

GOVERNMENT RESPONSE

STANDING COMMITTEE ON PUBLIC ADMINISTRATION REPORT 20 INQUIRY INTO PASTORAL LEASES IN WESTERN AUSTRALIA

Recommendation 1: The Committee recommends that legal departments and Directors General note that claims of legal professional privilege do not apply to documents called for by parliamentary committees.

The Estimates and Financial Operations Committee of the Legislative Council is currently holding an Inquiry into the Provision of Information to Parliament. It is understood that the Government will be making a submission to that Inquiry, including in relation to the production to Parliamentary Committees of documents that may be subject to claims of legal professional privilege. In this circumstance, the Government will provide a response on the issue to that Inquiry, and no specific response is given here in relation to Recommendation 1.

Recommendation 2: The Committee recommends that detailed information should be sought by departmental decision makers to ensure their decisions are made not only legally but also fairly.

The Recommendation is noted.

A Project Manager has been appointed, together with a team of four officers dedicated to the delivery of the project. The delivery of the project, including the sourcing of information to support ongoing decisions, has been scoped out through a revised project plan. The project delivery is based on Prince2 Project Management principles.

Governance for the management of the project includes a Project Steering Committee (PSC) comprised of three Executive Directors (Department of Lands), Manager Cadastral Services/Assistant Registrar of Titles (Landgate) and the Project Manager with invitations extended to the Director General of the Department of Lands to attend, when available. The PSC in turn reports on the project's processes to Department of Lands Corporate Executive meetings chaired by the Department of Lands' Director General.

This level of project governance provides a framework that ensures that decisions made in the delivery of the project are based on detailed information that will allow for a legal and fair outcome.

It is to be noted, that information is also obtained through an extensive consultation process involving a range of stakeholders and pastoral lessees. The Department of Lands, to date, have engaged with the Pastoralists and Graziers Association of Western Australia (PGA), the Pastoral Lands Board (PLB), Banks, Insurance Companies and pastoralists either individually or at formal meetings. The Department of Lands also provided consultation sessions as an invitee to other information sessions.

Examples of consultations with industry include:

- On 6 May 2014, a preliminary consultation session was held with representatives from the banking industry, to discuss the impact of the lease renewal process on bank's mortgages currently secured against pastoral leases that expire on 30 June 2015. The Department of Lands has committed to work closely with the banks up to 1 July 2015 to develop processes and procedures that will minimise the impact to mortgagees' security.
- The Department of Lands is working closely with lease holders who currently do not satisfy the requirements for lease renewal stated in the 1997 letter from the former Minister for Lands, Hon Doug Shave MLA. The Department of Lands will continue to liaise with State government departments, the PLB and affected lessees to develop an understanding of the issues that lessees may face in meeting these renewal requirements and work towards an outcome that, where possible, will allow for the conditional renewal of affected leases.
- With regards to permit renewals, Department of Lands' staff are currently undertaking site visits and reviews of pastoral properties that possess a permit to diversify. In conjunction with the PLB, the Department of Lands will utilise this information to develop a process for lessees to apply for permits post 1 July 2015. Advice will be provided to lessees, prior to the expiration of current permits, on the processes and timelines for applications of permits effective from 1 July 2015.
- The Department of Lands is currently liaising with pastoral lease holders who will be entitled to compensation for lawful improvements on areas of land that are to be excluded from their pastoral leases from 1 July 2015. Compensation will also be payable to lease holders who have been notified that their leases will not be renewed on 1 July 2015. Lessees have been provided with the opportunity to identify and self-value any lawful improvements prior to the Valuer General's site visits to determine the value of the lawful improvements. From 1 July 2015, affected lessees will be entitled to compensation for their lawful improvements.
- A consultation session with representatives of the Insurance industry has been scheduled to discuss the impact of the insurance clauses in the draft 2015 Lease renewal document. This is as a direct response to concerns raised by the PGA, PLB and pastoral lessees to the clauses currently included in this draft lease.
- Representatives from Landgate and the Department of Lands meet on a regular basis to develop procedures and processes for the lodgement of lease renewal documentation on 1 July 2015. Ongoing discussions regarding the lodgement process ensure that the procedures and processes to be used will meet the legal requirements for lodgement of documents. The Department of Lands will further consult with stakeholders on the proposed processes to ensure that all documents are lodged and registered correctly on 1 July 2015.

