



Issues paper

# Review of the Western Lands Act 1901

January 2008

Closing date:

Friday, 29 February 2008



Department of Lands



For God and Country

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**How to make a Submission on the Issues Paper**

Submissions are to be addressed as follows:

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**Closing Date for Submissions:** Friday 29 February 2008

## **1. INTRODUCTION**

### **1.1 This Document**

This document is the first stage in a two stage review of the *Western Lands Act 1901* as amended by the *Western Lands Amendment Act 2002*, and identifies issues raised by stakeholders following a request for comment by the Department of Lands.

Upon receipt of comment on the issues listed in this document a report will be prepared and presented to Parliament recommending amendments, if any, which should be made to the *Western Lands Act 1901*.

### **1.2 Reason for the Review**

The *Western Lands Amendment Act 2002* commenced, in part, on 1 December 2002 and provided significant amendments to the *Western Lands Act 1901*.

The amendments introduced section 3B titled 'Review of Act' into the legislation. This section states the following:

1. The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
2. The review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to the *Western Lands Amendment Act 2002*.
3. A report on the outcome of the review is to be tabled in each house of Parliament within 12 months after the end of the period of 5 years.

The anniversary of the five year period from the date of assent of the *Western Lands Amendment Act 2002* is 10 July 2007. A report as required by section 3B(3) must be presented to each House of Parliament in or before July 2008.

The Department of Lands is now conducting the review of the *Western Lands Act 1901*. This document is the first outcome of the review and presents relevant issues identified by stakeholders.

### **1.3 Background**

The Western Division of New South Wales makes up over 40% of the area of the State. The vast majority of the Western Division is Crown land, administered under various Acts, in particular the *Western Lands Act 1901*, by the Crown Lands Division of the Department of Lands.

The Western Division lies west of a line from the Queensland border at Mungindi to Balranald near the Victorian border. It covers some 32.5 million hectares. An area of some 9.4 million hectares (29% of the Western Division and 11% of NSW) is unincorporated, meaning it has no direct local government. The Unincorporated Area includes the villages of Silverton, Tibooburra and Milparinka.

Nearly all the land in the Western Division is held under Western Lands Leases granted under the *Western Lands Act 1901*. Most leases are perpetual (ongoing) and can only be used for the purpose for which the lease is issued. If different or additional uses are sought, an application, which is subject to a merit based assessment, must be made to the Department of Lands.

The Western Region of the Department of Lands administers over 6400 Western Lands Leases, including:

- 4,264 for grazing;
- 525 for agriculture;
- 1,358 for residence; and
- 180 for businesses.

Western Lands Leases are bought and sold in the same way as freehold property. However, when people 'buy' leases they are in fact only buying the improvements on the lease and the right to use the land for the purpose specified in the lease.

The Crown charges an annual rent for leases. In accordance with the *Western Lands Act 1901*, rents for grazing and agriculture leases are based on the total area of the property and on the environmental impact of the land use. Rents can also include a credit for managed rehabilitation or conservation purposes. Rents for residential and business leases are 3% and 6% of the land value, respectively.

Favourable concessions were made available in late 2005 to encourage holders of residential leases to convert their leases to freehold, with over 25% of leaseholders taking up this option in the first 6 months following the offer. Grazing leases are not convertible to freehold.

In addition, the Western Region of the Department of Lands oversees more than 1,200 Crown Reserves, 300 Crown and Irrigation Area leases, and 1084 licences to occupy Crown land. These lands are reserved for purposes such as public recreation, commons, urban services, showgrounds, public halls, cemeteries, schools and hospitals.

The *Western Lands Act 1901* is the primary Act governing the administration and management of land in the Western Division. It deals with such matters as the Western Lands Commissioner, the Western Lands Advisory Council, leasing of land, rural holdings, roads and access, sale of leasehold land and penalties/enforcement for breaches of the Act.

#### **1.4 The Kerin Review**

The *Western Lands Amendment Act 2002* gave effect to many of the proposals arising from the Western Lands Review undertaken by a team led by the Honourable John Kerin between 1998 and 2000.

The key elements of the amended *Western Lands Act 1901* arising from the Review include:

- New modern objects;

- Measures to facilitate the progressive establishment of a public legal road network;
- The creation of legal access to all rural landholdings through a system of easements;
- The establishment of a broadly-based Western Lands Advisory Council;
- A new system for setting rents for Western Lands Leases;
- The repeal of redundant, archaic and overly restrictive provisions;
- The removal of the current bar on the conversion to freehold of leases for agriculture and similar leases;
- Measures to enable greater flexibility in tenure and lease purpose arrangements, including sub-leasing;
- Introduction of licence and lease forfeiture provisions consistent with those of *the Crown Lands Act 1989*; and
- An extension of the powers of delegation that may be exercised by the Minister and the Western Lands Commissioner under the *Western Lands Act 1901*.

