Speech by

Mr L. SPRINGBORG

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

Mr SPRINGBORG (Warwick—NPA) (10.37 p.m.): The Opposition Leader has highlighted today the extraordinary distortion of this native title debate by the Australian Labor Party as it lets pure emotion drive its agenda. He made that point particularly in relation to the incredible distortions of land law that have emerged in the Labor position. Labor is attempting to transform what are obviously going to be some pretty slight coexisting native title rights into a thing that, statutorially, has absolutely extraordinary authority— discriminatory authority; authority on a scale never enjoyed by the holder of any other tenure in this country's history; authority way in excess of any set of rights that have ever attached in this country, even at the level of freehold, which members opposite—because they are so often the occupiers of quarter-acre freehold blocks—are almost obscenely keen to see totally exempt from native title. As the Opposition Leader has said, what we are seeing from members opposite is a very subjective mishmashing of the land law of this State in a manner that is going to make the task of fair and just land management in this State an impossibility.

I want to pick up on that theme of the Opposition Leader and take it in a different direction, because these distortions of the Labor Party have many impacts. I believe that a key issue is that what we are really doing—or what we really ought to be doing—in relation to the recognition of native title is not to try to expand it to suit the emotional needs of members opposite. What we have to be doing, as responsible legislators, is to try to deliver to this country, including to Aborigines, a land management system that is fair to all and which, above all, delivers outcomes to people—to black and to white taxpayers with an interest in land, shared or otherwise. That is what this debate should be about. What we should be doing is recognising the existence of native title as a new ingredient in our land management systems and incorporating it in a way that is fair and just. And we cannot go about that in the way in which members opposite want to go about it in this Bill, that is, to selectively and subjectively retain only those elements of land law which enable it to expand native title into something that it is not.

That is a hard enough task, even when we work from the basis of an inclusive, rather than an exclusive, approach. It becomes a virtually impossible task when members opposite are determined to reinforce some of the most clearly unworkable and unjust distortions that were in the original Native Title Act. The logical starting point is the right to negotiate in the original Act. In the context of the current debate, it must be remembered that that right was a statutory right. Labor now tries to suggest that the particular form of engaging native title into land management—as established in the original Keating legislation—is somehow holy writ, that it brooks no change.

In fact, the statutory provision of a unique right to negotiate was an early bid by the Labor Party to establish native title as a pre-eminent right to land in line with the Left Wing views of the likes of Senator Bolkus and of John Woodley from the Democrats that Aborigines are the only true land-holders in this country and that pastoralists are the tenants. Of course, that view, which is alive in this Bill, simply undermines the entire system of land management in this country. It makes a rational, workable wedding of native title to land management a virtual impossibility. The right to negotiate as developed in 1993 was an extraordinary and highly discriminatory extension of the rights that attach to interests in land in this country to just one type of land-holder. No other land-holder in this State has ever had the degree of influence over matters affecting their land that has been attributed now to Aborigines by the Australian Labor Party.

It is a little recognised fact now, because of the myths that surround this issue—myths that have been built up so rapidly by the Labor Party—that even the decision to make mining subject to a right to negotiate by making such tenures subject to native title was a political policy decision. Even before getting to the discrimination in relation to the right to negotiate processes themselves, there was a massive discrimination in relation to what was then held to be the authority of a mining lease. In fact, Labor was initially of the view that mining leases extinguished native title. The announcement of the policy reversal was made by Paul Keating's then Attorney-General and current native title adviser to the minority Beattie Labor Government of Queensland, Michael Lavarch. It was done in just about the most tortured statement imaginable. I have it here, but I will not read it because trying to understand it would just about send every member in this House blind. I seek leave to table that statement.

Leave granted.

Mr SPRINGBORG: The land law of this country was fundamentally torn asunder by the Labor Party even as it sought the grounds to further render it via the establishment of the discriminatory right to negotiate. The fact is that, throughout our recorded history, minerals in this country have been regarded as the property of the Crown. They have been exploited at the pleasure of the Crown. Even freeholders in this State have had limited rights when the Crown has determined that it wants to issue a mining lease for the exploitation of minerals. However, under the Keating right to negotiate, there was a massive expansion of those rights for Aborigines—for just one sector of the community. That is where the issues of natural justice and fairness come in, even in relation to the right to negotiate for mining on vacant crown land, let alone on pastoral land.

