ABORIGINAL HERITAGE LEGISLATION AMENDMENT AND REPEAL BILL 2023

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Sally Talbot) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Committee was interrupted after the clause had been partly considered.

Hon SUE ELLERY: In the first session of the debate on clause 1, I referred to a list of some 20 organisations that participated in an initial briefing with the minister. That occurred on 22 August. A total of 18 people participated in that session. I will table that. The following is a list of the parties invited to a briefing with the minister on 17 August 2023, so it is a bigger list than those who attended. A total of 42 people participated in that online session. I table both of those. This is in response to Hon Peter Collier and some others who referenced it.

[See paper 2699.]

Hon SUE ELLERY: A question was raised about when the implementation group first met following the announcement. The first meeting of the implementation group was held on 14 July. Five meetings have been held since 8 August. They were held on 18 August, 25 August, 8 September, 14 September and 6 October.

Hon Peter Collier: Can you tell us how those groups or individuals were determined?

Hon SUE ELLERY: Sure. Members will get two lists. The first is a very long list of all the native title groups. The second list, which is the shorter list, is a list of people who were identified by the National Native Title Council.

Hon STEVE MARTIN: I thank the minister for the update on who met and when. From what the minister just gave us, the first meeting of the implementation group was held on 14 July. That was dealing with the 2021 act. When was the next meeting?

Hon Sue Ellery: It was 18 August.

Hon STEVE MARTIN: By 18 August, the opposition had had a briefing on the bill. We were briefed on 14 August, according to my diary notes. I assume that it was a done deal and the amendments were written. What input between 14 July and the next meeting did any of those organisations or individuals have in the drafting of the 1972 act amendments? The only meeting they had, from what the Leader of the House has just told us, was with regard to implementing the 2021 act.

Hon SUE ELLERY: The feedback that was provided was then used to form the amendments that were moved in the other place.

Hon Steve Martin: The feedback from which meeting?

Hon SUE ELLERY: From the consultation meeting of 18 August. That feedback was used to inform the amendments moved by the government in the other place. Hon Steve Martin will recall from my answer to an earlier question that there were some 22 amendments, nine of which were technical or administrative amendments. The rest of the 22 amendments were based on feedback, which included feedback from that meeting of 18 August.

Hon STEVE MARTIN: There are a few numbers floating around. So, 22 amendments resulted from that meeting.

Hon SUE ELLERY: No, honourable member. I was asked a question, I think by Hon Colin de Grussa, about how many amendments the government moved in the other place. There were 22. Of those, nine were technical or administrative drafting amendments. I am advised that the remainder of those amendments were informed by the consultation that occurred at the meeting on 18 August.

Hon STEVE MARTIN: Were the 13 non-administrative amendments the result of that one meeting on 18 August?

Hon SUE ELLERY: There were probably other considerations as well, maybe even by the minister himself. The recommendations were partly informed by the meeting on 18 August.

Hon STEVE MARTIN: What I am trying to get at, I guess, is the level of input from the large number of people who were involved in that consultation and implementation group. If the minister was responsible for 10 of the 13 amendments, did three come from the consultation group? It was one meeting after the announcement that the 2021 act would be repealed. Would it be possible to determine how many of the 13 amendments were the result of consultation with the implementation group?

Hon SUE ELLERY: There were nine of what we would call technical or drafting amendments. One went to the regulations and eight others were technical. There were then five amendments that went to the "native title party" definition and eight that went to the section 18 transfers. The five and the eight were informed in part by feedback

from the meeting we have been talking about, but there were also other discussions going on as well, so it would not be accurate to say that they were informed exclusively by the conversations at that meeting. They were formed in part by that meeting.

Hon PETER COLLIER: This gets to the point that I was raising yesterday. The thing that I have grappled with throughout this is the fact that the government was so emphatic about the 2021 act progressing. As I understand it, the first implementation meeting was held in mid-July and everything was still roaring ahead. Just a few weeks later, it stopped. When was the decision made to repeal the act?

Hon SUE ELLERY: I will have to take that on notice. It was at a cabinet meeting. We are going to check the date of the cabinet meeting.

Hon PETER COLLIER: I would really appreciate that. Particularly given what we heard this morning, I am wondering whether this process commenced before 1 July. It would bother me if it did.

