NATIVE TITLE — SOUTH AUSTRALIA*

I welcome the opportunity to give an overview and update of South Australia's Native Title legislation. It has been a long and difficult process trying to cater for the numerous diverse interests which are affected by these new laws — and it is by no means over.

The government now has to ensure the passage of one more Bill and I expect we will have a rocky road ahead but we have overcome obstacles before and are quite prepared to surmount any future hurdles.

I think it would be useful to give some background to Native Title in this State so that everyone has a clear idea of how and why we arrived at where we are today.

Straight after the 1993 State election the government established a cabinet sub-committee to be responsible for managing the Native Title issue on behalf of the government. It comprises the Premier, myself and the Minister for Aboriginal Affairs. The sub-committee has been meeting on a regular basis with senior officials including the Chief Executive Officer of the Department of Premier and Cabinet, the Solicitor General and the Crown Solicitor.

The sub-committee has also consulted with all of the groups directly affected by Native Title on a regular basis.

On 21 April this year the Premier announced that the State government had made several important decisions to address the short and long term constitutional, legal and administrative issues arising from the High Court *Mabo* judgment of June 1992.

The Premier declared that South Australia would enact State legislation to ensure that our State laws were consistent with the Commonwealth's *Racial Discrimination Act* and, as far as is appropriate and in the event that it is valid, the *Native Title Act*.

It was also announced that we would retain the option of challenging, in whole or in part, the *Native Title Act* with a view to achieving amendments to that Act to make it workable and less complex.

South Australia did intervene in Western Australia's legal challenge of the Commonwealth Act in August. Our intervention was not to challenge the very basis of the *Native Title Act* but rather to protect the State's rights and to prevent the Commonwealth from intruding into areas of specific State responsibilities. The government believes that sections of the Commonwealth Act seek to override State responsibilities.

The case was heard in September and judgment is expected in the first quarter of next year. Notwithstanding that we are still waiting on the judgment, the government decided that it was important to proceed with State legislation in the interim.

On 19 October a package of four Native Title Bills was introduced into the House of Assembly. They were:

- The Native Title (South Australia) Bill
- The Environment, Resources and Development Court (Native Title) Amendment Bill
- The Mining (Native Title) Amendment Bill
- The Land Acquisition (Native Title) Amendment Bill

* Address to SA Branch by The Hon K Trevor Griffin, MLC.

The latter three Bills had been introduced in the previous session of Parliament but did not proceed, enabling public comment and further consultation on the State's response to the *Mabo* decision and the Commonwealth's *Native Title Act*.

The first Bill, namely, the Native Title (SA) Bill contained the validating provisions contemplated by the Commonwealth Act, contained a number of standard definitions of terms used in the native title context and provide for concurrent jurisdiction to be conferred on the ERD/Supreme Courts to determine native title questions.

Submissions on the Bills were sought from about 40 agencies, organisations and individuals. Some changes were made in response to the submissions received and comment was also sought from the Commonwealth government.

The State government actively sought to improve on the system in the Commonwealth's *Native Title Act* by adopting a more concise drafting style and working within the framework of the Commonwealth Act and the *Mabo* decision to produce a simpler, clearer and more workable scheme for South Australia.

Five amendments were made to two of the Bills (the Native Title Bill and the Land Acquisition Amendment Bill) in the Legislative Council that were **NOT** supported by the government. Four of the amendments were of a highly technical nature but the fifth deleted a government provision declaring that freehold grants and leases, including pastoral leases, had extinguished Native Title.

The government considered this provision to be of key importance in providing clarity and removing uncertainty. Among other things, it clearly declared the government's view, and the Commonwealth's view, that pastoral leases have in fact extinguished Native Title.

There were no amendments to the Environment, Resources and Development Court (Native Title) Amendment Bill. The Mining (Native Title) Amendment Bill has not been dealt with at this stage and will lie on the table during the Parliamentary recess — I will return to this legislation in a moment.

On 1 December a deadlock conference in Parliament was convened, involving representatives of the government, the opposition and the Democrats, to try to achieve a compromise on the five disputed amendments contained in the two Bills.

After negotiations which lasted all day the conference agreed on amendments which were accepted by both Houses of Parliament.

The provision relating to pastoral leases was reinstated. As a result of the consultation and discussion, the government acceded to a consensus view that we should express in the Bill the principle of the *Mabo* decision that native title in land was extinguished by an act occurring before 31 October 1975 that was inconsistent with the continued existence, enjoyment or exercise of native title in land. An explanatory note to the clause (which forms an essential part of the Bill) states that Native Title was extinguished by freehold grants and leases, *including* pastoral leases, made before 31 October 1975. The government regarded this as a critical provision and is satisfied that the new provision is a proper statement of the relevant law and the government's position.

