

Hon Simon O'Brien; The Deputy President; Deputy President; Hon George Cash; Hon Barry House; Hon Norman Moore; Hon Robyn McSweeney; Hon Nigel Hallett; Hon Paul Llewellyn; Hon Bruce Donaldson; Hon Sue Ellery

YALLINGUP FORESHORE LAND BILL 2005

Second Reading

Resumed from 11 April.

HON SIMON O'BRIEN (South Metropolitan) [8.13 pm]: I will conclude my remarks which were interrupted by the effluxion of time yesterday evening. I was talking to the house about a bill of attainder - which we should probably call a common law historical oddity from antiquity - that we are told was extinguished in British law in 1870. Just to remind members, a bill of attainder was a form of English common law in which a person could be condemned for a crime - most commonly treason - by being declared attainted. In addition to any penalty prescribed, including being hung, drawn and quartered, a condemned person could also find his or her civil rights nullified, and property, titles and rights confiscated and indeed denied to the person's heirs and successors. There are a number of quite interesting examples of a bill of attainder. I mentioned Lord Lovat - that is, the eleventh Lord Lovat, Simon Fraser - who was attainted not once but twice. In 1697, after the ninth Lord Lovat died, Simon Fraser, his brother, kidnapped and forcibly married the late lord's widow, Amelia. However, Amelia's powerful family, the Atholls, were angered and prosecuted Fraser, who fled the country. Fraser was convicted in absentia, attainted and sentenced to death. Due to his attainder, he could not succeed to the lordship when the tenth lord, who was also his brother, died. However, in 1715 Fraser supported the government against a Jacobite uprising and was rewarded by being pardoned for his crimes. In 1730 he won litigation seeking to confirm his title of Lord Lovat. He was therefore fully redeemed. Unfortunately, 15 years later, in 1745 he then participated in an uprising against the Crown. How the political cycle turns, and turns full circle! He was convicted of attainder, was sentenced to death and was beheaded on Tower Hill in London, becoming the last man to die in that manner in that place. His titles were forfeited. I acknowledge in passing that I believe Lovat's last words to the executioner were along the lines of, "Don't make a hash of it." Unfortunately, that must have been a self-fulfilling prophecy because, reportedly, in this very public execution the executioner made an awful hash of ending the unhappy life of Lovat. Subsequently, in 1854, that attainder of Simon Fraser, the eleventh lord was reversed and now the sixteenth Lord Lovat, who was born in 1977 and also called Simon Fraser, holds that position.

That is one story of how a bill of attainder can be used. I mentioned last night about how sometimes, with the reversal of political whim, such acts of attainder could be reversed; in this case not only reversed but also subsequently reinstated as the wheel continued to turn over the years.

Hon Kim Chance: Did they give him his head back?

Hon SIMON O'BRIEN: Yes. There is another example of this law being used. After the Restoration, the regicides, John Bradshaw - not our John Bradshaw - Oliver Cromwell, Henry Ireton and Thomas Pride, were served with a bill of attainder on 15 May 1660 backdated to 1 January 1649. After the committee stage, the bill of attainder passed both the House of Lords and the House of Commons - does the Leader of the House not wish this bill would do the same thing? - and was engrossed on 4 December 1660. There was then a resolution of the House of Commons, which reads -

That the Carcasses of Oliver Cromwell, Henry Ireton, John Bradshaw, and Thomas Pride, whether buried in Westminster Abbey, or elsewhere, be, with all Expedition, taken up, and drawn upon a Hurdle to Tiburne, and there hanged up in their Coffins for some time; and after that buried under the said Gallows; And that James Norfolke Esquire, Serjeant at Arms attending the House of Commons, do take care that this Order be put in effectual Execution.

We do not pass resolutions like that any more, Mr Deputy President!

Hon Kim Chance interjected.

The DEPUTY PRESIDENT (Hon Ken Travers): Order!

Hon SIMON O'BRIEN: How is this relevant to the bill, Mr Deputy President?

The DEPUTY PRESIDENT: I was about to ask that.

Hon SIMON O'BRIEN: Bills of attainder evolved into a convenient way for the King to convict subjects of crimes and confiscate their property without the bother of a trial and without the need for a conviction, or, indeed, any evidence at all. Is this not what Hon Paul Llewellyn was criticising when he was talking about traditional lands or normal land ownership being usurped at the whim of the Crown? In this case, the Crown sits over there on the government side and sponsors this bill, seeking to take away, without a man's day in court, his

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rights under law to this property. However, bills of attainder were abolished in 1870; or were they? I do not know to whom to attribute these words, but I found this comment when I was searching this subject on the web -

... "bill of attainder" can be eventually discovered -

That is, today -

in the crude tool of legislative intervention if such intervention is used to cut the Gordian knot of a difficult court case.

Does an element of attainder attach itself to this bill? Perhaps it does. I think the parallels I am drawing are obvious.

We have before us a bill that is targeted on this occasion against simply one person or one family. It seeks to do away with, by the crude tool of legislative intervention, the rights of that man to have his day in court, and to provide that what might well have been invalid or ineffective in law at any time in the past decades does not matter, because by this bill it will be considered forthwith to be valid and effective - a very crude instrument of legislative -

Hon Kim Chance: It is like taking away a worker's rights to his day in the Industrial Relations Commission.

Hon SIMON O'BRIEN: I knew I would finally strike a sympathetic chord with the honourable Leader of the House. Let us hope we have a division on this bill - I think I can see one coming - so that he can vote with his feet, as well as his conscience, against what the Crown, in the form of the government of the day, has decided to do with this chap.

I am addressing all my remarks through you, Mr Deputy President, but I hope that Hon Paul Llewellyn, in particular, notes my remarks. I followed Hon Paul Llewellyn's speech with interest, because he and his colleague have a very important role to play in this debate. I was confused by Hon Paul Llewellyn's final remarks. I will quote, if I may, from the uncorrected *Hansard* of Tuesday, 11 April, when Hon Paul Llewellyn said -

We -

Presumably, the Greens -

are prepared to move on in the case of one individual whose rights we respect and whose case is compelling.

