CONSERVATION AND LAND MANAGEMENT BILL 2021

Second Reading

Resumed from 24 June 2021.

HON TJORN SIBMA (North Metropolitan) [3.37 pm]: Upon being notified, through the customary manner, that this bill would be brought on for debate this week, I ran to my filing cabinet and tried to blow the dust off the file just to remind myself of the origins of this legislation, its intent and its likely practical implications. For the benefit of those in the chamber, an original version of this bill, which the opposition is in no way opposed to but stands ready to scrutinise in the appropriate way, passed the Legislative Assembly in November 2020 prior to the prorogation of Parliament—an exceedingly early initiation of that particular instrument, it must be said—to be effectively then reintroduced on the composition of the Parliament elected following the 2021 election in the middle part of last year.

The only substantial change between the bill that we are discussing now and the version of the bill that was agreed to in the other place in November 2020 is the time stamp on the bill. The long title and the short title have changed to reflect the fact that this is the not 2020 version of the bill, but the 2021 version of the bill. It must be said because with some degree of inevitability we will get to the remaining sitting weeks of this year and there will be discussions behind the chair about government legislative priorities. If I recall correctly, strangely, this one was not elevated to the top 10 of that list when we were discussing these matters around October and November last year. I found that particularly curious because the opposition had no entrenched opposition to the bill, and the issues as they appeared in the bill in the main were well ventilated and understood even if the implications of the legislation were still murky.

This bill has effectively been adjourned or marooned at the second reading stage for 14 months or around 400 days. It is with some measure of satisfaction that the circle of life as it relates to legislation is coming around the full arc of the compass. Why is this lethargy in legislation particularly interesting? It is because the government was quite clear about its election priorities insofar as they related to the management or the expansion of the conservation estate in its broadest possible way and its laudable intent to protect the rights of traditional owners. I quote from an election commitment given at an earlier election —

> At its heart, A McGowan Labor Government will protect the rights of Traditional Owners to their land and sea Country. We will recognise rights through improved consultation, recognition of indigenous leadership in land management, supporting participation in economic activities on Country, and the joint vesting of marine parks.

This is what this bill is about. It is about the joint vesting of marine parks. This is to be read obviously in conjunction with the policy position that I think has been a longstanding disposition of the government to expand the conservation estate by around an order of five million hectares. Effectively, in this bill we have the operationalisation, if not the implementation, of those twin policy objectives, and in no way do we dissociate ourselves from the good intent behind those policy implications. But what is curious is that it has taken 14 months since this was second read into this place to deal with the bill. I find it extraordinary. What is an impact of that? One potential impact is that issues that have been settled throughout the consultation of this bill with likely to be affected user groups in the marine environment may not be as settled now as they previously were. Perhaps there is not that degree of understanding or comprehension about the implications of this legislation among groups such as the commercial fishing groups, because consultation on this bill effectively ceased nearly two years ago.

Without embarrassing anybody, I was in an uncomfortable position recently when I advised a significant representative group that this bill would be brought on for debate today. I thought it would be a customary courtesy for either the staff or the ministers, particularly insofar as the Minister for Environment; Climate Action or the Minister for Fisheries are concerned, to go back to the industry groups that are likely to be affected by the implications of this bill as they relate to the construction of marine parks, both in the Buccaneer Archipelago and then later through the Southern Ocean, and tell them that this bill was on for debate. They could have asked whether they had any issues. I just find that an extraordinary oversight of consultation. I will leave it there.

I will get on to the matter of the desirability of joint vesting. I think it is a very sound principle. I will just remind members in this chamber that it was the Barnett government that initiated the concept of joint vesting of the conservation of aspects, of parts and parcels, of the conservation estate, especially the terrestrial reserves with Aboriginal body corporates. That was done by way of a 2015 or 2016 amendment to the Conservation and Land Management Act, which is effectively what this bill seeks to do. That was done under the stewardship of Hon Albert Jacob, who was then Minister for Environment and whom, incidentally, I just bumped into in the hall about half an hour ago.

