

Surety by Sharing Parallel Leases in New South Wales Australia

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SUMMARY

About half the land in NSW (some 40 million hectares) is Crown (Government or Public) land. Within these lands, there are large areas suitable for the construction of alternative and sustainable “green” electricity generating projects.

Currently these lands are either set aside for public purposes or privately occupied under a lease or licence tenure, many of which are Perpetual Leasehold providing exclusive possession of the land during the currency of the lease.

Recently, the NSW Government negotiated outcomes for a proposed wind farm development that would cover over 25,000 hectares on four separate grazing stations (farms or ranches) held under separate perpetual leases on Crown Land. The wind farm proposal was declared a major project under State planning legislation with significant investment of over \$2.5 Billion and the capacity to generate in excess of 1000MW of energy per year.

To proceed with the project the Government needed to ensure secure land tenure for up to 60 years. The Government investigated the concept of establishing legislation that would enable the granting of a Parallel Lease - a second lease that is granted over an initial lease and notwithstanding the convention of exclusivity, allows dual compatible occupation of the land by two separate parties at any one time.

The enactment of amending legislation in June 2008 allowed the government to then facilitate agreement between all parties for the planning and design of the wind farm to proceed utilising parallel leases.

This Paper will explore and explain:

- the background to the decision of Government to consider the parallel lease option;
- the benefits, constraints and requirements needed to make a parallel leasing project work.

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1. INTRODUCTION

The purpose of this Paper is to describe the events leading up to, and the outcomes of, changes in legislation for the dual leasing of Crown land in New South Wales (NSW), Australia. This change of legislation created a unique form of leasing allowing the State of NSW to lease the same Crown land under two separate leases for different uses “in parallel”.

2. BACKGROUND

New South Wales, although not the largest State within Australia, is its most populous State. It has a population of some seven million residents, 63% of whom live in the Sydney Metropolitan Area. It has a land area of approximately 809,000 square kilometres and generates approximately 32% of Australia’s Gross Domestic Product.

Approximately 47% (43.7m ha) of land in NSW is Crown land. There are over 65,000 leases and licences covering 33.5m ha and some 33,000 reserves totalling 2.5m ha. Each and every parcel of Crown land, from the coast to the outback, has its own unique features that sets it apart from other land within the State.

The Land and Property Management Authority (LPMA) is the predominant land management agency of the New South Wales Government. It not only administers Crown land but it also manages the Torrens Titling system for the State, it is the State’s spatial information and mapping agency and includes a number of specific Development Corporations.

3. CROWN LAND

The definition of Crown land is set out in the “Legal Aspects of Boundary Surveying as apply in NSW” by Ticehurst (1994).

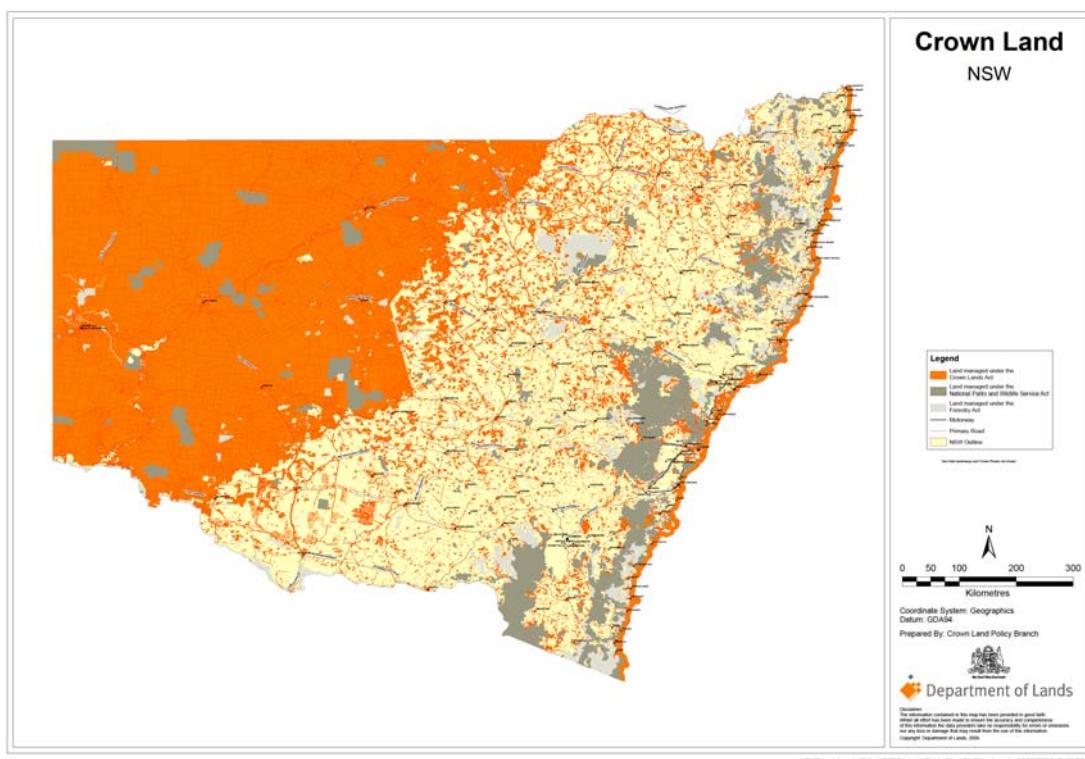
“It has been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired, this feudal principle extended to the lands overseas. The mere fact that men discovered and settled upon new territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it ... So we start with the unquestionable position that, when Governor Philip received his first Commission from King George III on October 12 1786, the whole of the lands of Australia were already, in law, the property of the King of England.”