In relation to mining on vacant Crown land, which was then categorised as land that had never been previously dealt with, Labor assumed that Aborigines could be the only people who had an interest other than the Crown and that their native title could, therefore, at least possibly extend to the equivalent of freehold. According to Labor, they therefore deserved to be treated as the holders of freehold. Of course, the substance of the right to negotiate belies that. As I have said, it was a set of rights quite vastly in excess of anything that any freeholder in this State has ever had access to in relation to mining or any other impact on their land. That created a massive barrier to the re-establishment of a valid, viable, land management system in this State that sensibly and fairly took into account native title. The distortion was too vast.

What is now proposed is a distortion heaped upon the distortion. When one considers what the High Court actually said in the Wik judgment—rather than what members opposite wish the High Court said in the Wik judgment—one realises that there is simply a further undermining of the credibility of the right to negotiate. In Wik, the High Court said that every pastoral lease in this State is subject to coexisting native title. That is another myth. The High Court said that pastoral leases did not necessarily extinguish all elements of native title. It said that where potentially surviving native title rights coexisted with those of a pastoralist, the pastoralist's rights prevailed. As has been pointed out elsewhere, that was simply the logical extension of one of the fundamentals of Australian law, that is, that statutory rights are more powerful than common law rights. That made the unique application of a set of rights, such as the right to negotiate, to Aborigines even more outrageous than it was at the time of the original distortion in the Keating Act.

The proposition for the retention of those special rights for Aborigines then had to fly in the face not only of the inequality of the original decision but also of the relative authority of tenures as established in Wik. For members opposite, the proposition had to be that, notwithstanding a decision that said very clearly that the rights of pastoralists were stronger than the rights of the Aborigines who might hold coexisting title, we would give to Aborigines rights in relation to mining on their land that are massively in excess of what the pastoralist enjoys. The pastoralist has been demonstrated to have the stronger title, but will retain only the procedural rights that he or she has always had. The Aborigine, who has rights that the High Court has declared are subject to the rights granted to the pastoralist, will, however, have far greater rights than the pastoralist in relation to mining on land in which they may hold a coexisting interest.

That is a ridiculous foundation for a valid land management system in this State. It is an impossible foundation for decent land law, for decent land administration, and for decent land management in this State. It is a distortion that simply leads to totally unjust, unfair outcomes and which simply compounds right down the line. We cannot develop a valid land management system when one of the foundation elements has been so comprehensively undermined. The only proper foundation is one in which there is procedural fairness—natural justice—for all who have an interest in land equally before the law. The obvious template for that is the one that has existed in this State for a very long time, that is, a solid set of procedural rights that does not disturb the ability of the Crown to manage land in a timely and decent manner in the interests of all Queenslanders with just-terms compensation for the impact on titleholders. Of course, that does not mean that the particularities of native title interest in land—as opposed to the particularities of the pastoral interests in land—somehow

will not be properly catered for if they are dealt with in a parallel, equal process. Of course, that is nonsense: they can be and they will be under the coalition's plan.

It is certainly true that the interests of native title are far less clear than are those of pastoralists. The content of native title is obviously in evolution in relation to land law, but it is evolving and every scheme that has been put forward in this country for dealing with it recognises and accepts that the interests are different from those of the pastoralist and has provided mechanisms for ensuring that those differences are recognised. Our system of law provides that, where those rights are to be impinged upon, there is a requirement—as there is for all dealings by Government—of just-terms compensation. The authority for that is the Constitution. Any other option that divides off from one of basic equality before the law is destined to generate massive problems.

I note that members opposite, and certainly their colleagues in the Senate, from time to time are very free in using selected quotes from Sir Gerard Brennan, who wrote the lead judgment in Mabo, when they perceive that it might help their case. The following quote from Sir Gerard, when he was Chief Justice, is from his Wik decision. I will quote it in full to avoid the distortions that members opposite typically make when they selectively quote this former High Court judge and, indeed, former High Court Chief Justice. It is from a passage in which Sir Gerard, with two of his most senior colleagues agreeing, gave the minority view of the court that pastoral leases were grants of exclusive possession which did extinguish all native title. However, I point out to members opposite that, in relation to the path upon which they have embarked, the sting is in the tail where Sir Gerard talks about the impacts of undermining basic tenets of existing land law in this country. At page 28 of his finding he states—and I believe that it not only makes very interesting reading for all members of this Parliament but also certainly very interesting listening—

> "If it were right to regard Crown leaseholds not as estates held of the Crown but merely as a bundle of statutory rights conferred on the lessee, it would be equally correct to treat a grant in fee simple not as the grant of a freehold estate held of the Crown but merely as a larger bundle of statutory rights. If the grant of a pastoral lease conferred merely a bundle of statutory rights exerciseable by the lessee over land subject to native title in which the Crown (on the hypothesis advanced) had only the radical title, the rights of the lessee would be ... rights in another's property."

