

**YALLINGUP FORESHORE LAND BILL 2005**

*Second Reading*

Resumed from 4 April.

*Point of Order*

**Hon BARRY HOUSE:** I have in my hand copies of two Supreme Court documents that indicate that this matter is currently under consideration by the Supreme Court. I will read one of the documents; the other is virtually a copy. The first document reads -

**IN THE SUPREME COURT OF WESTERN AUSTRALIA**

CIV/2353/2003

BETWEEN

**William Garth HAMMOND As Executor Of The Estate  
Of Thomas Garfield Hammond**

Plaintiff

- and -

**STATE OF WESTERN AUSTRALIA**

Defendant

**ORDER 29A CASE MANAGEMENT DIRECTIONS  
STATUS CONFERENCE No.4  
REGISTRAR S BOYLE  
DATE: 22 February 2006**

**IT IS ORDERED THAT:**

1. The plaintiff file and serve a reply to the defence not later than 14 days of today's date.
2. The parties are to file and serve affidavits of discovery not later than the 31 March 2006.
3. The time for inspection is within 14 days of the filing of the affidavits of discovery.
4. Prior to the date of the next conference the parties are to confer about the possibility of referring this matter to mediation together with CIV/2567/88 and the solicitor for the plaintiff is to write to the Court not later than the 31 March 2006 and advise the Court that the parties consent to the making of mediation orders.
5. This matter be adjourned to a Case Evaluation Conference on Wednesday, 12 April 2006 at 11.00am.
6. The costs of today on this action be fixed at \$250.00 and payable in the cause.

BY THE COURT

S BOYLE

REGISTRAR

The other document has the same wording, except that it is between William Garth Hammond, as executor of the will of Thomas Garfield Hammond, and the Minister for Works and others. I contend that there is an issue of sub judice in this matter, and I ask for your ruling on the matter, Mr President. I seek leave to table these two documents.

Leave granted.

[See paper 1413.]

**The PRESIDENT:** I propose to leave the chair until the ringing of the bells, so that I can read the documents Hon Barry House has just tabled and give the matter appropriate consideration.

*Sitting suspended from 3.07 to 3.22 pm*

*Ruling by President*

**THE PRESIDENT (Hon Nick Griffiths):** Hon Barry House has raised a point of order. In civil cases, the convention restricting references in debate would apply from when a matter is set down for trial. This matter has been set down for trial. The documents tabled by Hon Barry House go to matters of procedure and a case evaluation conference. The convention, however, is always subject to the right of the house to legislate on any

matter. The proceedings and the subject matter of the bill are intertwined to such a degree that it is unavoidable to separate the two. Therefore, the debate can proceed.

*Debate Resumed*

**HON GEORGE CASH (North Metropolitan)** [3.23 pm]: We are debating the Yallingup Foreshore Land Bill 2005. This is a bill in the same form as another bill of the same name that was introduced into the Legislative Assembly in 2002 and debated in this house soon after. I believe it is important to understand what this bill is all about and what form the bill takes, because it is relatively short when compared with other bills that have previously been before this house. The long title of the bill indicates that this is a bill for -

An Act to make provision about the resumption of, and the application of certain provisions to, certain land in the vicinity of the Yallingup foreshore, and for related purposes.

The bill will come into operation on the day on which it receives royal assent.

Clause 3 contains definitions. In this bill, “land” means the land at Yallingup that was the subject of a land resumption notice published in the *Government Gazette* on 9 December 1938, at page 2112. There are other definitions in clause 3. Clause 4 makes a statement about the validity and effectiveness of the resumption that took place some years ago. It reads in the following terms -

- (1) Subsection (2) applies if, and to any extent to which, the resumption was invalid or ineffective.
- (2) The rights and liabilities of all persons are declared to be, and always to have been, the same as if the resumption had been valid and effective in all respects.

The reason for this clause is to overcome any deficiencies that may have been present in the original resumption. I will argue, on the information that has been provided to me, that the state may be guilty of a concealed fraud in respect of the action that it took when the land was originally resumed, and some of the actions that it has taken since that resumption.

Clause 5 is headed “Certain repealed provisions do not apply to Yallingup foreshore land”. Subclause (1) reads -

- (1) The rights and liabilities of all persons are declared to be, and always to have been, the same as if the repealed provisions never applied to the land.

It is obvious what that means. The clause then goes on to describe the repealed provisions, and a number of acts are set out.

Clause 6 is headed “Certain current provisions do not apply to Yallingup foreshore land”. Subclause (1) states -

Sections 190 and 191 of the *Land Administration Act 1997* do not apply to the land.

Subclause (2) states -

The rights and liabilities of all persons are declared to be, and always to have been, the same as if sections 190 and 191 of the *Land Administration Act 1997* never applied to the land.

