

YALLINGUP FORESHORE LAND BILL 2005

Discharge of Order and Referral to Standing Committee on Legislation - Motion

Resumed from 12 April on the following motion moved by Hon Simon O'Brien -

That order of the day 90, the Yallingup Foreshore Land Bill 2005, be discharged and referred to the Standing Committee on Legislation for consideration and report.

HON PETER COLLIER (North Metropolitan) [12.04 pm]: I support this referral motion. My concerns rest primarily with the process of the bill. I do not know Mr Hammond; I have never met him or had any discussions with him. However, I have difficulties with the process of this bill, and that is why I believe we should refer it to the Standing Committee on Legislation. I have read the second reading debates in this and the other chamber. I reached a firm conclusion that the bill would usurp Mr Hammond's democratic right; that is, his right to have his day in court, something that should be available to all people living in a liberal, democratic society. I am of the opinion that this bill will scuttle natural justice and set an extremely dangerous precedent, which is something we need to avoid.

I am conscious of the significant role that the committee system plays in this Parliament, particularly the role of the Standing Committee on Legislation. That is why I would like this bill referred to that committee. The committee system is an extension of the parliamentary process. Its role is to scrutinise legislation much more thoroughly through the avenue of public and government witnesses. If we were to refer this piece of legislation to the Legislation Committee, we will have witnesses of the calibre of the former Chief Justice, David Malcolm, QC, Justice Malcolm McCusker, QC, and Justice Geoffrey Miller, QC - they will have the opportunity to contribute to the debate. I am very supportive of the idea that we give them an opportunity to contribute to the debate by putting their opinions on the line. I am very conscious of the fact we should not deny such eminent opinions on this bill. The committee system does work and we should not deny the Legislation Committee the authority to scrutinise this vital piece of legislation.

The second area of concern to me is the minister's second reading speech. I greatly value the second reading speeches for preparation to contributions I make to debates. They are a valuable tool of information and generally they provide a reasoned appraisal of the bill. I agree with Hon Bruce Donaldson that the second reading speech for this bill is a manifestly political document that refers to a couple of previous Liberal ministers. I cannot work out why that was done. It is completely irrelevant to the issue.

THE DEPUTY PRESIDENT (Hon Ken Travers): Order! The member is regressing by referring to the second reading debate. We are dealing with a motion that refers the bill to a committee and there should be limited debate on why it should or should not be referred to the committee. I ask the member to restrict his comments to that motion.

Hon PETER COLLIER: I thought I was.

The DEPUTY PRESIDENT: You did earlier in your contribution, but you are canvassing the second reading debate.

Hon PETER COLLIER: I do not see any reason not to send this bill to the Legislation Committee. The Greens (WA) have indicated their opposition to this motion and the government, logically, is opposing the motion. I cannot see why the government should oppose it. It will offer an opportunity for further scrutiny and fairness; that is all I ask in my contribution to this debate. I cannot see how on earth the government can deny that request in the interests of fairness. I implore the Greens to think about this issue. The Greens are very conscious of the role of fairness, particularly with regard to individual fairness and individual rights. Hon Giz Watson has articulated on a number of occasions a desire for a bill of rights. I have my reasons to suggest that we do not need a bill of rights, but I will get back to the issue. Having said that, with regard to a bill of rights, the Greens assume there will be fairness. Its web site clearly and unambiguously states under its bill of rights mantra that in civil and political issues there must be procedural fairness. I wonder whether there is fairness in this bill. Where is the fairness in not allowing this bill to go to the Legislation Committee? There is no fairness whatsoever so far as the Greens are concerned, and they need to rethink their attitude to this motion. I would support any clause in a bill of rights that states that no person should -

... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

That is article V of the Constitution of the United States, which is part of its Bill of Rights. The Greens (WA) will have great difficulty providing a credible argument for procedural fairness and due process in a debate on a bill of rights if it does not support this referral motion. This referral motion is essential for fairness. We live in a liberal democratic society. Fairness and due process are part of our liberal democratic mantra. With that in

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Hon George Cash; Hon Norman Moore; President

mind, I implore the Greens to look at its web site and to consider its philosophy regarding a bill of rights. Let us then see the Greens implement that philosophy by agreeing to this motion. It is a fair motion that provides for fairness and due process.

Hon Giz Watson: Does that mean you support a bill of rights?

Hon PETER COLLIER: Hon Giz Watson missed what I said.

Hon Giz Watson: Will you support a bill of rights?

Hon PETER COLLIER: I referred to article V of the US Constitution, which concerns fairness and due process.

Hon Giz Watson: Will you support a bill of rights?

Hon PETER COLLIER: If it has that aspect in it, I will support that aspect of a bill of rights.