That quotation, from the judgement of Justice Isaacs in *Williams v. Attorney-General* (1913), contains the basic principle upon which freehold titles are founded in New South Wales.

The term ‘Crown land’, when used today in relation to the administration of land ... has a more restricted meaning. In general language it means such land as the Crown is empowered to grant or otherwise dispose of from time to time to private individuals or to set aside for special purposes under the provisions of the *Crown Lands Act 1989*.”

The traditional doctrine of the Crown’s radical title, as outlined above, still applies today even though it has been modified in recent times by the legal recognition of native title rights (certain pre-settlement rights of indigenous people). Today Crown land is used for many public purposes, including schools, hospitals, sports grounds, community recreation, conservation and housing development. In addition, it is also available for alternative uses, including leasing for commercial or agricultural purposes, through to land development and sale to meet the needs of expanding regional and rural communities.

More importantly, multiple use of Crown land is specified by legislation through the *Crown Lands Act 1989*. It is the *Crown Lands Act 1989* and the *Western Lands Act 1901* which guide the management of Crown land within the State.



Crown lands within NSW are identified as being in two Divisions:

- the Western Division, and
- the Eastern and Central Division.

“Comprising 42% of New South Wales, the Western Division is chiefly held under leases granted by the Crown pursuant to the Western Lands Act. This Act, a product of

a Royal Commission in 1901 and later legislative changes, seeks to promote the prudent economic development of the Division's fragile land resource. It does this by the use of the restrictions and requirements available under the leasehold system and by the imposition of controls on grazing, cropping and clearing." (Ticehurst 1994)

Much of the land in the Western Division of NSW could be considered 'marginal' agricultural land. The land is subject to extensive periods of hot, dry weather leading to long term drought conditions often spanning many years. Historically, the Western Lands Act was introduced after a devastating economic and environmental crisis in the 1890s characterised by soil erosion, overstocking, rabbit plague and drought (Quinn 1997). The essence of the Act was the placing of strict lease conditions and controls for exploiting a very fragile landscape to prevent its long term deterioration.