Hon Alannah MacTiernan: Is he coming back to the Liberal Party?

Hon TJORN SIBMA: Who knows? We have lots of openings. We are hiring, minister.

Hon Alannah MacTiernan: You have certainly lots of vacancies.

Hon TJORN SIBMA: I think we might be luckier filling some of our gaps than the government is filling labour shortages in the delivery of its housing program, for example. I am more optimistic on that score.

This is a very sound and noble principle, but it must work properly. The actual legislation must work. It must be applicable. There is an obvious challenge here not so much with the legislation but there is a change to the object of the legislation, which I will get to later. I will hearken back to previous Parliaments. I propose that in the last composition of this chamber, in which a greater degree of political plurality was represented, legislation was better stress tested, that assertions and claims were tested and scrutinised more appropriately through both the committee process and the process of referring bills to the Standing Committee on Legislation. If this bill had come up for debate in this chamber in the previous Parliament, I know that if I were the handling shadow minister, I would have recommended and moved that the bill be referred to the Standing Committee on Legislation for a short time. There are obvious issues insofar as property rights, fishing licences and extant commercial operations that are lawful and presently viable, which will be made not so much illegal but unlawful or inappropriate, incommensurate with the objects of the marine park plans. There will be businesses today that are viable that will not be viable or will be less viable, potentially, on the passage of the bill. I thought an issue as significant as that might be worthwhile of the attention of a Standing Committee on Legislation.

For all my many flaws and many sins that people here will remind me about ad nauseam, and I have plenty of them, I try not to be unrealistic.

Hon Dr Steve Thomas interjected.

Hon TJORN SIBMA: Do not divide on that!

I do attempt to be pragmatic. If I could be so bold to suggest and put on the supplementary notice paper or move as an adjunct before the termination of this second reading address that this bill be referred to that committee, I know exactly what will happen. It will not go there.

The minister representing has told me that he has an obligation and cannot be in the chamber for this segment. Perhaps at the adjournment of the house tonight, the minister representing could speak to his successor who now occupies the space that he once held as Minister for Environment and say, "You know what, Hon Reece Whitby, perhaps there is something in this. Perhaps we might want to forestall the potential for legal action or damages claims. That might help us better construct a compensation package or the like. Therefore, perhaps it would not be such a bad idea if I moved a motion that we refer this legislation to the legislation committee ourselves for its view and report." This government is a pragmatic government. I was told earlier this morning that it listens. Perhaps if sensible amendments came out of that process, it would adopt them. You know what? I would probably support them. We would probably think that was sensible. But we know that is not going to happen.

What does this mean in a practical sense for the mechanics of dealing with legislation and regulation in this place? All that means is that we will spend a lot more time at that committee table, and the poor long-suffering excellent Minister for Emergency Services, who will be representing the Minister for Environment, will have to answer question after question, clause by clause, and we will not be doing that for our health.

There are some interesting dimensions to this bill. One of the interesting dimensions is that it effectively seeks to broaden not only the conservation purpose under the Conservation and Land Management Amendment Act, but also the extant and longstanding purpose of marine parks generally. There are three criteria, objects or purposes by which a marine park is established. Marine parks used to be managed by the former Conservation and Land Management Authority and are now managed by the Department of Biodiversity, Conservation and Attractions. The three dimensions were the proper conservation of the natural environment; the protection of flora and fauna; and the preservation of archaeological, historic or scientific interests. That is how we had done it in the past. There will now be a new addition, which I think is there to satisfy the government's other policy commitment to protect the rights of traditional owners, and that is the protection and conservation of the value of marine parks to the culture and heritage of Aboriginal people.

There are two ways of looking at that. One is to say that is fine. Another way is to concentrate on the obvious cumbersome pros. It is not there necessarily to protect Aboriginal culture and heritage, which I think is what the government is attempting to do. There is a cumbersome invocation to include "the protection and conservation of the value of marine parks to the culture and heritage of Aboriginal people". Good legislation is clear legislation. A fundamental legal principle is that we attempt, insofar as possible, to mitigate opportunities for misinterpretation or widely divergent interpretations of a piece of law. I suppose this is an early indication that at the committee stage, I will be seeking a rationalisation or an explanation of that phrase. I think this is a far more complicated phrase than what I am suggesting. If the government were to adopt the very simple-minded proposition that I have just put, please advise me what the problems would be, in a serious way.

