Speech by

# Hon. R. E. BORBIDGE

## MEMBER FOR SURFERS PARADISE

Hansard 9 March 1999

### LAND AND RESOURCES TRIBUNAL BILL

**Hon. R. E. BORBIDGE** (Surfers Paradise—NPA) (Leader of the Opposition) (3.43 p.m.): The Opposition will not be opposing this legislation, but we do have some concerns which I will raise during this speech. However, I understand that the Government, by way of amendment at the Committee stage, may well be addressing a number of the concerns that I will be raising. I thank the Premier for his courtesy in advising me earlier today of those proposed amendments.

The need for a State-based alternative to a Perth-based, Commonwealth-run, national Native Title Tribunal handling native title matters in this State and land matters in this State has been clear for a long time. The current Premier's Labor predecessor wanted to establish a State-based tribunal as long ago as the immediate wake of the passage of the totally unworkable Native Title Act way back in late 1993. He did not do so because he could not reach agreement with the then Labor Prime Minister on funding and related matters. The coalition could not do so in Government because of Labor's delays in the Senate over the response to the Wik judgment of the High Court.

Native title, which had been a mess under the original Mabo-based Native Title Act, became a farce after the Wik case, which affirmed the doubts we on this side of the House had long been seeking to make clear to the people of this State. We were parodied for that stance by honourable members opposite, but history and time proved that we were right. Now, finally, almost seven years after the Mabo judgment, Labor is at last moving on this significant side-bar issue in dealing with native title matters. It comes an inexcusable nine months after Labor finally let a very compromised Wik response through the Senate. The template was there in July. The Native Title Unit within the Premier's Department had done the work. There is absolutely no reason why this legislation could not have been on the statutes many months ago. It is, frankly, staggering that it has taken this Government so long to respond to this issue specifically, and that it has chosen to do so in such a piecemeal approach. In the Northern Territory and in Western Australia—the other two parts of this country where native title issues are a major concern for Government—legislation was put before the respective Parliaments in a coordinated fashion. We have had to put up with a situation in Queensland in which each leg of the response has been dealt with separately.

This is the third—and not the last—time we have debated native title under this Government. We should have got it over and done with in one go. Even after this, we will be revisiting the topic again when we deal with the heritage issues. I warn the Premier today that we will not be as helpful next time if the confidential draft plan on heritage matters is even approximately reflected in the final version, which may yet be many months away. That draft showed it is very clear that the intention of the Government is to provide an extraordinarily broad definition of cultural heritage matters that will simply deepen the bureaucratic nightmare confronting almost any land issue in the State these days, as a result of the Labor Party's determination to seek the edge of the envelope for the extension of the reach of native title at every turn.

So with that timetable behind us, and with the work still to be done, it is just ridiculous for the Premier to claim that he has fixed native title, as he contends he has. Of course, he has not. He is dawdling his way through it with a quite biased approach that will ultimately bite, and bite hard. The delays that have been built into land management in this State by the rush by Labor politicians and their fellow travellers—the Greens, the Democrats and Senator Harradine among them—to maximise its

impact are still with us. Certainty in the pastoral industry is therefore still a very long way off. Certainty for the mining industry is still a very long way off. We are nowhere near as far down the track as we should have been.

Very pointedly, the establishment of this tribunal is a precursor to Commonwealth approval of the alternative State provisions related to sections 43 and 43A of the amended Native Title Act—the right to negotiate provisions. Until this tribunal is up and running, the alternative State provisions cannot come into play. We dealt with 43 and 43A last year, when we had the extraordinary decision of the Government to maintain a full-blown right to negotiate for mining on pastoral land—a decision which is going to slow development in this State and cost us jobs. Even though we dealt with that last year, it is a dead letter until this Land and Resources Tribunal is up and running. So that is the cost of this piecemeal approach. That is the cost of a can't do Government. The Opposition supports both the establishment of an independent State-based tribunal and the amalgamation of the Wardens Court with the new body.

It is no secret that there is considerable dissatisfaction in some quarters with the operation of the Wardens Court. This dissatisfaction is best exemplified by the decision of the Court of Appeal in late 1997 which found that the Mining Warden had denied natural justice to a central Queensland pastoralist. The court found that the warden had taken evidence from South Blackwater Coal after closing public hearings and without notifying the pastoralist, Mr Edward Wall. There is no doubt that many in the pastoral industry were heavily critical of the Wardens Court and believed that its decisions were biased towards mining companies. I do not wish to pick sides in that dispute, but whenever there is a situation in which a court has lost the confidence of many in the community, remedial action is required.