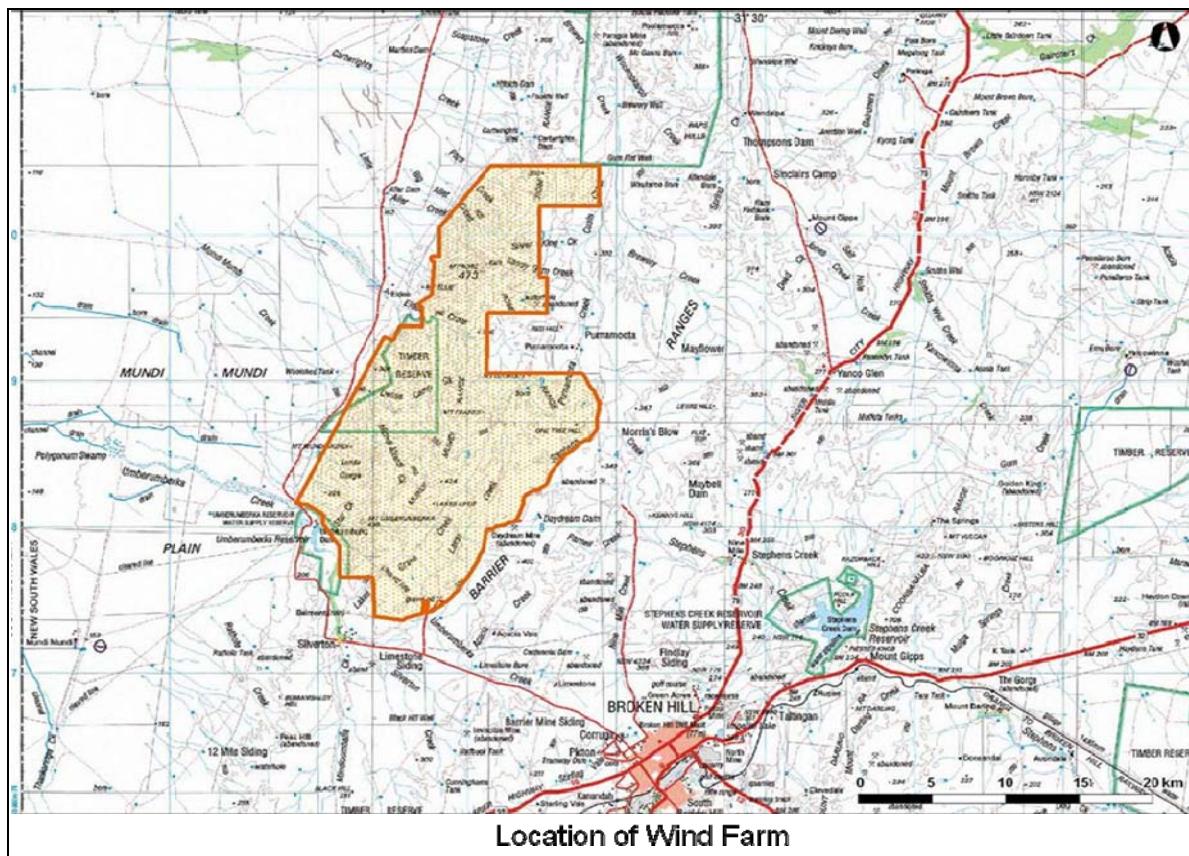
It is in this context that a proposal to build one of the largest Wind Farms in the world was presented by a private consortium to the NSW Government in 2007.

4. THE DEVELOPMENT

"The Silverton Wind Farm is a utility scale wind farm proposal, near Broken Hill in outback New South Wales. It would be developed by Silverton Wind Farm Developments Pty Ltd (the 'Proponent'), a special purpose vehicle jointly owned by Epuron Pty Ltd and Macquarie Capital Wind Fund Pty Ltd." (Silverton Wind Farm Developments 2009)

Silverton Wind Farm Developments (2009) in its report to the NSW Department of Planning, indicated that the development involves the construction and operation of a large-scale wind farm in the western region of NSW. The Proposal includes:

- Up to 598 wind turbines, each with three blades mounted on a tubular steel tower and a generator transformer inside or adjacent to each tower.
- Electrical connections between wind turbines and the site substations using a combination of underground cable and overhead concrete, timber or steel pole power lines.
- Site substations to convert from reticulation voltages (22-66kV) to medium voltages (66-220kV) for connection with the transmission switchyard.
- An onsite transmission switchyard that includes high voltage transformers and switchgear for connecting the output of the wind farm to offsite transmission lines.
- A new 24 kilometre transmission line connecting the transmission switchyard with TransGrid's existing Broken Hill substation (20 kilometres off site).
- A new 305 kilometre transmission line connecting the transmission switchyard with SP-Ausnet's existing Red Cliffs substation in Victoria (301 kilometres off site).

