

ABORIGINAL HERITAGE LEGISLATION AMENDMENT AND REPEAL BILL 2023

Committee

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 1: Short title —

Hon NEIL THOMSON: I will do my best to keep my questions within the clauses, but some questions may refer to clauses other than clause 1 because of their less prescribed nature. Please forgive me for that as we go. Hopefully, we will get broad answers to questions on clause 1 and then I will ask very specific questions on the other clauses.

My first line of questioning is about the sites that are on the directory, I believe it is called. The issue, I guess, is that there are a lot of sites. Some sites have been added to the directory during the time we have come under the new regime contained in the Aboriginal Cultural Heritage Act 2021. I would like to get a picture over the last decade, if that is possible, about the change in the number of sites and the rate at which those sites have accumulated in recent times in a general sense and, more specifically, the addition of sites in the lead-up to the implementation of the Aboriginal Cultural Heritage Act. What is the indicative number of sites that have been applied in those few months in the lead-up to the implementation of the act and shortly thereafter? Obviously, I would like it noted whether all those sites in the directory will continue with the implementation of the revised 1972 act.

Hon SUE ELLERY: We certainly do not have access at the table to precise data over the last 10 years, which was where the honourable member's question started, but on the basis of advice at the table, rather than any precise data list, I can say that about 100 were added in the first six months of this year. If the question was about the lead-up to the 2021 act, there were about 100. The second part of the question was about what happens to those. Under the transitional arrangements, proposed regulation 33 provides for how information currently on the ACH directory under the 2021 act may be transferred to a register under section 38 of the 1972 act. To the extent that information and documents are of a kind that can be recorded in a register, they must be transferred to and recorded in the register on repeal day. Section 38 of the 1972 act requires a register to be maintained of —

- (a) all protected areas;
- (b) all Aboriginal cultural material; and
- (c) all other places and objects to which this Act applies ...

Hon NEIL THOMSON: We have heard a figure quoted at various stages of the number of sites in the directory. My understanding is that it is in the order of 30 000 across the state. Is that correct?

Hon SUE ELLERY: That is correct, honourable member.

Hon NEIL THOMSON: If we look at the map that was provided, which I have done, we can see that there are sites within the Swan Valley, along the Swan River and within the Gascoyne flood plain. The vast majority of my home town of Broome is also a site. That has an impact on the obligations of landowners, particularly in relation to sections 16, 17 and 18 of the act. One of the challenges is that there are obviously a lot more sites than there would have been in 1972, when this act was put together. Much of that land is subject to detailed or ongoing activity, such as in the Swan Valley with vineyards and the construction of homes. As far as I am aware, a whole range of activities have not gone through the processes of any of the provisions in sections 16, 17 and 18 of the act, particularly around the alteration of those sites under section 17 or requiring consent under section 18. This has been an issue of concern. When the Aboriginal Cultural Heritage Bill 2021 was presented to Parliament, much store was set by the fact that there were no exemptions. However, we know that in practice the 1972 act never really applied to activities like those of an orchardist who operates in the Swan Valley. Is it anticipated that section 16, for example, will apply if somebody, like an orchardist or a tomato grower on the Gascoyne flood plain, excavates a site that is listed on the map? Section 16 states —

- (1) Subject to section 18, the right to excavate or to remove any thing from an Aboriginal site is reserved to the Registrar.
- (2) The Registrar, on the advice of the Committee, may authorise the entry upon and excavation of an Aboriginal site and the examination or removal of any thing on or under the site in such manner and subject to such conditions as the Committee may advise.

Will there be a very tight application of that provision? We know that excavation happens on a regular basis. I suggest that it occurs thousands of times a day in and around the Swan Valley and the Gascoyne flood plain. Will common sense be applied to that process or are we going to see a more stringent application of the 1972 act by the committee?

Hon SUE ELLERY: If I can paraphrase the honourable member's question, if I understand it correctly, the member said that in practice—that was the term he used—certain provisions of the 1972 act were never applied to certain undertakings or land uses.

Hon Neil Thomson: Correct.

Hon SUE ELLERY: The correct terminology is that the provisions applied, but, I guess, in reality, what did not happen was a proactive going out and checking, if I can put it that way. Under the new provisions, if someone has a section 18 consent and becomes aware of new information, they will be required to report that. Otherwise, they will be required to follow the provisions under the act. If they need to seek a section 18 consent or make a section 16 application, that is what they will do. The agency will respond to complaints. If somebody says, "I have reason to believe X is happening", that may be investigated. In the past, we undertook a commonsense approach to enforcement under the 1972 act. This approach included taking into account the impact of the activity on Aboriginal sites. That is the approach we will take once those provisions of the 1972 act are reinstated. Regulation 10 sets out a broad range of activities that require approval.

