ABORIGINAL HERITAGE LEGISLATION AMENDMENT AND REPEAL BILL 2023

Committee

Resumed from an earlier stage of the sitting. 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 14: Section 18 amended —

Committee was interrupted after the clause had been partly considered.

Hon Dr BRAD PETTITT: I will move my amendments very shortly. I have one last question regarding something that I am trying to understand around consultation. Were the government's simple and targeted amendments, as called by the minister, endorsed by the Aboriginal Advisory Council, which has been described as Western Australia's version of the Voice? I would be interested to know what its views were on these amendments.

Hon SUE ELLERY: No, it did not provide endorsement.

Hon Dr BRAD PETTITT: Was the Aboriginal Advisory Council even consulted?

Hon SUE ELLERY: It was provided with a briefing.

Hon Dr BRAD PETTITT: My comments here are probably well expected. Providing a friendly information session to a group that was meant to be an advisory council, which clearly has not endorsed these amendments, that was meant to be making sure in many ways that we got this kind of legislation right should be of great disappointment. My amendments to clause 14 are based around the way that section 18s consult Aboriginal people way too late in the process. The early consultation that ministers talked about is simply a guideline and we hope that companies will do the right thing. Our legislation should require more than guidelines; it should mandate that the right things happen and not rely simply on goodwill. It is with that in mind that I note my series of amendments to clause 14. I think they are probably worth moving together. I will take advice from the chair on that.

The DEPUTY CHAIR: Having taken some information, you have four separate amendments and putting them together in one motion would be rather difficult. Would you prefer to present them individually?

Hon Dr BRAD PETTITT: I am certainly happy to. Advice by my office was to move them concurrently, but if your advice is to move them separately, I am very happy to do so.

I move the amendment standing in my name —

> Page 14, lines 1 to 5 — To delete the lines and insert —
>
> (2) In section 18(2):
>
> (a) delete "shall, as soon as it is reasonably able," and insert:
>
> must
>
> (b) delete "site" (second occurrence) and insert:
>
> cultural heritage
>
> (c) delete "evaluate the importance and significance of any such site, and" and insert:
>
> and whether the proposed use of the land can be done, including subject to conditions, so as not to impact, damage or destroy that Aboriginal cultural heritage and
>
> (d) delete "its recommendation" and insert:
>
> the views of the native title party and the recommendation of the Committee

Hon SUE ELLERY: The government opposes this amendment. It is worth drawing to the honourable member's attention that the first part of his amendment says —

> (2) In section 18(2):
>
> (a) delete "shall, as soon as it is reasonably able," and insert:
>
> must

I take the honourable member to the bill before us; that is exactly what the bill before us says, therefore, the amendment will not make any changes. That bit of the amendment does not amend anything; it is a cut and paste out of the existing bill. I am not sure why the member would want to —

Hon Dr Brad Pettitt: So you support it.

Hon SUE ELLERY: Of course I support it. I cannot support the amendment because of the rest of it! I do support that bit, but I cannot support the rest. I do not know why the member put it there. With respect to what the member is actually trying to amend, which is from (b) onwards to replace the word "site" with "cultural heritage", as I have already

indicated, the introduction of concepts from the 2021 act, such as Aboriginal cultural heritage, is not supported. It would see that the committee is not required to form an opinion as to whether there is an Aboriginal site on the land, but instead whether there is Aboriginal cultural heritage on the land. When considered in light of the member's other proposed amendments—I appreciate we are not dealing with them as a bundle but they are related—this would fundamentally change the nature of the section 18 process, which is what was set out in the member's proposed objects and principles provisions, which the house has already rejected. This amendment would fundamentally change the purpose of a section 18 consent, which is, in effect, an exception to the offence of destroying or damaging an Aboriginal site under section 17 of the 1972 act. The member's amendments do not properly consider the interaction between the offence in section 17 and the purpose of the section 18 consent. Therefore, the amendment is not supported.

With respect to the amendment in proposed paragraph (c), I note the section 18 consent process authorises a person to use land for a purpose that, unless the minister gives their consent, would be likely to result in a breach of section 17 for any Aboriginal site on the land. What is proposed here, together with the amendment proposed by paragraph (b), is an amendment to the section 18 process such that the committee would not be required to evaluate the importance and significance of any Aboriginal site on the land, but rather whether the proposed use of the land can be done, including subject to conditions, so as not to impact, damage or destroy that Aboriginal cultural heritage. That, again, would fundamentally change the process of considering a section 18 notice and therefore is not supported.

With respect to the amendment proposed in paragraph (d), it is the practice of the committee to seek the views of a broad range of Aboriginal parties before making its recommendation to the committee, consistent with Justice Chaney's decision, which I referred to in our earlier discussion and many members have already referred to, in order to ensure procedural fairness. Rather than expanding the scope of consultation with Aboriginal people, the proposed amendment will limit the range of Aboriginal people with whom the committee is required to consult and prioritise the views of certain Aboriginal parties. This amendment is therefore not supported.

Hon NEIL THOMSON: I rise to express my furious agreement with the government. The minister has eloquently outlined why this amendment should not be supported. I reiterate at this point some of the comments made by the minister about the definitions of "site" and "Aboriginal cultural heritage" would somewhat—I paraphrase, so I ask for forgiveness for that—confound the act or make it difficult to provide that clarity. I express and reiterate that the opposition will not be supporting the amendments as presented.

Amendment put and negatived.

Hon Dr BRAD PETTITT — by leave: I move —

Page 14, after line 5 — To insert —

(2A) After section 18(2) insert:

(2A) In making the recommendation under subsection (2), the Committee shall have regard to:

(a) the views of the native title party or parties;

(b) the objects of the Act;

(c) the principles relating to Aboriginal cultural heritage; and

(d) the principles relating to management of activities that may harm Aboriginal cultural heritage.

Page 14, after line 5 — To insert —

(2B) In section 18(3) delete "general interest of the community" and insert:

matters in subsection (2A)(a)–(d)

Hon SUE ELLERY: The government will be opposing both of these amendments. I thank the member for agreeing to move them together. As I mentioned earlier, the committee in practice seeks input from a broad range of Aboriginal parties, including but not limited to the native title party in relation to the land, as that term is proposed to be defined. It is not appropriate to limit the committee to having regard only to the views of the native title party. Further, as the amendment proposing insertion of objects and principles was not supported, the remainder of this amendment is also not supported.

I turn to the amendment at 13/14; we oppose that one as well. The amendment proposes the removal of the requirement for the minister to have regard to the general interest of the community when deciding whether to consent to the proposed use of the land. The general interest of the community test includes the general interest of Aboriginal people and provides scope to balance other broader social and economic considerations without prioritising one over the other. The 2021 act similarly recognises the need for the minister to have this ability by the inclusion of the similar concept of the interests of the state. As I mentioned earlier, it is not appropriate to limit the minister to having regard only to the views of the native title party as opposed to other Aboriginal parties who may have an interest to be considered.

In addition, this clause seeks to ensure that any recommendation of the committee is made in accordance with the principles and objects. Again, the chamber has already dealt with that and rejected it, so the amendment is not supported.

Hon NEIL THOMSON: For the record, the opposition will not be supporting these amendments. I also understand that there is capacity within the committee for the establishment of procedures. I have confidence in the committee. I think the Aboriginal Cultural Material Committee has provided an incredible service and I think it should not be diminished. The newly configured committee, with some adjustments, may—I hope will—provide an ongoing service to the state in the interests of Aboriginal people, dealing with and working very closely with native title parties, and obviously working around a set of principles that conform with the legislation that will be in place and the legislation that is before us. I will make one comment on the support previously provided by a standalone Department of Aboriginal Affairs. It was disappointing in some ways that the machinery-of-government process led to the Aboriginal heritage component of that department being subsumed into the Department of Planning, Lands and Heritage. In my view, that does not adequately provide the level of engagement that occurred with the Department of Aboriginal Affairs. I note that the WA Labor Party, as part of its platform at the 2017 election, promised to create an office of the Aboriginal advocate with, I believe, an independent commissioner. None of that has occurred. I am sure a lot of the challenges relating to the intent of what Hon Dr Brad Pettitt has put in this amendment, requiring the committee to consider certain aspects and consult with certain persons or parties, would have been required even less if that work had continued to be undertaken with the structural governance that was in place prior to the machinery-of-government changes. That is just for the record. I support the government's position on this and I will not be supporting the amendments.

Amendment put and negatived.

Hon Dr BRAD PETTITT: I move —

> Page 16, lines 10 and 11 — To delete "may, having regard to the general interest of the community," and insert —
>
> > must seek the views of the native title party for that land and may, having regard to those views and the objects of the Act, the principles relating to Aboriginal cultural heritage, and the principles relating to management of activities that may harm Aboriginal cultural heritage

Hon SUE ELLERY: The government will be opposing this amendment for the same reasons that we have opposed the most recent bundle of amendments moved by the honourable member. It is similar to that proposed in respect of proposed sections 18(2A) and 18(3). It is not appropriate for the minister to seek the views of only one party when reconsidering the section 18 consent following receipt of the new information about an Aboriginal site.