## **1.5 Major Changes Introduced by the Amended Act**

### **1.5.1 Introduction of Objects of the Act**

The objects of the *Western Lands Act 1901* are as follows:

- (a) To establish an appropriate system of land tenure for the Western Division,
- (b) To regulate the manner in which land in the Western Division may be dealt with,
- (c) To provide for the establishment of a formal access network, by means of roads and rights of way, in the Western Division,
- (d) To establish the rights and responsibilities of lessees and other persons with respect to the use of land in the Western Division,
- (e) To ensure that land in the Western Division is used in accordance with the principles of ecologically sustainable development referred to in section 6(2) of the *Protection of the Environment Administration Act 1991*,
- (f) To promote the social, economic and environmental interests of the Western Division,
- (g) To make other provision for the effective integration of land administration and natural resource management in the Western Division.

### **1.5.2 Road Access**

Historically, the former Department of Lands adopted a policy, when subdividing Crown lands for sale or lease in the Eastern and Central Divisions, of ensuring that each parcel intended for separate occupation would, as far as practicable, be serviced by land reserved as a road. However, this policy was not routinely followed in the Western Division, and settlers used a series of undefined tracks to provide a practicable means of access through the Division.

The system of access was far from satisfactory for a number of reasons. First, there was uncertainty about the public's right of access through leases and to places of interest. In addition, this acted as an impediment to the development of tourism and recreation industries. Second, there was the problem of legal liability should a road accident occur. Third, many lessees could only reach their properties by crossing neighbouring properties, and there was the potential for access to be obstructed when disputes between neighbours arose. Fourth, in the absence of an official legal system of roads, landholders had little control over who entered and crossed their land, a situation that threatened the safety and security of their families.

The amendments to the *Western Lands Act 1901* in 2002 inserted provisions to enable the creation of a legal road and access network for the Western Division in the form of public roads and rights of way. These provisions facilitate the creation of a system of public roads linking cities, towns and villages and providing access to places of significant public interest, and provide a legal means of access to land locked properties.

These provisions enable the withdrawal of any land from a lease which is being used as a public road and for the dedication of that land as public road. It is anticipated that approximately 20,000 kilometres of road in the Western Division will be defined and dedicated in this manner. The *Western Lands Act 1901* also makes provision for a Western Lands lessee to apply for the creation of an easement, in the form of a right of way, over land which is considered as being used as a road or a track.

The Department of Lands has commenced a project to create an access network as described above. The project will take several years to complete.

### **1.5.3 Tenures**

Amendments were made to a number of provisions relating to the administration of tenures. These amendments, which are outlined below, make for more efficient administration and flexibility when dealing with tenures and remove outdated and antiquated provisions.

#### **1.5.3 (a) Minister's Consent**

The requirement for a Western Lands lessee to obtain the Minister's consent to mortgage a lease has been removed. The Department of Lands would ordinarily receive approximately 200 applications of this type annually.

The requirement to obtain the Minister's consent to sublease a holding was also removed. The provisions in the *Western Lands Act 1901* now only require the lessee to advise the Department of Lands of details of a sublease agreement and to ensure that the sublease is consistent with the permitted lease purpose of the head lease.

Provisions requiring the registration of a transfer within six months of the Minister's consent being granted were removed. This amendment gives landholders greater flexibility in conveyancing transactions.

#### **1.5.3 (b) De-restriction of Holdings**

The *Western Lands Act 1901* now allows for a declaration to be made that the consent of the Minister to the transfer of certain leasehold lands is not required. The amendment only

applies to leases held for residential, business, community or similar purposes which are less than 4,050 square metres in size (1 acre). This amendment enables the removal of this restriction by way of notification in the NSW Government Gazette.

The Department of Lands has utilised this new provision to remove the consent to transfer requirements from approximately 2,200 Western Lands Leases held for residence.

### **1.5.3 (c) Licences over Leases**

A Western Lands Lease may only be used for its granted purpose. Provisions for the grant of a Crown licence over a Western Lands Lease, with the lessees consent provide for greater flexibility in land use and have authorised such diverse uses on leases as car rallies, driver reviver stations, Rural Fire Service sheds, emergency airstrips, and signage. This mechanism has also been used for 'access' and 'pipelines', in lieu of the more expensive option of establishing easements.

