## ABORIGINAL CULTURAL HERITAGE BILL 2021

*Consideration in Detail*

Resumed from an earlier stage of the sitting.

Debate was interrupted after clause 81 had been agreed to.

**Clause 82: Protected area orders —**

**Mr V.A. CATANIA**: Subclause (1) states —

> The Governor may, by order made on a recommendation of the Minister under section 81(5), declare an area as a protected area for the purposes of this Act.

I asked a question at clause 81 about the Governor's involvement and why it does not come to Parliament. Can the minister explain the recommendation that the minister will have to make under clause 81(5) that will go to the Governor? Can the minister explain the process of the minister going to the Governor?

**Dr A.D. BUTI**: It is a recommendation that an area should be protected.

**Mr V.A. CATANIA**: Clause 82(3) states —

> An order under subsection (1) must —
>
> (a) provide a name for the protected area; and
>
> (b) describe the boundaries of the protected area in a manner sufficient to identify it; and
>
> (c) state that Aboriginal cultural heritage of outstanding significance for the purposes of this Act is located in the protected area; and
>
> (d) state the conditions, if any, to which the declaration of the area, or areas, as a protected area is subject.

I do not think anyone would doubt the order, under subsection (1), that the minister should provide the Governor. Is there any evidence from, say, traditional owners, who are the authority? Are they providing that information to the minister? Why is there not perhaps a paragraph (e), or I would say paragraph (a), to make the point that the minister has got the evidence from the traditional owners who are the authority on the land that the application will deal with? Why is that not written into clause 82(3)?

**Dr A.D. BUTI**: This is actually at the end of the process. The application would have already gone through the processes of the Aboriginal Cultural Heritage Council and the local Aboriginal cultural heritage service, so the traditional owners, obviously, would have had their say then. I refer the member to clause 75 on that.

**Mr V.A. CATANIA**: I suppose the point I am trying to make is that we talk about, and the minister has spoken about, how this bill is about Aboriginal people or traditional owners. I would have thought that this is a good position to write into the legislation that an order under subsection (1) must have had traditional owners, who are the authority for the land they speak for, provide that information and sign off on the order so that if there is any uncertainty when it goes to the Governor, the Governor can truly say that the process has been signed off by all.

**Dr A.D. BUTI**: In some cases, for cultural purposes, it may not be appropriate to disclose the name of the traditional owner.

**Mr V.A. CATANIA**: The name of the traditional owner does not have to be disclosed. The legislation could at least have, as I said, a paragraph (e) that states that traditional owners have given their consent; it does not have to name the traditional owners. There could be at least a paragraph in the legislation for the consent that has been granted to get to this point in acknowledgement of the authority of the traditional owners.

**Dr A.D. BUTI**: The consent will have already been given; otherwise, we would not have the process in which a recommendation is being made for a protected order. That would have come from the Aboriginal people who are seeking to protect their cultural heritage. They would have already consented; otherwise, it would not be at this point in the process.

**Mr V.A. CATANIA**: I understand that, but this is a matter of respect. It is very hard to find traditional owners mentioned in the legislation. There is a lack of acknowledgement of traditional owners, although the intent of the bill is to deal with traditional owners, I imagine. I think highlighting that in clause 82(3) would really show respect that they are included in the process, even though they would have been included up to that point. It should be in written form as part of this bill.

**Dr A.D. BUTI**: The member mentioned traditional owners. We are really talking about the knowledge holders. We are protecting Aboriginal cultural heritage and it is the knowledge holders who will have gotten us to this stage of the process. As we have said a number of times, the significance of this bill is that it will bring Aboriginal people

into the centre of the negotiations, which we do not have under the current legislation. Knowledge holders will be respected and we would not be making a recommendation under clause 82 for a protected area order if it had not come from the knowledge holders.

**Clause put and passed.**

**Clause 83: Amending and repealing orders —**

**Mr V.A. CATANIA**: I refer to clause 83(3)(c), which states —

> the removal of a condition to which the order is subject …

Who will the consultation be with and will there be any consultation about the removal of a condition to which an order is subject? Paragraph (d) states —

> the imposition of a new condition to which the order is to be made subject, or a change to a condition to which the order is subject, relating to any of the following —
>
> (i) the management of the area;
>
> (ii) access to the area;
>
> (iii) the other matters, if any, prescribed for the purposes of this subparagraph.

**Dr A.D. BUTI**: The process for the amendment or repeal of a protected area will be the same as the process for the nomination of a new protected area and will therefore ensure that the opinions of Aboriginal people and affected parties are taken into consideration. Also, I should add that a protected area cannot be repealed or amended to reduce the area unless it has been laid before and approved by a resolution by both houses of Parliament.

**Dr D.J. HONEY**: It is a pretty simple straightforward question. The clause says —

> An application for the amendment or repeal of a protected area order may be made …

It was not clear to me in that particular clause who that application is made to.

**Dr A.D. BUTI**: It is the same process as the original application, so it will be made to the council.

**Dr D.J. HONEY**: It is not clear that it is made to the Aboriginal Cultural Heritage Council. In other clauses in the bill, it is very, very clear who it is made to, but in that clause —

**Dr A.D. Buti**: Yes.

**Dr D.J. HONEY**: It is definitely to the council. Thank you very much.

**Mr V.A. CATANIA**: Subclause (4) states —

> (b) for the purposes of section 82(1), the Minister may make a recommendation to the Governor for the amendment of the protected area order under this subsection; and
>
> (c) before making a recommendation under paragraph (b), the Minister must —
>
> (i) give to the persons described in section75(1) written notice of the proposed change to the name of the protected area that provides a reasonable opportunity to make submissions to the Minister about the proposed change to the name of the protected area …

Again, minister, with reference to paragraph (b), why will the minister have to make the recommendation to the Governor? Why will it not come to Parliament to say that there is a change to the protected area? Why will it go to the Governor? Can the minister explain that?

**Dr A.D. BUTI**: This is a process of protecting cultural heritage sites. We want to reduce the burden on that. When an area is to be reduced or amended, it will come to Parliament. We do not want to add that hurdle to having a new protected area. But if a protected area is to be reduced or amended, it will come to Parliament.

**Mr V.A. CATANIA**: Can any member of the public seek information on the register of Aboriginal cultural heritage sites?

