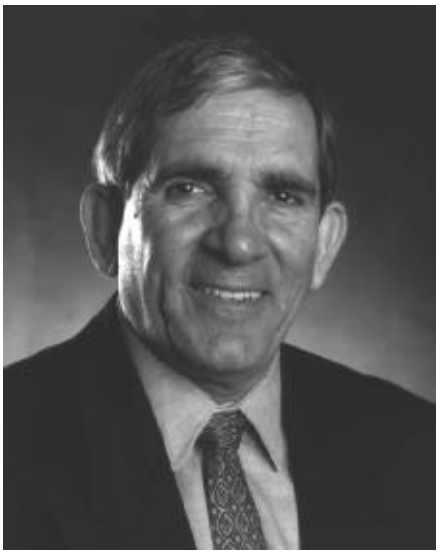

Speech by

Hon. J. FOURAS

MEMBER FOR ASHGROVE

Hansard 25 August 1998

NATIVE TITLE (QUEENSLAND) STATE PROVISIONS BILL

Hon. J. FOURAS (Ashgrove—ALP) (4.25 p.m.): I am pleased to rise to speak to this Bill. For a long time now I have been an unequivocally passionate supporter of Aboriginal reconciliation, and that of course fundamentally includes land rights. I understand that, if we are going to live in a society of social harmony and social cohesion, we need to work out how to get on together. It is sad that Aboriginal reconciliation has become such a political issue. I do not think it should be a matter of politics at all; it should be a matter of the heart and the soul. I think it should be about the sort of society that we want to see and the values we pass on to our children and our children's children. It is very, very important that we understand that we have to live together.

Too often the corporatists' agenda, particularly in the past decade or so where self-interest reigns supreme, does not allow for the making of the sorts of decisions that we need to take in the interests of having a good society, of behaving for the common good, of respecting human dignity and of having a fair go. That is because it is all about self-interest. Unfortunately, in order to be able to acquire these values I am talking about, a degree of disinterest is required.

I also share the concerns of the member for Archerfield. Those concerns have been expressed to me by many members of the community I represent. Before the election I was fortunate to attend a dinner at Ashgrove at which Noel Pearson was the guest speaker. Six hundred people came along to show that they supported reconciliation and the values about which I spoke earlier. I looked up this issue on the Internet the other day to see how people out there are viewing it. There was an article from a Peter Seidel and James Fitzgerald talking about the current Bill, the validation and confirmation Bill before the Parliament. Early on they talk about that fact that it validates grants between January 1994 and December 1996, but the issue I want to address is that of confirmation. That article states—

> "The 'confirmation' provisions will cause the permanent extinguishment of native title over vast areas of Queensland. The Queensland Government intends to adopt in full the NTA's imprecisely drafted Schedule of extinguishing interests, which includes non-exclusive land tenures where native title may otherwise have survived, like grazing homestead perpetual leases."

It goes on to talk about these grazing homestead perpetual leases. It says—

> "In Queensland, for example, grazing homestead perpetual leases are a common form of land tenure covering a large area of central and southern Queensland. They vary in size from a few hundred hectares to over 200,000 hectares each. Their conditions are in many respects comparable to the pastoral leases which the High Court found could accommodate coexisting native title in Wik."

Again that is a view that has been expressed by many people. I repeat—

> "Their conditions are in many respects comparable to the pastoral leases which the High Court found could accommodate coexisting native title in Wik."

I think that this legislation would extinguish native title before the courts have any opportunity at all to consider this. There has been no test case on whether these grazing homestead perpetual leases have extinguished native title. The other day around this Parliament I ran into David Byrne—David would be known for his work with the Northern Land Council—and he assured me that he knows of a number of

grazing homestead perpetual lease land holders who want to negotiate. This legislation might not allow them that right to negotiate. In fact, native title would be extinguished straight away. They actually want to coexist with the Aboriginal people. That is the first point.

