Speech by

Dr DAVID WATSON

MEMBER FOR MOGGILL

Hansard 10 November 1998

NATIVE TITLE (QUEENSLAND) STATE PROVISIONS AMENDMENT BILL (No. 2)

Dr WATSON (Moggill—LP) (Leader of the Liberal Party) (4.09 p.m.): I rise to speak to the Native Title (Queensland) State Provisions Amendment Bill (No. 2) of 1998. I will firstly outline what we do accept as fundamental. We accept the existence of native title and its legitimacy as defined by the High Court in the Mabo case and elaborated in the Wik decision. We accept that indigenous Australians do have a special relationship with the land, and in any development we should be cognisant of and sensitive to that fact.

We accept that the Crown, on behalf of all citizens, retains an absolute right to mineral resources. This position is not held in all jurisdictions. For example, in many jurisdictions of the United States mineral rights tend to go with land ownership. Under such a regime, the recognition of native title may lead to a completely different set of outcomes.

When it comes to mining, we accept that all titleholders—freehold, pastoral leases or native title—are entitled to a minimum set of conditions. They are entitled to be notified about any application, to a right to object, to be consulted, to mediation, to a hearing by an independent body, to a judicial review, to be appropriately compensated and to heritage protection. By section 43A, the Federal Parliament has empowered the various Parliaments of the States and Territories to do just that.

This Bill does take advantage of the processes put in place in the revised Federal legislation for exploration, fossicking and prospecting, as well as for gold and tin mining, and opal and gem mining. But when it comes to the major mining activities, this Bill fails to take full advantage of the most critical section of all, which is section 43A. The Premier cannot come into this House and bemoan the slowdown in mineral exploration and extraction over the past three years and then pass legislation which will only compound the problem. It is time for this Government to take some action to move forward. Already the business community is frustrated by the lack of initiatives this administration is bringing forward. It is largely surviving on the projects developed under the previous coalition Government. Of course, that will not last forever.

Amendments will be moved during the Committee stage to try to make this misconceived Bill workable, for if it passes in its current form it will harm rather than help the mining industry and will act as a further impediment to job creation in Queensland. Once again, the Premier has failed the people of Queensland by producing a Bill aimed at pleasing sectional interests rather than at advancing the State's economy.

Under section 43A of the Federal Native Title Act the State is given the ability to remove the shackles placed on the mining industry by the right to negotiation process. This Government has a duty, if it really cares about jobs—especially jobs for those most in need in our remote localities—to pick up the baton and run with it. Instead, the Beattie Government has failed this most basic of tests and, ironically, for no good reason.

It would be naive in the extreme to characterise the right to negotiate process as simply a procedural right. Any person involved in the mining industry knows that this process has very little to do with genuine negotiation. Time is money, and the ability to hold up the process becomes a power bargaining chip—not for the type of outcomes originally envisaged but for the economic and social requirements of a particular group in a particular locality.

It also could be said that the right to negotiate process was and remains inherently unfair as it imposes on one sector of the community—namely the mining sector—an undue responsibility to

provide for the economic and social needs of our indigenous peoples. It abrogates this and any Government's social responsibility and replaces it with private responsibility for solving social problems.

As I said, the revised Federal legislation has in a number of respects revised the right to negotiate process. Indeed, from 30 September this year, as I understand it, the right to negotiate process no longer applies to any of the following kinds of mining grants: where an indigenous land use agreement states that the right to negotiate is not to apply to the grant; if the grant is for the sole purpose of constructing infrastructure associated with mining; certain renewals of mining leases; those specially covered by an earlier right to negotiate agreement or determination; and within the intertidal zone.

In addition, in accordance with points 6 and 7 of the 10-point plan, the revised Federal legislation allows the States and Territories to introduce provisions as an alternative to the right to negotiate process. Any State or Territory alternative provision has to be approved, as stated by the previous speaker, by the relevant Commonwealth Minister. Alternative State and Territory schemes can replace the right to negotiate in relation to exploration, fossicking and prospecting, under section 26A; gold and tin mining, under section 26B; opal and gem mining, under section 26C; and mining grants and compulsory acquisitions on current or former pastoral lease land or land the subject of a Crown reserve that is in use, and mining grants within a town or city, under section 43A. In addition, the State can also seek approval under section 43 from the relevant Commonwealth Minister to apply a right to negotiate under its own legislation, provided such a scheme meets the criteria set out in the various sections of the Commonwealth Native Title Act.

