ABORIGINAL HERITAGE LEGISLATION AMENDMENT AND REPEAL BILL 2023

Committee

Resumed from 11 October. The Deputy Chair of Committees (Hon Sandra Carr) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon SUE ELLERY: When we concluded Committee of the Whole yesterday, we were just about to provide an answer to Hon Neil Thomson about who will have the final say on whether a prosecution will proceed. I can confirm that it will be the director general who will make the final decision whether to prosecute. That is the same delegation that exists under legislation and regulations that are enforced by the department on other planning, lands and heritage matters.

Hon PETER COLLIER: The minister said yesterday that she was going to check whether there had been any proposed amendments in June.

Hon SUE ELLERY: I read in *Hansard* what the member asked yesterday in reference to a matter he said had been raised in the estimates committee. I noted that he said the State Solicitor was going to confirm his advice. I have not put myself in between that and I am not going to, so, no, I have not looked at that.

Hon NEIL THOMSON: I thank the minister for that response on the director general. What I was getting to, by way of background, was that we had discussed the role of the registrar. We were led to this discussion because some of the site boundaries were much enlarged, which might be considered as Aboriginal heritage. We were talking about the Gascoyne flood plain, for example. We know that there are large areas where, to paraphrase the minister's words, they may not want to say where the Aboriginal heritage is. When the registrar assessed a section 18 application or when the investigator assessed a complaint, I assume that advice would have been provided to the Aboriginal Cultural Heritage Committee, and after consideration it would have gone through to the director general. I take that to be the process to determine whether a prosecution occurs. This brings back to my memory a certain provision that was considered in 2014, I think, when my colleague Hon Peter Collier was minister and was looking to introduce amendments to the Aboriginal Heritage Act. One of those amendments was that the director general would have explicit powers to determine where Aboriginal heritage did not exist. If we look at the uncertainty or the asymmetry of information in what is publicly available or what detail the registrar has, that might be a way of helping the director general make a decision, maybe on the advice of whomever the director general seeks advice from, and I assume there would be some capacity to seek advice from external parties. In going back to the 1972 act, has the government examined some of the amendments that were proposed in 2014, given that they were less extensive than the amendments in 2021? Has the government considered the idea of the director general having explicit power to determine where Aboriginal cultural heritage does not exist?

Hon SUE ELLERY: To the best of the knowledge of anyone at the table, no and, frankly, I do not know that we could have examined what the honourable member said was proposed in 2014. If it was a cabinet submission, for example, we would need to seek permission from the Leader of the Opposition to do all those sorts of things. To the best of the knowledge of the people sitting here, no.

Hon NEIL THOMSON: On the determination, we discussed the other day whether prosecutions might occur if they were in the public interest. It seems to me that two major components of the determination might exist for the director general—in this case Anthony Kannis—who might have a file on his table from an investigator on a particular breach of the act. There would be a public interest assessment and advice from the registrar, given that the registrar would have information that was not privy to the broader community in some cases. Will there be any requirement for the director general, under the delegation the minister just outlined, to seek further advice from traditional owners or other parties?

Hon SUE ELLERY: The member's question is whether there will be a requirement for the director general to seek further advice. No, there will not be a requirement, but that will not preclude him from doing it. In preparing the file, the investigative team would have consulted all the relevant stakeholders, including traditional owners if that was what was required.

Hon NEIL THOMSON: I assume that the director general would have on his table the file that had been delivered to him—assuming it is still Mr Kannis in the job. If Mr Kannis is making a consideration, it would be entirely reasonable for him to then undertake a separate procedure by engaging directly with either Aboriginal people or the Aboriginal Cultural Heritage Committee.

Hon SUE ELLERY: If the director general felt that the material put before him was in some way inadequate for him to make a decision, he could certainly go back to the investigators and ask for further information, further

investigations or further discussion with whomever, including the native title group involved in the matter. The member has worked in the public sector and would be able to imagine that if a director general were not satisfied with the information put in front of them, they would ask for further information, as a matter of course. Nothing is different here.

Hon NEIL THOMSON: Two quite notable cases came before and were presented. I do not know where at least one of them is in its court proceedings, so I will leave it to the minister to make a decision about whether she wants to answer this question. The one I am thinking about is the case about firebreaks, which I assume was a decision made by the director general. My first question about the Wanneroo example is: was the decision about proceeding to prosecution made in the public interest by the director general?

Hon SUE ELLERY: It is before the court now, and I will not get into a commentary about it.

Hon NEIL THOMSON: Maybe I will put things in a different way, then. I refer to all the cases that went to prosecution. I am trying to understand the delegations within the department. Often, when a delegation is to a director general, it can be given, in effect, to other officers, depending on the nature of the delegation. Thousands of times I signed planning matters that I actually never saw as the secretary of the Western Australian Planning Commission. A strange quirk of the public sector is that a person's electronic signature gets put on thousands of letters. I can assure members that it happens under delegation to officers, and there are reasons for that. It might have changed, but that was a longstanding tradition within the WAPC because the delegate in that case is actually the WAPC. That is the standard in the Department of Planning, Lands and Heritage. It is one that I questioned many times. I was even referred to in Parliament at one stage by the then member for Perth. I am trying to recall his name. He was somehow in cahoots with the then planning minister, Hon John Day, and there was some collusion. It was a delegation of a planning decision made by an officer. Letters to proceed with certain delegations happen all the time. My point is: are there instances in which a matter might proceed to prosecution without the director general effectively seeing the decision?

Hon SUE ELLERY: The answer to that is no. I feel compelled to, I guess, defend the honour of John Day and John Hyde. I remind the member that it is not a good idea to reflect on those sorts of things. The answer to the member's question is no.

Hon NEIL THOMSON: It did actually occur and was a source of frustration for me, but I will not reflect on it. Without referring to a specific case, the point I am making is that delegations for people are often managed by real delegation.

The point I am now making is about the issue of surveys because we have quite a number of issues with surveys, and people are interested in them. I suppose my question about surveys refers to how we have had quite a bit of activity within the system and what is on the website. We saw some guidelines for the Aboriginal Cultural Heritage Act. Some were taken down, and I believe that they were taken down almost immediately after the decision was made to repeal the act. At the time, there was some feedback from industry about why those survey guidelines were not there, given that we were still in the remit of that legislation. Given that we are doing some amendments, I want to ask why no consideration was put into the surveys, their nature and specifications, and how they will be outlined. There seems to be no provision for surveys in the legislation or in the amendment. Where will they be and how will they be presented, given that some guidelines now seem to have appeared? From memory, I think that there are two: consultation guidelines and site-assessment guidelines. Has there been any consideration to include a bit more on surveys?

Hon SUE ELLERY: Thank you. Honourable member, I am up for a wideranging debate on clause 1, but I am not up for repeating things that I have already said. I have already provided a description to the house about what will happen. I think I might have even said it in my second reading reply.

This is what I have already told the house. Eligibility for surveys is being developed. We intend to focus on areas that are not currently surveyed in highly urban areas to support priority infrastructure, and areas where it can be confirmed that Aboriginal heritage does not exist. I have already told the house that surveys required for the purposes of mining and extractive industries will be the responsibility of industry and will not be funded. We will work with stakeholders, including farmers, on how we develop the priority areas where we will start the surveys. I have already indicated to the house that if a farmer is making a section 18 application, then, yes, the government will pay for the survey. If someone is not making a section 18 application and wants to do a survey for their own purposes, they will pay for the survey themselves. We will be getting input from all the stakeholders on how we establish the priority settings for where those surveys will be rolled out.

Hon NEIL THOMSON: I want to focus on the ones. Excuse me if I have missed something, but the question was more about the government-funded surveys. I am sort of referring to the latter type of survey the minister mentioned—the self-funded surveys that someone has to undertake to get the section 18.

Hon SUE ELLERY: That is the opposite of what I said. I will say it again. If someone is making a section 18 application, the government will pay for the survey. If someone is not making a section 18 application and just wants to do one for their own interest, those surveys will not be captured in the 10-year rollout of surveys that we are talking about.

Hon NEIL THOMSON: Excuse me, again. The minister is saying that every survey conducted for a section 18 will be funded by the government. Is that what the minister is saying? I am just trying to clarify it because I am feeling confused.