The second letter I received was from Noel Pearson—and I mentioned Noel earlier—someone whom I respect. I respect his integrity and his judgment. He sent this letter to members of Parliament. It was headed "Does the Queensland Parliament understand the law it proposes to pass?" It is really typical of his approach to the issue. It really challenges us, and I think we should be challenged. In the first part of his letter Mr Pearson speaks about validation and expresses his concern that the Racial Discrimination Act may be tested during validation and may lead to another situation in which we have to go before the courts. We still have some very big fundamental questions to answer before we come to grips with native title. Pearson speaks about errors in the Schedule of extinguishment and says—

> "The Queensland Bill will 'confirm' extinguishment by adopting the Commonwealth Acts Schedule of Extinguishing Tenures. The Commonwealth Government has conceded that there may be kinds of tenure included in the Schedule which do not extinguish native title at common law. For this reason, the NTAA and the Queensland Bill make provision for the payment of compensation where native title is actually extinguished by the wrongful inclusion of tenures in the Schedule. A good example of the kind of tenure which should not have been included in the Schedule is a Grazing Homestead Perpetual Lease."

It should be clearly understood that for many Aborigines the issue is not a matter of fair and just compensation. I have no doubt that the courts would give fair and just compensation. The issue for the Aboriginal people is land rights. If we go through a process which extinguishes land rights, without these matters being tested in the courts, we have reason to be concerned. Pearson concludes his letter by saying—

> "Compensation: 'Act in Haste, Repent at Leisure.' "

He is very cynical of the proposition that Howard and Costello will pay 75% of the compensation. It is not a firm offer. It is a negotiated status situation. I know that when it comes to the crunch the Feds, as they always do, will try to minimise the amount of money they pay.

Let us get back to the principles that should be included in this legislation. I would like to take members to the speech delivered by the Federal Attorney-General when the Native Title Amendment Act was debated in the Federal Parliament. The Liberal Attorney-General said—

> "The approach of the previous Government raised expectations of certainty which the act proved unable to deliver."

There is no doubt about that. Everybody believed that pastoral leases extinguished native title. Under Wik it was proved that that was not the case. The Attorney-General went on to say this—

> "... in particular in relation to the circumstances where it can reasonably be said that native title does not exist. To do so we have chosen to confirm explicitly in the Native Title Act the extinguishment of native title by certain grants or activities by governments."

That is relevant to my argument about grazing homestead perpetual leases. The Attorney-General continues—

> "As I have already made plain, this Government respects, and will continue to respect, the Mabo and Wik decisions and the native title rights of indigenous Australians."

I am not a lawyer. I would like to be convinced that what we are doing here is with the proper knowledge of whether extinguishment occurs. As the Federal Attorney-General said, it is of interest to all Australians to be clear and certain about whether extinguishment has already occurred.

Why do we not allow this to be tested? That is the problem. Today I received a legal opinion furnished by Mr W. Sofronoff, QC. The opinion was given to Mr James Fitzgerald, a lawyer who works with the Queensland Indigenous Working Group. The opinion was delivered at 11.27 a.m. today. Mr Sofronoff is an eminent QC. I will go through his opinion, but the last line reads as follows—

> "For these reasons, I am of the opinion that the grant of a Grazing Homestead Perpetual Lease does not extinguish Native Title."

We go back to the fundamentals of this legislation. One of the fundamentals is where it can reasonably be said that native title does not exist. We respect Mabo and we respect Wik and we respect the law of the land. What are we doing here?

Members on this side of the House have previously praised Mr Sofronoff for his work. The previous Government had three goes at the High Court and lost on all three occasions. Their record is three-zip. In any country when a soccer team is defeated three-nil it has had a hiding. I am questioning what we are doing here today because we do not want to have a four-zip result.

I will take the House through some of the arguments that Mr Sofronoff raises to make his case that in his opinion the grant of a grazing homestead perpetual lease does not extinguish native title. I would like the Premier to tell us whether it really means that we will have to go to compensation. If that is the case, are we not being a bit hasty? The letter from the Social Justice Committee of the churches seems to suggest that. Mr Sofronoff gives a history of this matter in his opinion. He says—

> "Such a lease is a relatively new creation, having been introduced by an amendment made in 1975 to the Land Act 1962. Prior to 1975, the Land Act provided for two forms of grazing selection: grazing homesteads and grazing farms. These tenures were limited to areas not exceeding 45,000 acres."

