

*Standing Committee on Public Administration — Twentieth Report —
“Inquiry into Pastoral Leases in Western Australia” — Motion*

Resumed from 2 April on the following motion moved by Hon Darren West —

That the report be noted.

Hon LIZ BEHJAT: In rising to speak on the twentieth report of the Standing Committee on Public Administration, I thank all members of the committee who participated in this report, including Madam Deputy Chair herself. I also thank the deputy chair of the committee, Hon Darren West, for his contribution last week in which he gave a very good summary of the genesis of that report and the matters we looked into.

The comment that really springs to mind for me, as one of the metropolitan representatives on that committee, is that it is ironic that pastoralism and farming in general is all about good management of the land and the process of lease renewal for these pastoralists should have been about good management on the part of the department. The department had a draft communication strategy in place but it either chose not to finalise it and then utilise it or just ignored it completely. The department did not show good management as pastoralists are expected to do with land. The department did not show good management of the process of the lease renewal. I do not intend to range on that in my contribution today; others may speak on that.

I will focus on one part of the report that we made a recommendation on, as other committees before us did. I hope that committees after us will not be making the same comments. Recommendation 1 of our report is —

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.

I have now been on a few committees where departments have used this smokescreen, or this veil of secrecy, to say, “Committees are not going to get the information they want because we are claiming legal privilege.” They have to understand that Parliament trumps everything. We have the right to have the documents that we ask for. I refer members to “Legal Professional Privilege and Parliamentary Privilege” on page 24 of the report, which states —

The Committee requested documentation relating to the draft pastoral lease on 7 February 2014 from both Department of Lands and the Department of Regional Development. The Department of Regional Development advised the Committee that DoL was in possession of the relevant documentation.

As we know, the departments did split and there was a bit of toing and froing as to who actually had the documents that the committee wanted. The report continues —

Following discussion with the Department regarding the large volume of documentation the initial request would generate ... the Committee narrowed its scope to focus on requiring documentation regarding termination provisions.

They were the provisions surrounding the leases, so we gave the department a narrower focus. The department then came back to us and sought an extension to the initial deadline that we gave it of 21 February. The committee agreed that it could have an extension because there was an extraordinary amount of documentation. We extended the deadline for it to come up with the documents to 28 February. The report continues —

On 4 March, —

If members do the math, they will work out that that is four days after the deadline —

the Committee received a letter from Colin Slattery, the new Director General of DoL, invoking legal professional privilege in relation to the initial drafting instructions provided to departmental counsel, and indicating that other items were being considered as to their status regarding legal professional privilege.

The letter also informed the Committee that the Minister of Lands had requested to see the information before it was given to the Committee.

That is quite rightly so and we would expect that a diligent minister would want to do that. On 11 March, the minister’s chief of staff advised the committee by email that the documentation would be provided by the end of the week. At this point, I would like to say that when we were dealing with the minister’s office and the minister’s chief of staff, things did happen very quickly. It was the period from requesting things from the department to the department then sending them to the minister for the once-over that there seemed to be a huge logjam. We did receive the documentation, some on 12 March and some on 14 March. The last file contained a letter from the director general of the Department of Lands re-emphasising that legal professional privilege had been claimed in relation to a large number of documents. The title and dates of those documents were listed.

It is really important for us as the Legislative Council to remind departments that, as the report states —

The Legislative Council, following the Commonwealth parliament, has always maintained that it will not recognise claims of legal professional privilege as a reason for not providing information to a parliamentary committee. This position derives from the customary laws of parliament, which include the powers to conduct inquiries—powers delegated to parliamentary committees as ‘*creatures of the House*.’ Aspects of this customary law have been codified in Western Australia in the *Parliamentary Privileges Act 1891*.

The powers of Parliament and its committees are necessary in order for the legislature to exercise one its primary function in representative democracy: to hold the Executive to account.

At all times we need to be reminded of what that separation of powers is. We are charged to do just that—that is, hold the executive to account, regardless of which government is in power at that time. The government is beholden to this.

