm shaking my head because we are debating changes to section 17, not section 18.

**Hon NEIL THOMSON**: No. I am debating section 17 because the line states, "under a consent given under section 18(3)(a)", but we will be deleting "the consent of the Minister under section 18". It was a very simple consent. We have discussed how simple this process was, and we will remove the provision "the consent of the Minister under section 18" and put in the provision "under a consent given under section 18(3)(a)". Is the minister certain that any consents required for any scenario in which a person seeks approval to excavate, destroy or damage a site that any of these additions and any narrowing of the scope of consent under section 18(3)(a) will not impact on any negative way that consent was given?

**Hon SUE ELLERY**: The short answer is: it will not narrow and it will not have any impact in the sense that the member is trying to suggest it might. We have tried to make sure that it all ties back to section 18(3). That is what we are trying to do. I make it clear that it all ties back to that, but we have not changed anything along the lines that the honourable member is suggesting. Clause 13 of the bill will insert those words into section 17 as part of that process of tying it all back to the minister.

**Hon Neil Thomson**: And deleting section 18.

**Hon SUE ELLERY**: Well, yes, because it ties it all back to section 18(3)(a).

**Hon Neil Thomson**: So, by way of interjection, I was simply asking: why was it is necessary—section 18(3)(a)—when all it had in the act was section 18. Is it just a simple drafting preference?

**Hon SUE ELLERY**: Yes, honourable member.

**Clause put and passed.**

**Clause 14: Section 18 amended —**

**Hon NEIL THOMSON**: Clause 14 will obviously be subject to quite a bit of discussion, I would have thought. Clause 14 would amend section 18 of the existing act. Section 18 refers to the owner of the land. It includes lessees, and I think there has been some broadening of the definition of the owner of the land in some of the insertions to section 18, so we do not have to talk about them specifically, but that is just by way of notice. I have a question on the issue of contractors, or anyone who operates on land for which a landowner requires section 18 consent. The Aboriginal Cultural Heritage Act 2021 put the onus on proponents; it referred to proponents becoming liable for decisions made. We know that could have a lot of legal ramifications for someone who steps outside of the section 18(3) authorisation, whether they be a contractor or otherwise. If a contractor or third party engaged by a landowner who has obtained section 18(3) consent damages an Aboriginal site, would that person, contractor or other party be committing an offence, or will the section 18(3) consent provide coverage for all parties operating with the consent of the landowner?

**Hon SUE ELLERY**: The consent is for the land use itself. If the operator, contractor or whoever is operating with the consent of the landowner, there will be no issue. It is about the land use itself, not the person.

**Hon NEIL THOMSON**: Obviously, thus far, this provision seems to have worked okay. I am just making sure that there will not be any mischief made, given that there will be a broadening of the definition of an owner. A whole range of things are happening here. I know that the process of appeal through the State Administrative Tribunal comes under another clause, but this interaction of provisions creates complexity. That is why we have to ask these questions in this place and put the answers on the record. What would section 18 consent look like for the landowner? For example, a contractor might be working in a waterway that is considered to be a site. Given that the landowner will have to obtain authorisation under section 18(3)(a) to undertake certain works, I imagine there will be some specificity around that; in fact, there might even be a requirement to have some sort of management plan in place. But we know that specificity was part of the problem in the 2021 act. The contractor then goes and does the works; maybe a few changes are required because more fill or gravel sheeting has to be placed or something occurs on that site, but the work is within the broader scope of that management plan. How will the contractor know that they are going to be protected by the authorisation provided to the landowner under section 18(3)(a)?

**Hon SUE ELLERY**: They will know in the same way that they have known up until this point. Consent is given for the purposes of activity to be carried out on that land. As long as someone is acting with the permission of the owner, and the owner is acting in accordance with the permission granted to them, there will be no issue.

**Hon NEIL THOMSON**: Recently, we had an example—I will not go to the specifics of the case, because it may or may not be before the courts, but it was in the news—of a contractor who operated on behalf of the Shire of Wanneroo, I believe. Let us take a hypothetical case. I know that the minister does not like hypotheticals, but I am trying to avoid talking about a specific case that may or may not be before the courts. Let us take a hypothetical situation whereby a firebreak contractor is contracted by a local government to operate within the scope of a contract to deliver firebreaks on some crown land. The local government may have a management order or it may be fulfilling its requirements under the Fire and Emergency Services Act—it may be that simple—but the contract is issued by the local authority. Will it be a defence under proposed section 18 of this legislation for a contractor to say that the landowner is responsible? Given that the owner is referred to throughout this legislation and given that the government is making significant amendments to that legislation, is there any scope for further amendments to give further clarity to ensure that the landowner in the broadest definition as defined within the legislation will be responsible for seeking that section 18 approval?

