ABORIGINAL CULTURAL HERITAGE BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Stephen Dawson (Minister for Aboriginal Affairs) in charge of the bill.

Clause 35: Nature of local ACH service —

Committee was interrupted after the clause had been partly considered.

Hon NEIL THOMSON: I have a question about the accountability of the local Aboriginal cultural heritage services. Clause 35(1) states —

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

Will these services be subject to scrutiny by the Ombudsman?

Hon STEPHEN DAWSON: No. They will be accountable to the Aboriginal Cultural Heritage Council.

Hon NEIL THOMSON: That is concerning, given that the Aboriginal Cultural Heritage Council will not have the same powers of investigation. If a complaint is made about the conduct of a member of a local Aboriginal cultural heritage service about setting a service or a fee, or issuing a permit—noting that it could be a person; it does not have to be an organisation—who would a proponent apply to?

Hon STEPHEN DAWSON: The proponent would complain to the Aboriginal Cultural Heritage Council. The member touched on a fee. As I previously indicated, the fee will be set by the council. The LACH service cannot set a fee itself. Any complaints about a LACH service will go to the council.

Hon NEIL THOMSON: Will they be subject to a complaint to the Corruption and Crime Commission?

Hon STEPHEN DAWSON: No, honourable member. Clause 35 refers to the Public Sector Management Act in relation to the designation of a person as a local ACH service, which is not subject to that act. A person or organisation designated as a local ACH service is not an agent of the state and will not have the status, the immunities and privileges of the state. It will not be an agency of the state; however, it will report to the ACH council, so the council will be able to take action against a LACH service, as well as remove the powers of the LACH service from it.

Hon NEIL THOMSON: I think this goes to the heart of the concern about the accountability of these LACHS. There is one entity, the Aboriginal Cultural Heritage Council. If an aggrieved party is not able to receive comfort from the Aboriginal Cultural Heritage Council, who will they go to?

Hon STEPHEN DAWSON: They could go to the department or the minister but it will still be the council's responsibility to deal with the issue.

Hon NEIL THOMSON: For the record, this seems to be an extremely deficient component of this proposed law insofar as the LACHS will play a pivotal role at a regional level in the approval of matters relating to any kind of development or activity on people's land. Given the potential composition of the LACHS and the obvious commercial incentive for unscrupulous people who might be party to a LACH service—I am not saying that all LACHS will be like that; they will be very dependent on the capacity of them to deliver an efficient, ethical service—I think there is a serious deficiency noting the level of accountability that applies to any other agency, such as a local government, to an ombudsman or the CCC. Given the range of accountability that applies to any approving authority across the state, this is incredibly deficient. For the record, I implore the minister to make sure the Aboriginal Cultural Heritage Council has sufficient powers.

Will it have any investigative powers to undertake a review of the performance and conduct of individual members of a LACH service?

Hon STEPHEN DAWSON: The local Aboriginal cultural heritage services will be required to report the carrying out of their functions to the Aboriginal Cultural Heritage Council. As I previously indicated, the ACH council will have overall oversight of the LACHS. If a LACH service does not perform its function satisfactorily, the council or the minister can suspend or cancel the designation for all or part of an area. The minister could have a role in that too. That is the accountability. It will not be an agency of the state; it will report to the ACH council.

Clause put and passed.

Clause 36: ACH Council must designate local ACH service —

Hon NEIL THOMSON: Clause 36(1) states —

> The ACH Council must, as far as practicable, designate persons as local ACH services …

Will there be circumstances in which a single person will be a local Aboriginal cultural heritage service?

Hon STEPHEN DAWSON: There will not be. It will need to be a native title organisation or a Corporations (Aboriginal and Torres Strait Islander) Act–related organisation.

Clause put and passed.

Clause 37: Designation of local ACH service —

Hon TJORN SIBMA: I have a quick question. Clause 37(2) concerns when the ACH council decides not to designate a person as the LACH service for an area, and that the council must advise the minister in writing of the decision and the reasons for that decision. Could the minister possibly outline the circumstances in which the ACH council might determine that a LACH service should not be designated and whether that information will be appealable and made public?

Hon STEPHEN DAWSON: An example of what the member proposed could be if the application does not meet what is identified and laid out in clause 39.

Hon TJORN SIBMA: I note that there is still a fair degree to get through. If I am to take the minister's answer to its heart, the application being inconsistent with what is laid out in proposed section 39 is the only reason an application might be denied, or would there be other circumstances in which the council would determine that some person or some organisation is not appropriate for that designation? I suppose what I am getting to here is whether there is the potential for vested interests to become entrenched and the competition of LACHS to be thwarted. I am attempting to explore whether this provision might preserve, effectively, a business function through a regulatory instrument, rather than allowing other suitably qualified LACHS to operate in the same jurisdiction.

Hon STEPHEN DAWSON: Clause 40 sets out the priority and clause 39 sets out the requirement. In relation to a person and what acts as a person, the Interpretation Act 1984 states that the term "person" includes a public body, company, or association or body of persons, whether corporate or unincorporated. I want to place that on the record. It does not mean a single person.

Clause 39, "Requirements for designation as local ACH service", has a list of requirements including comprehensive knowledge of the local Aboriginal community in the area, the endorsement of any registered native title body corporate or registered native title claimant for the area, sufficient support of the local Aboriginal community and so on. It is not proposed that there will be competing LACHS in an area; there will be one LACH service for an area.

Clause put and passed.

Clause 38 put and passed.

Clause 39: Requirements for designation as local ACH service —

Hon NEIL THOMSON: I need clarification about fees again. A designated local Aboriginal cultural heritage service will be required to have a structure for the fees that it will charge. The minister said earlier that the Aboriginal Cultural Heritage Council will set fees. Just for clarification for *Hansard*, it seems as though those fees will be at the discretion of a local cultural heritage service and that it will need only to comply with the fee guidelines of the Aboriginal Heritage Council.

Hon STEPHEN DAWSON: The honourable member is correct. The council will set the guidelines around the fees, so it might set a parameter, but it will be open to a local area cultural heritage service to charge a lower fee. The guidelines will be set by the council and it will also endorse the fee structure that is put in place.

Hon NEIL THOMSON: There will be a significant difference in the business model of each LACH service. We know that the type of activity that occurs across the state varies depending on the region, both in terms of quantity and the nature of an activity. I alluded to my concerns earlier. I think that the business model for each LACH service will be significantly impacted by its location. Given that there is an element of cost recovery, which seems to be implied—notwithstanding the minister's lack of certainty about how much of it will be funded—it will be dangerous for the state. Tier 2 activities, for example, will disturb land—one of those activities is yet to be defined—when, say, a trench is dug for a plumbing service. Is it fair to say that the fee for that service will be different in one part of the state compared with another part of the state?

Hon STEPHEN DAWSON: It will be a case of supply and demand. Some LACH services will be busier than others just by virtue of where they are in the state and how minerally prospective or otherwise an area is. That is an important thing to say. In terms of what the fees will look like, that is yet to be decided and it will be dealt with in the co-design process. Could a fee be different in one part of the state from another? Potentially it could, but that will all be worked out as part of the co-design phase.

Hon NEIL THOMSON: Clause 39(b) states —

> … the endorsement of any registered native title body corporate, or registered native title claimant …

That will be a requirement. I refer to clause 40 in which there seems to be a particular priority list of designation services. The requirement of endorsement is an absolute necessity; is that correct?

Hon STEPHEN DAWSON: Yes.

Hon NEIL THOMSON: I note again that native title bodies' governance, management structures and membership vary considerably. Some native title bodies around the state that have only 70 or 80 members can have very small revenues and be in significantly difficult financial situations. By their nature, the governing bodies of those native title bodies change regularly. We have seen that that is a reality. I am not saying that is the case for all native title bodies; some of them are very well structured. In my region, some major native title bodies have significant infrastructure around governance, staff and a whole range of things. Is it foreseeable that the endorsement of these bodies will switch on and off and that that will create significant disruption to the economic activity that will need approval?

Hon STEPHEN DAWSON: No. Once we have designated a local Aboriginal cultural heritage service, it will remain designated until it is cancelled. That power will exist with the council, so if the council does not think that the LACH service is up to scratch or doing things in the required time frames et cetera, it could make a decision to remove the LACH service. We do not propose for the process to be slowed down at all.

Hon NEIL THOMSON: It is a complex bill and I have obviously read it in detail, but my recollection is that there is some process for a native title body to appeal the designation. That is my understanding and it may come up further in discussion. I am not sure whether that is correct. My understanding is that the designation can be removed. Is that not correct?

Hon Stephen Dawson: I have said that it can be removed. The council can remove the LACH service's designation.

Hon NEIL THOMSON: My understanding is that a native title body can effectively seek the disendorsement of the LACH service as an operating body.

Hon STEPHEN DAWSON: It will be up to the council to decide whether to accept a designation. Obviously, there could be whatever politics going on in the native title body. At the outset, it will be appointed, but if there is an issue at a later stage, it will be up to the council to decide whether to remove that designation.

Hon NEIL THOMSON: Noting the time, I will conclude my comments on this clause. The challenge of course will be with the designation. The stability of these LACHS will be important, and whether a change can be made through the ACH council or some other process. My concern is with the significant investment required for approvals infrastructure, noting that there will some requirement for proponents to provide their proposals in writing. I will go into more detail, but I assume that that means lodging an application via the internet. It might simply be to register the fact that due diligence has been undertaken by the LACH service. Hopefully, only one system of approvals will be used as a framework for these bodies; otherwise, it will just be a nightmare. Quite frankly, I hope it is not going to be letters. Has the minister assessed what a model LACH service might look like, the number of staff it might have and the approvals infrastructure that might be required so that it can meet the requirements of a designated local Aboriginal cultural heritage service?

Hon STEPHEN DAWSON: The answer is no. That work will be done as part of the co-design process. There may well be groups that decide that they just do not have the capacity to apply to become a LACH service. All that work will be done in the next phase.

Clause put and passed.

Clause 40: Order of priority of designation —

Hon NEIL THOMSON: The order of priority of designation of a local Aboriginal cultural heritage service for an area is interesting. This clause goes to the nature of this mishmash of ideas around native title and other aspects. I wonder why we did not just bite the bullet and require it to be a prescribed body corporate if that is where we are going. I understand that there will be issues with claimant areas where native title has not yet been settled, so maybe some allowances could be made there. Clause 40(1)(d) states —

> a CATSI Act corporation or a Corporations Act corporation that —
>
> (i) represents the local Aboriginal community in the area; or
>
> (ii) has members that are knowledge holders for the area;

That seems to be a very loose description in terms of the priority list. Surely there could have been some discipline in relation to this if it is truly going to rely on native title. It states a corporation that "represents the local Aboriginal community in the area". It is a very non-native title description.

Hon STEPHEN DAWSON: The member is correct. It is because there may not be native title for the area. This will align with native title where it exists; but, in the absence of it, we need to have a way of dealing with local people

to make sure that LACH services can be created and decisions can be made, and the Western Australian economy can continue to tick over.

Hon NEIL THOMSON: To me, it represents a degree of danger. I understand that a corporation may not have native title. Clause 40(1)(e) states —

> a native title representative body for the area.

Why is that the last order of priority? We have a CATSI act corporation that will represent the local Aboriginal community in the area, and further down the hierarchy we have a native title representative body for the area.

Hon STEPHEN DAWSON: I am told that an example is Murujuga Aboriginal Corporation, which is a CATSI act organisation. It deals with land for which various native title holders have native title interests, essentially. This would countenance such a situation.

Hon NEIL THOMSON: I find it fascinating that this order was struck upon, given the integrity and history of some of these representative bodies. My concern is that there may be a local community body that outranks a representative body. I assume that the designation of the LACH service will be informed by the native title prescribed body corporate.

Hon STEPHEN DAWSON: I am told it is about making sure that the knowledge holders are captured. That is why it has been done in this way.

Hon NEIL THOMSON: Clause 40 does not include anything about competency. Why not?

Hon STEPHEN DAWSON: Competency is dealt with in clause 39, so it is not needed in clause 40.

Clause put and passed.

Clause 41 and 42 put and passed.

Clause 43: Suspension or cancellation of designation as local ACH service for area or part of area —

Hon NEIL THOMSON: The minister may have answered this. I am trying to understand and unpack this as much as possible for the sake of the record. Clause 43(1) states —

> The ACH Council may, on the written request of a person who is designated as the local ACH service for an area, cancel the designation …

Effectively, could a local Aboriginal cultural heritage service cancel itself?

Hon STEPHEN DAWSON: Yes.

Hon NEIL THOMSON: Clause 43(2) states —

> The Minister or the ACH Council may, by written notice given to a person who is designated …
>
> (a) suspend the designation …

The minister did not say that the ACH council would be the arbiter of who was or was not a local Aboriginal cultural heritage service, but here it states "the minister or the ACH council", so the minister may interdict on this issue and cancel a local Aboriginal cultural heritage service?

Hon STEPHEN DAWSON: I am on the record as saying it is either. The ACH council or the minister could cancel or suspend the designation for all or part of an area.

Clause put and passed.

Clause 44: Change to area for local ACH service —

Hon NEIL THOMSON: What are the grounds for amending the area for a local Aboriginal cultural heritage service?