Sir Gerard Brennan used the legal term, but it extended to rights in another's property. He stated further—

> "... and if leases were of that character, an estate in fee simple would be no different. Then in whom would the underlying residual or common law title subsist? Presumably, in the holders of native title. But such a theory is inconsistent with the fundamental doctrines of the common law. And it would equate native title with an estate in fee simple which, ex hypothesis, it is not. To regard interests derived from the Crown as a mere bundle of statutory rights would be to abandon the whole foundation of land law applicable to Crown grants."

By that, quite simply the Chief Justice was saying that if one goes down this particular track, one overturns all the fundamental tenets and understanding of land law in this country as we have known it, and where does it stop ultimately? I think that has been a fundamental concern of the Opposition for a long time.

The High Court brought down a decision which was, as the Chief Justice forewarned, inconsistent with the fundamental doctrines of the common law and which, at least as significantly in the view of the nation's then pre-eminent jurist, abandoned, and I quote again the final phrase, "the whole foundation of land law applicable to Crown grants."

The land law system of this country was undermined by the decision of the slightest majority in the Wik case. That undermining has been complicated massively by the Bill now before this Parliament whereby the distortion of treating native title erroneously, as Sir Gerard says, as a freehold estate, is expanded even way beyond freehold. No freeholder has ever had rights anywhere near approximating those that this Bill provides Aborigines in relation to the right to negotiate on land where there is a shared interest.

That will make land administration in this State an absolute nightmare. As has been pointed out by numerous members who contributed to this debate, it will breed a great deal of resentment across the State. Already, we have seen that emerge. If this Bill is passed by this House, there will be two sets of land laws in the State: a set of land laws based on native title and a set of land laws based on all other titles. We will have an absolutely dysfunctional system; we will have an absolutely unjust system. It simply will not be able to deliver fair and just outcomes to all, because such outcomes are, effectively, specifically excluded. That is the most obvious of the shortcomings of the course we are on. We do not know how much worse it is going to get.

As other speakers have indicated, this Bill is silent on the right to negotiate and infrastructure. If anything, if the application of a right to negotiate of the style Labor in this place wants to impose on mining on pastoral land is extended by what passes for logic among members opposite to infrastructure, then we will see massive distortions of the land management system in that arena, too. Members opposite might like to bear in mind that that will bring the issue to the fore among many more people than the selective hit that this legislation delivers on pastoralists and miners, because we will be talking about giving these unique rights with their intrinsic ability to delay—and as Bill Hayden has implied, to extort—in relation to projects that provide services such as power, gas and water to communities in this State, including Brisbane. I believe that when a couple of projects do not get through in the nick of time, as the south-west gas pipeline just did, because we have given distortional, special, discriminatory rights to one group of people in this community— rights that are denied to others—then the whole house of cards is going to come down around the ears of the Government and the ears of the State. We have to get back to the basics, because the problem will be no longer isolated in the rural areas of this State, a good distance away from the Government members' back porches; it will be at the very back doors of all Queenslanders.

We now know via Wik most recently and, of course, via Mabo, that there is a new ingredient in land management in this country. In the end, a system of land management that works and works fairly has to emerge from this process—one that gives appropriate procedural rights to people who have an interest in land whatever their colour and background and gives Governments and bureaucrats a system that delivers outcomes to clients and to taxpayers. That is the bottom line, or ought to be the bottom line in this debate—a workable and fair land management system that takes into account what can only be, in the final analysis, relatively slight coexisting or surviving native title rights.

In conclusion, a lot of things continue to concern many people in Queensland about native title. When we had the Mabo judgment, a lot of people thought that it was a minimalist approach. Then we had the Wik judgment, which broadened further native title rights. A lot of other things continue to concern people about the further expansion of native title both in a common law and in a statutory sense.