Hon Ljiljana Ravlich: No you won't, you will chicken out.

Hon PETER COLLIER: I said that I will support that aspect of a bill of rights. The rest of it may be problematic. Hon Giz Watson will have difficulty supporting a bill of rights if she does not support this motion. It clearly contradicts what is on the Greens' web site regarding its stance on a bill of rights. I ask the member to reconsider her opinion on this issue. If we are to be perceived as a Parliament that represents the people in fairness and due process, we must give Mr Hammond his day in court. This motion will go a long way to ensuring that that process takes place. If it does not, we will have completely usurped the legitimacy of the judiciary and the legislature. I support the referral motion and I urge all members to support it.

HON HELEN MORTON (East Metropolitan) [12.11 pm]: I know very little about the issues of this case. The one thing that has come through is the sense of desperation of Mr Hammond. I do not know anything about this issue other than what has been raised during this debate. The sense of Mr Hammond's desperation has been quite consistent. It sounds as if this is his last hope. That is the feeling I have been getting about Mr Hammond. In the other place an opposition member crossed the floor on this issue. I have a great deal of respect for the contribution of that member. Her crossing the floor adds to my great sense of confusion about what should happen. During this debate I have noticed the amazing amount of collaboration between members on this side of the house. People have felt strongly enough about this issue to contribute to the debate with a common purpose.

I support sending this bill to a committee. I sense that a considerable amount of desperation and significant concern have been expressed during the debate. This has led me to believe that further consultation at the committee level is required. Last night I wanted the parliamentary secretary to explain why this bill should not be sent to a committee and why members on this side of the house were talking rubbish. I wanted her to make clear that no other factors needed to be considered and that all the evidence had been presented. However, I did not hear that in the short speech she made. I imagine that is because the parliamentary secretary is saving all that information for her response to the second reading debate. Unfortunately, the debate to refer the bill to a committee will have finished by then. It would have been more appropriate for members who are confused about the situation and who need to hear the information to have been told about it during this debate on whether to send the bill to a committee.

On the way home last night I gave some thought about whether the bill should be referred to a committee. I do not know anything about Mr Hammond. I have not met him, talked to him or had anything whatsoever to do with him. I concluded that the best way for me to sort out this matter was to take the Hammond factor out of the debate. I needed to do that to take out some of the emotive content so that I could consider whether any substantive matters needed to be considered. I do not know Mr Hammond. He has never contacted me and I am not necessarily looking to contact him. From what I have heard during this debate, I would describe him as somewhat obsessive and persistent. He has taken many tactical approaches to have his case heard. He has been working on this case for 14 years, which makes it almost a lifelong obsession. That can irritate many people from time to time. I imagine that this is the first thing he thinks about when he wakes up in the morning and is the last thing he thinks about at night. I had to put to one side Mr Hammond and his personality. To do that, I tried to substitute him with somebody else. I encourage members to imagine that this situation applied to the person who is the dearest to them. Given that this matter has been a 14-year obsession for Mr Hammond, I ask members to think about this situation applying to their dearest 14-year-old son or daughter. I ask members to consider this as a life-or-death situation. I have never been to the property in question. I do not know anything about it and, to be honest, I am not concerned about it. The land is of little interest to me. I decided that I needed to consider this matter dispassionately. Therefore, I am not thinking about this matter as a decision on whether this bill should be sent to a committee; rather, I am thinking about it in the context of having to make a decision about whether to turn off the life support system of a 14-year-old son or daughter. Perhaps that is what it is like for Mr Hammond. In that light, members are making a decision about whether to turn off the life

Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

support system of someone they have held dear to them for 14 or more years. I ask members to imagine that they have been told by a top doctor that there is no chance of their child's survival but that other doctors have said they have a different opinion. Would members turn off the life support system and take a philosophical approach to help them justify that action, and then decide that it was time to move on?

Hon Sue Ellery: Exactly how does that take the emotion out of the debate?

The DEPUTY PRESIDENT: Order, member! I am having some difficulty following the member's argument.

Hon HELEN MORTON: Trust me, it will help lead members to make a decision about whether to send this bill to a committee.

The DEPUTY PRESIDENT: If the member would enlighten me on that point, it would certainly assist this debate, which is a very narrow debate.

Hon HELEN MORTON: If members turned off the life support system of their child by taking the philosophical approach of just moving on, perhaps they could use that approach in this case and move on and not worry about the possibility that other factors must be considered. As with a case in which a decision has to be made, in all seriousness, about turning off somebody's life support, and doctors are saying there may be a slim chance of survival, they need to have the chance to put their case forward, review the case notes and see whether there are any small factors that have been missed. That chance would probably be taken. Doctors get it wrong, they seek second opinions and they go to case conferences. Crown lawyers get it wrong. We need only look at a couple of recent examples, such as Mr Narkle, Mr Button or Mr Mallard, to recognise that crown law officers get it wrong.