Hon Sue Ellery: I have no clue what you heard this morning.

Hon PETER COLLIER: I get that. It was a public hearing, so it is out there. As I raised yesterday during my contribution to the second reading debate, the one thing I have grappled with is the fact that it happened so quickly after the implementation of the act on 1 July. I was sitting with a group of friends on the Friday night and brought up the screen for the early edition of *The West* online and bang!

Hon Sue Ellery: You were talking about the ACH? Your life is tragic!

Hon PETER COLLIER: The Leader of the House has absolutely got it. It ruined the night.

I thought, without a doubt, that the government would make amendments. As a former minister, I thought that the government would have to amend the act because it was not working. I have been there; I know about the minister's role and responsibilities. The government had to make amendments—blind Freddy could have seen that—but to actually repeal the act was extraordinary. However, the government is doing that. With all due respect, that is to the government's credit. It saw that the 2021 act was a dog's breakfast and was totally wrong, despite all the rhetoric that we heard before. I guess it would not bother me so much had the government not been so emphatic in the lead-up to its implementation. Successive opposition members yesterday expressed their frustration at being labelled all sorts of things day after day. Anyone who had the gall to express any concerns about the bill was chastised by the government. I would be really disappointed if we found that while all this abuse was going on, back in the offices in Dumas House and at Aboriginal affairs the government was already talking about repealing the act. That would be extraordinary. Yesterday, I showed the house the document from the former Aboriginal affairs minister, Ben Wyatt. He was talking about it back in March 2018. Of course, that bill did not proceed. Eighteen months after the Aboriginal Cultural Heritage Amendment Bill 2021 was passed, the act was implemented. Then, within a matter of weeks, we had a repeal bill and associated amendments. That to me is extraordinary. That all happened so quickly. That is why I am a bit frustrated now, particularly, as I said, after what I heard this morning. I get it, but could the minister give the undertaking that she will find out, if she can? I appreciate it is a cabinet-in-confidence issue, but if she could let me know when it was decided, that would really help me to understand the whole process. At the moment, I am probably more confused than ever, after having heard what I have just heard from this implementation group.

Hon WILSON TUCKER: Minister, an excellent question was asked in question time, and the response provided a list of stakeholders that were consulted as part of the repeal bill process. Twenty-three organisations were listed, six of which are Aboriginal corporations. I believe that around 90 prescribed bodies corporate and Aboriginal corporations were consulted as part of the 2021 ACH bill. Can the minister please clarify that number?

Hon SUE ELLERY: I tabled two lists when we started Committee of the Whole again after question time. The second one is a long list that goes over two pages and identifies native title bodies that were consulted as part of the bill before us now. In respect of the consultation for the 2021 bill, that was a five-year process and a large number of organisations were consulted. I do not have a list with me. I am not going to get a list. I am not sure how that would progress debate on the bill that is before us now. I do not have the list here, but it would have been an extensive number and I am sure it was probably canvassed when the 2021 bill was debated in this place. The honourable member might like to check the debates at that time. I am not in a position now to provide the member with detail about the level of consultation on the 2021 bill.

Hon WILSON TUCKER: That is fine. Ignoring the level of consultation with Aboriginal groups for the 2021 bill, does the minister know how many Aboriginal corporations or entities or prescribed bodies corporate exist in WA today?

Hon SUE ELLERY: PBCs come under the commonwealth Native Title Act. That is not our act. If the member wants to direct a question to the feds about what lists they keep, that is where the definition sits. They are the ones who keep that list. There would be hundreds of such organisations and there are certainly hundreds of Aboriginal

organisations, so I am not sure that I can get the honourable member any further in respect of the matters that are in front of us right now in the bill.

Hon WILSON TUCKER: I think we can both agree that there are hundreds of Aboriginal groups and prescribed bodies corporate in WA.

Hon Sue Ellery: That is literally what I just said.

Hon WILSON TUCKER: I agree with the minister, and I think she can guess where my line of questioning is going. Six is a very small number compared with the number that exist. The consultation period for this bill was a lot shallower and had a more constricted time frame than that for the 2021 bill, but six is a very small number. Does the minister know how many Aboriginal people these six organisations represent?

Hon Sue Ellery: Can you just tell me where the six came from?