The report refers to the citation of the High Court of Australia judgement in 1998 in *Egan v Willis*, and states —

A system of responsible government traditionally has been considered to encompass “the means by which Parliament brings the Executive to account” so that “the Executive’s primary responsibility in its prosecution of government is owed to Parliament”.

The judgement goes on further to state —

The point was made by Mill, writing in 1861, who spoke of the task of the legislature “to watch and control the government: to throw the light of publicity on its acts”. It has been said of the contemporary position in Australia that, whilst “the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people” and that “to secure accountability of government activity is the very essence of responsible government”.

Again, Priestly JA holds in the New South Wales Court of Appeal case *Egan v Chadwick* —

I do not think that the justification for legal professional privilege applies in New South Wales when a House of Parliament seeks the production of Executive documents.

His judgement continues. The report also states at 3.82 —

In Western Australia, the power to summons people or papers is provided for by s 4 of the *Parliamentary Privileges Act 1891* ...

That section is then reproduced in the report, and states —

Each House of the Parliament of the said Colony, and any Committee of either House, duly authorised by the House to send for persons and papers, may order any person to attend before the House or before such Committee, as the case may be, and also to produce to such House or Committee any paper, book, record, or other document in the possession or power of such person.

On this occasion, the committee chose not to use its power of summons because time was of the essence for the committee to finalise its report. However, I remind departments and others who are called before parliamentary committees that committees will use that power. I have been a member of a committee that has previously used that power of summons and the Black Rod has been sent to issue that summons on behalf of Parliament. Committees are not frightened of doing that and this serves as a timely reminder to all people that when it comes to the work of its committees the Legislative Council and the Parliament of Western Australia is to be taken very seriously.

When the newspapers commented on the report of the Standing Committee on Public Administration they said that it was a powerful committee of Parliament. I remind the public that it is indeed a powerful committee and it will use the powers available to it. Not only does the Public Administration Committee remind the public and departments of the powers that committees have, I refer to 3.86 of the Public Administration Committee report, which quotes the Legislative Council’s Standing Committee on Legislation’s twenty-second report into the Workforce Reform Bill, which states —

Notwithstanding this, the Committee reiterates the advice provided by another Committee of the Legislative Council regarding the procedure that Departments should follow when they are claiming legal professional privilege — that is, all requests should be made by the Minister, providing precise details and reasons.

People cannot just hide behind that, and that committee is reminding everyone what privilege is.

I commend this report to the chamber and thank everyone involved in its production. I hope that pastoralists have a successful outcome and that their negotiations are ongoing. I commend the report to the chamber.

Hon JACQUI BOYDELL: I am also a member of the Standing Committee on Public Administration that undertook the inquiry into the pastoral industry—an extremely important industry to Western Australia. It is important that the pastoral industry work with government to manage pastoral leases on our behalf and to maintain a sustainable industry. The report has led to a series of key recommendations that should ensure the ongoing sustainability of an incredibly important industry. The inquiry was initiated as a result of a high level of contention surrounding the expiry in 2015 of the pastoral lease and the drafting of a new pastoral lease by the then Department of Regional Development and Lands. The committee undertook extensive consultation with key industry stakeholders and travelled to Kalgoorlie, Carnarvon, Port Hedland and Fitzroy Crossing. It was welcomed everywhere it went and the public hearings with pastoralists were extremely valuable to the committee's deliberations. I would like to personally thank those pastoralists who appeared before the committee, many of whom travelled far to meet with the committee.

Many issues were raised in the public hearings and submissions, but the report speaks for itself. I cannot go past the fact that the pastoral lease will still expire in 2015 and that changes are still being made to what at this stage is still a draft lease before its expiry in 2015. It became apparent to the committee that the main area of concern was the lack of consultation undertaken by the then Department of Regional Development and Lands with the pastoral industry and key stakeholders. I am not going to go over all of the detail, because, as I said, the report speaks for itself, but I did want to note this evening that during our inquiry it became evident that the government needs to intervene to get this process back on track. The government did that. In November last year, during the committee's inquiry time line, the government moved with key stakeholders in industry and pastoralists to get this process back on track. It was a very contentious and emotional issue for the pastoralists. I recognise that we are now a long way down the track of getting something that the pastoral industry and government will be happy with.