Some doctors - to use the analogy I gave before - are less able to accept their colleagues' critical analysis and they become a bit defensive. They personalise and internalise the issue. They see it as an attack on their reputation. They are totally unable to see beyond their own issues and how this issue, if it goes against what they have recommended, will impact upon them personally. Some crown lawyers are the same. Their opinion is given and they believe it should be acted upon without question. They perceive that if the issue is open to other opinions, it will constitute a challenge to their competence, rather than provide for an open and accountable consideration of the justice of the matter.

Unfortunately, some politicians are the same. They have taken a position on something, and political status or whatever becomes more important to them than does justice for an individual. The power of government is such that it can squash an individual without so much as "I beg your pardon". I am sure that Hon Paul Llewellyn recognises the traditional owners of this land and would turn their situation around were he able to turn the clock back in time. We cannot do that; the best we can do is acknowledge the wrong and build bridges of reconciliation. This is what he referred to as "moving on", because we cannot turn the clock back now. However, in this particular case it is not too late, and we can go to committee before we say, "It is too late to turn the clock back."

In summary, on the importance of going to committee, I would like to build the connection between the analogy I gave and the matter in hand. On one hand, we are talking about a dearly loved 14-year-old son or daughter; on the other hand, we are talking about Mr Hammond, whom I have never met and do not need to meet. On one hand, we are talking about turning off a life support system; on the other hand, we are referring to turning off and extinguishing the possibility for the reconsideration of an issue about a bit of land. On one hand, we are talking about going to a case conference, reviewing the case, and getting a second opinion because there is still a possibility that this dearly loved 14-year-old's life support system does not need to be turned off. In this case we are talking about the possibility in a positive sense. On the other hand, we are talking about going to a committee. There is still a chance. The matter is not clear and straightforward, but there is the slight possibility that this is the case. It is not being considered on an equal basis with the former, analogous case; it is now being considered negatively. The slight possibility is a negative consideration, whereas the slight possibility of saving the life of a child is considered a positive possibility.

It is necessary for members to use their own conscience and ensure that they have done everything possible to ensure that nothing has been missed in this case. If there is any possible factor that needs to be reconsidered or looked at before turning off the possibility for Mr Hammond, members have an obligation to look at that. Mr Hammond deserves the same consideration in decision making in this case as any one of us would give to turning off the life support system of our son or daughter.

Question put and a division taken with the following result -

Extract from *Hansard*
[COUNCIL - Thursday, 13 April 2006]
p1668b-1678a

Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

Ayes (11)

Hon George Cash	Hon Nigel Hallett	Hon Norman Moore	Hon Margaret Rowe
Hon Peter Collier	Hon Barry House	Hon Helen Morton	Hon Ken Baston (<i>Teller</i>)
Hon Donna Faragher	Hon Robyn McSweeney	Hon Simon O'Brien	

Noes (12)

Hon Shelley Archer	Hon Sue Ellery	Hon Louise Pratt	Hon Ken Travers
Hon Vincent Catania	Hon Paul Llewellyn	Hon Ljiljana Ravlich	Hon Giz Watson
Hon Kim Chance	Hon Sheila Mills	Hon Sally Talbot	Hon Ed Dermer (<i>Teller</i>)

Pairs

Hon Ray Halligan	Hon Jon Ford
Hon Murray Criddle	Hon Graham Giffard
Hon Bruce Donaldson	Hon Kate Doust
Hon Anthony Fels	Hon Adele Farina
Hon Barbara Scott	Hon Matt Benson-Lidholm

Question thus negatived.

Second Reading

Resumed from 12 April.

HON SUE ELLERY (South Metropolitan - Parliamentary Secretary) [12.28 pm]: I thank members for their contributions to what has been a fascinating debate. I would like to summarise the views that have been put this way. It is a question of an individual's rights; it is about an alleged fraud; it is about a piece of legislation designed for one individual; it is about the removal of a person's right to have his day in court; and it is about the government's motivation, including the government's allegation, on which I demonstrated last night that the house has been misled - knowingly or otherwise, I am not sure - on the government's activities in appearing in the proceedings. I want to go through all of those issues in my reply.

