

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO PASTORAL LEASES IN WESTERN AUSTRALIA

**TRANSCRIPT OF EVIDENCE
TAKEN AT FITZROY CROSSING
THURSDAY, 7 NOVEMBER 2013**

SESSION FIVE

Members

**Hon Liz Behjat (Chairman)
Hon Darren West (Deputy Chairman)
Hon Nigel Hallett
Hon Jacqui Boydell
Hon Amber-Jade Sanderson**

Hearing commenced at 2.06 pm

Mr NOLAN HUNTER,
Chief Executive Officer, Kimberley Land Council, sworn and examined:

Mr MERVYN STREET,
Director, Kimberley Land Council, sworn and examined:

Mr TOM BIRCH,
Deputy Chairman, Kimberley Land Council, sworn and examined:

The CHAIRMAN: I ask you to take either the oath or affirmation.

[Witnesses took the oath or affirmation.]

The CHAIRMAN: You all will have signed a document entitled “Information for Witnesses”. Obviously you have not read it, Mr Street, but has it been explained to you what is in that document? Are you happy with that document?

Mr Street: Yes, I understand when you are talking.

The CHAIRMAN: You are happy also with the witness document that you signed?

Mr Hunter: Yes.

Mr Birch: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to speak into them. Ensure that you do not cover them with papers or make noise near them. If you speak in turn, that will be easier for Hansard. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

That is all of the formalities over and done with, so we can be very relaxed now about what we are doing.

Mr Hunter, would you like to make an opening statement of behalf of the Kimberley Land Council?

[2.10 pm]

Mr Hunter: Yes. The Kimberley Land Council is an organisation that was set up by traditional owners in the Kimberley 35 years ago to advocate for the rights and interests of Kimberley Aboriginal people on a number of fronts, not just native title. Primarily, it is aimed at lobbying and advocating for addressing the social issues of people in the Kimberley. In terms of the population of the Kimberley, Aboriginal people make up half of the population of the Kimberley. Our interest in this is that we represent the traditional owners of the Kimberley in native title claim areas and other matters as their legal representative. We also have a responsibility for another part of our

engagement with the people that we represent on what they do in the future in terms of economic development and other things that look at the aspirations for making sure that people can have jobs and looking after country.

One of the issues, obviously, is that we occupy the same space as people who have different interests, whether it is mining or the pastoral industry. These two gentlemen are both on our executive but they also have a long history of being involved in the pastoral industry—as young men working on different pastoral properties for most of their lives. They have that wealth of knowledge and relationship. We have a number of concerns, primarily because we do not know what the end result will be, about the changes to pastoral lease for properties. The real issue is what the implications of that will be on people's native title rights and interests.

Apart from the details of the actual leases, I think that it is worth noting that we believe that native title is a federal law and there is an issue of jurisdictional differences, if you like. In that, I think that some things probably could be done a bit differently. When I talked about the future things we want to do, one of the things that we have been involved with is carbon abatement work. We have been carrying that out over a period of four years with our ranger groups. When we try to tackle employment, training and economic development opportunities—how to create business opportunities—what we have come up against is commonwealth legislation, the CFI, the Carbon Farming Initiative, versus the state's CRA, Carbon Rights Act. Everything for us relates back to native title and people being able to assert their native title in terms of the land areas that they have to be able to do what they need to do around business development and all those things. That is just one example and there are other areas. I have had conversations with both levels of government around this jurisdictional issue, and I think that we are sometimes caught in the middle of it. As an example, some years ago, the state government developed legislation that we believed impacted on our rights and interests, so we challenged it and went to the High Court. It was overturned and had to be withdrawn. One of the things that I have raised with the commonwealth is that we should not have to do that; there should be some acknowledgement or observation of the fact that there has to be some kind of relationship between federal and state law about that, rather than depending on us to do the individual challenges that we need to do.

With the pastoral leases, we simply want to ensure that native title rights and interests are observed and that any change to the legislation does not undermine, for example, future acts. One of the concerns that arise out of that is when you have a situation where there is no perceived break in a lease period, so that you would have a continuous perpetual lease, we think that that impacts on native title rights and interests, because we think there ought to be some way that has regard to future acts at the moment the lease expires and before the new one is issued in relation to procedural rights and the need to consult the native title stakeholders.