**Dr A.D. BUTI**: There is a public registry, but obviously the member will be aware that culturally sensitive information may not be disclosed.

**Mr V.A. CATANIA**: I keep going back to Parliament and whether the bill should be amended. As the minister already intends to amend what is a protected area, perhaps he could propose an amendment so that any change to the register will first go to Parliament and the register can be tabled, in a sensitive way, say, every 12 months or whatever period is required under the reporting mechanism for government departments. Perhaps the bill could be amended to report progress to Parliament on the protection of Aboriginal cultural heritage sites and whether that list is growing or some elements are falling off that registry. It is probably incumbent on the minister or the government of the day to provide information to Parliament so members are aware of any changes that have taken place, either positive or negative. I imagine that five, 10 or 30 years in the future it could be in the negative. Surely we could

have a reporting mechanism to Parliament to alert members to changes, positive or negative, that occur by way of amendment by the minister. It should go not just to the Governor but also to Parliament.

**Dr A.D. BUTI**: Under the existing act, amendments are made not by the minister, but by the Governor, and are then tabled in Parliament. Amendments go on a directory that is available to the public. I refer the member to clause 218, under which protected areas are gazetted.

**Clause put and passed**.

**Clause 84 put and passed.**

**Clause 85: Repeal of protected area order, or amendment to reduce area declared as protected area —**

**Mr V.A. CATANIA**: The clause reads —

> A protected area order must not be repealed or amended to reduce the area or, if in relation to a cultural landscape, areas declared as a protected area, unless the recommendation of the Minister under section 81(5), as applied by section 83(2), to repeal or amend the order —
>
> (a) has been laid before each House of Parliament; and
>
> (b) has been approved by a resolution passed by both Houses of Parliament.

Can the minister explain why this will be laid before both houses? Is it laid in both the upper house and this place at the same time?

**Dr A.D. BUTI**: I am not sure, but the point is that it has to be approved by a resolution passed by both houses of Parliament. The reason for that is to provide the highest degree of accountability, because here we are seeking to reduce the protected Aboriginal cultural heritage. This is not unlike similar provisions in the Land Administration Act for the vesting of an A-class reserve, land reserve or national park; it requires consultation.

**Mr V.A. CATANIA**: So that I am aware of how this process works, when it is laid upon the table in both houses, is there an opportunity for members to debate it or disallow it? The Leader of the Liberal Party mentioned previously that our job is to think of any unintended consequences of the bills before the house. We have to think of every avenue to protect Aboriginal cultural heritage sites. For example, we could get a rogue minister who has been lobbied by the resource companies to make changes to or reduce the size of a site, or whatever the case may be, and Parliament will need to scrutinise this. Does this clause allow members to scrutinise any amendments that will be laid on the table of both houses? Ultimately, whoever is in this chamber may need to look at the second reading speech and the debates we have had to determine the intent of the bill about the protection of Aboriginal heritage significant sites.

**Dr A.D. BUTI**: The clause states that there must be a resolution in both houses of Parliament, which answers the member's question. Clause 308 sets out the process for laying documents before a house of Parliament that is not sitting. The process is quite clear in this clause, and then clause 308 sets out the process when Parliament is not sitting. It would have to be passed by resolution of both houses of Parliament, which is the highest form of scrutiny available.

**Clause put and passed.**

**Clause 86: Provisions about protected area orders —**

**Mr V.A. CATANIA**: Subclause (1) reads —

> A protected area order must be published in the *Gazette*.

Does that remain in the *Government Gazette* for 28 days before it is removed?

**Dr A.D. BUTI**: It is the normal publication process in the *Government Gazette*.

**Mr V.A. CATANIA**: How many days is that? I cannot remember.

**Dr A.D. BUTI**: It stays as a gazetted item. It does not come off.

**Clause put and passed.**

**Clauses 87 to 89 put and passed.**

**Clause 90: Meaning of harm to Aboriginal cultural heritage —**

**Dr D.J. HONEY**: Subclause (1) states —

> To ***harm*** Aboriginal cultural heritage includes to destroy or damage the Aboriginal cultural heritage.

Then there is the caveat in subclause (2) below —

> … in relation to Aboriginal cultural heritage by an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities …

Just to be clear, that is very specific. I am assuming that it has to be an Aboriginal person who is associated with that area, and if another Aboriginal person who is not from that area comes into that area, they would not be included in that exception; is that correct?

**Dr A.D. BUTI**: The determining factor there is written in that clause, where it states "an Aboriginal person acting in accordance with the person's traditional rights, interests and responsibilities". That is the determining factor, not necessarily where they are from. Obviously, there will usually be a geographical connection, but the connection is the person's traditional rights, interests and responsibilities in respect of the Aboriginal cultural heritage.

**Dr D.J. HONEY**: I thank the minister. Who will determine that? If it came to a dispute or some matter or some concern and someone said, "No, you didn't have a right to do that; you didn't have a right to go there or touch those sacred objects" or the like, would that responsibility fall back to the LACH service as the authorised group under this bill, or would there be some other person—for example, an elder within the community—who might not have responsibility through the LACH service?

**Dr A.D. BUTI**: Aboriginal people will be central to determining whether there is a connection for the Aboriginal person under clause 90(2), but obviously harm will be determined by Aboriginal people. The LACH service and also the council will have a role to play, but if a prosecution is to take place, obviously, it will be the prosecuting authority.

**Dr D.J. HONEY**: I thank the minister. As I say, we have reinforced this a couple of times and the member for North West Central has reinforced it. I appreciate it is unusual, but I have heard of disputes of that nature whereby people dispute who has the right to be in a particular area or do a particular thing. It is not just a hypothetical; situations will arise.

I refer to the term "harm". Harm occurs when someone breaks something or digs up an area of significance—those sorts of things are really clear. I know we had a discussion on this before, but it has been a long and late process for some of us, including the minister. Would harm in this sense include a situation whereby someone, through their action, harms an intangible aspect of cultural heritage, whatever that may be? I think the example I gave last time was a man who inadvertently or deliberately goes into a women-only area. Let us say they did it deliberately to be mischievous. Does that intangible aspect also trigger harm? Again, I return to the grey nomads who travel all over Australia—they are everywhere. Obviously, many areas of significance to Aboriginal people are remote and often unattended, so men could be camping in an area that is strictly a women-only area. Would that sort of event trigger the potential for penalties under this section?