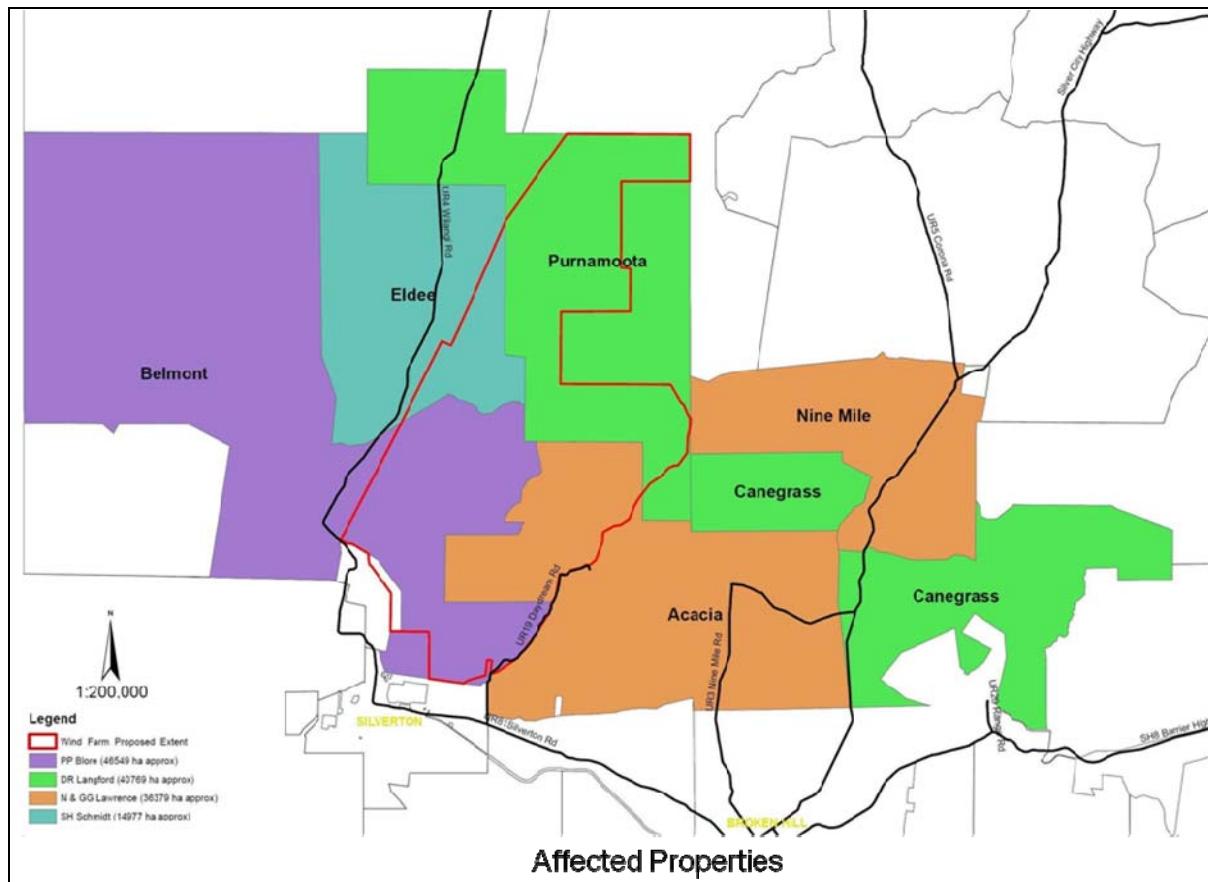


The total area to be covered by the development is approximately 25,000 ha of land. It is capable of delivering more than 1,000 MW of renewable energy for NSW, which is approximately 4.5% of the State's current power needs.

"It is proposed to be located on the elevated ridges of the Barrier Ranges with its southern boundary approximately 3.5 kilometres north of Silverton and approximately 25 kilometres north west of Broken Hill. The site boundary is approximately 20 kilometres from the South Australian border." (Silverton Wind Farm Developments 2009)

The land identified for the development is Crown leasehold land held under the *Western Lands Act 1901*. There were a number of Western Lands leases impacted by the proposed location of the Wind Farm which were held principally by four families. Although there were multiple family members in each of these parties, for the purposes of this Paper, it can be assumed that there were four Western Lands lessees affected by the proposed development.

Each of the lessees possess what is known as a perpetual lease, ie a lease which has an unlimited term that can be assigned (with the Minister's permission) to another party or transmitted to their heirs. It is generally recognised that a perpetual lease has a value close to the freehold value of the land.



5. THE PARTIES AND THEIR NEEDS

There were three parties involved in the land tenure arrangements for this development:

- i. The Landowner – in this case the land was Crown land administered under the *Western Lands Act 1901* meaning that the State of New South Wales was the landowner.
- ii. The Western Lands Lessee – there were four separate lessees affected by the proposed development. Some of these lessees were second and third generation occupiers of the same leasehold land.
- iii. The Developer – in this case Silverton Wind Farm Developments Pty Ltd (SWFD).

Some of the objectives of the three parties above could be summaries as follows:

- i. The Crown Landowner
 - an increased use of renewable energy sources within the State
 - a market return for the use of the State's assets, and
 - to promote the social, economic and environmental interests of the Western Division.
- ii. The Western Lands Lessees
 - Continued occupation of the land and operation of their existing approved activities such as grazing sheep, farming feral goats and tourism hospitality.
 - Minimisation of disturbance to the land and existing and future operations.
 - Recovery of costs, payment for disturbance to their operations and loss of exclusivity of occupation.
 - Maximising the commercial value of their leasehold interest.
- iii. The Developer
 - Create a commercially viable development.
 - Certainty of tenure for the bankability of the project.
 - Continued flexibility to further refine the development as more detailed investigations were undertaken.
 - Uninhibited access to the area to continue monitoring and investigative programs.

