Speech by

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NATIVE TITLE (QUEENSLAND) STATE PROVISIONS AMENDMENT BILL

Mrs LAVARCH (Kurwongbah—ALP) (3.31 p.m.): To place the Native Title (Queensland) State Provisions Amendment Bill into its proper context, I would like to briefly retrace some of the significant milestones in the development of the Queensland native title regime. By clearly understanding where we have come from, we can make sound decisions about where we should go.

The Mabo decision was handed down in June 1992. As is well understood, that historic decision held that the Australian common law recognised the native title of Australia's indigenous people to land where there is a continued connection to the land by the Aboriginal peoples involved according to the laws and customs of the people and the title had not been extinguished by the actions of Australian Governments.

Native title, unlike other land titles within our land law system, has its source in Aboriginal customary law and not in the grant of interests in land by Governments. However, like all land interests, native title is fully subject to the power of the Executive and the Parliament to deal with land in accordance with the law. In response to the Mabo decision, the Keating Government developed the Commonwealth Native Title Act. That Act had several objectives. It effectively drew a line in the sand between the time prior to Mabo, when Governments and the wider community acted in ignorance of native title rights, and after that time, when we all had an obligation to recognise and deal with native title. It guaranteed the validity of past acts, that is, actions and laws made by Government prior to the commencement of the Native Title Act. It protected native title from further unintended extinguishment. It also established a mechanism to determine, where native title rights continued, what was the nature of the rights and who held those rights.

Finally, it provided a "future act" regime to allow dealings in land to continue before native title determinations in a way which protected native title rights but permitted economic development. All in all, it was remarkable legislation. It showed incredible foresight and leadership on an extraordinarily difficult area. It was, as was probably inevitable in breaking new ground, flawed in a number of regards, and these flaws manifested themselves within the first few years of the legislation's operation.

What were those flaws? Firstly, the Commonwealth regime did not account sufficiently for the need to integrate native title recognition and protection into the land management processes of the States. Secondly, it underestimated the sheer difficulty and time required to establish a case for a determination of native title to be made by the Native Title Tribunal. Thirdly, it did not correctly foresee where the common law of native title would develop. The most obvious example is the assumption in the original Native Title Act that the grant of a valid pastoral lease would be inconsistent with continuing native title rights and interests. Fourthly, the idealism underpinning the Native Title Act failed to envisage the quite disgraceful way the Rob Borbidges of the world would attempt to use native title as a political weapon to attack progressive social and economic policy.

By late 1995, the Keating Government had proposed amendments to the Native Title Act to respond to the problems in the system thrown up by the Brandy decision of the High Court. That decision was on the ability of the National Native Title Tribunal to make determinations. Equally, there is no doubt the Keating Government would have also moved to overcome other problems like the failure of the registration test to be a sufficient hurdle for claimants to access the right to negotiate. For its part, the Goss Government had established a State native title regime in response to the Commonwealth's

Native Title Act. It was a basic regime which provided for the validity of past acts but did not really purport to incorporate native title into the State land management system.

The next stage of the evolution of the State's native title regime is based upon a number of court decisions. I have already mentioned the High Court decision in Brandy, but this was only one in an important series of Federal Court and High Court decisions. The Waanyi decision of the High Court confirmed that the registration test for native title claims was, to all intents and purposes, inoperative. It also foreshadowed that the assumptions about the effect of pastoral leases on native title may not have been as that believed by Government and many lawyers.

The key decision, of course, was the Wik decision, which gave more light to the interrelationship of native title to statutory interests in land by finding that the rights created by the grant of a pastoral lease coexist with and do not extinguish native title. The High Court greatly expanded our understanding of native title. The implications of Wik were the subject of another shameful fear campaign by the National Party and its Right Wing allies. Ironically, this beat-up of fear and emotion probably bit the National Party when its Federal counterparts could not deliver on the wholesale extinguishment which the Queensland National Party had demanded.

Away from the emotion and fear, the Wik decision did raise some important issues for the operation of the future act regime in the Native Title Act. While Wik was never, in truth, a huge issue for primary producers, as the High Court made it clear that pastoral rights prevailed over coexisting native title rights, it did raise issues for mining and resource development. The Howard Government responded to Wik with a 10-point plan. This change was far reaching to the Native Title Act established by the Keating Government. While basic concepts were maintained, their application was completely altered. Gone was the distinction between permissible and impermissible future acts based upon the so-called freehold test.

Under the original Native Title Act, future dealings on land where native title might exist could proceed if the same thing could have been done on freehold land. The 10-point plan replaced this threshold test with a cascading system of future act categories that governed the procedural rights and compensation entitlement which would be provided to native title holders. The categories include primary production, control of water and air space resources, facilities for the public and offshore areas.

