Speech by

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

Mr HOBBS (Warrego—NPA) (8.54 p.m.): Earlier in this debate we heard the member for Archerfield speaking about dignity and economic stability for Aboriginal people— something that everyone wants them to have. Mabo and Wik have led to divisions between Aboriginal people and the whites of Australia. However, on this issue there has been greater division between black and black than between black and white.

The expectations given to the Aboriginal people have been unrealistic. The support by the white carpetbaggers has been disgraceful. This legislation has taken the debate back more than one year. We heard the member for Cleveland state that only Labor can solve native title. What gives you the arrogance to say that?

Mr DEPUTY SPEAKER (Mr Reeves): Order! I remind the member of a previous ruling by the Speaker that members must refer to other members by their correct title and not as "you".

Mr HOBBS: The member for Cleveland said that only Labor can solve native title. What gives the member for Cleveland and the Labor Party the arrogance to say that? What experience and knowledge do they have over and above those who over generations have lived and worked the very land that is in dispute with the Aboriginal people! They have none of that. This legislation is taking us back more than one year. The Government is turning back the clock. The House of Representatives and the Senate approved a 10-point plan. The minority Beattie Government is varying a process that has been approved by the Senate. We have had the debate and agony has been experienced by everybody—the white community and particularly the Aboriginal people. All the Government is doing is dragging out the issue, the issue being the right to negotiate.

A claim that is regularly made by members opposite and members of the Indigenous Working Group is that one of the factors which makes the right to negotiate regime in this Bill less onerous than it might otherwise be—and which therefore allegedly makes it more reasonable, all things considered—is that the registration test for accessing it has been made tougher. The claim is that this means that only bona fide claimants will have the opportunity to access the right to negotiate.

There is no doubt that one of the most controversial aspects of the right to negotiate as it has developed is that it is a very major right that has been available not just to native title holders but also to native title claimants. As soon as there has been even a sniff of a mining project, native title claims have emerged. Whether or not the claim has had substance—and to date there has been absolutely no way of telling that at all—the claimants automatically gained access to a right to negotiate. That was a very powerful right to gain access to so easily.

It carried with it a right to negotiation over a six-month period after a two-month notification period. It carried the right to six months of mediation by the National Native Title Tribunal and then a two-month period in which the relevant Minister, on a narrow set of parameters, might overturn the National Native Title Tribunal decision. Section 39 of the Native Title Act required that in any determination that was made a vast range of views concerning native title—views that had not yet been established—had to be taken into account. Based on those very broad criteria, it opened up the potential for claimants to receive massive payments.

Within that process there were also massive opportunities to spin it out for years and to engage in, as Bill Hayden identified in relation to Century last year, near extortion. We have had undertakings of expenditure of some $90m by the proponents of that project and the State, and we still cannot build a bridge over the Gregory River to provide that project with all-weather access.

So it is readily seen that where claimants gain access to the right to negotiate they gain very considerable rights indeed. And they did so really without having to establish anything. All they had to do was whack in a claim. The claim really did not have to be backed by any substantive data. There was effectively no registration test for all of the claims that wanted to go to the next step and achieve—before there was any determination of native title—access to the right to negotiate. Of course, that was just ridiculous because it really did mean that, whenever and wherever a mine has ever been contemplated, the typical situation very quickly was that there was not only one claim; there were numerous claims, overlapping claims where the interest was very typically not land rights but an ability to lock onto a source of cash from, in fact, the mining industry.

That was stated very plainly by the mining industry in evidence before the joint parliamentary committee on native title when it was considering the Commonwealth's amending legislation which had, in turn, led to this legislation. It was clearly the money in many cases, not the native title, that was being pursued. Honourable members opposite know that; I know that; everyone knows it. That phenomenon is, of course, apparent to anybody who can read a map.

The issue of trying to bring some sanity to the situation was an obvious error that the Commonwealth sought to address when it was considering its Wik amendments. It wanted to achieve a situation whereby there were at least some minimal requirements in relation to both the initial application for a claim and then a more substantive test again if claimants wished to engage the right to negotiate so there could be at least some valid basis for assessing the very major statutory rights of the right to negotiate. Of course, attention has focused on the issue of the registration test and the right to negotiate rather than the application test.

The Commonwealth specifically sought to place some baseline requirements on claimants who sought registration. These were—

that the area to be claimed be identified with some certainty;

that the people making the claim be identified;

that the native title rights and interests being claimed be identified;

that the factual basis on which the claimants claim to be the native title holders be described;

that the registrar must be satisfied that prima facie the native title rights claimed in the application could be made out; and

that at least one member of a claim group has or has had a traditional physical connection with the land.

None of those requirements in the proposition that was put by the Commonwealth was particularly onerous. In fact, one would have thought that each and every one of them ought to have been a requirement of the original Act of 1993. The point which, of course, attracted the most attention was the requirement that there be a physical connection by at least one member—just one member—of the claimant group with the land over which rights were being claimed.

There is a sentimental view abroad that there ought not be any requirement at all for any establishment of a physical connection at any distance that requires any substantive level of proof before a claim is lodged and, simply by being lodged, provides claimants with very strong procedural rights. The source for this position used time and again by members opposite is what they refer to as the "Brennan test" in Mabo where some words of his honour in the context of connection with the land are selectively quoted. The passage that is used is at page 48 of Justice Brennan's judgment and the selective quoting is—

> "Where a clan or group has continued to acknowledge the laws and, so far as practicable, observed the customs based on the traditions of the clan or group in question, whereby their traditional connection with the land has been substantially maintained, the traditional communal title of that clan or group can be said to remain in existence."