### **1.5.3 (d) Conversion of Agricultural Leases to Freehold**

Whilst the opportunity to convert Western Lands Leases held for 'agriculture, horticulture or similar purposes' to freehold was widely supported during the Kerin Review, the opportunity has not been pursued by landholders with any degree of vigour. Only a relatively small number of holdings have been converted.

The Kerin Review also considered the conversion to freehold of Western Lands Leases held for the purposes of 'grazing'. It was recommended that leases held for the purposes of grazing should not be eligible for conversion to freehold. It was considered that a system of leasehold tenure was the most relevant to extensive low productivity areas of rangelands due to the ability of leasehold tenure to accommodate multiple uses as opposed to exclusive use by freeholding.

### **1.5.3 (e) Relaxation of Conversion Provisions**

The statutory repayment terms on the conversion of Western Lands Leases to freehold were amended to provide greater flexibility and allow for the introduction of schemes to make the conversion of certain types of Western Lands Leases more attractive. The primary amendments were the removal of 8% interest applicable on the balance of purchase monies and the repayments term of 33 years. These amendments allow the Minister to vary repayment terms.

In November 2005, the government announced a package of concessions to make the purchase of residential Western Lands Leases more affordable, especially for pensioners. These concessions, which took effect from 1 July, 2005 are:

- Zero interest on outstanding principal;
- Adjust instalments so that the purchase may be paid off over time at the same instalment amount as the current lease rent;
- For pensioners who receive a rental rebate, their annual instalment is only the rebated rental amount they pay, which was capped by the Minister at \$200 per annum;



- Once an agreement to purchase is confirmed the amount of instalment becomes 'locked in' for that period and is not subject to future changes in land value;
- There is no penalty for additional lump sum payments or payment in full;
- Waiving of the need for a field assessment report or individual valuation assessment which have previously cost in the ranges of \$100 to \$300 and \$250 to \$400 respectively; and
- Waiving of processing fees for pensioners, a saving of \$210.

Since the announcement of the concessions, more than 1,420 applications have been received. Of these, approximately 50% have been lodged by pensioners. 1,380 have already been finalised. This represents the conversion of nearly two-thirds of the residential Western Lands Leases originally eligible for the program.

This scheme has given residential lessees in the Western Division the capacity to obtain a greater interest and equity in their land, where they might otherwise have been unable to.

#### **1.5.4 Rents**

The amended *Western Lands Act 1901* established a completely new system for setting and periodically adjusting rents. The former rental system was considered to be anomalous, subjective, inequitable and out of date.

The inequity was demonstrated by the fact that some landholders were paying up to 30 times as much rent as their neighbours for the same land use on similar land. These anomalies arose, in part, from a system that set rent on leases for agriculture and leases for grazing in different ways.

Under the current rental system introduced in 2004 there is a base rent applying to the entire landholding, regardless of whether the land is used for grazing or agriculture. The base rent is set on a sliding scale so that a lower weighted average per hectare charge applies to larger landholdings. This is in recognition that many of the largest grazing properties are on the least productive land in the north-west of the Division.

Where lessees use some or all of their farms for cultivation and/or intensive agriculture, then additional higher charges apply to these areas. These charges represent premiums for land uses that impose greater 'wear and tear' on the environment. Where, in the Commissioner's opinion, lessees have an area of land set aside for managed rehabilitation or conservation purposes, a rebate is applied to the annual rent.

To cover the costs of lease administration a minimum rent for each enterprise applies. Rents are adjusted annually, based on 50% of the movement in the Consumer Price Index. The total revenue generated in the first year by the current rental regime was to approximate the total rebated rental revenue under previous arrangements. This, in effect, continued the 50% rebate that had applied since its introduction in 1994.

#### **1.5.5 The Western Lands Advisory Council**

The Western Lands Advisory Council created by the amended *Western Lands Act 1901* is similar in its functions and breadth of membership to the advisory body established under the

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*Water Management Act 2000*. It replaced the administratively created Western Lands Advisory Board.

The Council comprises specified individuals and representatives of groups who have an interest in the Western Division. The principal functions of the Western Lands Advisory Council are:

- To advise the Minister on matters relevant to the objects of the *Western Lands Act 1901*, and
- To advise the Minister on matters affecting the administration of the Western Division, and
- To consult with persons and bodies having an interest in any matter affecting the administration of the Western Division.