I will start with what happened in 1938. Mr Hammond Snr was offered and accepted compensation of £250 for the resumption of 33 acres of land. That was approximately a third of the size of the piece of land for which the year before he had paid £300 when he bought 96 acres of land. His first opportunity to say, "No thanks, I don't want that compensation and I take issue with the circumstances in which it has been offered" was then, in 1938. If Mr Hammond Jnr wanted to challenge the validity of the use of part of the resumed land as a caravan park commencing in the 1970s, he could have done so at that time. The effluxion of time means that in 2006, because all the material that may have existed in 1938 may not be available to us in 2006, there is the possibility of some uncertainty about what transpired in 1938. However, the state has had an opportunity to rely on that tool, which is a proper part of the law - that is, the limitation provisions - other than an extraordinary waiver that was granted by ministers of the state removing the state's right to that defence back in the 1990s. Because that defence was waived based on time or delay, it is possible that the defence is lost and therefore the effect on the state's ability to defend the action is significantly compromised. The government's position is that in all the circumstances at the time, that waiver was not appropriately given. That is the case having regard to the following matters. The terms of the waiver were extraordinarily broad. The appropriate minister to waive the limitation defence should have been the Attorney General, which was acknowledged by the former Attorney General, Hon Peter Foss, when he was in this place contributing to the debate. If all citizens were given the same treatment that Mr Hammond Jnr has received by virtue of those actions, effectively the descendent of anyone from which land has been resumed at any time in the past could now challenge the validity of that resumption and potentially claim the return of the land. The waiver, in its extraordinarily broad terms when it was given, was given against the advice of both the former Department of Land Administration and the former Crown Solicitor's Office. The land itself is an important public asset and in the government's view should be preserved in public ownership for the benefit of the whole community. The government, to that end, has undertaken that if the bill is passed, the land will remain in public ownership.

The bill does not inappropriately interfere with the court process; it declares the status of the land and the rights of the parties to that land in a manner that has been recognised as valid by the High Court. Although the declaration of the status of the land and those rights will dictate the outcome of the court cases, they are not directed to the court processes, except in authorising the Treasurer to pay the costs of proceedings of Mr Hammond Jnr. Another issue that was raised as a point of principle in the debate was that this legislation is

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flawed because it is directed at the circumstances around one individual. If members look at the circumstances of the changes that were made to the Land Administration Act in 1997, they will see that the previous government did exactly the same thing. Which previous government was that? It was a Liberal government that changed the provisions of the Land Administration Act in 1997 for the benefit of one particular individual - the same particular individual. Section 29 of the Public Works Act 1902 was repealed in 1955 and new sections 29 and 29A were inserted into that act. These provisions provided for a right to the former owner of land to repurchase land resumed under the Public Works Act 1902 in particular circumstances. Both sections 29 and 29A were repealed in 1997. However, transitional provisions in section 200 of the Land Administration Act 1997 continued to apply to sections 29 and 29A of the Public Works Act 1902 in relation to the Yallingup land. These transitional provisions were inserted following representations made to the government in these circumstances. When the Land Administration Bill 1997 was introduced, it proposed to repeal sections 29 and 29A of the Public Works Act 1902. An approach was made to the state government by Hon Barry House and Mr Hammond's solicitors to ensure that Mr Hammond's position was not prejudiced by the proposed repeal of sections 29 and 29A of the Public Works Act. Following a meeting between Mr Hammond's solicitors, state officers and a ministerial officer of Mr Shave on 30 April 1997, an amendment to the Land Administration Bill 1997 to achieve this aim was introduced. This amendment had been prompted by concerns from those representing Mr Hammond about the effect of the proposed legislation on Mr Hammond's claim. However, the new provisions contained in the amendment to the bill were in general terms; that is, the new provisions did not refer specifically to Mr Hammond's claim. On 10 June 1997 these new provisions were introduced at the committee stage of the debate on the Land Administration Bill 1997. In the Legislative Council, Hon Max Evans said -

It has come to the Government's notice that the general savings and transitional provision in the Interpretation Act and in clause 281 of the Bill may not be sufficient to transition across the processes already commenced under the Land Acquisition and Public Works Act. As a matter of precaution it has been decided to include a general transitional provision to ensure that all procedures already commenced under the Land Acquisition and Public Works Act are saved and can be completed under that Act, despite the proclamation of this Bill and the repeal of the relevant provisions of that Act.

The proceedings of the committee were then adjourned to 11 June 1997 when Hon Mark Nevill, on behalf of the opposition, responded to the proposed amendment as follows -

The Australian Labor Party supports this amendment. It allows for processes already commenced under the compulsory resumption of land under the Land Acquisition and Public Works Act to be transferred across. I understand that although the original clause was intended to make that provision, there was some doubt about whether it would achieve that. The Opposition supports this amendment, which I understand puts that beyond doubt.

