Speech by

LINDA LAVARCH

STATE MEMBER FOR KURWONGBAH

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NATIVE TITLE (QUEENSLAND) STATE PROVISIONS BILL

Mrs LAVARCH (Kurwongbah—ALP) (3.28 p.m.): I rise to support the Native Title (Queensland) State Provisions Bill. In doing so, I feel that I am in a very unique position in parliamentary and political history in Australia. My husband, Michael Lavarch, was a member of the Federal Parliament at the time the High Court handed down its historic decision in Mabo (No. 2). He was Commonwealth Attorney-General at the time when the Native Title Act 1993 was passed. At that time I was a practising solicitor and can recall some very interesting and thought-provoking discussions. Now I am a member of this Parliament at a time when we are introducing and considering changes to the native title legislation as a result of the Federal Government's response to another landmark High Court decision.

As I am sure members would be aware, my husband, Michael, is no longer in Federal Parliament. He has now returned to legal practice. That practice involves consulting on native title. He is also on the Premier's working party. Our roles are reversed, but the discussions are still interesting and thought provoking. I take this opportunity to thank him for his assistance in developing my understanding of the Bill that is presently before the House. I want to start my contribution to today's debate by borrowing from one of his recent observations. Comparing the 1993 Act to the recent Federal amendments, he had this to say—

> "In 1993 a mining industry leader compared reading the Federal Native Title Act to reading porridge. By this he meant that the principles underpinning the law were obscure and imprecise—even a little mushie and grey. If that was fair comment, then reading the Howard Government's Native Title Act is like reading the instructions of a manic Meccano model set which has been poorly translated from Japanese into English. It is complicated and highly prescriptive and so help you God if you miss fitting piece 24 KAA into slot 253 (i) (b) because you will never be able to assemble it."

The old native title regime could be criticised for not adequately answering questions raised by the incorporation of native title into the legal, policy and administrative landscape of Australia. The new native title regime can be criticised for being overly prescriptive. Like all black letter law regimes, in time it might suffer from the pursuit of loopholes or the harsh impact of unintended consequences. To say that the Federal Parliament has passed a Native Title Amendment Act is really a misnomer. Rather, some of the concepts in the previous law have been kept, but a completely new legislative framework has been instigated. This framework requires the Queensland Parliament to enact a new legislative scheme. The Bill before the House is the first part of this scheme.

In my contribution here today, I wish to place the Bill into its proper context by, firstly, briefly recapping the existing native title regime; secondly, outlining the approach of the new Howard Government regime; and, thirdly, focusing on the role to be now played by Queensland in implementing the new native title law. I have recapped the existing native title regime under the heading of the Keating Government law.

Until the Mabo decision in June 1992, Australian Governments and, indeed, the entire non-indigenous population had acted as if there was no such thing as native title. To the extent it was thought about at all, it was thought that native title did not survive the assertion of sovereignty by the British Crown upon settlement. Mabo, of course, changed this. The High Court held that native title exists in accordance with Aboriginal customary law and is recognised by the common law where

connection with the land has been maintained by the indigenous people involved and the title has not been extinguished by actions of Government.

The starting point for a legislative response to Mabo was to effectively draw a line in the sand between the past, when we did not know about native title, and the present and the future, when native title needed to be accommodated. In terms of the past, the Keating Government's Native Title Act provided a legislative guarantee that all acts taken by Governments from Botany Bay onwards were valid. If actions taken, like issuing of interests in land such as leases, could be invalid because of native title, then the actions and the titles would be validated.

The law then sets out a regime to recognise and deal with native title in the context of there being no certainty of where native title continues, what the nature of particular native title rights is or who holds those rights. It does this in three ways: firstly, by establishing a claims system for the determination of native title; secondly, by creating a national native title tribunal to administer the claims process; and thirdly, by providing a future act regime which protected native title while permitting ongoing use and development of land.

