



16 December 2024

Department of Planning, Lands and Heritage (DPLH)
140 William Street
Perth, Western Australia, 6000

Via email: NPLConsultation@dplh.wa.gov.au

RE: Proposed New Standard Conditions for Pastoral Leases

INTRODUCTION

The Pastoralists and Graziers Association of WA (PGA) is a non-profit industry organisation established in 1907, which represents primary producers in both the pastoral and agricultural regions of Western Australia.

Current membership numbers equate to over 70% of all pastoral leases, excluding Indigenous and conservation leases.

As the peak industry body for the pastoral industry the PGA welcomes the opportunity to provide comment on the proposed new standard conditions for pastoral leases.

BACKGROUND

The findings from the *Standing Committee on Public Administration's 2014 Inquiry into Pastoral Leases in Western Australia (Inquiry)*, clearly shows the importance of the Department having a thorough consultation process with pastoral lessees, and the importance in dealing with any potential contentious aspects of a new draft lease **before it is disseminated**.

With all pastoral leases in Western Australia set to expire on 30 June 2015, the then Department of Lands issued a draft lease to pastoralists in July 2013, and accepted comment on the draft lease (specifically about the rent valuations) until 18 October 2013. The content of the draft lease caused a great deal of comment, frustration, and anxiety among pastoralists, as it included new provisions that were quite different to existing lease provisions, particularly regarding terminations: with banks becoming extremely concerned and some announcing they would perform limited reviews of loans.

Pastoralists & Graziers Association of Western Australia (Inc)

Ground Floor, 28-42 Ventnor Avenue, West Perth WA 6005 PO Box 889, West Perth WA 6872
Ph: (08) 9212 6900 Fax: (08) 9485 0299 Email: pga@pgaofwa.org.au

It also caused significant distress to many pastoralists who perceived that they were being presented with a draft without the opportunity to negotiate what they viewed as unfavourable or unfair changes to the existing lease.

This was highlighted when the PGA first received a copy of draft lease at the same time as pastoral leaseholders in July 2013, and given the content of the covering letter it was evident that the Department was not seeking specific feedback from the PGA on the views of its members.

As noted in the *Inquiry's* Report:

The reaction of the PGA demonstrates that earlier consultation with pastoralists on the content of the draft lease would have allowed the Department to inform itself about potential issues: the response of the PGA and pastoralists was swift, and a negative view was formed about the content of the lease. The PGA then sought legal advice to ascertain whether the offending clauses – or indeed the lease itself – were lawful.'

Although the draft lease was provided to the PLB on three occasions prior to July 2013 it was not sent out to industry for comment. This was because the PLB is a statutory authority rather than a representative body.

Further, although a communications plan was drafted in 2011, it was never finalised or implemented by the then Department.

Although there were many changes in the draft lease issued to pastoralists in July 2013, there were only three areas of concern for most pastoralists: termination; pollution and environmental harm; and indemnifying the state. Concerns over these three issues remain and should be considered in greater detail by the Government.

SUMMARY

The PGA has been actively reviewing the proposed changes since they were made public on 26 April 2024 and following discussions with legal practitioners, finance and insurance professionals found concerns with the following proposed inclusions, which we believe should warrant further consideration by the WA Government. They are:

- The introduction of an indemnity provision releasing and indemnifying the WA Government in respect of all claims and losses arising from the lessee's occupation and activities on the land. This includes any contamination or pollution it causes or contributes to and losses arising from a breach of the lease. The lessee is not liable under the indemnity to the extent the lessor causes or contributes to that loss. The scope of the indemnity will be limited to the lessee's actions and activities and does not extend to the actions of uninvited third parties or other tenure holders.

- A requirement for the lessee to obtain and maintain insurance satisfactory to the WA Government relevant to its activities on the land and covering the injury or death of any person, property damage and liability arising from any sudden and accidental contamination or pollution.
- A more comprehensive clause requiring the lessee to pay or reimburse the lessor any reasonable costs incurred from providing and registering the lease or in relation to certain matters arising under the lease (assignment, surrender, default).