In short, under the Federal legislation there is ample scope for Queensland to legislate so as to avoid the problems, delays, costs and uncertainties of the right to negotiate process, at least so far as the vast bulk of mining activity is concerned, while still giving native titleholders, and even native title claimants, an appropriate and fair say. Has the Government taken advantage of this opportunity? Unfortunately, the answer to this is a resounding no.

The Premier has characterised the section 43A approach as minimalist. For the benefit of honourable members, it is worth outlining what section 43A actually requires, as distinct from what the Premier claims. Before any alternative State provision legislation can be approved by the relevant Commonwealth Minister, that Minister must be satisfied under section 43A(4) of the following matters.

First, the legislation must contain appropriate procedures for notifying any registered native title claimant, any registered native title body corporate and any representative Aboriginal/Torres Strait Islander body that an act to which the provisions apply is to be done. Second, the legislation must give any claimant or body corporate the right to object, within a specified time period after the notification, to the doing of an act so far as it affects their registered native title rights and interests. Third, if the act deals with compulsory acquisitions, it must provide for consultation, including mediation, between those claimants and bodies corporate who object and the State about ways of minimising the act's impact on registered native title rights and interests in relation to the land or waters concerned.

Fourth, in any other case, it must provide for consultation, including mediation, between those claimants and bodies corporate who object and the person who requested or applied for the doing of the act, about ways of minimising the act's impact on registered native title rights and interests in relation to the land or waters concerned, including access, or the way in which anything authorised by the act might be done. Fifth, if any person objects under the second point outlined above, it must provide for the objection to be heard by an independent person or body. Sixth, it must provide for judicial review of the decision to do the act.

Seventh, it must provide that if the independent person or body hearing any objection outlined in the fifth point I made makes a determination upholding the objection or that contains conditions about the doing of the act that relate to the registered native title rights and interests, the determination must be complied with unless the State Minister responsible for indigenous affairs is consulted, that consultation is taken into account and it is in the interests of the State not to comply with the determination. Finally, if the act deals with certain compulsory acquisitions, the alternative State provisions confer on each claimant and body corporate procedural rights that are not less favourable than those they would have had on the assumption that they instead held ordinary title to any land concerned and to the land adjoining or surrounding any waters concerned.

Any legislation conforming with all of those requirements could not, in my opinion, be characterised as minimalist. The legislation passed by the Northern Territory Parliament and being considered by the Western Australian Parliament is not minimalist but represents a fair balancing of the rights and responsibilities of the various parties.

The Federal legislation is quite clear. Under section 43, provision is made for the State to manage the right to negotiate on unallocated State land. In addition, section 39 of the Federal Act sets out at some length the type of matters that have to be dealt with as part of the negotiation process. It is clear that the Federal Parliament envisaged that the right to negotiate would continue to exist in both

Federal and alternative State legislation only with respect to land on which native title would have survived to the maximum degree. It would be reasonable for the Federal Parliament to assume that on land that has not been allocated by the Crown for use, common law native title would have the maximum chance of survival. But in addition, as I have said, the Federal Parliament, under section 43A, has also allowed the States and Territories to legislate alternative provisions that are less rigorous, but still extensive, with respect to those lands where it is reasonable to assume that there has been greater disruption and the chance of pristine native title existing is much less likely.

Under section 43A there is no obligation to negotiate but, rather, an obligation to consult, and this is where the Premier's legislation has gone off the rails. He has claimed that section 43A imposes only minimalist requirements and that to adopt the Federal guidelines would increase the risk of litigation. The Premier's suggestion is wrong and, indeed, provocative. There is absolutely no question that, whatever legislation passes, certain Aboriginal groups will complain about it and possibly challenge it. As the Premier now knows, one group is threatening to legally challenge his own Bill. But the real question is not whether a statute passed by the House will be challenged but, rather, what the chances are of a successful challenge. If the Premier has any advice to the effect that section 43A is unconstitutional, he should table it now. If he has any advice that his legislation is immune from challenge, he should also table that advice. However, I do not expect that he does. If he does not have such advice, then he should desist from making silly claims and be honest and up front about his motives.