Hon STEPHEN DAWSON: It is in subclause (4). It reads —

> The ACH Council may amend the area for which a person is designated as the local ACH service only if the Council is satisfied that —
>
> (a) the person —
>
> (i) is in the order of priority for designation for the amended area as set out in section 40(1); and
>
> (ii) meets the requirements to be designated as the local ACH service for the amended area as set out in section 39;
>
> and
>
> (b) there is no other person designated as a local ACH service for any part of the amended area.

Hon NEIL THOMSON: The minister said earlier that the area was related to the prescribed body corporate area. Is it possible there could there be multiple local Aboriginal cultural heritage services within one determination area?

Hon STEPHEN DAWSON: Yes, in one determination area, but they cannot overlap.

Hon NEIL THOMSON: That poses something of a challenge. I can understand where it might be appropriate. The major challenge I have is the capacity in size and potential for fragmentation of these services, given their huge responsibility to deal with matters that are going to have a direct effect on the functions of our economy and activities that all persons—Aboriginal and non-Aboriginal people—will want to undertake in our community. My concern is that there seems to be no limit to the potential fragmentation. I know that is probably a theoretical argument, because in reality, I would hope, as was said earlier, that there would be some sort of amalgamation, particularly for areas where not much activity is undertaken. For the record, again I hope and implore that the ACH council will have some role in guiding the degree of capacity and scale of the local Aboriginal cultural heritage services, given the important role they will have. My question is really whether the ACH council will have a role in making sure that we do not end up with huge fragmentation of local Aboriginal cultural heritage services in one determination area and across the state so that we do not end up with 200 or 300 of them all running their own systems and fee structures within the context of the ACH council guidelines. I think the success of this will be determined on the scale and ability to get good information on the ground and being able to quickly and efficiently deliver outcomes for our community.

Clause put and passed.

Clause 45: Change to local ACH service —

Hon NEIL THOMSON: I am sorry to labour the issue of change, minister, but it bothers me a lot. The ACH council may, on its own initiative or at the request of a person designated as a local Aboriginal cultural heritage service for an area, amend the name of the person, the contact details and other information. How efficiently will these services be able to be identified and contacted by someone who wants to undertake the most basic activity? How does the minister expect that to operate?

Hon STEPHEN DAWSON: They will be in the directory, honourable member.

Hon NEIL THOMSON: The directory sounds like a paper-based system. I am thinking of the average punter who wants to do something; they have done their due diligence and want to seek a permit. How will they get that permit?

Hon STEPHEN DAWSON: Hon Neil Thomson should have asked these types of questions that range over numerous clauses during debate on clause 1. There are clauses that relate to the directory later on and he can ask questions about the directory when we reach those clauses. The question that the member asked does not relate to clause 45, which is a technical clause.

Clause put and passed.

Clauses 46 and 47 put and passed.

Clause 48: Local ACH service functions —

Hon NEIL THOMSON: This clause goes to the heart of the functions of a local ACH service. The provision states —

> … as far as practicable, to be provided in relation to an area by the person designated as the local ACH service …

It will be vitally important that the functions are efficient. "As far as practicable" seems to be a pretty fluid requirement. Activities may not be able to occur if the services are not functioning. A local Aboriginal cultural heritage service might be in operation but not meet the "as far as practicable" requirement and not provide the service. What will happen then?

Hon STEPHEN DAWSON: If a LACH service does not provide the service, it will be open to the council to remove its designation as a LACH service.

Hon NEIL THOMSON: How long will that potentially take? There could be a situation in which it takes a couple of months. A proponent might have an application before a LACH service and for some reason it might not meet the function of "as far as practicable". I would have thought that that would mean that even if it is not practicable, the LACH service could continue to operate. I would have thought that there would be the necessity—not the option—for a local Aboriginal cultural heritage service to provide a service. I am trying to imagine a situation in which it would not be practicable. Can the minister describe a situation in which that might be the case?

Hon STEPHEN DAWSON: An example is during COVID when restrictions are in place and people cannot enter or leave a community. That is one example. Another example is law. At different times in different places, communities might be undergoing law. That is why the provision reads "as far as practicable". In terms of how long it might take, as I spoke about earlier on, the prescribed time frames within which work has to be done and what those time frames will look like will be done as part of the co-design process. I will also make the point that proponents who need to engage with LACHS will, I am sure, be the same proponents who currently engage with the state government. They are always very quick to pick up the phone to a local member's office, a minister's office or, indeed, the Premier's office, when they think something is being delayed. I am sure that if this bill passes, notwithstanding the time frames,

there will be proponents out there who will want to keep us all abreast of where their project is, and there will be pressure on everyone to make sure the decisions are made in a timely fashion, and with an element of transparency.

Hon NEIL THOMSON: This really goes to the heart of the problem: the mindset of the framers of this bill. Let us say there is a multibillion-dollar project to develop a mine site; the lead times are in years. There will be an army of consultants alongside the proponents to go through this process. Yes, we hear complaints about those sorts of proponents as well, and the challenges the minister mentioned—it may be law business, or it may be seasonal issues; who knows? There could be a whole range of issues. I keep coming back to the example of a builder who wants to put a footing down on an undeveloped site. I assume there will be continuity of service for exempt activities—maybe tier 1 activities—that will not be affected by law business. I do not think anyone in Western Australia could tolerate a situation in which the most basic activities are affected, and the minister has not been able to explain whether those activities are tier 1 or tier 2. For example, a farmer might want to plough a field for the first time. The minister has not been able to give an explanation yet. It is the things that happen on a daily basis. There are tens, hundreds, thousands of applications that need to be assessed on a daily basis. Local government does that, to a degree, and we know there are some challenges there. I am worried that this situation might develop, given the codification of new activities that never attracted any attention under current legislation. I understand the point of view of the mining industry and the resources industry. I understand the mindset of the framers of this bill when they sat down and drafted this provision. They have not thought about the nuts-and-bolts activities and the day-to-day approvals that require outcomes on a rapid basis to allow people to get on with their daily business. Will this bill deliver for that part of the industry?

Hon STEPHEN DAWSON: I have answered yes, honourable member. Again, we are not on clause 1 of the bill; we are actually now on clause 48. Let me state at the outset that I have no issue with the framers of this legislation, because I believe it is very good legislation. I will also mention the fact that whether people are in the Perth metropolitan area or out in the bush, they can be affected by cyclones, by flooding and by pandemics, as we have been in Western Australia for the past two years. Including the words "as far as practicable" helps us out in that regard.

Clause put and passed.

Clause 49: Fee for services provided by local ACH service —

Hon NEIL THOMSON: We have a lot more detail about the fee structure for an entity designated as a local Aboriginal cultural heritage service and about the variation of the fee. Basically, it is a complex area. Clause 49(3) states —

> However, a person designated as a local ACH service cannot charge a fee for services that it provides to the Department —

My understanding is that the department can be any department. It continues —

> or the ACH Council in connection with any local ACH service …

Does this mean that agencies like Main Roads will not be required to pay a fee for their application?

Hon STEPHEN DAWSON: No, it does not. Main Roads will have to pay a fee if it engages to undertake the services covered by the bill before us.

Hon NEIL THOMSON: What about the Department of Health? Will it be required to pay a fee? Cut to the chase so it saves me from having to try to guess which departments would not. Why do we have in the bill —

> … cannot charge a fee for services that it provides to the Department …

Which department does it refer to and which agencies are we discussing? My reading of "department" when I went to the list of definitions is that it can be any department, but it might just be the Department of Planning, Lands and Heritage; is that right?

Hon STEPHEN DAWSON: The member is correct; the Department of Planning, Lands and Heritage will be responsible for administering the legislation, if it is ever passed in this place.

Hon NEIL THOMSON: Does that include any activities of the Western Australian Planning Commission? I assume that it does not.

Hon STEPHEN DAWSON: It does not.

Hon NEIL THOMSON: Which activities might the Department of Planning, Lands and Heritage not have to pay a fee for? Has any consideration been given to that? My point is that if a local Aboriginal cultural heritage service provided a service, I would think that a cost would be associated with that. What is the likelihood, if any, that a service will be provided to the Department of Planning, Lands and Heritage?

Hon STEPHEN DAWSON: If an organisation gave information to the department to add to the Aboriginal Cultural Heritage Directory, a fee could be charged in that case.

Hon NEIL THOMSON: Is the minister telling me that the department, when it seeks information and holds a meeting for people in the bush or even in the metropolitan area when people come together to provide advice, will not be able to charge a fee for that service? Is that part of the local Aboriginal cultural heritage service?

Hon STEPHEN DAWSON: In that example, if they come together for a meeting and the local Aboriginal cultural heritage service discusses something that it wants to give to the department or it asks the department to add something to the Aboriginal Cultural Heritage Directory, no, it cannot charge the department a fee.

Clause put and passed.

Clause 50 put and passed.

Clause 51: Funding for local ACH services —

Hon NEIL THOMSON: The funding for local Aboriginal cultural heritage services is important. We had some discussions about that during the debate on clause 1. This clause provides a more elaborate opportunity to look at the funding issues for these services. As was highlighted earlier, there is a concern about the need to cost recover. During my contribution to the second reading debate, some points were made about the potential for outsourcing. I know that the minister and I differ. In his response to that issue, he mentioned the role of the consultants, for example, who are already providing services. I beg to differ on that. These bodies will provide statutory approval and will be directly involved in the outcome of activities. Again, a multiplicity of activities will go well beyond the large resources projects, and people will have to negotiate that process. Under this clause, the CEO—I assume that is the CEO of the Department of Planning, Lands and Heritage—will have the opportunity, with prior written approval of the minister, to decide that funding is to be paid to a person designated as a local ACH service. Is it anticipated that the process by which the CEO decides that funding is to be paid for a service will be caught up within a budgetary process of the Department of Planning, Lands and Heritage? Could we feasibly have a situation in which the CEO sees that a LACH service needs a top-up of, say, $1 million in its budget? Is it that broad? Will an opportunity exist for the CEO to provide for significant shortfalls in a LACH service's operating budget?

Hon STEPHEN DAWSON: The intention, once the bill passes, is to have a bucket of money to establish the LACHS in the first instance. Then, once the LACHS are carrying out the roles they are required to do under this legislation, they will be able to charge fees. The intention is to fund the LACHS to enable them to do the work that they want. LACHS will be able to charge a fee for the services that they deliver. It would be open to the director general to seek further funding in the future, but it should not be needed because we will give them the capability funding in the first place and then the ability to charge fees to provide the services.

Hon NEIL THOMSON: The LACHS will not be really constrained in any major way through the budget process. There will be no real accountability under the Financial Management Act. They will not be public service entities. They could operate at a loss, for example. I know how this could be a reality. We will have the minister. The Aboriginal Heritage Council will have some oversight. We will have the CEO. They will all look at the situation and know it will be a problem. It seems that there will be no capacity, really, to manage on a daily basis the efficiency of these LACHS, but under this provision the CEO will have the power to effectively fund LACHS with the approval of the minister. I think this is a recipe for disaster, considering the lack of accountability on one hand to this place. Agencies are subject to budget estimates hearings and a whole range of other processes. On the other hand, we will have a cost recovery arrangement. The government has washed its hands of effectively funding the LACHS, but it has slipped in the power for the CEO to fund the LACHS at some point in time. It does worry me. I have to say this is the minister's bill and I understand he has taken responsibility for that on multiple occasions. But I see here we have the capacity of the CEO—I can sort of see some nodding—to determine and set out the amount of money to be paid as funding to the person and the manner in which the sum must be paid. I assume the person can include a LACH service as a whole; is that correct?

Hon STEPHEN DAWSON: Yes, it would be a LACH service as a whole. As the honourable member quite rightly pointed out, the CEO of the department can provide extra funding, on the approval of the minister. As we have already said numerous times in the debate thus far, the capacity and capability of LACHS around the state will vary. This clause allows for the government to provide a LACH service with a top-up should it not be able to cost recover the full amount to do the work it will be required to do. However, if funding is given to an ACH service, and that service is cancelled because of clauses in the bill, the uncommitted amount must be returned to the ACH council. The CEO must ensure the local ACH service that is paid the funding sum is given a written notice of the conditions of the funding, including the requirement to pay back any uncommitted amount upon cancellation of the designation.

Hon NEIL THOMSON: I think the minister has now made it very clear. I appreciate that. The top-up concept will definitely be available under the legislation for a LACH service that is—hypothetically—suffering from a lack of ability to cost recover for its operations through a challenge around the costs. We know everyone is human and we can see that organisations might have cost blowouts. I already mentioned that there seems to be a lack of incentive for

LACHS to contain their costs because they are not subject to the same scrutiny that we would expect for entities that will be the beneficiaries of funding from the consolidated account. It appears that could occur.

This might help other members who wonder whether LACHS will be funded by the consolidated account. The capacity for that exists, which is absolutely necessary. In a lot of ways, I would prefer that LACHS be funded by the consolidated account, as a centralised process of cost recovery would be a much more sensible option for fees and for the good of Western Australia. This would ensure that we did not end up with a complete hodgepodge, which is probably not the right word, but a lot of variation across the state in terms of the quality, cost and performance of local Aboriginal cultural heritage services. As a former Treasury officer, I ask the minister whether the Department of Treasury has provided a comprehensive assessment of the potential budgetary impact of the upper and lower range of fees proposed under clause 51 into the future.