**Hon SUE ELLERY**: That was a longwinded way to get to the final question, I think, and it included an example—a case study, if you like. I am not going to case studies. But I can tell the member, the question is: has consent been granted for that particular use of the land? If consent has been granted, then anyone carrying out activity within the bounds of that consent will be doing so legally. If the contractor is not sure whether there is an issue, they will need to establish that themselves, and they should ask the question, but the onus will be on the person who is eligible to seek a section 18 exemption to seek that exemption and then operate within the limits of that exemption.

**Hon NEIL THOMSON**: Will it be the landowner within the definition of this act who will be required to seek that exemption?

**Hon SUE ELLERY**: Yes, it will be.

**Hon NEIL THOMSON**: I note that the minister agreed that we would have a discussion that effectively straddled both sections 17 and 18 of the existing legislation. One would suggest that the department that will undertake the public interest sessions in relation to any prosecution would first seek to determine whether the landowner had sought consent prior to issuing a contract for activity within or concerning any parcel of land.

**Hon SUE ELLERY**: Yes, honourable member; that is correct.

**Hon NEIL THOMSON**: I thank the minister. From what I understand, section 17 of the 2021 act refers to "a person". Given the onus is on the landholder to seek section 18 approval, would it not be the case that a contractor who operates within the terms of a contract issued by the landowner will not be the target of prosecution?

**Hon SUE ELLERY**: I do not think it is helpful for the member to put forward these case studies, if that is how he is describing them. The landowner is issued with an exemption under section 18. They have to follow the provisions of that exemption. If a contractor is given instructions to breach that, the first place the department has to start with is the terms of the exemption. There is a special defence for the contractor for lack of knowledge, which is set out in section 62 of the 1972 act.

The exemption under section 18 is granted to the owner of the land if something goes wrong. That is the point at which the department will start the investigation and then it will dig below and see what happened. It will depend entirely on the circumstances and, if it comes to that, entirely on the evidence put before the various bodies to determine who, if anyone, was at fault. The place to start is with the person to whom the exemption was granted.

**Hon NEIL THOMSON**: It is useful dialogue. It is helpful. The minister made an important point. I have a follow-up question on this specific issue. Apart from maybe asking whether section 18 approval is required from the landowner, what onus would the contractor or other persons operating on behalf of the landowner be required to have to fulfil their obligations?

**Hon SUE ELLERY**: I keep going back to the same point. The regulatory regime that we are setting out provides that consent be either granted or not granted to the landowner. There is no point getting into a conversation about a contractor in a particular set of circumstances. The onus is on the person who either had consent or who did not have consent. That is the point at which the department will start to investigate if something went wrong. Depending on the circumstances, there could be a whole lot of variations to that. The law says that the land user must have consent or not have consent. That is the starting point. I might add that we are talking about a starting point that has been in place for a very long time.

**Hon NEIL THOMSON**: I appreciate the last point the minister made about the starting point. We are going back to the old legislation. The defence I have about my line of questioning is that we knew the old legislation had problems. In my mind, section 17 is poorly aligned with section 18 because of the definition of "persons". There is a lack of clarity about what would provide sufficient protection. Huge changes have been made since this legislation was put in place. I keep reiterating the issues relating to the proliferation of sites—the approach to waterways and tributaries, for example, which were defined as larger waterways. By extension, as a matter of government policy, we seem to have a general approach to ephemeral streams potentially being seen as sites. We saw that with the Toodyay example.

I said something about the extension of the definition of "landowner". I want to ask a question about the extension of the definition of "landowner" because I do not see it in section 18. I thought it had been changed, but I may have missed it. Has the definition of a landowner in proposed section 18 been altered, and what is that alteration, if it has occurred?

**Hon SUE ELLERY**: There has been no change.

**Hon NEIL THOMSON**: For the record, the definition has not changed. Section 18 states —

> (1) For the purposes of this section, the expression ***the owner of any land*** includes a lessee from the Crown, and the holder of any mining tenement or mining privilege, or of any right or privilege under the *Petroleum and Geothermal Energy Resources Act* …

This provision refers to a lessee. Given that we have a much more complex type of landownership now, such as management orders and different types of subleases et cetera, does this provision incorporate every consideration in relation to a landowner, including the holder of a management order?

**Hon SUE ELLERY**: That has been the practice to date and there is no intention to change that.

**Hon NEIL THOMSON**: So many changes have been made to the Land Administration Act 1997 between 1972 and now. Matters came before this place not that long ago, when further changes relating to the excision of parts of reserves et cetera were made. For example, would the Aboriginal Lands Trust, which is the holder of a management order for reserves that it holds, be the body to which section 18 approval would have to be sought for activities to occur that might impact on section 17 of the act?

**Hon SUE ELLERY**: It would depend on the particulars of the land tenure. The department would need to look at that. That is no different from the way it has approached matters until this point and there is no intention to change that.

