

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO PASTORAL LEASES IN WESTERN AUSTRALIA

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 27 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 11.05 am**Mr MARK GREGORY****Partner, Castledine Gregory, sworn and examined:**

The CHAIRMAN: Mr Gregory, I am going to go ahead and go through the formalities while my colleagues are just taking a very short comfort break.

Mr Gregory: Thank you.

The CHAIRMAN: We have been here since quite early this morning, so I think it is an occupational health and safety thing I am supposed to worry about!

Mr Gregory: A five-minute break every couple of hours!

The CHAIRMAN: It is something like that. The members who are here today are Hon Amber-Jade Sanderson, who represents the East Metropolitan Region. I am Liz Behjat, the Chair of the committee and I represent the North Metro Region; Hon Jacqui Boydell, from Mining and Pastoral Region; and my two other colleagues who are out of the room at the moment are Hon Darren West, from the Agricultural Region. This is Dr Julia Lawrinson, our advisory officer, and Hon Nigel Hallett, from the South West Region of Western Australia. On behalf of the committee, I would particularly like to welcome you to the hearing today and thank you very much for very kindly offering at quite short notice to come and perhaps unravel some of the mysteries surrounding native title issues in the pastoral leasing industry.

Mr Gregory: It is my pleasure.

The CHAIRMAN: Firstly, if you could take an oath or affirmation?

[Witness took the affirmation.]

Mr Gregory: I am a lawyer in private practice with experience in native title. I understand that I was asked to come here today, with the benefit of that experience, to shed some light on some of the native title issues that surround the pastoral lease renewals in 2015.

The CHAIRMAN: You will have signed the document entitled “Information for Witnesses”. Have you read and understood that document?

Mr Gregory: I have.

The CHAIRMAN: The proceedings are being recorded by Hansard and 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 microphone and try to speak into it; ensure that you do not cover it with papers or make noise near it. 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. The formalities are now out of the way. I will start with some questions perhaps that we might have. Could you explain to the committee your understanding of how future act provisions might be triggered by changes to the conditions of pastoral leases?

Mr Gregory: Yes, I can. Can I just make an introductory comment before I do that?

The CHAIRMAN: I am sorry, I should have allowed you to do that. I apologise for that.

Mr Gregory: I am a solicitor with a long experience in native title matters, but the nature of what I have been asked to do today I think should be understood as not being legal advice. I think the government goes to the State Solicitor's Office for that advice. A number of the matters you have asked me to consider in the questions that have been given to me and other things that may come up today do touch on very complex legal matters. I will answer to the best of my ability, based on my experience and the short period of time I have had to prepare, but it should be understood that it is not legal advice and that for complex legal matters, the government needs to go to the State Solicitor's Office.

The CHAIRMAN: We understand that.

Mr Gregory: Having said that, one of the first points to make is that if we are focusing on pastoral lease renewals in 2015, they will all be future acts. There is no way of avoiding the fact that they will be future acts under the Native Title Act. I think the real question here is with these renewals, or we should perhaps call them re-grants because they are re-grants of pastoral leases and not renewals. With these re-grants, the real question is whether as future acts they will trigger any procedural requirements under the Native Title Act, because it is pretty easy to do renewal or re-grant without triggering any procedural requirements. The act is simply done and the renewal and re-grant provisions of the Native Title Act are structured in such a way there is, if you like, an easy way through. If you simply re-grant on the same terms and for the same term, the same length of time or no more, then while that is technically a future act under the Native Title Act, it does not attract any procedural requirement that might slow down the process or stymie the process or result in delay and cost and dispute.

[11.10 am]

So there is an easy way to do these renewals or re-grants. But if in re-granting the pastoral lease, you want to grant it for a longer term than the existing lease or, indeed, if you want to grant it in perpetuity, that is where you will strike a procedural requirement under the Native Title Act—perhaps I will explain later what that procedural requirement is—and that is where you might get delay and the kinds of negotiations and possibly disputes under the Native Title Act that I think the government is trying to avoid by taking the easy course with these future acts. As I understand it, based on what I have seen on the Department of Lands website, the government is proposing simply to re-grant the pastoral leases for no greater term, no greater length of time, than the existing leases. If they take that course, generally speaking, there will be no procedural requirement triggered under the Native Title Act. So if I can circle back to the question, the future act provisions of the Native Title Act will be triggered in every case because these re-grants will be future acts, but they will not necessarily trigger any procedural requirements under the Native Title Act, and especially changes to conditions of the pastoral leases will not necessarily trigger any procedural requirements under the Native Title Act.

The CHAIRMAN: Does that extend to granting of diversification permits that then necessarily does not trigger the future-act provisions?

Mr Gregory: Diversification permits, to my understanding, probably all are future acts. If you look at the state's website, it seems to indicate that some diversification activities are not future acts and some are. I have never looked at this in detail, but if you look at the types of diversification permits allowable under the Land Administration Act, they are for things to do with primary production—agricultural purposes, non-Indigenous pasture land clearance and so forth. Those kinds of activities under diversification permits, to my mind, seem to fit into subdivision G of the future act provisions of the Native Title Act, and I think they probably are future acts. I mean, it is a case-by-case basis, and that is a point on which you should take advice from the State Solicitor's Office. But on a cursory look, they look to me like they are future acts and need to be granted through the future act

provisions of subdivision G of the Native Title Act, which again is a very straightforward procedure to get diversification permits granted.

