CONSERVATION LEGISLATION AMENDMENT BILL 2010

Second Reading

Resumed from 17 November 2010.

HON SALLY TALBOT (South West) [9.05 pm]: We now get to the important matter of how we facilitate joint management agreements in some of the most environmentally sensitive and environmentally valuable areas of the state. Those people who follow the upper house notice paper will know very well that this has been on the notice paper for some time. I start by acknowledging that the government recognised some three weeks ago, when we got to the place on the notice paper at which we were to start debating the Conservation Legislation Amendment Bill 2010, the need for delay. That delay was not because the opposition was unready to proceed, as Hon Norman Moore, Leader of the House, knows.

Hon Norman Moore interjected.

Hon SALLY TALBOT: I am not going to be ungenerous about the decision to defer the debate on that day three weeks ago. However, I want to make clear, and put on the record, what happened on that day. If the member disagrees with me, I am sure he will have a chance to make his point later in the debate.

A considerable degree of disquiet amongst the major stakeholders came to the attention of the two people on this side of the house responsible for the carriage of this bill—namely, me for the Labor Party and Hon Robin Chapple for the Greens (WA). Their disquiet was not about the substance and the intent of the bill, but about the degree of consultation that had been undertaken. Their unhappiness was expressed in terms of what I regarded—I think Hon Robin Chapple agreed and will add his comments later—to be a genuine desire to see a better bill put in place. On that basis, I made several approaches to the government. I spoke firstly to Hon Wendy Duncan, knowing that she had taken a close personal interest in the events leading up to this bill, and to Hon Peter Collier, with his new-found responsibilities for Indigenous affairs, and they were both very supportive of delaying debate on this bill. Hon Norman Moore took a little more persuading. He is in charge of business in this house and he clearly wanted to get on with things. However, I then spoke to the minister, who is now in the other place, and he agreed, when he heard the concerns being expressed, that we should delay the debate. That is why we arrive here tonight at the start of this debate. I am not going to comment on this for very long. I think that most of the work that we will do will be done in committee as we work through the bill clause by clause to try to give some legislative effect to the points that have been raised with us by the major stakeholders and to see whether we can make this a better bill.

Just to give some substance to my comments, I will share with members a letter that was written to Hon Bill Marmion, the Minister for Environment, with a CC to Hon Brendon Grylls, Hon Colin Barnett, Hon Wendy Duncan and Hon Peter Collier. The letter is dated 14 February, and it is from the Environmental Defender's Office WA, the Goldfields Land and Sea Council, Yamatji Marlpa Aboriginal Corporation, the National Native Title Council, the Conservation Council of Western Australia, WWF Australia, the Wilderness Society WA Inc, and Nolan Hunter, chief executive officer of the Kimberley Land Council. The letter is signed by all those stakeholders, and it states —

> We the undersigned, wish to express our congratulations to the Government for introducing the Conservation Legislation Amendment Bill 2010. Amending legislation to allow for stakeholders, particularly Indigenous Traditional Owners and Native Title claimants, to enter into partnerships for land and sea management represents a crucial step towards integrated management for a more sustainable Western Australia.
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> However, in order for the amendments to achieve their purpose it is essential that key stakeholders, who may in future be involved in (or party to) joint management arrangements, are able to comment on the detail of the proposed legislative framework underpinning such joint management. We would like to draw your attention to a number of important matters regarding this Bill. Consultation with key stakeholders was very limited prior to the introduction of the bill into Parliament. Additionally, the late release of the Explanatory Memorandum into the public domain has frustrated the efforts of key stakeholders in interpreting the provisions of the Bill.
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> In light of the difficulties we have experienced in making comment on the details of this important piece of legislation, we request that second reading debate on the Bill be deferred to allow sufficient time for consultation, or that the Bill be referred to Committee to provide for further comment and input from our organisations.

As a member of the Labor Party, I am very much aware that the genesis of this bill goes back a couple of decades. This is a problem that has been brewing for some time, and this is a problem that has demanded our

attention for some time. In the last few months of the Labor government, we made an attempt to move down this path. My feeling at the moment—there may be some disagreement from other members on this side of the house—is that there is no need to take a first course of action whereby this bill would be referred to a committee. My feeling is that we can probably work through in this house what we need to work through. That will not take up much time, because we are very fortunate to have the assistance of groups with the experience and integrity of the groups that have signed that letter. These groups have done an extraordinary amount of work in the past three months to get us where we are tonight. I believe that if we can work through some of the suggestions that are in front of us, we will come up with a very adequate solution.