**Dr A.D. BUTI**: I will make a few comments on that. If it were a recreational activity on crown land, it would be exempt. In regard to harm, the term is deliberately non-exhaustive. Obviously, it can include many things, such as the removal of Aboriginal cultural heritage or the physical alteration of the Aboriginal cultural heritage to its detriment or degradation, or potential detriment or degradation, and the potential detriment of the Aboriginal cultural heritage located in that area. It could also include defacing, disturbing or interfering with Aboriginal cultural heritage. But, obviously, you would then have to go and look further to see whether it is a material harm or a serious harm, which comes later in the bill.

**Dr D.J. HONEY**: I thank the minister; I think that provides some clarity.

**Clause put and passed.**

**Clause 91 put and passed.**

**Clause 92: Serious harm to Aboriginal cultural heritage —**

**Mr V.A. CATANIA**: Clause 92 is titled "Serious harm to Aboriginal cultural heritage". I want to talk about the penalties. The penalties listed here are —

(a) for an individual —

(i) imprisonment for 5 years or a fine of $1 000 000, or both;

(ii) a daily penalty of a fine of $50 000 for each day or part of a day during which the offence continues;

(b) for a body corporate —

(i) a fine of $10 000 000;

(ii) a daily penalty of a fine of $500 000 for each day or part of a day during which the offence continues.

I cannot remember, but I think it was in the second reading debate that there was mention about Juukan Gorge and that Rio made I think $135 million from being able to desecrate that Aboriginal sacred site. The penalty for an individual of potential imprisonment for five years or a fine of $1 million or both is quite —

**Dr D.J. Honey**: Disproportionate.

**Mr V.A. CATANIA**: — disproportionate to the penalty for a body corporate such as Rio or BHP or some mining giant. Like I said, in the example of Juukan Gorge, that activity earned Rio $135 million. I am not saying that Rio did anything illegally, but if a company were to do something illegally, knowing that the fine could be $10 million but the windfall could be $135 million, it would be a pretty good risk for that company to take, because it would potentially make $125 million. The fine is $10 million for a corporation. Imprisonment for five years and/or a fine of $1 million for an individual is quite disproportionate—thank you, Leader of the Liberal Party—compared with a body corporate that could easily pay that $10 million fine, knowing that it could pocket $125 million. Why is it so disproportionate between the two?

**Dr A.D. BUTI**: These are maximum limits. Obviously, an individual may not actually receive the maximum penalty. These are the highest penalties in Australia. We have transverse legislation throughout Australia. These penalties are much higher than those contained in the Aboriginal Heritage Act 1972.

The member made the point that someone could do an economic cost–benefit analysis and determine that, for example, the penalty will be $1 million but they will make $10 million. Yes, they could do that, but, really, I hope that they would not. I am strongly confident that the reaction that resulted from that terrible act and what the company had to endure to try to restore relationships would be deterrents in themselves. But, obviously, these are very, very high penalties. These are the highest, harshest penalties in Australia. Also, we have to look at what else we have in the proposed legislation that will reduce the chances of such an event happening again.

**Mr V.A. CATANIA**: I accept that. I can imagine the publicity around someone choosing the economic analysis and benefit of accepting a fine of up to $10 million in lieu of getting, say, $125 million in their pocket. I hope that someone would never do anything like that. As I said before, our role as an opposition is to ensure that we think of any way possible that this legislation can be manipulated or taken advantage of. That is why I raised the disproportionate nature of an individual versus a corporate; I think the corporate can pay the fine, but it is a harsh penalty for an individual. As the minister said, it is one of the biggest, or the biggest, in Australia.

**Dr A.D. Buti**: Overall, it is the highest penalty in Australia.

**Mr V.A. CATANIA**: Everyone accepts that; do not get me wrong. The corporates could use it to their advantage. Can the provision be strengthened to ensure that the unthinkable never occurs?

**Dr A.D. BUTI**: Before I answer the question, is the member proposing that the penalty be strengthened or increased?

**Mr V.A. Catania**: Ensuring you don't have that situation where a company can take advantage of the cost–benefit analysis of paying the $10 million.

**Dr A.D. BUTI**: I am asking you: do you believe they should be increased?

**Mr V.A. Catania**: I am just saying there is huge disparity between the penalty for an individual, which has imprisonment.

**Dr A.D. BUTI**: There is an interaction between employment law and criminal law. This act may not prevent a director from being imprisoned. It depends how the incident is prosecuted. There will always be the possibility that a director could be prosecuted, but it will obviously depend on the interaction between a number of pieces of legislation and the actual involvement by any particular director.

**Mr V.A. CATANIA**: That is interesting. Potentially, if a board member of a company has done that cost–benefit analysis or if a CEO of a company has made that decision, could the penalty of imprisonment for up to five years plus a fine be afforded to them? Is that possible? Could an individual be imprisoned for five years or receive a fine of $1 million or both? Can that apply to a CEO or a board member of a company if they get their cost–benefit analysis wrong and find themselves not only paying, but also potentially imprisoned?

**Dr A.D. BUTI**: I refer the member to clauses 263 and 264, which deal with the criminal liability of officers.

**Dr D.J. HONEY**: I am coming at this from a slightly different direction. I thought the body corporate fine was very large and it looks like it will certainly be a disincentive. I resonate with the point the minister made that reputational harm is a bigger issue for larger organisations. The minister would be more aware than most that the costs that Rio Tinto has incurred are substantially greater than the fine. Yes, it would not want the fine, but there would be public odium.

I found the fine for an individual a little eye-watering. Yes, it is a disincentive, but an application can be made for the maximum penalty. Given the minister's significant legal experience, I was after a guide of what occurs in other areas when a corporate offence occurs versus an individual offence. Is that ratio of 10 to one usual? It struck me that $10 million is a large fine for a body corporate but a maximum fine of $1 million seems to be disproportionately large for an individual. Is this a standard ratio or is it exceptional for an individual in this particular case?

**Dr A.D. BUTI**: Under the Interpretation Act, if it is not prescribed in a particular act, the fine for a corporate offence is usually four times the fine for an individual, but we have made it 10 times the amount.