Hon STEPHEN DAWSON: No. Treasury has been involved in consultation on this legislation. However, I have been at pains to remind honourable members that fees associated with this process will be determined as part of the co-design process. The regulations and guidelines of co-design are all ahead of us. The government will be in a better position to know what this will cost once the co-design process is completed. As I have already pointed out, the budget included $10 million in capability money to start.

Hon NEIL THOMSON: The minister expects us to take a lot on faith. Again, it would have been much better if the matter had been referred to the Standing Committee on Legislation, given the significant unknowns in the bill.

Hon Stephen Dawson: With respect, by way of interjection, that issue has already been dealt with. The house has voted not to send that to committee, the member is not supposed to reflect on that decision—just so the member is aware of that.

Hon NEIL THOMSON: Thank you for the advice, minister. It is a complex bill and my colleagues and I are expected to scrutinise the significant impacts the bill will have, both economic and cultural, which I think will require a lot better detailed consideration than is available today. I am happy to finish on the clause.

Clause put and passed.

Clause 52 put and passed.

Clause 53: Terms used —

Hon NEIL THOMSON: I understand the importance of this provision and respect the need for it. I would appreciate an explanation, as someone who is not necessarily over the detail, about ancestral remains. Paragraph (a) refers to the "meaning given in section 55(1)(a)". The minister could explain proposed section 55(1)(a), if he wanted to, and I will be happy if he could go through how ancestral remains are identified.

I would have thought that a number of them are quite obvious because of the archaeological evidence that will be provided. However, given that previous clauses of the bill relate to cemeteries, and we had the comment about contemporary remains of Aboriginal persons, there might be situations in which it could be quite difficult to identify those remains. For the purposes of the scrutiny of this bill, could the minister possibly outline the level of discipline that might be imposed on the identification of all ancestral remains, given the penalties that will apply to persons—unwittingly, even—in breach of some of the provisions in the bill related to those remains?

Hon STEPHEN DAWSON: I draw the member's attention to the definition of "Aboriginal ancestral remains" in the bill. I am further advised that if remains are found anywhere outside a cemetery, those remains will go to the coroner and the coroner will have a role in identifying the source of those remains.

Hon NEIL THOMSON: I am sorry to impose, but I think this is important. The coroner's decision on the definition of whether the remains are ancestral remains or just the remains of a non-Indigenous person, for example, will be final; is that how this works?

Hon STEPHEN DAWSON: The coroner will decide whether it needs to deal with it. Yes, it is the coroner's role.

Sitting suspended from 6.00 to 7.00 pm

Clause put and passed.

Clauses 54 to 67 put and passed.

Clause 68: Reporting Aboriginal cultural heritage —

Hon NEIL THOMSON: I think that this clause deserves some further discussion. It states —

> (1) A person who knows, or becomes aware, of the existence of any of the following must, within the prescribed period, report it to the ACH Council —
>
> (a) an Aboriginal place;

(b) an Aboriginal object;

(c) Aboriginal ancestral remains.

There is a penalty of $10 000. It continues —

(2) However, subsection (1) does not apply to —

(a) an Aboriginal person acting in accordance with the person's traditional rights …

I would like a bit of a synopsis, if possible, of the logic of this approach. Again, I can see in the legislation the mind of the lawyer who framed it, and that they might have been thinking of a larger corporation with a lot of knowledge, with significant engagement with Aboriginal people on an ongoing basis, that maybe has a geographic information system and a whole range of things, and that maybe employs archaeologists. From some of the reports I have, we know that it is largely archaeologists who provide information about these places. I am happy to hear the minister's views on that. He obviously has had more experience in dealing with this as the minister than I have had, specifically on this matter. I am wondering how that might apply to people who will be relying on information systems. I would have thought that the other way around might have been important, obviously notwithstanding that an Aboriginal person who is acting in accordance with traditional rights will not expect to receive a penalty. However, there might be some obligation for those persons to provide information about where the Aboriginal place and object is. It seems a bit like proponents will have to shoot in the dark and the onus will be on them to identify those places. I would appreciate it if the minister can provide some rationale about the background. I know it is an open question, but if the minister is willing, I will be happy with that.

Hon STEPHEN DAWSON: Thanks, honourable member. First of all, the proposed act requires only people who know or become aware of the existence of Aboriginal cultural heritage to report the Aboriginal cultural heritage to the ACH council. We understand that not all Western Australians will know what is Aboriginal cultural heritage. A function of the ACH council will be to promote public awareness, understanding and appreciation of Aboriginal cultural heritage in the state. This will be achieved through the publication of fact sheets and educational awareness campaigns. Over time, this will assist people in identifying what is or may be Aboriginal cultural heritage.

In relation to an exemption, the proposed act provides that Aboriginal people will determine what is Aboriginal cultural heritage and what should be added to the directory. as some Aboriginal cultural heritage may be subject to culturally sensitive information and, in accordance with traditional law, should not be disclosed, the proposed act provides that an exemption should be provided to any person who does not report Aboriginal cultural heritage if they are acting at the written request of an Aboriginal person who is acting in accordance with the person's traditional rights, interests and responsibilities in respect of the heritage.

In determining penalties for the proposed act, other Western Australian legislation and legislation in other states and territories were considered. The penalty for failing to report Aboriginal cultural heritage is similar to the penalty provided for a similar offence in the Victorian Aboriginal Heritage Act 2006 and the South Australian Aboriginal Heritage Act 1988. It should be noted that the penalty amount stipulated in the proposed act is the maximum for an individual, but may be up to five times more for a body corporate.

Do Aboriginal people have to report heritage? The proposed act provides an exemption for an Aboriginal person acting in accordance with tradition, as well as the person acting at the request of the Aboriginal person, from the requirement to report Aboriginal cultural heritage. The proposed act recognises that Aboriginal people have custodianship over Aboriginal cultural heritage. One of the key principles relating to custodianship and control of Aboriginal cultural heritage is that Aboriginal people should be recognised as having a continuing living relationship with and as being the primary custodians of Aboriginal cultural heritage. Therefore, no Aboriginal person should be convicted of an offence for harming Aboriginal cultural heritage when undertaking activities in accordance with the person's traditional rights, interests and responsibilities in respect of the cultural heritage.

Hon NEIL THOMSON: The minister touched on that other aspect of persons acting on behalf of Aboriginal persons. I am thinking of consultants who might be working on behalf of Aboriginal persons. I do not know how to word this. I wonder why there will be no obligation for the provision of information to the Aboriginal Cultural Heritage Council, notwithstanding those places might be considered to have sensitive information. In general, I would have thought the need for the provision of information would have been better so that the Aboriginal Cultural Heritage Council could create greater awareness for proponents so that they would not be in a position whereby they inadvertently stumble onto places, objects or a whole range of things. What is the logic behind supporting those parties who work on behalf of Aboriginal persons? Could the minister explain why that was included?

Hon STEPHEN DAWSON: I am told that in legislation we cannot override the rights of Aboriginal people in how they manage their heritage, essentially.

Clause put and passed.

Clauses 69 to 71 put and passed.

Clause 72: Application for area to be declared as protected area —

Hon NEIL THOMSON: This part refers to protected areas. It is an interesting part of the bill and I think it probably deserves at least a little discussion. I refer to the additional protections that will be provided by declaring an area as protected. Could the minister explain what protected areas already exist under the current act, and, given the importance of protected areas, how many of those protected areas are there likely to be across the state, what will be the breadth and scope of those protected areas, and what additional protection they will provide?

Hon STEPHEN DAWSON: I am told that there are currently 78 protected areas across the state. The last one was declared—if that is the right word—in 1994. There have not been any since that time. Because the protected areas are currently vested in the Minister for Aboriginal Affairs, post the Native Title Act coming into place, it was deemed that any protected area declared after that date would be under a future act, so there have been no declarations made since that time. A declaration of an area as protected sterilises the land, so it means that a proponent cannot apply to damage cultural heritage on that land. I think I said earlier, either today or on the last sitting day, that an application to overturn a declaration as a protected area would have to go through both houses of Parliament.

Hon NEIL THOMSON: In the definition here, the test to declare an area as protected includes a requirement to describe the outstanding significance of the Aboriginal cultural heritage of the application area. I do not have a notation on that, but I think that might have been an amendment that was made between the two bills; is that correct?

Hon STEPHEN DAWSON: Honourable member, my advice is that I do not believe so.

Hon NEIL THOMSON: The identification of "outstanding significance" requires declaration by the knowledge holder of the Aboriginal cultural heritage group or community members. That significance should be recognised through social, spiritual, historical, scientific or aesthetic values as part of their tradition. I want to focus on that process of identifying outstanding significance and the test that will be undertaken. I assume that the decision to approve that will be made by the ACH council; is that correct?

Hon STEPHEN DAWSON: Guidelines will be made on how to declare a protected area and, obviously, that will happen as part of the co-design process that we have previously spoken about. Only knowledge holders may nominate an area containing Aboriginal cultural heritage of outstanding significance to be declared a protected area. Applications made by others on behalf of knowledge holders will be accepted. I am happy to give the process to the member. The process to declare a protected area will be as follows. An application must be made to the Aboriginal Cultural Heritage Council in the approved form. Applications must provide details of the area being nominated, including details of the Aboriginal cultural heritage deemed to be of outstanding significance.

On receipt of an application, the ACH council must give written notice to Aboriginal parties of the area being nominated to seek their views on the significance of the Aboriginal cultural heritage. Following this, the ACH council will consider the nature and significance of the heritage to the knowledge holders, and will make a preliminary view that the area or part of the area or no part of the area should be declared a protected area.

If the ACH council forms the preliminary view that no part of the area should be declared a protected area, the ACH council is required to give notice of its decision, including the reasons of this decision, to the applicant and the Aboriginal parties of the area that were notified of the application. The applicant or persons given the notice of the application may request that the minister consider the matter. The minister is required to consider the application along with further information that may have been provided and any submissions provided to the ACH council and the reasons for the ACH council's decision. The minister will either confirm the decision of the ACH council or decide that the area or part of the area should be declared a protected area. If the latter is decided, the ACH council is required to continue the application as if it made this preliminary view.

If the ACH council forms a preliminary view that an area should be declared a protected area, written notice must be given to any affected party of the area, such as landholders or public authorities with an interest in the area, before making a recommendation to the minister. When making a recommendation to the minister, the ACH council is required to consider the application and any submissions received by affected parties. The ACH council would then recommend that the application area or part of the area or no part of the area should be declared as a protected area.

When the minister receives a recommendation from the ACH council, the minister will decide whether the area should be declared a protected area. The decision has to be made on the grounds of whether the minister is satisfied that the area is or is part of or contains Aboriginal cultural heritage of outstanding significance and that it requires the protection afforded to protected areas. The decision must be made on the grounds of what is in the best interests of the state—that being the social and economic benefit of the state, including the social and economic benefit of Aboriginal people and the interests of future generations.

If the minister makes a decision that an area should be declared a protected area, the minister is required to make a recommendation to the Governor to declare that the area become a protected area. The Governor is responsible for declaring an area as a protected area. In making it a declaration by the Governor, it will give the protected area the highest level of protection afforded to an area in this state, similar to A-class reserves and state heritage–listed places.

That is hopefully a fulsome answer for the member.

Hon NEIL THOMSON: Thank you, minister. That was a very fulsome description of the process. I appreciate that. It certainly helps me. The decision then rests with the minister. I assume the protected areas have probably been one of the main bones of contention from our—no? It is not? I ask the minister, while he is conferring with his advisers —

Hon Stephen Dawson: Just by way of interjection, this hasn't really been an issue —

Hon NEIL THOMSON: It has not been an issue?

Hon Stephen Dawson: — of contention; no.

Hon NEIL THOMSON: Therefore, to streamline this discussion, Aboriginal groups have been more concerned about other matters as opposed to this particular power of the minister to determine the final arbiter of the protected areas. That is good to know and I am happy to leave it at that.

Clause put and passed.

Clauses 73 to 80 put and passed.

Clause 81: Decision of Minister —

Hon NEIL THOMSON: I note a table was provided on the Department of Planning, Lands and Heritage website—we have talked about it before and it has been tabled in this place—that outlines the amendments to the legislation. My reading of the table is that there is a bit of a disjunction in the clause numbers from clause 81 going forward. It may be the case that there was a previous bill, or I may be reading it the wrong way, and it is to do with getting the clauses in the bill out of sequence. It just made it a bit harder to identify the changes to the clauses. The final decision and recommendation of the Aboriginal Cultural Heritage Council is under clause 79. It would be helpful if the minister could explain what the recommendation will potentially be. I may sound like I am digging around here, but the clause is quite extensive and I am trying to get some understanding of what it all means. Clause 81 refers to the decision of the minister on the recommendation. I would appreciate it if the minister could explain the sorts of recommendations of the ACH council that the minister might make decisions on.

Hon STEPHEN DAWSON: This clause provides that when the minister receives a recommendation from the ACH council, the minister must consider the information the ACH council has provided to the minister under clause 79, "Recommendation of ACH Council", and any further information received under clause 80 and make a decision on whether an area should be declared a protected area within the period specified in the regulations of the proposed act. Like the ACH council recommendation, the decision of the minister must be made on the grounds of whether the minister is satisfied that the Aboriginal cultural heritage located in the area is of outstanding significance for the purposes of the act and that the area requires special protection from activities that may harm such cultural heritage. The minister must also be satisfied that measures are in place for any overlap area between the proposed protected area and the area that is the subject of any ACH permit or ACH management plan to be excised from the area that is the subject of the ACH permit or ACH management plan, and as to any further matters that may be specified in the regulations of the proposed act.