Another reason that I am suggesting this course of action is that we have kept these stakeholders waiting for long enough. These stakeholders have been caught in a situation that nobody anticipated. I will give members a brief run-down of that in a moment. They have expressed their frustration and deep unhappiness with the way in which the system is working to deliver to them something that is quite rightly theirs and that has been acknowledged by the courts as being quite rightly theirs. Our system of law and regulation has had its grip firmly on the hose for far too long. I want to see whether we can move through this process expeditiously so that we can at least find ourselves back in tune with these stakeholders. These stakeholders are saying, "Frustrated as we might be, and much as we would like to spend time on arguing for a better outcome, we will take what you give us now in order to move forward." That is the spirit in which I am approaching this bill.

Undoubtedly, the minister with responsibility for this bill in this house will be able to tell us, when she makes her second reading response, what has happened in the nearly three weeks since we deferred this debate. I am hoping that the minister will be able to tell us that some more extensive consultations have been held during these past three weeks. It was very troubling to me to find out that there are still people in the government and in the senior ranks of the bureaucracy who think that they can undertake a consultation of this kind simply by flying into a regional centre, sitting down with a group of traditional owners for a couple of hours, working their way through the bill clause by clause for those couple of hours, saying, "So you're right with that, then?" and flying out again. It simply does not work in that way. I do not want to endorse a process that has been conducted in that manner, and neither do any of my colleagues in the Labor Party. I am sure Hon Robin Chapple will make the position of the Greens very clear when he addresses this bill.

I am hoping that Hon Helen Morton, because she is in charge of this bill in this house, even though she is not the Minister for Environment, will be able to provide us with some indication of what has been happening during these past three weeks. What I have seen come across my desk is far more elaborate suggestions and pointers as to how this bill might be improved on the one that we were looking at three or four weeks ago. A lot of work has been done by the stakeholders. I respect the work that they have done, and I hope that we will give some acknowledgement to that work as we progress this bill through the house.

I have said that this process has been going on for a long time. I have also made reference to the fact that it is because of a set of circumstances that nobody anticipated would happen that we have ended up with this problem. We need to go back to the decision of Justice French in September 2002, when the Federal Court of Australia made a consent determination on the Martu native title application. Everyone assumed that that application would include—I think I can use that expression as a bit of shorthand—Rudall River National Park. That was probably the first time in the history of native title in Western Australian that it had been pointed out clearly by the court that if a vesting order has been made pursuant to section 33 of the Land Act 1933, native title has been extinguished. The point was made in that determination that exclusive possession native title would have been determined over Rudall River but for that extinguishing event, that extinguishing event being the creation of that A-class reserve. That was a bitter blow to the Martu people, as everybody will remember. What the government did, in order to address that unforeseen outcome that was part of that native title determination, was talk to the Martu about entering into joint management arrangements.

About three years later, a second determination was made on the Ngaanyatjarra lands native title application for the Gibson Desert Nature Reserve, and the same finding was made. I guess by then the lawyers had begun to realise that there was a problem with section 33 of the Land Act. In that determination the court made the explicit statement that exclusive possession native title would have been determined over the Gibson Desert Nature Reserve but for the extinguishing event.

During those few years, the Labor government put its mind towards trying to resolve that problem. That was clearly going to be done through some kind of formalisation of the joint management arrangement. Hon Helen Morton will remember very well the debate in this place in 2008 on the Indigenous Conservation Title Bill 2007. That went through this house, and ended up back in the Legislative Assembly when the government changed. I wonder whether, as part of her response, Hon Helen Morton will be able to tell us what has happened to that bill. Although quite extensive amendments were made between the debate in the other place and the debate here, my reading of that debate is that it came out of this place as a pretty good piece of legislation. It obviously fell away when the government changed. I read somewhere that the Attorney General said that he is giving the matter his

consideration. I do not believe that I have heard him actually say that it has been junked. It was something I raised with the advisers in connection with the discussion of the bill before us tonight, but it is still not quite clear to me. It is clear to me that there is some kind of ongoing narrative that connects the two bills, but I would appreciate some addressing of that matter by the minister with responsibility for the bill when we finish the second reading debate so we can talk about it in committee.