Information obtained through these processes will be considered by the Department of Lands' staff when making decisions. Comments received during these consultation sessions will also be used when reviewing the content of the 2015 lease at the end of the feedback period of 11 July 2014.

Recommendation 3: The Committee recommends that the Department of Lands should immediately commence meaningful and transparent consultation with the pastoral industry to resolve outstanding issues in relation to the 2015 lease, and that the Minister representing the Minister for Lands in the Legislative Council advise the House on progress within three months of the tabling of this Report.

The Recommendation is noted.

In July 2013, a draft pastoral lease document for renewal of pastoral leases on 1 July 2015 was released to pastoral lessees for public feedback. A comment period of eight weeks was initially provided, which was then extended to 15 October 2013. In November 2013, in response to feedback received, the Department of Lands met with the PGA, State Solicitor's Office (SSO) and Members of Parliament to discuss the 2015 pastoral lease renewal process and the draft July 2013 lease document. During this meeting, agreement was reached that two lease renewal options would be provided, with each pastoral lessee being able to choose the option that best suits their requirements.

In April 2014, the Department of Lands released the two draft lease renewal options and an accompanying draft Information Paper to the PGA and the PLB for comment. Both the PGA and the PLB were given approximately three weeks to review the documentation provided, obtain independent advice prior to the public release of the documentation and provide the Department of Lands with feedback. Preliminary feedback was also sought from Elders Bank prior to public release.

A forum was held on Tuesday, 6 May 2014 with representatives from the finance industry with mortgages registered against current leases. The Department of Lands, at that forum, committed to regular meetings with these representatives to address any ongoing concerns on the content of the draft documents and to develop a process for lodgement of mortgage documentation on 1 July 2015.

The Insurance Commission of Western Australia has been consulted in relation to the feedback received on the insurance clauses contained in the draft 2015 lease. A meeting has been scheduled with the insurance industry for 13 June 2014 to further discuss issues raised by lessees regarding the insurance clauses.

The Department of Lands wrote to all pastoral lessees on 8 May 2014 to advise of the release of the draft lease renewal documentation and to provide details of the consultation sessions and the process for providing feedback. The letter also included copies of the draft lease renewal documents and an information paper.

Since the tabling of the Committee's Report, representatives of the Department of Lands have attended various events to provide information related to the 2015 renewal process. These events included:

Location	Date	Invitee
Kununurra WALGA Office	29 April 2014	Western Australian Local Government Association
The Mangrove Hotel, Broome	7 May 2014	Pastoralists and Graziers' Association

The Department of Lands have/will conduct consultation sessions on the lease renewal options in the following locations:

Location	Date
Kalgoorlie	Tuesday, 13 May 2014
Marble Bar (in conjunction with PLB Stakeholder Forum)	Thursday, 22 May 2014
Carnarvon	Thursday, 29 May 2014
Karratha	Thursday, 5 June 2014
Fitzroy Crossing	Wednesday, 11 June 2014
Mt Magnet	Monday, 16 June 2014
Perth	Wednesday, 2 July 2014

The Department of Lands is also available to present at other functions, if invited, to provide meaningful and transparent consultation with the pastoral industry to resolve outstanding issues in relation to the 2015 lease. While the primary purpose of these consultation sessions is to provide information to lessees and stakeholders on the two lease renewal options that are available to the lessee to renew their leases on 1 July 2015, processes and timelines leading up to the renewal date will also be discussed.

The consultation period will be open until Friday, 11 July 2014. Submissions and feedback can be provided to the Department of Lands by mail or email. Following review of the feedback, the Department of Lands will, where appropriate, redraft provisions of the 2015 lease. It is intended that the renewal of existing lease and the 2015 lease documents will be available for signing in October/November 2014. Where lessees have met the conditions for lease renewal, they will be provided with the documents for signing.

Where pastoral lessees have not met the conditions for lease renewal when the lease renewal documents are available in October/November, they will be further notified of their outstanding requirements for lease renewal. The Department of Lands' staff will continue to work with these pastoral lessees to assist them, where possible, to meet the conditions of renewal.