However, unlike the ACH council, the minister will also have to consider what is in the interests of the state, which is defined to include the social or economic benefit of the state, which includes the social or economic benefit of Aboriginal people and the interests of future generations. This takes into account that the declaration of protected areas may significantly affect the rights and interests of other landholders or persons with an interest in the area, including the restriction of access or prohibition of activities from occurring within an area. If the minister decides that an area should be declared as a protected area, the minister may give any written direction necessary prior to the declaration to amend any ACH permit or ACH management plan under clauses 129(1) or 169(3) respectively so as to excise any overlap with the area that is to be protected, noting that such amendment will be based on the agreement of either the ACH permit holder or the parties to the ACH management plan under clauses 72(3) or 72(4) respectively. The minister is also able to determine that the protection area order is subject to any condition related to the management of or access to the area, or in respect of any other matter that is specified in the regulations of the proposed act.

Finally, the minister must recommend to the Governor that the government declare the area to be protected for the purposes of the proposed act. If the minister decides that no part of the application area should be the subject of a protected area order, public notice of such a decision will be required. The requirements of public notice are provided in clause 282 of the bill and require publication on a website maintained by or on behalf of the ACH council, and as required by the regulations of the proposed act.

Hon Dr BRAD PETTITT: As a follow-up on clause 81(6), will there be a review or appeal process if the minister were to make a decision that no part of an area should be declared as protected? Will there be process for review or appeal?

Hon STEPHEN DAWSON: There will not be. Decisions made about the interests of the state are not reviewable.

Hon Dr BRAD PETTITT: What will be the process? Can they apply again at a later date?

Hon STEPHEN DAWSON: Yes, they will be able to apply again after two years, but not within two years. They might want to give different information or a different explanation, or whatever, as part of their application.

Clause put and passed.

Clauses 82 to 88 put and passed.

Clause 89: Application of Part —

Hon NEIL THOMSON: I have a very simple question. This clause reads —

> This Part applies to the following Aboriginal cultural heritage only —
>
> (a) an Aboriginal place;
>
> (b) an Aboriginal object;
>
> (c) Aboriginal ancestral remains;
>
> (d) Aboriginal cultural heritage located in a protected area.

In relation to offences about harm, I read that changes were made in the second draft of the bill that, maybe, avoided any potential application of this bill to speech; that is, in relation to people making comments or other things that might not specifically relate to those elements in paragraphs (a) to (d). I would like clarification on that.

Hon STEPHEN DAWSON: I am not sure that we got the question, so if I am not giving the right answer, please, ask it again. The harm provisions apply only to the things that are outlined in the clause. Essentially, the clause sets out the Aboriginal cultural heritage to which this part applies. Offences of harming Aboriginal cultural heritage apply to an Aboriginal place, an Aboriginal object, Aboriginal ancestral remains and Aboriginal cultural heritage located in a protected area.

Clause put and passed.

Clause 90: Meaning of harm to Aboriginal cultural heritage —

Hon Dr BRAD PETTITT: As members will be aware, I have an amendment on the supplementary notice paper. But before I get to it, I understand that the definition of "harm" in clause 90(1) is different from what was in the 2020 draft bill. In fact, I understand that the words in my amendment on the supplementary notice paper are similar to what was in the 2020 draft bill. Can the minister confirm whether that is correct and explain the thinking behind changing the words that were in the 2020 draft bill?

Hon STEPHEN DAWSON: The definition of "harm" in the honourable member's amendment on the supplementary notice paper is what was in the consultation draft bill. The definition was amended in the final bill to remove the carrying out of any act in relation to Aboriginal cultural heritage other than expressing an opinion or belief that demonstrates disrespect for the importance of Aboriginal cultural heritage to Aboriginal people and diminishes the value of Aboriginal cultural heritage. The removal of those words was as a result of stakeholder feedback that that broad definition created significant uncertainty for stakeholders. In particular, the lack of judicial guidance on how this offence would likely be interpreted created an unnecessary level of uncertainty.

Hon Dr BRAD PETTITT: I am trying to dig down so that everyone is clear. My amendment on the supplementary notice paper seeks to insert paragraphs (a) and (b). The strong feedback of stakeholders to whom I spoke is that those two paragraphs are a stronger expression of harm to Aboriginal cultural heritage. I do not know whether the minister is able to disclose this, but I am just trying to understand which stakeholders were concerned about this more comprehensive definition of "harm".

Hon STEPHEN DAWSON: First of all, the government thought there were judicial precedents in relation to this issue, so it was included. Upon reflection, it was worked out that there was no judicial precedent in having a clause like this in the bill and it was very complicated to work out. There is that issue. In terms of which particular stakeholders raised it, I am advised that industry stakeholders voiced concern about it essentially because of what it would mean, the fact that there was no judicial precedent and it was going to be difficult.

Hon Dr BRAD PETTITT: This is my last question before I move the amendment. Does any other state or territory have this more expansive definition of "harm" included in similar legislation?

Hon STEPHEN DAWSON: We do not think it is included in any other legislation. I am further advised that the definition of "harm" does not necessarily preclude demonstrating disrespect for the importance of Aboriginal cultural heritage to Aboriginal people. It does not necessarily exclude that, but I am told that after reviewing the feedback, it was determined that what we have said is more legally and logically sound.

Hon Dr BRAD PETTITT: Although I acknowledge that feedback, certainly the feedback that I have had from a range of stakeholders is that this more robust definition of "harm" is preferable. On that basis, I move —

Page 75, lines 13 and 14 — To delete the lines and insert —

(1) To ***harm*** Aboriginal cultural heritage includes the following —

(a) to destroy or damage the Aboriginal cultural heritage; or

(b) to carry out any act in relation to the Aboriginal cultural heritage, other than to express an opinion or belief, that —

(i) demonstrates disrespect for the importance of Aboriginal cultural heritage to Aboriginal people; or

(ii) diminishes or otherwise affects the value of Aboriginal cultural heritage to Aboriginal people.

Hon NEIL THOMSON: On behalf of the opposition, I indicate that we will be supporting the government not supporting the amendment. I think this is a more careful approach, given the potential of setting a judicial precedent and the challenges with opinions or beliefs that might be expressed. I think it would be quite dangerous to curtail any views, notwithstanding the other protections that apply under federal legislation, including the Racial Discrimination Act et cetera. Our position is to not support the amendment.

Amendment put and negatived.

Clause put and passed.

Clauses 91 and 92 put and passed.

Clause 93: Serious harm to Aboriginal cultural heritage, including by accident —

Hon TJORN SIBMA: Bearing in mind that we have given a commitment to deal with this legislation by 9.45 pm, and that I am not in the habit of making speeches in committee consideration, I must say that I find clause 93 inherently problematic for reasons of law, because it underscores a bit of a fog of mystery in how much knowledge anyone can possibly have about the expanse of Aboriginal cultural heritage in this jurisdiction. To deny somebody the defence of accident is a serious undertaking. It is probably an issue that would have been deliberated upon with some interest by a committee should this bill have been referred to one. On whose advice was it determined that clause 93 as it is presented here, which will take away the defence of accident and seek to apply penalties for not destruction, but harm, which is still in a way nebulously defined, should be included in the bill, and is it absolutely necessary in order to achieve the objectives of the bill?

Hon STEPHEN DAWSON: I am told it was in the draft that was put out last year for public comment, so it was a policy consideration by the people who drafted the bill. I am told that up until now, there has never been the ability to prosecute somebody in this regard, but it was felt that it was a necessary inclusion in the bill; therefore, it has been included.

Hon TJORN SIBMA: Thank you, minister. We do not have time to do it, but would the minister have examples of cases that have occurred in this jurisdiction in recent times that have led to serious harm to Aboriginal cultural heritage by way of accident? That would be interesting to know. Has this occurred?

Hon STEPHEN DAWSON: I think it is about making sure that people do their due diligence to make sure that accidents do not happen. I do not have an example other than the contraventions that have occurred previously and that action was not able to be taken on. It is a serious inclusion in the bill, but, equally, not harming Aboriginal cultural heritage is also a serious issue.

Hon TJORN SIBMA: Would the minister be able to advise me whereabouts in the bill the opportunity for accidental harm to be caused to Aboriginal cultural heritage might be mitigated, perhaps by way of the education function that the ACH council will deliver? I must say that there is a knowledge gap here. I do not impugn any sort of partisan view to that. We are operating in a space that is yet to be quantified empirically. I would find this clause very difficult to agree to in the best possible circumstances, but if the government is going to include a clause like this, it is almost obliged to allow people to undertake due diligence to a degree at which it will have an up-to-date and accessible cultural heritage register that will be subject to free and open inquiry. I am interested to know what the government might do to remediate that gap.

Hon STEPHEN DAWSON: There will be a broad education campaign on the legislation. Obviously, this issue will be looked at. I draw the member's attention to clause 98, which talks about defences. Essentially, the defence is that the person has undertaken a due diligence assessment that there was no risk that the activity would cause harm to Aboriginal cultural heritage et cetera. That is an escape clause, if I can use those words.

Hon TJORN SIBMA: I am not intending to be obtuse here, but one might envision a scenario in which accidental serious harm was caused to cultural heritage and arose by cause of an accident and the origin of that accident was in ignorance. If one was to cause serious harm, how would that serious harm be detected if it was accidentally caused? I am really trying to find a scenario or a mischief the bill is trying to defend against. It seems it is dependent on self-disclosure or self-incrimination of some kind if it is caused accidentally. Presumably, an inspector or an Aboriginal inspector will not be surveying operations of any development going through all its development stages. I am trying to understand how, potentially, accidental serious harm caused to cultural heritage would be detected, reported or known about at all in a particular instance.

Hon STEPHEN DAWSON: It would have to be reported to us by somebody. I am further advised that feedback from traditional owners is that people should not use ignorance as a defence for harming Aboriginal cultural heritage. Generally, in life, I am not sure that ignorance is a legal defence.

Hon NEIL THOMSON: This ties into the issue I raised earlier about the necessity for traditional owners to disclose sites et cetera. The challenge is that the expectation is on the proponent. As I said, some of the proponents are well resourced and may be able to undertake the work that is required. However, there is the opportunity for proponents that may not be so well resourced to accidentally cause harm when the knowledge of sensitivity of an area in the context of cultural heritage was known to Aboriginal knowledge holders, yet not disclosed or available on the register. I think that is a very problematic situation. It could be a bit like a gotcha clause in some respect. Proponents might, with all best intent and desire, be properly informed, properly able to avail themselves of the information and would never have even contemplated causing harm, yet caused harm by accident and find themselves in that position. If that information was known to knowledge holders and accidental harm was caused, would there be any defence at all within the scope of this law in a court of law if that proponent was prosecuted for the harm?

Hon STEPHEN DAWSON: It is up to the prosecution authority to decide whether there is a case. The burden of proof is beyond reasonable doubt and the onus of proof is to be borne by the prosecution. The defence of accident is not applicable to strict liability offences generally.

Clause put and passed.

Clauses 94 to 101 put and passed.

Clause 102: Due diligence assessment —

Hon NEIL THOMSON: This clause, "Due diligence assessment", follows on from the discussion we had earlier. It would appear that a person undertakes a due diligence assessment to make a determination based on the Aboriginal cultural heritage management code. Has the Aboriginal cultural heritage management code been drafted?

Hon STEPHEN DAWSON: Honourable member, the code will be the subject of co-design, and that will include the details of the required levels of due diligence assessment and what information needs to be provided about the Aboriginal cultural heritage in the Aboriginal cultural heritage management plans. It is anticipated that for some proposals in which Aboriginal cultural heritage exists and prior investigations are adequate, further investigations may not be required. In cases in which Aboriginal cultural heritage has not been documented and reported, heritage investigations will be required to identify Aboriginal cultural heritage and understand its characteristics.

Hon NEIL THOMSON: When is the code likely to be available for broader consultation, noting the importance of due diligence for all members of the community? Any member of the community undertaking activity might fit into the tier 1, tier 2 or tier 3 strata.

Hon STEPHEN DAWSON: It will be co-designed. We do not propose to give a document to people or preordain what is in it. The intention is truly to sit down with the various stakeholders and co-design the stuff together. It will be some months away as part of the co-design process.

Hon NEIL THOMSON: Given that the people dealing with this code and showing responsible due diligence will be proponents, I hope that the minister works very closely with a broad cross-section of potential proponents because the onus of the requirement of due diligence sits squarely with those persons in the process of undertaking the activity. A part of the due diligence will be the assessment of whether an activity is a tier 1, tier 2 or tier 3 activity. We note that none of those activities have been defined and again we will be reliant on the process of regulation-making, which is underway. Can the minister describe to any extent what might be in a tier 1 to tier 3 activity? I also note that there are exempt activities; we had that description. I note that the bill does not refer to exempt activities. A person on the boundary of exempt activities could undertake activities that might be exempt or a tier 1 activity and there might be some requirement to undertake due diligence; I am not sure. I assume that including only tier

1 means that no due diligence is required for exempt activities but it is a bit of a conundrum because if that activity is deemed to be exempt and no due diligence is required, I can see a situation in which it falls into a tier 1 activity and somehow there is a breach. That person might say, "I didn't need to undertake due diligence." Can the minister provide a description of how that process might unfold?