**Hon NEIL THOMSON**: Sorry to press on with this but it is very important. We have heard a lot in this place about who the landowner is. We have seen many examples. Not so long ago I had a discussion with Hon Alannah MacTiernan, a former member, through a parliamentary question or during a debate in this chamber, on a matter relating to changes made. The point is the discussion in this place has revolved around who is ultimately responsible for that land. We saw that with the issuance of profit a prendre licences. I am trying to recall the section of the Land Administration Act in which they occur. From recollection, it was section 93. I am sure the officers with the minister today can correct me if I am wrong. As I said, we saw that in relation to the issuance of those profit a prendre licences, which give a person the right to act on land and who has that capacity as the landholder.

My understanding of the Land Administration Act has always been that, effectively, a management order halted the landowner, but the state seems to be taking a different approach because it saw itself as the one that could issue those licences and allow activities to occur. For the sake of *Hansard*, it is very important to put this on the record, particularly for a renewable energy company that might go out and construct turbines or solar panels on land under one of the licences that is granted by the state. In that case, it is a problem for a management order or holder, being the local authority, or a lessee in relation to a pastoral lessee, or even in the case of unallocated crown land. Who would be responsible for the section 18 application in that case? This was an opportunity to have a tidy-up. Given the incredible uncertainty about some of the more novel forms of tenure that the state grants under crown land, would the onus in the case of a renewable energy company be on the proponent, and can a proponent seek a section 18 approval when they are not the landowner?

**Hon SUE ELLERY**: The short answer is no, not without the consent of the landowner. I know that the member keeps referring to confusion, but we are talking about the provisions in the 1972 act and how the department will determine who the landowner is. Those provisions have not changed. If the wrong entity tried to lodge a section 18 application and the department identified that it was the wrong entity, the department would work with the applicant to find out who the correct applicant should be. To that extent, if I can be so bold—to use Hon Nick Goiran's language—if I am to be charitable, I think the member is trying to insert the confusion and uncertainty of the 2021 provisions into the 1972 provisions. The end result of what we are doing is that nothing will change in determining questions about land management orders or whatever it is. None of that will change. There are elements of section 18 that will change around new information and the like, and we will get to those in due course. However, for this line of questioning, nothing has changed.

**Hon NEIL THOMSON**: I have one more question on this point. Could section 18 have been defined better?

**Hon SUE ELLERY**: That is a matter of judgement. If the honourable member thinks it could have been, he can move an amendment.

**Hon Dr STEVE THOMAS**: I have a few questions about the section 18 process. I did not do this during the debate on clause 1, but I will refer to some of the guidelines that the government has presented. Hopefully, we can work our way through that in time. I refer the minister to the new Aboriginal Heritage Act 1972 guidelines on the Department of Planning, Lands and Heritage website. Hopefully the minister's advisers have copies of that. The first part of the guideline in the introduction identifies that Aboriginal sites include Aboriginal sites that have been assessed and Aboriginal places about which information has been provided but have not yet been assessed by the committee against section 5. I know there is a recommended time frame in the guidelines, but is there a time frame by which people will move out of the second part of that? If there is a whole pile of new sites or new places about which new information has been provided, is there an issue around the time frame in that we might sit in that pile for a long time without shifting?

**Hon SUE ELLERY**: If I understand the honourable member's question correctly, they are currently prioritised. The intention is that they will be dealt with within the 70-day time period.

**Hon Dr STEVE THOMAS**: Thank you, minister. Ideally, that is the intent. I once tried to instigate legislative time frames in the environment act and the then Minister for Environment, the current Minister for Emergency Services, did not go along with me on that.

**Hon Sue Ellery**: I would always trust his judgement, honourable member.

**Hon Dr STEVE THOMAS**: I am not so sure.

I think this is the intent more than anything else. I do not have a problem with that. I presume there is a reporting process to work out whether these things will be processed within that time frame. Page 4 of the guidelines on the website refers to a 70-day time frame. Is that 70 calendar days or business days?

**Hon Sue Ellery**: I do not have a page number on mine. Is there another number?

**Hon Dr STEVE THOMAS**: It is the little chart in number nine.

**Hon Sue Ellery**: Sorry, can you ask your question again?

**Hon Dr STEVE THOMAS**: Will there be a review to work out whether those time frames are slipping? Are these time frames 70 calendar days or business days from the day the applicant submits the recommendation from council to the minister and the 28 days that the minister has to make a decision?

**Hon SUE ELLERY**: There were two parts to that question. The answer to the first part is that it is calendar days. The answer to the second part is that because it is a new process, there will be an internal review process. There will be key performance indicators and they will be reported in the annual report.