I rise tonight to acknowledge the work of my colleagues Hon Liz Behjat, the chair; Hon Darren West, deputy chair; Hon Amber-Jade Sanderson; and Hon Nigel Hallett. There was a lot of work and extensive deliberation. A lot of different ideas were brought to the table and we had to consider many submissions from people in the industry. It was a good process to be involved in and I thank my colleagues for that work.

There were two other matters I wanted to note. Firstly, one of the findings of the committee was that the then Department of Regional Development and Lands had an extensive workload trying to work with the pastoral industry to manage some 600-odd noncompliant leases to get them to a point of compliance by 30 June 2015. It was a massive undertaking by the department. I acknowledge the move to split into two the department, which both have a massive workload. I look forward to the director general, Colin Slattery, and his new Department of Lands working more closely with the pastoral industry in particular.

Secondly, another area that was interesting—I hope that the government and the minister take on the recommendation of the committee—concerns recommendation 5. The committee found during its public hearings that the diversification permits for pastoralists were extremely important to the ongoing sustainability of the industry and that there should be more flexibility in how application permits are administered, the length of time that takes, and how they are attached to the person and not the property, which is definitely creating a problem for people considering whether to invest in diversification on pastoral land. The government and the minister should look at that area and consider working towards making that industry more sustainable and manageable for pastoralists. Recommendation 6 states —

that the Government should investigate ways of accommodating third party investment in activities allowed by diversification permits.

Again, at the end of the day that will allow the pastoral industry to maintain its viability. It is extremely important for government to have those lands managed in an environmental and financially sustainable manner. As I said, from a government perspective we are much further down the track. I think the relationship with industry and government is on a much more even keel. I acknowledge the work done and the contribution made by key stakeholders within the industry and government to make that occur.

We have a little way to go, but I think we are on track. I look forward to that engagement process with the pastoral industry occurring in a much more meaningful and transparent manner. I look forward also to seeing that draft lease proposal.

Hon MARK LEWIS: I too commend the Standing Committee on Public Administration on an excellent report. I have had a long association with the pastoral industry and I have been very much looking forward to this report. There are many good findings and recommendations in the report and I concur with the report. However,

like Hon Jacqui Boydell, I am particularly interested in the reform components of the report, because the report itself addresses the lease. I want to focus on recommendation 5 and suggest a pathway forward. As the report highlights, the diversification activity is probably one of the few things in the pastoral industry that we have to ramp up for our future. For those who are not aware, the pastoral area is about 38 per cent of the state. It is a pastoral estate and it is something that we, the government, must look to to try to get some economic development not only for the sake of economic development, but also for our social wellbeing. As I said, my interest really goes to the former part of this because the lease is probably now at least 50 years old, as Hon Darren West said. It is probably a facsimile of the old lease, which is most likely 100 years old, so it reflects government requirements of almost 100 years ago.

My interest, and I guess our interest, here is to look to the next 100 years to make sure the act and the lease get us to that point. In terms of recommendation 5, specifically diversification and, more importantly, the multi-use framework that we will need for our pastoral estate going forward, I want to reflect on the report, the inquiry and the information that was given to the committee by a gentleman who attended the inquiry. It goes to the issue of native title. It has to be recognised that we must move forward within the context of native title. That is a given, and I think it will be important. I will get a bit technical here and drop into legal jargon, but I think it is important that I do. I refer particularly to section 24GA of the Native Title Act, which describes the expression “primary production activity”, and states —

- (1) The expression *primary production activity* includes the following:
 - (a) cultivating;
 - (b) maintaining, breeding or agisting animals;
 - (c) taking or catching fish or shellfish;
 - (d) forest operations;
 - (e) horticultural activities;
 - (f) aquacultural activities;
 - (g) leaving fallow or de-stocking any land in connection with the doing of anything that is a primary production activity