Hon STEPHEN DAWSON: In relation to exempt activities, they are listed at clause 100 on page 828 of the legislation. In terms of the tiers, the member is correct; the activities in the tiers have not been predetermined. It is fair to say that there are different views amongst traditional owners about what should be a tier 1, tier 2 and tier 3 activity so there really is a need to get out around the state to talk to the prescribed bodies corporate and other stakeholders. There will need to be a coming together of ideas before we land on what is in each of the tiers. I put the following on the record. Due diligence assessment that is undertaken in accordance with the ACH management code will have the purpose of enabling a proponent to make an assessment as to whether the area where it is intended the proposed activity is to be carried out includes any area that is subject to a protected area order. The characterisation of the proposed activity will be a tier 1, tier 2 or tier 3 activity and that will determine how the proposed activity may lawfully be carried out; where Aboriginal cultural heritage is located; where it is intended the proposed activities be carried out; and whether there is any risk of harm being caused to Aboriginal cultural heritage by the proposed activity. If the proposed activity is categorised as a tier 2 or tier 3 activity, the person is to be notified or consulted about the proposed activity. That is what this clause is about. What is in those tiers has yet to be worked out.

Hon NEIL THOMSON: Are the due diligence requirements for all activities all the same?

Hon Stephen Dawson: Can you repeat that, please?

Hon NEIL THOMSON: Is the due diligence obligation identical for the various tiers—tier 1 and tier 3 activities?

Hon STEPHEN DAWSON: That is also subject to the co-design.

Clause put and passed.

Clause 103 put and passed.

Clause 104: Proponent may seek confirmation about proposed activity —

Hon NEIL THOMSON: Clause 104 is going to be a very big job for the CEO. I hope the department will have well-established processes in place. I note the rather archaic wording, "provide a letter of advice", to confirm whether a proposed activity is exempt. I would dearly hope that we are not literally talking about an exchange of letters. I would have thought that people could go to a website and ascertain whether the activity is exempt via a bunch of criteria and other things. Maybe they could lodge some sort of application on the website to get a response from the CEO in respect of the activity. We have a two-stage process. Firstly, there will be the determination of whether the activity is tier 1, 2 or 3. A request under clause 104(1) must be in writing, containing details of the proposed activity. The applicant will then have to apply for a permit through the LACH service, so it seems that a bit of a two-stage process might be required of proponents. Can the minister explain the resourcing and process that might be used to streamline what I imagine will be a rather active and busy process for the CEO?

Hon STEPHEN DAWSON: The intention is that there will be a very clear table and an exhaustive list. Clause 104(4) states —

> A letter of advice under subsection (3) must only be provided by the CEO if the proposed activity described in the letter is an activity in relation to which there is uncertainty as to whether or not the activity is —

Paragraph (a), (b), (c) or (d).

As I said, there will be an extensive list, but only if something is not on the list will a proponent need to actually avail themselves of this clause.

Clause put and passed.

Clauses 105 and 106 put and passed.

Clause 107: Persons to be notified or persons to be consulted about activities or proposed activities —

Hon NEIL THOMSON: This clause creates some concern as well. I note that under clause 107(1), if there is not a local ACH service for an area or part of an area, each native title party for the area or part of the area and each knowledge holder for the area or part of the area are the people to be consulted. That could be a horrendous predicament for someone undertaking a tier 1 or 2 activity, given the transaction cost to engage parties. The proponent's activity might have a value of only $5 000, because it might involve the sorts of services that fit into these other activities. How are they supposed to be able to consult with that broad a range of parties if there is no local Aboriginal cultural heritage service for that area?

Hon STEPHEN DAWSON: There will be a finite number of knowledge holders. It will not be an extensive list. This bill seeks to align with the Native Title Act 1993, but the bill recognises that heritage is broader than

native title. Often, knowledge holders are not members of a native title party but have knowledge of the Aboriginal cultural heritage in an area and have rights, responsibilities and interests in that heritage. We are not trying to make this an expensive or cumbersome process for proponents, but it is important to acknowledge that Aboriginal cultural heritage is priceless, so we need to make sure that we protect it for the future. Also, this provision will apply only to tier 2 activities; it will not apply to tier 1 activities.

Hon NEIL THOMSON: It will apply to tier 2 activities and above. It is all very well to say that heritage is priceless. I understand that concept and agree with it in the broader concept of heritage. From the lists that we have seen, the tier 2 activities could potentially be quite small projects in areas where there is an extremely low risk and it will not be a question of the likelihood of causing damage to heritage in either a significant or even a material way in any way. If there are no local Aboriginal cultural heritage services, proponents will be required, effectively, to go through what could be a very broad process. The minister is saying that there will be a number of knowledge holders. Is the minister suggesting that in the absence of a local Aboriginal cultural heritage service, a proponent undertaking a tier 2 activity with a total value of $5 000 will be required to go through this process even if it is very unlikely that the knowledge holders will be able to easily engage with any kind of rigour in the process of getting an approval? I find this part of the bill completely irresponsible and I think it is dangerous. If there is no local Aboriginal cultural heritage service, I think the state should be obligated to provide the proponent with some support because this provision will seriously undermine the activity. I can see this affecting all tier 2 activity and above. Maybe it will not affect tier 3 activity; maybe it will affect only tier 2 activity. It will affect those middle, low-cost activities that range from between $1 000 and $100 000 compared with those large activities for which engagement can occur because, as I said, the transaction cost as a proportion of the total project cost is low. I think this is a very dangerous provision. I again implore the minister to ensure that a safeguard will be provided for when a local Aboriginal cultural heritage service cannot be engaged by a competent and proficient body and that there will be a process that is more rigorous than this, because this could potentially completely block those tier 2 activities. That is a request. Maybe the minister can respond, because I think this will be unworkable.

Hon STEPHEN DAWSON: The commitment to co-design is real and serious. I will not speculate what might be a tier 1, tier 2 or tier 3 activity because that is not for me to decide; that will come out of the co-design process. It is intended that the Aboriginal Cultural Heritage Council will prepare some knowledge holder guidelines, for which there will be an opportunity for public consultation and submissions before their approval. Further, I draw the member's attention to clause 108, which talks about systems to identify persons to be notified or consulted. It states —

> A proponent may request the assistance of the CEO to identify the persons to be notified or the persons to be consulted about an activity that a proponent is carrying out, or a proposed activity that the proponent intends to carry out, in an area.

That is another thing that people will be able to avail themselves of.

Clause put and passed.

Clauses 108 to 114 put and passed.

Clause 115: Application for ACH permit —

Hon Dr STEVE THOMAS: It is repeated in a couple of other clauses, including clauses 120 and 163, but clause 115(2)(f) states —

> set out how the proposed activity will be managed to avoid, or minimise, the risk of harm …

Can the minister indicate whether he has a definition of "minimise"? I raised in my second reading address that obviously there will be circumstances in which Aboriginal cultural heritage will be effectively sacrificed for the greater good. Avoiding is obvious—do not harm it—but there will be circumstances in which some will ultimately go. If there is not a definition of "minimise", will the minister give an undertaking that, as part of the consultative process around the regulations, he will try to formalise that definition to acknowledge that it is accepted that in some circumstances there will be some impact, effectively? I am looking for some reassurance that the word "minimise" might indicate that, ultimately, the minister's direction will require him to allow some impact. If the minister does not have the definition now, maybe the minister can give us an undertaking that he will work out what it looks like coming up.

Hon STEPHEN DAWSON: Yes; I give the honourable member the undertaking we will work out what it looks like. There is no definition at this stage. It will be up to the council to work out, in its view, whether the proponent is minimising —

Hon Dr Steve Thomas: Surely there will be some ministerial oversight of that, because we do not want to be in the situation in which "minimise" really does not exist. We have to sort of somehow reinforce that "minimise" will occur on some occasions and destruction will occur on some occasions.

Hon STEPHEN DAWSON: It certainly will, and it does under the 1972 act. Proponents bring projects before the Aboriginal Cultural Material Committee and it looks at these things already.

Hon Dr Steve Thomas: I am trying to empower your discretion as the minister or the future minister to be able to do that.

Hon STEPHEN DAWSON: The intention is to work with the council to work out what "minimise" is. Perhaps this will inform part of the conversations that will be had in the co-design process for the regulations; stakeholders might wish to proffer a view on what "minimise" looks like.

Hon WILSON TUCKER: My question is about the application for an ACH permit. Is there a fee for the proponent who files an application with the council? Apologies if the minister already answered this previously.

Hon STEPHEN DAWSON: The answer is not yet, honourable member. The legislation provides the ability to charge fees. I am advised that it is intended that the department will track the number of applications and the resources that it requires to process them during the first 12 months, and that data will provide a sufficient basis for determining whether fees should apply to permit applications.

Hon WILSON TUCKER: I raised a question previously about the time KPIs associated with the council, and the minister said that they would fall under the performance scrutiny of the minister. Is the approval time frame for the ACH permit by the council one of those measurable time KPIs; and, if yes, what is the expected time it will take for the council to make a decision on an ACH permit?

Hon STEPHEN DAWSON: Guidelines will prescribe time frames. What those time frames will look like is to be decided as part of the co-design process. But, yes, that can be tracked. Essentially, if decisions are taking longer to be made than the time frame, that can be tracked. Whether they are in or outside the time frame can be tracked. As I alluded to previously, the opportunity exists for the minister to direct the Aboriginal Cultural Heritage Council if it does not meet the prescribed time frames. That is another option.

Hon WILSON TUCKER: Will the expected amount of time be included in the regulations?

Hon Stephen Dawson: Yes.

Clause put and passed.

Clauses 116 to 127 put and passed.

Clause 128: Conditions —

Hon NEIL THOMSON: I want to interrogate sovereign risk and the impact this clause will have on projects in Western Australia.

Hon Stephen Dawson: Could the member say that again?

Hon NEIL THOMSON: I would like to discuss sovereign risk and the impact this clause will have on projects of all sizes. One of the challenges with any project is the lead time for investment. As described in the "Objects of Act", there is a need for certainty, but this clause contains a broad provision that a permit holder must notify the ACH council of new information. Most permits that I am aware of are approved, applying a series of conditions. I understand that some information might be identified that will be material to the approval, but some of the definitions within the nature of cultural heritage might allow for some flexibility of interpretation. I worry about the impact of this clause on significant investment decisions and the appetite in the investment community to make decisions in Western Australia. Has there been a proper assessment of this clause in relation to sovereign risk in Western Australia?

Hon STEPHEN DAWSON: I do not think this is an issue of sovereign risk in Western Australia. This clause simply requires that when a proponent changes, such as a company is sold and someone else takes over that company, the council will be informed. To be honest, it is good governance.

Hon NEIL THOMSON: The minister referred to clause 127. I am referring to clause 128.

Hon STEPHEN DAWSON: Why is the onus on proponents to report new information? It is a standard condition that a permit holder must report new information about Aboriginal cultural heritage to the council. There is nothing to stop an Aboriginal person from reporting new information to the council. For ACH management plans, a party to the plan, which includes the Aboriginal party, must notify the ACH council if the party becomes aware of any new information about Aboriginal heritage. Members in this place have spoken about Juukan Gorge over the past few months. If a clause such as this existed then, the likelihood is that we would not have seen the tragedy at Juukan Gorge. I stand behind this clause; it is not an issue of sovereign risk. It is simply an issue of ensuring that we protect Aboriginal cultural heritage. If further work is done that finds sites of significance, they will need to be reported and taken into consideration.

Hon NEIL THOMSON: I was going to refer to this as the Juukan Gorge clause because it seemed to be that, and the minister seems to have confirmed it. Clearly, the section 18 matter, in terms of the destruction of the site, and the notification of new information is very different, I would have thought, from the more nuanced approach around conditions of approval. This is not about destroying a site; this is just about the conditions on a permit that a permit holder will have in order to undertake an activity. I think it goes much further than the Juukan Gorge situation. The section 18 component could have been easily rectified with a simple amendment concerning new information on which the council or minister would be able to make a determination that there is significant heritage that needs protection. As we heard earlier in the discussion, the department might even have known about the situation that was emerging. We are not going to go over any great discussion of that, but there was a possibility that it might have exerted some other influence on Rio Tinto at the time. The issue for me is that I have a concern about the permit and risk. Something might be identified as being important as part of a development; for example, they might come across ancestral remains during excavation. I would have thought that there would be a narrow enough interpretation to provide certainty to proponents and would be no different from any normal heritage proposal. My concern is that a local Aboriginal cultural heritage service might choose to exert a bit more influence than is necessary and place a situation before the council. I am focusing on subclause (3). I am interested in how that might come about, because it states —

> If the ACH Council becomes aware of new information …

I assume that that information could come through the local Aboriginal cultural heritage service. The LACH service might already have negotiated extensively to come up with a permit and then, once a project is at the cusp of being finalised and after many millions of dollars of investment, this process could create considerable disruption to that investment. I think there probably needs to be more safeguards in the legislation to protect the investment community against sovereign risk. The intent is to provide safeguards to prevent the destruction of Aboriginal culture, but I think the intent here should be to ensure that a degree of certainty is provided. Can the minister please comment on the process of how the ACH council might become aware of new information and how it will assess whether that information is significant enough to effectively revamp the conditions that apply to a permit?