It is therefore necessary to go to the Land Administration Act 1997 to see what sections 190 and 191 provide for. Section 190 of that act has the heading “Option to purchase if fee simple not required for public work”. The section contains a number of extensive provisions that go over one and a half pages and comprise 11 subsections. Section 191 is headed “Person who would be entitled to option to purchase may require determination of whether the interest is required”. That section contains three subsections. There is no need for me to go through those subsections, only to say that the provisions contained in clause 6 are to the effect that sections 190 and 191 of the Land Administration Act 1997 are not to apply to the land that is the subject of this bill. Notwithstanding that they are not to apply, clause 6(2) makes it very clear to a court that sections 190 and 191 of the Land Administration Act 1997 never applied to the subject land. That in itself has very significant ramifications regarding the resumption of this land.

Clause 7 is headed “Treasurer may make payment in respect of legal costs incurred in relation to Yallingup foreshore land”. Subclause (1) provides -

The Treasurer . . . may make payment in such amount as the Treasurer considers to be appropriate in respect of legal costs incurred in proceedings of a kind referred to in section 200(3) of the *Land Administration Act 1997* in relation to the land.

Subclause (2) reads -

Any money payable under a decision of the Treasurer under subsection (1) is to be charged to the Consolidated Fund which to the extent necessary is appropriated accordingly.

As I have said, this is not a lengthy bill. However, it is a bill that will have a considerable effect, not just on the land in question, but, more than that, on all those who claim a right under the estate of Mr Hammond, the person from whom the land was originally resumed. The bill is not about protecting the rights of an individual. This bill is about removing the right of an individual and preventing him from having access to a court of justice to examine the evidence that he is prepared to submit to that court and to determine whether a fraud was committed by the state against his family estate many years ago. The bill invites the Parliament to assume the role of a court and make a decision that will validate all previous acts relating to this land. It thereby denies the plaintiff any lawful opportunity to have his day in court. It also denies the Parliament access to the evidence of both the plaintiff and the defendant.

As I said earlier, a bill of the same form was introduced to the Parliament in 2002. I will not repeat the comments that I made during the second reading debate on that bill. However, anyone who is interested in this action should read the comments that I made on 9 May 2003 concurrently with the debates on this bill in both the Legislative Assembly and the Legislative Council.

Members will be aware that I have spoken in this house previously on the doctrine of the separation of powers as propounded by the French jurist and philosopher Montesquieu. Under the doctrine of the separation of powers, the functions of the three arms of the state - the legislature, the executive and the judiciary - must be exercised by separate and independent organs. This bill destroys the long-held principle of the separation of powers by ousting the jurisdiction of the courts and requiring the Parliament to assume the role usually reserved for the courts. This bill will remove the right of an individual to have his day in court. It will prevent the plaintiff from presenting his case, and the accompanying evidence in support of his claim, which in part includes the fact that the state perpetrated a fraud many years ago on his father when it resumed the land the subject of this bill.

There is no doubt in my mind that this bill can be described as being the equivalent of using a sledgehammer to crack a small nut. In its present form, the bill is unquestionably discriminatory in its effect. It is designed to target one particular individual and to extinguish the lawful rights of that person in relation to a single piece of land. Some have said that the reason for the government's legislation is the location and current value of the land. I put it to the house that this bill is not about the location or value of a particular piece of land. If this bill related to a piece of land that was located in the desert region of Western Australia and was of no significant value, the state would not be denying the plaintiff his day in court and the opportunity to justify the merits of his claim. This bill is not about a particular piece of land. It is about the removal of the longstanding principles of justice and equity in respect of that piece of land. Those principles should be maintained at all costs when there is a serious dispute between the parties about the published reasons for a resumption - in this case, of the Yallingup land - compared with the actual reasons for the acquisition of that land.

I should make it clear, as I have in the past, that I do not know whether the plaintiff's assertions are sustainable at law. I have always maintained the view that I am not in a position to judge the plaintiff's claim. The proper place for judgment of the plaintiff's claim is a court of law, so that the relevant facts can be presented, and the opportunity can be provided for cross-examination by the respective parties to the action to enable them to test the veracity of the claim against the evidence, in particular the records and documentation both before and after the resumption of the land, which the plaintiff says are known to be in existence and are in the government's custody. It is up to a court to test the validity of the plaintiff's claim by using its proven system of considering evidence and cross-examining witnesses to determine the merits of the case. I say again that I offer no opinion on the merits of the case, other than to say that every citizen is entitled to justice and to have his day in court.

I am aware that it is said by some that a number of the residents in the immediate area are wealthy and powerful, and they are very concerned that if the subject land was handed back to the estate of Mr Hammond, it would be developed in due course, and that development would have an adverse impact upon the immediate area. If that is the foundation or reason for this bill, justice in this state has hit an all-time low. If it is the case that the wealth and power of certain people who are motivated only by self-interest can prevent the plaintiff from having his day in court, we have reached a sorry position in Western Australia. The members of this house are not in a position to judge the plaintiff's claims and assertions, because the members of this house do not have the evidence before them to make a considered judgment on what is clearly a very complex set of circumstances.

