Agreement in Principle

Ms LYLEA McMAHON (Shellharbour—Parliamentary Secretary) [10.48 a.m.]: I move:

That this bill be now agreed to in principle.

The Mining and Petroleum Legislation Amendment (Land Access) Bill 2010 will restore certainty for landholders and exploration title holders over land access arrangements. The bill will ensure certainty about how these access arrangements are negotiated or arbitrated in the future. It will also validate existing access arrangements. The amendments set out in the bill address an issue that, left unresolved, has the potential to impact significantly on the State's economy. The Crown owns most of the mineral and petroleum resources in this State. Surface land may be owned privately but mineral and petroleum resources that lie beneath the surface remain the property of the Crown in the vast majority of cases. In order to identify where these resources are, the Government authorises mining and petroleum companies to access land to explore for minerals and petroleum.

The Government gives explorers the right to explore for those resources by assessing and approving an exploration licence. This licence does not mean that explorers can do whatever they like on the land. The exploration licence is subject to conditions, including conditions to minimise environmental impacts and rehabilitate any environmental damage. These requirements have been considerably strengthened by this Government in recent years through amendments to the Mining Act. In addition, explorers cannot access a property until they have made an access arrangement with the landholder. These arrangements deal with how and when the explorer will access the land, and may set out any compensation payable.

Before turning to the amendments in detail, it is important to provide some background as to how the current issue arose. It is also important to spell out what the issue means for landholders and exploration title holders. Provisions for negotiating access to private land for mineral and petroleum exploration have been part of the Mining Act and the Petroleum (Onshore) Act for many years. In fact, similar provisions exist in mining Acts in every State in Australia. The Mining Act and the Petroleum (Onshore) Act provide for access arrangements to be directly negotiated between exploration title holders and landholders. The two Acts also say that the titleholder can carry out exploration activities only in accordance with an access arrangement made with the relevant landholders.

When agreement cannot be reached, the Act provides for a decision to be made by an arbitrator or on review by the Land and Environment Court. Making land access arrangements is a time-honoured practice for all mineral and petroleum explorers. Traditionally, these have been made with the owner or occupier of the land. Under the legislation, the current definition of "landholder" is broad. Among other things, it includes "a person identified in any register or record kept by the Registrar-General as a person having an interest in the land". This means that there may be a number of landholders for each property, in addition to the registered proprietors. This is because mortgagees, easement holders and holders of covenants are also captured by the definition of "landholder".

The potential for difficulties around access arrangements became evident following the outcome of a recent appeal to the New South Wales Supreme Court. The judge quashed two access arrangements that had previously been determined by the Mining Warden's Court. In that case the Supreme Court ruled that all landholders with a registered interest in the land, not just the owner or occupier, must make a single access arrangement with the exploration company. I want to spell out some of the implications of that court decision. The judge concluded that a single access arrangement to which all landholders were party was required for the access arrangements in question to be valid. Entities such as banks and utilities that hold easements must therefore be included in the negotiation of a single access arrangement to a property.

In this case, in accordance with common practice in the industry, the mortgagees of both properties had not been included in the negotiation of the arrangements. This ruling prevented the exploration title holder from undertaking exploration activities on the land in question. Currently, there are 1,170 titles across the State. The court's decision potentially has implications for hundreds of access arrangements across New South Wales where more than one person has an interest in the land. These access arrangements may need to be renegotiated, and exploration under existing access arrangements might have to cease while this takes place. This decision could significantly disrupt exploration activity in New South Wales. The court's decision also has serious implications for landholders. It could also mean that the negotiation of access to land is not a decision simply between the owner or occupier of the property and the exploration title holder; the explorer would also have to negotiate with any entity that has a registered interest, such as mortgagees and those who hold an easement or right of way.

Negotiating a single agreement with all these parties may mean that the landholder has much less say in what happens on their land. Landholders may also be forced to go through the uncertainty and delay of arbitration. In the end, they may be saddled with an arrangement that compromises their interests in order to accommodate other parties. In addition, the landholder might no longer be able to make a confidential agreement regarding compensation for the use of their land. The landowner's bank would also be party to the arrangement, which could include an agreement as to compensation. It is proposed to amend both the Mining Act and the Petroleum (Onshore) Act to address the issues that have arisen as a result of the Supreme Court's decision. The bill will do

this by making several key amendments.