Hon SUE ELLERY: I have already said that surveys required for mining and extractive industries, for example, will be the responsibility of industry. They will not be caught up in and funded as part of that rollout. A survey for a farmer making a section 18 application will be paid for.

Hon NEIL THOMSON: That was my understanding. I just had to clarify that. We just try to work through these things. My question, which the minister can choose not to answer, was not about who funds things; it was about why there was no consideration of a provision in the bill related to the specification of surveys, given that there was quite a bit more in the act that we are now repealing. My follow-up question, to put two together, is: will that be likely to be presented at some further stage by means of regulation?

Hon SUE ELLERY: No. It has been announced as a policy position of government; we made that quite clear. There is still work to be done to liaise with those stakeholders about how we set the priorities and make sure the policy guidelines are clear to everyone. I am sure once that work is done, it will be made publicly available on the website or wherever else. It is not intended to prescribe the nature in the act itself or regulations.

Hon NEIL THOMSON: That comes to the heart of some of the concerns about the guidelines. We have had briefings from the department, and I appreciate them. There has been this constant refrain that those guidelines do not have the effect of law—is the term subordinate legislation or quasi-law?

Hon Sue Ellery: Delegated legislation.

Hon NEIL THOMSON: The term is "delegated legislation". This will not have that effect. The problem is with undertaking surveys, and I am thinking of mining companies paying for their own surveys, not government-funded ones. One hopes that those surveys will not be challenged, particularly given the capacity for proponents under the new provision—which we will talk about later; I will not go into new detail—and for native title bodies to go to the State Administrative Tribunal for appeal.

Hon SUE ELLERY: I do not know that that was a question; I think it was a comment. It is certainly in the interests of the resources and mining industries to make sure that the traditional owners they deal with are comfortable with the surveys being used. It is not in their interest to use a survey that is not acceptable. Common sense and the bottom line will dictate that the resources industry will want to do this properly.

Hon NEIL THOMSON: The reason I raise this, and I know it is not within the jurisdiction of this legislation, is the recent court decision on the $12 billion Woodside project. I do not know the details, but the reason I raise this is that there was a decision to hold up that project because someone did not consult with somebody. I assume that was under some offshore petroleum legislation or possibly the Environment Protection and Biodiversity Conservation Act; I do not know. Anyhow, I am not familiar with it. The point is that the principle is the same. There are consultation surveys and site assessment guidelines. My question is: is the government confident that the guidelines that have been prepared now will provide a level of protection for proponents who follow them scrupulously and will not be picked off through appeal through either the SAT or the Supreme Court?

Hon SUE ELLERY: The member is asking me to use my crystal ball to look at a set of policy guidelines on how the government will conduct surveys that it will fund and whether they will be sufficiently robust to —

Hon Neil Thomson interjected.

Hon SUE ELLERY: I am answering the question.

The member is asking whether they will be sufficiently robust to meet some tests in the future. I cannot speculate about that. The example the member has given has nothing to do with this bill. I do not even think it comes under state legislation, so I do not think it helps us at all. For its survey program, the government intends to consult with all the stakeholders about how that is best done and then roll it out in a targeted way to capture areas most urgently needed to be captured—to prioritise those areas and to roll it out over the 10 years.

Hon NEIL THOMSON: By way of clarification, I was not talking about government-funded surveys, but industry ones. The principle is about whether people follow those guidelines. I was using the example only as a means of illustration because the principle is important. All I was asking is whether the government is confident that if the guidelines now published are followed rigorously by our industry, which is self-funded, a native title

holder will not go to the SAT or the court. These guidelines do not have the effect of law. I am worried about this. I do not know whether the minister can give me an answer to provide comfort to industry. Industry is relying on these guidelines that are not law to undertake a process to make a section 18 application. Even if industry follows the guidelines to the letter, could some other interpretation either by SAT or the Supreme Court find that the proponent has not undertaken the necessary requirements under the legislation? Has there been that assessment?

Hon SUE ELLERY: The guidelines to be used by mining, resources and extractive companies are designed to be robust and to assist them to meet their obligations under the legislation, and they are done with the best intentions. I cannot predict what some court in the future might decide or what might happen. Also, the history of these and similar matters shows us that even if something is in a regulation or enshrined in legislation, from time to time courts will take a different view, depending on the circumstances. As I said when I started to respond to this line of questioning, the member is asking me to use a crystal ball and I am just not in a position to do that.

Hon WILSON TUCKER: Yesterday, I asked a few questions about the level of consultation the government has undertaken on the repeal bill. I believe there were three documents listing various stakeholders, and the minister undertook to collate them and give a total number of the Aboriginal corporations that the government has consulted. Is that something we can continue to prosecute?

Hon SUE ELLERY: The draft bill, the proposed amendments to be considered in committee, draft regulations and draft policy guidance materials were shared with 94 Aboriginal organisations. This included the National Native Title Council, Whadjuk Aboriginal Corporation, Nyamba Buru Yawuru Aboriginal Corporation, Tjiwarl Aboriginal Corporation and Yindjibarndi Ngurra Aboriginal Corporation, which are members of the government's implementation group. As an aside, I think the honourable member was also seeking clarification on the number of prescribed bodies corporate. I can confirm that 77 of those bodies are registered in Western Australia. I am seeing whether there is a consolidated list of that 94. I thought that is what the member asked for as well. If we can get him that, we will.

Hon WILSON TUCKER: That full list would be great.

Hon Sue Ellery: It was the second and the longer of the documents that were tabled yesterday, so you can get a copy of that now.

Hon WILSON TUCKER: Okay; that is fine. Of those 94 that were consulted, how many provided a response to the bill and put their position on the record?

Hon SUE ELLERY: If the honourable member gets himself a copy of the documents that were tabled yesterday, he will see that at the top of the long list that has 94 on it, it says that a total of 42 people out of the 94 organisations that were invited to participate in an online session took part. In terms of whether other submissions or responses were provided, yes, three were provided from Yamatji Marlpa Aboriginal Corporation, the Kimberley Land Council and the National Native Title Council.

Hon WILSON TUCKER: So 94 were consulted and 42 responded; is that correct?

Hon SUE ELLERY: I am trying to be generous, but I am repeating things that I said yesterday. I do not mind a broad clause 1 debate, but to be absolutely explicit, the honourable member could get himself a copy now of the document that was tabled yesterday. It states that 94 were invited for a briefing with the minister. Of the 94 organisations, 42 people participated in the online session with the minister. As to the other part of the member's question, which is new so I have not answered that before, about what other organisations provided feedback, the answer is the three I just listed.

Hon WILSON TUCKER: I am just trying to understand. The Leader of the House mentioned that 42 participated online with the minister. What about the remainder? Three provided feedback outside of those 42 parties of the 94 parties in total. Did the government receive any form of correspondence from the remainder of that total number of 94?

Hon SUE ELLERY: No. Of the 94 invited parties, 42 participated. Of those, the Yamatji group, the National Native Title Council and the KLC also provided a written submission.

Hon WILSON TUCKER: Of the number that did not respond, how much time was given to provide a submission? Was a deadline given when the correspondence went out?

Hon SUE ELLERY: It was four weeks for the policy documents and guidelines and two weeks for the regulations.

Hon WILSON TUCKER: Looking at this and trying to do the napkin math in my head, I can see that there was no response from around half that number. It seems as though the government provided adequate time for a response. Nonetheless, it did not receive a response from around half those Aboriginal corporations. Is the government concerned that it has created a bill that essentially is trying to protect the Aboriginal heritage in this state but that

it has not heard from half—potentially the majority—of the corporations that represent the Indigenous population of WA?

Hon SUE ELLERY: The member is asking me for a point of view as opposed to some detail in the bill that we are considering now in front of us. This matter attracted considerable public attention, so there is that to take into account. Best efforts were made to make sure that the information was distributed, and the numbers have come back in the way they have come back.

Hon WILSON TUCKER: Of the 42 that did respond, can the Leader of the House broadly respond to which issues those Aboriginal corporations identified? What was the sentiment of the feedback that the government received?

Hon SUE ELLERY: I do not mind a wideranging clause 1 debate, but I have already answered the question. I think I responded in my second reading reply, or maybe it was on clause 1. The feedback was around the definitions of Aboriginal heritage and the penalties.

Hon WILSON TUCKER: Are they the two main issues identified by those 42 responses?

Hon SUE ELLERY: I reckon this is the fourth time—yes.