Hon STEPHEN DAWSON: I make the point that it will be an obligation to report; it will not mean that the project will be dead. It could be that the council will just set conditions to minimise harm in relation to the new information. For example, there could be a condition to have Aboriginal monitors on site. It will not mean that a project must stop. It will relate only to low-impact activities and not the kind of project for which there would be concern about sovereign risk. If it involves millions of dollars of investment, it will require a management plan. It will be a tier 2 activity. I think the member is wrong to be concerned about sovereign risk in relation to this clause.

Hon NEIL THOMSON: I do not want to labour this—I know that we have to push on—but maybe it is more of a concern to have such an extensive clause on this matter when we are not dealing with Juukan Gorge examples; we are dealing with minor activities. I just think that creates more concern. I will leave that as a comment.

Clause put and passed.

Clauses 129 and 130 put and passed.

Clause 131: Objection to decision of ACH Council —

Hon Dr BRAD PETTITT: Once again, on page 2 of the supplementary notice paper, I have given notice of some proposed amendments. I will take the chair's advice about whether they are moved singularly or as a whole.

The DEPUTY CHAIR (Hon Steve Martin): You can seek leave, member, to move them en bloc or you can move them singularly.

Hon Dr BRAD PETTITT: I think it would make sense to move them en bloc because they are interrelated, but before I do so, I want to ask a question. The intent of these amendments is so that it is not just the applicant who is able to either appeal or be notified, but also broadened out to be any person who might be notified. Why was the narrower definition decided upon in the legislation so that it was just the applicant?

Hon STEPHEN DAWSON: The tiered approval system has been designed with the principle that the regulatory burden for a proponent should be proportionate to the type and degree of impact of the proposed land-use activity. This approach is part of a balanced system that will see the net gain being that more activities are regulated and there is greater engagement with Aboriginal people. Introducing objection processes for low ground-disturbance activities poses a risk to the practical operability of the legislation. It may have unintended consequences, including adding considerable time to the permit approvals process, as experienced with the expedited procedure process under the Native Title Act 1993. This process has been highly criticised for its inefficiency. The lack of review rights for permanent applications where the ground disturbance is low attempts to balance the increased participation of Aboriginal parties in the process, with the government's commitment to ensuring regulatory approval processes are timely and fit.

The ACH council must have regard to any submissions made by the Aboriginal parties prior to making its decision to grant, or refuse to grant, a permit. The council will need to be satisfied that the applicant will take all reasonable steps possible to avoid or minimise the risk of harm being caused to Aboriginal cultural heritage by the activity prior to granting the permit. The council will also be able to impose any conditions it considers appropriate to ensure the activity is managed to avoid or minimise the risk of harm to heritage. It is a standard condition of permits granted that the permit holder must notify the council of any new information about Aboriginal heritage in the area, and, in light of this new information, the council may impose or amend a condition on the permit that the council considers appropriate, to ensure that the activity is managed to avoid or minimise risk of harm because of cause to the Aboriginal cultural heritage. Stop activity orders and prohibition orders could also be issued to stop activity in light of this new information.

Unlike current section 18 notices, permits could be cancelled or suspended if the council is no longer satisfied that the activity has managed to avoid or minimise risk of harm to heritage or if the permit holder breaches a condition or carries out an activity that is not authorised under the permit.

Hon Dr BRAD PETTITT: Thank you for that. I think I caught in there that the minister said a person may be notified, within the current reading of this clause. Am I correct in understanding that although they will be notified, they will not be able to object? Is that correct?

Hon STEPHEN DAWSON: They could make submissions to the council, which the council will take into consideration.

Hon Dr BRAD PETTITT: I do not see why this is more bureaucratic. I am focusing on amendment 2/131, which would merely add a subclause after line 4. It states —

> (1A) A person to be notified may, within the prescribed period, object in writing to the Minister if the ACH Council grants the permit under section 119(1)(c)(i).

I do not quite understand how that is more bureaucratic and cumbersome than a person simply putting in a submission.

Hon STEPHEN DAWSON: This refers to low-level stuff; it is not high-level stuff, and so the decision has been made that it would be less bureaucratic not to have an appeal right here. There will be two opportunities for traditional owner groups to provide feedback: the first is to the proponent directly; the second is to the council. It is an Aboriginal council that will grant the permit after hearing from an Aboriginal party. That is the safeguard that we believe will be in place.

Hon NEIL THOMSON: Just to clarify, the objection provision applies only to tier 3 activity; is that correct?

Hon STEPHEN DAWSON: Sorry, it is tier 2.

Hon NEIL THOMSON: Obviously, there is no objection provision whatsoever for tier 1 activity, so basically would the applicant apply for a permit?

Hon Stephen Dawson: By way of interjection, there is no permit for tier 1 activity.

Hon NEIL THOMSON: There was a lack of clarity in some of the information we were provided through the department. There was an infographic, I think, which probably needs to be clarified. I would appreciate the minister providing that clarity, because a table was provided that did not seem consistent with the online infographic. Is the minister saying that there will be no permit requirement at all for tier 1 ever—period?

Hon Stephen Dawson: Correct.

Hon NEIL THOMSON: Okay. The objection process for tier 3 activity is a different process. That is provided.

Hon Stephen Dawson: Correct.

Hon NEIL THOMSON: I am sorry, I cannot recall where that is outlined, but it is not under clause 131.

Hon Stephen Dawson: No, that is correct.

Hon Dr BRAD PETTITT — by leave: Certainly, the feedback that we have been getting from key stakeholders is that this provision needs to be strengthened for not just applicants, but also other key parties involved. On that basis, with the deputy chair's permission, I would like to move en bloc the amendments listed on page 2 of the supplementary notice paper. I move —

> Page 104, after line 4 — To insert —
>
> (1A) A person to be notified may, within the prescribed period, object in writing to the Minister if the ACH Council grants the permit under section 119(1)(c)(i).
>
> Page 104, line 5 — To insert after "ACH permit" —
>
> or a person to be notified

Page 104, line 7 — To insert before "refuses" —

extends an ACH permit or

Page 104, line 7 — To delete "section 126(1)(c)(ii)" and insert —

section 126(1)(c)

Hon STEPHEN DAWSON: I just indicate, as I have previously, that the government is not supporting these amendments.

Amendments put and negatived.

Clause put and passed.

Clauses 132 to 146 put and passed.

Clause 147: Application for approval of ACH management plan —

Hon NEIL THOMSON: In the interests of expediting this, I have gone straight to clause 147, "Application for approval of ACH management plan". If the minister could indulge me a little on this, we can bat some general questions. I am trying to truncate some of the discussion on the management plans in general. As far as I can tell, only tier 3 activity will require a management plan or maybe there is some other provision in relation to tier 2 under which there might be a requirement. The issue is that these management plans will no doubt be governed by guidelines and procedures. However, I assume that they are yet to be developed and that the government has a fairly good idea of what an Aboriginal cultural heritage management plan might look like. I am sure some already exist with respect to the Aboriginal Heritage Act, although they may not be defined in the precise legal terms as they will be in the proposed act. I doubt a provision within the existing act requires them, but I am sure they exist.

Can the minister give a very broad description of what those management plans may entail and how many might have to be approved each year?

Hon STEPHEN DAWSON: Tier 2 proponents can choose to apply for a management plan, but they do not need to. There will be no necessity to do so.

The clause provides that a proponent may apply to the Aboriginal Cultural Heritage Council for approval of an ACH management plan that has been agreed to by each interested Aboriginal party for the plan. Such application must be made to the ACH council in the approved form and include the plan agreed to by each Aboriginal party and the proponent whose requirements are provided in clause 137 of the bill. It must include evidence that each interested Aboriginal party has given informed consent to the plan for the requirements in clause 146 of the bill. It must also include a summary of the information that the proponent disclosed to each Aboriginal party under clause 146(1)(a) of the bill. It must include details of the consultation required with each of the persons to be consulted under clauses 107 and 139 of the bill. It must include any responses to the proposal by each of the persons to be consulted on the proposal and include any other documents or information, if any, required by the regulations of the proposed act. Again, the intention is to design these plans as part of the co-design process. I suppose there has been some early thinking on the part of what it might look like, but the co-design will happen as part of the already announced co-design process.

Hon NEIL THOMSON: Does the minister have any idea how many management plans are likely to be sought?

Hon Stephen Dawson: I am advised that, under the existing legislation, we get about 100 section 18s per year, so it could well be in the order of that.

Hon NEIL THOMSON: That is a very useful guide because it probably helps to define what a tier 3 activity might look like in terms of what otherwise might be subject to the section 18 process. It might provide some comfort, I guess, to persons in the industry about the scope and the requirements. My understanding is that this could cost quite a considerable amount. I do not know whether the minister can consult with his advisers to ascertain the likely cost of an average management plan for, say, a standard resources project and maybe even an exploration project. Some sort of indication might be useful.

Hon STEPHEN DAWSON: I cannot. It is probably a case of: how long is a piece of string? I do not have an answer to that; it will depend on the project. To be honest, further advice is that we do not know how much it costs at the moment. Some of the bigger proponents have teams of people in their organisations working on this stuff. If it is anything like the environment portfolio I had last, some of the big proponents that were seeking environmental approvals had bigger environmental teams in their companies than did the whole of the department dealing with assessments, so it is probably similar for some of the bigger proponents at the moment.

Hon NEIL THOMSON: The minister has provided me with some comfort on that particular aspect of the bill. Obviously, it raises some concerns about other aspects of the bill, because it again feeds into the issue of transaction

costs. We had a discussion earlier about those tier 2 activities, which are the focus of my attention, given the challenge. It is important to define those tier 3 activities. I again implore the minister as part of the co-design process to look at the transaction costs and make them commensurate to the size of the projects that are likely to be affected by the requirement to deliver management plans. That is my comment. Once management plans are established, will there be any way for the Aboriginal Cultural Heritage Council to report on the performance of those management plans through its annual reporting process?

Hon STEPHEN DAWSON: I am struggling this evening; the sound in the chamber is not great. Perhaps after I have answered the honourable member's question, could the deputy chair remind honourable members that if they have conversations that do not rely on or concern the bill, they might take them outside. The honourable member does not have a very loud voice and at times it can be difficult to hear him.

In terms of the question asked, there will be reporting requirements in some of those management plans and that can be monitored when reports are given back to the agency.

The DEPUTY CHAIR: The minister and I share a concern that it is difficult to hear this conversation, so, please, members, if you are having conversations, can you take them behind the chair.

Hon NEIL THOMSON: I thank the deputy chair and I will endeavour to speak a little louder for the minister's benefit as the Committee of the Whole House stage winds up.

I think it would be useful if key performance indicators were a requirement for the Aboriginal Cultural Heritage Council. Also, will there be any scope under the provisions for the Auditor General to assess the Aboriginal Cultural Heritage Council and the effectiveness and efficiency of management plans?

Hon STEPHEN DAWSON: The Auditor General could look at the decision-making time frames and whether the ACH council is making decisions in a timely fashion. If it is not, I dare say the Auditor General could make recommendations on potential processes or other things that might need to be changed. That is probably the extent of what the Auditor General would look at. It would not necessarily be what is in the management plan because that would be for the ACH council to decide with the proponent.

Clause put and passed.

Clauses 148 to 210 put and passed.

Clause 211: ACH Directory —

Hon NEIL THOMSON: The Aboriginal Cultural Heritage Directory will be a critical component for the efficient and informed function of the new legislation when it is enacted. Clause 211(1) states —

> The ACH Council must establish and maintain a directory called the Aboriginal Cultural Heritage Directory.

Earlier we had discussion about the onus on proponents providing information on the location of sites and cultural heritage and descriptions of that. I note the department obviously has some sort of central database of sites and current protected areas. The minister mentioned that there have not been any new ones since 1994 or 1996—I cannot recall. Will some investment be made in the lead-up to the go-live situation with this legislation to provide a much more seamless and usable framework for the Aboriginal Cultural Heritage Directory?

Hon STEPHEN DAWSON: The short answer is yes. I am told that the existing register of places and objects is rudimentary. It is intended that the new Aboriginal Cultural Heritage Directory will contain features that facilitate greater participation by Aboriginal groups. Some of the features that may form part of the Aboriginal Cultural Heritage Directory include: portals whereby local Aboriginal cultural heritage services can have direct access to all the information held under the directory relevant to their area of designation; notification to local Aboriginal cultural heritage services about details of registered users undertaking searches within their area of appointment; and notification to local Aboriginal cultural heritage services of issues with approvals under other legislation. For example, there have been discussions with the Department of Mines, Industry Regulation and Safety that notification of approvals issued under legislation that it administers is to be provided to local Aboriginal cultural heritage services via the Aboriginal Cultural Heritage Directory. But it is also intended that stakeholder input be sought and further consultation be undertaken for the design and function of the Aboriginal Cultural Heritage Directory.