The Keating legislation selected the date 1 January 1994 as the line in the sand. All acts taken prior to that date were guaranteed validity by the law. From that point onward all future acts would have to take into account the possible existence of native title. The future act regime did this by imposing a benchmark which equated native title to freehold title for the purposes of procedural matters. This did not mean that native title was the same as freehold title but, rather, that freehold was used as the test to determine whether an action could be taken over native title land. If a Government could do an act over freehold land, then that was a permissible future act over native title land. If the act could not be taken over freehold land, then that same act could not be taken over native title land. If an act was not permissible but a Government wanted it to happen, then the native title would first have to be acquired by the Government. This might happen voluntarily or by powers of compulsion.

In addition to the freehold benchmark, the law prescribed that, in some circumstances, native title holders and claimants were entitled to negotiation rights when certain actions were proposed. These negotiation rights arose primarily in two circumstances: when there was a proposal to grant a mining interest over native title; or when native title was to be compulsorily acquired for a private purpose, such as allowing a tourism or private industrial development to proceed.

I turn now to the Howard Government's native title law. It was inevitable that the Native Title Act would require amendment based on the practical experience of the law and its operation. Other amendments were required by a series of judicial determinations which took native title into directions which it would be fair to say were not fully anticipated or intended by the Commonwealth and State Parliaments. For instance, both the Federal Court and the High Court interpreted the provisions dealing with the registration of native title claims—and hence access to the procedural rights, such as the right to negotiate—in a way which allowed a far greater number of claims to be registered than was first anticipated.

Most significantly, our appreciation of the potential for native title to coexist with statutory interests in land was greatly expanded by the Wik decision. As the Alert Digest No. 6 of 1998, which I tabled this morning, points out, the prevailing legal view inside and outside the Government was that a valid pastoral lease created a set of rights that were at common law inconsistent with the continuing existence of native title. I should dwell on this point for a moment, as it is the reason for this Bill.

At common law, native title can be extinguished by a Government demonstrating a clear and plain intention to extinguish the title. As Governments acted in ignorance of native title until the Mabo decision, this intention will not be found in express words but is implied by Government acting in ways which are inconsistent with native title surviving. The test of inconsistency involves examining the set of rights granted by the Government to a parcel of land to determine whether these rights are inconsistent with native title rights. As we do not know what native title consists of until it is determined, the test of inconsistency is not easily applied. However, if the statutory rights granted comprise exclusive possession of land, then it would be immaterial as to what the native title rights might be. Exclusive possession is inconsistent with any other set of rights.

The reasoning in the Mabo decision led the Commonwealth and State Governments to believe that freehold title granted exclusive possession and hence extinguished native title. The same conclusion was reached about the effect of exclusive leases. Up until the Wik decision, the prevailing view was that a pastoral lease granted exclusive possession at least where the leases did not expressly reserve rights to traditional Aboriginal owners. Leases in Western Australia and South Australia have such reservations. Queensland pastoral leases do not. This view was adopted by the Native Title Tribunal and the Federal Court in the Waanyi and Wik decisions. The High Court in Wik did not alter the Mabo reasoning about extinguishment of native title by grants of exclusive possession, but by a majority it concluded that a Queensland pastoral lease does not grant exclusive possession.

The consequence of the decision was that native title could potentially coexist with the statutory rights of lessees. In turn, this meant that the future act regime of the Native Title Act applied potentially to acts granted by Governments over pastoral lease land. The general practice of the Queensland Government was to not apply the future act regime of the Native Title Act to dealings over existing or former pastoral leases. This means that a range of land titles might be invalid because native title holders have been denied the protections of the Native Title Act. That is why the Bill commences by creating an additional category of acts to the past and future division created by the old law. Intermediate period acts are the ones which occurred from the passage of the original Native Title Act in January 1994 to the handing down of the Wik decision in December 1996. Acts taken in this period over freehold or leasehold land will be validated. They may have been invalid because the Government assumed wrongly that pastoral leases had extinguished native title and then issued titles such as a mining lease without following the procedures in the Native Title Act.

The Bill then goes on to limit the capacity for there to be further coexistence of native title and statutory interests in land by confirming that certain statutory interests extinguish native title. These interests include freehold, commercial leases, exclusive agriculture leases, community purpose leases and scheduled interests. A scheduled interest is one that has been identified by the States and Territories and accepted by the Commonwealth as granting exclusive possession in the land to the interest holder. A vast array of land titles have been scheduled including broadacre leases for pastoral purposes such as grazing homestead perpetual leases.