Hon NEIL THOMSON: Again, for the same reasons that we were outlined by both the minister and me on the previous amendments, we will not be supporting this amendment. Again, I put on the record, the fact that we would somehow remove the capacity to have regard for the general interests of the community I find an outrageous proposition. At the end of the day, this has to be a consideration for the committee. It refers to "may, having regard". I think we have to trust those appointees and experts on that committee to proceed with a very broad assessment and balance the needs that are required in our modern society while protecting, to the greatest extent possible, important Aboriginal heritage. The opposition will not be supporting this amendment.

Amendment put and negatived.

Hon Dr BRAD PETTITT: I move —

> Page 17, after line 1 — To insert —
>
> (6A) In section 18(7):
>
> (a) delete ", if it is satisfied that it is practicable to do so," and insert:
>
> seek the views of the native title party for that land and, if consented to by the native title party,
>
> (b) after "place of safe custody" insert:
>
> agreed to by the native title party.

Hon SUE ELLERY: The government will be opposing this amendment as well. The amendment would have the effect that the committee could take action under section 18(7) only if the native title party consented to it. Section 18(7) provides that —

> Where the owner of any land gives notice to the Committee under subsection (2), the Committee may, if it is satisfied that it is practicable to do so, direct the removal of any object to which this Act applies from the land to a place of safe custody.

It would not be appropriate to introduce into the legislation the concept of a veto whether by native title parties or otherwise and, therefore, this amendment is not supported.

Hon NEIL THOMSON: For the record, the opposition will not be supporting this amendment either for similar reasons to those outlined by the minister.

Amendment put and negatived.

Hon NEIL THOMSON: I would like to get back to the point that I was raising prior to question time, before I ran out of time. There will be a few more questions on clause 14 because it is a quite complex clause. This relates to clause 14(3) on page 14 of the bill, which states —

> After section 18(3) insert:
>
> (3A) 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.

I think there is probably some sense to that. However, I want to have a broader discussion on some of the challenges of this legislation. I understand the necessity to have quite a narrow scope with the amendments, but I think it is worth saying that this act has its flaws. We discussed that the last time we were considering the ACH, and that is why on first blush, before we saw the regulations, the opposition said that there was the need for reform. We saw under the Petroleum and Geothermal Energy Resources Act the issues around notices requirements. There is also the requirement to provide information more broadly in relation to surveys. This will introduce a notice requirement. It will also apply to the undertaking of surveys on mining tenement grounds that are not notified. There are aspects around providing information around surveys. There is not a requirement in this legislation for the sharing of information. It could also apply to the idea that for a notice on a decision under subsection (3), whilst the notice is being introduced, there is no requirement to provide information. It may be the case that, for example, a freehold property where the proponent, being a leaseholder of a mining tenement, might seek a section 18 approval and then not provide that information to the freehold owner. I hope I am getting the terminology right. Can the minister provide some clarification on a case, for example, when we are dealing with a gypsum mine in the wheatbelt, where these things are happening more often and when there is an undertaking, is there a requirement for that information to be provided? Similarly, it would seem sensible to consider—maybe the time is not right now—further notices or publishing information of surveys on the identification of Aboriginal heritage, which should be provided more openly, particularly for landowners or those who might have a similar or relevant interest. It is a simple question. Notwithstanding our opposition to bringing in too many amendments, has there been any consideration of providing greater information sharing relevant to surveys in addition to the publication of a notice?

Hon SUE ELLERY: Information about surveys is published and made public on the register. If the honourable member recalls, we had this discussion earlier in the debate. It might be the case that, for reasons that are important to the local Aboriginal people, the precise location is not identified so that people do not go and try to wreck it. That might not be available, but the survey information is published. Generally, where a survey is done, that is published on the register.

Hon NEIL THOMSON: Sorry, I misunderstood. I did not realise that survey information was available. That is good to hear. On the same page, clause 14 has the provision of inserting proposed subsection (5A). From my reading, I assume this has the effect of removing the gag order or the capacity. I am happy for an interjection, but my understanding, this is to do —

Hon Sue Ellery: It is about the gag order.

Hon NEIL THOMSON: That is right. It basically allows for proceedings in a court or tribunal for the matter of a native title body or party that effectively has had a contract. Certainly, that general concept is important, as we are supporting the bill. I seek clarification on the extent of the impact on how this provision deals with a State Administrative Tribunal appeal. In my perusal of this bill, I was a little challenged in identifying where we are extending the capacity for the SAT appeals. I know there is a broad appeal process, although it is separate to the call ins, so maybe the minister could indulge me a little. Is this also the provision for broadening the SAT appeal process in relation to these changes?

Hon SUE ELLERY: The provision that we are talking about now in subsection (5) is specifically about the gag. This is not the bit that gives rise to the SAT question that the member wants to talk about. This is just about the gag.

Hon NEIL THOMSON: Is the minister able to assist me, partly because my notes have got a little out of order.

Hon SUE ELLERY: Do you want to know where the SAT bit is?

Hon NEIL THOMSON: Yes, please. That simple question, yes.

Hon SUE ELLERY: It is subsection (4), just above subsection (5), which will take the member to section 18(5).

Hon NEIL THOMSON: I thank the minister. I appreciate that. We have been covering it for a few days. I had notes organised and things got disorganised in the space of the weekend. I have no real problem with subsection (5) as far as I can see, so I will leave that there. I want to talk about the impact subclause (4) will have on the SAT and

its capacity to actually deal with this matter. Again, I seek forgiveness here about the existing act, because when reading the bill, one misses the detail of what is actually in the act. I had the blue bill before, but I do not have it in front of me right now.

Hon Sue Ellery: By interjection, honourable member, would it be helpful if I read out the note about what this actually —

Hon NEIL THOMSON: Please, that would be of great assistance.

Hon SUE ELLERY: I live to serve. The section 18 process previously included a right to review to SAT of the minister's decision for landowners, but not for Aboriginal people. The bill will extend the right of review to the relevant Aboriginal parties, defined as native title parties, under proposed section 18(1AA). It is a fundamental protection in the new legislative framework. Further, proposed section 18(5A), which we are talking about now, is being added to render a provision of contract with a native title party, which restricts native title parties to a right of review of a section 18 consent decision, or commencing or being heard in subsequent court, and/or tribunal proceedings to be of no legal effect. The State Administrative Tribunal will make a decision on any request for review, with that decision subject to the normal appellate process to the Supreme Court. The right of review is a right to seek merits review of the minister's decision under section 18(3) to grant or not grant a section 18 consent, or a decision of the minister arising from reconsidering the consent after becoming aware of new information under proposed section 18(6A). The right of review applies equally to landowners and native title parties who are aggrieved by a decision of the minister. The extension of the right of review to native title parties and the inclusion of a right of review of a decision under section 18(6A) are new additions to the 1972 act proposed by this bill.

This right to merits review under the bill will not exclude the ability to seek judicial review of the decision; however, in accordance with section 19(3) of the State Administrative Tribunal Act, a SAT proceeding for a review of a reviewable decision cannot be commenced at the same time as judicial review proceedings are commenced, and if a SAT proceeding for the review of a reviewable decision has commenced, judicial review proceedings cannot be subsequently commenced in relation to the decision. Also, if judicial review proceedings have commenced in relation to a reviewable decision, a SAT proceeding for the review of a decision cannot subsequently be commenced. Essentially, an aggrieved person cannot have both a merits review and a judicial review going at the same time, and cannot seek judicial review of the decision once a merits review proceeding has commenced.

Hon NEIL THOMSON: I appreciate that, minister. I was able to get my blue bill back on the screen after question time, so that helps a little bit, too. Thank you very much for your indulgence, minister, and thank you for the clarification on not being able to do the two reviews at the same time, which I think is an important aspect of this. Certainly, the extension of a right of review—a low-cost appeal through a merits review, as the minister described—through the SAT seems reasonable in principle. The question for us as legislators here is: How do we understand the impact of that? How will that play out in reality going forward? We come here with different levels of experience on these matters, and our constituents would expect us to focus on the likely impacts and potential unintended consequences of this provision. The State Administrative Tribunal has the ability to look at matters within the administration of the legislation. Is there any way of describing in laypeople's terms the different types of appeal that might go through a judicial review process and might go to the SAT? Can the minister outline and elaborate a little bit on that? How likely then will that be to occur once this review process is law?

Hon SUE ELLERY: It will depend on the circumstances as they arise. Judicial review is a review of whether an administrative decision was made lawfully. It is not a merits review process. It would apply to the decisions of the committee, the minister or the Premier, as it did prior to the 2021 act. It is open to persons who have standing to seek review of such decisions, which are heard in the Supreme Court. The ability to apply for judicial review is not based on statute and, as such, there is no reference to it in the bill.

Hon NEIL THOMSON: That helps me because it reminds me of what I understood to be the process. The judicial review would look at whether the matter was lawful, but there is probably more scope in the interpretation of the merit of the matters going forward. That opens up some challenges in resourcing the SAT and the capacity for the SAT to make considered judgements on matters that fundamentally have already been subject to a merits assessment by the committee. We just had a debate on the broader interests of the community in the proposed amendments put forward by Hon Dr Brad Pettitt in relation to removing that scope. Given that the committee has the capacity to weigh up the interests and decisions of those people who are seeking to protect their heritage and the broader community interests, how will the SAT add value to the committee's decisions?