I turn now to the government's proposals in relation to the interaction between native title and the mining industry.

The mining industry in South Australia is regulated by the *Mining Act*, the *Petroleum Act*, the *Petroleum (Submerged Lands) Act* and a number of special Acts relating to individual mining developments: eg, the *Roxby Downs (Indenture Ratification) Act* and the *Cooper Basin (Ratification) Act*.

The first three Acts have been reviewed in light of Native Title but only the *Mining Act* has had amendments prepared and, as I mentioned before, these will not be dealt with until the next Parliamentary session which begins in February.

The Mining (Native Title) Amendment Bill makes significant changes to the existing Act. Some of the changes reflect South Australia's acceptance of the common law position in respect of Native Title established by the High Court *Mabo* judgment and are aimed at making the legislation non-discriminatory vis à vis native title holders. Other changes reflect the government's belief that land management issues are matters of critical importance to the economic development of the State. Yet other changes reflect requirements imposed by the Commonwealth's Native *Title Act*.

However, these initial amendments are the minimum necessary to ensure valid interests can be granted in compliance with the *Native Title Act*, the *Racial Discrimination Act* and the *Mabo* High Court judgment and to ensure that the *Mining Act* remains balanced and workable. A full scale review of the *Mining Act* will be undertaken in 1995.

In general terms the Mining (Native Title) Amendment Bill:

- Leaves the existing Warden's Court jurisdiction to deal with non-native title mining matters, intact. (The Native Title (South Australia) Bill provides that if a Native Title question arises in proceedings before the Warden's Court that court must refer the proceedings to the **ERD** Court for hearing and determination;
- Transfers the role of the Land and Valuation Court under the Act to the **ERD** Court;
- Provides for the **ERD** Court to be the arbitral body for the purposes of determining whether the grant of a right to prospect, explore or mine for minerals can be made where the "right to negotiate" procedure fails to achieve an agreed result. The **ERD** Court is also to have jurisdiction to determine claims of Native Title and assess compensation payable to Native Title claimants;
- To be non-discriminatory, provides for the definition of "owner" to be amended to include "a person who holds Native Title to the land".

Most importantly, the Bill provides for the insertion of a new Pt 9B in the existing Act. This Part is the linchpin of the government amendments. It represents an alternative to the "right to negotiate" regime in the Commonwealth Act.

I should say at this point that the government intends to seek recognition for the State "right to negotiate" scheme in Pt 9B from the Special Minister of State for the Commonwealth. Such recognition would mean that the State scheme would operate as an alternative to the Commonwealth scheme in the *Native Title Act* and would thereby **exclude** the application of Subdiv B of Pt 3 of the Commonwealth Act.

In a letter to the Premiers dated 3 February 1994, the Prime Minister said (among other things):

> "We have ensured that the legislation itself (ie the Native Title Act) provides considerable flexibility for States and Territories to build on their existing processes as an alternative to the Commonwealth ones."

The State has sought to exploit the flexibility afforded by the Commonwealth Acts to come up with a scheme that is simpler, clearer and more workable than the Commonwealth scheme.

To give you an overview of how the current proposed legislation will work I will outline some of the more important changes that are proposed to be made.

South Australia has sought to ensure that the right to negotiate regime does not require the establishment of onerous and time-consuming procedures before tenements can be granted.

This has been achieved by re-casting the negotiation obligations and procedures. The essential features that I wish to draw to your attention are as follows:

First, tenements are granted in the normal way under the existing provisions of the Act. Clause 63F provides that where a mining tenement has been granted (whether in part or in full) over land that could be affected by native title, the tenement simply confers no rights in respect of those parts of the land *unless* the miner:

- negotiates an **agreement** with the Native Title holders or claimants under Pt 9B;
- obtains a **determination** from the **ERD** Court allowing the mining operations to proceed; or
- the particular act has **no** effect on any native title interest.

This approach is an improvement on the Commonwealth approach as it allows the tenement to be granted and for exploration or mining to proceed forthwith over those parts of the land that are clearly not affected by native title.

The onus is on the miner to ascertain what parts of the tenement might be affected by native title and to then give the requisite notification and negotiate with whoever comes forward to claim native title. If no-one comes forward within two months, the miner may obtain an ex parte determination from the **ERD** Court authorising him or her to proceed.

We have also made provision for negotiations between Native Title parties and miners to take place covering every stage of mining activity at the one time rather than before the issue of each different mining tenement from exploration to production.