Hon WILSON TUCKER: The six is listed on the list of stakeholders that were —

Hon Sue Ellery: In the answer to the question in question time.

Hon WILSON TUCKER: Correct.

Hon Sue Ellery: Thank you. Can you just repeat the question, honourable member, with no preamble—just what you are asking?

Hon WILSON TUCKER: I am curious whether the minister knows how many Aboriginal people are represented by the six Aboriginal corporations that are listed on this stakeholder list?

Hon SUE ELLERY: No, and I might need to ask for the member's assistance here. I do not think I do. No, I cannot. I do not have that information in front of me, and I am not sure that if I were to get it, it would assist us to deal with the matters in front of us now.

Hon WILSON TUCKER: Minister, the point I am trying to get to here is that six groups were consulted. Doing some napkin maths, they probably represent a few thousand Aboriginal people each, potentially. There are 89 000 Indigenous people in WA, which represents about 3.3 per cent of the population. Given that the list is very small and only six organisations were consulted and, based on this napkin maths, clearly there is less than majority support by the Indigenous people who were canvassed on the repeal bill, does the government feel that it is important to have majority support by the Indigenous population for a bill that is designed to protect their cultural heritage?

Hon SUE ELLERY: I will tell the member what might help me. These advisers at the table were not involved in answering the question that he is talking about. Bearing in mind I provided the answer in a representative capacity, perhaps the member or someone can get a copy of the parliamentary question and the answer that he is talking about, I will crosscheck it with these people, who have no idea what we are talking about, and see whether we can progress it further. That might take a few minutes, so we might go elsewhere while we try to sort that out.

Hon STEVE MARTIN: Changing tack entirely—this is stretching the bounds of clause 1—what are the department's plans for post implementation of the 1972 act plus amendments? We saw the rollout of the 2021 legislation and the public meetings to explain it. I understand that the 1972 act has been in place for 50 years. The level of knowledge of the 1972 act, particularly in the great southern and wheatbelt et cetera, is very low. The knowledge of Aboriginal heritage and the implementation of this legislation has absolutely changed, so does the department have a planned rollout of consultation and education?

Hon SUE ELLERY: The member is stretching the friendship about clause 1. I can tell the member in a general sense. I have already referred to the fact that there will be consultation about, for example, how we do the surveys, making sure that people understand what the survey process will be and seeking feedback on how we will identify the priority areas to start the 10-year survey rollout. Work will need to be done on how information is provided to people, what is on the website, and what is circulated through other forums. All that work is yet to be done, and I cannot tell the member in detail what that will be.

If the deputy chair does not mind, I will take a minute to see whether I can address the question asked by Hon Wilson Tucker. I will just be a minute.

As best I can tell, I think Hon Wilson Tucker needs to look at three documents to ascertain the level of consultation, which I have to say was at differing levels across the three lists. One list was in the answer to the question I gave the member today. I am not sure whether the honourable member was outside the chamber on urgent parliamentary business, but I tabled another two lists. If the member looks at those two and the answer to the question I gave him today, I think he will see the totality. One of the lists I tabled has 94 organisations on it. They were sent information about the draft regulations, amendments and draft policy documents, and they were invited to provide feedback. It has been explained to me that the ones listed in the answer I gave the member in question time today were

engaged directly. The Aboriginal organisations on the list the member received in his answer were part of the implementation group, but consultation was not limited to those in today's answer; it included the other two lists. Those organisations represent thousands of Aboriginal people across Western Australia.

Hon WILSON TUCKER: I thank the minister for the response. That does help clear things up. How were the Aboriginal corporations on the implementation working group chosen?

Hon SUE ELLERY: I am advised that the minister would have made appointments to that implementation group to ensure that he had representation from representative bodies, prescribed bodies corporate and regional corporations, so it was a mix of those.

Hon WILSON TUCKER: I circle back to the totality of the Aboriginal corporations and prescribed bodies corporate that were consulted. Given that I do not have the three documents in front of me—I just have the one—can the minister give the definitive number of Aboriginal corporations and entities that were consulted?

Hon SUE ELLERY: I will not take the time now to cut across which on the three documents. We will do that in the break tonight. If it is critically important to the member's consideration of the bill, I am happy to provide it to him before we start again tomorrow.