The situation was changed in 1975 to permit the holders of grazing selections to convert their properties to grazing homestead perpetual leases. The significant change was that the size had to be limited to living areas. It was no longer limited to 45,000 acres. The question of how to make a living out of such an area has to be taken into account.

Many people have expressed views similar to those of Mr Sofronoff. People are saying that there are many similarities in the arguments used to defeat Wik in regard to pastoral leases. Mr Sofronoff said this—

> "A Grazing Homestead Perpetual Lease is a tenure of a kind that is entirely unknown to the common law."

It is a Queensland peculiarity. He continues—

> "One of the fundamental features of a lease is that it constitutes a grant of an interest in land for a term of years. Yet the Grazing Lease is said to be a lease 'in perpetuity'. Such leases are part of the unique Australian system of rural land management which was considered by the High Court in Wik."

That is relevant. It is part of the system of rural land management. We gave the leases so that the land could be managed. In the early days the Aborigines could still be part of that process. Sofronoff continues—

> "Consequently, even more so than in the case of a pastoral lease which was considered in the Wik case, it is important to bear in mind that this tenure creates an interest in land limited to the incidents prescribed by the Land Act."

That is what we are talking about. The Act is about land management. He continues—

> "... and it would be a mistake to import into such a tenure any features of a common law lease by reference to the use of the word 'lease' in the name of the tenure itself. In addition, even more so than in the case of a pastoral lease, a 'perpetual lease' cannot be taken to confer a right of exclusive possession simply because it is described as a 'lease'."

If this eminent QC is correct, this legislation has problems. Mr Sofronoff continued—

> "The Wik case established that 'leases', granted under the Queensland Land Act were not to be regarded as though the word 'lease' bore its common law meaning."

Mr Sofronoff speaks of other considerations in coming to his opinion that the grant of a grazing homestead perpetual lease does not extinguish native title. He talks about other issues that would be considered by a court looking at this matter. He says—

> "Other considerations which caused the majority in the Wik case to decide that the grant of a pastoral lease did not necessarily extinguish Native Title included the denial to a lessee of the power to destroy trees. That restriction also applies to the holder of a Grazing Lease. In addition, it was relevant that pastoral leases reserved the right of any person duly authorised by the Crown:
>
> > '... at all times to go upon the said land, or any part thereof, for any purpose whatsoever, or to make any survey, inspection, or examination of the same.' "

Again, we are talking about land management. It appears to me that the similarities are very strong—in fact, stronger than pastoral leases. I am very concerned that we are removing from our indigenous people a fundamental right to land. Although there is going to be compensation, the Feds have given us no guarantees about paying that compensation. I have not spoken to the Premier about this issue, but I have advised him that I was given this opinion by Mr Sofronoff. I hope that the Premier understands the reality of this, because many leases exceed 100,000 hectares.

Mr Johnson: Did he listen to you?

Mr FOURAS: I did not give it to him personally; I asked somebody else to give it to him. I believe that it is important for all members in this Chamber to think in terms of the Socratic concept of disinterest. We cannot always allow the sort of thing that Mr Borbidge did prior to the election campaign, that is, to promise pastoralists that this is an opportunity for them—now that Wik has

determined that pastoral leases do not extinguish native title—to freehold their pastoral leases. That is all that the kafuffle was about. The one-point extinguishment plan was an attempt to get pastoralists something that they did not deserve—to give them something that they did not own. I do not trust John Howard and Mr Costello to find that compensation money. Who trusts them? Nobody trusts them. And when it comes to the GST, they will not be trusted.

I am making this statement in good faith, out of the deepest sincerity and deepest feelings about the views I hold on Aboriginal reconciliation and land rights. I hope that the Premier and his advisers have been listening to this. I would like some response to it. I am happy to table for all to see the opinion from Mr W. Sofronoff, QC—the opinion given to the Queensland Indigenous Working Group about grazing homestead perpetual leases, which says unequivocally that he is of the opinion that the grant of a grazing homestead perpetual lease does not extinguish native title. I hope that the record of the Premier's advisers is a bit better than that of the previous Government's advisers, because their record was abysmal. I rest my case.