6. PLANNING ISSUES

Within the State of NSW, planning and development is carried out under the *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2000*.

Under the legislation, the Minister for Planning has the ability to declare certain projects to be Critical Infrastructure ie, the project may be considered to be essential to the State for economic, social or environmental reasons.

The NSW Department of Planning (2009) specifies that “the critical infrastructure provisions:

- ensure the timely and efficient delivery of essential infrastructure projects
- allow the Government and the planning system to rapidly and readily respond to the changing needs of the State
- provide certainty in the delivery of these projects
- provide for rigorous scrutiny to ensure environmental outcomes are appropriate
- focus on delivering outcomes essential to the NSW community.”

In this particular case, the Silverton Wind Farm Development was declared a Major Project and Critical Infrastructure under the *Environmental Planning and Assessment Act 1979*.

7. LAND TENURE ISSUES

In light of all of the above background, the LPMA (the Agency with responsibility for managing Crown land and for the administration of the Crown Lands Act and the Western Lands Act) was consequently placed in a position where a decision had to be made on how this project was to proceed in terms of land tenure arrangements.

Various options were put forward:

- i. Change of Lease Purpose;
- ii. Subdivision and Change of Lease Purpose;
- iii. Licence under the *Crown Lands Act 1989* over existing Western Lands lease; or
- iv. Withdrawal of land from existing Western Lands leases and issue a new lease for the Wind Farm (ie compulsory acquisition);
- v. Subleases from the existing Western Lands lessees to the Developer.

In the beginning there were a number of uncertainties still surrounding the project which made it difficult to formalise many of these options.

The project was still in a formative stage and, as such, the final locations of individual wind turbines were not fixed, thereby the road network, some 480 kilometres of road, could not be specifically defined. Consequently, the concept of subdivision and limiting the possible areas to be withdrawn from existing leases was impractical.

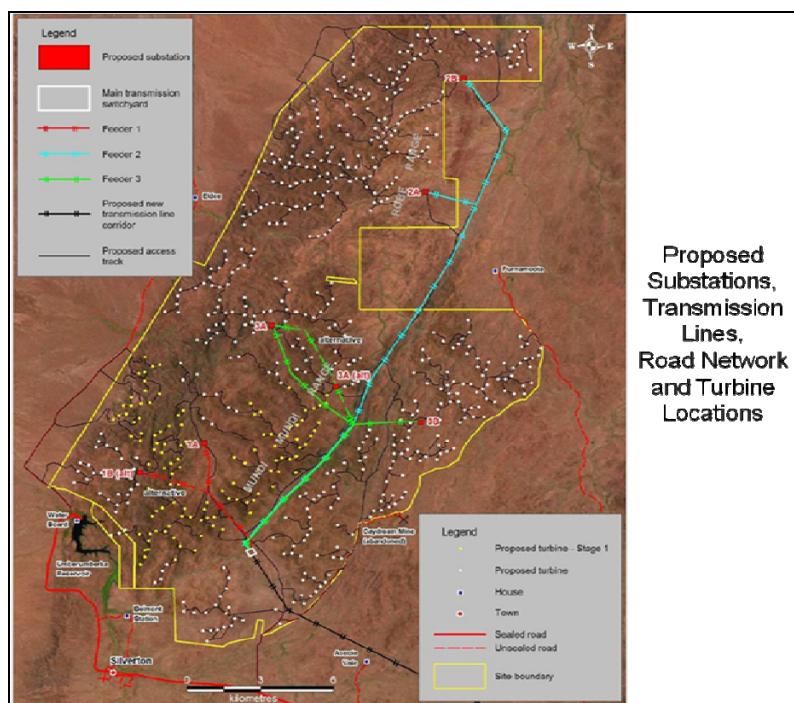
One option which retained flexibility for the Developer and had little effect on existing leasehold rights was the option of granting a Licence over the whole site area. However, at law a licence is revocable at will, is not registered on the title and thus failed to provide the Developer with adequate security of tenure required to finance the anticipated \$A2.2 billion investment.

Similarly, the option of subleasing directly from the four separate Western Lands lessees was rejected as the Government considered that a project of such significance required a direct tenure relationship with the Developer.