**Dr D.J. HONEY**: That gives me a calibration and indicates that the penalty is not extreme when compared with the upper penalty.

I am sure that the minister and my wife could answer my next question very readily. Within the clause, on line 7, is the word "penalty". On line 19, there are the words "summary conviction penalty". I am certain there is a very clear legal difference between the two. On page 76 of the bill, "penalty" is on line 7 and then there is "summary conviction penalty". I want to understand the difference between those two terms. I do not imagine that it is complex, but it is for me.

**Dr A.D. BUTI**: There is a difference between indictable offences, simple and summary. Obviously, indictable offences are known as crimes and are more serious and carry more severe penalties. These matters start in the Magistrates Court and progress either to the District Court or the Supreme Court. These matters progress to the higher courts under section 32 of the Criminal Code, and the indictable offence is triable on indictment only. That means that an accused person has the right for the matter to be heard by a judge or jury and this cannot occur in the lower court. Summary offences are also known as simple offences. A simple offence in Western Australia is a criminal act referred to in the Criminal Code Act 1913 as an offence, not a crime. The Magistrates Court in Western Australia has exclusive summary jurisdiction and deals with all types of simple offences. Simple offences cannot be dealt with in the District Court or the Supreme Court. An "either way" offence is an offence described as a crime for which the legislation sets out two maximum penalties—one that applies when the matter is dealt with in the summary jurisdiction, such as the Magistrates Court, and another that applies when it is dealt with on indictment in the District Court or the Supreme Court. Either way, offences are dealt with in summary jurisdictions unless the prosecution or defence makes an application under section 5(2) of the Criminal Code that the charge be tried on indictment.

**Dr D.J. HONEY**: Thank you very much, minister; that was very clear. How is it determined where that goes? Does that relate to the tier 1 or tier 2 or 3 level of interference or is it simply the case that the prosecutor would decide based on the facts of the case that that offence would be heard in a superior court or the Magistrates Court?

**Dr A.D. BUTI**: It would be determined by the prosecuting officers or body. Under clause 92, the harm has to be of a serious nature. A determination will be made by the prosecuting body.

**Mr V.A. CATANIA**: What penalties do we currently have and not have in Western Australia? What is the comparison between what is being proposed and what we currently have?

**Dr A.D. Buti**: Do you mean under the current Aboriginal Heritage Act?

**Mr V.A. CATANIA**: Yes, if there are any.

**Dr A.D. BUTI**: It is up to $100 000, but there is no penalty for serious harm under the current act.

**Mr V.A. CATANIA**: The penalties for an individual and a body corporate are broken down. As the Leader of the Liberal Party said, the penalties for a summary conviction for an individual and a body corporate are defined. How do those fines compare with what we currently have, if there are any?

**Dr A.D. BUTI**: The fine for a body corporate is $50 000 for a first offence and $100 000 for a second offence. The fine for individuals is $20 000 for a first offence and imprisonment for nine months; and for a second or subsequent offence, the fine is $40 000 and imprisonment for two years.

**Mr V.A. CATANIA**: What was the second one? Is that for a body corporate?

**Dr A.D. BUTI**: For an individual, for a second or subsequent offence, it is $40 000 and imprisonment for two years.

**Mr V.A. CATANIA**: What is it for a body corporate?

**Dr A.D. BUTI**: It is $50 000 for the first offence and $100 000 for the second, and subsequent.

**Clause put and passed.**

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

**Dr D.J. HONEY**: I really am surprised about the quantum of the fines in this clause because effectively they are half the penalties imposed for serious harm under clause 92. By comparison, this clause includes in the heading the words "by accident"; the other one should be "with intent". I would think that the fines for serious harm caused by accident would be significantly less, not just half. Let us assume a company decides, exactly as the member for North West Central said, to blast in an area. Let us assume it is not one of the big companies, but one that has discovered a concentration of gold in an area. They have to blow it up but they cannot get approval from the local Aboriginal corporation or the LACH service to do that. At the end of the day, they do not care much about their reputation because they are just going to take the money and disappear, and it is worth much more than $10 million, as a hypothetical. I understand there are reparation clauses as well so I appreciate that that will be an additional requirement, potentially. But what will happen if someone drives a vehicle through an area and they unknowingly, or simply sheerly by accident—again, I know we should not talk in hypotheticals because we cannot cover every

situation—runs into, say, a rock feature or a tree with a significant marking on it, as the minister knows, and destroys it purely because they have a blowout or whatever? I thought that it would have been made clear in the bill that there was no intent. They have just done it purely, as it says, "by accident", either through ignorance or misadventure. It seems that the penalties for those offences are really high when compared with the penalties for offences committed by someone who knowingly causes destruction. Can the minister explain the logic for why those penalties are so high? It seems to me that they are disproportionately high compared with those for someone who knowingly does the wrong thing.

**Dr A.D. BUTI**: This is about strict liability, which is not unusual or unheard of in the legal system. Doping offences in sport come under strict liability. All that needs to be proven is that a person had a prohibitive substance in their system and there is strict liability. It is probably a much greater fine than $500 000 for a person who has been training for 20 years and it prevents them from going to the Olympic Games. It is not unusual. In certain workplaces, safety provisions come under strict liability. The fact is that people have to do their due diligence. If people do their due diligence, they pick up on the fact that there are Aboriginal cultural areas that need to be protected. The penalties are much lighter than if there is intent, as the member pointed out, and it is a strict liability offence. We make no apologies for that, because the government is strongly committed to protecting Aboriginal cultural heritage.

**Dr D.J. HONEY**: I understand that point, but in this clause it is purely by accident. A fine should be a deterrent; the purpose of a fine is to act as a deterrent. But if someone does something that they absolutely did not intend to do, I find it harder to see how this could be a deterrent. I imagine that will occur in some circumstances, but in the great majority of these circumstances I find it harder to understand how this could be a deterrent. It is about something they did not know. They do not want to do it. They did not intend to do it. They did not mean to do it. They did it by accident, so a deterrent is almost meaningless in that sense because they never intended to do it in the first place. I understand the need for a very high penalty when it is a deterrent, but in the case of someone who has a genuine accident, with no intention whatsoever, I do not see the sense of having such a huge potential penalty when it cannot reasonably act as a deterrent because they never, ever intended to do that.