The reality is that the Premier has sold out the mining industry of Queensland. He has introduced legislation that will impose extra cost burdens and extra and unnecessary processes simply to placate certain sectional interests. I might add that this legislation does nothing to advance the needs or the aspirations of the vast majority of Aboriginals and Torres Strait Islanders. What the Premier's legislation does is impose a section 43 right to negotiate regime almost across-the-board. The Premier claims that this will not be so bad, because the Government will limit the issues that must be negotiated in relation to section 43A tenures. He has claimed that they will be limited to matters which practical experience has shown are the most critical for "on the ground"—to quote the Premier—negotiations. Well, if that is the case, then his view is certainly not shared by everyone. Indeed, any person reading the Bill will see that the matters that fall within the obligation to negotiate are potentially unlimited.

One of the difficulties with this Bill is that there are only 15 clauses, despite the fact that it is 150 pages in length. It is another indication of the way in which this Bill has been developed and the unnecessary pressures that must have been placed on the Parliamentary Counsel drafting it. Certainly from the viewpoint of this House, it is less than desirable to have a Bill that inserts more than 230 new sections into the Mineral Resources Act but has only 15 substantive clauses. In these circumstances, I will refer specifically to a section proposed to be inserted in the Mineral Resources Act.

Section 590 sets out the content of negotiations for a modified section 43A process. Subsection (1) says that subsections (3) to (5) apply the requirement to negotiate. But if one reads subsection (2) one sees that it provides that the subsection in which this provision is found does not limit the requirements that apply for negotiation. Moreover, the subsections offer little guidance. For example, subsection (3) says that a party must make every reasonable effort to reach agreement. In fact, I note that in the Explanatory Notes accompanying the Bill this is interpreted as "negotiating in good faith". It is this terminology that has led in the past to so much litigation. Subsection (4) says that a consultation and negotiation party is not required to negotiate about issues unrelated or unconnected to the proposed mining lease. I would think that this provision offers no guidance whatsoever to a mining company and will result in unnecessary legal action before its parameters are made clear, or at least clearer.

Finally, subsection (5) says that a consultation and negotiation party is not required to negotiate about matters unrelated to the impact of the proposed mining lease on the registered native title rights and interests of registered native title parties. Again, the same sort of comment could be made about the vagueness of this proposal. The only other sort of guidance that I could find existed in section 594, and even that section did not advance the matter much further. So I would say to the Premier that the obligation to negotiate under this Bill on mining developments on section 43A tenure is potentially open ended. Far from excising lawyers from the native title process, I think that the way in which this Bill is drafted will encourage litigation, if for no other reason than to provide some guidance as to where the obligations and the rights of the various negotiating parties start and finish.

The Premier knows full well that the imposition of a section 43 right to negotiate on section 43A tenures will potentially cost Queensland millions of dollars in lost mineral activity. For a man who claims to head a Government that is obsessed by jobs, jobs, jobs, he is, in fact, leading the State down the path of economic ruin.

Mr Fouras: You can do better than that. Come on!

Dr WATSON: We will see exactly where the State is economically in 12 or 18 months' time.

Mr Fouras: Are you saying that you are right? Do you really want that?

Dr WATSON: No, I do not want that. I am just saying what it will lead to. During the Committee stage, the Leader of the Opposition will be moving amendments designed to overcome some of these problems. However, it is clear that if the Bill is not amended and a modified section 43 approach is applied across all land tenures, and it is not limited to unallocated State land, mining development will be stymied and the industry will be rendered less competitive in comparison with both interstate and overseas developments.

This brings me to a final issue. In trying to talk up his half-baked proposal, the Premier has publicly said that he will be talking to members of the Senate and the Western Australian Upper House. I draw the attention of the House to the Premier's press release of 30 October, wherein he says—

> "I will be briefing and seeking support from the two Queensland Independents, Kim Beazley, the Federal Government, Senators and the Upper House in Western Australia."

That is nothing short of code for saying that he will be seeking to block the Western Australian Bill in the Western Australian Legislative Council and the Northern Territory legislation in the Senate. What an absolutely pathetic thing to do. Why else would the Premier be lobbying senators, Kim Beazley and, of all people, members of the Western Australian Upper House?

Mr Beattie interjected.

Dr WATSON: I do not think the Premier is that powerful, but he would probably like to think that he is. I say to the Premier that there is just one thing wrong with that very destructive strategy. He will not get Queensland moving by tearing down other States. Rather than trying to stay competitive by undermining other States' legislation—a distinctively negative tactic—we should have been looking to positive legislation in Queensland, allowing Queensland mining companies to compete in a vibrant environment. The Leader of the Opposition, in his amendments, will be providing the Premier with the appropriate lead.