

NATIVE TITLE AMENDMENT BILL 1997 [No. 2]

Consideration of Senate Message, 9 April 1998, Extract from the House Hansard, Page 2074.

Mr GARETH EVANS (Holt-Deputy Leader of the Opposition)(8.50 a.m.)-It is deeply depressing that the government has chosen to reject the Native Title Amendment Bill 1997 [No. 2] in the form in which it is returned to us from the Senate. There is no reason in law or justice or economics or morality for this bill in this form to be rejected. If it is rejected, it will not be for any reason of law or economics or justice or morality. It will be for reasons of politics-the politics of the coalition and the accommodation of the National Party within it, the politics of the forthcoming Queensland election and the politics of winning the federal election in rural and regional Australia.

This is a divisive and confrontational government which has deliberately taken a divisive and confrontational course on issue after issue since it has been in office. It has taken that course now on the Australian waterfront and it has taken it now here on an [2963] issue that is even more explosive-the issue of race and Aboriginal rights. The tragedy is that it has been so unnecessary for the government to take this course.

We in the opposition approached this whole issue from the outset in a conciliatory and consensual fashion. We kept trying to find solutions throughout the course of this debate that would be acceptable to all the key stakeholders-indigenous Australians, pastoralists, miners and the larger Australian community. We have been constantly disappointed by the government's reaction and we are disappointed again-disappointed to the extent of total depression-by the government's reaction today.

Let me proceed immediately to the substance of the issues and explain why it is that the government should be prepared to accept this bill in the form in which it has come back to us. The government says there are four key issues in the legislative package which make that impossible. That is not a view that is accepted by the opposition and let me explain why. First of all, the threshold or registration test. This is the key to a great deal else in the bill. It is crucial that it be effective. It is crucial that we end so-called paper claims once and for all. It is crucial that the right to negotiate in future be exercised only by claimants to native title with a reasonable chance of success.

The amendment passed by the Senate is not precisely what the government wanted in this respect, that is true, but it does get that result. It is a very different set of provisions from that which passed the Senate in December. What we now have-and let me identify it-is first of all a set of tough procedural hurdles that have to be jumped. We have a criterion whereby each individual claim has to be prima facie sustainable and determined as such by the registrar. We have to have a traditional physical connection, not just any old connection, or, in the absence of that, a lockout. That is going back only one generation: the issue has not been put in the

legislation of going back more than one generation.

Alternatively, if you have not got that kind of traditional association or a lockout, you at the very least have to have an acknowledged traditional law association or a customary association which has been maintained with this particular patch of land to the extent practicable-the Mabo test outlined by Mr Justice Brennan. That is not some loose, vague, spiritual association test, as has been constantly claimed; it is a workable and defensible addition to the legitimate bases for such a claim being made.

There is moreover something the government was always reluctant to accept-God knows why because it adds very significantly to the armoury of the miners who want to contest rights to negotiate being triggered in situations where they think the claims being made are indefensible. There is provision in our threshold test for a collateral challenge to be made to the registrar's decision in circumstances where it is beyond the registrar's power to determine a contested matter of fact, but it is a matter of the court's power. We have now put in a provision expressly enabling an unsustainable claim, in effect, to be swept away at the threshold. So much for the threshold test.

As to the right to negotiate, yes, as the bill comes to us from the Senate that has been retained for mining on pastoral leases-the issue that was left open, not foreclosed, in 1993. Why shouldn't that right to negotiate be retained? What we are talking about here is a common law right to have native title or a claim of such common law right which the government recognises legitimately does trigger a right to negotiate in relation to mining and compulsory acquisition exercises if it is on vacant crown land. What difference should it make that a pastoral lease has been given over that crown land? We are not talking about freehold and we are not talking about full commercial leasehold of the kind which involves exclusive possession; we are talking about pastoral leases, which, as we all know or should know, historically were no more than essentially grass and water licences to graze. That is the truth of the matter.