Hon COLIN de GRUSSA: I go back to the process we were talking about before for the implementation and consultation group. I will try to put together a bit of a time line. The implementation group met, and a decision was then made to repeal the 2021 act. That implementation group became the consultation group. Parallel to that, and we do not yet know exactly when, drafting commenced on what is essentially the bill before us. Consultation was ongoing during the drafting stage. At some point, obviously, a decision was made to introduce the bill into Parliament. I am trying to understand this: was the consultation process still ongoing at that point, when the bill was introduced into Parliament?

Hon SUE ELLERY: The bill was read into the Legislative Assembly on 9 August. Between then and when the bill was debated in the Legislative Assembly, some 22 amendments were drafted, and I have described the different amendment categories. The implementation group was consulted and feedback was asked for. That informed those amendments, but feedback also informed the regulations and the policy documents.

Hon COLIN de GRUSSA: What I am trying to understand here is why the bill was read in in the first place when that process was ongoing and there were likely to be amendments. Where I am coming from here is that we have already seen what happened in 2021 when that bill was rushed through this place and the other. We ended up with issues down the track. We are now looking at another bill that was developed in a very hasty fashion and has already had 22 amendments made after it was introduced into Parliament. I am trying to understand why that process was not allowed to go on for a bit longer to make sure the bill was the best bill it could be before it came into Parliament.

Hon SUE ELLERY: It is clear that a decision was made by government to respond to the public concern that had been expressed by a range of groups, and that government wanted to act to provide that certainty. The Premier said, when he stood to make the announcement with the Minister for Aboriginal Affairs, that we had wanted to provide certainty and clarity, but we had not, and we wanted to act to address that. The member may not find that an acceptable answer, but that is the fact. The member might draw any conclusion he wants to about that. That is the circumstance, honourable member. We wanted to provide clarity; we wanted to provide certainty, so the announcement was made and the bill was introduced. We continued the discussions to seek feedback on how we might best incorporate what had been publicly called for, which was simplicity and all of the issues that have been publicly ventilated up until the decision was announced by the Premier.

Hon COLIN de GRUSSA: My final questions on this are: Was there any consideration given to simply repealing the 2021 act then developing a separate bill to replace it? Could that certainty not have been achieved by simply repealing the 2021 act and working on a replacement bill?

Hon SUE ELLERY: I am really not in a position to answer that. The government makes decisions in cabinet. I am not in a position to stand in the house today and say, "Well, these are the things that we weighed up in making the decision that we reached in cabinet." I am sure the honourable member understands that process. We are where we are, which is that there were was a loud and clear public ventilation of concern about uncertainty and a lack of clarity. We have acted to address that.

Hon Dr STEVE THOMAS: I will try to be brief to give other people a chance at this. Leader of the House, I have managed to find within the bill places in which to apply my questions that were going to be clause 1. I have got a couple that I would like to check. The 2021 act proposed some definitions around intangible heritage. As we repeal that act, my understanding is that the definition of intangible heritage will disappear from the 1972 act that was amended. The amendments to the 1972 act, currently before the house, as I understand it, do not reinsert the definition of intangible heritage. Can I check to see whether that definition of heritage will be as interpreted under section 5 of the existing 1972 act?

Hon SUE ELLERY: Correct.

Hon Dr STEVE THOMAS: That is unchanged from the original, and I note the ruling of Justice John Chaney in 2015 about the definition of Aboriginal heritage. Given that in the 2021 act we were going to have a more discrete definition, was any thought given to beefing up the definition and providing that level of certainty, despite the fact that we are repealing the 2021 act? It does not appear that there are any amendments to give more clarity about what is defined as heritage in the amendments that are currently before the chamber.

Hon SUE ELLERY: The policy position adopted by government was that, having heard the message about the lack of clarity and the complexity of the new systems that we were putting in place, that what people wanted us to do after Juukan Gorge was put in place measures to address the circumstances that led to that. We made a decision to do targeted amendments that would address the principles we needed to address to ensure the circumstances around Juukan did not happen again. We did not want to revisit introducing a whole new level of complexity because that was the thing people were complaining about when they were complaining about the 2021 act. It was trying to reach a balance between what we needed to do to meet the community's concern that we were turning the whole thing on its head and making it too complex while addressing the very real issue around what we needed to do to respond to what happened at Juukan Gorge and make sure that could not happen again.