Firstly, the bill narrows the definition of "landholder". The changes do not affect the part of the definition covering owners of the land in fee simple. The change focuses on the part of the definition that involves the holding of an interest recorded by the Registrar-General. They are reduced to certain specified categories. These include registered mortgagees in possession, lessees and other persons with an exclusive right to occupy the land. This is sensible. Similar to owners in fee simple, these people are in the best position to negotiate access in a way that addresses the circumstances on the land concerned. Two types of Crown interests are also retained within the registered interested parties of the "landholder" definition. The first of those is covenants imposed by the Minister under the Crown Land Act, and the second is the interest of a Minister or public authority under a conservation, natural heritage or biobanking agreement.

This provision means that those covenants and interests can be appropriately managed in the development of access arrangements. The bill will remove the obligation for an access arrangement to be made with a new class of landholder termed "secondary landholder". Secondary landholders are those with a registered interest in the land other than those I have already mentioned. Secondary landholders include registered mortgagees and holders of easements and rights of way. These secondary landholders will still be eligible for compensation for any compensatable loss caused by exploration activities. It should be noted that it is industry practice to avoid exploration on utility and telecommunications easements. These are generally narrow corridors of land, and exploration activity can take place in a way that does not affect these interests.

Secondly, the bill allows for separate access arrangements where there are multiple landholders. This will ensure that each party with an interest can negotiate their own arrangement, and landholders can maintain confidentiality of their arrangements. The bill will not prevent landholders from agreeing to a single agreement if they so wish. The bill also provides that access arrangements are required to cover only the particular area of land on which the exploration title holder proposed to carry out exploration. This addresses the situation where the stage of work planned by the exploration title holder applies to only part of a block of land covered by the relevant land title or tenure. The intention is that only those landholders referrable to that part of the land need be parties to the access arrangement or arrangements or that stage of work.

The bill makes it clear that access arrangements should not replicate conditions of an exploration licence or matters that the exploration title holder is otherwise required to comply with under the Mining Act or the Petroleum (Onshore) Act. Licence conditions are enforced by the Government. It is not generally appropriate that they form part of an agreement between private parties. The bill will streamline requirements where there is a change in landholder. It does this by providing that, where an access arrangement covers two or more landholders, it does not terminate if one of them ceases to be a landholder of the property.

Provision is also made for situations where an additional person becomes a landholder of a property when an access arrangement with the existing landholder is already operating. The bill makes provision for a process for notification of an additional landholder to be included in an access arrangement. The existing access arrangement is to apply to the additional landholder, if the prospecting titleholder provides that person with a copy of the arrangement. For example, the access arrangement covering a landowner who leases out the land would cover the lessee. Similarly, a bank that becomes a mortgagee in possession would be covered by the access arrangement of the mortgagor.

However, there is provision for the additional landholder in such cases to make an objection and renegotiate arrangements. A replacement access arrangement must be agreed or determined within 28 days. Otherwise, the deemed application of the existing arrangement expires unless continued, with or without variation, by an arbitrator or the Land and Environment Court. Such a continuation may be ordered either within the 28-day period or afterwards. This will not prevent advance negotiations or arbitration to set up an individual access arrangement for a proposed additional landholder.

Despite these provisions, access arrangements will not run with the land. That means if, for example, the property is sold outright, a new access arrangement will need to be made with the new landholder. The bill also includes provisions relating to variation of access arrangements. This includes clarifying that where an arrangement has been determined by the Land and Environment Court the parties are free to agree on subsequent variations without having to return to court.

I turn now to the transitional provisions. The bill provides that existing access arrangements are valid if their creation would have complied with the proposed amendments. For example, this would cover cases where there was a failure to make an access arrangement with an entity such as a mortgagee who is now proposed to be in the secondary landholder category. It also provides a streamlined process for dealing with any arrangements that have been set aside by a court. In these cases, any party can apply to the Land and Environment Court for the determination of an access arrangement that complies with the amended Act. This amendment will overcome any need to negotiate new arrangements that include secondary landholders, and will make the arbitration process optional.