Hon NEIL THOMSON: It is good to hear the words "commonsense approach". The anxiety in the community is particularly around enforcement by the department. I will need to ask a few hypotheticals for the comfort of people who might own five hectares of land in the Swan Valley.

Hon Sue Ellery: Honourable member, I am not going to be giving you answers based on hypotheticals, sitting here at the table. I am happy to answer any questions you want to ask me about the provisions that are in the bill before us, but I am not going to give you the response to the sandcastle question. I am not going to do any of those things.

Hon NEIL THOMSON: Thank you. I was not planning to ask the sandcastle question. I think it would probably go without saying that if a complaint were lodged with the department in relation to somebody building a sandcastle, the department would not consider that further. I think the complaints-based system is important. The minister may say, "It's just a hypothetical," but it is more than that. It is a reality for people in the Swan Valley or south of metropolitan Perth, for example, where there are large areas of shaded area on the map, and most of the Gascoyne flood plain. If a complaint were lodged for somebody undertaking a regular farming or agricultural activity, which might involve the sorts of things that were discussed in respect of the other matters where they reflected what might otherwise be considered a tier 2 activity under the 2021 scheme, would it be the intention of the department to follow up with some sort of investigation or even prosecution, if that person did not have a section 16 or a section 18 approval?

Hon SUE ELLERY: The tier system will be gone by virtue of what is in front of us now. I can say that any complaint will be judged on its merits and some of them might be. For example, a sandcastle might be deemed straight up to be frivolous. Others may be taken more seriously and initial investigations conducted. Each complaint will be treated on its merits but the tier 1 system that the member described will be no more. Of course, we take the approach that where there is actual harm to a site, if an investigation has been conducted and harm has been found, a prosecution would be undertaken.

Hon NICK GOIRAN: With regard to the answer that the tier system will be no longer, what provision in the bill will take the tier system away? The minister has just indicated that the tier system will be no longer; what provision in the bill will make it no longer?

Hon SUE ELLERY: It is the repeals clause, which is clause 3.

Hon NICK GOIRAN: In light of that, can I draw the minister's attention to page 7, line 24, dealing with the transitional provision, which indicates —

Without limiting subsection (2), transitional regulations 23 may do any of the following ...

...

- (i) provide for the 2021 Act, or a specified 24 provision of the 2021 Act, to continue to apply ...

It is telling us what the transitional regulations may be able to do. It seems to indicate there that the tier system could be maintained.

Hon SUE ELLERY: The honourable member was correct to draw our attention to the fact that this is in a section that deals with transitional measures. It needs to be read in conjunction with the provisions that will repeal the 2021 provisions. It exists for the period of the transitional time. It is not—if this is what the member might be worried about—a backdoor way of reinstating those provisions that were in the 2021 act. That is not the intention.

Hon NICK GOIRAN: That may not be the intention, minister, but this provision—I appreciate that we are not yet at clause 8 and we will no doubt have a discussion about that when we get to it—could be the power that is given to executive government. Nevertheless, at the very least, will the tier system still be in place during the transitional period?

Hon SUE ELLERY: While the advisers are making sure that I get my language right, the explanation is that the transitional provisions will remain in place and include the reference, for example, to the tiered system, only for the purpose of dealing with those issues that are raised in the period between the 2021 provisions coming into place and when the transition period ends and we move to the new system. They are there as a defence. I am going to make sure that my language is precise, but that is the intent.

Some defences under the 2021 act will be continued under the 1972 act, but only for limited periods. Aboriginal cultural heritage permits and approved and authorised Aboriginal cultural heritage management plans will be transitioned as section 18 consents. Under the 2021 act, exempt activities that have been authorised under section 109, tier 1 activities under section 100, or activities where there was an assessment of no risk of harm under section 98A will form the basis of a defence under the proposed regulation 28 of the transitional regulations; however, this defence only applies for 12 months after the repeal. A defence for emergency activities is also provided for in proposed regulation 29 of the transitional regulations. Again, this defence only applies for 12 months after appeal.

The defences under the 2021 act will otherwise be saved in accordance with the proposed section 84, which is being inserted by clause 23 of this bill in relation to any offences committed whilst that act was in operation—that is, between 1 July and repeal day.

