Second Reading

The Hon IAN MACDONALD (Minister for State and Regional Development, Minister for Mineral and Forest Resources, Minister for Major Events, and Minister for the Central Coast): [8.00 p.m.]: I move:

That this bill be now read a second time.

The Mining and Petroleum Amendment (Land Access) Bill 2010 will restore certainty for landholders and exploration title holders over land access arrangements. The bill will ensure certainty around those access agreements that are negotiated or arbitrated in the future. It will also validate existing access arrangements. The amendments set out in this bill address an issue that, left unresolved, has the potential to impact significantly on this State's economy. The bill upholds longstanding practice and avoids potentially nightmarish bureaucracy for all parties. It ensures that those with a direct interest in the operations of a property can sit at the negotiating table with an exploration company and agree practical access arrangements to their properties.

New South Wales is unique in protecting landholder interests in this way. It is the only State that requires explorers to negotiate a comprehensive access arrangement with the landholder prior to exploration activity commencing. It is the only State that has a land access agreement. In Queensland, Western Australia and South Australia explorers are required only to give the landholder a notice of entry—which is a huge difference. This bill will mean that landholders will independently and confidentially be able to agree terms that suit their interests. They will be able to do this without needing to disclose the details to their bank or utilities such as Telstra and Country Energy that may have easements on their properties. It means that, potentially, thousands of access arrangements that have been negotiated in good faith across New South Wales in the past will stand. It also means that disruption to exploration activity in the mining industry will be minimised.

This is a win for landholders, a win for the mining industry, and a win for commonsense. The mining industry is the largest commodity export industry in the State. In 2008-09 the estimated total value of minerals produced in New South Wales was round $22 billion. Mineral exports comprised about 50 per cent of our total merchandise exports. Including minerals processing, the minerals industry employs approximately 47,000 people directly and supports over 200,000 jobs throughout the State. Mining is a contributor to diverse regional economies. Diversity in regional economies makes these economies more resilient to commodity and business cycles. Having a broad range of industries operating across the State is important to achieving sustainable economic growth and creating job opportunities for people who live outside the cities. That is why this debate should not be reduced to a debate about mining versus farming. It should also not be a question of one or the other.

It is important for us all to ensure that the industry and landholders have a clear way forward for making access arrangements for exploration. The Crown owns the vast majority of mineral and petroleum resources in New South Wales. This means that the resources are owned by the people of New South Wales, not by any landholder, or by any person who may have a lease over a property. Any mineral resources are owned by the State. The surface of the land may be privately owned, but the Crown owns almost all minerals that may be below the surface of that land—an essential point in this State. We are talking about Crown assets that are held on behalf of the people of this State. The Government has an obligation to ensure that, where appropriate, these resources are utilised for the economic benefit of the people of New South Wales to create investment and jobs, and to provide income.

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 to 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 on 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 negotiated directly between exploration title holders and landholders. The two Acts also state that the titleholder can carry out exploration activities only in accordance with an access arrangement made with relevant landholders. Where agreement cannot be reached, the Acts provide for decisions to be made by an arbitrator in the first instance, 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." That means that there may be a number of landholders for each property in addition to the registered proprietors. That 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 Wardens Court.

In that case the Supreme Court ruled that all landholders with a registered interest in 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 arrangement in question to be valid. Entities such as banks and utilities that hold easements must, therefore, be included in negotiation of a single access arrangement to a property. In this case, in accordance with common practice in industry, the mortgagees of both properties had not been included in negotiation of the arrangements. The ruling prevented the exploration title holder from undertaking exploration activities on the land in question.

Currently there are 1,170 exploration 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. Exploration under existing access arrangements might have to cease whilst this takes place. The decision could significantly disrupt exploration activity in New South Wales. The court's decision also has serious implications for landholders. It could mean that the negotiation of access to land is not a decision just between the owner or occupier of the property and the exploration title holder. The explorer would also have to negotiate with any entity with 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 landholders have 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 landholder's bank would also be party to the arrangement—and other financial institutions in some instances—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 from the Supreme Court's decision. The bill will do this by making several key amendments. Firstly, the bill narrows the definition of "landholder", but those changes do not affect that part of the definition covering owners of the land in fee simple. The changes focus on the part of the definition that involves the holding of an interest recorded by the Registrar-General. The changes reduce the definition to certain specified categories. These include registered mortgagees in possession, lessees and other persons with an exclusive right to occupy the land—for example, a share farmer with the full agreement of an owner. This is a sensible approach as they are the people who, similar to owners in fee simple, are in the best position to negotiate access in a way that addresses circumstances on the land concerned.