In February last year, the Department of Mines and Energy, at the direction of the then Minister, the then member for Tablelands, released a discussion paper on the court. That document outlined a number of worthwhile reforms aimed at bolstering the court and tackling some of the major concerns that industry bodies had.

This reform process has been overtaken by the need to establish a State-based body to deal with native title issues affecting the mining and pastoral industry, and I am sure that amalgamating the bodies is sensible and will hopefully help to build bridges to persons and groups who felt that they were not getting a fair go. One step that will help in this process is the explicit requirement that the tribunal must observe the rules of natural justice.

A similar requirement is absent from the Minerals Resources Act, and although there is most probably a common law requirement that the Wardens Court observes this basic element of procedural fairness, it is better that it be made explicitly clear in the legislation establishing the new body. Landowners, in particular, should be very pleased that their concerns about not having a fair go, and being treated fairly, are, in part, being addressed.

Section 26 of the Commonwealth Native Title Act provides that the right to negotiate applies to the creation of a right to mine. As the Premier pointed out when introducing this Bill, that includes not just mining leases but also tenures that allow exploration and prospecting and the extraction of petroleum or gas. However, the activation of the right to negotiate is avoided if the Commonwealth Minister approves alternative State provisions that comply with sections 43 and 43A.

One of the key elements of obtaining Commonwealth approval for alternative State provisions is the establishment of an independent body which will hear objections, which body will include a member of the national Native Title Tribunal. In addition, an independent State body is required to be established pursuant to section 24MD to deal with disputes concerning compensation for the compulsory acquisition of native title rights and interests.

I will not repeat at any length the Opposition's concerns with the way in which the Beattie Labor Government failed to address the real concerns of the mining industry with the alternative State provisions enacted to deal with section 43A situations. The right to negotiate process that will be inflicted on the mining industry under the State Act was unnecessary, will add extra costs and uncertainty to the industry and generally is counterproductive. However, that Bill has been passed and we have to deal with the merits of this Bill independently.

One matter on which I would appreciate clarification is the relationship between the presiding and the non-presiding members of the tribunal. I note that the Premier has been called from the Chamber, but I trust that the Minister in charge of the House and the officers are taking notes of these particular issues. I suspect that they may be dealt with, as I indicated earlier, in some of the amendments that the Government is proposing.

The Premier has indicated that this new body is not a court. It is subject to ministerial override. Its presiding members are not judges of the Supreme or District Courts. Yet the Bill provides that members of the Land Court will be non-presiding members. Following the recent High Court decision in Kable's case, I have some doubts about the legality of this arrangement. Certainly Land Court

members are judicial officers, yet under this Bill they are being treated differently and poorly in comparison with the presiding tribunal members. I would like the Premier to address this issue in his reply, and in particular whether there are any legal or constitutional problems in having Land Court members sitting with members of this tribunal in an inferior capacity.

Under this Bill the president of the tribunal will be treated in all respects as a Supreme Court judge and the deputy presidents as District Court judges, even though they will not be members of the Supreme or District Courts. Appointees will have lifetime tenure and will only be able to be removed in the same manner as if they were either respectively a Supreme or District Court judge.

I certainly support every effort to make the tribunal an independent body, and for that reason I support the transfer of responsibility for the administration of this statute and this body to the Attorney-General and the Department of Justice and Attorney-General. However, I would say to the Premier that this body is not a court. It cannot operate as a court and I am not convinced that the president of this tribunal should have equal status to a Supreme Court judge, especially as the person holding that position will not be a judge of that court.

The Supreme Court is the superior court of this State, and this or any Government should exercise suitable restraint before creating ad hoc tribunals and investing their members with a position and status the equivalent of the superior court of this State. There is no requirement in the Federal Native Title Act that we do this, and I would be interested to know what motivated the Government in elevating the president to this status. I formally request that the Premier, as the responsible Minister, responds to these concerns in his summing-up. I would also be interested to know whether the Attorney-General consulted with the Chief Justice on the matter and whether the Chief Justice is in concurrence.

A further matter which requires some comment is the fact that, although hearings of the tribunal must be open to the public, proceedings may be heard in camera if the tribunal believes that it is in the interests of justice to do so or it would allow culturally sensitive issues to be appropriately dealt with. This is a provision that will be needed from time to time. Nevertheless, in the Western Australian legislation there is a provision that its equivalent body may take account of cultural and customary concerns of Aboriginal peoples but not so as to unduly prejudice a party to the proceedings.

I am sure that before the tribunal exercised its discretion under clause 48 to hold hearings in camera it would try to avoid prejudicing other parties. But I think that there is considerable merit in putting this matter beyond doubt. I would suggest to the Premier that consideration be given to clarify the Bill in due course to ensure that, in exercising this discretion, appropriate consideration must be given to the prejudice that may be caused to other parties. I would also specifically request that the Premier addresses this issue in his response.