The Native Title Act provides a fairly broad multi-use expression. As the committee report highlights, the current pastoral lease is granted for pastoral purposes, as opposed to primary production. It is instructive to quote from the Land Administration Act about what “pastoral purposes” means. It reads —

pastoral purposes means the purposes of —

- (a) the commercial grazing of authorised stock; and
- (b) agricultural, horticultural or other supplementary uses of land inseparable from, essential to, or normally carried out in conjunction with the grazing of authorised stock, including the production of stock feed; and
- (c) activities ancillary to the activities mentioned in paragraphs (a) and (b);

However, the Land Administration Act requires that agricultural, horticultural or other supplementary uses of land be undertaken only under a permit issued under division 5 of the act. This goes to the heart of the issue. Hon Jacqui Boydell mentioned the problems the industry has in getting through the permit process. That is obviously causing the industry the most angst and, in my view, is frustrating the ability of pastoralists to fully utilise their pastoral estate for our economic and social advancement. If the Land Administration Act could be amended to allow the range of allowable diversified activity, as defined by the definition in the act, without the onerous permit process, including the issues related to the transfer of permits that Hon Jacqui Boydell mentioned, and third party issues that arise, we could truly provide a very flexible, multi-use framework for the state, going forward.

It is instructive again to turn to the evidence presented in the inquiry, as I mentioned before, by Mr Mark Gregory, a native title lawyer, who made a very interesting observation when he said—I will paraphrase his full quote—that the ability to enlarge or broaden the conditions of the lease to include the kind of other primary production activities that are currently allowed under the diversification permits, can be done under the Native Title Act provisions as they stand. He goes on to say —

... 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, he says, is relatively simple. He continues —

If the Land Administration Act were amended to allow that, then the Native Title Act, as currently drafted, provides for that to happen.

In other words—this is something I have been saying for years and it was confirmed to me by another native title lawyer, indeed, a barrister—we can align the allowable-use activities between the Native Title Act and the Land Administration Act by amending the definition of “pastoral purposes” in the Land Administration Act to mirror the expression “primary production activity” in section 24GA of the Native Title Act without, and this is important, triggering the more complex future act procedural rights in the NTA. Given those comments, and as is my understanding, the division 5 permit process in the LAA was designed to make clear—the avoidance-of-doubt principle—that the permitted activity would not trigger the more complex future act procedural rights in the NTA at the time, in 1986.

It is my view now that with the passage of time and a better understanding of the interaction between the Land Administration Act and the Native Title Act, we can adopt the mirroring of the definitions between the two acts—that is, “pastoral purposes” in the LAA and the “primary production activities” in the Native Title Act. We can undertake a broader range of diversification activities on our pastoral estate without the onerous task of going through the permit process. For all intents and purposes, this would provide lessees in any potential investment they may wish to make into higher value agriculture with clarity, knowledge and certainty that they will not get bogged down in the red and green tape that we now have to go through. Again that highlights the frustration in the industry. However, there is an important omission in what I have said in respect of primary production activities and the Native Title Act, and that is the issue of pastoral-based tourism and ancillary measures. This could simply be left as it is—that is, we use the permit processes in division 5 to continue doing the tourism-based activities we are currently doing.

I cannot think of anything more, within reason, that a lessee might want to undertake on a pastoral lease, or any other activities, other than perhaps wanting to build a space station, and that is not going to happen; so I commend the committee’s report and the suggestions I have made today to the government, and I look forward to working with the minister on implementing these recommendations.

Hon COL HOLT: Firstly, I would like to thank the Standing Committee on Public Administration for its hard work. As a member of the Legislative Council I have always found the committee system extremely valuable for focusing on some of the important issues that we tend not to get a chance to think about fully because of time constraints and processes, so I thank the committee for that hard work. As the representative of the Minister for Regional Development; Lands in this house, I would also like, on his behalf, to thank the committee for undertaking the review of the pastoral lease renewal process and how it impacts on pastoralists and the like. I again thank the committee on his behalf for the great work it has done in raising these issues. I can say that the minister acknowledges and accepts that the pastoral renewal process has been pretty poorly handled in the past, and caused unnecessary stress and anxiety. That has been acknowledged; I do not think it was ever intentional, but sometimes such matters have unintended consequences, and in this case it was for the pastoralists and the businesses in the renewal process. I would also like to think that we have now drawn a line in the sand with this committee report from which we can move forward and make sure that the transition of pastoral leases after 1 July 2015 is as smooth as possible, to create those great opportunities that we expect from our pastoral industry, as highlighted in the report and in some of the contributions to this debate with regard to the opportunities available in pastoralism and in diversification.