The CHAIR: Honourable members, before we proceed with questioning, I have been listening carefully to the questioning and I think the Leader of the House has answered a similar question a number of times now. I ask you to please be mindful of not repeating questions.

Hon WILSON TUCKER: This is the last question I have on this topic. Was there any feedback that was incorporated? The Leader of the House mentioned sections that groups were not happy with, which were not included. Was there any feedback that was incorporated into the bill?

Hon SUE ELLERY: Maybe the honourable member was out of the chamber—I am going to be generous—on urgent parliamentary business and did not hear part of the questioning yesterday by, I think, Hon Colin de Grussa or maybe Hon Steve Martin. Feedback was received and incorporated in the amendments that the government brought to the Legislative Assembly. The feedback was about the gag clause and other things. I do not want to be uncharitable, but I have already answered that question, honourable member.

Hon STEVE MARTIN: Changing tack, I am reasonably certain about this, but can I clarify that section 62 of the 1972 act, "Special defence of lack of knowledge", will not be changed in any way in the new bill?

Hon SUE ELLERY: That is correct, honourable member.

Hon STEVE MARTIN: Out of interest, section 62 mentions —

> In proceedings for an offence against this Act it is a defence for the person charged to prove that he did not know and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which this Act applies.

How would someone prove that they did not know something?

Hon SUE ELLERY: In a general sense, honourable member, it is the same test that would apply if those words were used anywhere else. That is, objectively, the person should have known or a reasonable person could have known. That is not a test that applies only here. It is a standard test that will apply.

Hon STEVE MARTIN: From that explanation, it would be difficult to use this defence if the person should have known. Is that how I read that? My lack of legal background is becoming obvious.

Hon SUE ELLERY: Again, this is not the only place in law in which this is used. The defence has both a subjective and an objective element—what the person actually knew, and what could have been expected to be known. It would not be enough to show a lack of knowledge by being wilfully blind to the possibility that the act may apply to the place or the object. The defence requires demonstration that the person could not reasonably be expected to have known. Ultimately, as I said, what is reasonable depends on the circumstances of each case and then it is up to the court to determine whether the person charged has proven the elements of the defence.

Hon STEVE MARTIN: I will not drag this out. If a survey is available to a landowner and the landowner chooses not to have their property surveyed, could that then be held against them in this defence?

Hon SUE ELLERY: I am not going to sit in place of the court. It will depend entirely on the circumstances and the facts.

Hon NEIL THOMSON: Section 16 is not going to be amended, so I wonder if we can give that some consideration, given the comments that were made when the Aboriginal Cultural Heritage Bill was introduced into Parliament that a lot of store was put on the legal definitions. Section 16, for those who may not be familiar with it, is "Excavation of Aboriginal sites". It states —

(1) Subject to section 18, the right to excavate or to remove any thing from an Aboriginal site is reserved to the Registrar.

(2) The Registrar, on the advice of the Committee, may authorise the entry upon and excavation of an Aboriginal site and the examination or removal of any thing on or under the site in such manner and subject to such conditions as the Committee may advise.

The problem we have in Western Australia—given all the work that has been done on the Aboriginal Cultural Heritage Act, I am surprised that we have not proceeded to make minor amendments to provide more clarity. As I have said in this place many times, just about every small-block landholder in the Swan Valley, hobby farmer south of the city, and every freehold landowner on the foreshore of the Swan River, in and around the Gascoyne flood plain, and in the town of Broome, for example, would be on a site. We are all on a site. The act says, "subject to such conditions as the committee may advise." There is an opportunity here for the committee to advise about freehold land.

The issue of excavation and entry upon freehold land on those sites has not been a problem until now. People are allowed to enter, dig holes and do things quite freely on their properties. I am thinking of the member for West Swan's electorate where someone can go out and dig a little hole and put a fence post in—no problems. Why did the government not consider some minor amendments to provide clarification of the normal activities on freehold land?

Hon SUE ELLERY: If the member's question is why do we not change section 16 of the Aboriginal Heritage Act to effectively ensure we could not end up with another Juukan Gorge incident, the answer is that we think we have taken other measures to address that. Other than that, it is clear that section 16 stands as it is. Section 16 states —

(1) Subject to section 18, the right to excavate or to remove any thing from an Aboriginal site is reserved to the Registrar.

(2) The Registrar, on the advice of the Committee, may authorise the entry … and excavation … and the … removal of any thing … subject to such conditions as the Committee may advise.

It has built-in protections. When we have a section like section 18, we also want some balance in certain circumstances.

Hon NEIL THOMSON: Much store was put on the issue of thresholds. That is why we ended up with tiers 1, 2 and 3 under the Aboriginal Cultural Heritage Act. I do not want to make it any more difficult for anyone who owns a block of land. I am sure they will not have to seek advice from the registrar in order to go home. Assuming we pass this law tonight and it goes to the Governor after it is signed off by Exco, we will not be suggesting that somehow people will require authorisation to enter a site, or will we? Because if we are, that is a problem. As I said, that was never exercised in that way. The government made it a thing when it introduced the Aboriginal Cultural Heritage Act. The government made a huge issue of why these thresholds were needed. Given that the government made a big issue of it, it could be said in the vernacular that the cat is out of the bag. The issue is that the very tiny thresholds that were put in the ACH act are being removed and there will be no thresholds. I want a commitment from the government, for the sake of those people out there who have a block of land with a shaded area over it, that they will not require authorisation under section 16 to enter their property.

Hon SUE ELLERY: The policy of the bill has been set by the house. The policy of the bill removes the tiers, for example. It removes those things. I think the member is trying to again prosecute the same argument we had during the course of the second reading debate. Those tiers are gone. What exists are the amended changes that we have made. Section 18 remains.

Hon Nick Goiran interjected.

Hon SUE ELLERY: The member can stand and raise his point about whether or not he thinks that the transitional provisions are a sneaky backdoor way for us to keep things in place. He can prosecute that argument in a minute.

Hon Neil Thomson is arguing that those things are no longer the policies in the bill that will apply to Aboriginal cultural heritage. The member knows what section 16 is about. It is about the power of the registrar. It does not talk about the individual landowner at all. It is about what power the registrar has to say that, despite section 18, in certain circumstances the registrar has the power to do what is set out.

Hon NEIL THOMSON: What the minister is saying has shed some light on this. For the sake of the community, I would like the minister to say that there will not be an expectation that someone who looks at a map and is entering their property the next day or is going home will need to get authorisation from the registrar. Yes or no? Just so we are all clear, will they be required to seek authorisation under section 16? That is the sort of argument that was prosecuted under the old policy that we are getting rid of, thank goodness. That was the argument that was prosecuted in this place. Obviously, we have a different policy now. I would like to hear, for the sake of *Hansard*, that someone

who lives on a freehold site, which tens of thousands of people in Western Australia do, will not need authorisation to enter their property. That is what I would like the minister to say.

Hon SUE ELLERY: I do not accept the premise of the member's proposition at all. Section 16, which is what he asked me about, is about the powers that exist for the register, subject to section 18.

Hon Neil Thomson interjected.

Hon SUE ELLERY: Honourable member, it is about the power that the registrar has, on the advice of the committee, to authorise entering an excavation site and the examination or removal on a site of any thing in such a manner and subject to the conditions as the committee may advise. All of that is subject to section 18.

Hon NEIL THOMSON: Thank you, minister. I want to move to the issue of interaction. There have been some questions about the interaction of the bill and the Environmental Protection Act 1986. I quote from *Hansard* —

> … as the Leader of the Opposition also mentioned today. Hon Neil Thomson also raised the risk of additional red tape and duplication.

This was during the debate on the Aboriginal Cultural Heritage Bill 2021. It continues —

> The Environmental Protection Authority was consulted throughout the process and the development of the bill. I quote from the EPA's submission on the consultation bill —
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> > For direct impacts, the EPA is supportive of the Aboriginal Cultural Heritage Bill 2020 —

That must have been an earlier version. It continues —

> being the primary legislation dealing with the protection of Aboriginal Cultural Heritage. It also supports the removal of unnecessary duplication in the environmental impact assessment …

Does the EPA support the duplication of environmental impact assessments for the implementation of the Aboriginal Heritage Act 1972 that is about to be amended?