Hon SUE ELLERY: If a person does not like the outcome—that is, the merits—they would go to SAT. If they think the decision-maker did not use the proper process—so, did not follow the law—they might seek judicial review.

Hon NEIL THOMSON: That is correct. Therefore, the issue here is—I am going to the heart of the problem—I feel that maybe the SAT is not properly equipped to deal with this matter. We already have a committee with Aboriginal membership that has the support of, and access to, a range of expertise such as archaeologists and anthropologists.

The SAT is a specialised body that makes decisions, and it is not as though—if I could use a comparison—it is a joint development assessment panel on which three professional members and two local government members make a decision that people can appeal on the merits of it if they do not like it. Given the history of the SAT, I would have thought that it was well equipped to do a merits review of the very regular decision-maker that is a JDAP. My point is: I can see why it was of interest to the government to just go to the SAT's process. I will not pursue this too long, but why will we provide a SAT commissioner to then do a merits review and potentially overturn a decision of the specialist body—a one of a kind in Western Australia—that is the committee that is already subject to considerable oversight and scrutiny?

Hon SUE ELLERY: I am not sure I entirely understand what the member is asking me, but I think he is asking: is the SAT equipped to deal with these matters? Yes, it is. The SAT deals with a whole range of matters across the span of decisions made by government, and it brings in people with particular expertise in those particular areas as it needs to. That is what it was established to do. The SAT certainly does not deal with just planning-type decisions; it deals with the full range of decisions, and is equipped to do that.

Hon NEIL THOMSON: Has any assessment been undertaken on the anticipated volume of SAT appeals?

Hon SUE ELLERY: No.

Hon NEIL THOMSON: This is a contended space at times. The committee's decisions will not always be agreed to. We hope that the vast majority of the decisions would be agreed to because of the consultation process, but given that it is potentially contended space, is it the government's expectation that the SAT will approach the government to seek additional resources if that becomes an issue?

Hon SUE ELLERY: Yes.

Hon NEIL THOMSON: Will the government review this additional process as we go forward, given the outcomes if it turns out that every decision or a lot more decisions are contested in this jurisdiction as opposed to going to court, which obviously has a higher threshold of cost and a different scope? Is that something that the government has considered going forward?

Hon SUE ELLERY: The honourable member is asking me to look into my crystal ball. I am not in a position to do that. From time to time, the government considers requests from SAT as part of the normal budgetary process. I am sure that will continue to apply.

Hon NEIL THOMSON: Proposed section 18(9) states —

> The regulations may provide for —
>
> (a) procedural matters for the purposes of this section; and
>
> (b) timeframes for doing things —
>
> In the section —
>
> under … this section, or for performing functions …

Regulations will be introduced to provide for a range of processes, including —

> (i) prescribing time limits … required …; and
>
> (ii) prescribing time limits within which a function must be performed; and
>
> (iii) providing for the extension of such time limits.

Are these regulations in draft form?

Hon SUE ELLERY: Yes. The regulations were provided in the consultation draft.

Clause put and passed.

Clause 15: Sections 18A and 18B inserted —

Hon NEIL THOMSON: Clause 15 seeks to insert proposed section 18A, "Premier may call in application to State Administrative Tribunal for review". I thank the minister for correcting me when I made an incorrect statement relating to the Planning and Development Act. I acknowledge that correction. For some reason, I knew that, but I must have been waxing lyrical at the time. One of the good things about this place is that if we make a mistake, it is always highlighted very clearly by members opposite, which is a good thing. That is why we are here—to work through these difficult matters.

Looking at these call-in powers, there is some difference in my mind between the call-in powers provided. Just to refresh my memory, I went through the wording. I do not know whether there is any difference between these and the ones in the Planning and Development Act. We have a process. Given that we are providing that SAT appeal

process, it probably makes sense. The legal purists do not like interference and these quasi-judicial processes by the executive. But in this case, given that it is the SAT and given that we have two alternatives, we can effectively intervene at an early stage and get SAT to consider, via recommendation to the Premier, or otherwise consider those matters. I had some experience around 2010 in a couple of call-in matters when I was in a former role.

I suppose the issue we are considering now is that we will be using the Premier. This is probably a little different from the case of the Planning and Development Act in which this call-in power would be applied when another body such as a JDAP made a decision and then someone appealed that decision as a trigger. It would then be up to the minister to call it in. It is different. Here we have a body that will be under the auspices of the responsible minister to make a decision. It will be appealed, and then the Premier will call it in. It is a little different. It is worth fleshing this out a bit. It cannot just be said to be the same as the Planning and Development Act because it is different in that respect. The Premier is not calling in the Minister for Planning's decision. The minister will be calling in a JDAP decision. In this case, the Premier will call in the minister's decisions. I see the need for some sort of call-in for protection in matters of significance. Why was the Premier included in this area of the bill when a minister has oversight of the committee? Why was the responsibility not given to the Minister for Aboriginal Affairs to call in a matter?

Hon SUE ELLERY: I think the honourable member might be confused. He is saying that this is not similar to the planning arrangements for certain reasons. It is important to understand that the Premier will not be able to call in an application before the courts. The Premier will not be able to call in an application before a committee. The Premier will be able to call in a decision made by the minister, so the minister is the administrative decision-maker in this case. There are three elements: the minister was the administrative decision-maker; the tribunal's role was effectively to be an administrative decision-maker; and the Premier's role is also to be an administrative decision-maker. As I said before, this call-in power is not novel. The Planning and Development Act includes a similar power for the Minister for Planning to call in an application to the tribunal for review. The reason the minister proposes that the Premier and not the minister has the call-in power is that the decision that will be the subject of review will be a decision of the minister. One cannot have a minister calling in their own decision; we have to go one level above. It would not be appropriate for the minister to call in their own decision. If the Premier exercises the call-in power under proposed section 18A and either directs the tribunal to refer the application or directs the tribunal to hear the application and refer it with recommendations, the Premier will have to cause a copy of that direction to be laid before each house of Parliament. In addition, the Premier will have to cause a copy of their written reasons for determination to be laid before each house of Parliament. These processes provide transparency and the ability for Parliament to scrutinise the exercise of the Premier's call-in power to ensure it is properly exercised. Finally, a decision of the Premier may also be the subject of a judicial review application to the Supreme Court. This is not required to be expressly provided for in the bill as it is available under common law.

Hon NEIL THOMSON: I think it is very important to be clear. These call-in powers could probably be described as similar to the call-in powers under the Planning and Development Act but they are definitely not the same because, as the Leader of the House rightly pointed out, the decision-maker is the minister through the committee. However, under the P&D act, it is more through a delegation through to a JDAP or a local government or some other decision-maker, which has the power to make a decision under the Planning and Development Act. That is then appealed and called in. I think that is different. The Leader of the House rightly pointed out the approach through judicial review.

Sitting suspended from 6.00 to 7.00 pm

Hon NEIL THOMSON: I would like to finish off on this clause with a couple of questions. I thank the minister for the background on this. She mentioned that under proposed section 18A(5), a copy must be laid before each house of Parliament. Will that mean it could be subject to disallowance or will it just be for notification?

Hon SUE ELLERY: No. The Premier will be providing advice to the Parliament. He will not be asking Parliament to endorse it or otherwise. It will not be like a regulation. He will be providing a report. The member would need to ask the clerk, but maybe once it is tabled, there might be some way it could be made the subject of a motion or something, but, of itself, no.

Hon NEIL THOMSON: The last question that plays to this point about the likelihood of a lot of applications going to the State Administrative Tribunal is: can the department, based on its experience with the provision of the Planning and Development Act, provide an estimate of the general cost of a SAT review as opposed to a judicial review?

Hon SUE ELLERY: The short answer is no, that work has not been done. A person does not need legal representation to appear before SAT, but they obviously would to take it to judicial review. I cannot give the honourable member any more information than that.

Hon Dr STEVE THOMAS: I thought the minister's explanation before the dinner break was pretty good. One of the first things I thought when I read this provision was why would the Premier call in this decision rather than the minister. Obviously, the minister is right; it would be unusual for a minister to call in their own decision, because it would be an admission that they got it wrong. It is also a bit interesting that the Premier might call in the decision of a minister. I imagine there would be a bit of tension around the cabinet table if a minister made a decision based on a set of information they had been given and the Premier said, "Hang on a minute; I don't think you've necessarily made the right decision." I would assume that the two might have a conversation "behind the chair", as we would say, and perhaps deliver an outcome before it got to that point. I will be really interested to see how often a Premier in effect suggests to a minister that they got the decision wrong. I think that will be particularly interesting. That is more comment than question.

I am interested in the thresholds that might apply. The bill states in proposed section 18A(2) —

> If an application is made … for review … the Premier may determine the application if the Premier considers that the application raises issues of such State or regional importance that it would be appropriate for the application to be determined by the Premier.