**Dr A.D. BUTI**: I refer the member to clause 98, which talks about defences that can be utilised, such as a due diligence defence. When a person does their due diligence properly, that may be a defence. Obviously, if they had have done their due diligence properly, they would not harm the area because they would know about it. But the point remains: strict liability is not unheard of in the legal system. I would say that a doping offence in sport, which attracts strict liability, is not as serious, actually, as protecting Aboriginal culture. We make no bones about this or apologies for it. If people follow the due diligence, they will know about it, but it is a possible defence.

**Dr D.J. HONEY**: Thank you, minister. I guess sometimes we look at things from different perspectives. I appreciate the answer the minister has given in relation to due diligence. If someone is not thorough and they do not scope out the work, to a degree it could be seen to be accidental if it is not within their control. But I was thinking more literally along the lines of an accident. An accident is a physical misadventure—something happens. That is different from someone who gets the coordinates wrong when they plot a line, for example, to dig a trench and they go through an area of significance. Again, I think the minister has been clear about the intention, but I think that there is a difference between those two things. I understand the point the minister is making on due diligence. My point is about misadventure—straight misadventure. I assume that the minister might say that that is not a defence. I am not sure; I cannot read that quickly enough with my tired brain at the moment. But there is a difference between those two things: misadventure versus someone simply not doing enough work up-front.

**Dr A.D. BUTI**: The penalties in clause 93 are maximum penalties, as they are in clause 92. Obviously, when a determination is made, the determining body will consider the so-called misadventure—how it came about. All I will add is that Aboriginal people have for centuries dealt with misadventures that have destroyed their Aboriginal culture. It is about time that they did not have to do that anymore.

**Mr V.A. CATANIA**: What were the penalties prior to this? What are the current penalties that exist? Is there a difference like there was in relation to clause 92?

**Dr A.D. BUTI**: Under the current system, it is just the same as the penalties that I read out previously—$25 000, $50 000 and $100 000 for corporates. Also, there is no strict liability under the current act.

**Mr V.A. CATANIA**: Say I own a farm in Wyalkatchem and have ploughed the land for generations, but when I clear some land, I come across some Aboriginal cultural heritage artefacts that I have disturbed by accident. Will that mean that I, as that farmer, will be trapped by, or will have committed an offence under, this clause?

**Dr A.D. BUTI**: It is dependent on the circumstances. It depends on the degree of the disturbance and harm, and the regulation co-design will determine the tier structure, which will determine the severity of the harm and the consequences.

**Mr V.A. CATANIA**: Would the same situation exist if an owner of an 1 100-square-metre block in Armadale decided to put in a pool, for example, and they came across something that could be considered to be Aboriginal

cultural heritage? Will this clause apply to that owner if they unknowingly or by accident destroy an artefact or ancestral remains—whatever the case may be? Will it be the owner of the property or the person who is digging the swimming pool, building the shed or disturbing the ground, who has potentially committed the offence because they have not done due diligence to ensure that there is no Aboriginal cultural heritage located on that block?

**Dr A.D. BUTI**: Is the member saying that block is over or under 1 100 square metres?

**Mr V.A. Catania**: It is over.

**Dr A.D. BUTI**: Obviously, there will have been harm, and then we will look at how serious the harm is. I cannot give the member an answer now because part of the co-design process is to work out the tiers of activity and disturbance and the resultant consequences. In that example of a person coming across an artefact on their block, the first thing they should do is to report it.

**Ms M.J. DAVIES**: I will start with the premise that we understand the intent of this provision, which is to make sure that we preserve and not damage this important cultural heritage. I am trying to think of the things that I will be asked about from an electorate point of view. The majority of farms in my electorate would fall under these categories. Can the minister run me through the process? Is it expected that every landowner, given that they disturb the land on a regular basis with seeding and harvesting, will have to go through the process of having their land assessed by the local Aboriginal cultural heritage service to prevent themselves from falling foul of committing an offence either by accident or otherwise? That is something that immediately comes to mind. I will start getting phone calls from landowners fairly shortly asking, "How do we make sure that we don't fall foul of this legislation? Do we have to contact the LACH service?" Who will that LACH service be? I presume it will be a group within the South West Aboriginal Land and Sea Council, but that is not clear to me at the moment.

I assume that everyone would like to avoid finding themselves in this situation, but I can imagine a significant amount of work in a short period, given that these activities in the agricultural sector are seasonally driven and we will need to get it done without putting people in jeopardy and potentially doing harm, as this bill seeks to prevent.

**Dr A.D. BUTI**: The obligation imposed in this act is currently in the Aboriginal Heritage Act 1972; it is not necessarily that different. If the member goes back to clause 8, "Objects of Act", she will see that subclause (1)(c) states —

> to manage activities that may harm Aboriginal cultural heritage in a manner that provides —
>
> (i) clarity, confidence and certainty; and
>
> (ii) balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community;

The specific answer to the member's question is that the co-design process will determine tier 1, tier 2 and tier 3 activities. Only tier 2 and tier 3 activities will require approval or consent, and stakeholders—that is why it is called coexistence—including farmers and agricultural people, will be offered an opportunity to be involved in the co-design process.

**Ms M.J. DAVIES**: Representatives will be involved in the design process; I understand that.

**Dr A.D. Buti**: They will be invited.

**Ms M.J. DAVIES**: They will be invited and included, thank you. I grew up on a farm with neighbours who had a site that we know was a watering hole—Derdibin Rock. It has been managed quite well between some of the local families and the family that has farmed that property. I imagine that when a person knows that there are culturally significant areas, they can be identified quite easily. But I presume that there will be some sensitivity to whole properties being covered and, realistically, how will that be managed so that we do not overburden those LACHS? We would want some assurance that this will not create a backlog and do more harm and create more anxiety for both sides of the equation. If we could have some assurance that that is how we are approaching this situation, it would make it far easier for me to have this discussion at a local level.

**Dr A.D. BUTI**: Yes, member, the whole idea is to ensure that stakeholders can be involved in the consultation process. In the majority of cases, farmers and Aboriginal people have coexisted very well and I do not see this as being necessarily any different. It would just be a matter of negotiating, coming up with a design and making sure that it is clear. As I referred to before, clause 8, "Objects of Act", will provide clarity, balance and a sensible outcome.