Hon PETER COLLIER: I have a few questions about proposed clause 1. I have got some other questions specifically about the section 18 clause which I will deal with. As we are dealing with a repeal bill—and I went through this quite thoroughly yesterday with regard to the fact that I felt there was an extraordinary lack of transparency with the rhetoric that was coming from the government about the 2021 bill that we were led to believe was perfect, and then it all went pear-shaped from 1 July. Was there ever an intent of the government to amend that bill prior to its implementation on 1 July 2023?

Hon SUE ELLERY: I am not sure I am in position to answer that question. Was there ever any intent by government to amend that bill? There has been no discussion that I have been involved in to amend the bill, but I am the representative minister so I could not say that the relevant minister did not think about it. I do not know what his thinking was. I am not aware of any consideration that had been entered into.

Hon PETER COLLIER: The reason I ask that is that at a public hearing of the Standing Committee on Estimates and Financial Operations this morning, we heard that the State Solicitor's Office had been asked to look at potential amendments, which seemed extraordinary. He is going to clarify that point. It was a public hearing. When I specifically asked that question, that is the response that I received. That would be extraordinary if that is the case. I am not going to verbal the Solicitor-General at all.

Hon Matthew Swinbourn: State Solicitor.

Hon PETER COLLIER: I apologise—the State Solicitor. We will wait until we get that back. Having said that, it would be interesting to know whether the government considered amendments in June this year and then implemented them in July, telling us everything was perfect.

Hon Sue Ellery interjected.

Hon PETER COLLIER: I will take on board what the minister has said. That is fine. With regard to the survey, there was not much detail in the response that the minister provided. The minister said that the survey is going to occur. Can the minister confirm that it will have a 10-year time line and will be publicly available?

Hon SUE ELLERY: I can tell the member that an annual program led by the Department of Planning, Lands and Heritage will be established to undertake surveys across the state. A flexible demand-driven element will be adopted, targeted to section 18 applications. Surveys will be undertaken only with the permission of landowners. There will be engagement with traditional owners to record and accurately map and remap Aboriginal cultural heritage sites. Approval will be sought to depict the true or accurate site or boundary location on the register. Through a gap analysis we will focus on areas that are not currently surveyed in, for example, high-density urban areas, to support priority infrastructure and areas within which it can be confirmed that Aboriginal heritage does not exist. Surveys for the purposes of mining, extractive industries, commercial and industrial subdivisions are the responsibility of industry and will not be funded.

How the program will be put together will be subject to consultation with all the stakeholders, including farmers and farming groups. If we use them as an example, honourable member, if someone is making a section 18 application, yes, the government will pay for that survey. If a farm is identified as a priority area, after consultation on what constitutes a priority area has been established with all the stakeholders, they will pay. If someone is not making a section 18 application and wants one for their farm, they will pay. What was the other one he raised with me? I am having a seniors moment. It has gone out of my head. But I think the key point to the note is that the survey will be a rolling one. It will start and be prioritised around those areas that are agreed to be priority areas. For example, if we are planning to build a road, that might be a priority area and it will roll out accordingly. If someone—a farmer,

for example—is making a section 18 application, yes, the government will pay. But, as I said, for mining and extractive industries, those surveys will be the responsibility of industry and will not be funded.

Hon PETER COLLIER: Thanks for that. That was comprehensive and that is what I wanted on the record, so that is great. In respect of the formulation and the development of this bill and the process we went through since the decision to repeal the 2021 act, there were two groups: the consultation group and the implementation group. Can the minister please give us some detail firstly on the consultation group? Who was included in the consultation group and why? Secondly, who was included in the implementation group and why?

Hon SUE ELLERY: I am advised that for the purposes of those who were consulted on the drafting of bill, the consultation group and implementation group were the same. I am advised that the membership was the co-chairs of the Aboriginal Cultural Heritage Council, the Chamber of Minerals and Energy WA, Association of Mining and Exploration Companies WA, Amalgamated Prospectors and Leaseholders Association, the Urban Development Institute of Australia, the Property Council, the Pastoralists and Graziers Association, the Western Australian Farmers Federation, Western Australian Local Government Association, Main Roads Western Australia, Nyamba Buru Yawuru in the Kimberley, Tjiwarl Aboriginal Corporation in the goldfields, Yindjibarndi Ngurra Aboriginal Corporation in the Pilbara, Whadjuk Aboriginal Corporation and the National Native Title Council.

Hon PETER COLLIER: Thanks for that, minister. That is good; that is comprehensive. To clarify, the consultation group and the implementation group are one and the same. They have different titles but the same composition?

Hon Sue Ellery: I am advised, honourable member, they are the same.

Hon PETER COLLIER: Okay. I appreciate that we are probably not going to get a uniform or overwhelming consensus, but was there any emphatic opposition to what was being proposed or created in the new bill?