Hon NEIL THOMSON: I strongly support this area. Aboriginal groups will now have an opportunity to participate with the use of technology and geographic information systems, which are now widely available. A range of opportunities will be provided that go beyond the punitive aspects of the legislation and more information will be provided. I hope that the identification of sites and the provision of information for all stakeholders and all Western Australian citizens will be emphasised, given the incredible value of Aboriginal cultural heritage to our community. I commend the minister for putting this element in the bill because there is a need for it, but it is also vital in achieving clarity of the objects that we have a very efficient, well-resourced and accurate directory. I have probably said enough, but they are my comments on this matter.

Clause put and passed.

Clause 212 put and passed.

Clause 213: Information and documents on ACH Directory —

Hon Dr BRAD PETTITT: My question follows up on the directory. Will the ACH directory include information on the current status of what Aboriginal heritage has been harmed and to what level, and the impact on its value?

Hon STEPHEN DAWSON: The clause provides the type of information and documents that can be included in the directory. The ACH directory will contain information specified in the regulations in relation to a protected area; a local ACH service for an area; a native party title for an area; the knowledge holders for a particular area and particular Aboriginal cultural heritage; an ACH protection agreement endorsed under part 8; an ACH permit; and an approved or authorised ACH management plan. A determination of Aboriginal cultural heritage is of state significance for the purposes of the act and a part 7 order.

The ACH directory will hold information about the Aboriginal cultural heritage of the state, including a description of the characteristics and location of that heritage. An Aboriginal object and intangible Aboriginal cultural heritage includes a description of where it is thought to have originated from or any type of recording, particularly in relation to intangible Aboriginal cultural heritage. The ACH directory can also hold any other information or documents relevant to Aboriginal cultural heritage and prescribed in the regulations, either at the request of another person or when the ACH council considers it appropriate to include that in the directory. For Aboriginal cultural heritage to be added to the ACH directory, it will need to be supported by a knowledge holder for that heritage. It is proposed that minimum recording standards will need to be met before Aboriginal cultural heritage is added to the directory. The purpose of the minimum recording standards is to ensure that sufficient information is captured about why and to whom the heritage is important. Unlike under the Aboriginal Heritage Act, there will be no statutory body responsible for determining whether Aboriginal cultural heritage is important to an Aboriginal person.

Hon Dr BRAD PETTITT: That is very helpful. I am trying to understand whether it will capture information that gives context for some of that Aboriginal cultural heritage. One key thing that comes to mind is cumulative impacts in an area that might have an adverse impact on the Aboriginal cultural heritage over time. Is there a way that that could be captured in the directory?

Hon STEPHEN DAWSON: It will capture plans and permits. It is not like the environment necessarily whereby there is a cumulative impact if there is a project on top of another project and it creates more of an issue. The issue with our act is that Aboriginal heritage is discrete, so it is probably harmed only once; it cannot really be harmed again unless chunks are being taken off it. It is very different from the cumulative impacts that feature in the Environmental Protection Act, for example. Certainly, those things that the member has suggested will likely be in management plans and permits. That information absolutely will be captured in the directory.

Hon Dr BRAD PETTITT: It is an interesting one. It is not quite as discrete as built heritage. I am thinking about the Heritage Act, which, I agree, is probably as the minister described it, although it is not as fluid—perhaps "interconnected" is a better word—as some of the things that might be captured under the environmental acts. I feel that there can be cumulative impacts on Aboriginal heritage. One element of intrusion by itself might not impact on those values, but I could imagine it if a series of things were happening in an area. If it cannot be captured, it cannot be captured. Often, it is not as simple as a building. I wonder whether some of that information could be captured, because I think it would be important for future approvals and future decision-making.

Hon Stephen Dawson: I will take that as a comment, honourable member.

Clause put and passed.

Clauses 214 to 223 put and passed.

Clause 224: Inspectors —

Hon Dr STEVE THOMAS: I have similar questions about clauses 224 and 225. This relates to the appointment of inspectors. Can the minister give us an indication of the intended qualifications and training of inspectors? I said in my contribution to the second reading debate that the government has a bit of a trend of appointing inspectors under a range of legislation, not just this one. It wants animal welfare inspectors. It wants inspectors in all sorts of areas. I think this is particularly sensitive, though, so can the minister give us an indication of the qualifications that will be required? Clause 224 refers to public service officers who might be inspectors, including police officers potentially, but also maybe he can cover clause 225, which refers to Aboriginal persons who might become inspectors. What qualifications will they have to have and what training will be given to them?

Hon STEPHEN DAWSON: Any inspectors who are hired by the department will receive training and be suitably qualified. There is a compliance unit within the Department of Planning, Lands and Heritage and its compliance officers are ex–police officers, but it would not be appropriate or practical for the police to be the only inspectors.

Obviously, police have a lot of duties and demands on their time, so the CEO of the department will have responsibility for the designation of a public service officer or a person employed or engaged by the department under section 100 of the Public Sector Management Act as an inspector for the purposes of the act.

This is similar to the provisions in a number of other acts. Under the Environmental Protection Act 1986, the CEO may appoint a person or members of classes of persons to be authorised persons for the purposes of the act, and the CEO may limit the powers conferred on those persons. Under the Heritage Act 2018, the minister may appoint a person to be an inspector for the purposes of the act, and the functions of an inspector under that act are subject to any limitations or conditions specified in the instrument of appointment; and so too under the Biodiversity Conservation Act 2016. Clause 45 of the Conservation and Land Management Act states that wildlife officers act as inspectors and are officers of the department designated by the CEO. I make the point that it is in a number of different acts that have passed through this Parliament under a number of different administrations.

Hon Dr Steve Thomas: The government does love having inspectors out there!

Hon STEPHEN DAWSON: It is not a red or a blue thing, it is an across-the-board thing.

The member asked a question about clause 225 and Aboriginal people, which I will answer now. The CEO of the department may appoint an Aboriginal person to be an Aboriginal inspector for an area of the state. Before appointing an Aboriginal inspector for a specified area for which a LACH service is designated, the CEO must notify the relevant LACH service of the proposed appointment and provide the LACH service with an opportunity to make a submission. An Aboriginal inspector will have, in respect of the area appointed, the powers conferred by or under the proposed act.

Hon Dr Steve Thomas: In clauses 224 and 225, will effectively the training, the support network and the oversight be the same?

Hon STEPHEN DAWSON: Yes.

Clause put and passed.

Clause 225: Aboriginal inspectors —

Hon NEIL THOMSON: I am interested in the accountabilities that will relate to Aboriginal inspectors. Those are quite clearly defined in the previous clause. I am wondering whether the accountability or integrity framework that is applied to public servants under the Public Sector Commissioner would be applied through the ACH council to Aboriginal inspectors.

Hon STEPHEN DAWSON: They would not be captured by the Public Sector Management Act, because they are not public servants. They would have only the powers essentially given to them by the CEO, and those powers would be fairly limited. No, they would not be captured by the PSM act.

Hon NEIL THOMSON: That is another matter of concern. We have talked about similar concerns around the accountabilities of the local Aboriginal cultural heritage services. Would these Aboriginal inspectors be subject to complaints to the Corruption and Crime Commission?

Hon STEPHEN DAWSON: Lots of people are scurrying to try to get the information. I do not believe they would be. Aboriginal inspectors who are not public servants are unlikely to be given the same range of powers as departmental inspectors because they are not public servants. The CEO could revoke the appointment of an inspector.

Hon NEIL THOMSON: From the minister's response, I assume the answer to my question is no, given that I asked whether the Corruption and Crime Commission —

Hon Stephen Dawson: I did say the answer is they are not.

Hon NEIL THOMSON: They are not, okay. Thank you for clarifying. Again, I am having trouble hearing.

Hon Stephen Dawson: The sound in here is not great.

Hon NEIL THOMSON: Insofar as the CEO had appointed these persons, if there were some form of misconduct complaint, would the CEO be responsible for their conduct and subject to the complaint? Would the CEO effectively be responsible for the conduct of these Aboriginal inspectors if an Aboriginal inspector acted outside the scope of their mandate and/or in a way that was not in accordance with the integrity framework of Western Australia?

Hon STEPHEN DAWSON: I am trying to get to the crux of the member's question. Was he asking whether the CEO could be reported to the CCC, for example, by virtue of one of these inspectors not doing the right thing?

Hon Neil Thomson: That is correct.

Hon STEPHEN DAWSON: The answer is no, but the same answer stands in that the CEO could revoke their appointment at any stage if there were reason to do so.

Hon NEIL THOMSON: What recourse would a person have if someone acted unlawfully and they were an Aboriginal inspector, apart from the CEO revoking their licence to inspect or appointment as an inspector?

Hon STEPHEN DAWSON: If anyone ever acts unlawfully, I would encourage their actions to be reported to police.

Hon NEIL THOMSON: That is part of the problem. Over the course of many decades in Western Australia, we have had the simple mechanism of reporting to police—after all, every citizen of Western Australia has the capacity to report the conduct of any person to police. Bodies such as the Ombudsman, the Public Sector Commissioner and the CCC are for a purpose; they have a specific role. They have wider powers to deal with issues of misconduct. They might not pass the test of criminal culpability, but they might be deemed to be inappropriate for an officer who has certain powers vested by the Crown of Western Australia. I think this is a very important matter. I think this is a huge blind spot in the bill. We have no level of accountability when a complaint is raised. I think it is unfair for Western Australians to be required to report these matters to police. I would have thought—I am sure this matter will be tested in law at some stage—that if the CEO has appointed an Aboriginal person to be an inspector and there is no other recourse, the CEO might be responsible for the actions of that individual. I am not a lawyer and I am only assuming this, as we try to work through this bill in a rather short time in terms of some of the challenges that we face. I will ask again whether any mechanism might be put in place. To give the minister some guidance, would there be any scope for the Aboriginal Cultural Heritage Council, for example, to provide some sort of oversight and accountability for the conduct of Aboriginal inspectors?

Hon STEPHEN DAWSON: It is administered by the department through the CEO, so it is the CEO who can appoint and revoke these positions. I do not think it is unfair for anybody to have the opportunity to report anything to police. I think we should be very proud of our democracy in Western Australia and the fact that the state government is making a continued investment into new police officers across the state. I am confident that, should a crime need to be reported to police, they would have the resources to be able to investigate properly.

Hon NEIL THOMSON: That is a complete misrepresentation of my comments, quite frankly.

Hon Stephen Dawson: Honourable member, I did not say that you uttered any words, so you can't say it is a misrepresentation of your words.

Hon NEIL THOMSON: I will clarify what I said for the minister's benefit so that there is no misunderstanding. Public servants can misbehave. It may not achieve the threshold of —

Hon Stephen Dawson: I hope you're not speaking from experience, honourable member.

Hon NEIL THOMSON: I speak from the experience of a senior public servant who has had to deal with misbehaviour in the public service. I can assure the minister that at times, persons —

Hon Kyle McGinn: Did you report it to the police?

Hon NEIL THOMSON: If the member would just listen, I will explain. This would not meet the test of a criminal matter that would necessarily be reported to the police. I could give a very high profile example of a person who was the chair of a statutory body, which I will not name in this place because of decorum. It was dismissed on the basis of misbehaviour; it was not considered criminal conduct. It is a very important provision to have within our public sector management arrangements. There is ample opportunity for an inspector to misbehave and not be subject to a police inquiry. I believe that is a major shortcoming in this bill. We need more accountability in relation to these persons who will be given powers to do a whole range of things within the remit of their role. As I said earlier, this is the minister's bill and these will be the minister's people. I say to the CEO, these persons will be undertaking the duties on behalf of the CEO and I strongly suggest a level of reconsideration of what accountabilities will be put in place to protect the people of Western Australia from any unlawful—not even unlawful—matters that are not appropriate behaviours for somebody who is carrying an identity card and working on behalf of the Crown. That is my point.

Hon STEPHEN DAWSON: The honourable member made his point. I hope that people are not suggesting for a second that just because Aboriginal people will be in these roles, they will somehow be more prone to doing things wrong, because that would be wrong. This is about Aboriginal empowerment.

Hon Neil Thomson interjected.

Hon STEPHEN DAWSON: I am talking.

Hon Neil Thomson interjected.

The DEPUTY CHAIR (Hon Steve Martin): Member! The minister has the call.

Hon STEPHEN DAWSON: There will be limited powers as determined by the CEO of the agency. There will be oversight by the CEO. The CEO will be able to revoke the appointment of inspectors.

Hon NEIL THOMSON: For the sake of *Hansard* and those watching—I know that people are watching—the imputation that I said that Aboriginal people would be more prone to misbehaviour is simply not correct. I find that offensive.

Hon Stephen Dawson: I am glad that the member corrected that for the record.

Hon NEIL THOMSON: You were the one who said it.

Several members interjected.

The DEPUTY CHAIR: Members! Hon Neil Thomson has the call.

Hon NEIL THOMSON: I am saying that there are quite different powers of accountability. People of Aboriginal descent are no less prone than people of non-Aboriginal descent to the issues that need to be considered. A level of accountability should be applied to all inspectors commensurate to the powers that they will be given by the Crown. That was my point and that is where I leave it.

Clause put and passed.

Clauses 226 to 233 put and passed.