The success or otherwise of the tribunal will in large part be determined by how quickly, simply and effectively it deals with matters which are currently heard by the mining warden. It will be essential that the rather complex nature of this tribunal, with presiding and non-presiding members, and with various referees performing different tasks, does not prevent non-native title matters being processed effectively. As important as native title is—and I should add cultural heritage issues as well—it would be an absolute tragedy if we forgot that this tribunal has to deal with all of the various matters that were previously dealt with by the Wardens Court under both the Mineral Resources Act and the Fossicking Act.

I recognise that the Premier has indicated that day-to-day proceedings will be able to heard by single member panels and that as minimal a disruption as possible will be caused to current processes under the Mineral Resources Act. Just last December, the Government decided to appoint a second mining warden with a third in reserve. The Minister for Mines and Energy said, and I quote—

> "There is an urgent need now to start clearing the backlog of cases which have accumulated over the last couple of years. It is time to firmly address this matter with action."

No-one in this Chamber would disagree with those sentiments, but it would be a retrograde step indeed if the new tribunal did not give sufficient time or priority to non-native title matters. I seek some information from the Premier as to how, administratively, the tribunal will be structured so that proper priority occurs and general mining and fossicking issues are dealt with in a timely manner.

The Premier pointed out that the Commonwealth Native Title Act requires that a member of the national Native Title Tribunal must participate in the determination of an objection under the alternative State provisions regime. He indicated also that the Government's preferred position was that presiding members of the tribunal become members of the national Native Title Tribunal. No doubt discussions with Commonwealth officials have taken place about this matter, and, if that is the case, I wonder whether the Premier can indicate the attitude of the Commonwealth. Is the Commonwealth minded, as a matter of principle, to appoint members of the proposed State tribunal also as members of the national Native Title Tribunal? I raise this point because if the Commonwealth does not agree, there are

a range of financial, administrative and logistical issues that then have to be addressed if the State tribunal is to operate efficiently and effectively.

If the Commonwealth does not agree and a member of the national Native Title Tribunal participates in tribunal matters, who pays the expenses of that Commonwealth member? Is it the State or the Commonwealth? Has this matter been raised and resolved, and if it has, what is the outcome? The Premier said in his speech that Queensland officers are negotiating with their Federal counterparts funding assistance issues, so I assume that, if these are live issues, then they would have been discussed thoroughly in that context, and in that regard I would welcome the Premier's advice to the House.

When in Government I directed that all of the native title policy and legal areas be amalgamated into one division within the Department of the Premier and Cabinet. I did it with the clear appreciation that it is essential that the Premier's Department take charge of high-level discussions with the Commonwealth on native title. In particular, I was acutely cognisant of the need for high-level coordination when it came to issues of financial assistance, as this will be essential if a State-based regime is to be set up and function properly. It is with this background in mind that I raise these issues, because without a proper understanding at the outset of the respective roles of State and Federal tribunal members and who is going to pick up the tab, there is the potential for ongoing problems as well as Federal/State disagreements. I would ask the Premier to inform the House when the next series of Bills relating to native title and cultural heritage matters will be introduced into this Chamber.

Anyone with even a passing knowledge of native title knows that there is an ongoing overlap with cultural heritage matters. Ever since Justice Evatt issued her report on the review of the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act a little over two years ago, there has been a considerable amount of debate as to the future of Queensland's Cultural Record (Landscapes Queensland and Queensland Estate) Act. Ideally, there is merit in having a single, cohesive approach to native title and cultural heritage, with miners and pastoralists not being confronted with different processes, different principles and different litigation. There is also no argument about having proper legislation in place to prevent improper interference with burial remains and cultural heritage sites and places. In the past, the mining industry has attempted to properly negotiate with indigenous representatives cultural heritage management strategies that protect important sites of significance to indigenous peoples but at the same time allow legitimate exploration, mining and infrastructure placement activities to occur.

I say to the Premier that there is growing uncertainty and unease in the mining and pastoral industries about the way in which the State is proceeding with its review of Queensland's cultural record legislation. Any reforms to cultural heritage laws and practices will have to be handled very carefully indeed. Already the mining industry is looking offshore for opportunities in a way that we would never have envisaged a decade ago. This Government must be vigilant and not put in place any further legislative or administrative barriers to job creation by the mining or pastoral industries. Subject to what I have outlined, and subject to the response to the concerns that I have raised in the Premier's reply, the Opposition will be supporting the Bill.