In my view, the second reading speech of the government is designed to obfuscate by providing only limited information from one party to the action. For instance, the plaintiff claims in part that the state dispossessed his father of the land the subject of this bill by fraudulent means, and that the land was resumed for an improper purpose. Given the nature of the claim and the history of the delays in having the plaintiff's evidence heard in open court, I ask: why is the government hell-bent on extinguishing the plaintiff's right to his day in court? Is it because the government has reviewed its files on the manner in which the land was resumed and subsequently used, and is now aware of the legal consequences of its actions so many years ago? Why else would the government frame the bill in the manner in which it is framed, if not to ensure that all actions taken by the government are deemed to be valid and beyond further question while denying the plaintiff his opportunity to air

his grievance in an open court? There is little doubt that should the plaintiff be able to show to a court's satisfaction that a fraud was perpetrated against his father many years ago in the resumption of this land, a court would hold that the Crown was holding the land as a constructive trustee for the former owner. I have no doubt that the government is aware of the obligations of the constructive trustee and, accordingly, seeks to use this Parliament and an individually targeted act of Parliament, to abolish any claim the plaintiff may lawfully have to the land the subject of this bill.

It has been put to me that the bill would be held to be an invalid use of power if we had a provision for fair and just compensation as part of the state Constitution or as a provision in specific legislation. I argue that a legislative provision for fair and just compensation is not relevant to the resumption of the land the subject of this bill. Fair and just compensation relates to land lawfully resumed or acquired. The payment of so-called fair and just compensation of itself does not extinguish or make good a fraud that has been perpetrated on a landowner. Once the fraud has been committed, the perpetrator of the fraud holds the property the subject of the fraud on behalf of the injured party. It is clear that the plaintiff's assertions, in part, involve claims that the state acted improperly in the resumption of the subject land and, further, that the state perpetrated a fraud on the then landowner in its dealings with him during the resumption of the land. These assertions are extremely serious and go to the heart of the system of justice in Western Australia.

It is critical that the facts relating to the original resumption, including the copious departmental file notes on this matter, be presented to an open court. I note that, equally, that would not apply to the statute of limitations in cases of concealed fraud, inasmuch as time will not be deemed to begin to run until the discovery of the fraud. If the plaintiff is prevented from having his day in court, that will represent a travesty of justice - one that this Parliament could not be proud of. I urge members to read the bill to understand the objects of the bill and to recognise that it will extinguish an individual citizen's lawful rights to have his day in court. In other words, he will be denied the opportunity to present his evidence and to have it tested and, therefore, to have a competent court determine the merits of the case. In addition to extinguishing an individual's lawful rights to have his day in court, the bill also provides that the land the subject of the bill was validly and effectively resumed. This is an attempt - I emphasise, an attempt - by the government to use the Parliament to make good any fraud that may have been perpetrated in the past concerning the subject lands. With regard to the limitation of time, which has been raised on occasions, I suggest that members read the Limitations Act 1935, particularly the sections on a concealed fraud, because I believe they are relevant to this issue.

I will summarise some of the issues I have raised to date before I refer to more detailed information that has been provided to me by the plaintiff. I understand that detail has been provided also to some other members of Parliament. The plaintiff claims that that detail will indicate a concealed fraud in the original and subsequent dealings in the resumption of this land. Firstly, this bill is not about protecting the rights of an individual; it is about removing the rights of an individual. Secondly, the removal of those rights from the individual means that he will be denied an opportunity that is available to any other citizen in Western Australia - the opportunity for a court of justice to examine the evidence he wishes to present and for the court to determine whether a fraud was committed by the state against his family estate many years ago. I have raised the issue of the doctrine of the separation of powers because I want to remind members, as I have in the past, that the doctrine of the separation of powers is all about the separation of the three primary functions of the state; namely, the legislature, the executive and the judiciary. The doctrine of the separation of powers is about ensuring that those particular organs of the state are able to function and make decisions independent of each other. They are distinct and independent organs. If members examine the separation of powers in Western Australia, they will have no doubt that there is a clear distinction between the role and functions of the Parliament compared with the role and functions of the courts. I emphasise that by saying: Parliament makes the law, and the courts interpret the law. I also indicated that the two great concerns of the law are the safety and wellbeing of the individual and the protection of his or her property rights. This, clearly, is not the intent of this bill. If the protection of an individual's property rights were the intent of the bill, we would refer the issues surrounding this case to an independent, competent court. We would enable that court to hear the evidence and decide the facts after the evidence was tested. However, this is not a one-way street. The plaintiff should be able to bring his evidence forward. Equally, the state should be able to bring its evidence forward. However, the state also would be bound by the rules of discovery to produce a significant number of documents on matters relating to this resumption, prior to the date of resumption in 1938, when departmental file notes were being written about the proposed resumption of this land. At that time, the land was resumed because the then state hotels department owned what is now Caves House Hotel in Margaret River. As evidenced by the file notes, the state indicated that it had a problem disposing of sewage from the Caves House State Hotel, as it was in those days, and that one of the reasons for the resumption of the land was to enable the government to construct a pipeline through to the sea to dispose of sewage and other matter. I am told that that fact was never raised with the then owner of the land. In fact, the departmental notes show that an attempt, or a number of attempts, may have been made to

conceal certain facts from the former owner of the land to deny him his rights in the 1930s when determining what actions he should take.