Clause 234: Power to stop and enter vehicles, and ancillary powers —

Hon Dr STEVE THOMAS: With regard to the powers of the inspectors, whether they are inspectors under clause 224 or 225, they basically will not have the power to access dwellings. They can have access to dwellings if there is informed consent, and they can enter other places if they have an entry warrant. Under clause 234, they will basically have the power to stop a vehicle, other than a mobile home, at any time. They will also have the power to detain a vehicle and move it to another spot. I raised this issue in my contribution to the second reading debate. The minister may not yet have this in written form, but I assume that there will be some guidelines for when it will be appropriate to use that power, regardless of which inspector it applies to. If those rules are not yet written and we do not yet have an indication of them, can the minister give a commitment that when they are made, he will provide the chamber with an indication of when those powers might be applied? I imagine it would be quite confronting to be pulled over by an inspector who might not be a police officer and have your car impounded if you have picked up a rock. You may have picked it up inappropriately, but I think the appropriate use of these powers will be the critical thing. The minister will undoubtedly at some point have guidelines. Can he give us an indication of whether they exist yet, or inform us of when they will exist?

Hon STEPHEN DAWSON: Those guidelines do not exist yet, but it is the government's intention to have guidelines around that issue. I make the point that similar provisions exist under the Biodiversity Conservation Act 2016, and there are really strong provisions under the Fish Resources Management Act. Under the Environmental Protection Act, an inspector or an authorised person may at any time stop, enter, search and inspect any vehicle. The same provision exists in other legislation, but certainly with regard to the legislation before us, the intention is to have guidelines around it.

Hon Dr Steve Thomas: Are you happy to let us know when those guidelines are around, and what they look like?

Hon STEPHEN DAWSON: Sure. I know that honourable members in this place have a great deal of interest in this legislation. I am happy to ensure that, when appropriate during the next consultation phase, honourable members are provided with a briefing about how the co-design process is going. If information sessions are happening, honourable members may well be invited along to some of them, when appropriate. It might not be appropriate, for example, for information sessions organised out on country, but I am happy to generally make the commitment to engage with members as we proceed.

Clause put and passed.

Clauses 235 to 276 put and passed.

Clause 277: Review of certain decisions —

Hon NEIL THOMSON: Clause 277 outlines a number of matters that are reviewable. Concerns have been raised by the Kimberley Land Council in relation to, in its words, the unequal nature of those reviewable decisions. It is claimed that the bill will remove the right to review a decision of the minister to approve or refuse an Aboriginal cultural heritage management plan. Submissions made by Aboriginal groups almost universally oppose this. Why were reviewable decisions limited?

Hon STEPHEN DAWSON: I know it is not question time, but I will ask the member's own opinion on this later on. The bill establishes a mediation and dispute resolution process via the Aboriginal Cultural Heritage Council when parties cannot agree. The bill also ensures that one of the very first things proponents will do when contemplating a new project is go and speak with the right traditional owners so that they can work through issues as partners in the process. In the rare instance that the outcomes of mediation and arbitration through the ACH council are still disputed, the ACH council will make a public recommendation to the minister and the minister will make a decision

on behalf of the government in the interests of the state. Making decisions on contentious issues is the job of the elected government. The bill will improve the openness and transparency of the decisions, the reasons for the decisions will be published and the Aboriginal parties and proponents will be informed of the minister's decision. That is not a requirement of the current act.

The concerns raised about the minister's final approval on an Aboriginal cultural heritage management plan cannot be compared with the minister's approval of a section 18 consent under the 1972 act. They are completely different tools. The considerations when making a decision about a section 18 consent are not comparable. Decisions on ACH management plans do not come to the minister for authorisation except as a last resort. The Northern Territory has a similar dispute resolution mechanism. Since 1989, there has been a need for ministerial decision-making only four times. I also highlight that under the Northern Territory Aboriginal Sacred Sites Act, there is no right of review to a tribunal of the minister's final decision. Ministerial decision-making will occur only when the parties cannot reach agreement and after the council has attempted to mediate an agreement between both parties. The council can recommend the authorisation of a plan to the minister only if the plan provides that the proposed activity will be managed to avoid or minimise harm to Aboriginal heritage. The minister's decision to approve a plan must be made on the same grounds as well as what is in the interests of the state, which includes the social and economic benefit to Aboriginal people and the interests of future generations. Whereas currently section 18 consent can consent only to destroy or impact Aboriginal cultural heritage, there is no requirement to avoid or minimise the harm to Aboriginal heritage.

Hon NEIL THOMSON: The consultation draft included a provision that provided a right of review for native title holders, as opposed to the destruction of their cultural heritage. That is the information that has been provided to me. My question is: why was this provision removed?

Hon STEPHEN DAWSON: A decision was made by government that in the best interests of governing this state, the minister's decision should be final.

Hon Dr BRAD PETTITT: Once again, I flag that I have given notice on the supplementary notice paper that I will move an amendment to this clause. Before I move it, I want to follow the line of questioning Hon Neil Thomson started, because for many stakeholders this is probably the fundamental line at which this bill has lost the support of many. As many of us said during the second reading debate, this is not about this minister. I want to understand how this clause might play out. A ministerial decision could be misused in a way that would see Aboriginal cultural heritage destroyed. I am thinking 10 years into the future when the minister finally steps down, having been a very long serving Minister for Aboriginal Affairs, and a new company called Crushed Rocks Inc decides to put forward a plan at a site of Aboriginal heritage significance. Unfortunately, the new minister is not as caring as this minister and he is all for Crushed Rocks, no matter what form it is. That is what drives him. Crushed Rocks will go through the charade of having a management plan and, ultimately, the Aboriginal heritage council will not recommend the management plan but will say that the council could not agree on one, so a recommendation will go to the minister, as I understand it. I am happy for the minister to correct me about the process. What will stop the minister from saying, "I like Crushed Rocks and I will approve the project, despite the site's state significance"? The company will not work hard to come to a mediated solution because why would it? It will meet with the minister and will know what the minister's position is, which is that, ultimately, he will come down on the side of Crushed Rocks. For me, this is a real concern. As I have said, it is not something we do in the planning world anymore. There is a parallel with local governments. Local governments used to make these decisions and if they could not agree, they could appeal to the minister, who would make the call. But now, of course, they do not. The matter goes to the State Administrative Tribunal, quite rationally. I want to ask what will stop a scenario from happening in which the mediation is not done in good faith because it is known that the minister likes Crushed Rocks and, ultimately, what the Aboriginal cultural heritage decision will be?

Hon STEPHEN DAWSON: I think the member is presupposing that this is all about the proponents, but members need to take into consideration that it might not be the proponent's plan that the minister authorises. It could be the council's plan or the Aboriginal party's plan. My belief is that proponents will be most likely to use the State Administrative Tribunal. That is to do with my experience as the minister; proponents bring applications before SAT in relation to decisions that have been made. The authorisation process is not one that proponents will want to go through. It will be a long and drawn-out process. The council will do the mediation. That is built into the process early on. Mediation will happen early on. But if it gets to the minister in this state—I have given the example of the Northern Territory, where four decisions have reached the minister over a 30-year period—the minister must consider whether the plan provides for the activity to be managed to avoid or minimise risk of harm being caused to Aboriginal cultural heritage, as well as what is in the interests of the state. "In the interests of the State" is defined as —

> (a) for the social or economic benefit of the State, including for the social or economic benefit of Aboriginal people; and

(b) the interests of future generations;

The minister's decisions and the reasons for those decisions will be published, and that level of transparency does not exist now. It will be open to proponents to seek a judicial review of the minister's decision. If the minister has not followed the act or the best endeavours of the act, including the one that refers to the interests of the state, a proponent can take a decision to court. That happens currently, for example, under the Environmental Protection Act. My decisions as the Minister for Environment were often taken to court by the conservation movement and by the Environmental Defender's Office. That happens currently. The court can make a decision that a minister has not followed the proper process. That can happen here. I am fine with SAT looking at local government decisions, quite frankly. This is bigger than planning decisions. This is about state significance. I am firmly of the view that SAT would not add to this bill. As I said, a decision was made by government that a minister's decision will be final.

Hon NEIL THOMSON: The information provided by the agency on the amendment to the review provisions and the removal of the right of review to SAT states that the right of review of a ministerial decision has been removed from clause 258, which was the clause in the previous bill. That relates to clause 277. It stated that it was to reflect accepted principles of modern government, public administration and responsible elected government of the day. What are those principles and how are they offended by the right of review to SAT?

Hon STEPHEN DAWSON: I am not sure I have more to add to this. It has, quite simply, been a decision of government that the decision, at the end of the day, will rest with the minister. The minister will make a decision in the best interests of the state, taking into consideration those things I said otherwise. Yes, it was in a draft bill. It was consulted on. I think I have made the point that over 100 changes were made since that consultation process. This is one of them. This is one that the government stands by, and I am probably going to leave it there.

Hon Dr BRAD PETTITT: I will come back to that amendment shortly. Before I do so, I also want to come back to an issue that was raised earlier in the debate. I quoted from an article in *The Conversation* by Joe Dortch and a range of others, including Kado Muir, Jo Thomson and Anne Poelina. In this article, they state —

> However the developer can appeal to the state administrative tribunal over ministerial decisions they don't like. The Aboriginal custodians for that area will not have an equivalent right of appeal.

Hansard records that the minister pushed back quite hard on that. I was copied into an email that the minister would have received from Joe Dortch on Friday, 10 December, at 4.11 pm. I do not know whether the minister has that in front of him. He does. This is an important email that I want to unpack because it is about this clause. Joe Dortch states —

> As a co-author of the article referenced, I think the original claim stands. Please be assured, we read the final Bill, despite the limited time made available. To show our reasoning, I have added a column to table in s227 of the ACH Bill …

I will table this email as it will be useful for other members. The authors make a clear argument based on a review of decisions that the proponent is the person who will benefit in all six cases and the LACHS in only one case. Does that coincide with the minister's reading of the bill? I seek leave to table this email.

[Leave granted. See paper 990.]

Hon STEPHEN DAWSON: Item 1 in that email is not right. The affected person is any party to the ACH management plan, so it could be the proponent or Aboriginal people.

Hon Dr BRAD PETTITT: The conclusion of Joe Dortch and others who wrote that article is clear: LACHS or any Aboriginal person "will not have an equivalent right of appeal" available to them as that which will be available to a proponent. Certainly, their view is that this imbalance will endanger the principles of free and prior informed consent. I hope the minister will respond to that, but I would be surprised if that was the intent of this clause.

Hon STEPHEN DAWSON: I disagree with the view of Mr Dortch.

Hon Dr BRAD PETTITT: I will move on, but it was important to table that email. I appreciate that the minister disagrees with the authors of that email, but I acknowledge their expertise and that of the minister. However, the views expressed in that email are concerning.

I refer now to the amendment standing in my name on the supplementary notice paper, which in my view is the most important amendment of the night. It seeks to rectify what is for many the most disappointing part of this bill. There was comfort in the 2020 version of the bill, which provided for a wider range of issues to be referred to SAT. I move —

Page 204, line 19, in the table — To insert after item 1 —

1A.	A decision of the Minister under section 165(1) to authorise or refuse to	The applicant for the ACH management plan to be approved under section 147(1) if the plan is

	authorise an ACH management plan	found to relate to Aboriginal heritage of State significance The applicant for the ACH management plan to be authorised under section 157(1) A person who is, or would be, an Aboriginal party in relation to the ACH management plan
1B.	A decision by the Minister under section 165(1) (as read with section 170) to authorise or refuse to authorise an amended ACH management plan	A party to the ACH management plan

Hon STEPHEN DAWSON: The government will not be supporting this amendment. I want to make it clear that the review rights for management plans will be the same. For approved plans, both the Aboriginal party and the proponent will be able to seek a review. For authorised plans, no party will be able to seek a review. The government believes that where it has landed on this clause is the right course of action, and we will not support the amendment.

Hon NEIL THOMSON: On behalf of the opposition, I indicate that we will not support the amendment. I want to make a comment about a question posed by the minister. I would go so far as to say that, given the importance of this issue—it has been a lightning rod for much debate—this area might have warranted further discussion, particularly given some of the other elements of challenge within the bill that relate to matters that are not subject to this provision. As clear as I can be about that, I say that this is the government's bill, it is the government's challenge and I think the government is going to have to live with the consequences of it.

Hon Dr STEVE THOMAS: At some point, the government has to be allowed to govern. I put to members that the State Administrative Tribunal and legal review do not always get it right. There is no ultimate public review of those court decisions. However, it is absolutely the case that a minister who makes what is deemed to be a poor decision and does not examine the triple bottom line, and that includes the economic one, faces the people every four years. That does not happen to any legal jurisdiction. The opposition is more than happy to make sure that the government faces the wrath of the people if it gets this wrong. The people have the opportunity to remove a minister or a government, and the opposition is certainly happy to empower that to the best of its ability.

Hon Dr BRAD PETTITT: I want to respond partly to that. I have not heard anyone come back to my analogy of seeking to remove SAT from planning decisions and giving them back to the minister. We saw some unfortunate outcomes when that was the case. There are certainly downsides when all the power lies with the minister. Unfortunately, that applies here. I also want to make the point that I am not the only one who thinks this amendment should be inserted in the bill. It would be fair to say that this is supported by a number of stakeholders. I note that when the Law Society of Western Australia wrote to the minister—I think it copied each of us in—it requested a very similar review. I think there are plenty of rational reasons to do this, and that is why I commend the amendment to the chamber.

Amendment put and negatived.

Clause put and passed.

Clauses 278 to 353 put and passed.

Title put and passed.