The sentimentalists, of course, do not quote other passages from Brennan or a number of other justices which do not serve their purpose. Even the lead-in by Justice Brennan to the comments quoted leaves his meaning ambiguous. Then if one goes to the comments of those two great favourites of the ALP, Justice Deane and Justice Gaudron, one finds that their view at page 101 of their joint judgment is that native title will have survived "where the relevant tribe or group continues to occupy the land". Justice Dawson held that all native title had been extinguished and that, if traditional land rights were to be granted, then the responsibility, both legal and moral, was with the legislature, not with the courts. Toohey did not have much to say on that topic.

So a great diversity of views were expressed across the bench in Mabo providing guidance as to how one might structure an improved threshold test and, of course, even on where a threshold test was necessary relative to the deed of extinguishment that had occurred. The so-called Brennan test, the threshold test so beloved of members opposite can therefore readily be seen as a highly selective presentation that has no particular status. I would defy anybody to read the Mabo judgment in full and come away with any view other than that it was a collective view of the majority that the great bulk of native title had been extinguished via dispossession and via subsequent Crown dealings in land, and nothing said in Wik really contradicts this, notwithstanding the extent to which the pastoral lease issue has been beaten up by members opposite.

The majority in Wik simply held that it was not necessarily the case that all incidents of native title have been extinguished by non-exclusive tenures and, in particular, by pastoral leases. The insistence of members opposite that there ought be no need for a physical connection is from the same beat-up bag. It is based on the sentimental rather than the real state of affairs. It owes a lot more to the sentimental view of Labor's Federal shadow Attorney-General, Nick Bolkus, that Aborigines are the landlords and pastoralists are the tenants and the similar views of the Democrats than it does to the so-called Brennan test.

The fact is that the call by the Commonwealth coalition for a physical connection test is indeed valid. As Nick Minchin explained to the Senate many times, the right to negotiate is a very powerful set of rights to make available to people who simply have an unsubstantiated claim to their name. There ought to be higher standards and it is nothing short of extraordinary that, for the first time, the new Commonwealth Act actually requires a reasonable standard of proof in relation to matters as simple as what area is actually affected by the claim, who is making it and what they actually claimed.

If one is going to be claiming substantial coexistence rights with a pastoral leaseholder to the extent that the claimed rights mean one ought to be consulted about what happened on that land before that claim is even established, then a test of physical connection is only reasonable. But to determine whether the threshold test that actually emerged from the Senate really does have that much of a sting in trying to reduce access to the right to negotiate by ambit claimants—and nobody can deny that we have seen plenty of that—one really has to look at what actually emerged from the Senate, and it was pretty tame.

The Commonwealth originally sought a straight-up declaration that at least one member of a claimant group had, at some stage in their life, a substantive physical connection with the land. That is all it is asking. It could have been 20, 30 or 40 years ago, but it had to be there if the claimants were going to access the right to negotiate. It ought to be emphasised that this was a requirement not for a native title claim, which could go ahead whether a claim was registered or not either before the native title tribunal or before the courts, but was only to be applied to situations in which Aborigines sought access to the right to negotiate. To achieve that very substantial right, they had to establish that connection.

It was qualified to the extent that, if the claimants could establish that they had such a connection in the past but it had been discontinued, then the previous connection would suffice—and the Senate rejected that. We have had the debate and we are having it again. We had Labor saying that pastoralists were the tenants and that Aborigines were the landlords; we had the Democrats and the Greens going along with that and we had Senator Harradine, who thought, as did Senator Bolkus, that the land was still all Aboriginal land.

What emerged in July was a significant variation in the Commonwealth's original scheme, and it was that the so-called Brennan test applied. The only reason an application or registration was rejected was the failure to establish that just one member of a claimant group had had access to the claimed land area in their lifetime. That would be appealable to the Federal Court. So much for the super-tough registration test! A claim can still be made on the same sort of criteria but with a requirement for a bit more detail.

All that did was reverse the reverse discrimination that was contained in relation to the quality of material that had to be presented in the early days of the Act when there was an Uncle Tom sort of assertion that because people were black they should not have to do too much. Quite frankly, they can afford better legal representation than can most people in this Chamber. Then, if the only reason the registration was knocked back was that the connection test could not be satisfied, that could be appealed on the basis of a connection that existed one or more generations ago.

In the end, that is not too onerous a test. It remains to be seen whether it ultimately reduces the extent of access to the right to negotiate. The suggestion that it is somehow a massive and unfair hurdle, or a hurdle that somehow makes the application by members opposite of the right to negotiate to mining leases on pastoral leasehold land in this State more acceptable, misses the point entirely.

The point, as other coalition speakers have stated, is that the right to negotiate should not apply to mining on pastoral land in this State. Aborigines got the right to negotiate originally in relation

principally to vacant Crown land—land that had never before been dealt with by the Crown—on the assumption that if they held land rights then those rights might approximate freehold. We now know as a result of the Wik decision that any rights Aborigines might hold in relation to pastoral land are a long way from freehold rights. At best, they are coexisting rights which must yield to the right of the pastoralists. It is therefore ridiculous that what is contemplated in the Bill before the House is that people with a potential interest in land, which, even if proven, would consist of far lesser rights than the pastoralists enjoy statutorily, should have a far greater right than the pastoralists when mining is proposed on that land. The pastoralists get limited procedural rights under the Mineral Resources Act; Aborigines get the full-blown right to negotiate.