Hon SUE ELLERY: No-one here is from the EPA. The member is asking whether an independent statutory authority is supportive of a particular thing. The member needs to direct his question to the EPA.

Hon NEIL THOMSON: Did the government receive a submission from the EPA on the repeal of the Aboriginal Cultural Heritage Act? Did the government receive a submission on the implementation of the amendments, as presented to the house?

Hon SUE ELLERY: I am advised that there was consultation on the regulations and that the response from the EPA was that it would happily—I do not know if it used that word—that it noted this was being prepared and would work with Department of Planning, Lands and Heritage on reducing any duplication.

Hon NEIL THOMSON: I thank the minister. I remind people what Hon Stephen Dawson said about this when responding to the same concerns and similar issues that I had then. The concerns do not go away. We live in the world and it goes around but the concerns stay. Hon Stephen Dawson said in response to that matter when addressing my concerns —

> … the EPA also proposes to amend and update its key policies and guidance that outline how the EPA considers Aboriginal cultural heritage issues.
>
> This government has worked closely with all government stakeholders to ensure that there is a whole-of-government response and consistency …

I have cut and pasted from *Hansard*. I said "across portfolios". I assume it was across portfolios. I am adding words to *Hansard*, but I assume that is what it was because that makes sense. Is that statement true for the amended ACH act 1972?

Hon SUE ELLERY: I do not have the quote that the honourable member read out in front of me, but I am advised that, in general terms, yes, it is.

Hon NEIL THOMSON: I shift to the issue of the government's engagement with the commonwealth government, particularly around the Juukan Gorge inquiry. That has been raised many times. The Department of Planning, Lands and Heritage submission to that inquiry stated —

> The current Act's Section 18 Notice and Consent process does not adequately facilitate risk-based decision-making and requires all proposals to follow the same approval pathway irrespective of the degree of actual or predicted heritage impact.

That quote is taken from page 2 of the eight-page submission provided by the department. I do not know whether the Leader of the House has a copy of that at the table.

Hon Sue Ellery: Which department provided the submission?

Hon NEIL THOMSON: The Department of Planning, Lands and Heritage made a submission to the Juukan Gorge Senate inquiry. I can repeat the quote if that would help.

Hon Sue Ellery: It is okay; I just did not hear which agency it was.

Hon NEIL THOMSON: Is the risk-based decision-making issue resolved within any of the amendments to section 18 that are before us?

Hon SUE ELLERY: Three elements in the bill before us now—the right of review, and the provisions around new information and removing the gag clause—address the issues raised in the Senate inquiry into the Juukan Gorge incident. The Aboriginal Cultural Heritage Committee will consider risks in providing advice and preparing material for consideration. That is how we can say that we have addressed the issues raised in the Senate inquiry.

Hon NEIL THOMSON: I will provide some advice to the agency and the government on this. Would there be any scope to look at introducing a risk-based approach in the guidelines, if that has not already been done, to allow proponents to tailor their section 18 applications and avoid over-engineering those applications? I use that term in a broad sense.

Hon SUE ELLERY: I cannot give any commitment about that, but I can say that the guidelines are out now for consultation. All stakeholders, including the honourable member, have the opportunity to provide comment if they want to.

Hon NEIL THOMSON: I might take up that invitation, by way of flagging my submission. I think it would be great if we could achieve a risk-based decision-making approach to all section 18 proposals, including, might I say, the opportunity for a lot of those that are not necessary to proceed based on materiality. It would be great to add a materiality clause in relation to that. I flag that and thank the Leader of the House for that advice; I will take up that opportunity.

The department also said in its submission —

> … the Western Australian Government considers the Act to be outdated, not reflective of Aboriginal community aspirations and, as detailed below, requires replacement with modern legislation.

It then went through a whole bunch of things that needed to be done. Is the government confident that we have got it right and that this is modern legislation that will meet the requirements set out in the submission to the Juukan Gorge inquiry?

Hon SUE ELLERY: As I have said in my second reading speech, my reply to the second reading debate and a number of answers I have given in the course of the clause 1 debate—I note that we are debating the bill that is before us now and not the previous one—we have taken the view that we have got the balance right. We are introducing additional measures that were missing from the regulatory regime under which the Juukan Gorge incident occurred and we have the balance right. History will be the judge of that. That is why we have taken the policy steps that we have taken.

Hon NEIL THOMSON: I will pick this up within the clause 1 process, because it is a generic consideration. I think we all received a letter from Professor Natalie Skead, dean and head of UWA law school, dated 23 August 2023. I make the observation that I am sure we agree furiously on a range of things. Some of the issues raised in this letter are valid and others might be a case of not seeing the wood for the trees—it is the old case of looking at the detail without looking at how to make it work. The letter contains some criticism that probably has some validity. I think it is probably because we do not have enough procedures in place. I am happy to table the letter afterwards; this is the only copy that I have. Professor Natalie Skead's letter states —

- The 1972 Act does not guarantee procedural fairness. There were obvious examples where the Department or the Minister acted to enable damage to Aboriginal heritage, without the relevant custodians knowing … Examples explained in the article include: the government opposing a group's standing to ask the court to review the Department's improper implementation of the Act … and the Registrar incorrectly informing a group of registration details …

If I had written that letter, I would probably have been a bit more balanced insofar as I would have said that the issue of procedural fairness also applied to landowners, but I suppose that would become an issue only if a prosecution proceeded. In some ways, one could argue that that issue is still a problem insofar as there might be the expectation that members of the community will undertake a process that they might otherwise not have to undertake, given that we have had this long discussion around the complete specificity of these sites. We do not have the information. The registrar has all the information but the community does not; it just knows that there might be a site. That, effectively, is what has come out of this discussion. Is the government comfortable that procedural fairness will be within the scope of the amended legislation?

Hon SUE ELLERY: Broadly, yes. I just said it in the answer to the honourable member's previous point: we take the view that we have got the balance right.

Hon NEIL THOMSON: I am going to move to fairly simple questions on aspects of the act that will not be amended, because I think it is important to cover those. I am mindful that some of these things that will not be amended will not come up in the clause-by-clause debate of the bill. I am also mindful that some of the generic questions I have asked might relate. I am trying my best to keep everything in train here. Section 7 refers to traditional use and section 8 to availability for traditional use. Can the minister give the chamber an outline of the effect of those provisions? I think that is important so that we can reflect a bit on this act. It is the old act and it will come back to law; we thought it worked quite well. Can the minister give some outline of what traditional use might be?

Hon SUE ELLERY: I am not sure what the honourable member does not understand about it. It is subject to section 7(2), which states —

> Nothing in subsection (1) authorises any person, or group of persons, to dispose of or exercise any right … which is, in the opinion of the Minister, detrimental to the purposes of this Act.

Section 7(1) states —

> Subject to subsection (2), in relation to a person of Aboriginal descent who usually lives subject to Aboriginal customary law … this Act shall not be construed —

So as to take away their right to undertake their cultural practices or require them to disclose anything about Aboriginal customary law or tradition if that would be a breach of their customary law or tradition.

Hon NEIL THOMSON: I think it is good to have some explanation of these provisions given that they will come back and the expectation was that these provisions would not be in effect. Will there be regulations for, or guidance on, how consultation might occur between the minister and the committee and whether that place or object referred to in section 7 should be made available to a representative body or person of Aboriginal descent?

Hon SUE ELLERY: It is not proposed that there will be any regulations around how that consultation should occur.

Hon NEIL THOMSON: Was there any consideration of the need for evidence or proof of a person's interests for the committee to make a place or object available? I am just wondering how that is going to being managed by the committee in relation to those persons of Aboriginal descent. We had a definition. The reason I am asking, to give some context, is that within the new legislation that is now being repealed, there was quite a lot about custodians or knowledge holders. Will there be a sort of default use of that knowledge-holder framework within the application of this act going forward?

Hon SUE ELLERY: That definition of "knowledge holders" will no longer apply. It may well inform people's thinking, but it will no longer apply. The consultation guidelines, as opposed to any regulations, will set out how consultation should occur with Aboriginal people to be respectful and to take account of how best to conduct that consultation, but that is the extent of it, honourable member.

Hon NEIL THOMSON: I want to talk about section 51 again, which is another area that will not be amended, from what I can tell. It is about powers of inspection. There was quite a lot again in the old legislation, or about to be old legislation. I get so confused. What is new is old and what is old is new. I am sure there is something we can make of that.