Proposed section 18A(3) states —

> The Premier may —
>
> (a) direct the President of the State Administrative Tribunal to refer the application to the Premier for determination;

Effectively, the Premier will say that they need to determine the application because it is too important for the state. The head of the State Administrative Tribunal will send it back to the Premier, and the Premier will make the decision. We would think, in theory, it would be made at the cabinet level, but I am aware, without pointing fingers or casting aspersions, that occasionally Premiers do not think cabinet consultation is all that necessary. I am interested in the definition of the threshold of issues of such state or regional importance. Has the minister given any thought to a definition of that so that we do not get into a debate and a discussion down the track? I can see an attempt at judicial review whereby someone says the Premier said an application is of regional significance and nobody knows what the definition is. Has the minister given some thought to the definition of state or regional significance and is she in a position to give us more detail on that?

Hon SUE ELLERY: The short answer is no, honourable member. It would depend on the particular circumstances. We are not trying to prescribe what that might be. The short answer is no.

Hon Dr STEVE THOMAS: I guess the fallback position is that it becomes an instrument that is laid on the table of Parliament.

Hon Sue Ellery: The Premier is required to give reasons for the decision and to table those. It would have to be something that was defensible, if you know what I mean. You would have to be able to explain it.

Hon Dr STEVE THOMAS: It might depend on what the numbers in Parliament are. I get that at least there is a mechanism, which we should note. Perhaps if the government was in a position to give that more definition over time, it might be useful to try to pin that down. I think the question will come up in the fullness of time. I had a question around proposed section 18B, but I do not know whether anyone else wants to speak on proposed section 18A before I get too excited.

Hon Dr BRAD PETTITT: I will not be supporting this clause. At the heart of this, we have heard time and again in response to almost every question that the government wanted to make only minor and targeted changes to the legislation, and here we have a reasonably large change to the legislation. I am certainly concerned about it. I know other stakeholders are also concerned that it is more likely to see, probably, the destruction of cultural heritage than its protection. Given the laser-type focus through this Committee of the Whole debate on not making changes to the legislation, why was this one such a priority?

Hon SUE ELLERY: First off, I make the point that I never said "minor"; I said "simple and targeted". The call-in power has been included to recognise that in some cases it is appropriate for an application for a review of the minister's decision to be determined by the Premier. It allows the Premier to intervene when the Premier considers a matter to be of state or regional importance and, therefore, appropriate for the Premier, rather than SAT, to determine.

If the member recalls, I said that this is about trying to put in place review mechanisms to ensure that we do not find ourselves in the position, like we did with Juukan Gorge, in which the minister of the day is not able to do anything about it. That is the reason for it, honourable member.

Hon Dr BRAD PETTITT: Is the Leader of the House confident that this provision is more likely to be used to protect cultural heritage than ensure its destruction? I raise that because I think there is a reading that the state significance part could often refer to projects that would potentially see cultural heritage destroyed. It seems there

are very few examples in which the state significance provision would be used to protect Aboriginal cultural heritage. Is it the expectation that it will be used to protect Aboriginal cultural heritage or the opposite?

Hon SUE ELLERY: I am sorry; there was a little bit of noise behind me. If I understand the question, it is asking whether I think the purpose of including this power is more to provide for the protection of Aboriginal culture than not. Is that what the question was?

Hon Dr Brad Pettitt: Yes. By way of interjection, I raise it in the context of state significance, which is one of the key triggers for this.

Hon SUE ELLERY: It may well be that state significance is Aboriginal cultural heritage. Is the member saying that he thinks that it is more likely that it will be a gas project? Is that how I can interpret the member's question?

Hon Dr Brad Pettitt: Yes. Most examples of state significance are not Aboriginal cultural heritage.

Hon SUE ELLERY: There is nothing in the bill before us that says state significance is only about economic value. In fact, it is not limited to financial value or the consideration of a proponent's interest. It is able to recognise a wide range of circumstances, including those of Aboriginal people and the general community.

Hon NEIL THOMSON: For my colleagues, I have moved on to proposed section 18B under clause 15. It is about the change of ownership of land subject to section 18 consent. By the way, that is a principle that we support. I think it is great that now it will be explicitly introduced. The Leader of the House could imagine many cases in which ownership, given its definition within the bill, would go to leaseholders and persons holding tenements, for example. I think it is important because those transfers happen all the time.

Up until now, has it been the case that, say, whenever there is a sale or change of ownership of a mine, that the section 18 consent has needed to be reapplied?

Hon SUE ELLERY: Yes.

Hon NEIL THOMSON: Does the Leader of the House have any read on how many of those cases have not complied with the requirements of the act and might be operating outside the scope of the law? Are there any examples out there? She does not have to name them. We will not go about shaming anybody, but are there examples out there in which people may have unwittingly sold their properties and continued to operate while thinking that they were under the remit of prior consent?

Hon SUE ELLERY: Not that we are aware of, honourable member.

Hon NEIL THOMSON: I have another question. Again, I am in support of this. I note that proposed section 18B(2) states —

> If there is a change in ownership of land the subject of a consent under section 18(3)(a), an owner of the land must give notice in writing to the Minister within the period prescribed by the regulations.

What is that period? Is that already included in the draft regulations?

Hon SUE ELLERY: Yes, it is, honourable member.

Hon NEIL THOMSON: In that period?

Hon SUE ELLERY: It is proposed regulation 20, and it is 14 days.

Hon NEIL THOMSON: That seems like a fairly tight time frame. I would have thought that most, not all, of these ownership changes would go through Landgate. I would have thought a large number would go through. Has there been any consideration to put in a system to automatically flag these things?

Hon SUE ELLERY: I am advised that there have been discussions with Landgate. The member makes a correct point. Landgate will not be able to capture all the changes of ownership, but, yes, there have been discussions with Landgate.

Hon NEIL THOMSON: We have other online systems. I am trying to think of the name of the one managed by the Department of Mines, Industry Regulation and Safety for the tenements. Is it correct that that would also require the same transfer process?

Hon SUE ELLERY: Yes, there have been discussions with DMIRS, but it is important to remember that the onus is on the owner to make sure that they comply. However, yes, there have been discussions with other sources of information about the change of ownership.

Hon NEIL THOMSON: These are my last questions on this clause. If the owner does not notify DMIRS of the transfer of land just because they forgot or had not read the regulations, or the settlement agent or whoever is responsible for that process had not done so, and if someone identified that as a breach in three or six months' time, they would probably cop a fine, but would they then be able to transfer the section 18 application? Will there be a period when a section 18 application will lapse; if so, would they then have to go through the whole process again?

Hon SUE ELLERY: The transfer will be automatic, and the 14 days is about the notice period. I am not quite sure where the member is trying to go there.

Hon NEIL THOMSON: That helps me because basically they would not be in breach of any provisions under the Aboriginal Heritage Act 1972, other than the fact that they failed to notify. Basically, someone who failed to notify could continue to go on with their operations; they would not be subject to any legal action or be penalised under section 5 of the act. The penalties under section 5 are much greater, obviously, and one can go to jail. There are penalties that would apply to some of these things. Is it correct that that person would not be in breach of anything other than the fact that they failed to notify the department?

Hon SUE ELLERY: The risk is that for the period that they had not notified of the change, they might not be complying with any conditions that had been put onto that section 18 application, so they might still get themselves caught up in that.

Hon NEIL THOMSON: Therefore, if they knew about the section 18 application, they had the documentation and management plans that they had to comply with, and they were meeting all the requirements under that but just simply failed to notify, is the minister saying that in 10 years' time they could notify and then be up for a $1 000 fine? Is that right? Basically, would there be no legal avenue for a body—provided they were meeting all the other requirements—to take them to court for failing to conform with proposed section 18A?

Hon SUE ELLERY: It would depend on the circumstances but, without knowing anything else about the general proposition that the member is putting, yes, they would need to have been complying with the conditions that had been imposed on them.

Hon NEIL THOMSON: Thank you; I think clarification is important. I would have thought that it would be a normal thing for someone who has bought a property under a section 18 to operate a small mine or quarry. Administratively, if people forget, the government will have the wrong information—sorry, the committee would have the wrong information. In fact, the government would have the right information, but it would be sitting in Landgate somewhere. I will not pursue that issue anymore.

Clause put and passed.

Clause 16 put and passed.

Clause 17: Sections 28 to 36 replaced —

Hon NEIL THOMSON: This clause will establish the Aboriginal Cultural Heritage Committee, the composition of which will be broader than that of the Aboriginal Cultural Material Committee. It will have two co-chairs, which is probably a good thing, and we support it overall. I have a question about the gender composition of the committee and keeping it balanced. Is that a new normal provision? I understand the reason for it—I am not suggesting it is a bad idea—but given that certain people have to be appointed for specific reasons and between four and nine other persons will be appointed by the minister, some of whom will be experts, I am not sure why that provision has been included. Is it now a common thing to conform with the provisions of the Equal Opportunity Act 1984?

Hon SUE ELLERY: It is a recognition that there is traditional Aboriginal women's business and traditional Aboriginal men's business. It is about making sure that there is an appropriate gender split in the first instance.