SPECIFIC ISSUES

- Clause 9.2 Insurance –The PGA questions the practicality and possibility for pastoralists to obtain insurance that covers 9.2(a)(i)(B) and (C) (to the extent that it refers to the Lessor being the State being covered; and (ii) which relates to environmental incidents. There is very limited information available to ascertain if this type of insurance is readily available or if so whether it is cost prohibitive.
- Clause 4.2(iv) – This reads very broad and seems to capture “rights of the State” which include the reservations in clause 10.2. The PGA recommends that clause 10.2 should be removed from its operation.
- Clause 9.1(b) (vii)- This read very broad and captures all loss/damage. Again, the PGA recommends that clause 10.2 should be removed from its operations so that compensation can be sought if improvements are damaged because the State used its rights of access.

CONCERNS

Indemnifying the State

While this provision may be consistent with modern leases and commercial practices, the impact of this open-ended indemnity provisions will place onerous obligations on pastoralists without a concurrent recognition of the important role of pastoralism in the environmental management of the rangelands and the economy of the state.

In the case of contamination or pollution, the lack of a liability cap could see the lessee required to indemnify the State for acts or omissions of a prior lessee or see the liability extend beyond the term of the relevant pastoral lease.

Further the lack of a liability cap will mean many lessees will be directly exposed beyond the claim limit of their relevant public liability insurance. This, coupled with the fact that the “Insurance Amount” is not specified creates yet more uncertainty for lessees who already contend with excessive regulation, environmental and cultural activism, unpredictable global markets, and the harshness of the WA rangelands.

The PGA believes that due to these concerns over the open-ended liability of the

indemnification (which potentially extends to historic claims and losses arising from prior lease terms), as well as the ability to insure against contamination, pollution, or environmental harm without a limitation or cap applying needs to be further investigated by the Government including discussions with insurance providers. We believe that that historical liability should only occur from 2015 onwards, which is when all leases were assessed and renewed.

Insurance

It is unclear whether insurance will be available for the broad range of matters the lessee will be required to obtain and maintain to the satisfaction and discretion of the WA State Government, and whether different insurance amounts will apply on different pastoral leases.

This uncertainty means it will be impossible for pastoral lessees to accurately forecast their insurance exposure as well as the threshold at which they may have to self-insure given the unlimited nature of the Lessee Indemnity. This is an entirely unreasonable outcome for lessees, and quite different to a 'standard' commercial lease where insurance limits and liability would generally be capped.

Costs

The proposed "standard" commercial terms and conditions benefit the lessor only, and will impose significantly greater contractual obligations, risk, and costs on lessees.

To argue that the inclusion of these new PL terms and conditions will "deliver a range of benefits that will provide greater opportunities and more security for the pastoral industry" is patently false given the disproportionate bargaining power between the State and what are, in most cases, individual pastoralists.

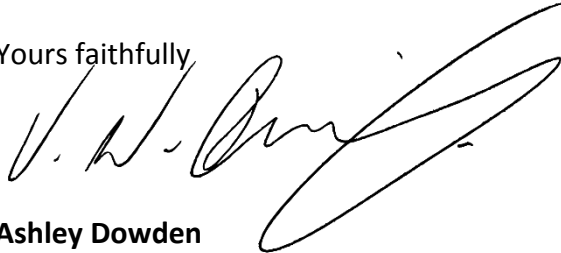
Unlike a normal commercial setting, pastoral lessee has the power to 'walk away' and seek alternative lease terms from another party, pastoral lessees have no such flexibility with their livelihoods enmeshed with the pastoral lease itself, often over many generations. To suggest, therefore, that the terms contained in the standard form pastoral lease should mirror a commercial setting is erroneous and ignores the long-term nature of pastoral leases and the major capital investment required from lessees on an ongoing basis to sustain operations (with no guarantee of future profitability).

Further there is no clarity over whether to renew or extend the pastoral lease will require lessees to enter into a Indigenous Land Use Agreement (ILUA), which will be subject to further costs.

There is also no clarity on whether lessees will be responsible for historical compensation costs, which the State agreed to cover in the 2015 lease renewal process. The PGA believes that the State should once again resume all liability for historical compensation issues that occurred prior to the 2015 lease renewal period.

We thank you for the opportunity to comment on this matter and are available to have further discussions to ensure that the new lease document fairly respects the rights and unique nature of pastoral lessees.

Yours faithfully

A handwritten signature in black ink, appearing to read 'A. Dowden', with a large, sweeping flourish extending from the end of the name.

Ashley Dowden

PGA Pastoral Committee Chair