It has been recognised by some members that the splitting of the Department of Regional Development and the Department of Lands into separate entities has also provided an opportunity; there is now an opportunity for the Department of Lands to really focus on its core businesses—pastoral leases being one of its core businesses—and to not be distracted by a joint remit with another department. We can now concentrate on getting this lease renewal process back on track to achieve the right outcomes for everybody.

Pastoralists will be offered the choice of two renewal options, as has been discussed. The first one is obviously based on the same terms and conditions as under the existing leases; the second one is also essentially under the same terms and conditions, but with some modernised language, and will be known as a 2015 lease. I understand that the Department of Lands is now responsible for consulting with the Pastoralists and Graziers Association and the Pastoral Lands Board prior to the release of that document, so that all pastoralists to get a chance to look at it. The PGA is the leading industry body in this space, and the Pastoral Lands Board obviously plays a regulatory role, so we need to make sure that they are up to date with what the leases are going to look like and how that process is going to play out. The consultation phase by the department on those two lease formats will commence very soon. Department of Lands staff are already engaged with a number of stakeholder groups and have arranged public forums in Carnarvon, Fitzroy Crossing, Kalgoorlie, Karratha, Marble Bar and Meekatharra, as well as Perth. These are expected to occur over May and June. Importantly, the department has carried out

consultation before; what we are talking about now is doing it properly and with the outcomes and report recommendations in mind. We all know that we can do consultation for consultation's sake, but it does not work without real commitment to providing the right information and without taking on board the right feedback. I think the report has obviously provided some direction in terms of what the consultation should look like, and I am sure that the staff from the Department of Lands who are now working on that consultation will approach it in the right way.

The state government supports and encourages diversification; some members made contributions along those lines. We have probably waited far too long for the pastoral industry to explore the opportunities that come with diversification. Some of our lease arrangements and regulatory roles have probably restricted that a bit, and it is about time we moved beyond that to realise the great potential we have in what is 30-odd per cent of the lands in regional Western Australia. We want pastoralists to be innovative and to be good carers of the land and their pastoral leases, but we also want them to have good businesses that contribute to the economies of our regions.

The department is giving the committee's recommendations its full consideration, and it has already started a land tenure reform process—the rangelands reform program—with the aim of developing a suite of regulatory options to be made available to proponents on an optional basis. The issue of diversification permits being attached to a specific lease or transferred to the next purchaser is currently being investigated as part of this program.

Hon Liz Behjat interjected.

Hon COL HOLT: Does the member reckon it might become an asset if they go through these? Exactly!

A new suite of rangelands condition monitoring systems will be implemented, and by using that with remote sensing climate data and other information I think we will have a much more reliable system for assessing the trends in our rangelands conditions across the whole of the pastoral estate; it will be good for the state to know how our rangelands conditions are performing.

I am sure that the state government will give a full and frank response to the committee's report and recommendations in due course, and I take this opportunity on behalf of the minister to again thank the committee for its work. I think it is a useful process to highlight some of the things that could and have gone wrong, and this is a great point in time to take those recommendations and move forward so that we can all get good outcomes, for the pastoral industry and from the state government perspective. I commend the report.

Hon LIZ BEHJAT: Having heard the parliamentary secretary's initial response to the report and his undertaking that there will be a further and fuller government response to it, I want to put on the record my delight at hearing him say that diversification permits will now attach to property rather than the person. Hopefully, there will be a lot of good outcomes from this report, but if it achieves nothing else, that would still be a huge outcome for all the people who took the opportunity to give evidence to the committee in our travels; after the leases, that issue was far and away the second most burning issue for them. I thank the parliamentary secretary for that response.

Question put and passed.

Progress reported, pursuant to standing orders.

Sitting suspended from 6.00 to 7.30 pm