Hon PETER COLLIER: Minister, I have held my breath, but it is time to bring down the government!

Hon Sue Ellery: Give it your best shot!

Hon PETER COLLIER: I will give it my best shot. I have a couple of questions about the composition of the committee. There will be two chairpersons with an additional four people, up to 11 members in total. As a matter of interest, what will be the quorum?

Hon SUE ELLERY: Five members.

Hon PETER COLLIER: I turn to conflicts of interest with members of the committee. Of course, as I understand it, whenever possible, members of the committee will be Aboriginal. I get that, but sometimes it will not be possible. There will be situations in which Aboriginal people will quite likely have a conflict of interest during the consideration of a section 18 application. Are there any strategies in place to ensure that there will be a quorum, given the fact that the committee could potentially include two or three Aboriginal people with a conflict of interest?

Hon SUE ELLERY: Regulation 31 makes it clear that a member who has a material personal interest cannot attend while discussing the issue and is not allowed to vote. Regulation 32 provides a mechanism whereby the committee or subcommittee, as is relevant, can pass a resolution to the effect that the members voting are satisfied that the interest is so trivial or insignificant as to be unlikely to influence the disclosing member's conduct and should not prevent the person from voting. That was in the procedures for the 2021 committee.

Regulation 33 deals with what happens if there is no quorum. The intent of this provision is to avoid a situation whereby a conflict inhibits the ability of the committee as a whole to perform its functions. It includes two options:

one, the minister can deal with the matter if the committee cannot; or, two, the minister can reduce the quorum. Importantly, the minister cannot deal with a matter if the relevant committee function relates to a particular individual or if the function that the committee is performing is the provision of advice or a recommendation to the minister. In those cases, the only option would be to reduce the quorum.

The first option was in the committee procedures for the 2021 act; the second option is drawn from the Local Government Act and has been included to support the efficient operation of the committee.

Hon PETER COLLIER: That was playing devil's advocate; I like to think that will not happen, more often than not. I doubt it will happen very often, but it is good that there is a plan B.

In the composition of the committee, which will be through the appointment of the minister, there will be a degree of subjectivity, as there is with every single committee. What skill set will be considered for committee members? I know that there will be one male and one female chairperson, but what other skill sets will be considered for members of the committee?

Hon SUE ELLERY: The bill provides that the minister has to ensure that the members have between them an appropriate level of knowledge, skill and experience to effectively perform their statutory and regulatory functions, but there is not a prescribed skills matrix. As with a lot of boards, there is no determination that a board must have one person with a certain skill set and another person with another skill set; it will be an overall judgement. For example, the current Aboriginal Cultural Heritage Council comprises a lawyer, a geologist, people who work in native title, a former minister of the Crown and people who have experience in the public service.

Hon PETER COLLIER: Speaking from experience, I can tell members that any ministers exposed to this committee really will be open to criticism. I think the government has closed a few of the gaps there, and I wish it well with the composition of that committee. With that said, section 18 applications are the most contentious issue that the committee will have to consider. When I was on the committee, we would deal with anything from 60 to about 100 section 18 applications a year. Is that pretty much what the government is expecting at the moment—around that?

Hon SUE ELLERY: Ninety is the average for the last five years.

Hon PETER COLLIER: That is an increase. I think the last time I asked the minister it was 72; that was in 2016. Anyway, it is around 80 or 90. I brought this issue up in my second reading contribution. One of the issues with the 1972 act was that it got to the point at which the mechanism for consideration of section 18 applications and approvals was really slow. One of the biggest criticisms was that it was outdated. It was a 50, 60 or 70-year-old bill. It was outdated, too slow and too arduous. I asked a question in the briefing about how this new system would improve the process for the consideration of section 18 applications and was told that the committee would meet fortnightly, as opposed to monthly. Can the minister confirm that?

Hon SUE ELLERY: Yes, that is correct.

Hon PETER COLLIER: If it meets fortnightly, we have to assume that it will get through a lot more work, and I get that. Will the board's remuneration increase correspondingly?

Hon SUE ELLERY: The remuneration will be the same as the Aboriginal Cultural Heritage Council is remunerated now, in line with the recommendations of the Public Sector Commissioner. The chair is remunerated some $28 948 per annum, members are remunerated $17 462 per annum, and a member who acts as chairperson is entitled to a fee of $459 for each meeting.

Hon PETER COLLIER: This is the only concern I have with it. I get it that we are constrained to a degree by the determination about what amount is paid. They are not paid princely sums—we can see that—but they will potentially be open to an enormous amount of criticism. The government is asking this new committee to meet twice as much for—what did the minister say—$17 000 per annum?

Hon Sue Ellery: About that, yes.

Hon PETER COLLIER: It is a part-time position. I want to clarify that the remuneration for the new committee will be exactly the same as it is for the current committee; that is, the members will get $17 000 to sit twice as much.

Hon SUE ELLERY: I am told that those amounts that I referred to—the $17-odd thousand—take into account meeting twice a month. If the committee met only monthly, which it did before, the members would get half that amount.

Hon PETER COLLIER: I assume, therefore, that the $5 096 per annum fee for the establishment and payment of the committee is included in that cost recovery.

Hon SUE ELLERY: No, honourable member. The figure of around $5 000 is determined by the total cost of the public servants divided by the number of sites assessed. The committee members are not factored into that; it is the cost of the public servants who deal with the assessments.

Hon PETER COLLIER: Thank you for that, minister. That makes it easier for what I was going to suggest. It is too late, and nothing will hang on this. Personally, I think that for this committee, the issue of cultural heritage—the minister does not need me to tell her—is massive. The government has to get this right. We cannot have another stuff-up. This has got to be right. Section 18 approvals can bring the state to a grinding halt, as the minister is well aware. We have to treat this committee with enormous respect, given everything we have been through—the abolition of the committee and the re-establishment of the committee et cetera. I do not think what we are offering this committee in remuneration is going to cut it. That is just an observation; the minister does not need to comment.

Hon Sue Ellery: By interjection, if he is not listening already, I'm happy to raise it with the minister that he might like to talk to the Public Sector Commissioner. I get the point you're making.

Hon PETER COLLIER: I would really appreciate that, because as I said, the reason I asked the question about cost recovery is that I was not quite sure; I am pleased that it is not included in that. It will not have any bearing on the $5 096. A majority, if not all, of these people are Aboriginal people who in a lot of instances will have to travel, if they cannot meet via Zoom or whatever. We will be taking an enormous amount out of their lives every fortnight for what really is, quite frankly, an unacceptably low level of remuneration. If we really want to make sure that the Aboriginal Cultural Heritage Council will operate effectively, I urge the government to give some consideration to paying it appropriately, particularly when we see what some of these other boards get. In terms of Aboriginal culture, this is as significant as it gets. I would really appreciate it if the minister could bring that to the attention of the minister and suggest looking at paying that committee appropriately.

That is my last comment on that. I really hope this works. It comes with my good wishes, and, as the minister is well aware, the Liberal Party supports this piece of legislation. As a former Minister for Aboriginal Affairs, Aboriginal cultural heritage is very, very significant to me. I really hope this works. If the minister could just pass that suggestion on to the minister, I would appreciate it.

Hon Dr STEVE THOMAS: I am looking at the consultation draft regulations. The minister mentioned disclosure of a vested interest in draft regulations 30 and 31. In respect of the definition of "vested interest", would an Aboriginal person who is part of a landholder group about which a decision is being made be automatically excluded for having a vested interest? I understand from what the minister said that we can get around that by having additional members on the board so that others could make that decision. Would they automatically exclude themselves from the decision-making process as part of that and then rely on regulation 32? The question then would be: under what circumstances would regulation 32 be used?

Hon SUE ELLERY: A committee member or a subcommittee member who has a material personal conflict of interest must disclose the nature and extent of that interest. "Material personal interest" is not a defined term, but it is a term that is used in a range of other contexts. Courts have said that a material personal interest is one of a real or substantial nature that might be seen as having the capacity to influence the manner in which a decision-maker acts or in which a person performs their role. It will involve a relationship of some real substance to the matter under consideration and would have the capacity to influence the vote of the particular person. It is the substance of the interest and its nature and capacity to have an impact upon the ability of a director to discharge his or her fiduciary duty that will be important. A material personal interest does not need to be a financial interest; it could, for example, arise in a situation in which a matter has the potential to benefit a family member of the committee member. Whether a person has a material interest depends on the facts.

Hon Dr STEVE THOMAS: In theory, a cultural or heritage interest might be considered a personal interest.

Hon Sue Ellery: It may. It will depend on the facts. It will depend on the extent et cetera.

Hon Dr STEVE THOMAS: It is worth ventilating that there might be some circumstances. The government can get around this anyway. As the minister said in reply to Hon Peter Collier, there will be other members of the council, and I presume the government's intent is to spread the representation so that it would not be overly centred on one group. I imagine the government will get around it anyway. I wonder whether there is the capacity for the government at some point to give a bit more detail about whether someone's heritage group was part of an examination would be a reason for someone to exclude themselves from the vote or not. I accept that the minister is the representative minister and we will not get that answer tonight, but it is worth looking at to determine a more substantive and prescriptive outcome.