Hon SUE ELLERY: The first thing I would say is that I am not speaking on behalf of any of them. They are all quite capable of speaking on their own behalf, but I am advised that the Aboriginal groups were concerned about the changes in the definition of “Aboriginal cultural heritage” and they preferred the 2021 version.

Hon STEVE MARTIN: For my clarification, there has been some discussion about the two names of the one group. When the consultation group first met, was it aware that it was dealing with the 1972 act with amendments or was it consulting on what it thought might be amendments or changes to the 2021 act?

Hon SUE ELLERY: Two things: it started out as the implementation group for the 2021 provisions, but once the government announced the change in policy, that group’s terms of reference were changed to be the consultation group for the matters that are before us now.

I am sorry to jump, but if it is helpful for Hon Peter Collier, I have another list of Aboriginal organisations that were consulted by the minister on the provisions before us now. We will break soon to take questions, and in the break, I will get a clean version of this copied so the member can see that. They are not part of the group, but they had separate meetings with the minister and were consulted on the details.

Hon STEVE MARTIN: Thank you, minister. Would I be able to find out when that group first met and how many meetings were held after the bill—the 1972 plus amended bill—was announced?

Hon SUE ELLERY: I do not have that information here, but we can find it for the member.

Hon COLIN de GRUSSA: As I understand it, the time line was that the implementation group came first and then became the consultation group once the change in policy—if you would like to call it that—was announced. Did advice from the implementation group lead to the change or was that decision made separately from the group?

Hon SUE ELLERY: I was not in the meetings, so I guess I could probably accurately describe it thus: it probably coloured the thinking of the minister, but I was not there. A lot of public debate was going on at the time, as the member might recall. I am sure all that was mixed up in the information that was in the minister’s and Premier’s thinking.

Hon COLIN de GRUSSA: After the change in decision, that group became the consultation group and began consulting widely—I think that was the word used yesterday. Was the amendment and repeal bill developed in consultation with that group? Did it provide advice about what should be in the bill?

Hon SUE ELLERY: The group was provided drafts of the changes. It was asked for its feedback. It provided feedback, feedback was taken on board, and some changes were made to reflect some of the things provided in the feedback. I think an example is the section 18 transfers.

Hon COLIN de GRUSSA: Who else was provided with the drafts? Who else was consulted in drafting the bill?

Hon SUE ELLERY: I referred to a list of other Aboriginal organisations that the minister consulted, and I will get the member a clean copy. I will table that afterwards.

Hon Neil Thomson; Hon Sue Ellery; Hon Nick Goiran; Hon Peter Collier; Hon Steve Martin; Hon Colin De Grussa

Hon COLIN de GRUSSA: I appreciate that. I guess what I am asking the minister is: were all those groups given copies of the draft bill and asked for their feedback, or were they just consulted on the development of the bill?

Hon SUE ELLERY: They were provided with the draft bill, draft regulations and policy documents and asked for feedback. They provided feedback, and feedback was taken into account.

Hon COLIN de GRUSSA: Thank you. As we know, we are dealing with bill 125-2 in this place, and the other place was initially dealing with bill 125-1. A number of amendments were proposed by government in the other place. How many amendments were proposed?

Hon Sue Ellery: By government in the other place?

Hon COLIN de GRUSSA: Yes, by government in the other place. There must have been a list.

Hon SUE ELLERY: Can the member not just look at *Hansard*? I am advised that there were four key issues and 22 amendments.

Hon COLIN de GRUSSA: Did all the amendments arise out of the consultation process? In other words, was the genesis of those amendments from only the consultation group and those other bodies consulted?

Hon SUE ELLERY: Nine of the 22 were minor administrative and technical amendments. The rest reflected the discussions and feedback provided about the provisions.

Hon COLIN de GRUSSA: Were any other amendments identified by either the consultation group or other bodies consulted and then not proposed by government?

Hon SUE ELLERY: As the member would anticipate in the normal scheme of things, some feedback was taken on board and some was not. For example, Hon Peter Collier asked me a question about whether those consulted were not happy with any elements, and I gave him the example of the definition of heritage. That was one of them. In the normal course of these things, some people will suggest that we do X, Y and Z, and government will say, "Thank you very much. We will do X and Y." That is the normal process of consultation and consideration of these things.

Hon NEIL THOMSON: How will the agency receive complaints about any breaches it might investigate, and from whom would it receive complaints?

Hon SUE ELLERY: It will be all modes. Some people will send emails. A particular portal can be used as well. Some people will phone. All manners of communication will be received.

Committee interrupted, pursuant to standing orders.

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