



Kimberley Land Council
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13 September 2013

Hon Liz Behjat MLC
Chairman
Standing Committee on Public Administration
Parliament House
PERTH WA 6000

Dear Madam,

Re: Inquiry into Pastoral Leases in Western Australia

We refer to your letter of 13 August 2013 seeking written submissions from the Kimberley Land Council ("KLC") in relation to the Standing Committee on Public Administration's inquiry into pastoral leases ("the Inquiry").

We have included our written submissions on the matters referred to in the Terms of Reference to the Inquiry with this letter.

You will appreciate that the relatively short period of time provided for submissions to be made has limited our capacity to consult with our members and Kimberley Aboriginal people in relation to their views on the matters referred to in the Terms of Reference.

Generally however we note that any reform of land tenure or change in pastoral lease arrangements will have a significant impact on Kimberley Aboriginal people. The connection between Kimberley Aboriginal people and the pastoral industry has been extensively documented and therefore it is imperative that Kimberley Aboriginal people have a significant role to contribute in the Inquiry.

It is also noted that any reform of land tenure or change in pastoral lease arrangements will be a future act under the *Native Title Act (1993)* ("NTA") which will necessitate a process of detailed consultation and negotiation with Kimberley Traditional Owners in respect of any effect on their native title rights and interests. Native Title has been determined over approximately 70% of the Kimberley and we expect this percentage to increase further to closer to 90% over the next couple of years. Given how fundamental the issue of native title is to any reform of pastoral lease arrangements, it is critical that there be thorough and culturally appropriate engagement with Kimberley Traditional Owners before any decisions are reached and legal procedural rights under the NTA are invoked.

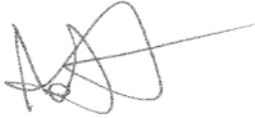
We would recommend that a regional approach to engagement should be adopted and that representatives from each of the affected native title groups from across the Kimberley form a working group or steering committee to engage with the State on the future of Pastoral Leases in the Kimberley and in particular on the matters referred to in the Terms of Reference. It is strongly encouraged that any consultations on matters directly affecting the rights of Indigenous peoples should adhere to the

principles set out in the United Nations Declaration on the Rights of Indigenous Peoples around free, prior and informed consent.

We look forward to the outcome of the Inquiry and to any future engagement with the KLC and Kimberley Traditional Owners that comes out of the Inquiry.

Please do not hesitate to contact me if you wish to discuss further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nolan Hunter', with a long horizontal line extending to the right.

NOLAN HUNTER
Chief Executive Officer



Kimberley Land Council

KLC Submission to Standing Committee on Public Administration

Inquiry into Pastoral Leases in Western Australia

11 September 2013

1. The Kimberley Land Council (“KLC”) has been invited to provide a written submission to the Standing Committee on Public Administration’s Inquiry into Pastoral Leases in Western Australia (“the Inquiry”).
2. The KLC provides this submission on behalf of itself as a Native Title Representative Body and also on behalf of its members who through their respective native title claims have been determined to hold native title over approximately 70% of the Kimberley region.
3. The KLC notes that we have not had sufficient time or resources to consult with our membership base and therefore would recommend, given the centrality of native title rights and interests to the various matters under consideration in the Terms of Reference, that there be a process of consultation that allows the views of native title holders and native title claimants in the Kimberley to be properly recorded and considered.

4. The Terms of Reference for the Inquiry state that

“The Committee is to inquire into and report on pastoral leases granted to the pastoral industry in Western Australia, in particular:

- a) the management of the increase in the number of stock and environmental damage on pastoral land;*
- b) the adequacy of security of land tenure*
- c) procedures for granting or renewing pastoral leases*
- d) the proposed pastoral lease 2015; and*
- e) any other matter.”*

5. We have addressed each of the Terms of Reference below

a) The management of the increase in the number of stock and environmental damage on pastoral land

6. The KLC has been at the forefront of land and sea management initiatives in the Kimberley and works with a number of government and non-government partners and funding agencies to ensure the environmental and cultural values of the Kimberley are protected.