I guess that raises the question about the need to have adequate consultation with native title stakeholders. Our concern is that that has to occur. It is a bit hard to second-guess what the final result of those leases will be, but one of the things that I have to advise my board about is what it means for our stakeholders here and whether we actually have to seek legal advice to challenge and raise this to the commonwealth if we think this impacts upon those native title rights and interests.

The CHAIRMAN: Did the Kimberley Land Council make a submission with regard to the draft pastoral lease?

Mr Hunter: We have written a letter that raised a number of issues and we will submit that as well. Basically, we just want to make sure that we are adequately consulted.

The CHAIRMAN: There are a few questions here that I would just like to run through, so that we have the best picture that we can possibly get. Our understanding is that there are 55 pastoral leases held by Indigenous groups. Do you know how many of those are located in the Kimberley?

Mr Hunter: Not off the top of my head; I know that there are lots of Aboriginal pastoral holdings.

The CHAIRMAN: Would you be able to take that as a question on notice to be able to provide us with that information? You do not have to write it down; we will give you the question. Not today or tomorrow —

Mr Hunter: Yes.

[Supplementary Information No C1.]

Mr Hunter: The precise number, sure.

The CHAIRMAN: We understand that the Kimberley Land Council has a number of Aboriginal rangers and cultural advisers. What sort of role do they play with the pastoral leases at the moment? What sort of things are they doing?

Mr Hunter: There are different projects and engagement. I do not think that they are at the level where it is significant enough. There are some issues that need to be dealt with; the example that I am thinking of is the declaration of Indigenous protected areas. I do not know if you aware of the recent horse cull at Billiluna, where there is the management of a pastoral lease and simultaneously having an Indigenous protected area declared, which was initially suspended because it could not operate under the threat of feral horses. What they do is declare zones for different levels of biodiversity and other types of conservation and environmental projects and management. When I talked about the issue of economic development and employment, I suspect that we have similar concerns to the pastoralists; we occupy the same space in this area. We think there are opportunities around working with mining and pastoralists in the Kimberley. We have good examples of collaborations in some instances; we have mining agreements, for example. The biggest and more controversial project was the James Price Point gas project. But it is an example where traditional owners, even though they realised that they did not have a right of veto, were still able to negotiate to look at the opportunities that could come by way of employment, training and other things. We believe that the same could also be said about the pastoral industry; there is a place where we could all exist together and possibly look at the opportunities. We know that there are Indigenous pastoral properties, so we have that in mind as well.

One of the things that does concern us is the issue of diversification. We are interested to know what the effect of that will be. Our interest in economic development is in the potential for joint venturing on stuff. The example I am thinking of is carbon abatement work for some properties, given you require a minimum size area to conduct it in. We will look at partnerships like that.

[2.20 pm]

The CHAIRMAN: Do you see there is an opportunity for some tourism things as well?

Mr Hunter: I think that there are ways we are trying to promote. One of the things we are really trying to do is say, “Look, if we recognise that the level of industry is not there in relation to the jobs that are required”—I mean, if you look at mining, the majority of the people that can fill the positions in those fly in, fly out—so we are being proactive about looking at opportunities ourselves. We are interested in diversification in terms of if there are opportunities for employment or joint venturing. I spoke to people like Jack Burton who is always interested in opportunities in business. Our representatives tell us that we want jobs for our kids, we want to do this. There are many challenges to that, of course, but it is not to say that we do not have the aspirations or want to do something that can help our people. The point about diversification, the other side of it, is that our concern is that certain infrastructure development or types of activities can extinguish native title. That is what we want to be sure does not happen. There is a whole issue around extinguishment that has not yet been addressed. We have got numbers of examples in other areas around the Kimberley and other parts of the country. I also wear another hat as the chair of the National Native Title Council, so we talk about these things. At some stage, I am not sure whether this will be raised at a different level in terms of discussion and activity that occurs, but the idea is that we take it back to the native title rights and interests. If there is going to be any change, if there

is going to be any legislative development, we want to make sure that does not tread on the rights and interests of native title holders.

