Speech by

Hon. R. E. BORBIDGE

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MINERAL RESOURCES AMENDMENT BILL

Hon. R. E. BORBIDGE (Surfers Paradise—NPA) (Leader of the Opposition) (10.24 p.m.): In speaking to the Mineral Resources Amendment Bill proposed by the member for Gladstone, I will comment briefly on a couple of the matters that have been raised by the Premier.

When the Premier says that the Howard Government native title regime, which he will have to fall back on, does not work, what he is really saying is that the Keating native title regime does not work because, despite its best efforts, the Democrats and the Labor Party and the Greens and Senator Harradine made the development of a better and a more sensible system by the Howard Government simply impossible. In the final analysis, if the State-based regime does not get up, it is not the Howard regime we fall back on; it is the original incredibly flawed premises and detail for the most part of the 1993 Act.

I make the point to the House tonight that today I called on the Federal Opposition Leader, Mr Beazley, and the Federal Labor Party to support in the Senate the legislation that the Queensland Government passed through this Parliament. I did so not because I do not believe that the legislation is not flawed, but it is the legislation that has been put forward by the duly elected Government of the day and with all its faults if we do not get that legislation through then we are going to have one unholy mess. I hope that Mr Beazley and Federal Labor will accept their responsibilities in making sure that they do not support the Democrats' disallowance motion in the Senate. The Premier knows that he has the support of the Commonwealth Government in the Senate. If it falls over, it will fall over because of the actions of Federal Labor, including the actions of Federal Labor members from the State of Queensland.

I say at the outset that the National Party and I cannot not support this Bill because it seeks to provide to non-exclusive leaseholders in this State the same ability to take part in the right to negotiate processes of the Native Title Act where mining is proposed on land in which they have an interest as has been extended by the Labor Party to native title claimants.

What it seeks, therefore, is the very equality of rights before the law for land-holders that was the cornerstone of the National Party's position in the negotiations that flowed from the Wik decision of the High Court in December 1996. Honourable members will recall that in the Wik decision the majority of the court gratuitously decided to turn the land law of this country effectively on its ear.

What the court held was that pastoral leases, which had been held in Mabo and for 200 years to have been grants of exclusive possession that had extinguished native title, were suddenly not grants of exclusive possession. They were and always had been, despite 200 years of practice, according to the court, mere grants of quite limited statutory rights which did not necessarily extinguish any native title at all. By that extraordinary ruse, a bare majority of the High Court were able to create the sort of reach for native title that they had decided, no doubt well in advance of the Wik case, was what they wanted to inflict on this country so that they could be heroes of the land rights push.

It is very relevant to note that one of the dissenters from the bare 4-3 majority in that decision was the then Chief Justice of the High Court of Australia, Sir Gerard Brennan, who wrote the lead judgment in Mabo. The Chief Justice was of the view that the majority were fundamentally wrong in determining that a pastoral lease was not a grant of exclusive possession and that the finding of the

majority equally fundamentally undermined Australian land law and threw it into dangerous confusion—effectively the response of the then Chief Justice. Of course, that is precisely what that bare majority decision did.

One of the most significant impacts of that massive distortion of the law by the Wik decision was that the reach of the right to negotiate provisions of the Native Title Act were massively, totally and inappropriately extended. The first thing that has to be understood in considering this proposed discriminatory extension of the right to negotiate is that it was not, and is not, an element of native title as recognised or as developed through the common law.

The revisionists would now have it that the right to negotiate is some sort of fundamental aspect of native title as described and developed by the courts. Earlier tonight in this place we heard some of those views expressed. It is not. It is a purely political construct. Anybody who followed the development of the Native Title Act in 1993 knows that. It was constructed out of the very understanding after Mabo that native title did not extend generally speaking to any land over which substantive tenure had been granted in the past, because it was understood that virtually all of those grants had totally extinguished native title.

At the time, the right to negotiate was devised quite specifically and quite openly as a form of compensation for that presumed widespread extinguishment. The right, available to no other Australian, was to apply on land where it was assumed in Mabo that native title might still exist, and that was restricted on the then understanding of the reach of native title almost exclusively to vacant Crown land. So the proposition in this artificial construct was that native title claimants—not native title holders, but native title claimants—would have access to a special right to negotiate if mining was proposed on vacant Crown land where they had lodged a land claim. A key part of the political construct was that giving them this sort of right was legitimate because, apart from the Crown, they were the only people who might have an interest in that land.