The reason I find that phrase a bit worrying is how would we potentially be able to mediate differences of value and differences of importance held by adjacent traditional owner groups within the boundary of the same park? For

example, in Recherche Archipelago—I hope I have pronounced that correctly; close enough—there are four adjacent groups. In the interpretation of this bill, are we assuming that each of those groups values that marine park and values its contribution to the preservation of their culture and heritage in the same way as their neighbouring groups? That is a genuine question. I do not know enough about the individual groups, their custom and lore, and their heritage and what they value, to make a determination, but I assume, being a generalised student of human history and interaction, that the people we dislike the most are our neighbours, and that competing claims or values might be applied to similar territory. I am seeking to understanding how the government might navigate that process. That process potentially is more problematic because of the introduction of that cumbersome, in my humble opinion, phrase.

Although the boundaries of the marine parks in Buccaneer Archipelago have pretty much been drawn, gazettal has not been enacted, and I do not think it will be enacted for 12 months. Therefore, it will also be interesting to know what we are specifically attempting to preserve for future generations. I think we will get to that in the committee stage when we talk about the inevitable operationalisation of this bill.

I turn now to a matter to which I think I made passing reference in the debate on the Aboriginal Cultural Heritage Bill, which was very ably managed at the end of last year by the Minister for Emergency Services. This is probably another reason that would speak to the wisdom of referring this bill to the legislation committee. I note that at that time, we genuinely asked: Is this an appropriate area to be dealt with under this particular bill? Are we potentially duplicating the intent and objects in the Aboriginal Cultural Heritage Bill? Are we creating some policy divergence and potential legislative divergence between the two, or is there not even daylight between the two? We need a serious assessment of that matter at the very least.

I had the opportunity to speak to what I thought was the very good motion moved earlier today by Hon Lorna Harper in private members' business. I want to talk about the management generally of the conservation estate by the state government, particularly through its principal agency, the Department of Biodiversity, Conservation and Attractions. Forgive me as I am putting my file together while I extemporise. The overall conservation estate in Western Australia is enormously large.

For the benefit of members, I want to read part of an answer that I received from Hon Stephen Dawson in a representative capacity almost a year ago, on Tuesday, 10 August 2021, when I thought we might be approaching the event horizon of debating this bill. That did not happen—it was a year early. I asked what was the current size of the conservation state by individual category. It might interest members to know that as at 30 June last year, there was almost 6.5 million hectares of national parks, 1.2 million hectares of conservation parks, and about 10 million hectares of nature reserves. Of interest here is that nearly 4.4 million hectares of marine parks, 132 000 hectares of marine nature reserves and 143 000-odd hectares of marine management areas, as well as some other spot areas, are under management. The cumulative total is around 20 million hectares of terrestrial and marine estate in Western Australia under management. I do not have a view whether that is good or bad necessarily, but my keen interest has been the degree to which those estates have been capably and properly managed. This is not a partisan political point; it gets down to the way departments are structured, funded and operated and the key performance indicators they work to. I am sensible enough and have been around enough governments, state and federal, for long enough to know that the ship of state, the bureaucracy, is difficult to turn around and certain structures and foundational tenets are set in stone and that sometimes things get confused with amalgamations and the like. But it is a fair question for any fair-minded person in this state to ask who is concerned about environmental management: how well managed is that conservation estate? I am not in a position to declare one way or the other, but I acknowledge the absolute paucity of information.