Hon DARREN WEST: Just so that I have got this fairly clear, and I am sure that you are well aware that farmers sometimes ask silly questions. Just so that I have got this clear in my mind, the area of diversification, if there was to be changes mooted in the lease, would be more around the Land Administration Act rather than the Native Title Act?

Mr Gregory: I think it depends. If what you are suggesting is that pastoral leases be broadened, if I can call it that, to include the kinds of activities that are currently done under diversification permits. Is that the model you have in mind?

Hon DARREN WEST: Correct. That is just a possible scenario that I am trying to tease out a bit.

Mr Gregory: Yes, that would require an amendment to the Land Administration Act, as it is currently written. At the moment you have a pastoral lease and you have diversification permits; they are quite separate things.

Hon DARREN WEST: So in your view the biggest stumbling block to change in the way we go about issuing pastoral leases is the Land Administration Act or is it the Native Title Act or are they equal but in different ways?

Mr Gregory: For that particular model, for broadening the current model of a pastoral lease to include broader primary production activities, if I can call it that, the Native Title Act would not need to be amended. You could do that under the Native Title Act as it currently stands, using the renewal and re-grant provisions. You would need to amend the Land Administration Act to achieve that end.

Hon DARREN WEST: I am sorry for hogging the questions. Then, perhaps in the scenario where you might look at granting leases in perpetuity, that would be more of an issue that would need to come under the native title legislation or would it be the Land Administration Act as well?

Mr Gregory: It is allowed for under the Native Title Act, but if you want to re-grant the pastoral leases in perpetuity, then that is one of the circumstances in which the re-grants do trigger a moderately complicated procedural requirement under the Native Title Act. It is still dealt with under the same re-grant and renewal provisions. It is still a renewal or a re-grant, but you come out of the easy part that I described before where there is no procedural requirement only to go into another part of the Native Title Act that ties you up in a procedural requirement.

Hon DARREN WEST: Who would trigger such claims under the Native Title Act? Would it be the claimants, could be others who did it? How would that unfold?

Mr Gregory: That procedure under the Native Title Act is a little bit interesting. It is section 24MD(6B). If you want to re-grant a lease in perpetuity, you go under that procedure under section 24MD(6B). Essentially the way that works is the Department of Lands would notify any affected native titleholders that the lease is proposed to be granted in perpetuity. The native title group then has a couple of months to object to that if they choose to do so, and only if they do object, then you go off to a course of consultation with the native titleholders and, if that does not work, there is a deadlock breaking mechanism under what is called the independent person, who is the Chief Stipendiary Magistrate in WA. That can take many months or a year or two to work through that process. If after the department has notified the proposal to grant a lease in perpetuity, the native title parties do not object within the couple of months they have got to do so, then the department can simply grant the lease. If you like, it is a process that is driven by the native title party choosing to object to the proposed re-grant in perpetuity.

Hon DARREN WEST: In the next question I am going to ask you to speculate, with your best knowledge. There seems to be a fear that any change to the lease will result in “all hell breaking loose”, which was a term we heard. In your opinion, how likely do you think this would be? If we

were, say, to make some moderate changes, for example—because it seems to me a little strange that with diversification, you cannot earn more from those even though it may be a better land-use than pastoralism—that can allow you, for instance, to make more money out of your tourism operation or your carbon farming, and we were to perhaps look at the issues of perpetuity. Let us take those two options for the areas we have discussed. In your view, what implications would you expect from such a change?

Mr Gregory: Both of those possibilities, the possibility to re-grant the lease in perpetuity and the possibility to enlarge the lease to include the kinds of other primary production activities that are currently allowed under the diversification permits—both of those things can be done under the Native Title Act provisions as they stand, the provisions about renewals and re-grants. Again, we are now getting towards the kind of detailed technical legal advice where the government needs to go to the State Solicitor's Office, but very broadly speaking, both of those things are possible without changes to the Native Title Act. In particular, the change to pastoral leases to broaden them to encompass broader primary production activities would need an amendment to the Land Administration Act, but it would not require an amendment to the Native Title Act and nor would it require those re-granted pastoral leases to go through the more complex consultation procedure under the Native Title Act that I just outlined. That is a relatively simple change. If the Land Administration Act were amended to allow that, then the Native Title Act, as currently drafted, provides for that to happen. The second scenario, the re-grant of the leases in perpetuity, is a little bit more complex. Again, it can still be done under the Native Title Act, as it is currently written, but it is one of the changes, one of the re-grant circumstances, in which you then do have to go off into that more complicated consultation procedure. I have not looked at the question of whether grants of pastoral leases in perpetuity are allowed under the current Land Administration Act. I believe they are capped at 50 years. I did not look at that before I came here. So that again, if that is the case, would require an amendment to the Land Administration Act as well.

