Speech by

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

Mrs LAVARCH (Kurwongbah—ALP) (4.28 p.m.): I have listened to the contributions of the Leader of the Opposition and the Leader of the Liberal Party during this debate this afternoon. They took me back to my primary school days. When I was at school—mostly in south-east Queensland, but for a short period interstate—I remember learning about the great industries that made Australia strong. I was told that these industries earned for our nation the foreign income which was vital to our collective standard of living. I learnt of the pastoral industry and how Australia's prosperity rode on the sheep's back. My fellow students and I were taught about the impact on Australia of the gold rushes and how the mining industry was forged. We understood the ethos that surrounded rural Australia. We sang Waltzing Matilda, read poems of Henry Lawson and Dorothea Mackellar and formed in our minds a romantic notion of our wide, brown land and the men who tamed it.

What we were not told was the history, culture and life experiences of the land's traditional owners. We were taught little of Aborigines. Although probably well meaning, it was paternalistic and downright wrong. In reality, we learnt a myth. I accept that it is not a myth that Australia's economic fortunes were built on farming and mining, because that is as true now as it was in the 1960s and 1970s when I was at school. Nor is it untrue that many people struggled hard to make an impression on the difficult Australian terrain. However, we did learn a myth—a myth based on a notion of the rugged outback shaping of what it meant to be an Australian when, in fact, Australia has always been one of the most urbanised nations in the world. Australians are city and town dwellers; they are not rural farmers. That myth was repeated here this afternoon and relied upon by the Leader of the Opposition—a myth the Leader of the Opposition cannot or will not see past.

Of course, contrary to myth, our land was not unoccupied at the time of the British settlement and the subsequent expansion of the beachhead at Sydney Cove. It was occupied by a large number of different Aboriginal peoples. The land was not only occupied by them but also subject to their laws, customs and traditions—customs that meant that they belonged to the land, not that the land belonged to them. I can only imagine what it must be like for Aboriginal Australians to comprehend the impact of being almost excluded by our history. I can only imagine because, in common with the vast majority of Queenslanders, I did not meet Aborigines when I was growing up in Brisbane. I did not meet any, nor did I see any. There were not any Aboriginal children in my class or even at my school. I went to Bald Hills State Primary School. It was only much later that I turned my mind to the position of the land's traditional owners. It was much later in my life before I even spoke to an Aborigine. So, in common with many Queenslanders, I have to imagine.

One of the great speeches delivered by a man whom I believe to have been a great Prime Minister, Paul Keating, asked us to imagine. In December 1992, about six months after the Mabo judgment, Paul Keating addressed a gathering in the Redfern park in Sydney. He said—

> "... it might help us if we non-Aboriginal Australians imagined ourselves dispossessed of land we had lived on for fifty thousand years—and then imagined ourselves told that it had never been ours.
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> Imagine if ours was the oldest culture in the world and we were told it was worthless.
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> Imagine if we had resisted this settlement, suffered and died in the defence of our land, and then were told in history books we had given up without a fight.

Imagine if non-Aboriginal Australians had served their country in peace and war and were ignored in history books.

Imagine if our feats on sporting fields had inspired admiration and patriotism and yet did nothing to diminish prejudice.

Imagine if our spiritual life was denied and ridiculed.

Imagined if we had suffered the injustice and then were blamed for it.

It seems to me that if we can imagine the injustice we can imagine the opposite.

And we can have justice."

What Paul Keating was saying is that we can have justice if we can imagine the opposite of oppression, dispossession and ridicule. The Bill before the House offers some hope that we can reach that justice, not because it is a Bill that is underpinned by idealism but, rather, because it is based on pragmatism. It offers hope, not because it purports to overcome the injustices of the past but because it maps a realistic way forward for the future.

The Bill tackles what is the most difficult of the many difficult issues thrown up by the Mabo decision: it tackles the relationship between native title rights and the community's economic interests—the relationship between native title and mining. I believe this is the most difficult issue because the problems are real but the opportunities are great. It is more difficult than the relationship between native title and the pastoral industry as the issues there are as much perception and emotion as they are real.