I mentioned in an earlier debate my concern that there is no transparency about dollars to the principal services and the ecological value obtained—not in any structured or substantive sense. This might be a useful prompt to reconceptualise what we expect is appropriate terrestrial and marine management. These issues are germane to the fact that if the government is going to jointly vest and invent new government structures, it be very clear about what it is attempting to achieve, not only in the instrumental management of an individual marine park and its associated areas, but also more broadly and more strategically. I am sure there are good people in the department who have a view, but they are obliged to report in this very uninformative way through annual reports and budgets. I do not know the answer to that, but as much as it is legitimate for the government to move to expand the estate, because it has an election mandate to do it, as a custodian of land and sea country, I want to know that overall the government is doing a better job and this bill will achieve a better ecological outcome than the evidence, or the lack thereof, suggests. There has never been an ecologically or environmentally based justification for this bill. That is not in the bill. This bill will create a new set of management structures to legitimise and contemporise arrangements for the management of new marine parks, but it speaks nothing about how this marine estate will be properly managed. That is a shame.

I will use this occasion to raise an issue I have raised previously. I will be as nonpartisan as I can be, I hope, although it will be used by incoming governments. I reflect on what the new federal minister has done. In a political

way, she tipped a bucket over the previous government's environmental management, but she used a *State of the Environment* report to do so. It would be in Western Australia's long-term interests if we resurrected an apolitical, impartial scientific-based assessment of the state of the environment in Western Australia. It used to be the case until 2013–14. It has not been resurrected so, to be frank, both sides are equally culpable in not disclosing this information. It would be useful for industry and the community at large to establish a baseline upon which we work and a framework by which decisions are made as we progress into the future. I mention this only to acknowledge information that has been received through the estimates process by questions prior to the hearings. In the 2021–22 financial year, across the state, 217 species and 20 ecological communities were considered critically endangered; 198 species and 17 ecological communities were considered endangered; 263 species and 28 ecological communities were considered vulnerable, for a sum total of 678 threatened species and 65 threatened ecological communities. A very basic question of mine is: how are we to expect the passage of this bill to turn around that dire set of statistics? That is a policy question. I must say as well that the concept of establishing marine parks is a very sound one. It is one that the previous state Liberal government did quite proudly, but we also need to prove ourselves to be capable administrators of this estate.

Now, to the more detailed dimensions of this bill. There are obvious implications about the passage of this bill. One of them is a consequence of this new object and will be within the contours or the context of new marine parks to establish new special purpose zones, therefore, the preservation of Aboriginal culture and heritage. If I recall this, because it was a long time ago, there was an implication at the briefing we received from officials at the time this bill was originally introduced, and in discussions hence and answers to questions I put over the last 14 months or so, that this construct—the development of this new zone that will effectively be given a head of power under this bill—will potentially cause some conflict with existing users of the marine estate. Who are those users? They are commercial fishers, charter boat operators, potentially even recreational users. This bill will have a potential impact on existing, lawful, well-entrenched businesses, some multigenerational. I asked a series of questions and I will reflect on the two or three that are perhaps most relevant to this matter. I asked, effectively, about the process of determining the bona fides of these new zones. In a question I asked on 2 June last year, among other things, I referred to the minister's confirmation of advice relating to the indicative joint management plans, which we will get to later, citing existing activities in proposed special purpose zones for cultural protection being culturally incompatible with the protection and conservation of marine parks to the culture and heritage of Aboriginal people. I asked what information—for example, peer-reviewed archaeological or ethnographic studies and the like—was used to determine those zones, and whether those zones were, in and of themselves, compatible or incompatible with the existing activities undertaken. I asked a similar question about the compatibility test, in a variety of ways. For argument's sake, why would a commercial fishing activity that has been going on for 50 or 60 years in a particular part of the ocean be, upon the passage of this bill and the creation of these new plans and the creation of these new zones, incompatible with a lawful commercial activity that has existed for some time previously? I received an answer that was not necessarily helpful, I must say. There seems to be the potential for one set of operators to effectively be displaced from their commercial activities in a particular zone, within a particular park, by a new category of operator coming in and potentially conducting commercial activities in the same space, if they can demonstrate that their activities are compatible with the very cumbersome object I referred to previously to a degree that the previous operator was not.