**Ms M.J. DAVIES**: Just so that this is on the record, I agree with the minister; there have been long and strong relationships. In fact, in my electorate we have had exhibitions in Quairading that have celebrated the role that Aboriginal people have played in clearing the land and being involved in agriculture, which is not something that is often spoken about publicly. Some wonderful work was done. I am trying to think of who conducted it; the Community Arts Network might have worked with the community there. But it comes down to the timing factor. I know that the minister is unable to give an answer today because it will be part of the co-design process, but just for the record, we need to be mindful of the fact that there are agricultural processes—much like in the mining industry

when companies go in for final investment—that are seasonal and regular and we will need to have in place very clear guidelines to ensure that people do not fall foul of this provision, because they need to get on with work in the window for seeding or harvesting or any other activities that are required.

**Dr A.D. BUTI**: This will be determined in the transitional period of at least 12 months after royal assent of the bill.

**Dr D.J. HONEY**: With regard to this area, I am concerned about a significant unintended consequence, if you like, of this legislation. I understand the genuine intent that the government has to protect Aboriginal cultural heritage and that it is legislating for a number of ways to deal with that, but I will run through a situation that is subject to this clause and its penalties. For the great majority of farming activities, a single person is involved and there is no-one else to observe them or no-one else who knows what is going on. I am a farmer who is digging a trench at the back of my shed. I am going through some soft sand and I come up with some bones in the bucket of my excavator and say, "Crikey! I actually read that bill from cover to cover. I've now accidentally harmed what would be regarded as significant cultural remains."

I believe that currently, in the great majority of cases, people would report that because they think it is the right thing to do, and I think overwhelmingly that people in rural communities especially have great respect for Aboriginal heritage. I would want to report that, but even though I had done it completely inadvertently, with no way of imagining that it was there, I would potentially be subject to a half-million-dollar fine. The minister could perhaps confirm this in his answer, but many farms are companies for taxation purposes. Potentially, they would be subject to a $5 million fine. I could just bury those bones in the ground and not another person on this earth would know that I had buried those bones. I could continue on, complete that activity and not potentially be putting my whole family's livelihood at risk and me at enormous financial risk.

I have gone through that because I think it is a realistic scenario, because it is not just funds. An enormous amount of activity occurs when only one or two people are cooperating together and doing that sort of activity. Rather than protecting and revealing Aboriginal heritage, we could have a situation in which people will have a substantial financial motive not to reveal. If no-one else knows, and there is no way that it would ever be found out and in practical terms they do not reveal it, we would lose the opportunity to bring out more Aboriginal heritage. It is an overarching concern that I touched on in my contribution to the second reading debate that when penalties are so high, in particular for accidental, inadvertent activity by which people reveal things, there will be a huge motive to discourage people from revealing things. The magnitude and onerousness of all the penalties will discourage that act. Can the minister recognise that that is a concern in that scenario that may have the opposite effect of what the government intends with the bill?

**Dr A.D. BUTI**: I recognise the seriousness of damage to Aboriginal cultural heritage. Regarding the member's question, we are talking about serious harm under the clause being dealt with at the moment. The member talked about ancestral remains. If he came across them and then reported them, that would not amount to serious harm. I refer the member to clause 61 that refers to a defence and how ancestral remains must not be disturbed or removed. Clause 61(3)(a) states, in part —

> (iii) was lawfully on the land where the Aboriginal ancestral remains were present and did not reasonably suspect that ancestral remains were present on the land or that the person's actions would disturb or remove Aboriginal ancestral remains present on the land;

And paragraph (b) states —

> the person ceased carrying out the activity … that caused the disturbance …

**Mr V.A. CATANIA**: Touching on private property and potentially falling foul of the law by accidentally damaging Aboriginal cultural heritage on property that is greater than 1 100 square metres, what role will local governments play in ensuring that approvals are necessary to renovate a house, put in a swimming pool, build a shed or a wine cellar or whatever the case may be? Is any work being undertaken with local governments to ensure that when someone puts in an application for a development, there will be notice for that property owner as well as the local government that someone is consciously looking at or ensuring that perhaps they need to have a heritage survey on that property? Has any work been done with the Western Australian Local Government Association or local governments in general to have that as part of their approval process?

**Dr A.D. BUTI**: Yes, there has been consultation with WALGA. It wants to be involved in the consultation process and public awareness programs going forward.

**Mr V.A. CATANIA**: It is good that there has been consultation, but has there been ongoing consultation through the approval process to ensure that once this new law goes through Parliament, an individual property owner will not fall foul of any illegal activity unbeknownst to them? Will there be an education campaign with local governments around the state? What financial assistance will the government provide those local governments that may ultimately take on the responsibility of ensuring that property owners who own property over 1 100 square metres do not fall foul of this clause?

**Dr A.D. BUTI**: Unlike the member for North West Central—I would never want to get between a bucket of money and the member for North West Central—WALGA has not asked for any consideration of funding. It has been involved in the process, and going forward we are looking at how it can be more involved to hopefully streamline the process and be involved in the ultimate objective of this bill, and that is to protect Aboriginal cultural heritage.

**Mr V.A. CATANIA**: I totally agree with what the minister has said; never get between a bucket of money and me! I agree that this is all about protecting Aboriginal cultural heritage. I totally agree and there is no question from my point of view or this side of the house—or corner, one would say—but one issue that many people have with this bill is the financial support to go forward to ensure that people do not fall foul of the law by accident, more than anything. Local governments will play a major role in ensuring that their ratepayers do not fall foul of the law. The biggest criticism of this bill is the lack of funding by the state government for this transition moving forward under this new legislation. Would the government consider it if WALGA came to the government and said that it needed money, especially those local governments that have property well and truly over 1 100 square metres, like a lot of regional towns?

**Dr D.J. Honey**: Smaller councils with big areas.

**Mr V.A. CATANIA**: Yes. There are smaller councils with huge areas, large blocks and obviously a very small ratepayer base. They do not have those means to educate the community on awareness, especially if they are putting in a development application. Is it up to local government to assess the property or sign off on it? If the local government signs off on a property and the individuals tick the box, will the local government also be potentially liable?