**Hon Dr STEVE THOMAS**: I thank the minister for that. That is very helpful. The guidelines outline the process for what the landowners will do. Step 1 is to assess the likelihood of harm, step 2 is to consider any harm and step 3 is to determine the nature and level of the harm. That is all quite reasonable stuff. This might apply more across the board on the new section 18 process. This might be more of a suggestion for the future rather than the past. The analysis of historical disturbance might be a very useful process. It might be intuitive within the guidelines that are written that when assessing any likely damage, potentially that would automatically assess whether there has been a historical disturbance. Did the government give some thought to including a more definitive definition of "historical disturbance"? Much of the debate around the first bill was the ability to continue doing what someone was doing. If someone had already run cattle on a site, unless there was an obvious Aboriginal heritage site, historical disturbance would probably make a big difference. Historical disturbance does not seem to have found its way into the guidelines. I am interested in why it did not and whether there is an opportunity to be more prescriptive around ongoing land use and, in particular, to provide a definition of "historical disturbance".

**Hon SUE ELLERY**: The government did not consider changing definitions, but it is taking it into account, honourable member, on a case-by-case basis. It is regularly reconsidered, if I can put it that way, on a case-by-case basis.

**Hon Dr STEVE THOMAS**: I think it is important, and I think it is something that is potentially a useful idea for a future debate with a bit more detail around the impacts of historical disturbance. Can I ask again, and it is slightly different, in the fees regulations—the fees regulations that are in section 18 talk about a $250 submission fee, and an additional $5 096 —

**Hon Sue Ellery**: Just bear with me while I get to the fees—okay I am there.

**Hon Dr STEVE THOMAS**: Sorry, I will give Leader of the House a minute to find the regulation act. Again, these are consultation draft proposals, but I suspect they are unlikely to change. Under part 2—whether it is section 16 or section 18 of the act, under 4 or 5, they are basically exactly the same fees. A $250 fee in itself is fine, but —

> (b) if the person is a commercial proponent or government proponent — an amount equal to the sum of —
>
> (i) $250; and
>
> (ii) $5 096 multiplied by the number of identified places specified in the notice.

That is presumably the number of heritage sites identified in the development site, rather than the number of development sites.

**Hon SUE ELLERY**: If the honourable member goes to the top of page 3 on those regulations, it talks about an "identified place", and then further down the page it defines a "proposed investigation site". It sets it out there. The provision the member is referring to —

> (ii) $5 096 multiplied by the number of proposed investigation sites.

The consultation draft states that a proposed investigation site —

> means a place … specified in the request as being either or both of the following —
>
> (a) a place that it is proposed to enter, excavate or both;
>
> (b) a place on or under which things are or may be located that are proposed to be examined, removed or both;

**Hon Dr STEVE THOMAS**: I did read that—"a place that it is proposed to enter, excavate or both". If someone is just entering a place, it makes it a proposed investigation site. Say, for example, there is a five-kilometre stretch of river bank, which was entirely within one land title. Would it be reasonable for the landowner to say, "That is one site," even if an entire river is claimed even beyond the boundaries of the property? Would that be a single site with a $250 fee plus a $5 096 fee, or is it the case that there may be multiple sites that would have to be examined and multiple fees that would be charged—potentially?

**Hon SUE ELLERY**: One site, honourable member.

**Hon Dr STEVE THOMAS**: Excellent. In relation to the mining sector—for whom in this whole debate I have to say I have fairly limited sympathy—that would make a lot more sense. There would be multiple sites stretched over a fairly large area, particularly in terms of exploration. If someone had an exploration lease, for example, they would assume that any site that was not within a certain distance of another site would be treated as a completely different site, and therefore a whole new set of applications.

**Hon Sue Ellery**: By interjection, correct.

**Hon Dr STEVE THOMAS**: In that case, can I ask if there was a process by which the numbers were determined—$250 and $5 096? It just seems an odd number—$5 096.

**Hon SUE ELLERY**: I have answered that question already in the clause 1 debate. The $5 096 is—does the member know how in a budget paper, we try to calculate a cost of service? We use a mathematical formula, which is the cost of running the team that manages this—which is about $2.4 million—divided by the number of investigations. That is how we came up with that cost of service, if you like.

**Hon NEIL THOMSON**: I would like to take the minister back to the line of questioning that Hon Dr Steve Thomas raised about the additional information provision. I give notice that there is an amendment standing in my name in relation to this. In fact, there are four about that. They apply to clause 14 and they are in the revised supplementary notice paper, now interspersed with an amendment by Hon Dr Brad Pettitt.

Just to be clear, in the revised notice paper—I am not sure how to do this; it is on page 4 of the Aboriginal Heritage Legislation Amendment and Repeal Bill 2023 [125-2] SNP 125, Issue No.3. At the bottom, it states —

> **Hon Neil Thomson:** To move —
>
> Page 15, line 22 — To insert after "information":
>
> of material importance

On page 5, it says —

> **Hon Neil Thomson:** To move —
>
> Page 15, line 33 — To insert after "information":
>
> of material importance

Following that, it says —

> **Hon Neil Thomson:** To move —
>
> Page 16, line 10 — To insert after "information":
>
> of material importance

We are skipping the motion that will be moved by Hon Dr Brad Pettitt in due course, but then we are going to 4/14 —

> **Hon Neil Thomson:** To move —
>
> Page 16, line 21 — To insert after "information":
>
> of material importance

There was some discussion whether it should have been on the bill. On page 12 there is a provision about —

> **new information about an Aboriginal site**, in relation to land the subject of a consent given under subsection (3)(a), —

because we are talking about section 18(3)(a) —

> means information about an Aboriginal site on the land, other than information that a person who made a decision to give, amend or confirm the consent was made aware of for the purposes of making the decision;

The purpose of this amendment, which I will be moving shortly, is—and I will get guidance from the chair, if I may. Do I speak for the purpose of it or move the motion and then speak on it?