In addition to the above planned consultations, the Department of Lands has developed a Communication Plan that is in the process of being reviewed by the Project Steering Committee and endorsed by the Department's Corporate Executive. The Department of Lands have also engaged external assistance to advise and assist further delivery of meaningful and transparent consultations with the pastoral industry while resolving the outstanding issues in relation to the renewal of the pastoral leases in 2015.

Recommendation 4: The Committee recommends that the Minister needs to take carriage of any lease renewal process with appropriate lines of communication through the department and with industry.

The 2015 Project Team has ensured that adequate means of reporting and consulting with the Minister for Lands have been established. The representatives of the Department of Lands, including the 2015 Project Team, meet fortnightly with Ministerial Staff to provide updates of the progress of the 2015 Project, including the development and release of the draft lease renewal options.

Formal briefings on the 2015 Pastoral lease renewal project were provided to the former Minister for Lands on 12 September 2013 and to the current Minister for Lands 26 February 2014. The Minister for Lands is also provided with regular briefing notes detailing the progress of the project and at milestones, such as the release of the lease renewal options on the Department of Lands' 2015 website. In addition, the Executive Director, with the Director General, meets regularly with the Minister for Lands and raises specific project issues with the Minister.

On 15 May 2014, the Department of Lands' briefed the Minister for Lands prior to the Budget Estimates. This briefing included discussions regarding lessees who may not meet the conditions of lease renewal, as detailed in Hon Doug Shave's letter of 24 December 1997, and are at risk of nonrenewal of the lease on 1 July 2015. It was agreed in these discussions that the Minister will make the decision on any offers to lessees of conditional renewals. Conditional renewals will provide for the lessee to meet outstanding renewal requirements within a specified time frame or risk being in breach of their new lease.

The Minister for Lands currently signs milestone correspondence to lessees, including the letter of 8 May 2014 announcing the release of the draft lease documentation for consultation. The Minister for Lands will also be asked to approve the final lease documents that are to be sent to lessees for signing and execution to renew leases from 1 July 2015.

Ministerial Staff have and will attend industry consultation sessions on the lease renewal options.

Representatives of the Minister for Lands, the Hon Wendy Duncan MLA and the Hon Vince Catania MLA have also met with the PGA on several occasions.

Recommendation 5: The Committee recommends that, as activities under diversification permits can represent a large investment from pastoralists, the Department of Lands should investigate whether diversification permits can be either attached to the lease, or transferred to the next purchaser. This would mean that diversification permits would become an asset.

All current pastoral leases were granted between 9 January 1964 and 30 March 1998 under the former *Land Act 1933* (Land Act) for a term expiring on 30 June 2015. The Land Act did not contain any provision for pastoral lessees to undertake any activities other than the grazing of livestock on native vegetation. The exception to this was the clearing of land for the purposes of promoting the growth of indigenous pasture, for which permission was required from the Minister for Lands.

Pastoral leases granted under the Land Act continued under Part 7 of the *Land Administration Act 1997* (LAA) on the repeal of the Land Act on 30 March 1998.

When drafting the LAA it was recognised that pastoral lessees had been carrying out activities on pastoral leases that were not legislated for. As a result, specific provision was made in Part 7 of the LAA to lawfully allow activities that were supplementary or complementary to the pastoral activities on the pastoral lease. Division 5 permits, often referred to as 'diversification permits', were introduced to the pastoral lease framework to ensure that supplementary activities were provided for in the Act and so as not to contravene the *Native Title Act 1993* (Cth) (NTA) requirements.

Section 106 of the LAA provides that a pastoral lessee may not use land under a pastoral lease for any purpose other than pastoral purposes, except in accordance with a permit issued under Division 5 of Part 7 of the LAA. The current permit provisions of Part 7 (issued by the Pastoral Lands Board) provide for a range of activities consistent with or related to pastoral purposes:

- to clear land – section 118;
- to sow non indigenous pasture - section 119;
- for agricultural use for crop or fodder; horticultural use, provided the purpose is reasonably related to pastoral use of the land under a lease – section 120;
- for use of land under a lease for tourism supplementary to pastoral purposes - section 121;
- for non-pastoral use of enclosed or improved land – section 122; and
- to keep or sell prohibited stock - section 122A.