**Dr A.D. BUTI**: Some of the matters that the member referred to still have to be worked through, and the most efficient way to deliver them is what will take place. The Western Australian Local Government Association has not come to government—from my recollection; I am not the actual minister—seeking funding. The member keeps mentioning that one of the main criticisms of this bill is financial issues. I have not heard that at all. It may be, but I have not heard that at all. In the Barnett Liberal–National government, the Nationals WA, in regard to royalties for regions, built many facilities in local government areas. Did the National Party then provide local government with the money to run the swimming pools and gyms? I think probably not.

**Mr V.A. CATANIA**: I will just answer that question, minister. That is local government decision-making, and local governments actually chose to build those projects, so that is a decision of the local government on how it spends its royalties for regions.

**Dr A.D. Buti**: Wasted!

**Mr V.A. CATANIA**: Local decision-making.

**Dr A.D. Buti**: Wasted!

**Mr V.A. CATANIA**: Local decision-making.

**Dr A.D. Buti**: Wasted!

**Mr V.A. CATANIA**: Keep saying that. Because we want to get back to this bill, minister, I am happy to talk about royalties for regions every day of the week. I am on this side of the house because we believe in regional development and regional communities.

**Dr A.D. Buti**: Now we know why you became a rat!

**The ACTING SPEAKER (Mr D.A.E. Scaife)**: All right! Members, let us just —

**Mr V.A. CATANIA**: Yes, it was. But your ship will sink at some stage and those rats will start coming out!

**The ACTING SPEAKER**: Member for North West Central! You know that I am bringing this back under control. We do not need it. Let us get back to the bill.

**Mr V.A. Catania** interjected.

**The ACTING SPEAKER**: Member for North West Central!

**Mr V.A. Catania** interjected.

**The ACTING SPEAKER**: Member for North West Central, back to the bill! Thank you.

**Mr V.A. CATANIA**: Will the minister undertake an education campaign for all residents in Western Australia? There are about 50 000 properties over 1 100 square metres in Western Australia. Will the government and the Minister for Aboriginal Affairs write to each of those property owners to inform them that if they want to disturb the ground, these are the considerations that they made need to undertake?

I think it would be good to have an education program. I think it would help promote the importance of ensuring that Aboriginal cultural heritage sites are protected, but, more importantly, it will ensure that those individuals do not fall foul of this piece of legislation, as it may capture people who may accidentally disturb Aboriginal cultural

heritage artefacts, ancestral burial sites, or you name it. I think it is important that there is a bit of an education campaign. Will the government consider providing funds to the Western Australian Local Government Association, the Western Australian Farmers Federation, the Pastoralists and Graziers Association and the Kimberley Pilbara Cattlemen's Association just so everyone can be aware? I think it is important that people are educated about the legislation as it could affect their property and livelihoods—ensuring that they truly negotiate and protect those Aboriginal cultural heritage sites.

Will the minister embark on an education campaign and will the government consider funding it through some of those organisations that I have just mentioned?

**Dr A.D. BUTI**: We are dealing with the consideration in detail of the actual bill before us, not some of the issues raised by the member. I will just repeat what has been said a number of times: the government will be engaging in an extensive consultation program and a public awareness program, as will the councils. There is not really much more I can add for probably the tenth time in that respect.

**Mr V.A. CATANIA**: I just want to put on the record again: will the government strongly consider an education program when it comes to the Western Australian Local Government Association, the Western Australian Farmers Federation, the Pastoralists and Graziers Association, the Kimberley Pilbara Cattlemen's Association and any other large membership of property owners that this legislation and this particular clause will capture, to ensure that people do not fall foul of the law? Will it also educate the community on how important it is to protect Aboriginal cultural heritage sites, artefacts and, like I said, anything that this legislation will capture?

**Dr A.D. BUTI**: I think I said that there will be an extensive public consultation education program, which will involve all the stakeholders that need to be involved. That is what the consultation process revolved around in regard to various drafts of the bill. There will be a consultation and an educational process going forward.

**Dr D.J. HONEY**: I am sure that this is a very simple question. I just do not have time to look up the code. Clause 93 states —

> (2) Despite *The Criminal Code* section 23B(2), it is immaterial for the purposes of subsection …

Why is that subclause in the bill?

**Dr A.D. BUTI**: It is in the bill because it deals with a strict liability issue.

**Dr D.J. HONEY**: Section 23B(2) of the Criminal Code states that an accident is a defence, but here in the bill it is a strict liability issue, as the minister said.

**Dr A.D. BUTI**: That is correct.

**Clause put and passed.**

**Clause 94: Material harm to Aboriginal cultural heritage —**

**Dr D.J. HONEY**: I think the minister can guess my question here. This clause is about material harm to Aboriginal cultural heritage. Can the minister please explain the difference between material harm and the previous penalty?

**Dr A.D. BUTI**: I refer the member back to clause 91.

**Clause put and passed.**

**Clause 95: Harm to Aboriginal cultural heritage —**

**Mr V.A. CATANIA**: Clause 95 states —

> A person commits an offence if the person harms Aboriginal cultural heritage.

Can the minister describe the difference between clause 94 and clause 95? There is obviously a huge difference in penalty as well.

**Dr A.D. BUTI**: Clause 94 refers to material harm and clause 95 refers to harm that is not considered to be serious material harm.

**Dr D.J. HONEY**: Minister, we had a discussion before concerning a farmer going about their activities and the risk that, fearing a penalty, they might hide what they find as opposed to reporting it to an authority, but the minister said that there is a defence. The farmer may have gone through and dug up a skeleton and broken its bones. Would these penalties be triggered, given that they are at a lower level, or would the defence that the minister mentioned before still apply to these lower level offences? The minister can see where I am coming from here; that is, the farmer is obviously not going to say that the action was deliberate. There is no defence against it being deliberate harm or serious harm. But does that then mean the farmer can fall foul of these penalties, which are lower penalties and have a definition of less serious harm? I think the minister understands my question, but I am happy to go through it again if he does not.

**Dr A.D. BUTI**: Going back to the member for Cottesloe's issue about ancestral remains, if the person stopped at the time, they would not be caught up with that because they would have stopped at the time and reported it. They would not have actually harmed them under the provisions of the bill before us. However, if they continued, of course, it would be a different matter.

