Speech by

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LAND AND RESOURCES TRIBUNAL BILL

Mrs LAVARCH (Kurwongbah—ALP) (4.48 p.m.): This is the third occasion since last July that the Parliament has had before it a major legislative initiative on native title. This tells us two things. Firstly, it tells us that native title raises complex issues requiring extensive effort on the part of the Government and the Parliament to implement a fair and effective regime. Secondly, it tells us that Queensland, of all the States and Territories, is leading the way in tackling the issues thrown up by the Federal amendments to the Native Title Act. Both facts are a tribute to the Premier, as he has not only shown strong leadership for the State on a difficult question but also shown that he is willing to lead the nation. This is in stark contrast to the Leader of the Opposition, who is struggling to convince even his own party that he has the leadership qualities to keep his job, let alone lead this State.

The genesis of the Land and Resources Tribunal is found in two sources. Firstly, and most importantly, there is the need for Queensland to establish a State tribunal to carry out functions prescribed by the Federal Native Title Act. Without a State tribunal, Queensland would not be able to take up the opportunity to introduce a flexible system to deal with the needs of the resource sector fully within the State's Land Management System. Secondly, there is a need to reform the role of the Mining Wardens Court within the State resources regulatory system. The need to reform this court arose out of extensive criticism of the fairness of the Wardens Court processes by landowners and a review of the court by the Department of Mines and Energy.

In November last year, the Parliament passed the second stage of the State native title regime. The innovation of the State regime is that it focuses on the nature of the mining interests being sought by the resource company rather than the statutory tenure over which the interest is to be granted. Now, let me explain the significance of this.

As members would be aware, the Wik decision was centred on the question as to whether a pastoral lease granted to the pastoralist a right of exclusive possession to the land. By finding that a pastoral lease did not grant exclusive possession, the High Court concluded that native title rights were not necessarily extinguished by a pastoral lease, and native title and pastoral rights could coexist. This decision then led to the native title debate—in the eyes of economic stakeholders at least—turning solely on the effect that various statutory land tenures will have on native title and how this intersects with the future act provisions in the Native Title Act.

There was concern that the Native Title Act may have rendered invalid a range of activities which pastoralists undertook on their leases, such as the construction of dams or fences. In reality, these concerns were overstated and fed by some dreadful misrepresentation of the facts by people such as the Leader of the Opposition. Nonetheless, the Howard Government reacted by proposing changes to the law which graduate the procedural rights provided for the protection of native title depending on the statutory land tenure involved. The most visible manifestation of this is the way in which the Native Title Act creates different procedural regimes for mining over unallocated State land and land subject to pastoral lease. For unallocated State land, the right to negotiate applies. For land subject to pastoral lease, a right of consultation and objection applies. Not surprisingly, many indigenous leaders view the distinction in the regimes applying to unallocated State land and pastoral lease land when mining is proposed to be artificial. By this reasoning, native title rights should be

afforded equal respect and equal protection regardless of whether or not statutory interests have been granted in the land.

From a legal analysis, it is understandable why a distinction is drawn. In the case of pastoral leases, there exists not only another interest holder in the land but, under common law and statute, this other interest holder, that is, the pastoralist, has rights which prevail over the rights of native title holders. In such a case, the native title rights must, by definition, be impaired to some extent—probably a great extent—and hence, should be afforded procedural rights no greater than those afforded to the pastoralist. Equally, from a pragmatic political point of view, it is much easier to argue that coexisting interest holders, that is, native title holders and pastoralists, should have equivalent rights rather than try to explain the finer points of legal and jurisprudential theory, which indicates that the right should be treated differently. As we know, native title does not lend itself to snappy 15-second grabs on television news.

What the Premier faced when putting together the State native title regime was a daunting mixture of stakeholder self-interest, misinformation, competing legal theory and alternate assertions of moral high ground. In devising the solution, the Government, in essence, created a process which applies equally to unallocated State land and pastoral lease land and only draws a distinction for the purposes of compliance with the provisions of the Federal Native Title Act. This means that time frames and processes for notification, negotiation and arbitration are similar regardless of the statutory land tenure involved. In contrast, a clear distinction is drawn between exploration and production tenures. Exploration tenures trigger a bare bones procedural process which reflects that, generally, the disturbance to the land flowing from exploration will be significantly less than for actual mining.