Anyway, what was in the 2021 act is about to go. There was a lot about inspections and the ability to enter and so forth. The 1972 act has an inspection power and honorary wardens. Who will be an honorary warden?

Hon SUE ELLERY: If we look above section 51, we see that it is anyone appointed under the provisions in section 50.

Hon Dr STEVE THOMAS: If I could just jump in for a minute, I was going to talk to the minister about the various guidelines that have been put in place but I have worked out how to do that under the relevant clauses, so I think I will do it there. To facilitate that, some guidelines have been printed on the Department of Planning, Lands and Heritage website. Can the minister update the house on what is in there, what is yet to come and whether any have been updated since I have done this work?

Hon SUE ELLERY: Draft guidelines are in the process of being prepared for the bill before us now for once it becomes an act. They are out there now.

Hon Dr Steve Thomas: They are all out?

Hon SUE ELLERY: No, the draft guidelines are out for consultation now. When that is completed and the bill becomes an act, the finalised guidelines will go up on the website.

Hon Dr STEVE THOMAS: Is it possible for us to get a list of the sets of guidelines that will ultimately be presented?

Hon Sue Ellery: Do you mean the draft?

Hon Dr STEVE THOMAS: I do not mean the details of the guidelines, but the sets of guidelines. I want to make sure that all the sets of guidelines —

Hon Sue Ellery: Is it the different categories?

Hon Dr STEVE THOMAS: The different categories, yes, please. I do not necessarily need it now, but when the minister is ready to present them.

Hon Sue Ellery: Sure. I will try to do that during question time.

Hon NICK GOIRAN: The bill before us will do a number of things, including repealing the 2021 act. It will also make some amendments to section 18. Prior to 1 July this year, was there a fee that needed to accompany a section 18 application?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: As at today, the 2021 act has not been repealed. Are section 18 applications made at the moment; and, if so, does a fee apply?

Hon SUE ELLERY: I am advised that the ability to lodge a section 18 ceased on 30 June.

Hon NICK GOIRAN: In due course, the 2021 act will be repealed and section 18 will recommence. At clause 14, there is an intention to amend section 18. When section 18 recommences in the fullness of time, will there be a fee associated with such applications?

Hon SUE ELLERY: I am advised that under clause 4 of the draft Aboriginal Heritage (Fees) Regulations 2023, which I am advised the opposition was provided a copy of, when section 18 re-emerges, there will be a fee of $250 or, if the applicant is a commercial proponent or government proponent, the $250 fee will apply as well as a fee per site, described as $5 096 multiplied by the number of identified places specified in the notice.

Hon NICK GOIRAN: There was no fee prior to 1 July. There is no capacity to lodge section 18 notices at the moment. In due course, the section 18 applications will recommence and a new fee will apply. That is the intention, according to the draft regulations. There seem to be two fee structures. One talks about a $250 flat fee and the other one is a higher fee for commercial applicants. Are there any exemptions for these fees?

Hon SUE ELLERY: Small businesses and not-for-profit organisations will be exempt from paying the $5 096 fee. "Small business" is defined in the Small Business Development Corporation Act. An Aboriginal and Torres Strait Islander corporation is not liable to pay a fee unless it is for profit or commercial gain.

Hon Peter Collier: What about government proponents?

Hon SUE ELLERY: Sorry, there was an interjection about government proponents. They will have to pay.

Hon NICK GOIRAN: Everybody will have to pay the $250 fee for section 18 applications.

Hon Sue Ellery: By interjection, yes.

Hon NICK GOIRAN: However, certain people will have to pay an additional fee. It is $5 096—rather peculiar. We will not spend time in getting to the bottom of why it is $5 096 compared with $5 000.

Hon Sue Ellery: By interjection, I responded in my second reading reply that it is around cost recovery and that is the amount that has been calculated.

Hon NICK GOIRAN: Okay. Thank you for that further explanation. I apologise that I was away from Parliament on urgent parliamentary business at that time. An amount of $5 096 will have to be paid in some cases. The minister mentioned it will be for each specified site. Let us say that 10 sites are specified; will it be 10 times $5 096?

Hon Sue Ellery: By interjection, yes.

Hon NICK GOIRAN: The exception to that will be if an applicant can demonstrate that they are either a not-for-profit organisation or a small business.

Hon SUE ELLERY: Yes. My advisers did tell me another one but I did not say it. The director general will have the power to grant a waiver. That is in part 3 of the document that was provided to the opposition. Clause 6 of that document states —

> The CEO may, on a case-by-case basis, refund, reduce or waive, in whole or in part, a fee paid …

Hon NICK GOIRAN: Will that also apply to the $250 flat fee?

Hon Sue Ellery: By interjection, I am advised yes, honourable member.

Hon NICK GOIRAN: Regarding the $5 096 fee, it will be paid for each specified site in certain cases unless the applicant can demonstrate that they are a not-for-profit organisation or a small business, or they manage to get the director general to waive the fee. What is "small business" defined under?

Hon Sue Ellery: Under the Small Business Development Corporation Act.

Hon NICK GOIRAN: Would small prospectors qualify as a small business?

Hon SUE ELLERY: It would depend. A small business is defined by the Small Business Development Corporation Act. Under that definition, it means a business undertaking —

> (a) which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001* of the Commonwealth and which —
>
> (i) has a relatively small share of the market in which it competes; and
>
> (ii) is managed personally by the owner or owners or directors, as the case requires; and
>
> (iii) is not a subsidiary of, or does not form part of, a larger business or enterprise;
>
> or
>
> (b) which is declared by the Governor by Order in Council pursuant to subsection (2) to be a small business for the purposes of this Act.

Hon NICK GOIRAN: At the very least we can say that if a prospector satisfies those elements of the definition, it should be exempt from paying the $5 096 fee. If they cannot, obviously they will need to pay it. The mere fact that they are a prospector does not automatically make them ineligible from being considered a small business.

Hon Sue Ellery: That is correct.

Hon NICK GOIRAN: Thank you. My further question is about fees. Is there an intention to have a survey fee?

Hon SUE ELLERY: Surveys are not covered in the legislation, so they would not be captured by this fee regime. I answered some questions about this earlier. The intention is that extractive businesses, resources companies and the like that require a survey to satisfy themselves of their obligations will pay for their own surveys. Industry will pay for its own. If a farmer has to make a section 18 application, that will be covered by the government. If a farmer is just interested in doing it and wants to do it, they will pay for it themselves. The survey that the government will roll out for everyone else who is not covered by the things I have just mentioned will be at the government's cost. The government will pay for that. As I have said, there will be consultation about the priority, where to start and how it will roll out et cetera. It will depend on where someone sits in that regime.

Hon NICK GOIRAN: Will a maximum amount be applicable for these surveys? Obviously, at the end of the day, the government does not have an endless supply of funds, but neither do individuals. I hear what the minister has said about farmers, who will be covered by government in certain circumstances. Will some form of regime manage the survey fees?

Hon SUE ELLERY: The answer is that work is still to be done on what the survey scope might look like and whether we will cap it, so that someone could spend up to X amount and the government would cover that. All that work is yet to be done.

Hon Dr BRAD PETTITT: I return to perhaps the first principle behind why we are here. I will return to the 2021 second reading speech. In asking this series of questions, I am trying to understand some of the key issues raised in the original 2021 second reading speech about the 1972 act and how those issues have been resolved in this bill. The second reading speech has some very interesting quotes. Just to be clear, I am reading from the second reading speech by Hon Stephen Dawson in 2021. I will read a couple of quick quotes. Hon Stephen Dawson said —

> Although the Aboriginal Heritage Act 1972 was considered progressive for its time, it is now outdated and does not meet the expectations of Aboriginal people and the broader community.
>
> …
>
> In 2017, the McGowan government committed to review the 1972 act. The review process has been comprehensive … The review process clearly established the need for better protection, for Aboriginal people to be given a voice and for greater efficiencies and certainty for all parties.

My reading of the amendments to the 1972 act is that they are pretty minor, and I think that has been the notion of the debate so far. How do the minor amendments in the bill before us address the very reasonable concerns this government had in 2021?