The advisers pointed out to me that this bill is nothing like the ICT bill. It becomes obvious when members become familiar with the bill. I think the government believes it has a better solution, but as I have been through the bill in some detail, and as that letter that I read out a couple of minutes ago points out, we did not get the explanatory memorandum until very late in the piece. It turned out to be a 40-page document. There has been a lot of work in the past couple of weeks getting up to speed. I can see it is a better bill in that its scope is broader, because obviously the ICT bill related to only Rudall River and the Gibson Desert Nature Reserve. I still have some very serious reservations about the way this bill works. I would appreciate it if that matter could be addressed.

I should point out, in case people are reading this debate some time down the track, that the reason the debate on this bill is starting in this house is that at the time it was second-read the minister was in this house. It will be a reverse debate in some senses. The minister will not get the chance to make his own comments until it has gone to the other place. That probably sets the tone for this debate. I intend to try to get some things on the record so that things become clearer once they go to the other place.

As was pointed out in the second reading speech, we are essentially amending two acts. Of course, it is time they were amended. The Conservation and Land Management Act 1984 is silent on all matters related to Indigenous heritage. There is no mention of Aboriginal customary purposes when it comes to the sorts of practices that go on inside environmentally sensitive areas. I get the feeling that if we talked to anybody under the age of about 30, they would be astonished to find we are still working on legislation that did not make provision for customary practices such as the taking of material for medicine, food, or ceremonial or artistic purposes. Clearly, the bills need to be brought into the twenty-first century; they need to be brought into the post-reconciliation age, if I can call it that.

I have given a bit of history of Rudall River and Gibson Desert and how these discussions were first ignited, or what gave them some impetus. The stumbling point happened a few years after that when it was brought to the attention of bureaucrats in the Department of Environment and Conservation, and then to the government's attention, that sections 16 and 16A of the CALM act were deficient in terms of joint management arrangements. I suppose this is one of the occasions when we are really in the hands of the lawyers, because my reading of section 16 is that although it does not mention joint management arrangements, it does not specify single management arrangements. It does not actually say that only the CEO of DEC can enter into these arrangements. Governments of both persuasions often decide to take the advice of the State Solicitor and play it safe. Here we are now making specific provision for joint management arrangements in the CALM act.

The government has recognised this in its own rhetoric: consultation was the absolute key to get this bill off on the right foot. My view is that it has not been entirely successful in that respect, although I think we are closer to it now than we were a few weeks ago. This is not some airy-fairy leftie–greenie fantasy that we wax lyrical about on this side of the house; it is about those fundamental —

Hon Donna Faragher: Excuse me; the last I knew it was introduced by this government, not yours.

Hon SALLY TALBOT: It is about concepts of free, prior and informed consent, which are basic legal principles. It is not something that sits terribly —

Hon Donna Faragher: We introduced the bill!

Hon SALLY TALBOT: Hon Donna Faragher will have an opportunity to speak on this bill.

Hon Donna Faragher: I will!

Hon SALLY TALBOT: I am absolutely sure she will take it, because after all —

Hon Donna Faragher: We actually introduced the bill, not you.

Hon SALLY TALBOT: I recognise that, but if Hon Donna Faragher was listening to what I was saying, she would know that I was talking about the consultation process, which I assume, because she would have seen her second reading speech—I do not think Hon Donna Faragher made it; I think somebody here —

Hon Donna Faragher: Sorry; I actually had a baby, but you know!

Hon SALLY TALBOT: I was not going to say the member had a baby. I was going to say that she was out of the house on urgent parliamentary business.

Hon Donna Faragher: It was urgent, I suppose!

Hon SALLY TALBOT: Hon Donna Faragher was still the responsible minister at that stage, so I am assuming she saw the second reading speech. It gives voice to this imperative about consultation. I am suggesting that Hon Donna Faragher did not get off to a terribly good start with that. I am pointing out that the need for consultation is now taken to be a fundamental legal principle. It is a fundamental right of Indigenous people to be put in a position in which they can give free, prior and informed consent to these kinds of measures.