In summary, the Queensland approach has genuinely integrated into the land and mining systems of the State the recognition and protection of native title rights. The Bill before the House continues that process. A number of the provisions of the Commonwealth Native Title Act require that the State provide an independent personal body to carry out various functions if the State is to take up the opportunity to enact its own regime to replace the right to negotiate administered by the National Native Title Tribunal. The Land and Resources Tribunal will be this independent body. This means that the Queensland tribunal will take over from the National Native Title Tribunal the future act determination role in cases of applications for the grant of mining tenures over native title land and the compulsory acquisition of native title for non-Government purposes.

Consistent with the State approach of land management integration, the new tribunal will also assume the jurisdiction of the Mining Wardens Court. This results in one single forum for all energy resource based projects irrespective of native title considerations. The tribunal is also to be granted jurisdiction to hear matters arising under agreements reached under the State native title regime and also actions brought under the Queensland cultural records Act to protect indigenous cultural heritage.

In relation to the Mining Warden's function, the tribunal will incorporate the Government's response to the 1998 discussion paper on the administrative processes and functions of the Wardens Court produced by the Department of Mines and Energy. In short, this discussion paper recommended the replacement of the Wardens Court with a new Mining and Petroleum Tribunal, the greater use of alternative dispute resolution mechanisms to resolve disputes, and rules of evidence and procedure which move from an adversarial model towards an administrative model or inquisitorial model.

This review was done in isolation to the native title debate but, interestingly, the recommendations which focus on the need for greater levels of expertise within the Wardens Court and a mediation framework for dispute resolution sit well with the thrust of the native title reforms. Accordingly, the tribunal will be constituted by members with backgrounds and experience able to determine matters involving indigenous issues, mining and petroleum, dispute resolution and native title issues. There is considerable flexibility in the make-up of the tribunal between presiding members, non-presiding members and referees. Each have specific functions and designated expertise which should ensure that there is a matching of expertise within the tribunal to the issue being confronted. These issues may involve native title and, in many instances, will not.

There is one notable area where the tribunal will not have jurisdiction, and that is the determination of native title. The process of deciding whether native title claimants actually hold native title and the nature of the rights held will continue to be the role of the Federal Court and the National Native Title Tribunal. The Western Australian Government, in contrast, has proposed that all native title functions, including the determination process, be vested in State bodies. I believe that the approach adopted by the Queensland Government is preferable, as it ensures that the future act provisions of the Native Title Act are handled within the land management systems of the State. There is no need for the determination process to be replicated at the State level. In fact, a better outcome will be achieved by maintaining a national standard.

I note in passing that Mr Graham Neate has been appointed to replace Justice French as President of the National Native Title Tribunal. I wish Mr Neate well in his new and important role. I hope

also that the Commonwealth will consider moving the principal registry of the National Native Title Tribunal to Brisbane, as Queensland will have the greatest call on the tribunal's services, given the decision of the Western Australian Government to effectively move all native title matters to the State system.

Finally, I would like to speculate on what the future of the native title regime may be in Queensland. The first thing is to note that there will be a further two legislative additions to the native title regime during the year, the first being an extension of the regime to the petroleum industry as part of the review of the Petroleum Act. Recently, a discussion paper on the reform of the Petroleum Act was released. The reform will, in part, have to make decisions on how the issue of petroleum tenures and the operation of pipelines will intersect with the State native title provisions. It will certainly see the Land and Resources Tribunal accept jurisdiction for petroleum matters. The Government excluded the petroleum industry from Stage 2 reforms largely because of the arguments of the industry that it faced quite different issues from those faced by the mining industry.

The second addition will flow from the review of the Cultural Records Act. This legislation governs the protection and management of the so-called Queensland estate. This means the physical and cultural heritage of the State, both indigenous and non-indigenous. There are a number of shortcomings with this legislation.

From an indigenous perspective the major shortcoming is that the law does not actually mandate that indigenous people are to be involved in the identification of indigenous sites of importance. While this is now required as a matter of departmental administrative practice, it would be best if the regime provided expressly for indigenous involvement in the identification of indigenous culture.

From an industry perspective, a lack of certainty has meant that the law has been used on occasions as a negotiating tool for matters which have little relationship to the actual protection of Aboriginal cultural heritage. While the use of the law in this way reflects a failure in the relationship between Aboriginal people and a developer, it nonetheless undermines support for cultural heritage protection measures.