Some documents that will be provided to me form part of the records of the court on this matter. The first is a note written in March 1938 to the Under Secretary for Works and reads -

This file was left with me by Mr. Williams of the Land Resumption Office, who wished to know whether or not the Government desired to proceed with the resumption of a block of land adjoining Caves House at Yallingup.

I submitted the papers to the Hon. the Treasurer, who stated that it was not desired that the resumption be proceeded with.

(Sgd.) Alex J. Reed,

24th March, 1938.

UNDER TREASURER.

In response to that, another document has been provided to me. It is a letter directed to the Under Secretary, which reads -

The decision of the Hon. Treasurer settles the proposition of the Chief Secretary for the time being.

The owner of the block recently called upon this office. He asked for something definite regarding resumption and was informed that it was not the Government's intention to proceed at present. I pointed out that I could not speak with certainty regarding any future proposition bearing in mind that portion of the block may be required in the near future in connection with the septic installation for the new Caves House. I mentioned that a small area may be taken and indicated the locality.

Mr Hammond was in full agreement with the proposal and would fully support same. The object of his visit was to ascertain the position in order to decide his own policy.

The letter was signed by W.C. Williams for the Assistant Under Secretary, LRO. I suggest that "LRO" are the initials of the Land Resumption Office. The letter was dated 11 April 1938.

Another letter directed to the Hon Chief Secretary - I should say at this point that these documents are in the form of memoranda rather than letters - states -

Will you please note the decision of the Hon. Treasurer.

It was signed by the then Minister for Works and dated 14 April 1938.

Another document, a memorandum, addressed to the Hon Minister for Works dated 3 March 1938 states -

The matter of the resumption or acquisition of this land has been under consideration for over 30 years.

It is interesting that this document was written in 1938. They alluded at that stage to the fact that resumption of the land was considered in the early 1900s. I guess that the wheels of government turn slowly, not just in respect of this land, but also generally. The same could be said of the plaintiff's opportunity to have his day in court. The memorandum continues -

The land comprises Sussex Location 269 and is situated immediately in front of Caves House. It is, in fact, the gorge or valley between the House and the ocean.

The acquisition of this valley of 96 acres is most desirable from every viewpoint, but really becomes an actual necessity when viewed from the point of view of our sewage disposal, which has for many years past polluted the stream that runs through the property.

The document continues -

Now that a large sum of money is about to be spent on the enlargement of Caves House, it is evident that the added sewage disposal will become a matter of much gravity.

The land, from almost a State aspect, should be acquired either by resumption or purpose.

It goes on to state -

Please see the minute of the Town Planning Commissioner (Page 9, 6365/02).

It further states -

I forward for your full information, File State Hotels 87/1927.

I hope you may be able to finalise this matter speedily.

It is signed by W.H. Kitson, Chief Secretary, and dated 3 March 1938. There is also some handwriting on that document. One of the notations is to somebody's attention and is initialled.

On 21 February 1938, a memorandum from J. R. Campbell, who was the general manager of Caves House, to the Under Secretary of Lands stated -

You recently were making enquiries regarding the acquisition of land fronting the Caves House Yallingup.

You will notice from the file that this is a matter which has been repeatedly given consideration for over 30 years past. The situation today is far worse than ever it was, and the acquisition of the land is a public necessity.

I should be glad if you would advise me what action you propose taking in this matter, and in due course return this Department's file.

In that note, Mr Campbell was alluding to the need to dispose of the sewage from that particular property by way of a pipeline from Caves House through the resumed land to the coast.

Another document dated 12 February 1938 is a letter written by the Town Planning Commissioner. It is addressed to the Secretary of the Premier's Department, Perth. It is headed -

Re private land adjoining Yallingup  
Caves House.

I will not read the entire letter because it is lengthy. The last two paragraphs state -

I would urge and strongly recommend that immediate resumption of this area take place, otherwise the value of public expenditure at the Caves House will, to a great extent be minimised, and the value of the locality weakened for tourist attractions.

It will also be clear that beach development and a properly controlled seaside resort as an adjunct to the Caves House would be undertaken by the State.

There are arguments that the content of these letters clearly indicate a particular intention by the state to take the land for the benefit of Caves House and not for the benefit that was set out in the *Government Gazette* when the land was originally resumed.

Another letter dated 12 February 1938 is on the letterhead of the Town Planning Commission and is directed to the Under Secretary for Lands. It is signed by the Town Planning Commissioner, and states -

I attach a copy of a memorandum forwarded to the Under Secretary, Premier's Department.

