Speech by

Hon. R. E. BORBIDGE

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NATIVE TITLE RESOLUTION BILL

Hon. R. E. BORBIDGE (Surfers Paradise—NPA) (Leader of the Opposition) (10.30 a.m.): This would have to be one of the most misnamed pieces of legislation ever to come before the Queensland Parliament: the Native Title Resolution Bill. This particular piece of legislation, the result of a backroom deal in which the Premier of Queensland sold out the interests of Queensland to help Kim Beazley save face, is one of the most frustrating pieces of legislation to come before this House, because it will cause so many problems for the people of Queensland that it will be an absolutely horrendous legacy of this discredited and cheating Premier and this discredited and cheating Government.

A few days ago the Premier said that defeat of his native title regime by his Labor colleagues in the Senate would cause a meltdown in the Queensland mining industry. Five months ago he said that defeat for the scheme would divide Australia and threaten the reconciliation process. The existing scheme, he said, had decimated mineral exploration in the State. Last week the Senate rejected the core elements of the Premier's regime. We are now being asked by the same man to welcome what he said would bring about a meltdown as a magnificent breakthrough to a workable system.

The Premier was right in what he said a few days ago. He was right five months ago. These amendments, which bring what is left of his scheme in line with the demands of Labor in the Senate, are a devastating outcome for the mining industry in Queensland. It is a system that is significantly worse than the scheme the Premier put up to the Senate. It is even worse than would accrue to the industry with a direct reversion to the Commonwealth regime, which is the automatic outcome on the failure of States to get a State-based regime endorsed. I will detail those impacts as we go through, yet again, the mess that has developed because of the paucity of the template Paul Keating gave this country to deal with this issue in 1993.

Once again, the key issue around which the disaster revolves, when we are engaging the mining aspects of native title, is the right to negotiate. It is the adherence by the Left to the myth of the alleged centrality of the right to negotiate that remains the barrier to any commonsense or just outcome. Labor is entirely blinkered, and wrong, on the right to negotiate. It has, relatively recently, adopted the catch-cry that the right to negotiate is the core of native title. I think the Premier in his second-reading speech referred to it as a common law right. In fact, the right to negotiate was a mere statutory add-on. It was tacked on at the eleventh hour by Paul Keating to the deal in 1993 in order to achieve a breakthrough in stalemated negotiations with Aborigines.

Even as a late addition, it was understood to have a very limited application. The understanding then of the reach of native title was that it had been extinguished by prior grant on virtually all substantive tenures, including on leasehold. Native title was thought then to exist, almost exclusively, on vacant Crown land: land on which there had never been any prior extinguishing tenure. On that basis, in Queensland, it was to have very limited application because we have only about 2% of the State as VCL, or as unallocated State land, as it is now described.

The right to negotiate was to come into play if mining was proposed on VCL if there were native title claimants. The justification for it was flawed. The suggestion was that because native title claimants were the only people who could potentially hold an interest on VCL, other than the Crown, then they deserved to be treated, effectively and procedurally, as if they were freeholders. The fact is that the

level of rights accorded under the right to negotiate were far in excess of the rights that were and are available in this State to any other freeholders under similar circumstances. This in turn was justified as reflecting the special nature of native title, which is something that outraged other titleholders, whose links with the land were dismissed as lesser and not worthy of such special treatment.

All this was in fact ideological code for making the mining industry a major contributor to Aboriginal economic well-being in the absence of other income streams for the great bulk of such people outside the welfare system and outside the other vast sums of typically misdirected Government moneys. It was a disgraceful transference of responsibility for Aboriginal well-being onto one industry which, along with pastoralists, had been singled out by cosmopolitan Labor to carry the guilt can.

Then we had developments in the common law which greatly complicated the picture. There was a hint from the High Court, in a reference to the Waanyi case, that a future decision of the High Court could extend the reach of native title to cover tenures beyond VCL; and the Wik decision of December 1996, by a bare majority of four to three, declared that pastoral leases in Queensland did not necessarily extinguish all native title. The result of that was that the potential reach in Queensland of native title, and thus of the right to negotiate, was not the 2% of the State that was presumed after the initial Mabo case, but upwards of 80%. That very dramatic variation in the reach of native title required a review of the Act.