In the case of pastoralists, the position is straightforward: where native title coexists with the right of pastoralists, then the right of the pastoralists prevail. The pastoralists might express a legitimate concern that there exists now an uncertainty that was not apparent prior to the Mabo decision. The pastoralists may not know who native title holders are and what is the nature of the native title rights. That is quite true. But, in the final analysis, that is far less important than knowing what your rights are as a pastoralist. The Wik decision and the 10-point plan amendments make it clear that those rights are extensive and they prevail unimpeded by whatever native title rights might or might not ultimately be declared to be. The situation for miners, however, is quite different. The law asks that miners negotiate with native title interests both for the grant of a right to mine and the compensation that flows from the grant of the interest. It is the operation of the right to negotiate that has attracted much attention in the public debate surrounding the Native Title Act and which is at the core of this Bill.

To understand the Bill, it is necessary to understand a little about the right to negotiate. The genesis of the right is the royal commission that led ultimately to the enactment of the land rights legislation in the Northern Territory. The system operating in the Northern Territory provided traditional owners a right to say no to development, a right of veto. It is often pointed out that the Mabo decision did not advocate the provision of the right to negotiate. That is true. It is also true that the Mabo decision did not propose that past statutory titles should be guaranteed validity when some may have been invalidly granted because of the failure to provide basic procedural rights to native title holders.

By necessity, the Native Title Act had to go beyond Mabo and create a balance of competing interests that provided certainty to all statutory titleholders and guaranteed that in the future native title holders should have a say about development on native title land. The Act provided that, but the Northern Territory model was not adopted. No right of veto was provided to native title interests. Instead, native title interests were given a right to negotiate in certain circumstances. Those circumstances were twofold: firstly, when there was a proposal to grant a right to mine; secondly, when a Government proposed to use its powers of compulsory acquisition to resume native title not for a public purpose but for the benefit of a private interest.

This Bill deals with the first category. I understand that changes to State law on compulsory acquisition of native title will be considered in future legislation. There are strong views held on both sides of the debate about the right to negotiate. For Aboriginal people, the right is not a special benefit, but, as explained by the former Social Justice Commissioner, Mick Dodson, in his 1994 report on native title, it is a "minimum requirement which may enable native title holders to have a say about dealings with their land". Miners do not see the right as a minimum requirement but as a right that goes over and above that which is enjoyed by the holders of statutory interests in land.

While the mining industry might accept with some reluctance the right to negotiate applying on vacant Crown land that is subject to a native title claim, it opposes strongly the right applying to coexisting tenures, such as pastoral leases. The resolution of the question depends very much on the view that is taken of native title. If native title is viewed—as it has been done this afternoon by the Leader of the Opposition and the Leader of the Liberal Party and also by the mining industry—as an interest in land from a different source than a statutory interest but not essentially different in substance, then there is much to the miners' argument. However, by that argument the rights of both a

pastoralist and a native title holder should be equivalent when mining is proposed for land. Each should enjoy the same scheme regarding notification, consultation, objection and compensation.

Essentially, these rights go not to the question of whether a mining title should be granted but rather what should be the conditions attached to that title and the compensation to be paid for disturbance to the land caused by the mine. In contrast, native title advocates see the argument in a completely different light. By their argument, native title is far more than an interest held in land; it reflects the very nature of Aboriginal culture and societal structure. It is a far more precise right than a lease that permits particular activities to take place on land. If that is the case, then it is short-changing native title to argue that native title holders and registered claimants should have a right that is equivalent to the far lesser interests in the land. Of course, pastoralists do not see their leasehold interest being of lesser weight than native title interests. As I have explained earlier, both the common law and the Native Title Act provide that pastoral rights are to prevail over native title rights.

The Bill before the House does not attempt to settle these questions, which are as much moral and philosophical as they are legal. Rather, it accepts the Commonwealth's starting point as found in the Native Title Act and devises a Queensland compromise. The opponents of the Bill allege that the Bill will either water down the right to negotiate too much or make the right too freely available. I believe that neither allegation is correct. The Bill allows the right to negotiate to be accessed over so-called alternative area land. This is land where native title might coexist with statutory interests, such as a pastoral lease. The Commonwealth legislation permits the States to create a regime that will replace the right to negotiate with a consultation and objection right. To cast this decision as tilting the balance in favour of Aboriginal interests is to ignore the very significant changes in the native title scheme that reduce the occasions on which the right to negotiate can effectively be accessed when compared with the situation prior to the 10-point plan.