[11.20 am]

Hon DARREN WEST: I presume I am right in saying that the Land Administration Act would be much easier to amend than the Native Title Act.

Mr Gregory: This Parliament can do it of course. That is one thing.

Hon DARREN WEST: Yes, we can do it here in-house, so to speak.

Mr Gregory: Yes, and the Native Title Act is a bit hard to amend, in the sense that since 1998 most of the amendments have been pretty marginal technical amendments and there has not been a political appetite to do wholesale amendments to the future act regime under the Native Title Act. So I think that is a fair comment. I should say, however, that once you get beyond those couple of scenarios that you have outlined, if you try to rewrite pastoral leases in a wholesale manner, you could stray into an area where suddenly they are no longer re-grants or renewals of pastoral leases. You have tried to bite off too much, as it were, and suddenly you cannot re-grant them under those relatively easy provisions and you would be having to either find another process under the Native Title Act to grant them or you would be having to negotiate case-by-case Indigenous land-use agreements to get them granted. It is an area on which legal advice from the State Solicitor's Office is critical, I think, to make sure. If the Parliament does decide to re-grant the pastoral leases on new terms, either in perpetuity or to cover the current diversification uses, you would need advice from the State Solicitor's Office to make sure that you do not overstep the mark and enlarge the proprietary interest under the pastoral lease and it takes you out of the renewals and re-grants provisions altogether and you are in a whole new world.

Hon DARREN WEST: So you are in very much uncharted water there.

Mr Gregory: Again, depending on what you are proposing to do, if you want to take those larger steps, you could find a pigeonhole in the Native Title Act that is neatly available that you go

through or you could be in a world where it is a bespoke type of title and you need to negotiate an Indigenous land use agreement on a case-by-case basis. You need to be careful how far you try to take it.

Hon DARREN WEST: When you say “an Indigenous land use agreement on a case-by-case basis”, are you talking in terms of the pastoral lease or with a claimant group?

Mr Gregory: The grant of each lease would be a future act, so you could do it on a case-by-case basis for each lease, but if you had, say, five or 10 leases all within one claim area, you could negotiate with that group to get all five or 10 granted under the ILUA.

Hon DARREN WEST: I have had a pretty good run. That is great!

The CHAIRMAN: In Indigenous land-use agreements, do you have direct experience in the registration and negotiation of those? Could you perhaps just enlighten us on that a little?

Mr Gregory: I do have experience for mining projects and some experience in government projects. I have never done a pastoral one, but I can share with you my —

The CHAIRMAN: Would it be different; do you think?

Mr Gregory: The statutory requirements are the same, so the steps you have to go through under the statute are the same. Costs for big mining projects and for large government projects, I suspect, are probably greater. For example, the mining projects I have worked on—I will take a step back. The key statutory requirement for an Indigenous land-use agreement is that you need to go through a very robust process of getting the authorisation, the agreement of the whole native title group, and that essentially means notifying it widely, bringing that group together or as many of them as you can together in a large meeting, giving them all the information about the agreement and getting their agreement to it, and then going off to the Native Title Tribunal and registering the Indigenous land-use agreement. Now, typically, if you are a large mining company wanting to negotiate and register an Indigenous land-use agreement and you are on a tight project timeline, you will pay for that process to occur, and that can cost many hundreds of thousands of dollars because you are wanting to tick all the boxes under the legislation and you want the meeting to happen quickly, so you will organise and pay for a meeting and all the notification and all the processes that hang around it. I suspect it is uneconomic for the average pastoralists, or indeed the government on a lease-by-lease basis, to spend many hundreds of thousands of dollars negotiating and authorising and registering each ILUA. I do not have direct experience of this, but what I am aware of is that a number of ILUAs are done—technically you have to go through the same statutory process, but there are commonwealth-funded meetings of the native title groups. So if you, as a pastoralist, can piggyback on the back of one of those commonwealth-funded meetings, go to that meeting and get your ILUA authorised at that meeting, then the costs can be considerably less if you are sharing the costs with the commonwealth funding body or the costs might be nothing, at least for the meeting costs. There are ways to reduce the costs typically associated with negotiating and authorising ILUAs. Whether they can be reduced to nil or an acceptable level, I am not sure. But there is a very strict statutory process you have to go through to get an ILUA authorised and registered. Typically, in my experience, that is a large and expensive task. But I am aware that in Western Australia there are at least a handful of pastoral lease ILUAs, and I do not expect the pastoralists paid multiple hundreds of thousands of dollars to get those ILUAs authorised and registered. So they must have found another way to do it, perhaps, as I say, by utilising those very occasional commonwealth-funded meetings to get the authorisation they need.

The CHAIRMAN: You say that there are very few that have been registered and perhaps that might be one of the reasons people have not gone down that path because those barriers, financial and otherwise, might be there.

Mr Gregory: Yes.

The CHAIRMAN: Members, do you have any further questions for Mr Gregory? That information has been most useful to our committee. It is something that I think I can say we have been struggling with in relation to matters surrounding it, and as you said, it is not a simple area; it is very complicated. On behalf of the committee, we sincerely thank you very much for coming today.

Mr Gregory: My pleasure.

Hearing concluded that 11.26 am