Two types of Crown interest are also retained within the registered interest part of the landholder definition. The first of those involves covenants imposed by the Minister under the Crown Lands Act. The second involves interests of a Minister or public authority under a conservation, natural heritage or biobanking agreement. This provision means that 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 landholders termed "secondary landholders". Secondary landholders are those with a registered interest in the land, other than those I have mentioned, and include registered mortgagees and holders of easements and rights of way. These secondary landholders will still be eligible for compensation for any compensable loss caused by exploration activities. It should be noted that industry practice is to avoid exploration on utility and telecommunication easements. Generally, exploration activity on these narrow corridors of land can take place in a way that does not affect these interests.

Secondly, the bill allows for separate access arrangements for multiple landholders. This will ensure that each party with an interest can negotiate his or her own arrangement and can maintain confidentiality of the arrangements. That is an important point because after having gone through a very long drought many farmers are not so well off as others and may have extended their debt situation to meet the problems of the drought. In those circumstances they may not wish to have the financial details between them and an exploration company revealed to another party such as the bank, and for very good reasons. In managing their land they may have made a determination to invest in cropping or extra livestock. If the bank sees the details of the agreement, which, under current arrangements that have effectively been put forward in the Supreme Court, it would have to have that disclosed as part of forming a single access agreement. The bank's position might be that the farmer should reduce the overdraft or attend to the mortgage.

The Hon. Duncan Gay: What is the aim?

The Hon. IAN MACDONALD: I think banks more or less would rather the debt be paid in that direction. The bill will not prevent landholders agreeing to a single arrangement if they wish to. The bill provides also that access arrangements are required only to cover the particular area of land on which the exploration title holder proposes to carry out exploration. This addresses situations 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 for that stage of work. The bill makes it clear that access arrangements should not replicate conditions of an exploration licence; nor should they replicate matters that the exploration title holder is otherwise required to comply with under the Mining Act or Petroleum (Onshore) Act.

These 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 also is 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 title holder 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 to 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 that 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 the Land and Environment Court has determined an arrangement the parties are free to agree on subsequent variations without having to return to court.

I refer 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, which it is now proposed will be in the secondary landholder category. The bill provides also 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—it makes up 50 per cent of our merchandise exports—will have a major impact on the New South Wales economy. The bill will remove doubts about the validity of the thousands 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. Given the considerable interest in this bill and that there seems to be much misunderstanding about some aspects of the bill, I am proposing a period of consultation with farmers and other stakeholders to ensure everybody has a chance to have their say. This is an important issue and must be dealt with properly, but there is a lot of uncertainty in this field. Exploration activities already have been terminated or ceased in western New South Wales because of uncertainty about the validity of access agreements.

Currently the situation is that many thousands of agreements could be subject to challenge. The bill will direct negotiations to the farmer or occupier of the land as the party with whom the negotiations will be conducted, rather than all the other parties attendant to a registered interest. I cannot conceive of any utility or bank being concerned to have rights being incumbent upon the decision that has been made by the Supreme Court. However, the problem is that the legislation containing the definition of "landholder" operated for many, many years without challenge.

The Hon. Trevor Khan: How many?

The Hon. IAN MACDONALD: Many years.

The Hon. Trevor Khan: How many?

The Hon. IAN MACDONALD: Many years. I can state how many years later. It was certainly up to 15 years ago.

The Hon. Trevor Khan: Up to 15?

The Hon. IAN MACDONALD: It has been in for so long and has been the way the Act has operated for so many years that the Government and I believe—as most reasonable people would, even some members opposite—the issues should be dealt with in that way, not by application of the broader definition. That is why the Government has introduced the legislation. I am sure that the Deputy Leader of the Opposition, the Hon. Duncan Gay, will move to adjourn the debate to enable the legislation to be discussed fully.