These amendments will ensure certainty for landholders and the mineral and petroleum explorers who approach them seeking access to their land. The bill will provide a consistent and transparent approach to how access

arrangements are made. It will mean occupiers of the land, not banks or utilities, are the key party at the negotiating table when access arrangements are made with explorers. The significance of the mining industry to the New South Wales economy means that there must be certainty and consistency for both landholders and titleholders. Disruption to our most significant industry will have a major impact on the economy of New South Wales. The bill will remove doubts about the validity of existing arrangements and sets out clear requirements for future arrangements. This will benefit not just landholders and the minerals and petroleum industries, but all of New South Wales. I commend the bill to the House.

Mr ANDREW STONER (Oxley—Leader of The Nationals) [11.04 a.m.]: I lead for the Liberals and The Nationals on the Mining and Petroleum Legislation Amendment (Land Access) Bill 2010. The bill amends the Mining Act 1992 and the Petroleum (Onshore) Act 1991. Having not seen the bill until just a few minutes ago, I am not in much of a position to describe what it does. However, I now understand the bill amends the definition of "landholder" so that an exploration company only needs to make an access arrangement with a person who has exclusive possession of a property or a right to exclusive possession; removes the requirement for exploration companies to negotiate access arrangements with secondary landholders such as easement holders or mortgagees; retains the rights for secondary landholders to claim compensation if their interests are adversely affected during exploration; and provides an exploration company with the flexibility to make more than one access arrangement where there is more than one landholder for a property.

I am simply reading from the explanatory notes of the bill. I have had no opportunity up to this point to talk with the experts, particularly legal people, those in the mining industry and other stakeholders affected by the issue such as the landholders to which the bill refers. From the outset I indicate that the New South Wales Liberals and Nationals cannot support this legislation, particularly legislation as complex, difficult and contentious as this bill. The first time that the shadow Minister, the Hon. Duncan Gay, or I have seen the bill is here in this Chamber this morning. In fact, the bill actually hit the table after the Parliamentary Secretary had begun the agreement in principle speech.

This is an outrageous subversion of longstanding standards and conventions on due process, designed to facilitate proper debate and optimal legislative outcomes. It is another sign that New South Wales Labor has zero regard for democratic principles in this Parliament. The Government is trying to rush through this extremely important legislation without the opportunity for proper consultation with key stakeholder groups. The Liberals and The Nationals have never been in favour of retrospective legislation, and this is certainly true for a matter that we understand is still before the courts. This is the Supreme Court matter that involves landholders in the so-called Caroona exploration lease and is the reason for this bill. We understand that there is an appeal in relation to that matter and it is before the courts. The Government's introduction of legislation over the top of the judicial process is nothing short of dictatorial.

The Government is quite happy to blur the separation of powers, one of the guiding principles of our democracy. The Government is happy to ride roughshod over the judiciary and over concerned communities on this extremely important issue. The bill really is a case of legislation in two parts. The first part is the unforeseen statewide ramifications of that Supreme Court case. Those ramifications need to be carefully examined and legally appraised to ensure that what appears to be a simple ratification of current arrangements does not have further consequences that result in problems that affect the title of farmers and other landholders across the State. We understand the definition of "landholder" needs to be clarified following the Supreme Court decision. We also understand that what is at stake may be new mineral and resource exploration in New South Wales, but it is imperative that we get it right. We should not be rushing through a bill sight unseen. New South Wales Labor, based on its track record over the past 15 years, cannot be trusted to get legislation right. This bill is far too important to throw every convention of parliamentary debate out the window.

The second part of the bill concerns Caroona. This issue deserves to be treated differently, for the reasons I outlined earlier concerning the separation of powers and retrospectivity. The Opposition finds the parts of the bill that deal with Caroona to be totally abhorrent. This group that has used the laws of the land to protect their rights are now seeing a Government trying to retrospectively remove those rights. We in the Opposition are absolutely appalled by this and will not support that part of this or any other bill. Given our concerns about the appalling removal of the rights of people concerned with Caroona and about the Government's lack of transparency in not allowing us to properly examine this legislation, we are left with no choice but to oppose the bill today.