The proposed amendment to the bill was then put and passed. The consequence of that amendment sought by the government was that Mr Hammond was able to take advantage of the provisions of sections 29 and 29A of the Public Works Act, notwithstanding that both those provisions were not in force in 1938 when his father's land was resumed and that the provisions had been repealed by the Land Administration Act 1997.

I turn now to some of the propositions that have been raised about the alleged delays in the present actions. Mr Hammond's third action, commenced in 2003, challenges the validity of the resumption of land in 1938. All the documents relied on by him in his statement of claim in the third action were discovered by the state in the first and second actions on 21 November 1996, and some of those documents were referred to by Hon George Cash in his contribution to the second reading debate. Searches of all archived files since the commencement of the second action have not located any relevant additional documents from the time of resumption. It appears that many of the documents and files from that period were lost or destroyed in the decades prior to the commencement of any litigation in relation to the land. The papers that relate to the purpose of the acquisition of the land in 1938 that are now able to be located have already been discovered. There are no secret files of documents from the relevant period that have not already been discovered. It is the loss of relevant documentation and the loss of witnesses who can be examined or cross-examined about what happened in 1938 that prejudice the state in defending an action based on events that occurred so long ago. That is why the extraordinarily broad waiver of the limitation period is so damaging and so important.

As I indicated to the house last night, and as I will repeat, Mr Hammond commenced the second action on 10 November 2003, and the state filed its defence on 4 December 2003. A registrar of the Supreme Court made a number of procedural directions on 10 December 2003, the first of which required that Mr Hammond file his reply by 28 January 2004. Despite being given a number of extensions of time, Mr Hammond has not filed a reply in the time required by the court's directions. It has therefore not been possible to complete the subsequent procedural steps such as further discovery of documents. The orders made by the registrar, which Hon Barry

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Hon George Cash; Hon Norman Moore; President

House relied on in his contribution to the second reading debate, have been overtaken. As I told the house last night, on 4 April the registrar of the Supreme Court made orders at the request of Mr Hammond and with the consent of the state. Those orders required Mr Hammond to file and serve a reply by 5 April 2006 and vacated the case evaluation conference on 12 April 2006. An extraordinary proposition was put to the house last night: in a telephone call that allegedly occurred yesterday, Mr Hammond told Mr House that the government failed to appear. That is extraordinary! On Mr Hammond's own application, the conference date was vacated. When was it vacated? It was vacated last Tuesday, 4 April. It is extraordinary that this man, who we have been told has been badly treated, can be so badly mistaken about the events of his own case and the application he made for the conference date to be vacated. Either Mr Hammond was not telling the truth or Hon Barry House was not telling the truth. I do not know who it is, but one of them is not telling the truth.

Hon Ljiljanna Ravlich: I think Mr House should do some explaining.

Hon SUE ELLERY: Somebody needs to do some explaining.

Much has been made about how a case evaluation conference is an incredibly substantive hearing of the matter. In any event, a case evaluation conference is not a substantive hearing of the matter; it is an inquiry by the registrar into what procedural steps have been taken by the parties to be ready for trial.

Another point of view that has been put is that the government is responsible for the delays in Mr Hammond commencing his actions. The conduct of the state was not responsible for the long delay. Most of the delay since the commencement of proceedings in 1988 has been due to Mr Hammond failing to prosecute his action. For example, since 1996 Mr Hammond has not taken any steps to bring his actions to trial, other than attempting unsuccessfully to expand the scope of the statement of his claim in the first and second actions and filing a writ and statement of claim in the third action.

Another issue that was canvassed in the second reading debate was concealed fraud. Section 27 of the Limitation Act 1935 provides that, for certain kinds of actions, a limitation period does not begin to run in a case of concealed fraud until the fraud is, or could have been, known or discovered. That provision would not apply in an action against the state or its officers, as it did not operate as an exception to section 6 of the Crown Suits Act or section 47A of the Limitation Act; that is, but for the waiver in extraordinarily broad terms by the relevant ministers at the time, the state would have had a limitations defence against the claim by Mr Hammond that the resumption in 1938 was invalid, notwithstanding that the claim involved an allegation of fraud. It is important to note that the term "concealed fraud" in that section does not have its common meaning. A right of action will be concealed by fraud not only when active steps have been taken to conceal the existence of the right of action; it may be sufficient that a person who is aware of the possibility of action remains silent about its existence or the relevant facts.

Another proposition that was put to us is that nobody has had an opportunity to research all the matters involved in this case. Somebody has had that opportunity, and that somebody is very familiar to our friends opposite. On 25 May 2005, the ABC news reported that the shadow Attorney General, Sue Walker, crossed the floor of Parliament to support the legislation, claiming that the land was properly resumed and should be protected. She is reported as saying -

I cannot possibly support having paid for land in 1938 validly, land now which is worth \$70 to \$100 million, paying \$3,200 for it.