Hon SUE ELLERY: I had a bit of an interchange with Hon Neil Thomson about this. I made the point then and I will make it again now: the policy of the bill has been set. We have done that. We did that in the second reading debate and in the second reading vote. The point of the Committee of the Whole stage is for us to look at the bill clause by clause. The clause 1 debate allows us to range over the bill, and so far, the member has heard us have an exchange about certain provisions. I will say again what I said before: I will not revisit the second reading debate, because the house has settled that. This is an opportunity to look at the content of the bill and decide whether we want to accept it.

However, I know the point that the honourable member is making. I understand his point entirely, and I understand that his position and his view is that this bill does not go far enough to meet the requirements, according to his interpretation of the Senate inquiry and the views he holds.

Hon Dr Brad Pettitt: What I am saying is that they are actually the government's views.

Hon SUE ELLERY: I am trying to say to the member that the house has made a decision. That is what we did during the second reading debate, so we are not revisiting why we changed the policy. The policy is set. In this section of the debate, we can canvass the range of clauses before us. All I am trying to do is acknowledge that I understand the point the member is making.

But for all the reasons that were outlined by the Premier and the minister on the day of the announcement and for all the reasons I outlined in my second reading speech and reiterated in my second reading reply, and given the level of community confusion and consternation about the 2021 provisions, we think that the best thing to do is to make simple, targeted amendments to the 1972 legislation, and that is what we are doing. Whether it is about the removal of the gag clause, the new information requirements, the section 18 changes, the right of review by native title parties or the capacity to call in decisions, we say that we have got the balance right to address the issues in all those elements. We say that the holes in the regulatory framework that allowed Juukan Gorge to happen will be addressed. I completely get that the honourable member does not think that that is satisfactory, but I go back to the purpose of what we are doing now. In clause 1, we can go across the various clauses and have a general debate about them, but we are now at the point of debating the clauses in front of us.

Hon Dr BRAD PETTITT: Thank you. I am also making the point that it does not go far enough by this government's own measure. We are talking about a range of further amendments that could and should be made to the 1972 act to go back and meet the government's own rhetoric—what it said in this place in 2021 about the 1972 act. I will give another example from the WA government, when it addressed the commonwealth Parliament's Juukan Gorge inquiry and spoke about the 1972 act. The WA government submission said —

> One of the Act's greatest weaknesses is that it does not expressly provide for consultation with Aboriginal people in the identification, management and protection of their heritage.

Before I get the same answer again, my point is that plenty of sections within the 1972 act could be strengthened. The key bit of this is that Aboriginal people will not have a voice in many things that have an impact on their key heritage. This was a fundamental shift in the 2021 act. With the changes the minister previously outlined, the bill will not—I will say this again, using the government's own words—"expressly provide for consultation with Aboriginal people in the identification, management and protection of their heritage". Why will there be nothing in the modified 1972 act that will do that?

Hon SUE ELLERY: I understand the issues that Hon Dr Brad Pettitt raises, but he is not using the committee stage of the bill for the purpose for which it was intended. I note that the member has amendments on the supplementary notice paper and in due course we will debate those amendments, and that is where the member can have the debate we are having now. But the debate on clause 1 is a general debate about the clauses across the bill. The member can even—because that is the way we have done it so far—draw my attention to a particular clause if he wants to and I will entertain it, but that is not where we are at now. The issues that the member wants to raise are best addressed when we debate the amendments, which I assume the member will say will address the things he sees as inadequacies now.

Hon Dr BRAD PETTITT: The reason I raise these things in the clause 1 debate is that they run across the whole bill and are fundamental to how we understand giving a voice to Aboriginal people. I draw the minister's attention to a really interesting letter that all parliamentarians were sent written by Professor Natalie Skead, who is the dean of the University of Western Australia law school. She very articulately outlined why the broad return to the 1972 act will not meet the intended rhetoric about key things such as procedural fairness for Aboriginal people, which is what I am trying to highlight, and I cannot deal with some of those things in debate on individual amendments. In many ways, I will do my best to put lipstick on the pig of the 1972 act, which this government has acknowledged is not fit for purpose and does not in any way meet contemporary expectations of giving Aboriginal people a say in their own cultural heritage. Given the expert advice before me from a range of people, including the dean of the

WA law school, I am trying to understand how this 1972 act will provide and guarantee procedural fairness to Aboriginal people.

Hon NEIL THOMSON: If I can continue with section 51 of the Aboriginal Heritage Act 1972 and get a bit of clarity about the wardens, how many wardens are currently certified—I think that is the word to use—under the 1972 act?

Hon SUE ELLERY: There are none.

Hon NEIL THOMSON: Were there any prior to the overarching legislation at the end of June?

Hon SUE ELLERY: Yes. To the best of the knowledge of those at the table there have been maybe six. Scrap that number—I do not know; we do not have that information.

Hon NEIL THOMSON: Given this provision in section 51 and the discussion, even from Hon Dr Brad Pettitt, about engaging Aboriginal people, is there an intention for the state to engage more wardens going into the application of this 1972 legislation?

Hon SUE ELLERY: There is no intention to do that.

Hon NEIL THOMSON: I have a related question. Maybe I am drawing things together that cannot be, so I am happy to be corrected by the minister. Quite a few groups indicated an interest in establishing a local Aboriginal cultural heritage service. I cannot recall how many, but the minister might be able to report to me whether any were formally created under the 2021 act. I suppose a degree of funding went out —

Hon Sue Ellery: Is that for LACHS?

Hon NEIL THOMSON: Yes, I mean local Aboriginal cultural heritage services. I just wonder whether there is any connection or even the opportunity—not in the negative sense; I am not trying to trick the minister—with the LACHS and those unofficial LACHS. A few were starting to get together to become wardens under the section 51 provisions in the 1972 legislation.

Hon SUE ELLERY: Three were designated. Around another 30 prescribed bodies corporate had perhaps initiated a process of starting a LACHS.

Hon NEIL THOMSON: To help truncate the other clauses, there is a provision for the Aboriginal Cultural Heritage Committee to establish subcommittees. I am following the theme of whether these powers of inspection might draw in some of those former or finalised LACHS—sorry to use that word. I think the minister knows what I mean.

Hon Sue Ellery: I do, and that is the bit that freaks me out!

Hon NEIL THOMSON: Yes. Is there any capacity within the subcommittees to use those LACHS, and will inspectors be drawn from them?

Hon SUE ELLERY: Two things are being conflated here. It is unlikely with the subcommittees because they will be appointed by the minister to do certain things and they will need certain expertise. It is a possibility for wardens, but I am not advised that there has been any detailed consideration of that.

Hon NEIL THOMSON: I thank the minister; that has helped. I refer to some questions I had about the template agreements under the south west native title settlement. The Yamatji settlement might have been the template as well. I cannot recall whether a template heritage agreement was established under the 12 agreements, but I know the Yamatji and south west agreements established template heritage agreements. The minister may have answered some of these questions, but I cannot recall. I asked whether there had been any legal or policy advice about the need to amend those agreements under the 2021 legislation, and I was advised that there was still ongoing consideration, so there might have been a requirement to make some changes. I am happy for a short response to this. I assume that by going back to the 1972 act, all of those problems will disappear and there will be no need to amend the template heritage agreements that exist under those two native title settlements.

Hon SUE ELLERY: No, we will not need to.

Hon NEIL THOMSON: That is great. We are getting toward the end of my contribution on clause 1. Others may have issues they want to raise. A fair bit of investment was made towards the 2021 act. In fact, it was predicted that there would be $80 million in higher fees and charges for the Department of Planning, Lands and Heritage associated with the ACH act, reflecting the cost recovery of local Aboriginal cultural heritage services. I asked whether the LACHS will be reimbursed for any expenses incurred that cannot be realised under this new regime. The government said that the LACHS will not continue and that instead support will be provided to existing native title groups, including the relevant prescribed bodies corporate, registered claimants or native title representative bodies, to improve capacity. Are there any out-of-pocket expenses for those three LACHS that were established now that they will effectively be de-established by the repeal of the 2021 act?

Hon SUE ELLERY: They will receive a pro rata payment for the period for which they operated. I am advised that the transitional provisions will have capacity for them to be reimbursed for any services they have provided, once we transition to the new arrangements.

Hon NEIL THOMSON: For the others—I cannot recall the number —

Hon Sue Ellery: There are about 30.