**The DEPUTY CHAIR**: I will take some advice.

**Hon NEIL THOMSON**: Before you do that, chair, can I just be clear that I am not wishing to move off clause 14; this is just —

**The DEPUTY CHAIR**: Of course.

**Hon Sue Ellery**: Can I just note that Hon Dr Brad Pettitt is on the notice paper ahead of Hon Neil Thomson? I think we have to deal with his first.

**Hon NEIL THOMSON**: Okay, well in which case, we should deal with Hon Dr Brad Pettitt.

**The DEPUTY CHAIR**: Just resume your seat and I will take some advice. We are dealing with clause 14 as a whole. Hon Neil Thomson, as per the supplementary notice paper it is cleaner for Hon Dr Brad Pettitt to proceed first, but you are entitled to move yours before him if you wish to do so.

**Hon NEIL THOMSON**: Hon Dr Brad Pettitt has just conveyed to me that he is quite comfortable with me moving this. Given they are quite distinct from the amendments proposed by Hon Dr Brad Pettitt, I propose if it is okay with you, chair, to proceed, we can speed up the process given I have read these out. I seek the deputy chair's guidance about giving an explanation about these amendments or whether to move them and then provide it.

**The DEPUTY CHAIR**: You can speak to them or you can move them and then speak to them.

**Hon NEIL THOMSON** — by leave: I move —

Page 15, line 22 — To insert after "information" —

of material importance

Page 15, line 33 — To insert after "information" —

of material importance

Page 16, line 10 — To insert after "information" —

of material importance

Page 16, line 21 — To insert after "information" —

of material importance

I will give a brief outline of my reasoning. As I said, there was possibly some capacity to condense the amendments within the scope of the other clause that talks about new information about an Aboriginal site. The issue here is pretty simple. We are introducing a new requirement for landowners holding section 18 consents to notify the minister of new information. I say this in a general sense because there are four different provisions for different requirements for a landowner to advise the minister. I probably do not need to go into those in detail because they are quite self-evident. We seek to provide a degree of protection because we do not want a large mine, for example, operating in the Pilbara with a multimillion-dollar workforce to be placed in jeopardy because a little bit of information is provided—it might just be somebody advising the minister, there might be something in writing—of some matter not properly defined in the original consent and advice then being needed. This creates an intolerable situation of sovereign risk. I am sure the minister will respond to this depending on the views of the government on my amendments. I understand that materiality is very difficult to define because these things are subjective. However, we have already heard in relation to amendments moved by Hon Dr Brad Pettitt that words matter, especially when things end up in court. I would be interested in the government's response about whether further consideration has been given to a materiality clause. If the government had done its job properly, it may have considered a materiality clause. It may have even provided better amendments than the ones I am moving here today. My advice to the government about this matter is that if it is not happy with these amendments but thinks their intent is okay or supports them, I would be more than happy to consider amending my amendments or even for the government to amend the bill. My intent is pretty clear. It is to provide some protection for landowners operating economic enterprises and undertaking activities on their land so there is not a chance of mischief to require the notification information that might not even be material to the section 18 approval. I said in my second reading contribution that laws are there to provide protection against mischief. This could become very, very difficult for landowners with section 18 consents. It creates some concern for holders of existing section 18s who think they are safe, but now they have a new obligation to notify the minister.

How long is a piece of string on this issue? At what level of materiality should they provide that information? That is the intent of my amendments today. This is not to say that I hold all the knowledge on this issue. If the government agrees with the intent of these amendments but not the words, I invite it to provide a more robust set of words. In the absence of that, and given the concerns that have been raised with me about this matter by industry, I seek to have these amendments passed by the house.

**Hon SUE ELLERY**: I start by thanking the honourable member to agreeing, for the efficacy of deliberations, to move his amendments as a bundle. I appreciate that offer. I am about to break his heart by saying that the government

will not support the amendments. Clause 14 amends section 18 of the 1972 act. The amendment moved by the honourable member seeks to amend the language throughout clause 14 to impose a threshold test of materiality when considering new information about an Aboriginal site. A similar amendment was moved in the other place to increase the threshold of new information about an Aboriginal site.