Then he said -

We are prepared to move on and the Greens will support this bill.

Sorry; if the Greens respect this person's rights, and if they think his case is compelling, they should not support this bill. Whether or not his case is compelling, the Greens should not support this bill, because this guy needs to have his day in court. If he is denied by this bill - this crude legislative instrument - his day in court, the chances are that Hon Paul Llewellyn and I and everyone else may also be denied our day in court. That is why the Greens should oppose this bill. If they will not do that, they must find some other way to give this person his day in court; that is, if the Greens are dinkum about respecting this man's rights, and if they think the Crown should not act arbitrarily. If we cannot give him his day in court by preventing the passage of this bill, we need to refer it to another forum in which he can have his day. It is not as good, but maybe a committee of this house would provide the only vehicle, in this saga stretching from 1938 to 2006, by which this person might have some sort of day in court, and we could consider the relative merits of the case.

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

Hon SIMON O'BRIEN: For that reason, and because the Greens have indicated that they will support this bill - it is not too late for them to change their mind - I will now move without notice -

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.

The Greens now have the opportunity to indicate whether they will support that motion, and then the house can follow its logical course from there.

HON GEORGE CASH (North Metropolitan) [8.24 pm]: I stand to support the motion moved by Hon Simon O'Brien. I believe it is a proper motion, having regard to the manner in which this bill has been introduced and the manner in which the government wants to deal with the bill; that is to say, it wants to deal only with the government's side of the equation and not let the plaintiff have his day in court. Hon Simon O'Brien is right

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when he suggests that this Legislative Council, if it is to make decisions, needs to make informed decisions. In this case, all we have at the moment is almost an *ex parte* application whereby one party has put its case, but the other party is yet to be heard. It is almost a case of the Zimbabwe solution. Members may have been to or read about Zimbabwe and the way in which there are land grabs in Zimbabwe. The President decrees that land will be taken, and then the army moves in and takes it. However, before the army moves in, the owner is given a first warning. If he does not respond to that first warning, in some cases he is hacked to death. I am not suggesting that the plaintiff to this action is being hacked to death in a physical way, but certainly his evidence is being shredded inasmuch as nobody will be able to hear it.

This bill, as has already been said, prevents the plaintiff from airing his evidence in court and having that evidence tested. We are now seeing a process under which the plaintiff is required to rely on just a few letters being read to this house and recorded in *Hansard* that present a flimsy example of what has occurred over many years. I say "flimsy example" because just a few letters and a few notations on memorandums certainly do not present the evidence that the plaintiff has. No doubt relevant points have been made and raised, but certainly the evidence as such has not come forward, and that is the reason that I say that this bill needs to be referred to the Standing Committee on Legislation.

The DEPUTY PRESIDENT (Hon Ken Travers): I am glad Hon George Cash is making those references, as he has already made his second reading contribution.

Hon GEORGE CASH: Indeed, I have, and that is why I have often said to others when I have been in the chair that members must stick to the motion before the house. The motion is a referral motion, and I am giving the house the reasons that it should refer this bill to the Legislation Committee. For example, the Legislation Committee was set up to enable members of the public and other interested parties to come forward and present their side of an argument, and to present technical information on particular issues to enable the Legislation Committee to become more informed about matters that are brought before this house. As members know, the Legislation Committee considers all the evidence that is put forward and reports to the house in due course. However, the Legislation Committee affords an opportunity to people to produce and present evidence. We have been doing that in the Legislative Council, in its present form, since 1989. I was one of those who was a member at that stage, and I helped set up the Standing Committee on Legislation. In those days we were more interested in government officers going before the committee, but we also wanted members of the public - interested parties - to be able to go before committees and explain what they had to offer. That remains the modern committee system in the Legislative Council. I am arguing that this bill should be referred to the Legislative Council Standing Committee on Legislation, because the impact on the plaintiff in this case is huge. I have said on a number of occasions that the man has evidence and he wants to provide that evidence in a public forum. If the government is to refuse him his day in court, at the very least he must be given the opportunity to bring that evidence before a parliamentary committee.

When I spoke last night on this bill, I mentioned in one instance three particular QCs who have provided opinions on the plaintiff's claim. They were David Malcolm, QC, who later became the Chief Justice of this state; Geoffrey Miller, QC, who is currently a Justice of the Supreme Court; and Malcolm McCusker, QC, who is regarded by those who have some knowledge of the legal profession to be the most eminent silk in Western Australia. I would expect that the Legislation Committee would want those three people to come before it to explain their particular view on the plaintiff's case. As I say, if this Parliament is to make informed decisions on this matter, at the very least it must be given information and must be provided with the opportunity to learn what this is all about. It seems to me that if we do not agree to this motion, what we will do is deny the defendant not only his day in court, but also any chance of that information coming forward.

I would suggest that the denial of this motion would in fact be a contempt of the justice system of Western Australia. There is no doubt that courts insist upon hearing evidence. They then test that evidence. It seems to me that if it is the government's intention that the Parliament usurp the position of the courts in this case - that is, be the judge and jury of the circumstances surrounding this resumption - at the very least the Parliament should be given the facts. I mentioned yesterday that I thought that it was absolutely critical that certain officers from the Department of Land Information and officers from the State Solicitor's Office should be required to come forward and explain their position to the Legislation Committee, because I am told that if the correct questions are put to certain individuals, they will be obliged to recount a pattern of conduct that will show just where the state stands in this matter. I would argue that the Legislation Committee, if it is able to consider this bill, will be able to determine very clearly whether or not over the past 70-odd years a concealed fraud has been perpetrated against the plaintiff or the estate of the original owner.

I respectfully ask the Greens (WA) to consider the decision they make on the second reading of this bill so that it is an informed decision; that means hearing the plaintiff and expert witnesses who are able to speak with

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authority on matters affecting the original resumption. The Parliament is entitled to the facts. We are not, as a Parliament, entitled to close our eyes and our ears to evidence that is not only readily available but that a particular plaintiff wants to bring before the Parliament. I say again that the Parliament is entitled to be informed. In the past the house has used the Legislation Committee or other committees of the Legislative Council to seek further information so that the Parliament can be better informed.