Hon NEIL THOMSON: I assume a fair bit of work has gone on behind the scenes. Some will have done a lot; some might have done only a little. I am sure there is a range. Will an ex gratia payment or compensation be paid by the state for any work they might have undertaken in developing governance arrangements or considering how they were going to establish their staff structure and so forth?

Hon SUE ELLERY: I am advised that the government has already announced that it will honour grants to those 30 or so PBCs that were working on becoming a LACHS. That in itself will be a capacity-building exercise for them to use the provisions of the new regime once it comes into play.

Hon NEIL THOMSON: Have any concerns been raised by those PBCs about a potential shortfall in the grants process? Are they satisfied with that arrangement?

Hon SUE ELLERY: I am advised no; they will not be out of pocket. The focus now is on how they will pivot from preparing for the regime that is being repealed.

Hon NEIL THOMSON: On the theme of money, I asked about the reform of Aboriginal heritage laws in WA and how many applications for section 18 approvals were made under the existing act. I received an answer to that, so the Leader of the House does not have to respond. I also talked about the modelling. I asked how many additional staff had been allocated to the Department of Planning, Lands and Heritage's Aboriginal area to deal with the forecast number of queries. This is when things were being moved about a bit. The Leader of the House said that the state government had allocated an additional $77 million in funding to support the implementation of the new Aboriginal Cultural Heritage Act 2021. That is a big amount of money. Will that $77 million still be allocated to the Department of Planning, Lands and Heritage? The Leader of the House stated in the answer to that question that the figure included funding for local Aboriginal cultural heritage services—we have probably covered that as it was a grant so I assume at least some of that would have been dispersed; there might be some surplus—as well as resourcing for the department for an additional 35 staff, including 10 staff in the regions to work directly with proponents and Aboriginal organisations. Does the government intend to continue with those additional 35 staff in the department and the 10 regional staff as part of this back-to-the-future model?

Hon SUE ELLERY: We are not locked in on what the final amount will be. That will go through the normal budgetary process and consideration by the Expenditure Review Committee through the normal budgetary channels as to whether there will be any difference in the amount or staffing.

Hon NEIL THOMSON: Will there be no change to the funding model at all?

Hon Sue Ellery: No, that is not what I said.

Hon NEIL THOMSON: My apologies.

Hon SUE ELLERY: There has been no decision on what the final allocation will be of funds or staffing. That will be revisited in light of the changes that are being made. It may stay the same or it may change; I do not know. It will go through the normal budgetary process.

Hon NEIL THOMSON: There might be an opportunity to transfer some of those funds back to, effectively, the taxpayer-funded survey model.

Hon Sue Ellery: There may be, honourable member.

Hon NEIL THOMSON: I want to talk about industry, particularly the small sector because it deserves some consideration. That was one of the concerns raised in the e-petition, and I would like to know whether it was a significant issue. There was a lot of concern in the lead-up to and after the implementation of the Aboriginal Cultural Heritage Act as to whether there might have been a curtailment of proponent activity because of the uncertainty around the model. Is the government comfortable that there has not been any curtailment of any proponents, and have there been any reports back to the government about businesses impacted as a result of the implementation of the Aboriginal Cultural Heritage Act?

Hon SUE ELLERY: No, honourable member.

Hon PETER COLLIER: I had a number of questions to ask about the fee structure but Hon Nick Goiran has already addressed that issue. I get the point about cost recovery, and $5 096 is an interesting and very specific figure. Can the minister explain it to me? Because it is so specific, what does it include?

Hon SUE ELLERY: In the budget papers we have costs. The member would recall that it is scientific in that it is a mathematical equation. We take the total cost of providing the service and divide it by a range of things. In this case, it is based on the annual cost of the team that processes and assesses the applications divided by the average number of place assessments undertaken in the year. It is a fairly simple mathematical equation. That is as close as they can come. It is similar to the methodology that is used to determine—I cannot remember the language in the budget papers—the cost of service. It is that kind of equation. That is how it was done. It is around $2.4 million divided by 480.

Hon Peter Collier: From section 18s and including —

Hon SUE ELLERY: Section 18s and section 16s.

Hon PETER COLLIER: Thank you for that, minister. I appreciate that. I have only a couple of quick questions on clause 1. I will drill down on that component a little more when we get discuss the Aboriginal Cultural Heritage Committee. I will not waste the minister's time now. I will deal with that at that particular clause.

The definition of "native title party" was revised in the other place. Why was the decision made to prescribe some groups in the legislation? Is there scope to prescribe additional native title parties through regulation? If that is the case, why is that the case?

Hon SUE ELLERY: I am advised that there are three categories of definitions and a fourth catch-all whereby something that does not neatly fit in the three other categories can be prescribed. To answer the second part of the member's question, yes, there is a head of power in the regulations to enable an organisation to be prescribed.

Hon PETER COLLIER: I will finish now. Thank you for that. I will flesh that out later. To finish off, I asked a question about this in my second reading contribution, but the minister did not answer me; that is okay! It was a very generic question and I know that Hon Neil Thomson has covered this area. For clarification, one of the biggest issues we had with the bill that we are repealing was the lack of certainty, particularly for farmers, pastoralists and landowners. The Premier and the Minister for Aboriginal Affairs have been quite emphatic in the comments they made with the announcement that farmers, pastoralists and landowners can carry on as they have for the last 50 years without risk. That sounds good, as I said in my contribution. Can the minister confirm whether that is the case?

Hon SUE ELLERY: Yes. If property owners previously required an approval, it is reasonable to assume that they will have obtained approval. If they have been operating on their property for the past 50 years without an approval, they can continue on the basis that no approval has been required. Of course, circumstances can change, including because of new information et cetera, and that is captured in the bill before us.

Hon NEIL THOMSON: This will probably be my last question on clause 1. Other members in the chamber might want to ask a question on clause 1. A while back, I asked about the number of applications made under the system. I wonder whether, through the minister, the department can provide an update on how many tier 2 applications the Department of Planning, Lands and Heritage has received, how much revenue has been collected in fees, how many tier 3 applications DPLH has received, how much revenue has been collected through those applications and how many management plans have been received. For the assistance of the minister and the departmental advisers, if they have that information on them, which they might because I have asked about it before so they might have thought about providing an update to the chamber, at the time of asking those questions, 20 permit submissions had commenced the process but they were not yet applications. I am interested to know what the difference is between an application and a submission. The answer to my questions without notice (2) to (5) was nil. Can I get some clarity on that and an update on the exercise of the current legislation?

Hon SUE ELLERY: Since 1 July 2023, the number of permits issued and applied for was 139. Nil have been issued. Six permit applications have been formally lodged and fees have been paid to instigate the formal lodgement and assessment. There are 133 that are either at the drafting stage, have been lodged or have commenced consultation. The member asked about the management plans as well. Since 1 July 2023, there have been 40. Nil have been issued and 40 are either at the drafting stage, have been lodged or have commenced consultation. No fees have been paid for any management plans to instigate formal lodgement and assessment by the Aboriginal Cultural Heritage Council.

Hon NEIL THOMSON: I have a follow-up question. Would all 40 of the management plans potentially be utilised or managed under section 18? I will go back a step. Of those 139 applications, how many are expected to become section 18 applications?

Hon SUE ELLERY: Six.

Hon NEIL THOMSON: What would happen to the other 33 draft applications? Would they be considered tier 2 applications and therefore would not meet the threshold for section 18 applications?

Hon SUE ELLERY: The six applications have not been transitioned. However, the consultation work that has been done on those may well form part of what is needed to be demonstrated as part of a section 18 application going forward.

Hon NEIL THOMSON: Are those six likely to be tier 3 applications? Is there any idea what configuration they are?

Hon Sue Ellery: By interjection, they are tier 2.

Hon NEIL THOMSON: They are all tier 2. If they do not transition, what happens to the approval going forward? Does the approval stand?

Hon SUE ELLERY: They have not been approved, honourable member. Six applications have been formally lodged—133 are in draft, lodged or have commenced consultation.

Hon NEIL THOMSON: To give clarity to the six, and maybe the 133 proponents out there who provided a draft or flagged a consideration under the 2021 act and now the 1972 act, will those proponents have to do their own due diligence to assess whether they should undertake a section 18 application?

Hon SUE ELLERY: It will depend on the circumstances of the applications, but the agency will work with those 133 to assist them to figure out where they will fit in the new legislation.