I also asked whether any consideration had been given to potentially grandfathering—I know that is a paternalistic term—existing operations from being deemed incompatible, or whether there was the potential for joint use of the same zone. We might reflect upon the fact that perhaps there is a legitimate lawful claim—in fact, it is more than "perhaps"; there is a legitimate lawful claim. The tenor of the response I got back was, effectively, no: there would be a determination made that your fishing charter business is incompatible with operations in this zone.

Not being au fait with the fishing industry, I thought, perhaps naively, that there would be another part of the ocean that they could just move out onto, but I am not sure that that is actually the case because I think the government has recognised that there will be a series of compensation claims lodged by existing commercial operators. I drew that conclusion after reading a remark in a joint media release of 31 July by four government ministers—the Premier, the Minister for Environment, the Minister for Aboriginal Affairs and the Minister for Fisheries—titled "Three new marine parks in the Buccaneer Archipelago". It states —

> "The McGowan Government is committed to supporting commercial and recreational fishers in the Kimberley, including fishing tourism operators.
>
> "A sector support package will be developed with the community and the fishing sector to ensure the continuation of sustainable fisheries, high quality fishing experiences and support for local industries."

Recent policy decisions by this government make me particularly alarmed when I see the phrases "sector support package" and "transition package". This seems to be very different from a compensation action that would be done under one of the fisheries-related acts. There is a special, specific mechanism that one can apply for. I will ask during question time today whether that process has started and who will be consulted. I am very interested to drive into

the issues of incompatible use determinations, recourse to appeal, the provision of natural justice, and how the government proposes to manage competing uses in a confined space. I am also interested to know whether the government's preference is to effectively shepherd operators through an unknown sector support package, or to direct them to their legislative right to seek compensation through the appropriate act and mechanism. From what I have heard, that is not necessarily an easy process to navigate. It does not provide a guaranteed outcome and I do not know whether different decision points in the business operation and planning cycle will effectively corral people in either one direction or the other. That is just one reason why we do not know what this bill and the utilisation of management plans that this chamber has no oversight of, because they are executive decisions, will actually entail. I am concerned about where this might end up.

There is a broader industry issue. The introduction of new marine parks creates a series of new obligations, regardless of how the zones are going to operate. Later, we will focus on these special zones and what they mean. Let us look at it from the perspective of the viability of commercial fishing in Western Australia. Legitimate concern has been expressed by the industry about what I think it calls "spatial squeeze". These are operators whose business longevity demands a sustainable business model. I think the best land and sea users in this state are people engaged in productive activity. I think we need to give them some credit. As much as it is the custom of this house to debate either congratulatory or damning motions focused only on our narrow bandwidth, there is an industry in Western Australia that is being sensible and has seen the reasons for investing in sustainable practices and getting the appropriate certifications and the like. Are we making business life more difficult for it? It is the wrong analogy and a mixed metaphor, but I think it is suffering the death of a thousand cuts through the encroachment of these sanctuary zones, potential displacement by great new renewable energy projects, including windmills the size of the Eiffel Tower being placed in fishing zones, and other industry interactions.

In a broad sense, that brings me back full circle to the process of consultation. This is a valuable industry that needs to be supported appropriately. One measure of support for the industry is to demonstrate good faith. Even though we have ventilated issues around the composition of this bill for a long time, there has been a change in personnel. There has obviously been a change in Western Australia's economy, and there have been responses, both COVID-related and non-COVID-related. I think it is a very difficult time, frankly, for small to medium-sized enterprise, not large capitalised firms, across all sectors in Western Australia to be making investment decisions, to have confidence in the longevity of their own businesses, and to engage in planning when they are surprised that a bill that will directly affect them comes back to Parliament after 14 months of silence. I hope this is not true, but I am getting it from credible sources, so I am going to assume that it is, without embarrassing people by naming names. I will ask this simple question: what consultation on this bill has occurred, even if it has just been a cursory phone call or an email, since the beginning of this year to Recfishwest, the Western Australian Fishing Industry Council, Surfing WA, the Australian Petroleum Production and Exploration Association, the Chamber of Minerals and Energy WA, or any other marine user? I appreciate that perhaps the answer will be, "We've been consulting on the composition of these marine parks." That will lead me into a question about discussions on the composition or construction of this new Southern Ocean marine park, because I would like to know which traditional owner groups have been consulted and which groups have not been consulted to date.