If the granting of a permit will affect native title rights and interests the future act provisions of the NTA will be triggered. Permits under sections 119, 120, 121 and 122A are generally for purposes related to pastoral use of the land and will be a *primary production activity* (or associated or incidental activity) or *farm tourism*

activity for the purposes of Subdivision G of the NTA. As such, the grant of a permit will be valid and the non-extinguishment principle will apply to suppress native title for the duration of the permit. Native title parties are entitled to be notified before any grant is made. Compensation will also be payable to the native title holders.

Permits for non-pastoral activity under section 122 of the LAA, however, may trigger more substantive procedural rights for native title parties under the NTA (depending on the nature and extent of activity authorised by the permit). The Minister may be obliged to consult with native title parties, who have a right to object, in relation to a proposed grant or, alternatively, the Minister may seek to enter into an Indigenous Land Use Agreement (ILUA) before the grant can be made. Again, compensation will be payable to the native title holders.

The Department of Lands recognises that activities carried out on a pastoral lease under a diversification permit can be of significant value. The Department of Lands currently has administrative processes in place to enable the effective transfer of a permit issued under Division 5, Part 7 of the LAA from an outgoing to an incoming lessee.

The Rangelands Reform Program, commissioned by the 1st term of this State Government, is reviewing a number of proposed legislative reforms that may provide a better framework under which pastoralists can undertake activities currently covered by Division 5, Part 7 of the LAA.

Recommendation 6: The Committee recommends that the Government should investigate ways of accommodating third party investment in activities allowed by diversification permits.

Part 7 of the *Land Administration Act 1997* (LAA) provides comprehensive provisions which deal with Pastoral Leases. The relevant features of a pastoral lease in relation to third party investment are:

- it does not grant exclusive possession (others may have access provided they do not interfere with pastoral purpose);
- it is for a term of up to 50 years (current leases range between 18 and 50 years);
- it can only be for pastoral purposes as defined in section 93 LAA as follows:
 - commercial grazing of authorised stock,
 - agricultural, horticultural or other supplementary uses of land inseparable from, essential to, or normally carried out in conjunction with the grazing of stock including production of stock feed, and
 - activities ancillary to the above;

- the land may not be used for purposes other than pastoral purposes and a pastoralist may not sell any product of a non-pastoral use of the land except in accordance with a permit issued under Division 5 of Part 7 (section 106 of the LAA); and
- a permit issued under Division 5 of Part 7 may only be issued to the lessee.

Also, the grant of a pastoral lease does not extinguish native title: the rights of a pastoralist under a pastoral lease prevail over but do not extinguish native title. As such, native title rights and the rights of pastoralists co-exist in relation to the land.

Division 5 of Part 7 of the LAA was introduced to the pastoral lease framework to ensure that supplementary activities that had been historically carried out on pastoral leases, without a legislative basis, would be lawfully allowed, subject to the requirements of the NTA.

Division 5 of Part 7 of the LAA was introduced to enable low impact activities to occur on a pastoral lease that may provide a pastoral lessee an income stream additional to that earned through grazing livestock. The LAA does not impose any limitation on how those activities are to be financed. A permit issued under Division 5 of Part 7 is not a form of land tenure and cannot be issued to a third party. This is likely to render the return on investment for significant financial input much less secure.

If higher-impact and commercial activities are contemplated, generally it will be necessary to consider excision of the area from a pastoral lease and the grant of an appropriate alternative form of tenure (e.g. a Crown lease under section 79 of the LAA). Where native title exists, that process would necessarily involve the compulsory acquisition of native title or the negotiation of, and entry into, an ILUA. In addition, the release of the opportunity for public competition would also need to be considered on a case by case basis.

Under the Rangelands Reform Program, commissioned under the 1st term of this State Government, a number of legislative reforms are proposed to provide a better framework under which multiple activities can be undertaken on a lease, providing that those activities are broad-scale and consistent with the preservation and ongoing sustainable management of the rangelands.

One of the proposed amendments to the LAA is the provision of a rangelands lease, which will be a form of tenure suited to third-party investment, whereby the third party could become a joint lessee of the rangelands lease. The issue of a rangelands lease will require native title to be addressed in accordance with the NTA, which if native title is not to be extinguished would be by entry into an ILUA.

Other Findings

In relation to the findings of the Committee's report, the following comments are also made.