I ask the house to support this motion, because if this plaintiff is not to be given his day in court as the result of a decision of this Parliament, at the very least he should be given the opportunity to appear before one of the Legislative Council's committees so that he can not only table the evidence he has, but also give evidence to the committee. More than that, other people, such as the former Chief Justice of Western Australia, David Malcolm, QC, Malcolm McCusker, QC, and, if it is appropriate, Justice Geoffrey Miller, QC, can come forward to the committee to explain the reasons behind the opinions that they provided in this case. I ask the house to support the motion.

HON BARRY HOUSE (South West) [8.35 pm]: I also support the referral to the committee and urge the house to support the motion before us tonight. The debate now gives me the opportunity to inform the house of a telephone conversation I had with Garth Hammond just a couple of hours ago. I was briefly updating him on what happened yesterday and where the debate was currently at. I also asked him how the Supreme Court mediation order, to which I referred yesterday, had gone today. Members might recall that the Supreme Court mediation order was due to take place at 11.00 am today, 12 April. Guess what? Surprise, surprise! The Crown did not turn up.

Hon Norman Moore: Did not turn up?

Hon BARRY HOUSE: Yes.

Hon Norman Moore: With no explanation?

Hon BARRY HOUSE: Absolutely nothing happened.

Hon George Cash: It is relying on this bill for a stay of proceedings.

Hon BARRY HOUSE: That is precisely right. If that is not a breach of an individual's right to justice, I know nothing. That makes this motion even more important, because this motion will provide possibly the last opportunity that we will have anywhere in the system to allow Mr Hammond, and other people, to air their views on this matter. If the Parliament, as it seems now, is of a mind to be the decision maker in this case - the judge and jury - let us get some information and let us provide a forum in which the different views, attitudes, legal opinions and positions on aspects of this whole case can be heard. That is the first point I make. If this Parliament is of a mind to deny this individual his day in court, which is a denial of natural justice, at least let it refer the matter to the Legislation Committee at this point to provide a forum for all the evidence that is available and all the views that might be available on this matter to be heard. If the Parliament is determined to be the judge and jury, at least let us do it with some semblance of weighing up the evidence and assessing it on its merits before the Parliament finally makes its decision.

I am sure that most members in this place are familiar with committee procedures. Committees of this house adopt procedural fairness. Members will know that it involves informing individuals or organisations of the points to be made in a committee report, so that they get the opportunity to put their response to the committee and for that response to be incorporated in the report. If there is to be an adverse finding against an individual or an organisation, they are informed of that intention by the committee and get the opportunity to make a response. That is called procedural fairness. The Parliament does not at present even entertain the thought of giving this individual any sort of procedural fairness unless it agrees to this motion to refer this bill to a committee.

If Parliament is of a mind to reject this motion - I certainly hope it does not - we will proceed to the second reading vote and then through the committee stage to the third reading without any opportunity for this Parliament to assess, weigh up or even hear any other legal points of view, and there are plenty around. We have only scratched the surface in this debate over the past couple of nights. Many people in the legal fraternity and in the community have valid points of view on this matter, and we will not be doing the right thing by the community, to say the least, if we charge ahead and make a decision without those views being aired. This could be the last opportunity for any of those issues to be aired. We have already heard Hon George Cash refer to opinions from eminent legal minds in this state - former Chief Justice Malcolm, Malcolm McCusker, QC, and Justice Geoffrey Miller, to mention only a few. Parliamentary debates that have taken place over the past few years on this matter should also be considered. The Solicitor General's point of view should also be considered. It seems that the government has just grabbed that legal view and taken it as gospel, and is charging ahead with

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the case on the say-so of just one legal view. There are others, as we have already heard, but, by the sound of it, they will not get a chance to have any airing.

This motion is aimed very squarely at Hon Paul Llewellyn and the Greens (WA), because, as they know, the balance is in their hands. They hold a very responsible position, but they should at least give Parliament an opportunity to hear the alternative points of view and assess the situation on its merits. Parliament should be insisting, by supporting this referral to a committee, that it hear from the Busselton Shire Council, which has a vested interest: it has built a road and a car park on the disputed land, and has various other concerns that are pertinent to the future of that area. We should hear from the caravan park lessee, Don Ferguson. I mentioned Mr Ferguson last night. He has a very important stake in this whole exercise. We should know what his arguments are about the issue. We should know the position of the Yallingup fire brigade, which has a shed on the land. We should also know the arguments of the Yallingup Residents' Association. Last night in this debate several members referred to individuals as well as that organisation. They have a very legitimate right to put their point of view to this Parliament and be heard by a forum. The only forum that is possible now is a committee of this Parliament. I cannot plead with members more than that. We should also hear from the Department for Planning and Infrastructure to get a bit more information about the process that it adopted in assessing this matter over a long time. I quoted some figures from 1985 in the contributions I have made to two second reading debates on this matter.

Hon George Cash interjected.

Hon BARRY HOUSE: I have tabled documents. I have quoted from a summation of the situation which pointed to various delays, some of them over a year. I think the department has not only a right, but also an obligation to explain that to the people of Western Australia. The only way it can do that and the only way we can access any information on that is through a committee hearing. The planning processes which have been referred to need clarification.

It has been mentioned that one of the selling points for this legislation to the community was that here was one greedy individual who wanted to pinch back \$70 million worth of valuable, pristine beachfront land. Last night, in my comments on this debate, I tried to explain that that is a fallacy because the future of this land lies with the planning process. We should hear from the Western Australian Planning Commission, which is responsible for the "Leeuwin-Naturaliste Statement of Planning Policy", the document that covers the planning processes over this land. What is the situation? We have been told by Mr McGinty that it involves \$70 million plus. I know and he knows that that is total rubbish because the "Leeuwin-Naturaliste Ridge Statement of Planning Policy" provides for the possibility of only a very small section of this disputed land being considered for any form of development in the future, regardless of the ownership of the land. That is the planning process and this Parliament has a duty and a right to hear the arguments from the WA Planning Commission.