In a way, I attempted to give the minister an assurance that I would not seek to delay the passage of this bill for delay's sake. I think that frankly many of the issues foreshadowed by me both in this debate and behind the chair are well known, but the appropriate time to consider the implications and what this means is in the committee stage. I might just foreshadow a few other areas so that preparations might be made. It is not an exhaustive list, but a general list.

I am very, very interested in the governance arrangements that will apply to any joint vesting agreement. I would like to know what the single point of accountability will be. I would like to know how assets and liabilities will be managed. I would like to know how potential disputations will be resolved. I am also generally curious to know how the actual management plans and the process will work, which, if I understand this correctly, will have to be co-signed by not only the Minister for Environment and the Minister for Fisheries, but also the Minister for Mining and Petroleum and I would assume the Minister for Aboriginal Affairs, and whether that process was followed in the construction of the three marine parks, identified by way of that media release, in the Buccaneer Archipelago. I might just also mention that one of the purported attributes of this bill is to do some administrative clean-up, such as standardising and simplifying certain procedures and undertaking some red-tape reduction. I am still, hopefully, only a young man, but I have been around long enough to know that all kinds of mischief can be made in sweeping statements given in explanatory memoranda and second reading speeches to that effect, so as we get deeper into the bill I will be interested to know what precisely it is that we are talking about.

My colleagues wish to speak to this bill, but I will conclude by saying this: the joint vesting of conservation estate with traditional owner groups, irrespective of whether it is terrestrially based or marine based, is a very good idea. I am glad that the government has taken it up. The example was set in the terrestrial domain and the government seeks to apply it to the marine estate. We are all practitioners here; it is very easy to campaign in poetry, but we must

govern in prose. The detail of the implications of this bill present for us an issue of concern to the degree that existing property rights will be trammelled, determinations will be made without recourse or appeal, and individual operators will be shepherded down a particular avenue of compensation and transition, which, on occasion can be quite unseemly. For that reason, I encourage the government to think about referring this bill to the Standing Committee on Legislation. I look forward to discussing this matter further in the Committee of the Whole House stage.

HON NEIL THOMSON (Mining and Pastoral) [4.26 pm]: In the short time I have, I will be following with commentary, but I want to thank Hon Tjorn Sibma for some of the matters he raised on the Conservation and Land Management Amendment Bill 2021. I will posit a position on the timing of this bill that I hope is not the case. I hope we can get a response on this, because it was only a few days ago at the community cabinet in Broome when, with some fanfare, the announcement on the Buccaneer Archipelago was made. There was certainly some dissatisfaction in the community about the amount of notice given to community members who have raised concerns about that. No doubt we will have more time to discuss that as we go forward; I just hope that it was not some sort of tactical decision by the government to leave this bill until after that decision. I hope that is the case. I hope that the government was not trying to avoid a more open and transparent debate around some of the challenges faced in that process, because it has certainly left some considerable concern and fear among those intergenerational community members who have recreational fishing as part of their lifestyle in the wonderful environment that we have.

I will not be completely negative in my comments on this legislation, because the fundamental principle outlined in this bill is sound. As Hon Tjorn Sibma raised, the joint vesting of terrestrial parks was passed under the Barnett government. In fact, I was chief of staff for a short time in 2011–12 under the then Minister for Environment, Hon Bill Marmion, when the drafting of that proposal had commenced. It had taken some time, obviously to 2015, when the final bill was put through. There has been a level of bipartisanship about the principles around joint vesting. The concept of joint management with traditional owners is a sound one, as I said, but the challenge is around the process. I will go into this in more detail when I following up with my further comments. The challenge comes down to the process and the balance of power that exists between bureaucracy and the minister putting them together.

Debate interrupted, pursuant to standing orders.

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