The net effect of the confirmation of extinguishment is to limit the area of Queensland that may be subject to native title claim and the application of procedural rights afforded native title claimants. It is possible that the legislation may, in fact, put into place the extinguishment rather than confirm common law extinguishment. In that case, a native title holder will be entitled to compensation for the loss of their native title rights. The adequacy of compensation for the loss of native title rights was a point that the Scrutiny of Legislation Committee examined. It is a fundamental principle of legislation that it should result in the compulsory acquisition of property rights only if fair compensation is paid. Compensation for the loss of native title is yet to be explored by either Australian Parliaments or the courts.

The Commonwealth legislation requires that "just terms" compensation be paid as section 51(XXXI) of the Constitution imposes the requirement on the Commonwealth when exercising its powers of acquisition. There is no similar constitutional restraint on Queensland, although the State's acquisition laws require compensation to be paid. The Federal Native Title Act allows the States to validate past and intermediate period acts or confirm the extinguishment of native title only if just terms compensation is paid. That means that the Bill before the House requires that native title holders be paid compensation if their rights are impaired. Although that meets the requirements of the Legislative Standards Act, which governs the work of the Scrutiny of Legislation Committee, it does not tell us what "just terms" actually means. Whatever it means, the Premier's second-reading speech points out that the Federal Government will meet 75% of the cost.

I turn now to the role of the States. An enduring tension within the native title regime is the fact that the Commonwealth has developed law that has significant implications for land management but it is the States which are land managers and not the Commonwealth. There has been criticism that the Native Title Act processes have not been properly integrated into the land systems of the States and this has caused frustration, delay and cost for all stakeholders. The existing law allowed the States to take on the role of the Native Title Tribunal and administer a State-based future act regime and the right-to-negotiate process. Only South Australia took up this option with the balance of the States not accepting the challenge for a variety of reasons ranging from views about "unworkability" of the laws to complaints about the Commonwealth not picking up sufficient of the cost of a State system. Of course, political reality was that there was little incentive for the States to implement their own regime. No matter what the State did, criticism would be levelled from one quarter or another.

The Howard Government law shifts the incentive for the States and makes it inevitable that there will be State-based alternatives to the Federal law. It does that by allowing the right to negotiate to be replaced on pastoral lease land by an alternative process. Given the importance of the resource sector to the States, I imagine that this opportunity will be taken up in some States. The areas requiring or inviting a State response include the validation of intermediate period acts, confirmation of extinguishment by particular titles, the alternative regime to the right to negotiate for mines on pastoral lease land and the replacement of the right to negotiate for exploration and small mining. The Native Title Act sets out the criteria the State regimes must meet. For instance, if an intermediate period act consists of a mining title, then the State must notify the relevant Aboriginal representative body within six months of the act being validated. More importantly, the alternative State regime must be approved by not only the Commonwealth Government but also the Senate. That is because the Commonwealth approval will be in the form of a disallowable statutory instrument. That all means that there will be considerable political, community and sectorial pressure on the States in determining the new regimes. It is conceivable that there will be different regimes emerging around the country. It will also mean that

the Senate will attempt to strike down regimes that do not incorporate the spirit of provisions like section 43A—the alternative to the right to negotiate for mines on pastoral leases.

It is my observation that the native title debate still has a long way to run. The future challenges will encompass the inevitable constitutional and legal challenge to the legislation as well as the development of State-based regimes. The extent to which indigenous land use agreements are used and whether regionalism will be embraced by all stakeholders is another area to be canvassed. The question of what is fair compensation for the extinguishment or impairment of native title is still to be determined. The interplay of native title and other laws, such as cultural heritage and environmental laws, is another aspect that is yet to be understood.

The Howard Government's Native Title Act was a long time coming. It provides a new framework of reference to deal with native title at a legal and institutional level; however, it is left to the States to implement it. In his second-reading speech, the Premier outlined his strategy, dealing quickly with the challenge. I congratulate him on adopting an inclusive, consultative approach. I support the Bill.

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