So what was always an ad hoc and unjust idea in giving to Aboriginal people a right that no other Australian enjoyed in similar circumstances, where apart from the Crown only they had an interest, and which saddled the mining industry of this country alone with an almost insurmountable problem in relation to bureaucracy and cost, was potentially, massively and ridiculously extended by the Wik decision. Under the right to negotiate regime post Wik, where it was assumed that native title extended to pastoral leasehold country, we are being asked to accept that Aboriginal native title claimants should have a right to negotiate when mining is proposed on land in which they might have some usufructuary rights but that the leaseholder should not.

There was no logic to that. There was no justice to that. Only the native title claimant would have these special rights. Of course, that was unacceptable to anybody with the slightest degree of commonsense. The logical thing to do, the just thing to do, was to ensure formal equality of rights before the law. The obvious benchmark in determining what rights Aborigines should have in relation to land in which they claimed an interest was to provide them with the same set of rights that were available to anybody else in similar circumstances. Because the right to negotiate was a purely political construct it was, of course, subject to legislative revision to reflect that commonsense position.

The Commonwealth in the negotiations with the States, the Territories and the Aborigines after the Wik decision recognised the fundamental need to revisit the right to negotiate. During those negotiations the Queensland National Party argued that what the Commonwealth ought to do to restore some sanity to the law was to enable the States and Territories to put in place native title regimes that would enable them to restore equality to land law. If Aborigines had some rights in relation to pastoral land, which were limited by the rights already granted to the pastoralist—as was quite clearly held in Wik— then the rights enjoyed by both types of land-holder should be equal. We argued that Aborigines should have no more rights and no lesser rights than the same rights available to the pastoralists in relation to dealing with mining exploration or development on their land.

However, that concept of equality before the law was fought tooth and nail in the Australian Senate by Labor. It was fought tooth and nail by the Democrats. It was fought tooth and nail by the Greens. They almost tripped over each other in the Senate in their rush to make rural Australia and the mining industry the nation's native title scapegoats, to make those two groups the salve for their conscience, the panacea for yuppie guilt over the historical treatment of Aborigines. They were worse than blind to the history of the right to negotiate; they rewrote it.

During the debate on Wik, the right to negotiate went from being an admitted political construct in terms of the original Native Title Act to being some form of fundamental aspect of native title. The right to negotiate became the symbolic rallying point for the politically correct. It became the symbol of urban guilt over the treatment of Aborigines. City dwellers decided to export the issue well beyond the city limits and dump it on to just two groups, the miners and the pastoralists. That was an intellectually and morally poverty-stricken response. It was an insincere response. It was a selfish response.

The right to negotiate, as it is envisaged by Labor, is not a fundamental element of native title; it is a fundamental element of the battle plan of the lawyers and the Left. At the end of the Wik negotiations, what we got out of the Commonwealth Parliament on the particular issue of the right to negotiate at least approximated what sensible people everywhere knew was a reasonable outcome. There was an ability for the States to void the right to negotiate provisions in their own native title regimes where the land concerned was non-exclusive leasehold as long as they put in place procedures that gave native title claimants the same degree of input into mining applications as was available to leaseholders. That was the only reasonable approach open. It was a much-needed correction to the madness of the right to negotiate.

That is what would have been the form of the State-based regime put forward if the coalition had been returned in 1998. Instead, the minority Labor Government that emerged after the 1998 State election chose to reflect the views of the extreme Left of the Labor Party, which had dominated the debate in Canberra, and opted in the development of a Queensland regime for an extension of the right to negotiate to pastoral land. It opted to give Aborigines with a potential right in relation to that land an ability to negotiate the terms of mining exploration or development on that land that was not available to the leaseholder. Labor in Queensland bowed to the demands of the Labor Left in Canberra and acted against the interests of equality, against the interests of pastoralists, against the interests of the mining industry, and ultimately against the interests of the Aboriginal people.

Notwithstanding that, the scheme finally devised by the Premier appears headed for nowhere. The regime is now before the Senate, which has the authority to disallow it. It now looks certain that at the end of this month that is what will happen. The Democrats, who hold the balance of power, have moved for disallowance. The coalition has signalled that it will support the scheme, not because many in the coalition in Canberra believe that it is particularly desirable or particularly good legislation, but because they recognise that it is the will of the Government of Queensland, it fits the Commonwealth's minimum criteria and, therefore, it should pass.