It belongs to the people of Western Australia and there are laws in place so that public authorities can properly defend any action on behalf of the state, . . .

Hon Norman Moore: That's not the first time she's made a mistake, and I suspect it won't be the last time.

Hon SUE ELLERY: Okay; that is interesting. I am also told that comments made by other members reflected quite positively on the amount of research Ms Walker had undertaken.

It is the case that this matter is not about an individual's rights; it is about the right of the state, on behalf of the people of Western Australia, to exercise its ability to rely on a limitations defence in a matter that has a significant impact on the state's assets. This man has had several days in court, both before and after the waiver was granted in the extraordinary circumstances that I have outlined. There is no alleged fraud. There was no alleged fraud in 1938. I commend the bill to the house.

Question put and a division taken with the following result -

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Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

Ayes (12)

Hon Shelley Archer
Hon Vincent Catania
Hon Kim Chance

Hon Sue Ellery
Hon Paul Llewellyn
Hon Sheila Mills

Hon Louise Pratt
Hon Ljiljana Ravlich
Hon Sally Talbot

Hon Ken Travers
Hon Giz Watson
Hon Ed Dermer (*Teller*)

Noes (11)

Hon George Cash
Hon Peter Collier
Hon Donna Faragher

Hon Nigel Hallett
Hon Barry House
Hon Robyn McSweeney

Hon Norman Moore
Hon Helen Morton
Hon Simon O'Brien

Hon Margaret Rowe
Hon Ken Baston (*Teller*)

Pairs

Hon Jon Ford
Hon Graham Giffard
Hon Kate Doust
Hon Adele Farina
Hon Matt Benson-Lidholm

Hon Ray Halligan
Hon Murray Criddle
Hon Bruce Donaldson
Hon Anthony Fels
Hon Barbara Scott

Question thus passed.

Bill read a second time.

Committee

The Deputy Chairman of Committees (Hon Ken Travers) in the chair; Hon Sue Ellery (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title -

Hon BARRY HOUSE: I shall use the opportunity of the debate on the short title to clarify for the chamber a situation the parliamentary secretary raised just recently in her response to the second reading debate. Will you indicate, Mr Deputy Chairman, whether this is an appropriate time to do it?

The DEPUTY CHAIRMAN: The debate on the short title is fairly narrow in its scope, but I am sure the chamber will give the member leeway with the circumstances he wishes to clarify.

Hon BARRY HOUSE: The matter has been raised of a Supreme Court notice that I brought to the attention of the chamber. I was given a copy of that Supreme Court notice a couple of weeks ago by Mr Hammond. That notice indicated that a mediation hearing would take place on Wednesday, 12 April. I tabled that document and referred to it during debate on this bill on Tuesday. I had a brief telephone conversation with Mr Hammond during the dinner break last night, Wednesday 12 April, at about 6.30 pm. According to my notes, it went something like this: I said -

How did the mediation meeting go today?

Mr Hammond said -

Oh, it didn't happen.

I said -

Oh, didn't the Crown turn up?

Mr Hammond said something to the effect that that was about it. We then moved on to a very brief conversation, taking no more than a minute, in which I updated him on the stage the debate had reached in the house. That ended the conversation. I came into the house a short time afterwards and mentioned that situation at the beginning of my remarks on the committee referral motion. The parliamentary secretary later tabled another Supreme Court notice indicating that the mediation hearing date of Wednesday, 12 April had been vacated. That was the first I had heard of it. I do not know the reasons. I have not had any conversation with Mr Hammond or anybody else regarding who requested it or what were the circumstances behind that vacation. I have heard only the parliamentary secretary make her comments a few minutes ago. My only information on any matter is that Mr Hammond's wife has been receiving treatment for cancer. I do not know whether that had anything to do with it, and I do not want to imply that I have any other information.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Yallingup foreshore land validly and effectively resumed -

Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

Hon GEORGE CASH: The clause reads -

- (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.

Will the parliamentary secretary expand on her comments that certain files in respect of the resumption of this land are no longer able to be found?

Hon SUE ELLERY: I am advised that officers of the State Solicitor's Office have searched the archives and have not been able to find any contemporaneous - that is a lawyer's word - files or paperwork, and obviously the documents are not able to be found.

Hon GEORGE CASH: Will the parliamentary secretary explain what she means by "contemporaneous files"? This is a very important question because "contemporaneous" means, to my understanding, documents that are recordings of matters that occur at the time the recording is made. I do not quite understand what the parliamentary secretary means by "contemporaneous files".

Hon SUE ELLERY: Officers were not able to find any files that went to the events that occurred around 1938, beyond those, of course, that have already been discovered and that I referred to in my second reading response.