The CHAIRMAN: In your submission to the committee—this probably goes around what you were saying with diversification as well—one of your recommendations was that a comprehensive assessment of the suitability of land for the pastoral activities needed to be undertaken. Has that happened that you are aware of?

Mr Hunter: Not that I am aware of, no.

The CHAIRMAN: Going on about extinguishing native title as well, but the committee has been advised that there are minimal changes to the proposed pastoral lease to avoid triggering the future act provisions of the Native Title Act. So, in future would the KLC prefer to see Indigenous land use agreements on pastoral lands to ensure mutual benefits?

Mr Hunter: There was a lot of discussion between ourselves and the state government. This was when there was a lot of talk about the global ILUA and that was about creating certainty for access for miners and pastoralists et cetera. Our view at the time, and the Federal Court confirmed this by calling a meeting with us all, was that if there was criteria for native title and that had been met, then I think the consideration was that you could not then propose another layer of criteria of assessment for native title. But the way it was being presented was that native title determinations were held up and it would seem that determinations were not going to progress unless those conditions were accepted. The way it was put—the Federal Court called a meeting on this, Justice Barker, so he recognised as well that there were things that happen in relation to agreement making that was a part of the process leading up to determination and things that needed to happen later; that is, where a native title determination is made. Then there has to be an agreement with the new prescribed body corporate that is the entity for the native title around the issue of access and ILUAs.

The CHAIRMAN: Is there a document that we can see that would set that out in relation to what those issues are that you have just explained?

Mr Hunter: Look, there are bits and pieces of information that have gone back and forth where we have engaged with the state and they have sent stuff to us. There have been different conversations that have been had. I do not know if there is a document specific —

The CHAIRMAN: Nothing from the High Court?

Mr Hunter: I would have to check with our legal staff on that, but there will possibly be something that I could attach to our submission.

The CHAIRMAN: Anything that you could provide in that regard would be very helpful to the committee in our deliberations, so if you are able to go back and have a look to see what it is that you have got and provide copies to us, we would be grateful.

We heard evidence earlier today that—and what you have just explained may be why things do not seem to progress is that you get to this point where all the parties agree that there should be an ILUA put in place but then it just seems to get to that point and no-one seems to be able to take it any further than that. So would you say that is one of the reasons why, because there is this uncertainty as to how that would then affect native title as to when that is finally —

Mr Hunter: No, quite the opposite. The hold-up is not with the intent of the parties, I think; they either get to a point where they understand that there are things that they could agree upon; it is about the actual process for developing an ILUA. We had below Bidyadanga and the number of years in terms of the state's capacity or resources to be able to progress an ILUA is, resource and time wise, not an easy process. That is probably the bigger burden or challenge for developing an ILUA. One of the issues that we have is that if you talk about a proposed ILUA—because there are issues in dealing with the actual agreement, the toing and froing about the terms and the legalities

that go with that—we know that on a practical level what it would take to try and progress an ILUA for every native title agreement, you are talking like 15 or 20 years in reality, if you look at what it took for the state to work with us to get that ILUA, that native title. So I think one is that it is an issue about capacity, not just on our part. Probably I think the lesser problem or issue with it is not about the intention of the parties; I think the more serious issue is of what it actually takes in terms of how long it takes to progress an ILUA.

The CHAIRMAN: The Indigenous groups and the pastoralists sometimes are in conflict with each other and that has obviously been a thing that has been going on for some time. How are they currently managed when we have these issues between the groups?

Mr Hunter: Look, every now and again we will write a letter when some incidents occur. We also write to different ministers on that. We believe that, looking at your pastoral lease clauses and the issues around that, talks about the requirement for leaseholders to conduct themselves in a particular way. We have had some instances where we believe that—again, this relates to the observation of a federal law that applies to everyone, being native title. If you look at the decision that came out of the Wik decision, talking about coexistence and the fact that pastoralists and Indigenous interests can coexist and therefore setting some way in which Indigenous people can assert their rights, their issues with fences and gates and occasionally things being done to Indigenous people that does not quite stack up to the requirements of that coexistence. One of the things that pastoralists are not supposed to be able to do is to restrict access where there is a native title right and interest. But I do understand that the friction occurs when gates have to be locked and access roads have to be managed and all those types of things. But, generally, I think most of the pastoralists up here are aware. Because of the level and extent of native title work that is going on and the number of determinations in the Kimberley, I think we have probably about 70 per cent understanding that there is native title and the issue is that I think both of them coexist. I do not think that is a major problem.