Hon Dr STEVE THOMAS: Thank you. I am happy to take the word of the Leader of the House that that was the intent of the process. I think the difficulty came even by inserting the definition of "intangible Aboriginal heritage". It perhaps got even more confusing in the 2021 act. The question, therefore, is: would claims for intangible heritage, that would have been accepted under the 2021 act—because it specifically referenced intangible heritage—be likely to proceed under, I presume, section 5(c) of the 1972 act, which states —

> any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

Would it be fair to say that what was proposed as intangible heritage could well still be picked up under the original definition in section 5(c)—this is obviously not the fault of the government, but this is the original act—which I think is where Justice Chaney was taking the debate? Does that not leave a fair degree of uncertainty around the thresholds of heritage, if you will?

Hon SUE ELLERY: Whether something constitutes an Aboriginal site that is subject to the protection of the 1972 act is a factual question. There must be sufficient evidence to demonstrate that it falls within the definition of "Aboriginal site" under section 5. That applies regardless of the nature of the heritage in question. Intangible heritage will only constitute an Aboriginal site and therefore will be subject to the protection of the 1972 act if it is linked to, or is associated with, a place. Mythology alone—I think the member's second reading —

Hon Dr Steve Thomas: I've actually never used the word "mythology".

Hon SUE ELLERY: No, let me finish. I think the member was trying, very respectfully, to find the appropriate language and referred to storytelling, for example.

Hon Dr Steve Thomas: Yes.

Hon SUE ELLERY: Without being linked to a place, it does not fall within the definition of section 5.

Hon NEIL THOMSON: I will continue on that point about mythology. Before question time I asked a question about the issue of prosecutions. The Leader of the House provided an answer to my question about how many prosecutions had occurred under the legislation since 2017 and how many of them related to the destruction of tangible, as opposed to intangible, Aboriginal cultural heritage. There were also some other questions about Rio Tinto that I will not get into. The Leader of the House said that since 2017 there had been nine prosecutions completed under the Aboriginal Heritage Act 1972. Three involved artefact scatters and rock art engraving sites, which I assume would be classified as archaeological under section 5; two involved mythological sites—that was the response I got from the Leader of the House, which was not solicited by me; and four involved a combination of artefact scatters, fossils and mythological sites. This goes to the heart of the definition. If we look back at section 5, "Application to places", there is a concern. Section 5(c) refers to —

> any place which, in the opinion of the Committee …

The "Committee" in this case being the Aboriginal Cultural Material Committee, as it was then, and is about to become the Aboriginal Cultural Heritage Committee. That will become the register of places, I assume. My first question is: are the places referred to in section 5(c) determined by the committee to be registered?

Hon SUE ELLERY: If something meets the definition, it automatically goes onto the register. The ones that are subject to the opinion of the committee are, under section 5(c) —

> any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

That is the role of the committee. If it otherwise meets the definition, it will go on the register. If the committee is asked for its advice, it might provide advice, but the ones for which the committee is specifically referred to are set out under section 5(c).

Hon NEIL THOMSON: To be clear, and so the Leader of the House knows where I am coming from, the purpose of my question is to ascertain how those 30 000 sites got on the register. The Leader of the House said that there are multiple pathways. From what I am hearing, it could just be that there is an application by an Aboriginal group to say, "This place is important and of significance", and then it would just go on the register without going through the committee. Is that correct?

Hon SUE ELLERY: The registrar is responsible for maintaining the register. If something meets the definition of a site—a place—it goes onto the register. The registrar might ask for the opinion of the committee on something else, but the only areas that require the opinion of the committee are those that I just read out under section 5(c). It could be that the committee is asked for an opinion on something that falls outside what is listed under section 5(c), but the only things it is required to provide an opinion on are the areas set out under section 5(c). Otherwise, if something meets the definition, it is just put on there by the registrar.

Hon NEIL THOMSON: I think this poses something of a challenge for the community; for example, the Gascoyne flood plain. By way of comparison, the Swan River was on the register and that probably fitted within the committee's consideration of ethnographical interest because it was part of the definition of "ethnographical", being a scientific assessment of cultural practice and customs. When we look at a river and the mythology around a river for Aboriginal people, there is probably a reasonable case to make that, from an ethnographical point of view, it will be included. However, we saw an inclusion of tributaries and that has led to a recent decision for prosecution; I will not go into any detail on that case. I suppose I am talking about an expansion of that.