The changes were identified in the report of the Scrutiny of Legislation Committee, which I tabled this morning. The analysis shows that the right to negotiate will be wound back in six major ways. In short, these are, firstly, through the new registration test processes making it more difficult for claims to be registered and, hence, gain potential access to the right to negotiate. Secondly, the confirmation of extinguishment of native title by exclusive possession tenures means that claims cannot be registered over grazing homestead perpetual leases. These are not insubstantial broadacre holdings in the State and cannot now be subject to the right to negotiate. Thirdly, low-impact exploration is removed from the right to negotiate. Although this outcome was envisaged under the original Native Title Act, in practice the exclusion was not in place in Queensland.

Fourthly, high-impact exploration is excluded from the right on alternative area land. Under the old regime, such exploration would have triggered the right to negotiate over both coexisting tenures and not allocated State land that is subject to a registered claim. Fifthly, gold and tin mining is excluded from the right to negotiate by provisions in this Bill. The old Act makes no distinctions based upon the type of mining operation or the kind of metal mined. Sixthly and finally, the right to negotiate's application to cases where compulsory acquisition of native title is involved is narrowed. Although that is not relevant to this Bill, it does illustrate further the background to which the Bill's treatment of the right to negotiate should be judged. This analysis shows that it is misleading to focus only on the application of the right to negotiate on alternative area land and ignore the other changes in the law that will narrow the ability to access the right.

In an earlier debate on native title I commented on how the Howard Government, with its new Native Title Act, has created a highly complex scheme. In comparison, the old Act is akin to the Trade Practices Act, which depends upon statements of general principle, while the new law is like the highly prescriptive Income Tax Assessment Act. The complexity is reflected in the Bill. Distinctions can be drawn between different types of mining on different kinds of land. Although there is a genuine effort to combine processes, the path one ends up on depends on a range of variables. I do not share the Premier's optimism that the Bill will starve the lawyers.

In short, the Bill provides that exploration will not trigger the right to negotiate but will in high-impact cases invoke an objection and consultation process. For mining itself, the right to negotiate will be triggered regardless of whether native title has been constrained by coexisting statutory tenure. However, the paths will separate at the tribunal determination stage between alternative area land and not allocated State land. The factors that the tribunal must take into account for not allocated State land reflect the full right to negotiate while in alternative area land cases a lesser range of matters must be considered.

Before I leave the right to negotiate, I would like to clarify a misconception that the Leader of the Opposition and his deputy, the member for Toowoomba South, Mr Horan, seem to be labouring under in relation to the Chevron gas pipeline project and the application of the right to negotiate. On several occasions the Opposition has posed questions to the Premier which have as their premise that the Government, while in Opposition, supported the Chevron project pursuing amendments to the Native Title Act that excluded the right to negotiate from applying to that project. The truth is that, under

the old Native Title Act, the right to negotiate did not apply to the acquisition of native title rights under the provisions of the Queensland Petroleum Act. Amendments to the Commonwealth Native Title Act proposed by both the Howard Government and the Senate had the net effect of changing the law so that the right to negotiate would apply to the project when previously it did not. I am advised by the company's advisers that the objection of Chevron was not to the right to negotiate applying to the project but to it applying after the process of negotiations had already been entered into and agreement reached with traditional owners. In other words, the company was seeking a transitional amendment that would allow the existing law to continue to apply to the advanced state of native title negotiations.

In any event, the Native Title Act, as amended by the Commonwealth, had the effect of maintaining the existing outcome in regard to the right to negotiate. That is, it did not apply. It should be noted that the company's objection was not to the right to negotiate. I repeat, its objection was not to the right to negotiate, but to the law changing at such an advanced stage in the process. To suggest otherwise is mischievous and misleading.

In conclusion, I believe that the Bill is worthy of support. It offers a pragmatic and sensible way forward. It does not pander to the interests of miners without having regard to the genuine and proper interests of native title holders. By the same token, it understands the community's interest in achieving reasonable economic development. It does so in a framework that emphasises the processes of agreement, discussion and mediation. It gives proper recognition to competing interests and comes to a balanced outcome. I congratulate the Premier on achieving all of this in such a short time frame. I commend the Bill to the House.