7. Through the various land and sea management programs that it runs, the KLC employs over 100 indigenous rangers and cultural advisors across 14 ranger groups and 7 Indigenous Protected Areas, and carries out a multitude of land and sea management activities across the Kimberley.
8. There is a large amount of land in the Kimberley that is currently subject to a pastoral lease where native title has or will be determined to exist. It is important that this land is not excluded from land and sea management activities being undertaken by native title groups and indigenous rangers on their traditional country and that the aspirations and commercial interests of pastoralists are able to meaningfully and sustainably co-exist with the land management aspirations and native title and heritage rights and interests of traditional owners.
9. The KLC recommends that as part of any renewal of pastoral leases in 2015, there should be a comprehensive assessment of the suitability of land for pastoral activities and that this should be balanced up against the environmental and cultural values of the land. This should inform a process where stakeholders consider how best the environmental and cultural values of land under pastoral lease can be managed and whether there are opportunities for the inclusion of certain parcels of land within the "pastoral estate" to be incorporated into land and sea management programs.
10. In relation to indigenous held pastoral leases, the KLC has identified opportunities for pastoral activities to co-exist with innovative and effective land management initiatives and we would recommend there should be a facility in indigenous held pastoral leases to allow an appropriate level of flexibility to accommodate this.
11. The KLC is concerned at the increase in the number of stock and the quantum of land required for pastoral leases to be commercially viable and would consider that there should be a thorough assessment and full consideration of any associated environmental, social and cultural impacts, particularly in areas of high biodiversity and cultural significance.

b) The adequacy of security of land tenure

12. The KLC understands that there have been deliberations over a number of years about alternative land tenure arrangements for pastoralists and that the outcomes of these deliberations were reflected in the Rangelands Tenure Options Discussion Paper released in April 2011.
13. Whilst the KLC did not provide detailed submissions in response to the Discussion Paper, we did send a letter dated 20 May 2011 which was jointly signed with 4 of the 5 Native Title Representative Bodies in Western Australia.
14. That letter highlighted that we were not able to provide detailed comments for two main reasons. They were
 - a. *The deadline provided for submissions does not allow sufficient time for representative bodies to carry out a consultation process with native title holders, claimants and other affected Aboriginal People of Western Australia; and*

- b. *The State Government is not yet able to provide a clear view based on legal advice as to whether the proposed reforms will result in the extinguishment of native title, or a clear explanation as to how extinguishment will be avoided.*
15. This remains the position of the KLC and unfortunately we have again not been provided with the time or the resources to fully consult with Kimberley Traditional Owners in relation to the Inquiry.
 16. The position of the KLC is that whatever course of action that is taken in relation to either the renewal or variation of pastoral leases in 2015, there will almost certainly be a future act under the *Native Title Act (1993)* (NTA) which will trigger certain procedural rights for native title holders and native title claimants.
 17. The nature and extent of these procedural rights is complicated and will need to be the subject of legal advice but it appears fairly clear that any proposal around a move to a rangelands lease or to a perpetual lease would require either a compulsory acquisition of the native title rights and interests in the land or an Indigenous Land Use Agreement with the affected Native Title Holders.
 18. Given how fundamental the issue of native title is to any reform of pastoral lease arrangements and in light of the fact that native title has been determined to exist over approximately 70% of the Kimberley including much of the land under pastoral lease, it is critical that there be a thorough and culturally appropriate process of engagement with Kimberley Traditional Owners before any decisions are reached and procedural rights under the *Native Title Act (1993)* are invoked.
 19. The KLC would recommend adopting a regional approach to engagement with representatives from each of the native title groups from across the Kimberley forming a working group or steering committee to engage with the State on the future of Pastoral Leases in the Kimberley and in particular on an proposal to reform land tenure arrangements.
 20. The KLC is also of the view that the extent of activities permitted under a pastoral lease should be limited to pastoral activities and activities associated with or incidental to a primary production activity (ie including farm tourism). Any other activities that may be proposed to occur on land under pastoral lease should properly be the domain of native title holders (either as project proponents or as project partners).
 21. The KLC notes that many traditional owners are denied access to land that is subject to a pastoral lease despite the determination of native title rights over the land and Section 104 of the *Land Administration Act (1997)*. The rights of traditional owners to access land under pastoral lease should be further clarified and should be built into the terms of pastoral leases and enforced as part of assurance and compliance processes.
 22. The KLC would also recommend that there be a formal mediation service provided by the State to assist with relationship issues that arise in the co-existence of rights granted under pastoral lease and native title rights and interests.