I come back to the Gascoyne River situation. There is the Gascoyne River, but if we look at the map, we see sites going out beyond the Gascoyne River, often following a boundary of a road or a cadastre; the boundaries are straight lines. Pretty much all of the horticultural zone in the Gascoyne is on that register, and that happened only recently; I think Yamatji Marlpa Aboriginal Corporation put in an application. I am understanding the Leader of the House to say that Yamatji Marlpa Aboriginal Corporation might just put in an application within 600 metres or so from the river's edge. I do not know what the distance is, but it is quite a big area and in some places may be more than a kilometre, depending on where the flood plain goes. I think that is where part of the challenge is. It will potentially bring normal operations under the provisions of sections 16, 17 and 18. I think that is where there might be some nervousness about going down the path of how the department is going to react to complaints and prosecution. The Leader of the House is saying that there is nothing to stop an Aboriginal representative body or group from saying, "This is our area; we believe it's of importance", and under section 5(a), that would just be accepted. My first question is: is there any process to actually assess the merits of an expanded area that goes on the register, apart from the registrar?

Hon SUE ELLERY: I think there is perhaps a conflation of three separate things in the member's question. I will start with the first, which is: how does something get on the register?

The provisions are set out under sections 5(a), (b) and (c) of the Aboriginal Heritage Act. The agency is required to put matters that fall under section 5(c) before the committee. It can, and, as a matter of practice, most times it does put matters falling under section 5(a) and (b) before the committee as well, but it is not required to do so.

That is how a site gets on the register. To get on the register, someone has to fill in a heritage form, an evaluation is done, and, if required, advice is prepared and provided to the committee. That is how it gets on the register.

The member then morphed into how somebody makes a complaint.

Hon Neil Thomson: I will come back to the complaints process separately, if we can.

Hon SUE ELLERY: Okay; that is what the member started talking about. I think that the third element the member referred to was quite wide areas that might be, as I understood what he was saying, perhaps beyond the physical boundary of a flow of water, for example. It might be slightly beyond the boundaries, if that is what the member was talking about, and he was asking about that as well.

Hon Neil Thomson: That's probably the question. How does that get managed?

Hon SUE ELLERY: Okay. Again, advice would be provided, and the committee would make its determination. It is not always the case, but it may well be that an area that is wider than the physical flow of water is sought because Indigenous people do not necessarily want the public to know the precise location of what is particularly

important to them. It has to be identified for the purposes of the decision-making, so it is identified for the purpose of the register. If it is the case that the local people do not want a particular spot to be identified, the area that might be defined as a site might be slightly broader than that tiny bit, and if a section 18 consent is required, the department will let the landowner know, and that process then applies accordingly. But I think the member conflated three things in his question.

Hon NEIL THOMSON: I will try not to do that. It is complex, and to make it less complex, I will go back to the Gascoyne River example. This is a genuine concern. People are worried about, I guess, all the attention that has been given to all this, and how this might play out as we go back to the 1972 act. The river is a flow of water; it would probably be reasonably identified as a site. However, the issue is that we have these very wide boundaries that effectively take up the whole cultivated area of the Gascoyne. I think the minister can see the problem: people will think that they have to get a section 18 consent every time they want to do anything, and I do not think that is what is intended.

I suppose my question is: why has the registrar allowed this very wide interpretation under section 5(a), (b), (c) or (d) to apply, when I would have thought that people are not going to require section 18 consent in order to carry out normal activity in their day-to-day lives?

Hon SUE ELLERY: I do not think it is accurate to characterise that the registrar is taking a particularly broad interpretation of the definitions; that is not the case. It is as I indicated earlier. In order to seek coverage, an application needs to be made, and an assessment is made on whether whatever is being sought to be identified as a site meets the definitions. It may well be that in that particular case, the local Indigenous owners do not want to publicly identify the precise geographical location of the site. They may not want to do that publicly. They are required to identify it in order to have the site registered, so the registrar has that information. A proponent might see an area on a map that is broader than the actual particular site, and they might say, "I want to build my house there, I'm going to ask a question about whether there is any issue with doing that", and the registrar will tell them whether they need to seek a section 18 consent, because the registrar knows where the precise site is. I have no clue whether that is related to the member's question about the Gascoyne. I am not going to get into hypothetical this or that; I am just not in a position to do that. But in regard to what information is held, there will be some occasions on which the local Indigenous people will not want to effectively put up a neon sign saying, "Hey, folks, here are some particular rocks that have deep meaning to us, and we don't want them disturbed." The job of the registrar is to make sure that the registrar has that information and that there is a broad enough capture, if you like, so that the precise site is not identified, but if somebody wants to find out, they will be provided with information about whether what they want to do on that piece of land next to the special spot will require them to lodge a section 18, or not.