Section 5 of the 1972 act, which is not proposed to be amended, sets out the criteria for firstly, any place of importance and significance where objects have been left connected with traditional cultural life; secondly, any sacred ritual or ceremonial sites of importance to Aboriginal people; thirdly, any place that in the opinion of the committee is of importance and significance to the cultural heritage of the state; and, fourthly, any place where objects to which this legislation applies are traditionally stored. These are the four criteria that determine whether there are Aboriginal sites that should be protected under the 1972 act. The criteria under section 5 will be the same for any new information. It is not appropriate that the threshold for new information about an Aboriginal site once a section 18 consent has been given is different from the threshold for Aboriginal sites when the section 18 notice is first being considered. The time that information is obtained should be, and is, irrelevant. An Aboriginal site that meets the section 5 criteria and therefore is subject to protection under the act by definition is of material importance. The amendment relating to the reporting of new information about Aboriginal sites as proposed in the bill provides a number of options for the minister upon receipt of such a report, which ensures there is flexibility and discretion to make an appropriate decision. It has been drafted to provide simplicity and certainty in the new legislative framework. Introducing a threshold of material importance will require a landowner in each case they become aware of new information of an Aboriginal site to make a determination about whether it is of material importance and therefore must be reported to the minister. It is clearly inappropriate to ask a landowner to make such an assessment about an Aboriginal site. This will also add complexity and place extra burdens on landowners to meet their obligations under the act.

For those reasons, that first amendment in the bundle we are considering is not supported. For the second of the honourable member's amendments, the arguments are similar to the ones I have just given. The third in the bundle is opposed for the same reasons, as it would compromise the intent to have consistency of thresholds, provide simplicity and certainty for landholders and not place extra and inappropriate burdens to determine whether the information is of material importance. For those reasons, we will be opposing the amendments.

**Hon NEIL THOMSON**: I have not done one of these before, so I am seeking advice on whether I can speak to this matter in response.

**The DEPUTY CHAIR**: Yes.

**Hon NEIL THOMSON**: The government raised points about sites and the importance of those sites. I think they are mentioned under proposed section 77(5) in relation to the definition of a site, and I think the wording put in there was a site of significance. I think this is a complete mismatch of the issue I am dealing with here. This is not about the site itself; this is about the additional information. If I look at where new information is provided, I assume that it has to be relevant to Aboriginal heritage, but it states —

> … in relation to land the subject of a consent given under subsection (3)(a), means information about an Aboriginal site …

The problem is that yes, we know the site is significant; that is why it is on the register, but that is a totally different consideration. This is about new information. As legislators, I believe, it is very important that when we look at our multibillion-dollar mining and resources sector, we recognise that we already see the activism that goes on. With greatest respect for my colleague Hon Dr Brad Pettitt, we know in the Greens movement considerable activism is used. Welding together activism around environmental issues and Aboriginal heritage matters is not an uncommon feature of the Greens movement. It is not an uncommon strategy in this matter.

If I were seeking to cause mischief in our very important resources sector and I had access to someone who was able to speak with any kind of authority on Aboriginal heritage, I would just bombard—this strategy could be used—the operator. We are not talking about a proponent here; we are talking about an operator. We are talking about mine sites operated by Rio Tinto and BHP. They are the reason for all the prosperity of our state. They pay for social housing. They improve disadvantage in our state. They allow us to deal with very important matters in my region of the Kimberley, such as the rebuild. These are vital parts of our economy, yet if I wanted to create mischief using this provision, particularly now with the additional provision on the State Administrative Tribunal appeals process, I could. I think we will get to the SAT process in due course. It will raise considerable challenges for the department and the minister, notwithstanding the need for appeals and the need to avoid that oft-spoken of matter of Juukan Gorge and to avoid that situation. It was well within the powers of the minister at the time, Hon Ben Wyatt, to pick up the phone and ring the CEO. That is my understanding from the communications we have had in this place about that matter and the notification of that office prior to the demolition of that gorge. Without the legislative capacity, he could have made a humble request, to use the words we have often heard in recent times,

of that organisation, and I am sure it would have undertaken to reciprocate that request, had it been made. But, obviously, I can only assume it was not made.

My position on this is that we must provide protection to our resources sector. It remains to be seen. We heard the minister talk about flexibility and discretion being applied, but it remains to be seen where information might have been provided—through who knows what means?—within the normal capacity of an operator, such as Rio Tinto or BHP, operating their vast operations across our state. We see examples in which information is provided not through direct means but maybe through indirect means. Somehow there could be some sort of mechanism challenge. We need to provide greater protection. I can see mischief being done here notwithstanding the need for flexibility. We have had discussions on a range of other aspects of this bill and returning to the 1972 act. It has been said that a certain level of discretion was used within the confines of the act under the auspices of the minister and support was provided by the ACMC. We hope that continues with the Aboriginal Cultural Heritage Committee.