Hon GEORGE CASH: In that case, will the parliamentary secretary acknowledge that there are considerable holes in the evidence that would have been available in this matter?

Hon SUE ELLERY: The answer is that we do not know. If there were, they could be favourable to one side or the other side, but we do not know.

Hon GEORGE CASH: If the parliamentary secretary says that she does not know the evidence that was available in this matter, how can she say there was never a concealed fraud?

Sitting suspended from 1.00 to 2.00 pm

Hon SUE ELLERY: Before the lunch break I was taking advice in response to a question asked by Hon George Cash about how I could have said in my second reading response that there was no concealed fraud, given that documents are missing. I said there was no fraud because I had seen no evidence of it, and certainly no evidence was presented in the second reading debate. The state cannot positively prove that there was or was not a concealed fraud without the evidence of relevant witnesses and the availability of all of the papers of the time.

Hon GEORGE CASH: I appreciate the response from the parliamentary secretary. That in itself is a very significant point because the state is now acknowledging, in fact admitting, that it cannot be sure whether a concealed fraud was perpetrated against the former owner of this land so many years ago. That is clearly one reason the opposition wanted the matter referred to an open court - so that all the documentation could have been brought forward to establish a chain of events or a pattern of conduct to assist the court in determining whether such a concealed fraud or other irregularity relating to this resumption had occurred. I will refer to a letter dated 24 March 1938 addressed to the Under Secretary for Works, and a letter from the assistant under secretary, dated 11 April 1938, directed to the under secretary. I would be very happy to provide the parliamentary secretary with copies of these letters if she requires it. Part of the response of 11 April 1938 reads -

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.

Is the parliamentary secretary able to confirm that the original intention was to resume the land for public recreation purposes, or were there other reasons? If there were, what were those other reasons?

Hon SUE ELLERY: I said in the second reading speech that, based on the documents that are available, indeed the land was resumed for public recreation purposes.

Hon GEORGE CASH: Does this letter to the under secretary not indicate that the land was resumed for another purpose? Again, I am prepared to provide a copy if the parliamentary secretary wants it.

Hon SUE ELLERY: The letter was written before the resumption. The reason for the resumption was set out in the Executive Council minute, which I referred to in the second reading speech. The reason for the resumption was public recreation purposes.

Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

Hon GEORGE CASH: Can the parliamentary secretary say with any certainty that the letter of 11 April 1938, to which I just referred, was not part of the reason behind the resumption of the land?

Hon SUE ELLERY: We would be speculating if we were to say what was behind the letter referred to by the honourable member. What we can rely on is the Executive Council minute that effected the resumption. That minute said that the land was for public recreation purposes.

Hon GEORGE CASH: Will the parliamentary secretary agree that, notwithstanding the Executive Council minute on the resumption and the reasons given for the resumption, there may have been other reasons behind the resumption?

Hon SUE ELLERY: I am not sure how the question, or my answer to it, will take us any further forward. It may, or it may not.

Hon GEORGE CASH: The answer demonstrates what I was trying to get at - the fact that we are not able to access all the files of the department. We have not had independent access to the files, but rather have had to rely on the fact that the parliamentary secretary says that certain things do or do not exist. That, and the fact that this matter is not to be referred to the committee, disadvantages the plaintiff in this case because he will never be able to be certain that other documentation does not exist showing that there were reasons other than use of the land for recreation purposes behind the original resumption. One of the reasons the government has inserted a validation clause in this bill is that it is uncertain about the real reasons, or uncertain about the actual chain of events leading back to before the resumption. Will the parliamentary secretary confirm that that is the reason for the validation clause - to make good the uncertainty that clearly exists?

Hon SUE ELLERY: That is why a validation clause is inserted into the bill. It would not be there for any other reason.

Hon GEORGE CASH: Is that the case in this instance?

Hon SUE ELLERY: I thought I just answered that. Yes.

Hon GEORGE CASH: It is clear that the parliamentary secretary is not able to answer the questions that are being asked on the basis that the departmental files are not available. She has told us that it is a matter of fact that the files are missing. Notwithstanding that information, the government has introduced a bill and is prepared to completely abolish any rights Mr Hammond has regarding his action in the pursuit of the resumption of this land. Members will understand why I suggested earlier that this whole process is a travesty of justice. The mere fact that the records do not exist - so we are told - is good reason for whatever files currently exist to be examined by a parliamentary committee. I have been in this place long enough to be able to count; therefore, I do not believe that pursuing further information from the parliamentary secretary will be of great benefit. I do not think that the parliamentary secretary is in a position to give factual answers to certain questions on the basis that that information is apparently no longer available. However, this bill takes a quantum leap. The validation clause is contained within the bill to make good any irregularity that is on the files and which can be found. It certainly makes good any irregularities that this house will never know about because we have been told that the documentation does not exist. That is a totally improper way of using Parliament to solve this very difficult problem. I have done all I can do. As I said, I can count; therefore, I do not believe it serves any purpose to continue asking questions at this stage.