As part of that review, the Commonwealth, in consultation with the States, saw one of the most crucial areas of reconsideration to be the extent of the ongoing application of the right to negotiate. This was because the right was designed as a form of compensation, applicable to VCL, that was to make up for the validation of intermediate period acts, or for the very widespread extinguishment that was assumed to have occurred, and it was going to apply to a relatively small area of the land mass. An extension of the right across the vast areas of the country understood post-Wik to be subject to native title would turn it into a massive burden on the mining industry.

For many of us in this society, the burden on the mining industry was unjustified, even at the point when it was to be applicable to only about 2% of the State. It was a right that no other Queenslander enjoyed, and the expense related to it for the mining industry was a form of discrimination against that industry by way of guilt shedding about the economic status of Aborigines that was simply unjustifiable—a good reflection of chardonnay-influenced thought processes.

Of course, it was in the wake of the Wik decision that we saw the transformation of the right to negotiate from the negotiating card that it was in 1993 to now, somehow a new life as a backdated, intrinsic, deep-seated element of native title. Let us deal with that myth. I repeat that it has never been that. It was a political and a statutory add-on in order to stitch up a deal for Aboriginal support of the Native Title Act in 1993, and as such it was quite properly subject to review, as is any other element of any other piece of legislation. The message of the failure of the right to negotiate by then was clear. What it had become was a siren call to native title claims and to virtual blackmail. That was very apparent, well before the impact of the Wik decision was felt in Queensland. Exploration and project development in Western Australia, which had about 40% VCL and which was therefore pushed into engaging the right to negotiate processes widely, had been in disarray for years.

In Queensland, the impact of the Wik decision on exploration was dramatic. We had a High Court decision which implied that we would have to engage the right to negotiate on high-impact exploration and on mining development, while we had a Native Title Act which was built on the premise that native title had been much more broadly extinguished. The National Native Title Tribunal was accepting native title claims over every tenure except private freehold. The law, common and statutory, was in an absolute and utter mess.

We decided that the only possible way that we could issue exploration titles at that point was if industry was prepared to accept responsibility for what might be the position in relation to those tenures if the law ultimately came to reflect that native title did indeed exist far more broadly than the statutory law then catered for. We were roundly condemned for that at the time, from one quarter in particular, but I note that the current Government faced no such criticism when it maintained that attitude for precisely the same reasons.

The mining industry, understandably, then and throughout much of the life of this Government, was simply not prepared to take that responsibility on any more than my Government or the current Government were prepared to expose the taxpayer. That is just as well, because these amendments ensure that the cost to the taxpayer and the industry of any other course would have been incalculable—but massive.

So when we came to renegotiate the new shape of the Native Title Act after the Wik decision, achieving some reasonable perspective on the right to negotiate was a very high priority. What we tried to do was to achieve between Aborigines and all other Australians equality before the law. Our view was that, if mining was to be proposed on land where native title might exist on a shared tenure, then the native title holders should have no less than the rights—and no more than the rights—that were

available to any other titleholder of that land. That seemed to us to be an intrinsically fair outcome, and arguably even more than fair when the fact was that in the Wik decision the majority said that, where native title and leaseholder rights clashed, the rights of the leaseholder would prevail.

Notwithstanding the fact that the statutory rights of the leaseholder were the more powerful, the native title holder would get equal procedural rights. The Commonwealth agreed with that and some important elements of that overall package of reforms to the Act survived the Senate, which then had Senator Brian Harradine from Tasmania holding the balance of power. A crucial element of the amended Act that finally emerged from the Senate in the middle of 1998 was that States could establish their own regimes for dealing with native title as long as they met minimum standards set in the parent Act.

One of those minimum standards was that in relation to the right to negotiate States could develop their own schemes as long as they provided to native title holders on those non-exclusive shared tenures rights that were equal to those provided to other titleholders. That meant that there need not be a right to negotiate in relation to mining development or in relation to exploration. That seemed to us a just outcome.