You might care to take a co-operative or concerted action to have the matter looked into.

It would be rather late for resumption to be made if the private owner decided to present a plan of subdivision to the Town Planning Board for approval.

The plaintiff would argue that that letter in itself, which was directed to the Under Secretary for Lands from the Town Planning Commissioner, was a clear signal that the state should act with haste because if the private owner decided to present a plan of subdivision to the Town Planning Board, a number of matters would flow. One would be that the board would be required to make a decision regarding whether to either approve or not approve the subdivision. Secondly, if it approved the subdivision, any resumption of the land would no doubt have to be at a greater value than was originally paid. Again, the plaintiff would no doubt argue that that adds to the evidence that shows that the state had a particular intention both prior to and after the resumption of the land. That intention was certainly not signalled to the then owner of the land. There is documentation on government files that indicates that these matters were concealed from the former owner, and that the manner in which the former owner was treated and the information provided to him at the time represents a concealed fraud.

Those documents are from the 1930s. I indicated earlier that this matter has been before this Parliament for a very long time. Firstly, as I said, the original bill was introduced into the Assembly in 2002 but not proceeded with when it came to this house. I will qualify that point. It went to a second reading debate but, because, in my view, the government could not guarantee the numbers at the time given that the composition of the house was different from today - there were five Green members when the first bill was introduced in 2002 and debated in this place in 2003 - the government could not afford to take a vote on the second reading because there was every likelihood that the bill would be lost. Such was the concern of members of this house at the time, which concern is probably demonstrated by some matters I raise today. One difficulty with which this Parliament is faced is that some members have indicated to me that they will rely on what is said in the chamber to determine their position on the bill. If that is true, the plaintiff will be sold short. The plaintiff clearly wants to introduce significant evidence on many issues that occurred both prior to and after the resumption. He wants to raise those issues in a court so that various parties and the people responsible can be cross-examined - I refer to employees of the Department of Land Information, as DOLA is now known, and the State Solicitor's Office - to determine

their intent in handling this matter. Some may say that the various state government employees who handled the matter in the 1930s may not be around to answer questions, but there is clear evidence on departmental files of the government's intention at that stage. However, there is an opportunity for the plaintiff to cross-examine some employees who continue to be employed by the State Solicitor's Office and the former Department of Land Administration. Some who are not current employees but who work in other occupations in Western Australia are in fact available to give evidence in this case.

I am told that a significant body of evidence can be presented to show that some of the dealings between employees of the Department of Land Administration and the State Solicitor's Office would prove very interesting when raised in a court; that is to say, in recent years when this matter was the subject of discussions between the Department of Land Administration and the State Solicitor's Office, the intent of some of the employees to conceal what may be shown to be a fraud was evidenced in documentation and notes that appeared on the file. Clearly I would not want a cleansing of the files to occur, as that would be a very dangerous proposition. It also would go to the heart of justice in Western Australia if that were the case, although I am not suggesting that it would be the case. I just say that it is critical to the plaintiff that all the evidence be considered, not just the comments made in this Parliament. Members of this place are not sufficiently aware of the information and evidence in the whole case. Members are being asked to make a subjective decision on some comments made in the second reading speech, in which the government claims that it is in the state's interests that all previous dealings on this land be validated, notwithstanding a possible fraud, and that the plaintiff be paid an amount of money to cover some costs sustained by him over time. That is why I said earlier that this Parliament is not a court. Its functions are not the same as a court, its role is not the same, and it should not be called on to do the work of a court of law, as that is not what we in this place are about. This matter should properly be considered in a court of law. It should not be considered in this Parliament, because members will have the opportunity only to cursorily consider some facts that have been presented. That is not what justice is all about.

Since 2002, when this matter came before the Parliament, a son of the former owner has given some briefings to a number of members of Parliament. I recall that some years ago the plaintiff briefed the Liberal Party room, and I believe other members of Parliament, and provided some documentation on his position. However, I recall that during a party room briefing he gave that I attended, he made it clear that all he could do was raise a number of issues. He did not want it assumed that his comments were the whole story and all the evidence that he wanted to bring forward. However, he made a number of comments, and one document that was circulated by him to interested members at the time, headed "**YALLINGUP FORESHORE LAND BILL 2002**", reads as follows -

WHEN I DEPART THIS ROOM TODAY I HOPE TO LEAVE YOU WITH 6 THOUGHTS.

