Speech by

Mark McArdle

MEMBER FOR CALOUNDRA

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SOUTHERN MORETON BAY ISLANDS DEVELOPMENT ENTITLEMENTS PROTECTION BILL

Mr McARDLE (Caloundra—Lib) (4.23 p.m.): Consideration of this bill has not been an easy process as it raises two conflicting questions of importance. The bill itself is complicated and, as I stated, contains within it two competing questions: firstly, the question of an immediate resolution for about 500 current title holders directly affected by the bill and, secondly, the principles that have for many years been part of land tenure in this country. As a consequence of these competing interests, and after weighing carefully the issues, we are determined that we cannot support this bill based on the rights that vest in freehold land being too important and historically intrinsic to ownership of freehold land.

The history surrounding this bill is lengthy. However, a brief overview is warranted. In the 1960s and 1970s the southern Moreton Bay islands were subdivided into approximately 22,500 lots and in 1973 the islands were included in the Redland shire. As a consequence of the land use strategy study, released in January 1999, the number of lots that could be developed was reduced by approximately one-third, and a compulsory acquisition of almost 5,500 lots occurred, which has now left approximately 500 lots the subject of this current bill. As a consequence, it is that number of lots that the bill will directly impact upon and, importantly, it is the owners of those lots who will feel the effect of the legislation.

The concern we raise is summed up by considering the impact this bill will have as a precedent on freehold title. Historically freehold land is held by way of grant from the Crown. Yet there is no concept of absolute ownership of land vesting in a person as most people believe. However, the law does recognise the right of persons to hold land under certain conditions. Though there are now only two methods of holding freehold land, we are only concerned here with freehold land that is held in fee simple, which is regarded as the most privileged of all positions allowing persons to treat land as if, in fact, it did belong to them.

Persons in this category have the right to dispose of property during their life or after death through a will and testament. Disposal can take many other forms and can include mortgage and lease. This right is so extensive and ingrained that although the Crown owns the land it cannot acquire it back from the holder of the estate in fee simple without paying adequate compensation.

The High Court in 1923, considering fee simple, said—

A fee simple is the most extensive in quantum, and the most absolute in respect of the rights which are conferred, of all the estates known to law. It confers, and since the beginning of legal history, it always has conferred the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination. Besides these rights of ownership, a fee simple at the present day confers an absolute right, both of alienation inter vivos and of devise by will.

Therefore we have legal history that commenced in England flowing through to the present day securing rights inherent in the land which are sustained even though the land is transferred to another party. Of course, the common law has continued to evolve and the decision of the High Court in Mabo modifies the principles of absolute ownership of the Crown. But it was also a determination in Mabo that native title does not have any effect on freehold title.

If we then consider the elements of freehold title, the question becomes what rights exist in freehold land that an owner will be able to capitalise on at their discretion. They include, firstly, an unfettered right to transfer or will the property to any person or entity they desire, such transfer to include the inherent rights in the land earlier referred to; secondly, the right to deal with the land vests in the land itself and not the owner thereof; and, thirdly, the definition of an owner is not restrictive in its meaning.

This bill, however, provides the following: that the transfer of title removes the inherent right to deal with the property—that is, in these circumstances, to build a house upon. Further, it removes the concept of rights vesting in the land itself and places the right in the owner. In effect, a right that existed within the land is placed within the owner, which is contrary to freehold title. It limits the definition of owner to a joint tenant or tenant in common, either legally or beneficially entitled.

Further, a right which exists for a period of 10 years to construct a house is extinguished when a transfer occurs, though the transfer may occur with, say, eight to 10 years left to run. Further, by removal of the right to contract the total rights that exist in the land it diminishes the right of the owner to deal with the land in the state that they purchased it. These inconsistencies are large enough to cause a dangerous precedent. As I have stated, this has not been an easy task. However, the overriding principles are such that we cannot support the bill.