Hon SUE ELLERY: I note the point that the honourable member is making, but boards, committees and governments—all sorts of decision-making bodies—have to deal with this question of conflict of interest and perception of a conflict of interest. It is not new to this group. Although particular circumstances go to the nature of the things they are making decisions about, they are perfectly capable of making decisions and putting in place their own standing orders or operating procedures to deal with that. I do not think we should think that they are somehow so significantly different from any other board or committee that has to deal with conflicts of interest.

Hon NEIL THOMSON: I take the minister to proposed section 30, "Procedures", which reads —

> Subject to regulations made for the purposes of section 32, the Committee may determine its own procedures.

Proposed section 32 refers to the regulations about the committee. A range of regulations may be made about the committee that include a nomination, appointment, term of office, resignation and removal from office of members of the committee or of a subcommittee of the committee. Just looking at this, it is the committee that will set out the regulations for nomination, appointment, term of office et cetera. Is it fair to say that the committee will establish its own rules?

Hon Sue Ellery: No, it is not. It says "regulations may be made about the committee", not "by the committee". They are made by the government. It is a set of regulations—disallowable instruments.

Hon NEIL THOMSON: Proposed section 30 reads —

> Subject to regulations made for the purposes of section 32, the Committee may determine its own procedures.

Let me be clear: it is the procedures in relation to the regulations. I am trying to understand why there are procedures that will be set by the committee in relation to matters that are to be dealt with by regulation. I was hoping the minister and the Parliament, effectively, would create regulations for nomination, appointment, terms of office et cetera. The minister is effectively saying that the nomination will be tabled in Parliament. What regulations are likely to arise from proposed section 32? What would they look like? What sort of things will they deal with?

Hon SUE ELLERY: They are set out in proposed section 32. Proposed section 30 says that that will happen subject to proposed section 32, which says that the government will make regulations about all those things—for example, the circumstances in which a person can be removed from being a committee member, which is addressed in proposed paragraph (a), or how to appoint alternative members of the committee to deputise. The government can make regulations about those things, and, subject to whatever the rules are that the government puts in place, the committee, like any other committee, will make its own meeting procedures and decide how it deals with its business as long as that is in accord with the regulations that have been made about those things set out in proposed section 32.

Hon NEIL THOMSON: I do not understand why it is written so broadly when other things have been more clearly defined. Proposed section 30 states that it will be subject to regulations made for the purposes of section 32, so that has been clarified. The government will make the regulations. The only one listed was meetings and proceedings of the committee under proposed section 32(e). It will make procedures around the meetings and proceedings of the committee, such as for the chairing of meetings. I cannot see why the government would have any say over the procedures around nomination, appointment or term of office. Some of those things do not seem to be relevant to the establishment of procedures for the committee.

Hon SUE ELLERY: It is a perfectly normal practice for a committee itself to say, "Here are the rules that we have been given by the government in which we need to operate and we are going to do it in this way." That is perfectly normal. Committees that operate across government and outside government—all over the place—do exactly that.

Hon NEIL THOMSON: That is stating the obvious; that might be what the minister would say to me. I will leave it there, but proposed section 32(a) does seem odd.

Clause put and passed.

Clause 18: Section 55 amended —

Hon NEIL THOMSON: Clause 18 will amend section 55 to read —

> A person who, having consent or authorisation to do anything which would otherwise constitute an offence against this Act, is in breach of any condition to which the consent or authorisation was made subject, commits an offence.

A simple tidying up of the wording is occurring in this provision. However, my question is: who will assess, on an ongoing basis, the management of the conditions of the authorisation?

Hon SUE ELLERY: The department will do compliance checks, but there are also some reporting provisions in terms of some of the conditions.

Hon NEIL THOMSON: What resources does the department have to assess them?

Hon SUE ELLERY: There is a compliance investigations team and a regional team. Those things are already in place, honourable member.

Hon NEIL THOMSON: With the increased meeting rate, I assume the government plans on having more section 18s in play as the economy grows. One would expect that to be an increasing burden on those compliance teams. How will the government address that to ensure that those offences do not occur?

Hon SUE ELLERY: I think we canvassed this in an earlier part of the debate. There was a significant uplift in FTE when the 2021 changes came into effect. The extent to which that FTE will be used remains to be seen, and adjustments may be made through the normal budgetary process. They certainly have what they need to commence.

Clause put and passed.

New clause 18A —

Hon Dr BRAD PETTITT: I move —

Page 25, after line 30 — To insert —

18A. Section 57 amended

(1) In section 57(a)(i) delete "$20,000" and insert:

$700,000

(2) In section 57(a)(i) delete "9 months" and insert:

2 years

(3) In section 57(a)(ii) delete "$40,000" and insert:

$1,400,000

(4) In section 57(a)(ii) delete "2 years" and insert:

5 years

(5) In section 57(b)(i) delete "$50,000" and insert:

$7,000,000

(6) In section 57(b)(ii):

(a) delete "$100,000" and insert:

$14,000,000

(b) delete "$1,000" and insert:

$500,000

By way of explanation, without being in the context of the bill, those words may not make a huge amount of sense. It may be useful to explain what this new clause proposes to replace. Penalties sit in the bill, not in regulations where they might normally sit, so the legislation would need to come back to Parliament if they needed to be adjusted in any way. From the briefing I received, I understand that the last time they were adjusted was about 20 or so years ago—in the early 2000s. Is that correct?

Hon Sue Ellery: Yes.

Hon Dr BRAD PETTITT: I suggest that 20 years on, it is probably the right opportunity to update these penalties given inflation and that these penalties, as they currently sit, are easily the lowest in the country. To give members an explanation, the intent under section 57, "Penalties", is that for an individual who commits a first offence under this act, the penalty would rise from $20 000 to $700 000 and the term of imprisonment would increase from nine months to two years. For a second or subsequent offence, it would rise from $40 000 to $1.4 million and the term of imprisonment would increase from two years to five years. In the case of a body corporate, for a first offence, my amendment would take that from $50 000 up to $7 million; for a subsequent offence, the penalty would rise from $100 000 to $14 million; and the daily penalty would rise from $1 000 to $500 000. These are very significant increases.

It is worth highlighting some comparisons across jurisdictions and, interestingly, with the 2021 act, which had penalties varying from $1 million and/or five years' imprisonment plus $50 000 a day up to $10 million and $500 000 a day. It is not dissimilar to what I have proposed. Other states' penalties sit well above the low amounts in the tens of thousands. Tasmania has penalties from $195 000 up to $390 000; Queensland, from $144 000 up to $1.4 million; the ACT, from $160 000 up to $810 000; Victoria, from $10 000 or six months up to $50 000; and South Australia, which has new legislation coming in, will put its penalties up to around $2 million. This is about reasonable, sensible futureproofing and it is simple and targeted, to use the minister's words, as the kind of amendments that I know we like. Again, this has been widely supported by a range of stakeholders that we have been dealing with. I will quote from the letter from the Australia International Council on Monuments and Sites. It says —

> Australia ICOMOS believes that penalties for breaching the Act need to be significantly increased to reflect the costs of the loss of, or damage to, the heritage that has occurred; and to provide a significant deterrent to breaching the Act. For example, the penalty might constitute a fine greater than the financial gain made in utilising the land on which the site/s were located.

I think the key point is that when we are talking about penalties that are extremely low, as they are currently printed, and have not been updated for two decades—penalties of $20 000 and $40 000 and up to $100 000 for a body corporate, which is the highest penalty—and we are often talking about large companies and the profits that they make, we need to make sure that the penalties are significant and commensurate with the damage.

I think this is a very simple and logical provision. I would certainly be happy if people thought that the amounts proposed to me by stakeholders sat consistently with those in the 2021 act and in legislation in other jurisdictions. If people want to adjust them, I would be open to that, but I think it should go without saying that the penalties that are currently printed are way too low to be significant. Their real value will only get lower, because we are not going to come back in the next five years and change the act again. Their real value will continue to decrease. This is the one opportunity that we will get to fix them. I will be fascinated to hear the arguments against the new clause, because it feels to me to be deeply rational and deeply consistent with what else is happening around the country.

Hon SUE ELLERY: I am not sure how someone can be deeply rational and deeply consistent. They are either rational or not; they are either consistent or not. In any event, I am sorry, but I am going to break the honourable member's heart again. The government will not be supporting the new clause. These penalties reflect the penalties in the 2021 act. We committed to and have publicly said that we are making a small number of simple, targeted amendments to the 1972 act. The size of the penalties in the 2021 act were of particular concern to smaller proponents who do not have the financial resources of the larger players, whether in relation to having in-house teams of people to manage the required processes or defending any legal actions or paying penalties. The government has listened to those concerns in deciding not to increase the penalties set out in the act. In the amendment and in the transitional regulations, there was an identified need to address penalties for a number of matters. These include most obviously the penalty relating to regulation 10, as well as new offences for administrative matters relating to, for example, conflicts of interest by the Aboriginal Cultural Heritage Committee. Penalties for such breaches needed to be proportional and commensurate to the penalties imposed for legislative breaches and to the scale of the offence.