From the government's second reading speech, from the briefing I was given by the people in DEC, and from the feedback I have received from the stakeholders, the consultation involved the land councils, quite properly; the Miriuwung–Gajerrong group; the Yawuru, who are the native title holders around the Kimberley; and the native title holders involved with the Burrup and Maitland Industrial Estates Agreement, which I understand is probably the most complicated of those three negotiations. I situate my comments in the context that all those groups want these agreements honoured. I will refer to the two native title determinations that I just described, but there are probably about 11 other separate areas of the state that are subject to exactly the same problems that we found with Rudall River and the Gibson Desert Nature Reserve. The state has existing obligations in relation to those native title claims. We need to take action quickly to empower the traditional owners to look after and manage their own traditional country. One of the difficulties that we run into is the stage at which we should be involving the traditional owners, the stakeholder list of councils and other groups that I just read out in relation to that initial letter. I suggest that there are still elements in the government who do not have their heads around how this kind of consultation might be done. I have been given permission by the TOs to use an example of a certain area. Creating something as significant as a nature reserve involves walking into someone else's country and making a determination about how that country will be cared for. One thing that was very much on the minds of members of the Liberal and National Parties, which were then in opposition, when debating the Indigenous Conservation Title Bill 2007 was the need to protect multiple values. We need to protect the environment in areas that have already been designated as A-class nature reserves and national parks and also promote cultural and community values among the local people. One of the problems is that the government still seems to think that it is acceptable to involve the traditional owners way down the track when all the important decisions about the boundaries and what the multiple values will be have been determined. However, I believe that some people, including our new Minister for Environment and his predecessor, have a problem with the concept of multiple values. When I asked Hon Donna Faragher what I thought was a perfectly straightforward question about what multiple values she was aiming to protect at Camden Sound, she said that everyone knew about the whales. The whales might be very valuable, but they do not represent a multiple value. I understand that when a similar question was asked of the new Minister for Environment in the other place last week, his answer was, "There are a lot of fish." I think government members have a little way to go before they can sit down with some of the TOs and have a serious conversation about that type of thing.

I note that Hon Peter Collier is away on urgent parliamentary business, but I urge him—I am not in a position to share this document with him—to ask the Minister for Environment for a copy of the submission in response to the "Proposed Camden Sound Marine Park Indicative Management Plan 2010", which was submitted to the Department of Environment and Conservation by the Kimberley Land Council. There is a very clear and, I think, quite distressing account in that document about the government's failure to consult with the TOs and take the views of TOs as seriously as the government takes the views of other stakeholders, such as pastoralists. I can give members some flavour of the comments. The TOs from the Dambimangari mob have given me permission to refer to this. Their submission states —

> Despite assurances in those meetings that the State was concerned to ensure that a co-operative and joint approach to management of sea country was implemented, there was been no action taken to date to allow native title claimants to participate in the process for *consideration of* establishment of a conservation reserve that is likely to have significant detrimental effects on their property rights and their cultural heritage. The most recent confirmation of this came in correspondence from the Premier to the KLC dated 3 December 2010, in which a "communication program to raise awareness in the community about the [Kimberley Science and Conservation] Strategy and its implementation" was identified as the State's sole response to engagement with Traditional Owners regarding the proposed marine park. This demotes the native title rights and cultural heritage of Traditional Owners to the same level as the general public interest in the creation of conservation reserves. This response is not appropriate or adequate.

All of us on this side of the house would heartily concur with those sentiments. We urge the government to try to do better.

This bill is complicated. As I said, I will leave many of my detailed comments for the committee stage. When the Liberal Party was in opposition, it often used to fling across the chamber the accusation that we presented legislation that was not backed by a detailed set of regulations. That specific criticism was made of the waste avoidance and resource recovery levy bills when I carried them through this house. The point is that we needed a

legislative framework around which to write those regulations. However, this is a different kind of bill. We should have got to this stage with a very well worked out set of regulations because those regulations need to be worked through with all the stakeholders. We cannot embark on this kind of process with the same attitude that I have just described in relation to the proposed Camden Sound marine park. The government cannot involve the TOs as just another interest group. That is not what they are; they are the owners of that country. I cannot understand why we do not have a properly worked-out set of regulations in front of us, at least in a worked-out draft form, that can be considered as we move through this bill. I would like the minister to address that point.