The onus is not on those who want to argue for a right to negotiate to be extended to pastoral leases; the onus must be on those who would want to take away the right to negotiate from those with credible common [2964] law claims to native title who would have that right if it were vacant crown land and for whom the existence of a pastoral lease should make no difference. Pastoralists are not being prejudiced in any way. Their rights will not be one iota diminished from what they are under statute or common law at the moment.

The final point to make about the right to negotiate is that it is critical not only to the justice and morality of this package but also to its legal certainty. The Hindmarsh Island case left very much open the necessity for a race based constitutional provision to operate to the net benefit of Aboriginal or indigenous people and it is clear that the right to negotiate will be crucial in any determination of that net benefit.

As to the third issue of the sunset clause, it is true that has now been deleted from the legislation, but this has always been the least credible, least plausible, of the government's positions and, frankly, acknowledged as such in many private conversations, which I will not be rude or crude

enough to actually identify, going right back to the beginning of this debate. The truth of the matter is that it has always been acknowledged that the sunset clause would not inhibit the pursuit of common law claims-and that has been acknowledged again by the Prime Minister (Mr Howard) today; all it would do is rub out the statutory procedures being applicable. All the existence of a sunset clause would have done is trigger an avalanche of ambit claims which would make much more difficult the practical resolution of these vexed and sensitive issues.

As to the final of the four issues, the Racial Discrimination Act clause, this is not the kind of destructive weapon the government claims it to be. We did amend the text of the bill to make specific provision to exclude from any possible override by the Racial Discrimination Act its application to not only the original validations but also the validations that have been accomplished for the intermediate period from 1994 to 1996. There has been in addition an interpretive footnote inserted in our amendment designed to make it clear that the RDA applies in relation to the performance of functions, the exercise of powers or the resolution of ambiguity.

In other words, there is a very clear direction being given to the courts that it is not the intention of the legislature that the Racial Discrimination Act cut some sort of destructive swath through the substantive provisions of the legislation. It is there as an interpretive guide and it is there as a restatement of the fundamental principle, which we all ought to be prepared to accept, that non-discrimination ought to apply and ought to be visibly seen to apply.

It is critical to appreciate that these four issues are not the only issues that have been the subject of the Senate debate. A huge number of other issues have been debated and overwhelmingly in relation to all these other issues the government got what it wanted. Let me list what the government has achieved in this respect so people can understand why it is we say that the government should not be rejecting this legislation in the form in which it has come back and for it to do so is politically driven rather than driven by economics, law, morality or justice. Let me list these issues quickly.

On the validation issue, the government got what it wanted with ALP support. On the issue of confirmation of past extinguishment, the government got everything it wanted with a couple of comparatively small exceptions. On the question of indigenous land use agreements, largely as a result of a consensus in negotiation we have achieved something that is supported by both the government and the opposition parties, a better outcome than December and one that in particular will allow for the resolution of a great many of those tangles of outstanding claims from the pre-1996 period which will not be revisited under the new threshold test and which have to be somehow addressed if we are to resolve the continuing problem areas, particularly in the Goldfields and elsewhere.

On the primary production regime, the government's pastoral diversification regime was here accepted, effectively in its entirety. The government and the pastoralists have everything in practice they could reasonably want, and did in fact want. Non-claimant applications, water and air space issues were clear wins for the government in the sense that it [2965] got exactly what it wanted; it got its bill. On the renewals issue, the government got nearly all that it wanted, with one huge advance on December, which was given to it with ALP support, and that was the

renewal of mining leases and interests on the same terms as they had previously existed. That will not now trigger a right to negotiate. It was a matter on which the mining industry had very strong feelings—a matter on which we sought and achieved a consensus outcome.