Outside of those changes, the government does not propose to increase the penalties in section 57 of the 1972 act and therefore we cannot support the amendment.

Hon NEIL THOMSON: I also support the government's position, and the opposition will not be supporting the new clause. I want to reflect a little on the job that members have in this chamber. When we talk in a casual way about increasing penalties from, for example, two years to five years, we are talking about people who could sometimes be facing enormous stress for whatever reason. There might have been a breach or they might have done something that they should not have done, but sometimes they might not have had access to information. I think we should reflect on the stress and concern that we place on people. Of course, there must be some penalty for any actions that occur and of course we need to see modest changes over time that reflect the normal consumer price index changes. It is very easy for us in this place to lose sight of the impact this will have on families—on people. We are not talking about the large companies that have deep pockets and are not necessarily impacted so much by such a penalty. There is stress. I have talked to people who have faced prosecution. I have met with them and heard about the stress, concern and worry. We must always stop and pause for thought when we present ideas like increasing prison terms, and think about the consequence. The same people who talk about increasing penalties here are also advocating for a reduction in penalties and restorative justice. We have to be serious about the way we approach these things and consider the impact.

Penalties are there only to be a deterrent against certain behaviours. That is all they should do. Penalties should be there to provide some educative basis for people to comply. This is the problem with the 2021 act; it comes across as being punitive. That is the issue. It is so prescriptive and people are so afraid and anxious about breaching it because they do not know whether they are undertaking their due diligence or undertaking it in the proper way. All the onus is on them. The same people are now casually talking about increasing penalties. Think twice about it.

At the end of the day, one of the objectives of this place is to make sure that people are educated. We work together so that people become aware of their responsibilities to preserve Aboriginal cultural heritage and understand the value and depth and wonder and interest of it all, as part of our great tapestry in Western Australia. It is a great aspect of all our culture, but is not about locking people up or putting people into debt and breaking their businesses. At the end of the day, we know the courts also make those assessments, but we should think twice about casually throwing it in because we want to play to a certain part of our constituency that we are somehow being tough. It is the height of hypocrisy because the same people who proposed to build this to their constituency would also be seeking to undermine the issues with some penalties.

I may be a little bit passionate on this matter, so please excuse me, but I want to support the government's position. We will not be supporting any gratuitous increase in penalties.

Hon Dr BRAD PETTITT: Let me be clear: this is a clear example of an amendment that is targeted and simple. I cannot think of a clearer one. Plenty of other ones that have been less simple and less targeted than this have been supported.

Less than two years ago, every single member in this place, apart from Hon Sophia Moermond, supported penalties of $10 million and five-year jail terms in the Aboriginal Cultural Heritage Act, including Hon Neil Thomson. If we are going to talk about hypocrisy, can we just be clear that I am merely proposing what this government put forward and what the opposition supported less than two years ago? Do members know what? We knew it was a good idea then because we needed the right things in place. I am frustrated because this is a clear example of what feels like the brokenness of this place right now. This should be a really simple and rational compromise, acknowledging that the government missed this. It missed the opportunity to fix this. There is no way anyone can seriously claim that a corporate penalty for a repeat offence of $100 000 is a real disincentive. No-one in this place could say that with a straight face. I fail to understand why we cannot be sensible and do our job in this place as the house of review to make this legislation a bit better by increasing that penalty to an amount that we can all agree on. I really do not understand it. Frankly, it is hard to explain. It feels like there is a complete lack of courage to actually follow through on the earlier convictions of the 2021 act in any form. I honestly do not know.

I feel like I am expressing the most disappointment in this area. I reached out earlier and encouraged the government. I told the minister to move this amendment herself and that I would support it. I cannot do anything else other than get up and call out our failure, because we are accepting a low 20-year-old amount that will sit on the statute book for another decade or more and will become increasingly worthless. You know what? We are not stopping the destruction of Aboriginal cultural heritage. We should be ashamed of that. When it happens again, because there is no real incentive not to and there is more money to be made by blowing up cultural heritage than the cost of the fine, it will be us who will have to own that because we did not stand up and make sure that we put the right penalties in place.

I am disappointed. It is a real lost opportunity to work across this chamber to make sensible, pragmatic, targeted and simple changes to make legislation better. This greatly depresses me and makes me angry, and I think it lets us all down.

Division

New clause put and a division taken, the Deputy Chair (Hon Sandra Carr) casting her vote with the noes, with the following result —

Ayes (3)

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

Noes (29)

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

New clause thus negatived.

Clause 19 put and passed.

Clause 20: Section 67A inserted —

Hon NEIL THOMSON: This clause relates to the setting of fees. There was some discussion concerning fees in the draft regulations, particularly about what a commercial proponent means. I think it is worthy to touch on this issue a little more because the regulations outline the fees, and fees are an issue. One of the big issues in the 2021 act was that although the regulations specified the hourly rates of fees that could be applied, there was no restriction on the number of hours that might be required. I know that some extraordinary survey fees and so forth will be impacted. My understanding is that these regulations will apply only to the applications. Is that correct?

Hon SUE ELLERY: Yes.

Hon NEIL THOMSON: This is one of the challenges we face. I was speaking to a consultant just recently and there is a massive issue about fees when seeking advice and consultation about Aboriginal heritage. Figures of $50 000 were quoted for a drill hole, and an issue about a gravel pit was raised with me and the request for a $30 000 consultation fee, which arbitrarily went up to $130 000. Separately, I have had claims from a person in the pastoral industry that when they wanted to do some irrigation bores, they were told that they had to pay a $250 000 fee to the Aboriginal native title body, which was quoted by the native title representative who met with this person, to get some traditional owners onto the site to basically do a walk around and undertake a survey. Does the government propose to do anything about the apparent escalation in fees for those things that do not directly apply to the actual application to the committee?

Hon SUE ELLERY: No is the short answer. I think what the honourable member would be proposing, if that were his suggestion, is an intervention in the market. What is charged is what the market determines. Far be it for me to lecture a member of the Liberal Party about capitalism, but that is what we are talking about! The government is able to set the fees of the things that we expect people to do to be compliant with the law, but these regulations will not cover the market, and there is no intention for us to intervene in that market.

Hon NEIL THOMSON: I certainly do not expect to be lectured on the matter of capitalism; however, in saying that, the Leader of the House raised a point about effectively what will be a monopoly service because in seeking to undertake a survey, a person cannot go to another native title body; they have to ask the people who have the knowledge. The fees will not be regulated; it would be a vast improvement to the law if further consideration was given. For the government's attempt with the 2021 act, I give it an A for effort but a D or E for delivery. That is what happened. Effectively, the fees were not capped.

This might be gratuitous advice for the record, but the government will need to keep a close eye on this. There is real concern that businesses are withdrawing from the market. I have also heard that the provision of building sand in a region is almost non-existent because of the cost of fees associated with the clearances or assessments that need to be done before a person can deliver the application to the committee. The fee is so exorbitant that they have basically given up on the whole idea.

This will have a direct impact on the cost of living and the cost of housing. It will have a direct impact on carbon emissions because trucks will have to drive extended distances to deliver building sands to remote and regional towns across Western Australia. It will directly affect the cost of road construction. There is no effort by the government to deal with these fees, noting that expectations were set very high in the 2021 act. This issue needs to be addressed.

I will focus on the commercial proponent. There was discussion in the other place about the meaning of "small business", which comes from section 3(1) of the Small Business Development Corporation Act. As my colleague David Honey asked in the other place, will farmers be classified as a small business?

Hon SUE ELLERY: Honourable member, I responded to this is in either my second reading reply or during the debate on clause 1. It depends on whether they meet the definition. As I advised the chamber before, a "small business" means a business —

> (a) which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001* of the Commonwealth which —
>
> (i) has a relatively small share of the market in which it competes; and
>
> (ii) is managed personally by the owner or owners or directors, as the case requires; and
>
> (iii) is not a subsidiary of, or does not form part of, a larger business or enterprise;
>
> or
>
> (b) which is declared by the Governor … to be a small business for the purpose of this Act.

That is, the Small Business Development Corporation Act.

Hon NEIL THOMSON: A family farm could fall under that definition; pretty much every family farm would be defined as a small business.

Clause put and passed.

Clauses 21 and 22 put and passed.

Clause 23: Sections 72 to 87 inserted —

Hon NEIL THOMSON: There are a few things dealt with here. I want to draw attention to proposed section 73, "Protected area orders". It reads —

> (1) In this section —

> ***historical protected area order*** means an order made under section 315(1) of the 2021 Act that, under section 316(1) of the 2021 Act, is in effect immediately before repeal day as if it were an order made under section 82(1) of the 2021 Act;

The minister may have already answered this; excuse me if she has. Will any new protected areas be included? I think this section is about the transfer of those protected areas from one act to the other, so I think these are transitional arrangements. It is not? Okay.

The way I read it, it means that protected area orders made under section 315(1) of the 2021 act were transferred from the previous act. Were all these protected area orders made under the 2021 act? Were all existing protected areas made under historical protected area orders?