Therefore, the fate of the Premier's regime rests with the Labor Party. The Labor Premier of Queensland is not assured of the support of his Labor colleagues in Canberra and that is because they do not think that his legislation goes far enough. They want a full-blown right to negotiate on exploration. They are not satisfied by the fact that the Keating Native Title Act has halved mineral exploration in this State. They want to kill it altogether. They are not satisfied that the Premier's right to negotiate at the development phase goes far enough. They want a return to the regime that a former Federal leader of their party and a former Governor-General, Bill Hayden, has described as near extortion. They do not really want the State to have any say in the issue at all; they want the Commonwealth to control the native title agenda. Further, the only native title regime that they want is a regime that has the informed consent of the relevant Aboriginal representative groups. The Premier's regime does not have the informed consent of the relevant representative group in Queensland, which is the Queensland Indigenous Working Group.

So the reality is that this Labor Premier's package is almost certainly headed for defeat at the hands of Labor in the Senate when the disallowance motion is debated. That would lead inevitably to the fact that Queensland would have to revert to the right to negotiate provisions of the Commonwealth Native Title Act. That is the automatic result of a failure of the State-based regime to get up. Frankly, it is about six of one and half a dozen of the other as to whether that ultimately means much beyond the tremendous embarrassment to the Premier and the tremendous waste of time and effort over the past two years in trying to develop a regime, however unsatisfactory, to try to get things moving again in this arena.

There are 1,200 backlogged mining tenures waiting for some sort of workable system. In the end, the reality is that there is not a lot of difference between the State-based regime and the Commonwealth regime to help in this regard. There are ostensibly some slightly shorter time lines in the State Act that might compact the process and make it marginally less costly at least in terms of time, but only a few weeks at best, and there still remains all the room in the world for extortion and dragging matters out. There are ever so slightly better procedures under the State-based regime in relation to exploration than those under the Commonwealth Act, but the determination of the lawyers to achieve a full-blown right to negotiate over what most sane people would call low-impact exploration would probably succeed. If the native title lawyers have their way, if we bend a blade of grass driving a drilling rig across a paddock we should be subject to a full-blown right to negotiate.

The mining industry understands very clearly that the difference between the Commonwealth Act, which remains at its core the Keating Act of 1994, and the regime proposed by the Premier is minimal. What the mining industry, rural industries and the Aboriginal and Islander people need is a system that delivers some certainty. The ever more obvious fact is that it is simply not going to happen in this country as long as the fairies at the bottom of the garden—the Democrats— control the balance

of power in the Senate and while ever Labor allows the loony Left to run the party's agenda on the native title issue.

The ridiculous impasse we have been subjected to since Paul Keating's rush of blood in 1993, when he wanted to show for egoistic internal Labor Party purposes that he could do what Gough Whitlam and Bob Hawke could not in relation to native title, is going to continue. There is no doubt we are where we are today on this issue largely because of the scale of the Keating ego. The ongoing tragedy is that the Woodleys and the Bolkuses of the Senate will simply combine to ensure a continuation of an approach to native title that is so counterproductive to genuine reconciliation in this country that they ought to be ashamed of themselves. But the tragedy is that it is not just reconciliation that they are wrecking. They are also wrecking one of Australia's most important industries—the mining industry—and creating economic and emotional challenges for the primary production sector. But I suppose if one is a fairy at the bottom of the garden one does not feel the need to worry about such mundane things as the national, State and regional economies and the rights of people to go about their work.

Therefore, this Bill is before the House in very disappointing circumstances in relation to any reasonable resolution of the native title issue in this country and in this State within the medium to even the long term. The principle behind it is admirable and commonsensical. It is a principle with which a very significant majority of the people of Queensland would, I have no doubt whatsoever, agree wholeheartedly, and that is the principle of equality, not special treatment dependent upon race. This Bill is at least a symbolic step along that commonsense path and, just as assuredly as it would achieve widespread support among the public, it will no doubt be defeated here when the Labor Party will once again show its extraordinary colours on this issue.

The National Party will support this Bill because it at least reflects the cornerstone of our approach on this issue, which is that equality is the only sensible way forward for the Aboriginal and non-Aboriginal people of this country. We appreciate in the face of the certain opposition of the Labor Party that our support is symbolic, but it is important on behalf of commonsense to keep putting our cards squarely on the table. In Government we would certainly seek to reflect the spirit of this Bill in the terms of our commitment to equality. We would seek to put in place legislation that gave both Aborigines and leaseholders equal rights before the law based on the rights that have long been a foundation of dealing with these issues on pastoral land. For those reasons, I will be supporting the legislation proposed by the honourable member for Gladstone.