There is much of the original 10-point plan with which I disagree. However, at least the Howard Government purported to respond to Wik and the practical experience of the native title regime with a considered public policy response. In contrast, the Borbidge Government did nothing but mouth abuse at the High Court. Literally, its only response was to place a freeze on all land dealings on other than freehold land. This appalling abdication of Government responsibility was the height of neglect to the interests of the mining industry in this State.

Immediately prior to the passage of the 10-point plan—which has now become a 7.5–point plan through the Harradine compromise—the Federal Court handed down the Croker Island decision. This decision confirmed that native title rights could exist over offshore waters and is clearly important for our State with its long coastline, and particularly to the waters of the Torres Strait. Fortunately for Queensland, the passage of the 10-point plan coincided with the election of the Beattie Government. It has meant that responsibility to shape a Queensland native title system has been in the hands of a Government willing to pragmatically but compassionately balance the interests of all stakeholders in this debate.

It is quite frightening to think of how a re-elected Borbidge Government may have responded. There would have been no real commitment to consultation and negotiation with Aboriginal people. There would have been an attempt, as has happened in Western Australia, to deliver all things to the mining and industry stakeholders and ignore the legitimate rights of Aboriginal people.

This attempt to give miners open leases would have proved futile as the Borbidge Government would never have survived the scrutiny of the Senate. The miners know this. Land developers know this. Even those opposite know it. Those opposite know that it would never have survived the scrutiny of the Senate. Only the Queensland Nationals are dopey enough to attempt to pander to the most extreme elements of their small-minded constituency. Fortunately, the Beattie Government has rejected extremism and adopted notions of fairness and balance in developing the Queensland regime.

The first stage ensured that titles granted on the incorrect assumption that leasehold interests extinguish native title would be valid. Also, specified tenures are confirmed to have granted exclusive possession, and hence extinguished native title. This outcome has delivered certainty, but at a price to native title holders. It was a pragmatic decision, and once again the Aboriginal people of this State have demonstrated their willingness to give way to the interests of others.

The second stage of the Queensland regime is embodied in the Bill which is now before us. It provides for the incorporation of the native title regime into Queensland's land management system. It

does this in a pragmatic way which respects the right of Aboriginal people to be involved in decisions about land where the rights are held by native title holders. With regard to mining in Queensland, the State regime will mean that the focus is on the nature of the Act proposed rather than the tenure of the land involved. By this I mean that, to the extent it is allowed by the Commonwealth Native Title Act, exploration will attract a defined process of consultation but not the right to negotiate.

For actual mining, a State alternative to the right to negotiate applies. This alternative attempts to coordinate the processes applying regardless of whether the land is subject to a pastoral lease or not. The starting point for the State is that miners and traditional owners are encouraged to enter into an indigenous land use agreement. Indigenous land use agreements are a means by which native title holders and developers can document their agreement in a way which delivers certainty to the developer.

Stage 3 of the Queensland regime provides for the establishment of the Land and Resources Tribunal as the State body empowered to administer the State native title regime. By incorporating the old Mining Warden's Court, the Land and Resources Tribunal will effectively be a one-stop shop for mining and land access issues within the State. When operational, the tribunal will overcome a continuing deficiency in the native title regime. That deficiency has been the failure to fully integrate native title into the State land use system.

Later stages of the Government's reform will see issues surrounding cultural heritage also being administered by the Land and Resources Tribunal. This is an important initiative. It is important because Aboriginal cultural heritage is, in the eyes of the law, a separate matter from native title. The idea behind cultural heritage laws is that they lead to the identification and protection of areas of significance to Aboriginal people. This may be because of the continuing cultural importance of the site or, in some cases, because of the location of artefacts or remains. Whilst legally different from native title, the distinction may not be readily accepted by traditional owners. Responsibility for a site of significance is not likely to be sourced differently from the laws and customs upon which native title rights are sourced.

It is logical that the one tribunal has responsibility for both issues, and this is what the Land and Resources Tribunal will do. I note that the tribunal will also have responsibility when the compulsory acquisition of native title is proposed for a major infrastructure project and this acquisition will not trigger the right to negotiate.

I would like to conclude by saying that this Bill is imperative for the achievement of a successful management system for mining within the State which properly accounts for the rights and interests of the indigenous community. I congratulate the Premier for taking the politics out of this issue. I congratulate the Premier for bringing all the parties together for consultation and negotiation. I congratulate those parties for their constructive approach to the formulation of this Bill. I admire the Premier's patience with the Commonwealth. It is my hope that our native title regime will be given a tick so that we can get on with it. I commend the Bill to the House.