The third point was made that somehow this would put an additional requirement on the landowner to make the assessment about the importance of the information. No, I think it is quite the opposite. It would provide greater protection for the landowner when mischief is being caused, when information has been provided by one means or other of which the landowner may not have been fully aware or which may have been provided in such a way that it is a constant demand of requiring information to be then moved on and would put at risk the issue of the very important operations of a multimillion-dollar mine site or maybe a gas project.

We can see the incredible interest that members of the Greens party and others have put into—by utilisation of Aboriginal cultural heritage, for example—the case of a $12 billion project. It is outside the jurisdiction of this place, but it is equally important for our state in terms of our future economic development. It is also equally important, may I say, to the decarbonisation of our globe and our society. It is vital that we continue to exploit our resources in a secure and strong way so that we can make a contribution through natural gas in the vital transition as we wean the world off coal.

I believe this amendment would provide great consistency. I again counsel or seek the support of the government. I know it has made points and I am responding to those reasons why not. I again seek that it deals with anything that could be improved to provide security from concern for those large operations and reduce sovereign risk in this state and support this amendment.

Finally, as I expect that, by the numbers, this amendment will not be supported, I seek that the government ensures that it keeps a very close eye on the future and potential for mischief that might be created by members in the community who seek to simply shut down our state and our resources industry. That is what is happening in our state and some people seek to do so by any means possible. I put that to the chamber and, therefore, I commend the amendments in my name.

**Hon Dr BRAD PETTITT**: I will not be supporting the amendments, but I want to respond to a couple of those comments. The great irony of where we stand today is that it was not Greens activists who led us here. Interestingly, it was activism by farmers and other lobby groups that brought us to where we are today with the Aboriginal cultural heritage legislation. In fact, we could quite reasonably put that non-Aboriginal activists won out over Aboriginal activists or activists who represented Aboriginal people in this case.

Putting aside the whole debate around gas, which I could have a strong response to as well, I think these amendments are not supportable. It takes it further in a direction that I would be very disappointed to see, and in due course I will be moving some further amendments to hopefully drag it back in a better direction.

*Division*

Amendments put and a division taken, the Deputy Chair (Hon Stephen Pratt) casting his vote with the noes, with the following result —

Ayes (12)

| | | | |
|---|---|---|---|
| Hon Martin Aldridge | Hon Nick Goiran | Hon Sophia Moermond | Hon Neil Thomson |
| Hon Peter Collier | Hon Louise Kingston | Hon Tjorn Sibma | Hon Wilson Tucker |
| Hon Donna Faragher | Hon Steve Martin | Hon Dr Steve Thomas | Hon Colin de Grussa *(Teller)* |

Noes (21)

| | | | |
|---|---|---|---|
| Hon Klara Andric | Hon Lorna Harper | Hon Stephen Pratt | Hon Darren West |
| Hon Dan Caddy | Hon Jackie Jarvis | Hon Martin Pritchard | Hon Pierre Yang |
| Hon Sandra Carr | Hon Ayor Makur Chuot | Hon Samantha Rowe | Hon Peter Foster *(Teller)* |
| Hon Stephen Dawson | Hon Kyle McGinn | Hon Rosie Sahanna | |
| Hon Kate Doust | Hon Shelley Payne | Hon Matthew Swinbourn | |
| Hon Sue Ellery | Hon Dr Brad Pettitt | Hon Dr Sally Talbot | |

**Amendments thus negatived.**

**Hon Dr BRAD PETTITT**: I am still on clause 14 and note that I also have a bunch of amendments that are inter-tangled. Before we get to those, I am trying to understand what the thinking is. If I understand this correctly, an amendment to section 18 to ensure that Aboriginal people are consulted on matters relating to impacts on cultural heritage is not to be found in the bill before us, or even in the regulations. It is only found in the guidelines, which of course are not enforceable. Why is there not a stronger requirement for self-determination or giving a say to Aboriginal people in the legislation or proposed regulations before us?

**Hon SUE ELLERY**: I go back to the point I have made before, honourable member. The approach has been to do simple, targeted amendments, and we are on a time line. In addition, a procedural fairness process has been in place for years under the 1972 act to give Aboriginal people a say about matters relating to their heritage, and that will continue to be implemented. In reality, this is usually done earlier than the Committee of the Whole stage. Many proponents have demonstrated strong collaboration and engagement with native title owners and other Aboriginal stakeholders through the section 18 process, and proponents should continue to do this. Genuine engagement with Aboriginal people can help to ensure that section 18 notices are submitted with the necessary information to support the decision-making process, and can reflect shared views of landowners and Aboriginal people on issues in which that has been achieved. It is the minister's expectation that proponents will continue to engage in meaningful consultation whenever possible in support of their section 18 notice.