On the issue of reservations, the government got what it wanted. On the question of services to the public, there was a mixed outcome for the government. It got everything except the right to construct new facilities without a compulsory acquisition right to negotiate regime being associated with that. On low impact acts, there was achieved in the Senate an extension to low impact exploration—that is, that does not now trigger a right to negotiate. That is a major advance for the mining industry and for the government on what was achieved in December, and it was delivered with complete cross-party support as a result of negotiations. On the freehold test and offshore issues, the government got exactly what it wanted. On statutory access rights, the government got half of what it wanted. It maintained what we would regard as the unfair element of suspending common law native title rights when statutory access is in fact achieved, granted or exercised, but the opposition won its position on the extension of those access rights to cover various lock-out situations.

On compensation, we achieved an improved regime—delivered by agreement—and one thing that will make the bill a lot more certain in its legal application so far as this area is concerned. On the question of applications procedure, the government got what it wanted. On claims procedure, it got what it wanted. On the question of representative bodies, it got what it wanted, with some significant improvements on the 1993 bill incorporating some positions negotiated by the government with the opposition. On a whole miscellany of other issues, which it is not easy to simply characterise, the government got 14 of its amendments up; we got seven, including,

might I say, an amendment to guarantee the Queensland Chevron pipeline deal which was delivered last night—a statutory provision to that effect—by the opposition, the Greens, Senator Harradine and the Democrats against government opposition. That is there in the text of the legislation and that will not be forgotten in the forthcoming Queensland debate.

The point is this: I have just rattled through, together with the original four matters I dealt with at more length, the 20 key issue areas that were up for debate in the Senate. On 14 of those 20 key issues, the government got exactly or more or less exactly what it wanted. On two other of those 20 issues, the outcome was divided from a government perspective. On four of those issues—the RDA, the sunset clause, the threshold test and the right to negotiate; the big four that the government keeps emphasising—it did not get what it wanted. But I should say that overwhelmingly the balance is there and any reasonable analysis of the outcome in the Senate will make it absolutely clear that this is a package that should have been accepted by the government. I should say that even this outcome has been even more divisive and confrontational than could have been the case. More options were on the table that could have delivered consensual negotiated outcomes on issues which still remain divisive as between us, including, I have to say, the right to negotiate itself.

The debate lost its way when the government, as I understand it, backed away from various undertakings or assurances or understandings that were given in negotiations with Senator

Harradine. That led him to walk back from positions that he previously had taken. There is no point in going over the agony of all that debate over the last two weeks, but all I can say in general terms is that, had the political atmospherics been a lot better, had this government been not so obviously determined to create the conditions for confrontation here, a totally acceptable outcome could have been achieved; and that is of course something we have been arguing for from day one-that it is possible with goodwill to achieve that. [2966]

What we have as a consequence of the failure to reach a complete agreement on all these issues is a number of residual areas of quite serious legal uncertainty so far as this bill is concerned. Because of the government's achieving its way on a number of the issues that I have already mentioned, there is a very real question as to whether this legislation can in its present form satisfy the beneficial requirement which we believe continues to exist in section 51(xxvi) and which will be determined by the High Court when it finally gets around to addressing the substantive issues on things like confirmation of extinguishment to the extent that it does not apply common law rules. There are some just terms, issues which again are redolent right through this legislation, which had I the time I would address.

But let me just come back to where I started. Nothing in the economics, the law, the justice or the morality should stop this bill being accepted. The government will be judged by its failure to accept this bill. It will be judged, of course, by indigenous people who, once again, have had their hopes of reconciliation and advancement sadly dashed. It will be judged by the miners and all those others who want commercial certainty and who have been denied it by the failure to reach agreement on these issues. The government will be judged internationally by those who are all too conscious internationally of the long record of insensitivity this government has chalked up on racial issues. And this government will be judged by the Australian people, who do not want division and confrontation, who do not want to see unleashed all those forces of prejudice, fear, humiliation and hurt that, whether intended or not, are absolutely inevitable if we do proceed, as now seems inevitable, to a race based double dissolution.