1. THE OWNERSHIP OF LAND IS A CORNERSTONE OF THE AUSTRALIAN WAY OF LIFE.
2. THE GOVERNMENT OF 1938 FRAUDULENTLY OBTAINED 33 ACRES OF MY FATHERS LAND FOR SELF SERVING COMMERCIAL PURPOSES. THIS CRYSTALISED A MASSIVE CONFLICT OF INTEREST BETWEEN THEM RUNNING A HOTEL BUSINESS AND HAVING THE POWER OF THE GOVERNMENT EXECUTIVE.
3. SUBSEQUENT GOVERNMENTS DID NOT ACT WITHIN THE LAW BY USING THE LAND FOR PURPOSES BEYOND THEIR POWER AND WITHOUT FIRST OFFERING IT BACK TO THE ORIGINAL OWNER AS PRESCRIBED AT LAW. (SEE OPINION OF DAVID MALCOLM QC).
4. THE GOVERNMENT, THROUGH IT'S AGENCIES DOLA & CROWN LAW, HAVE STALLED AND DELAYED MY ACTIONS AND THEN USED THAT TO DENY ME MY DAY IN COURT. GEORGE CASH AND DOUG SHAVE MOVED TO CORRECT THIS DISGRACEFULL SITUATION AND IN MY VIEW SHOULD BE COMMENDED FOR THEIR ACTIONS.
5. THE PRESENT ATTORNEY GENERAL NOW SEEKS TO CONCEAL THE FRAUD COMMITTED ON MY FATHER.
6. EVERY AUSTRALIAN SHOULD BE ENTITLED TO BE HEARD IN A COURT OF LAW AND NOT HAVE THAT RIGHT LEGISLATED AWAY. THIS IS POSSIBLY THE MOST MEAN SPIRITED, ONE PERSON, PIECE OF LEGISLATION TO COME BEFORE THE PARLIAMENT OF WESTERN AUSTRALIA.

The plaintiff also provided additional documentation, but it is many pages long and it is not possible for me to read it today. However, it is certainly available to those members who wish to avail themselves of it.

As we moved on, the plaintiff over time made a number of other representations and provided documentation to members of Parliament. The document I have with me comprises three pages of his notes. It is important that what he said be recorded because if this is to be the only place where matters relating to the resumption of this land are aired, at the very least I am sure the plaintiff would want his comments recorded for those who may be interested in reading them in the future. More than that, if this bill is passed, further action may be taken in other courts to determine the rights of the Parliament to extinguish one individual's lawful right or rights in respect of certain property. The document reads -

**YALLINGUP FORESHORE LAND BILL 2005**  
**The most disgusting piece of single legislation in the history of**  
**the Western Australian Parliament**

**WHY**

**The Injustice:**

Constructing a caravan park, a car park, a road and a fire station on the resumed land without following the procedures laid out in the Public Works Act was gross negligence and an insult to my father. The fact remains that the caravan park today earns income for the Government and is a total wrong to the Hammond family.

**Parliament is not a Court:**

The events and legal action leading to this Bill are complex. A court of law is the only place for matters such as this to be resolved. Members are being asked to act as judge and jury with scant regard to the relevant facts at law. A court is the only place where the true facts can be aired. Political bias has raised it's ugly head in a matter which should be straight forward.

**The Bill will be ineffective:**

Senior legal advice indicates that this Bill, if enacted, will not achieve what is intended as the way will always be open to challenge the outcome under constitutional law.

**The resumption was fraudulent:**

Again senior legal opinion indicates that the taking of the land in the certain knowledge that the action was deceitful and attempting to conceal the actions by hiding behind a seemingly soft resuming reason was in itself a fraud. All was revealed on discovery of correspondence available in 1998 under the newly introduced FOI Act.

**Investigate those party to the crime:**

For all the years prior to the coming into being of the FOI Act persons in Government Departments were in possession of privileged information through archived files, but did nothing to rectify the fraudulent actions of the past. The Hammond family commenced their enquiries in 1972, but were continually fobbed off.

**There is a win win situation:**

IT has always been offered that should the Government be prepared to give and take the Hammond family would be prepared to accept that in return for us giving the community the road in, the parking areas, the waterfront area, the fire station site and the land not contemplated for future use as delineated in the Leeuwin Naturaliste Statement of Planning Policy, we would settle without prejudice for the return of the Caravan Park (but be prepared to extend a lease on similar terms, to the existing leasee, and to the expiration of the present term) together with the land delineated as proposed residential in the 5AA statutory planning document, the Leeuwin Naturaliste Statement of Planning Policy.

**Outcome:**

The result of this would be to satisfy the community that major development could not take place. The Hammond land abuts the new Caves Ridge Development. The existing established infrastructure of roads, parking, waterfront areas and fire facilities will remain.

Green groups would be the big winners with the majority of the land remaining in it's natural state. Few people realise how small the Hammond land is in relation to the visible hillside. The Government hold by far the major portion.

The alternative is to end up in further heavy litigation that may well deliver a very different result if the court were to rule in favour of the entire claim.



Thank you for taking the time to read this, and I hope that you will consider the matter.

Yours sincerely

Garth Hammond.

1<sup>st</sup> Sept 2005

At the bottom it has an appendix attached for further information. It is important that the Parliament be aware of the plaintiff's position in negotiating on this land. The appendix reads as follows -

APPENDIX attached for further information.