The current State Government took quite a different view. It decided to maintain the right to negotiate for mining development. It also decided to maintain a level of procedural rights in relation to so-called high-impact exploration on non-exclusive tenures that were set at a very high level—far higher than are the procedural rights that will attach to other titleholders.

Having said that, there were some slight benefits in the scheme that the current Government proposed and took to the Senate. The Senate had the right of veto over any proposed State-based regime. There was a moderate but still substantive set of procedural rights attaching to so-called low-impact exploration and there was the fact that for high-impact exploration there was something under a full-blown right to negotiate.

The mining industry was far from thrilled with the formula but it did see some hope of getting the backlog of exploration tenures moving, as a result of at least having some sort of legislation in place and in having a State-based Land and Resources Tribunal to work through. There were also some potentially reasonable benefits for small miners, little operators dealing with alluvial gold, the gem miners and the small tin miners of the cape. They were potentially going to be able to avoid the cost of the right to negotiate.

All of that is now gone. To get the agreement of Labor in the Senate to even the relatively meaningless remnants of his package, the Premier had to beef up even his low-impact exploration regime. The parameters establishing exploration as low impact, and thus free of the right to negotiate, were already tough as a result of the interpretation of the Federal bureaucrats, if not the law-makers themselves.

Small-scale drilling operations, which are the lifeblood of exploration activity in this country, were theoretically free of the right to negotiate. Ostensibly, a miner could drive a drilling rig to where he wanted to drill; he could clear and level a pad for the rig; he could clear a few hundred square metres around the pad to create a safe and practical working environment to lay his pipe; and he could access water in a nearby stream or a dam to lubricate diamond drills, but what he could not do was clear any land to get his rig to the drill site. If he left a made road or a track, then he could only travel across country to the extent that he did not need to grade any section of it or make a cutting to get over a gully or a creek bed. As soon as he did that, his exploration became so-called high impact and he had to engage the higher set of procedures.

The reality therefore was that most exploration that involved a drilling rig was going to become high impact and require explorers to go through the more stringent procedures. It was this set of circumstances that made the lack of a full-blown right to negotiate at the high-impact exploration stage one of the few potential benefits to industry from the Premier's package.

What the Premier had to agree to to get the remnants of his package through in relation to exploration was two-fold: he had to beef up his low-impact regime to the level that is now proposed for New South Wales and he had to go to the full right to negotiate on high-impact exploration. The combined impact of these two concessions was to remove any advantages to explorers, slight as they were, in the Premier's initial scheme.

For example, it will be even harder now to have any drilling take place under the low-impact regime. The clearing of pads for drilling rigs may only be done under this new regime where the levelling that is involved can be achieved by removing 30 centimetres of soil or less. That rules out a miner setting up a rig on anything with more slope than a billiard table if he is going to achieve low-impact status.

Apart from some politically correct and environmentally friendly noxious weed slashing on a drill site, clearing is forbidden. Drilling in creek beds for water is forbidden under the low-impact regime.

Miners will require the informed consent of the native title holders before they can actually fulfil any element of their low-impact exploration licence—before they can even have access to the licence area.

What the Left has done in imposing the Carr model for low-impact exploration on the Premier is to effectively ensure that anything more than a geologist working carefully on foot with a geologist's hammer and maybe some aerial survey work will be classified as high-impact exploration.

Under the model imposed by Labor in the Senate, high-impact exploration will attract the full right to negotiate, and under the model imposed by Labor in the Senate, virtually all exploration will be high impact.

In other words, the Labor Left has effectively won a complete victory on the right to negotiate under the Premier's heavily amended State-based regime. There will be a right to negotiate on essentially all exploration. There will be a right to negotiate on mining development. There will be a right to negotiate for the small miners. More than that, there will be no cognate negotiations.

One of the disincentives for State-based regimes, particularly a State-based regime that is virtually a mirror image of the Keating era regime, is that there will not be single sets of negotiation for packages from exploration through production. We will see rights to negotiate on renewals. We will see one right to negotiate for exploration and another right to negotiate for production. The Left in Canberra is keenly aware of all of these points. They know that what they have achieved with this package is to take the administration of native title in Queensland back to, as close as possible, the Keating model circa 1993 which, given the expanded reach of native title as per the Wik decision, will fantastically compound the negative impact of the Native Title Act on industry.