Hon NEIL THOMSON: That is good to hear. I appreciate the response, and the response to all clause 1 questions. Will the agency contact all those proponents? Is that the plan—to formally contact them?

Hon Sue Ellery: By interjection, yes.

Hon NEIL THOMSON: When it contacts them, will advice be provided? We are not expecting 139 section 18 applications because of a change of policy that might exist. Is that correct?

Hon SUE ELLERY: That is correct. It could be a mix of things in there. We do not know.

Hon NEIL THOMSON: That is probably one of the most important comments today because it highlights a change of policy. I think the important part is the recognition of the intent of the government in terms of providing that apology on the steps of Parliament House and talking to the people and saying, "Look; we've heard you. We're going back." We are looking to reduce the scope or net in terms of working across the community. I did say that was the last question, but this is more the last generic-type question —

Hon Sue Ellery: I wasn't getting excited.

Hon NEIL THOMSON: Thank you, Leader of the House. Has the department or minister received any correspondence from the industry on any potential impacts? I think 50 or so tribute agreement prospectors allegedly—I have no way to validate the claims—had to leave their prospects because some companies that had lease agreements decided the risk was too much without having a tier 2 application. Has the department kept a file of concerns raised? Is there are picture of how many people have been impacted by the implementation of the 2021 act?

Hon SUE ELLERY: No. Industry has not provided a specific complaint or concern about the impact it has had on them.

Hon NEIL THOMSON: What about local government?

Hon SUE ELLERY: I am advised there has not been any presentation or evidence provided to the agency.

Hon WILSON TUCKER: I want to return to the line of questioning on consultation. I believe I am up to date in terms of the discussions that were had when I was away on urgent parliamentary business and I apologise for the overlap. I am not concerned so much about the amendments that were raised in the Legislative Assembly, but more so who raised them and how they came to be. We spoke about consultation with some of the Aboriginal body corporates—the PBCs. Did any of those amendments that were successful and introduced into the Legislative Assembly come from Aboriginal corporations that were consulted during the drafting and consultation phase?

Hon SUE ELLERY: Yes—the definition of native title party.

Hon WILSON TUCKER: Thank you. I am curious—which corporation raised it and what was the definition?

Hon SUE ELLERY: We do not have that here.

Hon NEIL THOMSON: I should never promise to do last questions!

Hon Sue Ellery: That is why I didn't get excited.

Hon NEIL THOMSON: We do not want too much excitement on a Thursday afternoon! Are there any plans or work underway in the department to prepare further regulations apart from transitional regulations? Can the Leader of the House give a description of what that work might entail?

Hon SUE ELLERY: There are three sets of regulations available now; the opposition has been provided with copies of those. The advisers at the table will check while the Committee of the Whole stops for question time for any others that are intended.

Hon NEIL THOMSON: We are coming to the end of the consideration of clause 1. If there are any other intended, it would be good to have advice on what those entail and the purpose of the regulations.

Hon Sue Ellery: I need to be able to provide an answer to that, but I do not have it right here.

Hon NEIL THOMSON: I understand. I am just noting that we do not have the opportunity to have the dialogue around them.

Hon Sue Ellery: You can ask about regulations in other clauses. If that is the issue stopping us passing clause 1, I will give you an undertaking that I will happily answer your question in another clause.

Hon NEIL THOMSON: Thank you. I am finished.

Clause put and passed.

Clause 2: Commencement —

Hon NICK GOIRAN: The bill contains some transitional provisions. When will they commence?

Hon SUE ELLERY: I anticipated that we might get that question from the honourable member.

Hon Nick Goiran: You seem excited about clause 2.

Hon SUE ELLERY: I know; who would have thought! What is it called when one adopts the behaviour of their kidnapper?

The DEPUTY CHAIR (Hon Dr Brian Walker): Stockholm syndrome.

Hon SUE ELLERY: That is what has happened to me.

Clause 2 of the bill provides that the act will come into operation as follows —

(a) Part 1 — on the day on which this Act receives the Royal Assent (***assent day***);

(b) Part 3 (other than Division 2) — on the day after assent day;

(c) section 30 —

(i) if the *Land and Public Works Legislation Amendment Act 2023* section 82 comes into operation before the day on which section 3 comes into operation under paragraph (d) — on the day on which section 3 comes into operation;

or

(ii) otherwise — immediately after the *Land and Public Works Legislation Amendment Act 2023* section 82 comes into operation;

(d) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

Part 1 contains the preliminary provisions and needs to come into effect first because those provisions include the commencement clause itself. That is why they will come into effect on the day on which the bill receives royal assent.

Part 3, division 1 of the bill will commence on the day after royal assent. This part of the bill contains four clauses that are all directed towards one purpose—ensuring that transitional regulations can be made. Part 3, division 1 will amend the 1972 act to provide for the making of transitional regulations, to ensure that any transitional regulations may be made, as necessary, in preparation for the repeal of the 2021 act. At the time this provision was included in the bill, transitional regulations were still under development. Draft transitional regulations have now been developed. It is proposed that those transitional regulations will come into effect on the same day that the remainder of the bill comes into effect. However, should some other transitional matters arise between now and then, this part will provide flexibility to make transitional regulations to deal with them.

The third part of the commencement clause, which is paragraph (c), is needed because the provision that it refers to in the Land and Public Works Legislation Amendment Act 2023, which was passed this year, has yet to come into operation. This provision will simply provide the flexibility needed to give proper effect to what is really a minor consequential amendment that this bill will make to that act—that is, replacing the reference to the 2021 act with a reference to the 1972 act. That is all that that will do.

The final paragraph of the commencement clause provides for when the remainder of the act will come into effect. The remainder of the act will obviously include the various changes that are proposed to the 1972 act, such as the anti-gag provision and the establishment of the new committee. Many of those provisions align repeal day with

when the amended 1972 act will come into effect, providing a seamless transition between the two systems. This includes the various transitional provisions. These provisions will commence on a day fixed by proclamation, and different days may be fixed for different provisions. It is anticipated that they will commence on a single proclaimed commencement date.

I make it clear that it is not the government's intention to delay the repeal of the 2021 act indefinitely. The government has made the clear and difficult decision that it is necessary to repeal the 2021 act, and has communicated that decision both publicly and in this Parliament through the introduction of the bill. In fact, as members noted in their contributions to the second reading debate, it may well be that many members of the public think that that repeal has already occurred. The government's intention is to introduce an updated 1972 act as soon as possible. We need to repeal the 2021 act before 31 December 2023. Sections 310 and 311 of the 2021 act are due to commence on 1 January 2024. Those provisions would repeal the 1972 act in its entirety, as well as the regulations. The government has brought the bill to Parliament for the purpose of reinstating the 1972 act in its entirety and making necessary targeted amendments to it. The bill includes provisions that will repeal the 2021 act. Part 3 will repeal the whole of the 2021 act; it does not provide for the government to pick and choose which parts will be repealed.

Hon NICK GOIRAN: On what date will the transitional provisions commence?

Hon SUE ELLERY: When the substantive amendments all commence.

Hon NICK GOIRAN: On what date will that be?

Hon SUE ELLERY: We anticipate that it will be early November. That is obviously subject to it going through the normal Executive Council processes et cetera. We anticipate that it will be early November.

Hon NICK GOIRAN: The government anticipates that it will be early November but there is no obligation for the government to do that. The Leader of the House mentioned the date of 31 December as being a key target date. What would be the effect of the government failing to proclaim the operative provisions prior to that date?

Hon SUE ELLERY: The 1972 act would fall away.

Hon NICK GOIRAN: What impact would that have on the bill presently before the house?

Hon SUE ELLERY: The question, as I understood it, was: what would happen if the 1972 act fell away? Is that correct?

Hon Nick Goiran: Yes, if the operative provisions in this bill are not proclaimed prior to 31 December.

Hon SUE ELLERY: We would be left with the 2021 provisions.

Hon NICK GOIRAN: That would be a highly unsatisfactory state of affairs for all parties concerned.

Hon Sue Ellery: Most unsatisfactory.

Hon NICK GOIRAN: At the very least, are we saying that part 2 of the bill that is presently before us must be proclaimed on or before 31 December 2023?

Hon SUE ELLERY: That is correct.

Hon NICK GOIRAN: Why does the bill not say that?

Committee interrupted, pursuant to standing orders.

[Continued on page 5386.]