As a result, some of the matters which contributed to the initial decision to choose Option (iv), which was to withdraw the land from the existing leases and issue a new lease to SWFD, were:

- i. the Development was considered significant public infrastructure;
- ii. the existing leases did not authorise this type of development;
- iii. the underlying land was Crown land and thus subject to the interpretation of specific legislation;
- iv. the existing lease and the Crown legislative provisions did not contemplate this additional land use;

- v. development and use of the land could not be seen as supplementary to the grazing enterprise;
- vi. there was potential for the development not to proceed;
- vii. legislation and the existing lease conditions enabled the withdrawal of the land from the lease for public purposes;
- viii. precedent existed where the Crown had utilised those provisions in the past;
- ix. Silverton Wind Farm Developments Pty Ltd (SWFD) required certainty and the State was supportive of the project.



8. THE DECISION

In February 2008, the LPMA advised the Western Land lessees of the decision to compulsorily withdraw all the required land from their current leases and to enter into direct dealings with Silverton Wind Farm Developments.

Compensation would be provided under the State's *Land Acquisition (Just Terms Compensation) Act 1991*.

9. THE RESPONSE

The response to the LPMA's decision was, as anticipated, very strong and very vocal.

There was significant opposition to the decision by the lessees and they were supported by their representative bodies in the Western Division of the State. They sought, and received, significant media profile at local, state and national level.

As a result of the adverse response to the initial decision of the LPMA to withdraw the land, the LPMA responded by further investigating other alternative proposals.

In doing so, the LPMA identified what it believed were the major concerns of the Principal Parties:

- i. **The Crown Landowner**
 - The strict conditions under the lease and the *Western Lands Act 1901*.
 - Capacity to provide Silverton Wind Farm Developments with certainty of tenure, without fettering the Minister's discretion.
 - Possible protracted court proceedings.
 - How to address the concern of the Western Lands lessees, particularly with respect to their long term affinity and history with the land.
- ii. **The Western Lands Lessees**
 - The principal issue for the Western Lands lessees was the loss of their attachment to the land. For several lessees, the emotional attachment to the land was, without doubt, the most significant issue to address.
 - The division of their property.
 - The sub-viability of the remainder of their properties following the withdrawal of the land required for the Wind Farm.
- iii. **The Developer**
 - Security of tenure for the project to proceed.
 - Ongoing positive relations with the existing Western Lands lessees.

10. A NEW LEASING MODEL

i. Concurrent Lease

At common law a lease granted by a lessor in respect of land already under lease is known as a "concurrent lease". In the period during which the terms of the concurrent lease and pre-existing lease overlap, the concurrent lessee is not granted exclusive possession, but obtains the lessor's right of "reversion", ie all of the lessor's rights such as the right to collect rent. In effect, a concurrent lessee effectively acts as the lessor of the original lease.

In the case of Silverton Wind Farm, it was apparent very early on that, although a concurrent lease could be granted under the existing Crown lands legislation, the existing Western Lands lessees would not accept the Developer (Silverton Wind Farm Developments) effectively standing in the shoes of the Crown as their lessor.

Therefore the option to pursue a model based on a concurrent lease was considered but not pursued in any detail.

ii. **Other Crown and Public Land Jurisdictions**

a) **New Mexico State Land Office, New Mexico**

The Commissioner of Public Lands in the State of New Mexico has the ability to grant concurrent leases. However, such an arrangement still required the existing lessee to relinquish part of their existing leasehold.

Another alternative lease model available in the State of New Mexico was a Planning and Development Lease however, this was principally designed to improve the value of trust land for future sale, lease or exchange. It did not address the issue of existing leases currently in place.

b) **Manitoba Government, Canada**

The Lands Branch of Manitoba Conservation (2006), had developed a “Crown Land Policy and Wind Farms” document to provide guidance to the private sector for the development of wind farms in their State.

The principles set out in that document were:

“Crown lands which are already under disposition (eg lease) may be made available where the wind farm development is in the provincial interest.

Where the wind farm development requires Crown land which is presently under lease, the lessee will firstly be asked to voluntarily surrender the specific areas needed for the wind farm development. If a satisfactory agreement cannot be reached, only then will formal cancellation of lease rights be considered.

Crown land lessees who may lose all or a portion of their leased land will be compensated for direct costs they may incur, eg, costs of moving fences and other issues such as land damage and disturbance. All such costs will be borne by the wind farm developer.”

In its Questions and Answers document (Manitoba Conservation 2006) it states:

“Will Crown lands which are currently under lease or permit for some other use be considered for wind farm developments?

— Yes. The major component of wind farms are the wind turbine towers. These towers do not require a large area, often less than a quarter acre.

- Also, many land uses and activities are compatible with and can occur in close proximity of turbine towers.
- Where a wind farm development requires Crown land which is currently under lease, Manitoba and the wind farm developer will negotiate with the lessee to surrender the required areas needed for the wind farm. If a satisfactory agreement cannot be reached, Manitoba will then consider removing those areas from the lease.”