**Hon Dr BRAD PETTITT**: Will that rely on the goodwill of applicants rather than any requirement?

**Hon SUE ELLERY**: It will rely on everyone, partners and proponents, to do the right thing. If they do not, the committee will pick that up. In addition to that, there has been judicial authority around procedural fairness to ensure that that will happen. Remember what we are dealing with at this point. The committee will look to see whether there has been consultation. If there has not, it will be picked up at that point, and the committee will take the view that there should have been. In addition, there has been judicial finding on the importance of that.

**Hon COLIN de GRUSSA**: Deputy chair, I seek some guidance here. We are on clause 14 and, as I understand it, we are looking at amendment 11/14 on the supplementary notice paper.

**The DEPUTY CHAIR (Hon Stephen Pratt)**: At the moment, we are just on clause 14. The amendment has not been moved.

**Hon COLIN de GRUSSA**: Okay. The guidance I seek, then, on these amendments is whether they be moved given that the amendment at 8/11 defines "Aboriginal cultural heritage" and these subsequent amendments then refer to Aboriginal cultural heritage. What is the effect of that? Do those amendments then fall away?

**The DEPUTY CHAIR**: I will take some advice. The advice is that the amendments can proceed in terms being moved, and there are examples within the legislation of terms that do not have a clear definition. It would be up to the mover, Hon Dr Brad Pettitt, to test that before the chamber for the committee to decide.

**Hon Dr BRAD PETTITT**: Thank you for that clarification, deputy chair. I come back to what the Leader of the House was saying. I am advised that in the past Aboriginal people would often find out about the potential impact on their cultural heritage via the department of Aboriginal affairs only after a section 18 application had been lodged, and that the guidelines had often not been followed. Is the Leader of the House saying that these guidelines have always been followed and that notification did occur?

**Hon SUE ELLERY**: I am trying to say exactly what the honourable member has just said. In the event that an application is made and there has been no consultation, the committee will find that. In the example that the member has given, the committee found that and the department notified the relevant Aboriginal stakeholders. That is the point that I am trying to make.

**Hon Dr BRAD PETTITT**: The point that I make here is: in terms of best practice and free, prior and informed consent, I think we can all agree that being advised by the department only after a section 18 application has been lodged is certainly not desirable. I come back to where I started my questioning. I understand that the Leader of the House said that the guidelines were largely followed during that early engagement. I am trying to work out the evidence base for this. Does the department collect the information on how many proponents engage early on section 18 applications before lodgement versus those that are picked up only after lodgement by the department?

**Hon SUE ELLERY**: This might be of some assistance, honourable member. The minister has announced his expectation that section 18 applicants consult with relevant Aboriginal people prior to lodging a notice and consultation guidelines to assist. The Aboriginal Cultural Heritage Committee will also undertake procedural fairness with Aboriginal people prior to making a recommendation to the minister. The honourable member might recall that during the second reading debate a number of members commented on Justice Chaney's 2015 decision in Robinson v Fielding that concerned Port Hedland harbour. One of the outcomes of that, relevant to this question, is that the decision said —

> … the ACMC is obliged, as a matter of procedural fairness, to ensure that it has sufficient information from the Aboriginal persons who might be affected by a decision as to the existence, significance and importance of sites which might be affected by a proposal under s 18.

Exactly what was required would depend on the facts. That is the point that I was trying to make. If the ACMC does not have that information before it—which it requires and is required to have as a consequence of Chaney's decision—the definition of "procedural fairness" that the ACMC will apply is to ensure that it hears from the relevant Aboriginal people. That is why we say that we do not need to set out the provisions proposed in the member's amendment because it is already the practice, reinforced by the 2015 decision, and it requires that the ACMC test itself that it has sufficient information from the Aboriginal people who might be affected by the decision as to the existence, significance and importance of the sites that might be affected by that particular application.

**Hon Dr BRAD PETTITT**: I am still trying to understand this because the guidelines do not mandate that that consultation occur. It would have been a simple shift from the 1972 legislation to take that from a guideline to either a regulation or amended legislation to mandate that that occur. The Leader of the House has outlined a fallback position that is definitely not best practice. I do not understand why we cannot use a simple amendment to take it from a guideline to a requirement—to make sure that that consultation occurs.

**Hon SUE ELLERY**: I know that the honourable member thinks that our targeted, simple amendments are not enough, but every time we add another targeted, simple amendment we make it more complex. We are trying to, with the greatest of simplicity and clarity, address the issues that led to the circumstances at Juukan Gorge. We are trying to address the concerns that were expressed during the course of the public debate and do it within a time line. I get the point that the member is making about best practice and the like, and I understand his reasons for saying that this is not satisfactory, but that is the reason that we have taken the response that we have to the member's amendments.

**Hon NEIL THOMSON**: My question relates to page 14 of the bill and the insertion of proposed section 18(3A). It refers to the publication of the notice and states —

> As soon as practicable after making a decision under subsection (3) or (6A), the Minister must publish notice of the decision on a website maintained by, or on behalf of, the Department.

**Committee interrupted, pursuant to standing orders.**

[Continued on page 5497.]