In the Legislative Council the Opposition will ask that the bill be adjourned, to enable proper process and consultation with the many groups affected by the legislation. We will ask the Government to delay the passage of the legislation until the next sitting week—which is the normal convention in this place—to allow us the opportunity for proper scrutiny of the bill and consultation with the community. It will also enable us to thoroughly examine the bill—which, as I have said, just hit the decks here 15 or 20 minutes ago—so that we can consider what it does and does not do. Simply put, the Government cannot be trusted given its past form.

The New South Wales Liberals and Nationals believe that mining and other industries on the land can coexist, providing the right balance can be achieved. It is important not just for the national and State economies but particularly for regional economies that we get this balance right. New South Wales Labor, in its greed selling exploration leases for hundreds of millions of dollars—unless, of course, it involves a close Labor mate—has lost the balance. That is why the recent Supreme Court case eventuated, and it is why this issue has now arisen.

Getting the balance right, where landholders' rights are preserved, where industries can coexist and where economic benefits ensue, particularly for regional communities for so long neglected by this Government, is no easy task. To ask us to tick off on a bill sight unseen is, frankly, an insult to the people of this State, an insult to the Parliament, and an insult to all the stakeholders in this issue. Getting the balance right is a task that deserves proper process—not a bill dropped in this place after the debate began. Simply put, the New South Wales Liberals and Nationals cannot support legislation we have not seen.

Mr ROBERT COOMBS (Swansea) [11.12 a.m.]: I support the Mining and Petroleum Legislation Amendment (Land Access) Bill 2010. Claims have been made that the outcome of a recent Supreme Court case regarding access to land for mining and petroleum exploration was a win for landholders. Nothing could be further from the truth. When it comes to making access agreements for exploration, there is a new reality. Up until now, the practice has been for the exploration title holder and the person on the land to make access arrangements, or to have an arrangement arbitrated. However, this practice is now not considered to be in keeping with the requirements of the Mining Act. Under the provisions of the Mining Act, any party with a registered interest in the land must be party to a proposed access arrangement.

Those with a registered interest in the land can include finance providers such as mortgagees or anyone holding an easement over the land, such as Telstra. They can also include anyone with a right of way, such as a neighbour, or anyone holding a covenant over part or all of the land. This means that, in some cases, a farmer could be just one of several people with an interest in the land. And the current uncertain reality is that all of these holders of an interest in the land must now be part of just one access arrangement. Up until now, the person on the land and the exploration company generally negotiated access arrangements. They set out when and how the exploration title holder could come onto the land. They were clear about what they would do if there were a difference of opinion between the landholder and the exploration title holder. This was achieved by including a dispute resolution mechanism or procedure in the terms of the access arrangement. They made agreements on compensation to be paid to the landholder. Importantly, access arrangements made in this way were designed to give landholders a say in what could happen on their properties.

In effect, as a result of the recent Supreme Court decision landholders now do not have that say. They are potentially one voice amongst several. Making just one access arrangement with all those with an interest in the land could well have unwanted outcomes for landholders. Each party with a registered interest can have an equal say in what happens on the owner's land. Each party also has an equal right to negotiate, to ask for information, and to delay or deny access. As well, each party has the right to object to any of the terms of the access arrangement. These circumstances could lead to increased rates of participation in arbitration, where a third party makes the access determination. They could also lead to increased appeals to the Land and Environment Court, with all of the stresses associated with the delays and costs of litigation.

There is another, quite different, outcome, which could be undesirable for landholders where there are multiple participants in an access arrangement. The access arrangement will no longer be confidential. Terms will be available to any other party with an interest in the land. Terms may include details such as financial compensation for access, and having to disclose such matters may not be in a landholder's best interest. In practice, all of these issues mean that the recent Supreme Court decision will diminish the right of most landowners to determine what happens on their properties. The bill will remove these uncertainties. It restores the balance so that the primary relationship is once again between the person who owns or occupies a property and the exploration company. It will provide clarity and certainty to landholders, to those with an interest in the land, and to exploration title holders. I commend the bill to the House.