I will give members a taste of some of the issues that have been raised with me as examples of why those regulations are just as critical as the substance of the bill, if not in certain respects even more critical. We still tend to assume that we can put things in different baskets and address them separately. What I read in the government's rhetoric about this bill is that the government will take care of all the environmental concerns and the TOs will look after their business, which is essentially to do with law, culture and heritage. Of course, it does not work like that. I can tell members, as a member for the South West Region, that the TOs in the South West are as concerned as—I might perhaps say they are even more concerned than them—some people in the government about the spread of dieback. If we are going to have joint management arrangements in the South West, the control and management of dieback must be right up there as one of the primary considerations; it is not an add-on later. The government cannot walk up to the table some months down the track and talk about it.

Other TOs have raised with me the issue of removing things from environmentally sensitive areas. I have already talked about the use of these areas for cultural purposes, including for medicine, food, art and other ceremonial purposes. We need a very clearly worked out set of expectations, requirements and penalties that link into those purposes and set out what can and cannot be taken. When I talk about taking things, I am not talking about taking things in the sense of causing environmental damage; I am talking about the damage that might occur to cultural, social and heritage values. I have been sitting here for the past couple of hours listening to Hon Ken Travers, Hon Alison Xamon and Hon Simon O'Brien talking about certain traffic regulations. Hon Ken Travers pointed out that again and again we were being asked to trust the government. The government says, "It'll be okay; we won't do anything terrible." Even if we accept that at face value and that is the case—I make the same point that I made during an earlier debate—we do not know who will be in government next. We do not know what will happen in 10 or 20 years. We should be concerned about leaving as few loopholes as we can when we pass this legislation. I cannot see why we cannot have at least a set of draft regulations for the outcomes of customary practice.

There are a couple of glaring holes in this amendment bill. I do not really want to rank them in order of importance, but perhaps one of the most obvious is: what is the first thing to look for when looking through a bill of this kind? It is money. Is it going to cost anything? If it is, has the government made provision to provide those resources? If I am wrong, I am sure Hon Helen Morton will address it in her second reading summary. There seems to be an assumption in the capital and operational costs associated with joint management. Are they going to be picked up from consolidated revenue? Are they going to come from somewhere else? Does the minister think there will not be any capital and operational costs? I cannot see that that latter proposition could be sustainable. The minister would surely have to be looking at least at training costs. If the minister is not looking at training costs, there is a big problem. Members on both sides of this house will be very familiar, although those on the government side of the house might give it less credibility than do members on this side of the house, with the accusation that a state government program—for example, the Indigenous ranger program—more often works just as a program that dresses people up in a ranger's uniform and gives them a badge and sends them out to do nothing that they have been trained for. There is a stark contrast between that and some of the programs run by the commonwealth. If honourable members have had a chance to read some of the background material that was provided to them about this bill, they will be aware of the contrast, elaborated in some detail, between the programs associated with caring for country and some of the commonwealth programs that provide real training. That is basically the question I am asking: where is the money for the training? If it is not there, where is it going to come from; or is it not there for another reason?

There is also the question about who we are actually empowering to enter into joint arrangements. Again, I will leave most of my comments until the committee stage, but I want to refer to the definition of the person responsible. For those who want to follow this debate, clause 8 of the bill is key here. It refers to all persons responsible and to the written consent to proposed section 8A management agreements. The specific terms at proposed clause 8A(11) state —

> (a) each person responsible for the land is either a party, or has given written approval, to it; and
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> (b) the Minister has given written approval to it.

That definition of the person responsible leads to some very serious problems, because it essentially omits an absolutely vital class of persons. Those are the people who do not have exclusive native title rights to the area

under question. This omission means that a joint management agreement could be reached between the CEO of the Department of Environment and Conservation and a non-exclusive interest holder—for instance, a pastoral lease holder—without the consent of the non-exclusive native title holders or the registered native title claimants. It is a technical point, but if members have had a look at the amendments on the notice paper, they will see that this is something that many of those amendments have tried to address. There is clearly a failure when we get different classes of people being subject to a different standard of treatment or a different validity of claim under a piece of legislation like this.

There are several amendments on the notice paper that relate to the definition of "person responsible", so that it includes exclusive and non-exclusive native title holders and registered native title claimants. There is also a question about how people are informed of what is going on. I think as we work our way through the committee stage it will become obvious that there are real problems if there are people with either existing or future claims to the land who are simply missed out of the whole negotiation process. Clearly, this is going to lead to very serious problems down the track in terms of legal challenges.

Debate adjourned, pursuant to temporary orders.