One of the great tragedies of this situation is that it is so little understood in the wider community. The significance of the mining industry to this State is so great that there ought to be a clearer understanding of what is being done to it. As the Premier made clear in his statements when he still held out some desperate hope of getting some sense from his colleagues in Canberra, if there is no exploration, there is no mining development. If there is no mining development, or much-reduced mining development, this State is shooting itself in the foot. Aborigines will miss out at least as much as any other section of the community, and probably more so. We do not need to shoot ourselves in the foot in this way to recognise some enlightenment to Aboriginal policy, to recognise and make up for at least some of the mistakes of the past.

The native title regime in this country and in this State is symbolism gone mad. I know that the Premier is of a view that he may be able to avoid some of the problems associated with the conventional route of the right to negotiate through indigenous land use agreements. He has been trying that route with the small miners. He is now trying to go down that route in relation to a Statewide ILUA on at least the backlog of mining tenures. There are some 1,200 of those tenures waiting to be dealt with. They represent several years in which the mining industry has largely been marching on the spot. I suspect the Premier's chances of bringing off an ILUA on that scale are incredibly slight. It means achieving a solidarity of view across every native title body corporate, every claimant group for every claim and every representative body from one end of the State to the other. And now those negotiations have to go on with people who know that they can achieve a right to negotiate for virtually all and any activities associated with mining over and again.

The Western Australian model may well be a better route. In the west, the effort is to establish ILUAs covering mining on a claim-by-claim basis. But again, the very fact that the Premier has been sent to the cleaners by the Left in Canberra may militate against goals on that scale.

I do not intend to take up much more of the time of the House. We have had essentially the same debate in this House for far too many times. The failure of the Legislatures of this country to have developed a workable and sensible regime for dealing with this issue since the Mabo decision in June 1992—now over eight years ago—is a travesty. The Left of the Australian Labor Party and their fellow travellers among the Democrats and the Greens carry most of the blame. Paul Keating's rush of blood in 1993 to pull off what Gough Whitlam and Bob Hawke had failed to do in establishing a national regime for land rights led to a fundamentally flawed Act that has failed Aborigines, failed the mining industry and failed in particular rural Australia, particularly pastoralists. Along with the miners, they have been asked by a tiny handful of the politically correct to carry virtually the entire load on this issue. In that in particular, it has been an intellectually and morally poverty stricken response.

There was a real chance at least after the Wik decision and after a change of Government at the Federal level to restore some balance to that equation. We could have learned from the mistakes so apparent in the initial Act and the thought processes that drove it. We could have come up with something far more practical and sensible that would have provided better outcomes for all groups. Instead, in the Senate in 1997 and 1998, the Labor Left extended its grip on this issue in that party. The deal that ultimately emerged via Brian Harradine retained only some elements of the 10-point plan.

The subsequent change of the balance of power in the Senate to the Democrats has guaranteed even sillier outcomes for as long as the Labor Party remains captive of the Left. If anything,

it is becoming more captive of the Left, which now effectively reflects the view that, unless native title legislation has the informed consent of the relevant indigenous groups, it is unacceptable. The Left has marched in tune with the United Nations committee on the elimination of all forms of racial discrimination, as do the Democrats and the Greens. CERD is now the undisputed Pied Piper for the politically correct on this issue. What all that means is that there can be no sensible, reasonable resolution of the native title issue as long as the Left dominates Labor, in the Senate at least, and as long as the balance of power in that Chamber is held by the Australian Democrats. Messrs Woodley and company are even further off with the pixies than Nick Bolkus.

In conclusion, I want to say something on the issue of what the Left calls security. Security refers to the role of the Senate in being able to dominate State Governments on this issue. It is an article of faith across the Left grouping—of Labor, the Democrats and the Greens—that States should not be trusted with land management where it engages native title. They want a situation whereby the Commonwealth totally controls the issue. It is that sentiment as much as any other which resulted in the drubbing for the Premier in Canberra last week, because the fact is that the right for the Senate to veto and shape State native title-based regimes is virtually a once-off right. The Commonwealth Minister makes determinations that a State-based regime meets the minimum criteria of the Act, but those determinations are a disallowable instrument before the Commonwealth Parliament. However, once a State-based regime is through, then a State may vary its regime as long as it remains, in the view of the Minister, within the parameters of the Act. Any future determinations of the Minister are not, according to my advice, disallowable instruments. The only way the Senate might achieve another bite at the cherry is if the Minister determines that what a State seeks to do by variation of its regime is not within the parameters set by the Act and he determines to provide the State with an extension of time in which to come back to him with amendments that are within the parameters of the Act.