Some additional points:-

- I have never resisted the land being kept as a reserve. It has always been open to the various Authorities to do as they wish with the land.
- The Government should never have taken the land from my Father as it did.
- There is only one person who has ever put a value on the land and that is Jim McGinty.
- George Cash and Doug Shave have always said the case would be defended vigorously, but not on process and procedure.
- Neither Cash nor Shave promised, nor have I asked for, any favors in this matter.
- Nothing wrong was done with this land, except for the original resumption, until the establishment of the Caravan Park on April 1<sup>st</sup> 1972. My father commenced actions at that point. He died in 1976 and I have continued ever since.
- This matter has at all times been frustrated by the delaying tactics of DOLA and Crown Law who have in some instances taken more than a year to answer correspondence. We were consequently carried over time frames, which the Government now wishes to use to defeat our action.
- I changed solicitors in 1998. Were it not for the point taken by the Crown that if the land had been taken by fraud, a separate action would be required against the State, and the Yallingup Foreshore Land Bill, I would have entered the action for trial years ago.
- It was not until 1997 discoverable documents revealed the fraud of the original resumption that we were in a position to take the second action.
- The stalling tactics are self evident again by this Bill that is before you now having been first introduced in Feb 2002.
- I rely on the Public Works Act. The Supreme Court has ruled the amendments made in 1955 apply to this claim.
- The fraud claim has always existed based on the law pre1938. It has only recently been made because it was not until 1997 the fraud was revealed.

Those remarks are made in dot point form by the plaintiff. I also have a copy of an open letter to all members of Parliament. It is dated 1 September 2005 and is signed by Garth Hammond, Yallingup, 6282. That letter comprises four pages, and perhaps another member who is speaking on the issue may wish to raise that particular matter. The plaintiff has clearly written on a number of occasions to members of Parliament. On 2 September 2005 he wrote the following -

Dear Member

**RE: YALLINGUP FORESHORE LAND BILL 2005**

I write to persuade you to abandon this bill. I appreciate you have limited time and accordingly provide the following brief statement of facts and submissions, but if you want further information I would be pleased to immediately provide it.

On 9/12/38 the then Labor Government resumed about 33 acres of land in Yallingup owned by my father for the stated purpose of **public recreation grounds**, under the Public Works Act 1902.

In 1938 Caves Hotel was under the administration of the State Hotels Department, and was a trading concern under the State Trading Concerns Act 1916. The hotel was damaged by fire in the 1930's and

in the process of being rebuilt in 1938. The Department wanted to control the land owned by my father because it perceived that would enhance the operation of the hotel, hence the resumption. However, because resumption for a trading concern was not a purpose for which land could be resumed under the Public Works Act 1902, the correct reason for the resumption was not expressed in the resumption notice, instead the resumption was incorrectly said to be required for public recreation grounds.

The resumed land was accordingly vested in State Hotels for the purpose of public recreation grounds.

Since the resumption, the resumed land has been used in part for:

- fire brigade depot;
- public roads and parking; and
- caravan and camping park (leased to private enterprise).

The balance of the resumed land of about 26.36 acres is in the same condition now as it was in 1938. Under the Public Works Act 1902, if the resumed land is not used for public recreation grounds then before it could have been used for any other purpose, my father should have been offered the right to repurchase the land. Every person who has had land resumed under the said Act has been able to exercise that right. However, by the Yallingup Foreshore Land Bill 2005, the current Labor Government proposes to extinguish or forfeit that right in so far as it applies to my father's land, without compensation.

The interest of the Government in Caves Hotel came to an end when the hotel was disposed of to private enterprise under the Caves House Disposal Act 1965. The resumed land is now vested with the Shire of Busselton.

I have obtained a number of opinions from counsel about the meaning of public recreation grounds. The opinion of David K Malcolm QC as he then was, now the Chief Justice is public recreation grounds means a public ground with facilities for games, etc.

Geoffrey Miller QC (as he then was), now Justice Miller, agrees with that opinion.

Malcolm McCusker QC has expressed the opinion the circumstances of the resumption of my father's land was a fraud. The Government should not simply disregard that view as frequently the Government relies upon the advice of Mr McCusker on legal matters and to provide it with reports, most recently involving the sad saga of Mr Marquet.

My father died on 15/3/76. I am pursuing his rights as the Executor of his Will.

I am not seeking any concessions from the Government. What I am asking for is the claims on behalf of my father are determined by the Supreme Court where I have been litigating since the mid 1980's. However, that action has been stalled since the introduction of the Bill. Abandonment of the bill will simply mean I will have my day in court, arguing the resumption should be reversed based on the rights contained in the Public Works Act 1902 and also in the unwritten law.

I have no intention of causing financial harm to the Government nor to prejudice or inhibit the use to which the resumed land has been put as I have above described. All I seek is the return of that part of the land which has not been used in any way differently to how it was being used in 1938, i.e. about 26.36 acres out of 33. That relief can be provided at no cost to the Government.