As a house, we should appeal to the Greens (WA). Hon Paul Llewellyn has a very weighty decision to make on this matter. In his time in this house he has taken his responsibilities extremely conscientiously and has considered issues on their merits and considered debates as they occur. I appeal to Hon Paul Llewellyn not to be afraid of committee scrutiny. Members should bear in mind that parliamentary committees can report only to the house. A parliamentary committee can only hear the evidence and report back to the Legislative Council. If it is deemed that this place is the place to make a decision, which I vigorously oppose but some people have other views, let us hear from a committee that is in a position to get some information to report back to this house. That is all a committee can do. A committee cannot make a judgment on the issue. A committee cannot be a court of law. A committee can only hear the facts and lay them on the table. It is still for the house to decide on that matter.

I cannot support this motion any more strongly. It is vital that the Parliament of Western Australia restores some credibility in this matter. We will not have any credibility as a Parliament if we do not at least provide the opportunity for an airing of these issues through a committee structure and allow a committee of this house to make a wider assessment of the situation and provide a report to the house, so that if the house deems that it is the body that should make the decision, it can make its decision based on much better advice.

HON NORMAN MOORE (Mining and Pastoral - Leader of the Opposition) [8.50 pm]: I support the motion moved by Hon Simon O'Brien. We might save some of the time of the house if the government were to indicate whether it will be supporting this motion.

Hon Sue Ellery: You must be joking! No, we will not.

Hon NORMAN MOORE: I am sorry the parliamentary secretary has said that, because that demonstrates to me a very poor attitude towards this bill and the processes of this house. Just last week, the parliamentary

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secretary's side of the house agreed to send the Energy Safety Levy Bill to a committee for consideration because it thought it was worth getting people's views about whether a levy should be imposed upon the public. It was not a problem. In fact, it was agreed to without debate. Tonight we are debating a bill that is vastly more significant in its outcome than the Energy Safety Levy Bill, yet the parliamentary secretary says I must be joking when I ask whether the government will be supporting the motion to send this bill to a committee. This is not a joke, parliamentary secretary. This is a very serious matter. If the parliamentary secretary has not worked that out by now, I regret that her future will be limited - I never would have thought that until now.

Hon Barry House and Hon George Cash have pointed out clearly why this is a reasonable course of action to propose. The purpose of the motion is not to defeat the bill. It is to provide an opportunity for members to become more aware of the circumstances that surround this issue. That is what our committees do. The reason we have set up our committees is to enable us to engage in a far more in-depth analysis of complicated and complex legislation than is normally available in the house. Indeed, it saves a lot of the time of the house. The house could save a lot of time on this bill if it were to agree to the motion moved by Hon Simon O'Brien tonight. The matter could go to the Legislation Committee, which has a very good reputation, as you well know, Madam Deputy President (Hon Louise Pratt). That committee will not make serious political judgments about this matter. Rather, it will consider this bill on its merits. I would love to hear a committee's interpretation of the views of the three eminent legal persons mentioned by my colleagues; namely former Chief Justice David Malcolm, who is regarded by many people as being one of the most respected legal minds in Western Australia; Geoffrey Miller, who is now a Supreme Court judge; and Malcolm McCusker, who most people would acknowledge is also one of the most respected legal minds in Western Australia. I would love a committee of this house to hear their views. All we know at this time is what members prosecuting the argument on behalf of Mr Hammond have told us those people have said. I do not know what Mr Malcolm thinks, I do not know what Mr Miller thinks and I do not know what Mr McCusker thinks. However, I know that no-one on the government side knows what they think either.

It would be good to know what they think, and the thoughts of anybody else in the legal world who might have a view about this sort of legislation. I hope I made my views about this sort of legislation clear last night. I would be very interested to know what members of the legal profession think about this sort of legislation. They should be invited to appear before the Standing Committee on Legislation to give their views on this sort of legislation: whether it is as bad as Hon Simon O'Brien has portrayed - I am sure it is - or whether it is just some reasonable legislative process that the government should be allowed to undertake. If those in the legal world say this is okay, then I guess my next speech on this subject will be a lot less passionate. I would like to know what those in the legal profession think, because I know what I think.

I was also interested to hear from Hon George Cash, when he promoted the argument yesterday against this bill, some of the history in the departmental files. At the present time, at least, we as a house do not have access to those files. They are available to the State Solicitor's Office and, if the matter were to go to court, they would be available to the legal people and the judge involved in the court hearing, but it seems this matter will not go there, so why should we not have access to those files that might put a completely different interpretation on this issue? If the house votes against the motion to send this matter to a committee, it will in fact deny itself the ability to access evidence that may, on the one hand, lead to members changing their minds, or, on other hand, having their views reaffirmed. It might transpire, if this matter goes to a committee, that the committee will report that it has looked at all the evidence, it has heard from the legal people and it has seen the files, and it thinks the government is right. We never know. Over the years I have read some committee reports that have been a bit of a surprise, and that is because a committee, particularly the Standing Committee on Legislation, with the reputation it has gained over the years, has the ability to see through the political jargon surrounding many issues and present well-reasoned and sensible conclusions. It is not out of the question that the committee might come down with a decision that this particular legislation should be passed.

I do not know what the numbers are like on the Legislation Committee, but I suspect they do not support the opposition. Therefore, we are not asking for this bill to be referred to some opposition-dominated committee that will produce the report we want. We are asking not only the Greens, but also those in the Labor Party, the government, to seriously contemplate this proposition. If the government fails to put a time limit on this matter, it should move an amendment, as it did the other day with the Energy Safety Levy Bill, that the committee must report by a certain date. That is better than doing nothing. Tonight, all we are asking for is something that is better than nothing. At the moment, nothing is available. The only thing facing Mr Hammond and the opposition is the passage of legislation that will deny him the right to go to court, which will in fact validate everything the government has done since 1938. The issue will be all over, red rover, unless he can somehow appeal to a superior court in due course at great expense to himself.