The Government has established a working party to review the Cultural Records Act and this working party has recently released an issues paper to help focus public submissions on the review of the law. Beyond the legislative developments which will occur, the future will see major issues emerge under three broad categories. The first is the further resolution by the courts of significant legal issues. The second concerns the impact of structural changes to the processes applying to the native title regime. The third relates to the extent to which native title and economic developers will strike agreements largely outside of the formal supervision of the State or Commonwealth native title regimes.

There are a number of important legal issues about the recognition of native title which are going through a process of judicial development. The High Court will, over the year, hear appeals from the Federal Court decisions in the cases of Croker Island, Miriuwunga Gajerronga and Yorta Yorta. These cases involve the existence of native title in offshore areas, the Kimberley region of Western Australia and the border area of New South Wales and Victoria respectively. All represent significant Federal court decisions which, in the case of the first two decisions, have extended or strengthened the position of native title holders, and in the third decision found that native title had been washed away by the tide of history.

Each of the decisions raises important matters concerning the relationship of native title to various statutory titles and the rights of native title holders to resources. It is likely that these issues, together with a consideration of what "just terms" means for the compensation for the loss or impairment of native title, are likely to significantly shape native title law. More than likely there will be calls for further legislative amendment at the Commonwealth level following the High Court's decision.

The second area of development involves the impact that the procedural and structural changes implemented by the 10-point plan have on the operation of the native title regime on the ground. Important in these changes is the new registration test being applied by the Native Title Tribunal and the recently announced shake-up of the boundaries of Aboriginal land councils. It was universally recognised that there needed to be law reform to ensure that only those native title claims which were well founded were able to access the procedural rights afforded by the Native Title Act. While the original Native Title Act contained a threshold test for registration, as a result of court decisions this test became virtually inoperative.

Already the Native Title Tribunal has commenced the process of checking existing claims against the new registration criteria. It is to be hoped that the outcome of this process will ensure that all

claims contain sufficient information so that indigenous and non-indigenous interests alike are able to proceed with clarity and certainty as to exactly who is asserting native title rights over what area.

Aboriginal representative bodies play an important role in the native title regime. Last week the Federal Minister for Aboriginal Affairs, Senator Herron, announced changes to the geographic boundaries for the coverage of land councils throughout Australia. There is no doubt that there needed to be reform to the operation of Aboriginal representative bodies. Indeed, this was clearly pointed out by an examination undertaken of Aboriginal bodies by the Office of Indigenous Affairs within the Department of the Prime Minister during the previous Federal Labor Government.

However, the concern I have with Senator Herron's reforms is that they appear as much motivated by a desire to reduce the power and influence of some Aboriginal leaders as they are by any logical assessment of the needs of Aboriginal people. It will prove utterly counterproductive to play politics with Aboriginal organisations. It will certainly do nothing for the relationship between economic developers such as the resource industry and traditional owners if superimposed upon negotiations is renewed conflict about where power rests within Aboriginal land councils.

Mr Bredhauer interjected.

Mrs LAVARCH: Exactly. The third area to be watched closely is the extent to which agreements will be used in order to resolve native title issues. To this end it is pleasing to note that Queensland has seen a number of milestone agreements reached. These include the Hope Vale agreement, which represents the first negotiated permanent determination of native title under the Native Title Act. Recently, Queensland also settled the Western Yalanji claim. This is an important agreement as it represented a finding of native title co-existing with pastoral rights.

More recently there has been an agreed native title determination involving Saibai Island in the Torres Strait. Historically, the Attorney-General appeared before Justice Drummond in the Federal Court and consented to the native title determination. This determination recognises the ongoing native title rights over four Torres Strait islands but notably excludes any determination over the waters of the Torres Strait.

It is the thrust of the Queensland reforms that negotiated agreements be reached on native title matters. Indeed, the Stage 2 legislation requires that genuine efforts be made to reach agreement, and to this end assistance is given by specifying the matters that are to be discussed in the negotiation and consultation process.

In conclusion, it is fair to say that Queensland is making strong progress in putting together the legal framework which will assist practical outcomes to native title and development issues. Further, the Government, through its native title services section in the Department of the Premier, can provide assistance to parties in reaching agreements. Undoubtedly, the establishment of the Land and Resources Tribunal will also be important for on-the-ground outcomes in the State.

In the final analysis, however, the Government can only do so much. Outcomes that benefit Queensland require more than good laws—it requires goodwill. It is to be hoped that the next time the Parliament considers further additions to the native title regime we can report that this goodwill has become the hallmark of relationships in the State.