**Dr D.J. HONEY**: I am sure the minister has seen plenty of excavators in his day. They can dig up enormous volumes and get buckets half full of bones and leave parts of skeletons of ancestral remains in the ground. They will have caused harm, although not deliberately. They could stop, but they would have stopped when they had caused harm. Would they be potentially subject to these lower level penalties for having done that?

**Dr A.D. BUTI**: It is possible, but, obviously, certain mitigating factors will come into play that will determine whether there will be any degree of penalty and the severity of that penalty.

**Clause put and passed.**

**Clauses 96 and 97 put and passed.**

**Clause 98: Other defences —**

**Dr D.J. HONEY**: At clause 98(a)(i) it states, in part —

> … that there was no risk of harm being caused to Aboriginal cultural heritage by the activity …

How can a person make an assessment that there is no risk?

**Dr A.D. BUTI**: By undertaking a due diligence assessment.

**Dr D.J. HONEY**: I reach the inescapable conclusion that the only way we can have a view that there is no risk is for a local Aboriginal cultural heritage service to be determining on every activity; otherwise, I do not see how anyone can make that assessment. It seems that every activity that has significant disturbance will have to have a LACH service involved; otherwise, how will we demonstrate there is no risk in the activity?

**Dr A.D. BUTI**: This relates to the Aboriginal cultural heritage management code, which will be subject to a co-design. It will set out the required process that needs to be followed to assist the proponent in completing the assessment. Through that co-design process, the government will work with all stakeholders to determine the categorisation of tier 1, 2 and 3 activities.

**Clause put and passed.**

**Clause 99: Compensation for harm to Aboriginal cultural heritage —**

**Mr V.A. CATANIA**: Can I have some explanation, especially on subclause (1), which states —

> The CEO may, with the prior written approval of the Minister, decide that compensation is to be paid in respect of Aboriginal cultural heritage to which harm has been caused as a direct or indirect consequence of the commission of an offence under Division 2.

Can the minister explain what that means in layman's terms and what compensation the CEO may pay and who will pay the compensation?

**Dr A.D. BUTI**: The trigger will have to be a conviction under the Sentencing Act. The proposed act amends schedule 1 of the Sentencing Act to allow penalties for harm to Aboriginal cultural heritage offences to be paid to a special purpose account rather than the government consolidated revenue to facilitate the payment of compensation to the Aboriginal parties. The fine will be paid to the special purpose account to ensure that compensation can be paid.

**Mr V.A. CATANIA**: It could be that an individual on a property or a mining company pays it into a special purpose account. Will it be a trust account or an interest-bearing account? What role will the CEO have in this? Will the CEO be the signatory to this account? Will the CEO make the payment once the issue is resolved or there is an outcome? Will the CEO pay the compensation that is in the special purpose account to the individual or the Aboriginal organisation to cover the situation that has unfolded?

**Dr A.D. BUTI**: The CEO will determine whether compensation is paid. Clause 99(4) states —

> A determination under subsection (3) must be made in accordance with the criteria, if any, prescribed.

The special purpose account is dealt with in clause 279.

**Mr V.A. CATANIA**: For compensation to be paid, the penalty will have been agreed to and it will have gone into a special purpose account. At some stage, the CEO of the department will be authorised to release the funds to, as clause 99(6)(c) states —

> the Aboriginal person, group or community to whom the compensation sum is proposed to be paid in full, or the Aboriginal persons, groups or communities between whom it is proposed that the compensation sum be shared and the amount of each share.

Will any restrictions be imposed on where the compensation can be spent? Are there any criteria around that or is there a process for that?

**Dr A.D. BUTI**: I do not think there is any intention to do that because it would be quite discriminatory to pay compensation to Aboriginal people and tell them they can only spend it in a certain way. We do not do that normally in other compensation matters.

**Mr V.A. CATANIA**: I tend to disagree. We do that with native title settlements. Governments tell Aboriginal people how they can spend their money. If we are talking about that, it needs a major overhaul of the Native Title Act to bring that into —

**Dr A.D. Buti**: It's a commonwealth thing.

**Mr V.A. CATANIA**: I agree. I hope that the minister and the government can lobby to change the Native Title Act and modernise it to make it more workable. The point is exactly that: conditions are generally put on how Aboriginal people can spend their money. I am just wondering —

**Dr A.D. Buti**: Are you advocating for it?

**Mr V.A. CATANIA**: Absolutely not. I asked the question because it is important to get clarity on how that compensation will be paid. It is good to hear that there will be no strings attached, as one would say. Clause 99(3)(c) states —

> the Aboriginal person, group or community to whom the compensation sum must be paid in full, or the Aboriginal persons, groups or communities between whom the compensation sum must be shared and the amount of each share.

That just shows that it is important that there are no strings attached to how Aboriginal people will be able to spend the money that they will get through the right avenues of compensation.

**Dr A.D. BUTI**: I have heard of no intention that there will be strings attached to compensation, but obviously everything in this area will be determined under the co-design process and the regulations that will be implemented.

**Dr D.J. HONEY**: I apologise, minister; I just had to pop out of the chamber for a second on urgent parliamentary business, so if the minister has covered this question, I am happy to go back through *Hansard*. Otherwise, how will the quantum be determined? For most offences, when a person commits an offence, it goes to a court. One of the advantages in our court system is that we have judges who are experienced in these matters and they have some guidelines on the penalties they can apply, but they can do that unemotionally in a way that the quantum is fairly relevant to other people who have had that penalty applied to them. How will it be determined what is an appropriate quantum in this case? Perhaps while the minister is there—I do not want to drag this out at all—if someone is unhappy with the penalty and thinks it does not reflect the seriousness of the harm that was done, is there a process for that to be appealed to a higher authority, if you like, to say, "Well, we think this is wrong"?

**Dr A.D. BUTI**: Is the member talking about the compensation paid?

**Dr D.J. Honey**: Yes, I am, minister.

**Dr A.D. BUTI**: Firstly, I have repeated ad nauseam that under clause 99(4) a determination on compensation under subclause (3) must be made in accordance with the criteria, if any, prescribed. That will be worked out in the regulations. But there will be no right of appeal on compensation.

**Clause put and passed.**

Debate adjourned, on motion by **Mr D.A. Templeman (Leader of the House)**.

*House adjourned at 4.31 pm*