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I would like the committee to consider the issues that Hon Barry House so clearly pointed out a moment ago relating to the planning processes. It was only last night that the parliamentary secretary representing the Minister for Planning and Infrastructure made the point by way of interjection that there cannot be high-rise buildings on the land because the planning processes will not allow it. I was very grateful for that interjection. She was effectively saying that the argument we were promoting was correct. The bottom line is very simple: the planning processes will decide what happens to the land, not Mr Hammond, high-rise developers or mad land sharks who might want to rape the land. It would be very useful to have the people who are involved in the planning processes of Western Australia make it very clear to this house, through a committee of the house, what can and cannot be done on that land. It would be a very useful addition to the collective knowledge of all members, and particularly useful in the context of our making a decision about Mr Hammond's position. The government certainly made it very clear that it sees this attempt by Mr Hammond to go to court as somehow or other a vehicle for him to rip millions of dollars out of the system for a very miserable amount of money. I will quote the end of the second reading speech, which refers to two former Liberal ministers -

Their extraordinary decision to grant waivers to a key defence argument in ongoing court actions against the advice of departmental officers and the Crown Solicitor's office has seriously compromised the state's ability to successfully defend this litigation. If this legislation is not enacted to protect the land, a real risk is that this prime beachfront land, which is worth many millions of dollars, will be handed to Mr Hammond for the mere sum of \$3 900.

That quite outrageous conclusion to a second reading speech at least gives us some indication of the government's mentality on this matter. If I cannot, I would like a committee of this house to, hear the advice of the departmental officers and the Crown Solicitor's Office that is supposed to have suggested that the actions taken by former ministers to give Mr Hammond his day in court have seriously jeopardised the state's ability to successfully defend the litigation. The last part of the speech is the reason the bill is before the house: the government thinks that it will lose if the case proceeds. That is why it has to use this sledgehammer of legislation to defend its position. It would be lovely if every time we went to court and we thought we were going to lose, we got Parliament to pass a bill to ensure that we would win. What a fantastic state of affairs. We could have changed the result of the last election! We could have got Parliament to pass a law that the election result was wrong, and have it turned around. We would have a lovely state of affairs if we started doing that sort of thing. I am very keen to hear the advice of those officers - or at least to read it - that has led the government to come to this conclusion which is outlined in the concluding paragraph of the second reading speech.

When Hon Barry House told the house that the court appearance - or whatever it was today - did not take place because the Crown did not turn up, I became very concerned. It should concern everybody. I hope that the government has a good explanation.

Hon Sue Ellery: Very good.

Hon NORMAN MOORE: Did they get caught in traffic or something?

Hon Sue Ellery: You will hear it - keep going.

Hon NORMAN MOORE: I have not been there; I do not know. All I know is what I have been told tonight. If it is true, and I have no reason to doubt it, the government will need a very good explanation.

Last night it was suggested that this bill is before the chamber today because the matter is now before the courts and some action is taking place after all these years. That brings to mind another matter I want the committee to investigate; that is, why this matter has taken so long to get to this point from the very beginning of the litigation action. Who has been holding up the process? We all know that the court system takes a long time. No-one would want to get into it if it could be helped. Once a person is in the system, it takes a long time to get out of it; however, it should not take this long. Has the government deliberately sought to delay, defer and frustrate Mr Hammond's legal processes over the years, or has Mr Hammond done it himself? I do not know. I know only what I have been told. We would prefer it if all these arguments were heard in a court not by you, Deputy President (Hon Louise Pratt), but by an independent judge who has no axe to grind and no political views on the matter and who would listen to the evidence from both sides before making a decision. We argued that last night, but it seems that we did not argue the case successfully. The Greens (WA) and Labor Party members are entitled to make that decision.

The second-best option is for members - who will determine this decision - to find out more about this matter than they already know. I refer to not only members on this side of the house, but also government members. If I asked government members privately whether they knew all the facts surrounding this matter, whether they had gone into it in detail and whether they would like to know more about it, I believe that most of them would tell me that they have not gone into it in a lot of detail but had only a rough idea of what it is about. They have heard

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Mr McGinty's point of view and they know what the decision of caucus is, and so that is what they will do. I believe that privately they would not mind knowing more about it.

Last week they agreed to learn more about the Energy Safety Levy Bill. We were not joking then; we were deadly serious. The house determined that the Energy Safety Levy Bill would impose a levy on taxpayers in four years and sent the bill to a committee to find out what people thought about that. The house accepted the decision to send that bill to a committee, yet the government considers Hon Simon O'Brien's motion to send this bill to a committee a joke. A joke? That is absolutely appalling. It demonstrates that the government does not understand how serious this issue is as a matter of principle. It demonstrates also that government members have been told what to say and do by the Attorney General and his departmental officers, and are simply carrying out their wishes. Those departmental officers are the people who the government alleges led the previous Liberal ministers down the wrong path. Those officers will get their day before a committee of this house. It beats going to the court. When a case is heard before a court, information must be provided through discovery, evidence must be given to the opposing side, questions must be answered and witnesses can be cross-examined. All those things can happen in a court. Is it not much easier for those who are promoting this course of action to decide to have it dealt with by the Legislative Council? They are only members of Parliament; they are not legal people. They will have a political argument about it, the legislation will be passed and it will all be over, red rover. It is no wonder the departmental officers want to go down this path; it is an absolutely guaranteed win. It is like knowing that the jury will vote its way 6-5 every time, because the jury has been hand-picked. This matter is coming before this jury - the Legislative Council. The course of action taken by the government is slightly more favourable to their interests than is the course of action proposed by the other side of the argument. What a lovely scenario it would be if every time a person wanted to win a court case, he or she picked a jury that would guarantee a win. That would be fantastic.