Hon SUE ELLERY: The 78 protected areas that originally existed under the 1972 act and then again as protected area orders under the 2021 act are being transitioned back as protected areas under the 1972 act. They will again exist as protected areas under the 1972 act, as they did originally under that act.

Hon NEIL THOMSON: I thank the minister for helping me; that is the answer I was trying to elicit. Are there no additional protected areas from the intervening period?

Hon SUE ELLERY: That is correct.

Hon NEIL THOMSON: Proposed section 76 states —

> ***ACH permit*** has the meaning that was given in section 100 of the 2021 Act.

Can the minister please explain the purpose of this proposed section?

Hon SUE ELLERY: The purpose of this is really to transition permits under the 2021 act to become section 18 consents under the 1972 act.

Hon NEIL THOMSON: Will all those permits, including the tier 1 and tier 2 permits, be converted to section 18 approvals? Is that correct?

Hon SUE ELLERY: I am advised that there are not any. There are six applications. If the member casts his mind back, he will remember that we talked about those during the debate on clause 1. They will be treated as section 18(2) notices under the 1972 act.

Hon NEIL THOMSON: I refer to proposed section 77, "ACH management plans". Again, if the minister could explain the purpose of this section and give me a quick summary version, that would be appreciated.

Hon SUE ELLERY: Any approved plan will become a section 18 consent and any application will become a notice.

Clause put and passed.

Clause 24: *Conservation and Land Management Act 1984* amended —

Hon NEIL THOMSON: I note that amendments will be made to the CALM act that are similar to those made to the Environmental Protection Act. Why is responsibility for Aboriginal cultural heritage not carved out of the Department of Planning, Lands and Heritage? Section 56(2)(a) of the CALM act states that the responsible body for the land shall have the objectives of protecting and conserving the value of the land to the culture and heritage of Aboriginal persons.

Hon SUE ELLERY: In each of these clauses we are reversing the consequential amendments we made in 2021. We are reversing those. Is there something specific the member is looking for?

Hon NEIL THOMSON: Thank you for that clarification. Yes, there is. We understand that we are reversing those, but we have taken a selective approach to that. If we had had a simple reversal, we would have had a repeal bill and maybe some necessary administrative changes for the transition. However, we are making some changes. An issue came up with the EP act. We spoke about the social surrounds policy and here we are dealing with the Conservation and Land Management Act. Section 56(2) of the CALM act states that the commission shall have the objectives of protecting and conserving the value of the land to the culture and heritage of Aboriginal persons. I wonder whether there is an opportunity to be clearer about the CALM act and its subordination to the old law being re-established. Given all the other changes that have been made to the 1972 act, I would have thought that would be beneficial.

Hon SUE ELLERY: I think we might be working at cross-purposes. The provisions set out in part 4 literally do what I said they do: they take out the words "Aboriginal Cultural Heritage Act 2021" and insert "Aboriginal Heritage Act 1972". The member is asking whether consideration was given to changing the CALM act, for example, to go further than we have proposed by way of simple and targeted amendments. The answer to that is no.

Hon NEIL THOMSON: That is useful to know. I think this issue requires further discussion. We talked in this place a bit about the policy being reversed to the previous policy that we decided was much more in keeping with

community expectations and was the one that we wanted to go to. We note that the commissioner has written and published a position paper that includes free prior informed consent of intangible heritage, which is not the government's position under the Heritage Act. The position statement also unilaterally backs the United Nations Declaration on the Rights of Indigenous Peoples. One could argue that that might be fine, but the problem is that if policies do not align with the law that is being introduced, it can end up effectively creating confusion. Although I do not expect the minister to make any commitments tonight, I suggest that some work might be done on this. We talked about the social surrounds policy with the Environmental Protection Authority, but people working under the Conservation and Land Management Act might also need to consider that matter. I say that as a statement; the minister can comment on it if she wishes.

Clause put and passed.

Clause 25 put and passed.

Clause 26: *Control of Vehicles (Off-road Areas) Act 1978* amended —

Hon NEIL THOMSON: Clause 26 makes provision for the control of off-road vehicles. There was specific mention made of the management of off-road vehicles in the 2021 act. In fact, I think there was a prescription in relation to going anywhere other than on an existing track. That, by the way, created a lot of concern, from conversations I have had with people involved in the Department of Fire and Emergency Services. These people obviously did not want to go on the record because of the issues in relation to fire management. People often have to travel across ground in some situations. I know there were some exemptions under the 2021 act in respect of the control of fire, but then there was the issue of managing fire prevention in the long term. We now have an honorary warden; I assume that position was there before. Is that correct?

Hon Sue Ellery: By interjection, yes.

Hon NEIL THOMSON: Given that we do not have any honorary wardens, what use will that be?

Hon SUE ELLERY: The power is for the minister to appoint one.

Hon NEIL THOMSON: Does the minister intend to appoint some honorary wardens? What roles will they play?

Hon SUE ELLERY: Not that I am aware of.

Clause put and passed.

Clauses 27 to 34 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [8.35 pm]: I move —

That the bill be now read a third time.

HON NEIL THOMSON (Mining and Pastoral) [8.35 pm]: I rise to speak on the third reading of the Aboriginal Heritage Legislation Amendment and Repeal Bill 2023. This represents a tremendous day for the people of Western Australia. We must pause to reflect on the incredible efforts of the community of Western Australia to bring us to this point. Nobody in this place would have anticipated the two chambers of this Parliament here this evening of 17 October 2023 passing a repeal of the Aboriginal Cultural Heritage Act 2021. There were some administrative issues in this bill and they were aptly discussed and teased out by my colleague Hon Nick Goiran in debate on clause 2. That provided a certain level of clarity to our community that certain actions are yet to be undertaken, and we take in good faith that the government has come this far. The fact that the government has come this far is a major statement in itself of the perseverance of the community and its capacity to step up and have its voice heard, notwithstanding the incredible numbers in favour of the government in this place. I acknowledge the fourth estate, the media, which played a very important part in highlighting these matters.

In saying that, we moved some very minor amendments to put the concept of materiality into the clause referring to new information, and they were rejected. I hope that the concerns that have been raised with me will not come to fruition. I hope that not having those materiality provisions in the bill will still allow for the good function of the legislation. We certainly do not want a great deal of business uncertainty and lack of clarity in Western Australia, which has been the case in the last few months for all scales of business. Large corporate mining companies were probably more willing to adopt the 2021 act as they had the resources to do so. Some expressed concerns to me quietly, but did not want to be clear about it. The push certainly came from smaller entities in the farming community, the prospecting community and the civil construction community.

Here we are. We have gone through the bill in great detail. The government was quite keen to adopt some amendments. We gladly support the repeal of the 2021 act; that is the outcome we were all seeking. We claim this as a victory for Western Australians. We stand shoulder to shoulder with the people of Western Australia as we go forward on this historic day in the Western Australian Parliament.

The opposition moved a motion to split the bill, but that was rejected. There is more work to be done on the challenges that we will face, which became very apparent as we went through the Committee of the Whole stage. One example was our recent discussion about the cost of the fees and services. More work has to be done. The lack of clarity around section 5 was also not addressed by any amendments. That will need to be looked at in the future because we will not be applying a risk-based approach to our management of Aboriginal heritage in Western Australia.

We did get some reassurance, though, in some of the discussion and answers. I commend the Leader of the House for providing me with some very honest and frank answers. I note that at times, as we worked through this process, my questions were not always the clearest. I note for *Hansard* that the Leader of the House made an action in response to that point. The Leader of the House tried, in good faith, to unpack some of those things and provide as clear an answer as possible so that we could understand the implications of this bill.

We are doing this job together. Today, the government and the opposition stood on the same side. We had a situation in which the Greens put up a whole range of confounding proposals that would have reintroduced matters from the 2021 legislation that would not have provided clarity or certainty. I understand where Hon Dr Brad Pettitt was coming from, given his constituency. I am not sure whether he was involved in those meetings in Katanning or got phone calls from frantic farmers, landowners who might own just a few hectares of land or even just over 1 100 square metres of land, or contractors. That was an issue. In saying that, there is an ongoing need for reform in this space. That is something on which Hon Dr Brad Pettitt and I agree. In principle, the outcome is still not perfect.

If the opposition were in government—that might be the case in 2025; the opportunity for that has vastly increased as a result of the debacle with the 2021 act—the approach would have been to simply repeal the legislation, go back to the 1972 act, spend some time on proper consultation and come up with a new fit-for-purpose piece of legislation that addressed a number of concerns from a whole range of sectors, including those that might have interests in conflict with each other.

This is where we have ended up at this point in time. I do not want to extend the debate anymore, but I will say that it is an incredible outcome for the people of Western Australia. The people of Western Australia should be proud of what they have achieved. I am proud and the opposition is proud to stand with the people of Western Australia to deliver a repeal of the Aboriginal Cultural Heritage Act 2021.

Division

Question put and a division taken with the following result —

Ayes (29)

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

Noes (1)

Hon Dr Brad Pettitt *(Teller)*

Question thus passed.

Bill read a third time and passed.