c) Procedures for granting or renewing pastoral leases

23. Many of the issues associated with the grant or renewal of pastoral leases will be similar to the issues raised above in respect of the adequacy of security of land tenure.
24. Under the Native Title Act, different future acts attract different classes of procedural rights ranging from a right to negotiate to a right to comment.
25. Regardless of what the legal requirements are under the *Native Title Act (1993)* in relation to the grant or renewal of pastoral leases, it is important that there is proper consultation with traditional owners and that any concerns that traditional owners may have in relation to the renewal of a pastoral lease are addressed.
26. The fact that there has been a determination of native title over land under pastoral lease is significant and needs to be properly considered by the State, pastoralists and traditional owners as part of any renewal of a pastoral lease.
27. For this to occur there needs to be a proper and culturally appropriate engagement process and traditional owners need to be provided with the information and time to consider the issues and make a decision. In this regard we draw your attention to the *United National Declaration on the Rights of Indigenous Peoples* and to the *Equator Principles* which require any consultation with indigenous people or consent provided by indigenous people to be free, prior and informed.
28. It may be that engagement over the renewal of pastoral leases has the potential to create mutual benefits for traditional owners and pastoralists, particularly in relation to land management initiatives and formalising relationships with newly established prescribed bodies corporate.

d) The proposed pastoral lease 2015

29. We are unclear as to what this particular Term of Reference is intended to capture. We have not yet received a copy of any new proposed pastoral lease and would request a right to provide submissions on the terms of any proposed pastoral lease renewal in 2015.

e) Any other matter

30. Many traditional owners are proud of their involvement in the development of the pastoral industry in the Kimberley and generally there is support for a successful and responsible pastoral industry in the Kimberley.
31. However the involvement of Kimberley Aboriginal people in the pastoral industry have been plagued by many tragic and unfortunate events and even today traditional owners have difficulties accessing traditional country that is under pastoral lease and establishing constructive and respectful relationships with some pastoralists.
32. The advent of different types of land management opportunities on land under pastoral lease needs to be recognised, as does the aspirations of traditional owners to look after country and take advantage of economic and employment opportunities for the betterment of Kimberley Aboriginal people.

33. The array of activities and opportunities on land that has otherwise been primarily used for pastoral activities needs to be considered as part of this inquiry and it is important that the reaffirmation of the pastoral industry in the Kimberley is done properly and in accordance with the cultural protocols.
34. The principles of co-existence and mutual advantage as enshrined in the Wik Decision¹ remain unfulfilled and the reconciliation of the two competing interests in pastoral land has not yet been fully realised.
35. Any process of consultation and engagement in respect of the renewal or reform of pastoral leases needs to ensure that the interests and aspirations of traditional owners as well as pastoralists is properly recorded and addressed.
36. A proactive and respectful process is likely to be more productive than any process that only recognises bare legal rights and interests and risks becoming bogged down in complex and costly court processes.
37. Finally the KLC notes that each native title group and each pastoral lease is likely to have its own complex set of factors and circumstances that will need to be considered. We think it would be a mistake to adopt a “one size fits all” approach that does not have the capacity or flexibility to recognise and take account of the diversity and complexity of interests that both pastoralists and traditional owners have in the land.
38. Ultimately any process should aim to encourage pastoralists and traditional owners to move away from a situation of contestation and conflicting land use towards a more constructive dialogue build around the development of a collaborative and mutually respectful approach that emphasises principles of economic, environmental and cultural sustainability.

¹ *Wik Peoples v the State of Queensland* (1996) 187 CLR 1