I will not prolong my comments any further other than to say to the Greens (WA) and government members that this motion provides us with an opportunity - it does not have to be a long opportunity - for members of the Standing Committee on Legislation to sit down, unencumbered by the process and pressures of this house, with those who know about this matter to learn what it is all about. The committee can ask the eminent lawyers why they came down on one side of the argument some time ago. It can ask the departmental officers why they are so strident about going down this path. It can ask why it is necessary for Parliament, and not the courts, to make this decision. It can ask why the government has chosen this course of action and not the normal course of action. It can find out what is in the files that have accumulated over the years. Let us look at them. I would like to see them - I am sure everybody would. These are the sorts of things that a committee of this house can and should do. Quite frankly, this bill is the sort of bill that should be placed under scrutiny. As I said at the beginning of this debate, the opposition would much prefer that the courts decide this matter. Sending the bill to a committee is a second-best option. It will not make any difference to the outcome of the bill; rather, we will be given information that we do not have now. Sending the bill to a committee will not mean that the bill is defeated. It will simply mean that the house can do its job better than if the bill does not go to a committee. Members know that the house does its job better when it has a chance to consider bills through the committee process, because the committee can interview people who know better than we do. That has been done successfully on many occasions and it will continue to be done successfully in the future. For all the reasons that opposition members outlined yesterday during the second reading debate, this bill desperately needs that scrutiny. I ask the Greens and government members to please take this motion seriously. They must understand that it will not necessarily affect the outcome. Sending this bill to a committee is the proper and right thing to do, and it should be done.

HON ROBYN MCSWEENEY (South West) [9.13 pm]: I support Hon Simon O'Brien's motion to send the Yallingup Foreshore Land Bill to a committee. Garth Hammond must be very frustrated with the law, our legal processes and Parliament, given that the Greens (WA) have already indicated that they will not support Liberals in their fight for justice. He must also be frustrated by the fact that the law has ignored him. Perhaps the Greens will be fair and just and agree to send this bill to a committee. If for no other reason, the bill should be sent to a committee in accordance with the fair and just processes of Parliament. I certainly hope that Hon Paul Llewellyn and Hon Giz Watson agree to what I call procedural fairness. Given that a committee can look at the facts, invite professionals to appear before it, considers the factual merits of an issue and compiles a report that is evidentiary based, I support this bill being sent to a committee. The Parliamentary Secretary to the Attorney General just said that we have to be joking if we want to send this bill to a committee. I assure the parliamentary secretary that Garth Hammond, who has fought for justice for 14 years, does not think that this is a joke. Three judges have given their opinions. Having spoken to Mr Hammond on many occasions, I can only imagine his frustration when doors are slammed in his face and all avenues are closed. That takes a toll on a person. I support Mr Hammond having his day in court; however, if that is not possible, the next best thing is to

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send this bill to committee because that is the only way that Mr Hammond will receive a fair hearing. A fair hearing is what is needed with the Yallingup Foreshore Land Bill. I support the bill being sent to a committee.

HON NIGEL HALLETT (South West) [9.14 pm]: I take this opportunity to support Hon Simon O'Brien's motion and I applaud the impartiality that Hon Paul Llewellyn and Hon Giz Watson bring to this Parliament. I find it very encouraging that Hon Paul Llewellyn has acknowledged that the law is imperfect. I appeal to him to acknowledge the law and let Parliament give to a citizen of Western Australia, in this case Garth Hammond, an opportunity to have his day in court; indeed, that should apply for anyone who seeks a decision from a court. If the land in question were a quarter-acre block out the back of Southern Cross, we would not have spent four or five hours in this Parliament debating the matter. Is it the amount of land that worries us? Is it the amount of money that worries us? These matters should not cloud the issue. As members of Parliament, it is not our role to be judge and jury; it is our role to deliver fair legislation. I appeal to the Greens (WA) and to the Labor members of Parliament that if they are in doubt, they should support the referral of the bill to a committee. If members want to earn the respect of Parliament and the community of Western Australia, they should acknowledge the real role of Parliament and gather all the information that will enable Parliament to make an informed decision. If this Parliament is to make an even-handed and fair decision based on the information available, it will not hesitate to support the motion moved by Hon Simon O'Brien. We as members on all sides of this house have nothing to lose by supporting this motion. It comes back to having a court decide Mr Hammond's future. What do we have to lose? Absolutely nothing. We can make fair and just legislation. We can let the court decide. I urge all members of Parliament to give unbiased support to this motion of Hon Simon O'Brien.

HON PAUL LLEWELLYN (South West) [9.17 pm]: From time to time we are all confronted with long-term perennial grievances that people bring to us. Even in my short time as a member of the Standing Committee on Environment and Public Affairs we have heard such a grievance. Very often the grievance is not exactly as it might seem. It is not just a grievance about an injustice or wrongdoing or litigation; it is in fact rolled up in an emotional argument and a commitment, and in this case possibly a deathbed commitment, to continue a case.

Hon Norman Moore asked why this commitment ended up in this place. It ended up in this place for a very good reason. It ended up here because Mr Hammond brought it to not only one member of this house but also to just about every regional representative. Any lower or upper house member who would listen has heard Garth Hammond's story, and that is why our files are full of the Hammond story and the Yallingup story. I do not believe this is a fight for justice, to quote another member. This is not a fight for justice and some higher good. We dealt with the imperfections of the law and the imperfections of our history last evening. There is a series of injustices and imperfections which we inherited and which this place represents and embodies. This place is what it is: a place where we must make difficult decisions from time to time.

In the view of the Greens (WA) - it is not just my view; I inherited this case - this has been a vexed and long-term grievance tied up in emotional argument that involves not just a matter of justice, but also attachment to an outcome and to the process. I make the distinction between attachment and commitment. We can be very committed to achieving and moving forward. In this case, if the Yallingup Foreshore Land Bill is referred to the Standing Committee on Legislation, we will be committed to getting all the evidence on the table and so forth versus being attached to that outcome. When we debate issues in this house, we tend to take one side or the other. We tend to become attached to an outcome, rather than committed to justice or to inquiry.

This issue has undergone a longstanding inquiry as part of a very public process. That is why we all know fragments of the case. However, it is a vexed issue because of the passage of time and because people's perceptions and memories have been attached to the facts. There comes a time when we must move forward and put the past where it belongs, which is in the past. It is time to move forward without compromise on principle, but with a commitment to moving forward and achieving an outcome to relieve the state and the community of this longstanding vexed issue.