It is clear that this Policy was prepared to address the situation where the “State” interests should take precedence over existing leasehold interests.

This Policy aligned with the original decision of the LPMA in New South Wales to cancel the existing leasehold rights in support of development which is clearly in the interest of the State.

However, it did not provide the alternative model being sought.

c) New Brunswick, Canada

Similar to the Province of Manitoba, the Province of New Brunswick (Department of Natural Resources 2005) also had developed a detailed Policy on the “Allocation of Crown Lands for Wind Power Projects”.

Sections 8.2 and 8.3 of the Policy document describes the process where a wind farm is proposed over Crown land where existing leasehold rights exist:

“8.2 Applications over Existing Rights

Applications for wind exploration on lands over which someone else holds an existing Crown lands right may be considered:

- subject to the location criteria outlined in section 6 of this Policy;
- if, according to the Director of Crown Lands, uses compatible with wind power exploration exist; and
- in the case of an existing lease, subject to the availability of unused or redundant portions of the lease, and the consent of the lessee.

The Department may refuse an application if wind power exploration is considered to be incompatible with the existing land use.

8.3 Notification and Consent of Right Holder

The Department will notify all affected right-holders of any new wind exploration applications and/or approvals that may affect the subject lands over which the right is held.

The Department will review the suitability of a wind exploration application over an existing lease, by consulting with the lessee. Consent from the lessee must allow the Department to amend the existing lease by withdrawing the identified and unused portions from the existing lease, if the wind exploration application is approved.”

What this Policy, as written, failed to address is the situation where there are significant objections from existing lessee/s and no consent from the existing lessee/s is forthcoming to allow a wind farm development, which was the case in New South Wales.

iii. The “Parallel Lease” Model

The LPMA and its legal advisors, in attempting to address all of the concerns of the various parties identified previously, developed a new type of lease over Crown land which could be granted “in parallel” to an existing lease.

Legislation, the *Western and Crown Lands Amendment (Special Purpose Leases) Act 2008* (NSW) was introduced into the NSW Parliament in June 2008.

The purpose of the Act was to allow the Crown to grant a lease (known as a “Special Purpose Lease”) in a “development district” for a “designated purpose” even though there was an existing lease over the land. Previously, without the legislation, the granting of a lease with respect of land already under lease would have been treated as a concurrent lease which was unsuitable as previously discussed.

The Special Purpose Lease concept was structured to protect the rights of the existing lessee, consequently a number of specific criteria were put in place by the legislation, including:

- A Special Purpose Lease can only be granted for a designated purpose in a declared development district.

The discretion to declare any land to be a development district remained with the Minister for Lands.

At this point in time, the legislation only recognises one designated purpose: “the construction and operation of facilities for the harnessing of energy from any source (including the sun or wind) and its conversion into electrical energy”, but this may change in the future – the legislation grants the Governor General the power to proclaim a new purpose upon recommendation by the Minister for Lands who must consult with the Minister for Planning.