Clause put and a division taken with the following result -

Extract from *Hansard*
[COUNCIL - Thursday, 13 April 2006]
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Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

Ayes (12)

Hon Shelley Archer	Hon Sue Ellery	Hon Sheila Mills	Hon Ken Travers
Hon Kim Chance	Hon Adele Farina	Hon Ljiljana Ravlich	Hon Giz Watson
Hon Kate Doust (<i>Teller</i>)	Hon Paul Llewellyn	Hon Sally Talbot	Hon Matt Benson-Lidholm

Noes (11)

Hon George Cash	Hon Nigel Hallett	Hon Norman Moore	Hon Margaret Rowe
Hon Peter Collier	Hon Barry House	Hon Helen Morton	Hon Ken Baston (<i>Teller</i>)
Hon Donna Faragher	Hon Robyn McSweeney	Hon Simon O'Brien	

Pairs

Hon Jon Ford	Hon Ray Halligan
Hon Graham Giffard	Hon Murray Criddle
Hon Ed Dermer	Hon Bruce Donaldson
Hon Louise Pratt	Hon Anthony Fels
Hon Vincent Catania	Hon Barbara Scott

Clause thus passed.

Hon GEORGE CASH: I indicate that there is no value in me speaking to the remaining three clauses because it is obvious that the parliamentary secretary would argue that she does not have available to her all the evidence. Therefore, we are frustrated in attempting to get reasonable responses from her.

Clauses 5 to 7 put and passed.

Title put and passed.

Bill reported, without amendment.

Report

Question (that the report be adopted) put and a division taken with the following result -

Ayes (12)

Hon Shelley Archer	Hon Sue Ellery	Hon Sheila Mills	Hon Ken Travers
Hon Kim Chance	Hon Adele Farina	Hon Ljiljana Ravlich	Hon Giz Watson
Hon Kate Doust (<i>Teller</i>)	Hon Paul Llewellyn	Hon Sally Talbot	Hon Matt Benson-Lidholm

Noes (11)

Hon George Cash	Hon Nigel Hallett	Hon Norman Moore	Hon Margaret Rowe
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Pairs

Hon Jon Ford	Hon Ray Halligan
Hon Ed Dermer	Hon Murray Criddle
Hon Graham Giffard	Hon Bruce Donaldson
Hon Louise Pratt	Hon Anthony Fels
Hon Vincent Catania	Hon Barbara Scott

Question thus passed.

Report of committee adopted.

Third Reading

HON SUE ELLERY (South Metropolitan - Parliamentary Secretary) [2.23 pm]: I move -

That the bill be now read a third time.

Point of Order

Hon NORMAN MOORE: My understanding of standing order 243 is that when a bill has been opposed in the committee stage, it cannot be moved to the third reading on the same day. It needs to be considered at a later date. I seek the consideration of that matter by the Chair before we proceed to the third reading.

Hon Peter Collier; Deputy President; Hon Helen Morton; Hon Sue Ellery; Hon Barry House; Deputy Chairman;
Hon George Cash; Hon Norman Moore; President

The DEPUTY PRESIDENT (Hon Simon O'Brien): I will leave the chair until the ringing of the bells in order to refer this matter to the President for a ruling.

Sitting suspended from 2.24 to 2.33 pm

Ruling by President

THE PRESIDENT (Hon Nick Griffiths): Honourable members, I have been asked to provide a ruling with regard to the application of standing order 243 to the Yallingup Foreshore Land Bill 2005, which is the order of the day that is being considered by the house. The Yallingup Foreshore Land Bill 2005 passed through the committee stage and the report has been adopted. I am advised, and it is my understanding, that the bill was not amended during the committee stage. However, there was debate and, more importantly, opposition to the bill during the committee stage. Standing order 243 reads -

When the report is finally adopted a subsequent day shall be fixed on motion for the third reading;

Provided that where a Bill passes through the Committee stage without opposition and has not been amended the third reading may immediately be moved and the Bill read a third time.

The meaning of those words is plain. I will repeat them -

Provided that where a Bill passes through the Committee stage without opposition . . .

In this case there was opposition -

and has not been amended . . .

The bill was not amended; however, we must consider the two ingredients involved, because clearly there has been opposition to the bill. Therefore, the bill cannot be read a third time at this day's sitting.