Hon NEIL THOMSON: That is why there needs to be further amendment to the act, which has not occurred. That is an opinion the Leader of the House and I might not share. The proliferation of sites continues. The challenge for the community is that there is a requirement under law that has not been exercised in any way, simply because the gatekeeper—the department in relation to prosecutions—has been quite narrow. We saw a structural change under the 2021 act and the gatekeeper became a lot broader.

So that I do not conflate the issues, I am prepared to park that and say that a lot more work needs to be done to provide the necessary clarity for the community under this legislation. I think the act is problematic. We all agreed when we debated the 2021 act that there were problems with the 1972 act, and we are going back to it. It worked because the gatekeeper, the department, was circumspect in the application of law. Some assessment was done, maybe by the registrar; I do not know. It might have gone back and said, "This complaint did not apply because we know the detail of that site and this broad site was not relevant, so it was okay."

Hon Sue Ellery: Honourable member, that is not going to change.

Hon NEIL THOMSON: It is an important point—that is, the question on which the community is seeking comfort in terms of the prosecution—and it is not going to change. I repeat it because that is why we support going back to the old act as opposed to staying with the current act. We are in furious agreement; it is not going to change. The gatekeeper provided a level of protection for the community so that we did not get the sort of behaviour we saw at Canning River and other places.

I return to the point about the comfort the community is looking for in the role of the gatekeeper. I take on board the Leader of the House's commitment that it will not change. Are there any internal procedures within the department to assess the materiality or relevance of a complaint?

Hon SUE ELLERY: It is worth remembering which agency we are dealing with. It has prosecution policies and guidelines and it has trained investigators. This is not the only area in which it is required to respond to complaints. It is required to respond in respect of the planning act, the land act and the heritage act. Those provisions are in place. It is not the case that someone can ring up and say, "I've got a complaint to make", and that is taken on face value and they start writing out the prosecution. There is an investigation. What also needs to be taken into account

when prosecutions are undertaken is whether it is in the public interest to prosecute. As I said, that function exists not just for Aboriginal cultural heritage but also all the provisions that need to be taken into account around the planning and land acts and the heritage act more generally.

Hon NEIL THOMSON: Thank you; that is helpful. If we consider the nine prosecutions that were completed over the space of six years, they have all gone through that process. There are guidelines within the entity, so they are assessed. Who can make a complaint to initiate a prosecution?

Hon SUE ELLERY: Anybody.

Hon NEIL THOMSON: Of those nine prosecutions, would any of the complaints have been initiated by another department?

Hon SUE ELLERY: I do not have that information here. Noting the time, I might be able to get the member more information by tomorrow, but I cannot guarantee that. I think it is worth noting that nine prosecutions in six years does not form the basis for the community to have an almighty fear that this need occur. If I am able to provide information about the nature of the complainants, I will. I cannot guarantee it, but I will ask.

Hon NEIL THOMSON: I appreciate the candour of the Leader of the House and the information. As much as I think it is important, nine prosecutions are not a lot. Everyone in this place would agree that if the government could have prosecuted Rio Tinto, we probably would have seen that happen because that seemed to be a very significant matter. Coming back to the Leader of the House's point about nothing changing and providing that comfort to the community, there have been a couple of publicised prosecutions. One involved a firebreak. I know nothing about the specifics. It seemed a very low-level complaint. The other involved a driveway across a tributary, which is still afoot so we will not talk about the specifics. However, where people get nervous is that the threshold of decision-making to proceed with prosecution might change over time. Is that the case?

My second question is: ultimately, who in the department has the final say about whether a prosecution will proceed? Is it the director general?

Progress reported and leave granted to sit again, pursuant to standing orders.