Yours faithfully

GARTH HAMMOND

I also have an e-mail from the plaintiff's current solicitor to the plaintiff, dated 17 October 2005. It is lengthy, so I will not read all of it. It begins by stating -

I confirm the pleas of fraud are based on the advice of Malcolm McCusker QC.

The effect of the Yallingup Foreshore Land Bill 2002, if enacted, will be to deny your existing right to have the claims against the defendants determined by the Supreme Court. Thus the concealed fraud complained of could not be exposed.

The Bill is a unique piece of legislation in that it is expressly devoted to stripping an individual of his rights, which rights have otherwise been enjoyed by every other citizen in Western Australia, i.e. the rights expressed in the Public Works Act 1902.

I remind you the Bill in its current form does not give you the right to recover costs, hence, whatever work I might now do could be nullified by the Bill being enacted without you having any right to be reimbursed the additional costs thus incurred by you.

I have previously mentioned my view being the bill, if enacted, would not necessarily finalise the dispute based on the pending legislation being discriminatory, unconscionable, in conflict with the Australian Constitution and the principles of estoppel. In a generic sense it could be said the Act is part of an abuse of process.

Whether it is an abuse of process in the judicial sense, or an abuse of the processes of Parliament is I suggest a distinction without much difference because, as time continues to go by with the Bill not being progressed by the Government, in particular in the Upper House, increasingly it seems apparent the Government is content to leave the Bill as is, as this has been sufficient to stay the prosecution of the Supreme Court proceedings.

In short the proceedings have been stopped because of the Bill. The Bill has not progressed since 2002. The Government has thus achieved what it wants without the Bill being enacted and so the moral and legal consequences of this proposed legislation and the uncompensated forfeiture of your rights not able to be determined.

Were the Government to introduce legislation which would in the same way limit or forfeit the rights of all persons who have their land compulsorily resumed, the level of interest that would generate would surely see the legislation fail. Here, the legislation might be passed simply because it affects only 1 person, you.

I make the above comments because I am not sure where the dispute is going and how long it will take to bring to an end. On 18/10/04 Registrar S Boyle suspended case management indefinitely as a consequence of the Bill. Unless I do something, the litigation will continue to be stayed. Under Professional Conduct Rules I am obliged to prosecute claims diligently and expeditiously, but here I am not because, whatever work I do and the costs of it stands to be wasted by enactment of the Bill. I have not seen a client put into a more invidious position, which is made even more so disappointing by the fact that the opponent is in substance the Government, normally a litigant of the highest integrity.

I bring all this to your attention because something must be done to break the impasse.

The e-mail is signed by the plaintiff's solicitor.

Mr President, Hon Barry House raised a point of order with you indicating that the matter is currently the subject of a case evaluation conference, which is due to occur in the Supreme Court of Western Australia tomorrow, Wednesday, 12 April 2006, at 11.00 am. Hon Barry House asked you to consider whether raising issues in relation to this bill was a breach of the sub judice provisions. You have ruled that, this being a civil matter, that is not the case, particularly having regard to the fact that it is being referred to a case evaluation conference, which is a matter of proceedings rather than a matter of trial. Because you did not give a written decision, Mr President, I may have misconstrued your intent or the reasons for your decision, but I understand that you believe that it is proper to continue discussing this legislation, primarily on the basis that this Parliament is entitled to legislate, having regard to matters that may be before a court. I recognise that this is a civil case and not a criminal case and that any matters raised in this Parliament are unlikely to sway a Registrar or Judge of the Supreme Court. I am sure they will make their decisions based on the facts that are presented to them rather than the limited information I am able to provide today.

I want to raise one issue in particular. I have said that this matter has been proceeding for a number of years. It has now reached a stage at which a case evaluation conference is to be held tomorrow in the Supreme Court. I am also aware that the plaintiff is attempting to get an appointment with the Minister for Planning and Infrastructure, Ms A.J. MacTiernan, to attempt to facilitate negotiations about this land. I am not able to say whether the plaintiff has formally written seeking that appointment, but I am aware that that is in the plaintiff's mind because I have been provided with a draft letter addressed to the State Solicitor's Office, for the attention of Robert Mitchell, to that effect. Part of that letter discusses the need to resolve the issue and to negotiate. A number of the points I have raised to date indicate that the plaintiff is prepared to negotiate, but the government, for reasons best known to itself, does not want those negotiations to occur. The government would rather this bill be passed, because if that happens the evidence in the departmental files will never ever be allowed to come to light. I argue that that in itself would be a total injustice and the use of this Parliament in a totally wrongful fashion. I have said on a number of occasions that the Parliament is not a court. As members of Parliament, we are not in a position to make a decision on a very complex civil matter on the scant information that has been provided to us. It is critical that all the evidence be provided in an open court and that that evidence be tested.

Debate interrupted, pursuant to sessional orders.

[Continued on page 1402.]