As already mentioned, it is the **agreement** with Native Title holders (or the determination of the court) rather than the grant of the mining tenement itself that creates the right to mine on Native Title land.

It is proposed that agreements may be negotiated by a person who holds a mining tenement providing—

(a) An **individual authorisation**: authorising mining operations on Native Title land by a particular mining operator under a prospecting authority or mining tenement held by the mining operator; or
(b) A **conjunctive authorisation**: authorising mining operations on Native Title land by a particular mining operator extending to future prospecting authorities or mining tenements that the miner might hold.

Agreements may be negotiated by the Minister or an approved association of mining operators providing—

An **umbrella authorisation**: authorising particular types of mining operations in a particular area (regardless of the holding of a tenement by any particular person).

The umbrella authorisation would obviate the need for any further negotiations with Native Title parties by a person holding a particular prospecting authority or mining tenement. It is contemplated that the provision may be used in relation to precious stones fields or other areas known generally to contain minerals.

If no Native Title parties come forward within two months of initial notification, the **ERD** Court may make a summary determination authorising mining operations on the land which may include a conjunctive or umbrella authorisation.

As the proposals stand, the court may make a determination including a conjunctive or umbrella authorisation in the event of lack of agreement between the parties. However, the Minister cannot exercise his or her power to override the court and impose a conjunctive agreement on the parties or to extend the scope of a conjunctive or umbrella authorisation.

If a declaration that Native Title exists in land covered by a conjunctive or umbrella authorisation is subsequently made, the authorisation may be reviewed by the **ERD** Court and the agreement or determination varied or revoked on the basis that it is unjust to Native Title holders not represented in the negotiations or to the mining operator.

The difficulty perceived by the Commonwealth in the South Australian scheme, that Native Title parties who do not assert their rights on initial notification miss out altogether, is a difficulty that arises throughout the Commonwealth and other legislation in mining and other areas.

South Australia believes that the ability to re-open an agreement or determination if Native Title holders appear at a later date provides a system that is more favourable to Native Title holders than that provided under the Commonwealth scheme. Under the *Native Title Act* it is only at the stage of issue of a tenement that new Native Title parties may become involved.

If the government is unable to obtain the support of either the opposition or the Democrats for its scheme such that we are forced back to the position under the Commonwealth Act, negotiations must be carried out before each authority or tenement can be granted (rather than before operations are conducted). The only other alternative to this is for the South Australian mining legislation to be altered to collapse the number of tenements that are required, so that the grant of one mining tenement covers all stages from exploration to production. This is a possible option, but would require a full-scale review of the *Mining Act* and the philosophy underlying it.

Turning now to some of the other changes, I should point out that the "notice of entry provisions" have been amended to make it clear that a mining operator is not entitled to carry out mining operations that affect Native Title unless authorised to do so by an agreement or determination under Pt 9B. Since the new section 63F contemplates that a mining operator may conduct operations on Native Title land that do not affect Native Title it is necessary for s 58 to provide a means of entry to the land for that purpose.

It is proposed to insert a new clause in the Bill which would enable the **ERD** Court, on application by a designated person (probably the Director of Mines) to issue a compliance order in relation to unauthorised activities by mining operators. It is hoped that this provision may go some way to alleviating fears about the practical operation of s 63F.

The power of the Minister to override agreements has been included in the South Australian scheme as an additional protection to Native Title parties and miners.

Other proposed changes include an amendment making it clear that explanatory notes form part of the Act. Explanatory notes have been used in the Bill to explain some of the more complex concepts in narrative form. This device was thought to be useful in this context, but further thought will be given to the idea before extending it to other legislation.

Also, s 61 is proposed to be amended to provide that compensation is payable under s 61 for economic rather than financial loss (this is a proposed compromise on more wide ranging amendments sought by the opposition).

Finally, it is proposed to give the relevant representative Aboriginal body a right to be heard in relation to a determination in the event of lack of agreement. This is in response to a request by the opposition for a provision of a similar nature to be included.

This scheme provides certainty to tenement holders and a system for the grant and administration of title which is as expeditious as possible.

These proposed amendments will be dealt with in the new year and you will no doubt follow closely the Bill's passage through both houses of Parliament.

I take this opportunity to reinforce that at all times the government has consulted widely and regularly and, while there will be disappointments for some, we have tried to reconcile as many areas of dispute as is possible with such a unique piece of legislation.

It hasn't been easy getting to this point but it would have been a lot more difficult had we not had the benefit of considerable assistance and co-operation from all parties involved, even though there are matters of disagreement.

There remains a considerable amount of work to be done but I look forward to continuing co-operation in achieving the goal the government has set.