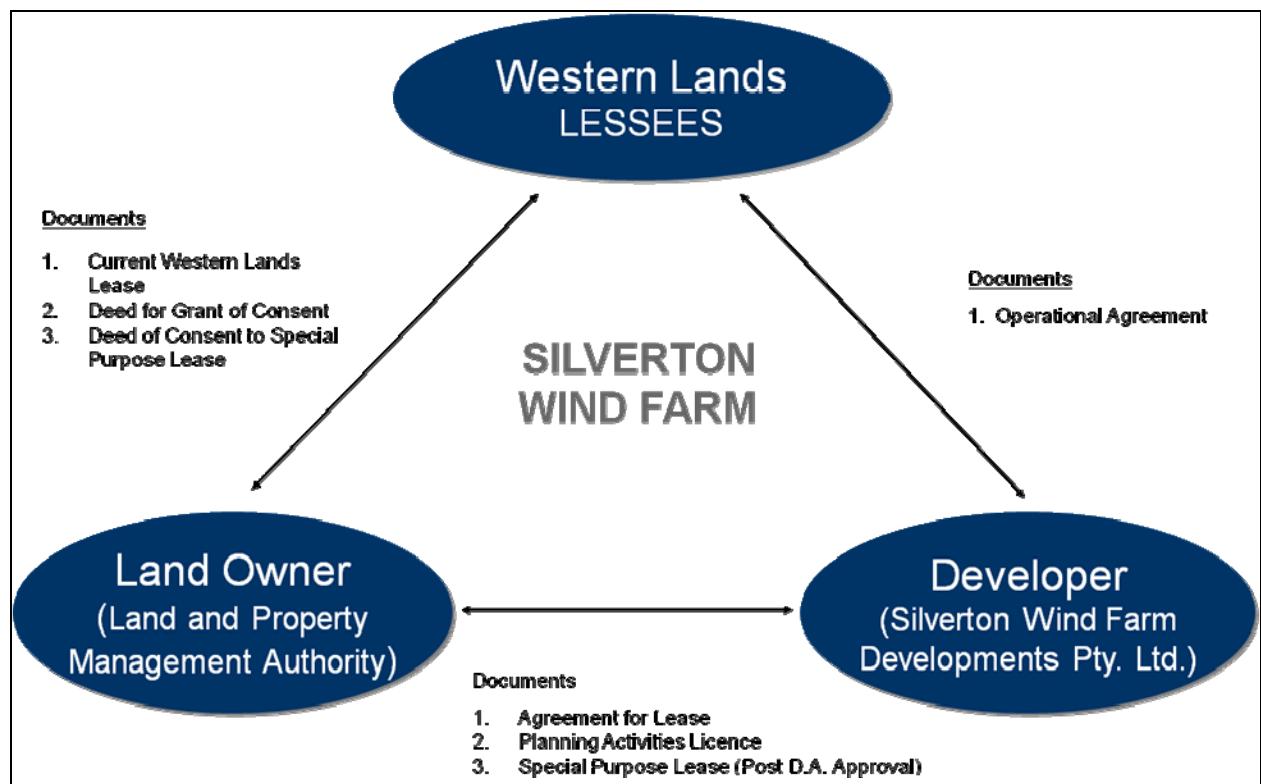
- Although a Special Purpose Lease may be granted over an existing general purpose lease (defined as a lease under the *Western Lands Act 1901* or the *Crown Lands Act 1989* other than a special Purpose lease), it may only be granted with the written consent of the lessee under the general purpose lease.

This provides the opportunity for the general purpose lessee to negotiate specific conditions of consent including compensation.

The legislation also addressed the issue of exclusivity by providing that the general purpose lease remains a lease even though it no longer confers exclusive possession and the special purpose lease is a lease even though it does not confer exclusive possession. The relevance of this is that leases are generally recognised as a strong form of tenure which can be registered on the Torrens register giving them the protection of indefeasible title and a State backed assurance fund.

11. RELATIONSHIP BETWEEN THE PARTIES

The legal relationship between the parties is best illustrated by the following diagram, which illustrates the respective legal documents involved:



The finalisation of agreed documents between the parties involved:

- approximately 18 months of negotiation;
- six legal firms representing the various parties;
- multiple economic analyses to finalise commercial lease terms and compensation;
- an independently facilitated workshop to seek consensus of approach between the parties. This workshop also included representatives from the Associations which lobbied strongly against the approach of withdrawal action.

12. THE APPROVAL

On 3 January 2009, the Premier of New South Wales formally announced that planning approval had been granted to Silverton Wind Farm Developments Pty Ltd.

Concurrently, negotiations were being finalised for the land tenure documents illustrated in the previous diagram and on 30 June 2009 the Minister for Lands executed the Agreement for Lease with Silverton Wind Farm Developments Pty Ltd.

This was done on the basis that the Deeds for Grant of Consent between Land Owner (LPMA) and the Western Lands Lessees had previously been executed. The execution of those documents by the Western Lands lessees provided the written approval required under the legislation enabling the State to enter into a direct lease with the Developer.

13. CONCLUSION

The legislative changes undertaken to the *Crown Lands Act 1989* and the *Western Lands Act 1901* provide a “unique” leasehold tenure model.

The most significant “driver” for such a change was, without doubt:

- To provide a model that protected the rights of an existing lessee whilst enabling different compatible uses of the land to coexist.

There is no doubt that, if this model is to be successful, there will have to be ongoing cooperation and support between the parties over the term of the lease.

The success, or otherwise, remains very much in the hands of the respective lessees themselves.

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BIOGRAPHICAL NOTES

Paul Robinson, Director Strategic Policy and Projects

Paul began his career with the NSW Public Works Department where he undertook significant hydrographic surveys along the NSW coastline. In 1988 he was appointed Manager Survey Services of the Maritime Services Board. After completing his business degree, Paul became increasingly involved in property management and development and was appointed General Manager Corporate and Business Services, where he oversaw foreshore lease management, implementation of Spatial Information Systems, initiation of the Maritime Infrastructure Program. In 2003, as Executive Director Maritime Asset Strategy, Paul was responsible for major infrastructure development projects. In 2008, Paul joined the then Department of Lands where he continues to be involved in infrastructure development and Crown land reform programs.

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