The committee process also will be imperfect. What if the committee delivers an outcome that Garth Hammond or the Hammond family believe has not done them justice? Whose door will they knock on then? Will they ask future new members of Parliament to bring it back to the house again for a decision? What happens if a satisfactory outcome is not delivered by the courts? This case will return again and again because not only is it about the facts or procedural fairness but it is tangled up in a series of values, some mythology and some facts. I see no advantage in referring the bill to a committee. That process will not reveal further information that will change the nature of the conflict. The nature of this conflict is complicated, in the same way as a divorce case gets complicated and the evidence is coloured. This case will inevitably result in a tangle of ideology around justice, fairness, just rights, historical grievances and vexed issues. Democracy is expensive. In my short time in this place, I have come to understand that democracy is expensive. The process that we have involved ourselves

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in, not just as a Parliament, but also as individual members of Parliament, has been an expensive, long-winded exercise.

Hon Barry House interjected.

Hon PAUL LLEWELLYN: Democracy is an expensive process. This issue has already occupied the minds, attention and resources of a considerable number of people in our region. It is time to move on, and that is where the Greens started this conversation. The Greens and the community have heard a considerable amount of evidence and have had a considerable amount of discussion, and we should avoid running an ideological debate in this place -

Hon Norman Moore interjected.

Hon PAUL LLEWELLYN: We should avoid running an ideological debate in this place about just terms, because in some ways that is just as much an abuse of this case as any other injustice. The Greens will not support the motion. More than enough resources have been put into this matter already.

Hon Simon O'Brien: What about we have a bill to declare invalid the election of any Greens member to this house and that it be effective from the last polling day? What if we support that?

The DEPUTY PRESIDENT (Hon Louise Pratt): Order, members! Hon Paul Llewellyn is clearly not entertaining interjections, so members will allow him to continue his speech.

Several members interjected.

The DEPUTY PRESIDENT: Order, members!

Hon PAUL LLEWELLYN: We have made the case, and I will make it again, that the Greens are committed to fair and just outcomes. One of our central planks is that social justice, fairness, just outcomes and intergenerational values be considered -

Several members interjected.

Hon PAUL LLEWELLYN: The Greens do not support the motion to refer the bill to a committee. It would serve no more purpose to the case.

HON BRUCE DONALDSON (Agricultural) [9.27 pm]: I support the motion to refer the bill to a committee because of two or three factors that have stuck in my mind. The first glaring factor was the second reading speech. I have been in this place for 13 years and I have never heard a speech like that. It was gutter politics at its worst. I do not know who was the author of the second reading speech. Did it come from the Attorney General's office? Did it come from the State Solicitor's Office? I hope that the parliamentary secretary will identify how that second reading speech, which was absolutely disgusting -

Hon Ken Travers: This is a referral motion.

Hon BRUCE DONALDSON: I am talking about the referral motion. I am giving the reasons that the bill needs to be referred to a committee. That was clearly the worst second reading speech I have heard in this place in 13 years. It showed contempt for this house and the Parliament and abused parliamentary privileges. The other factor is what I call the conscience clause, clause 7, which needs to be examined. It clearly states that the government is prepared to pay the legal costs of Mr Hammond, yet it will deny him his day in court through this legislation. I await the introduction of a bill that will validate the claim by the contractors who deepened the Geraldton port for \$70 million from the state government. Will we see a bill very soon validating that situation? Will a piece of legislation prevent those contractors from having their day in court over that \$70 million claim? We will never know what the advice of the State Solicitor's Office was or is. However, we do know that there has been an unholy rush to bring on this bill all of a sudden, after it has been languishing for a number of years.

Eminent legal people are also being denied the opportunity to appear before a court. The people mentioned by Hon Barry House and Hon Norman Moore are very highly regarded in the legal fraternity. I have yet to see two lawyers agree. Also, no lawyer can say that he is the sole fount of knowledge. Some lawyers might like to think that they are. However, I can give the house an example of a matter involving Crown Law, as it was previously known, and the Solicitor General. Many years ago I went to school with a person who became Solicitor General. Some years ago, the Court government introduced the Young Offenders Bill. Prison rules were to be transferred to accommodate young offenders. A very eminent Queen's Counsel, Mr Len Roberts-Smith, advised the Joint Standing Committee on Delegated Legislation. The committee said in its report to the Attorney General at the time that that move was completely out of order because many of those prison rules had legislative effect and could not be transferred and used for young offenders; there needed to be other legislation to give validity to those laws. We were pooh-poohed at the time. However, by the time we had finished, surprise, surprise, Crown

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Law removed half those prison laws that it was going to transfer because the committee was right. I made up my mind then that Crown Law is not the sole fount of knowledge.

I would like the government to have the intestinal fortitude to stand in the court and present its case. I do not know what the result would be. I have always believed that if a person can go to court, at least there is the opportunity for justice to be done. That justice may not be done in the way in which a plaintiff would wish it be done, but so be it.

Hidden beneath all this is gutter politics. I have become suspicious. I have become more suspicious every day over the past three or four years as I have watched this legislation unfold. From my observations, the State Solicitor's Office is hell-bent on making sure that this legislation goes through. I am not a lawyer but, reading between the lines, my assessment is that Mr Hammond has a very good case. However, with this bill he will never be allowed to present it in a court. As a member of Parliament, I feel ashamed that this is happening. It disappoints me greatly. It is not often that I get very upset. However, I believe in justice for people. The court should decide whether that justice should be in favour of Mr Hammond. How many times have I heard that there is a separation of powers between the Parliament and the judiciary? All members of Parliament stand and fly the flag for that separation; for keeping the judiciary separate from the Parliament. How many members of Parliament across Australia were horrified when a High Court judge said that judges not only interpret laws, but also make them? Do members remember that? I do. People across Australia were not very happy with that statement, because judges are not elected and they are not responsible to anyone. That judge - I think it was Mr Justice Kirby - was talking about not only interpreting but also making laws.

I have listened, I have seen the urgency and I have seen the absolute contempt illustrated by the body language of members on the other side of the house.

Hon Sue Ellery: By whom?

Hon BRUCE DONALDSON: I am just saying, it has been shown by those sitting on the member's side of the house.