That determination—to provide an extension of time—then becomes a disallowable instrument and the Senate is back in. But, apart from that, the Senate is now locked out of the game. That is why Labor's Aboriginal Affairs spokesman, Daryl Melham, quit. It was not in protest at some alleged win for the Premier; it was over the security issue. Mr Melham knows that Queensland is now out of the reach of the Senate. The Premier knows that, too, but he will not buck the system. This highlights that until there are sensible people in the Australian Senate, this issue is absolutely unresolvable. When there is a sensible group of people in the Senate and elsewhere, we may see some progress on this matter at last.

In the meantime, the Opposition cannot support this legislation. We would have supported the Premier's original position, without great enthusiasm, if he had been able to get it through. While it offered only slight advantages over the Commonwealth regime, which would have been what we would have been forced to fall back on if the entirety of the Premier's package was rejected in the Senate, we now have a result that we believe is even worse. We have a State-based Land and Resources Tribunal but we effectively have precisely what the Left in Canberra wants, which is an unworkable regime that, as the Premier said, will likely bring about a meltdown in the Queensland mining industry, insofar as there is anything left to melt. This is the worst possible outcome for all Queenslanders, including Aboriginal Queenslanders.

I wish to make a couple of comments about the way in which the State of Queensland was sold out by Mr Beattie in this regard. Laurie Oakes got it right in an article in this week's Bulletin headed "Beazley, the dignified victor". He stated—

> "Let's cut through the nonsense. Kim Beazley had a win in the deal he negotiated with Queensland Premier Peter Beattie over native title."

Laurie Oakes went on to say—

> "He dragged the Queensland premier kicking and screaming to a position that is fully in line with the policy Daryl Melham introduced at the ALP's national conference in Hobart."

I concur with the assessment by Mr Oakes.

There was an opportunity for Mr Beattie to demonstrate to the people of Queensland that he was not a branch office Labor Premier—the Labor Party national convention in Hobart. Mr Beattie could have used that convention to argue for Queensland, the Queensland point of view and his Queensland legislation.

Mr Welford: And he did.

Mr BORBIDGE: He did not. He rolled over. He did not even raise it. He sold out the interests of this State. He would not take on big Kim at the Labor Party convention in Hobart. He would not take on big Kim in the Senate. He would not take them on, because he did not want a public brawl with Federal Labor. He would not engage in a public debate in spite of the fact that, according to his own words, if his legislation did not go through there would be a meltdown in terms of the implications for the mining industry. We had a Premier who had the opportunity to fight the good fight for Queensland, and what

did he show? That he is a branch office Premier who rolled over like a little poodle dog while Kim Beazley tickled his tummy! Kim said, "Pete, go home. Go back to the doghouse. Stop yapping and do as you are told." That is precisely what Mr Beattie did on this most crucial of issues in terms of the economic development of Queensland and the resources sector of this State.

This raises a very interesting question. If Australians ever have the misfortune of being confronted with Prime Minister Beazley, heaven help this State and its branch office Premier, because the branch office Premier will do what he is told. He will not stand up for the interests of Queensland, the resources sector and everyone else. He would not even stand up for his own legislation, as flawed as it was. He was not prepared to stand up for it publicly. There can be no greater indictment of a Queensland Premier, unless of course that Queensland Premier had been part of an outfit that had corruptly cheated its way into office, and we know that he fits that bill as well. The Opposition opposes this legislation.

Mr FOLEY: I rise to a point of order. That remark is unparliamentary and it should be withdrawn.

Mr BORBIDGE: With respect, it is not. The Premier is obviously not here to take a point of order. A member cannot take a point of order in respect of another.