- (1) Paragraph 2.5 of the Report provides that the Committee recognises that some areas of pastoralists concern, such as tenure reform, are being adequately addressed by the Department of Regional Development. These concerns are in fact being addressed by the Department of Lands and not the Department of Regional Development.
- (2) Finding 2 is that the Director General of the Department of Regional Development and Lands should have been aware of the Shave letter and its implications for pastoralists. The Director General of the then Department of Regional Development and Lands has advised that a period of 12 years, that included four different agency heads with responsibility for pastoral leases, had elapsed from the time the letter was sent by the then Minister and the appointment of the Director General of the Department of Regional Development and Lands in 2009. As a consequence, this does not represent a significant breakdown in communications within the Department of Regional Development and Lands.
- (3) Finding 4 is that the draft lease's provision regarding termination for animal welfare breaches did not specify a threshold for 'action taken'. A threshold was specified – it being action that was taken under the *Animal Welfare Act 2002* concerning animals on the land or in the care of the lessee e.g. prosecution commenced or notices issued. There are different types of action which can be taken under that Act, and which were considered appropriate in the circumstances, hence it was drafted in more general terms.

Following analysis and assessment of the feedback provided concerning the July 2013 draft lease, this provision has been removed from the proposed 2015 pastoral lease.

- (4) Finding 5 is that the Department of Regional Development and Lands could have added less onerous and more transparent provisions, including natural justice provisions, which would have been consistent with a lease that was intended to reflect modern administrative practices.

The termination provisions included in the version of the draft 2015 pastoral lease that was provided to pastoral lessees in July 2013 were consistent with modern commercial leases.

In addition, section 35 and Part 3 of the LAA sets out right of appeal provisions, which are transparent and include natural justice provisions. The forfeiture provisions under the LAA are more generous than what would apply under a non-LAA commercial lease.

The forfeiture process under the LAA provides that the lessee is to be given notice of any proposed forfeiture and provides an appeal process before forfeiture occurs. This includes a right for the lessee to give its grounds of

appeal. This same procedure applies to the proposed forfeiture of all leases under the LAA.

Commercial leases at common law only have a statutory right for relief after forfeiture occurs, by application to the court.

- (5) Paragraph 3.24 of the Report refers to the pastoralists obligation under clause 7.1(a)(iii) to expend significant resources on remediating contamination, pollution and environmental harm that was committed or caused by a third party, and that this is viewed as being unfair.

Clause 7.1(a)(iii) of the draft 2015 pastoral lease was limited to complying with Environmental Notices issued in respect of, arising from or relating to, *the Lessee's use of the Land* (emphasis added). The obligation was therefore limited to activities by, or within the control of, the pastoral lessee, for example by its contractors. The lessee was not liable for activities by third parties outside its control unrelated to the pastoral activities. A similar limitation was included in the corresponding indemnity provision in clause 9.3.

This is a provision that would be expected in commercial leases generally and is a provision that is commonly found in other LAA leases. Notwithstanding this, the provision has been amended to provide clarification, and to remove any doubt, as to the limited liability of pastoral lessees.

- (6) Paragraph 4.5 states "...92% of Land Conservation Districts in the De Grey area and 58% in the East Pilbara, were carrying stock numbers above present carrying capacity in 2011/12."

This statement is incorrect in that 'De Grey' and 'East Pilbara' are Land Conservation Districts (LCD). The Commissioner's report advises that 92% of leases in the De Grey LCD and 58% of leases in the East Pilbara LCD were carrying stock in excess of present carrying capacity.

- (7) Paragraph 4.26 contains the statement:

"The role of Department of Parks and Wildlife and the Department of Agriculture and Food Western Australia in managing feral animals, particularly dogs, has decreased significantly over the past 15 years: the responsibility has shifted from the Agricultural Protection Board to regional biosecurity groups."

This statement could be misinterpreted that control of feral animals, including wild dogs was the responsibility of the Agriculture Protection Board (APB) and is now the responsibility of Recognised Biosecurity Groups (RBGs). Responsibility for the control of declared pests is and always has been the responsibility of the landholder; currently under the Biosecurity and Agriculture Management Act 2007 and previously under the Agriculture and Related Resources Protection Act 1976. The APB and now RBGs are responsible for expenditure on and coordination of control programs.