The DEPUTY PRESIDENT (Hon Louise Pratt): Order! The motion before us is a referral motion.

Hon BRUCE DONALDSON: I am saying that this is all part of the integral reason, Madam Deputy President. We may or may not have a vote at some stage this evening. We are waiting with absolutely bated breath to hear the parliamentary secretary representing the Attorney General.

Hon Ken Travers: She tried to get the call.

Hon BRUCE DONALDSON: She will get the call in due course, but I did not know there was a prohibition on members speaking in this house or any rules or regulations preventing them. I think that every member should be heard.

Hon Ken Travers interjected.

Hon BRUCE DONALDSON: If Hon Ken Travers wants to be heard, he should get up and make a speech. He should have the intestinal fortitude to stand up, have a sense of decency and defend what his government is about to do. He will not do it.

Hon Ken Travers: I have no problem with what we are about to do.

Hon BRUCE DONALDSON: He should stand up and say so, and give his reasons. I am absolutely disgusted at the way in which the Yallingup Foreshore Land Bill has been advanced over the past few years. I am disgusted because I see a chamber of this Western Australian Parliament being used and abused. I never thought I would ever see it. I have seen some funny events take place in this chamber, and some bits and pieces of which we have probably all been ashamed at times, but every member on the other side should be hanging his or her head in shame at what is happening tonight and has been happening for some time. I am pretty disappointed in all of them. I believe that deep down many of them have the decency to believe that somebody should at least be given the chance of his day in court to seek justice. If his argument were rejected by the court, we would all cop it because that would be it, but at least he could walk away knowing that he had had his day in court. If he lost the argument, that would be tough, but that is what life is all about.

I support the referral of this bill to the Standing Committee on Legislation, because it is important. I am a great advocate of the committee structure of this house and always have been. I have enjoyed committee work. Many of the reports presented to this house have been of a very high standard. That is a reflection on the staff and the fact that when we sit around a committee table - surprise, surprise - every person takes his or her political cap off. I have always enjoyed that aspect of committee work. This matter could have been advanced. The

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Legislation Committee could have handled it and reported back to the house. As Hon Norman Moore quite clearly said, the committee may have found that Mr Hammond did not have a case. That could easily have been the case; who knows? At least it would have been done. This Parliament could then have made the point that it had looked at the matter and that the committee had not agreed with his case. Some might still have wanted to fight on, but at the end of the day at least this man would have had access to the first part of justice. I support the motion of Hon Simon O'Brien. This is a very sad day for this house because of the way this bill has been generated. We have slowly but surely slid into the gutter. I am disappointed in those people who have been responsible for this. I go right back to the State Solicitor's Office and the Attorney General's office. Underneath it all, my mind will never be altered unless I have proof that this has been generated for one reason only; that is, the State Solicitor's Office gave the advice that the government could not win.

HON SUE ELLERY (South Metropolitan - Parliamentary Secretary) [9.41 pm]: Madam Deputy President -

Point of Order

Hon NORMAN MOORE: Can you clarify the status of this speech, Madam Deputy President, and whether it closes the debate on the second reading? Can the parliamentary secretary speak on the referral motion and then speak on the substantive motion?

The DEPUTY PRESIDENT (Hon Louise Pratt): The parliamentary secretary is in a position to speak to the referral motion at this point, but that does not close the debate.

Debate Resumed

Hon SUE ELLERY: The government opposes the referral motion. The essential elements of the argument are that a fraud was committed against Mr Hammond; that this legislation offends an individual's rights and deprives him of his day in court; and, if we do not let him go to court, at least we can let him go to a committee. No fraud was committed against Mr Hammond Snr. In 1937, he purchased 96 acres of land for £300. The following year, 1938, he was offered, and accepted, compensation for the amount of £250 for about a third of that area - 33 acres. There has been no breach of his rights. He has had several days in court, both before and after the state's rights were compromised by a decision to waive, in the broadest terms, that proper instrument of the law, the limitations provisions.

Of greater concern to me tonight is that one of the key supporting arguments being relied on to prove the motivation of the government in this matter, and why this should be referred to a committee is that the government is using this bill to create some kind of artificial device to avoid a court proceeding that was listed for today. That was mentioned in the formal contribution by Hon Barry House; by several other members in their speeches; and in by others, including Hon George Cash, through interjections. I have in my hand a document that states -

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

CONSENT ORDER

REGISTRAR S BOYLE

DATE: 4 April 2006

PURSUANT TO ORDER 43 RULE 16 AND BY CONSENT IT IS ORDERED THAT:

1. The directions made by Registrar S. Boyle on 22 February 2006 be varied as follows:
2. The plaintiff file and serve a reply to the defence by 5 April 2006.
3. The parties are to file and serve affidavits of discovery by 21 April 2006.
4. The case evaluation conference listed for Wednesday, 12 April 2006 is vacated.
5. The Case Evaluation Conference be adjourned sine die.

Extract from *Hansard*
[COUNCIL - Wednesday, 12 April 2006]
p1561c-1573a

Hon Simon O'Brien; The Deputy President; Deputy President; Hon George Cash; Hon Barry House; Hon Norman Moore; Hon Robyn McSweeney; Hon Nigel Hallett; Hon Paul Llewellyn; Hon Bruce Donaldson; Hon Sue Ellery

BY THE COURT
SANDRA BOYLE
REGISTRAR

I seek leave to table the document.

Leave granted. [See paper 1441.]

Hon SUE ELLERY: I am also advised that this order was made on application by Mr Hammond himself. So, what happened tonight? Hon Barry House needs to check his facts, because either Mr Hammond misled Hon Barry House during that phone call that Hon Barry House says he made in the past couple of days to apprise Mr Hammond of the events in the house, or Hon Barry House misled us tonight. It is not the case that the government was using this legislation as some kind of artificial device, and it was certainly not the case that the government did not turn up today or failed to appear. In fact, what happened is that on application by Mr Hammond, the date was vacated, and that order for vacation was issued on 4 April 2006. The government opposes the referral motion.

Debate interrupted, pursuant to sessional orders.