[2.30 pm]

There was one more thing about this review; that is, the recent review of the Native Title Act, probably the result will be established and determined. I do not have knowledge about the time line of that, but if you looked at when the pastoral leases will expire and when changes to the Native Title Act will occur, when we have looked at the Native Title Act this issue that we talk about with the future act seems to allow certain things. We believe that is not correct. We know that native title law has never been reviewed. It was developed on the run. While it allows certain things, we are curious as to what changes may occur to that that may have an effect for these leasing renewals, particularly if the results of that and the implementation of any new legislation on native title is done before the leases expire. How do you take that into account particularly and what observations will be made by the state around that? I first started talking about the tension between the state and commonwealth jurisdictional issues.

The CHAIRMAN: Presumably you have a fairly good working relationship with the Minister for Aboriginal Affairs?

Mr Hunter: We have a relationship! Obviously there are some things highlighted around the heritage act, for example, where we do not see eye to eye. We probably have more engagement and interaction with other ministers. The thinking has changed for the Kimberley Land Council over the years where we are focussing more on developing good collaborative relationships and trying to work on things together, or trying to find a way that we can progress things. We do not want to be locked up and doing battle with people. We particularly do not want to be locked up with the state in challenging legislation if it treads on people's rights and interests, particularly in light of the fact that the Australian government has endorsed the UN declaration of Indigenous rights, which is unenforceable because they were one of the countries that did not sign up to it. That is another matter; I will not go into that. There are things like the Paris Declaration that Australia did sign up

to, and other things that we will look at when we have our interaction with government at different levels.

The CHAIRMAN: Do either of your colleagues want to tell us anything about the pastoral industry; their observations over the years or what you would like to see happening in the future? I do not want to put pressure on you; just so you have that opportunity while we are here today because we may not come back to Fitzroy Crossing.

Mr Street: What I would like to day, because I grew up working for pastoral stations. We got this native title person. We like to work closely with the pastoralists. Let them work within native title but we want to work together. The pastoralists do not want this you, know; they are getting scared of this native title, but native title and the pastoralists are going to work together—that is what I think. We are never going to tell them no. We have to give them the chance and they have got to give us a chance. We can share the land together. We are not going to take their right away. They can have their rights in the stations but we have a right to our land too. That is why we have to work together.

Mr Birch: I would just like to say how time has changed over the years. Looking at these photos here now from the early days, when we were working in stock camps. Now the new rules are coming in. All I look forward to, through the native title work, is coexisting with the pastoralists and the board to share our views on country. It is the same with the mining. Whatever prevails, old people want to go back on country, just fishing or looking at camps. That is what I would like to see happen anyway in the future. I was bred and born here; I am saying that this is a free country. It would be unnerving in the future to lose the feeling of our country, our land. We should all just pay attention to government rule and all that. That is what I am saying.

The CHAIRMAN: Anything from you in closing, Mr Hunter?

Mr Hunter: Pastoralists are in the same boat around wanting certainty and predictability about their future. I guess we want to have an understanding and appreciation of that predictability and certainty as well.

The CHAIRMAN: I would like to thank you for taking the time to put in a submission, firstly. That will be very helpful to us in our deliberations. Thank you for taking the time to come and talk to us today. There is nothing better than being able to have that face-to-face interaction to know what people are thinking about the issues that are confronting the industry, both from a pastoralist point of view and from the Aboriginal point of view. On behalf of the committee, I thank you for visiting us today.

Ladies and gentlemen, that closes our hearing for today. We have finished our inquiry in Fitzroy Crossing. I would like to again thank you all for taking the time to come. Those of you who gave evidence, we appreciate it. You will be sent copies of your evidence and you can correct any small things. Those instructions will come from Hansard. For those of you who just came along to listen, thank you so much. The evidence that has been provided to us today has been very useful. We appreciate you opening up your stories to us.

Hearing concluded at 2.37 pm