The 14 members comprise:

- An independent chairperson;
- The Western Lands Commissioner;
- Four people representing lessees in the Western Division, with two to be nominated by the NSW Farmers Western Division Council, one to represent pastoralists of West Darling (Pastoralists Association of West Darling), and one to be non-aligned;
- A person representing the interests of environment protection groups;
- Two people representing local councils;
- A person representing catchment management boards;
- Two people representing the interests of Aboriginal people;
- A person representing the Minister for the Environment; and
- A person representing the Minister for Agriculture.

## **1.6 View on the Current Operation of the Act**

### **1.6.1 Achievement of its Objects**

The experience of the Department of Lands during the operation of the amended *Western Lands Act 1901* is that it is generally working well to achieve its stated objects.

*(a) To establish an appropriate system of land tenure for the Western Division*

- The *Western Lands Act 1901* contains mechanisms to issue rural leases (grazing, agriculture etc.) and urban leases for purposes such as residence, community purposes and business.
- Leases can issue for a term or in perpetuity which conveys an appropriate level of equity depending on land use.
- Leases issued for residence, business and community purposes may be converted to freehold. Leases issued for agriculture, horticulture or similar purposes may also be

converted to freehold where the land uses are considered to be ecologically sustainable.

- Provisions exist for the administration of leases, in particular for the Minister to consent to the transfer, subdivision, change of lease purpose and conditions, extension of lease term, convert certain types of leases to freehold, issue cultivation permits and charge rent.

*(b) To regulate the manner in which land in the Western Division may be dealt with*

- Leases may only be used for uses consistent with the lease purpose and subject to the terms and conditions of the lease. A change in land use must be considered under the *Western Lands Act 1901* and also in conjunction with other natural resources legislation (*Environmental Planning and Assessment Act 1979*, *Native Vegetation Act 2003* etc.).
- Matters in dispute can be referred to the Local Land Board for determination.
- The Commissioner can issue an order on a leaseholder to 'do' or 'not do' certain things.

*(c) To provide for the establishment of a formal access network, by means of roads and rights of way, in the Western Division*

- The provisions contained in Part 9C of the *Western Lands Act 1901* are being actively utilised to incrementally establish a network of legal roads and easements for rights of way across the Western Division.
- Finalisation of the Legal Road Network Project will result in the general public having legal access to many tourist sites throughout the Western Division and will enable lessees to improve security of their properties and reduce trespass incidents.

*(d) To establish the rights and responsibilities of lessees and other persons with respect to the use of land in the Western Division*

- Rights of lessees and conditions of land use are clearly conveyed in the *Western Lands Act 1901* and in lease conditions.
- Rights to remove minerals, commercial or marketable timber and commercial fish are not conveyed in a lease issued under the *Western Lands Act 1901*. The power to issue licences or leases to access these resources is contained in other legislation, eg, *Mining Act 1992*, *Forestry Act 1916*, *Fisheries Management Act 1994*.
- Licences may be granted for any purpose over land held under a Western Lands Lease with the consent of the lessee.

*(e) To ensure that land in the Western Division is used in accordance with the principles of ecologically sustainable development referred to in section 6(2) of the Protection of the Environment Administration Act 1991*

- Where a change of land use is proposed under the *Western Lands Act 1901* and it does not trigger a Part 4 determination by a consent authority under the *Environmental Planning and Assessment Act 1979* (EP&A Act), the Department of Lands before giving its consent is required to consider the proposed change in accordance with Part 5 of the EP&A Act. In most circumstances this will include preparation of a comprehensive review of environmental factors.
- The Minister must be satisfied that the future use of land under a lease held for agriculture, horticulture or similar purposes is ecologically sustainable prior to issuing an approval to convert such a lease to freehold.
- The Minister must be satisfied that the future use of Crown lands proposed to be used for a specific purpose is ecologically sustainable prior to agreeing to sell such lands for that purpose.

(f) *To promote the social, economic and environmental interests of the Western Division*

- The Western Lands Advisory Council has a responsibility to report to the Minister on any matter affecting the Western Division. The Western Division community is widely represented on the Council and includes the Western Lands Commissioner.
- The Minister may reduce, waive or remit the rent, interest or fees payable on leases where it is deemed that the lessee is suffering hardship.
- The *Crown Lands Act 1989* enables the reservation of Crown land for various purposes. Section 2A of the *Western Lands Act 1901* enables the application of these provisions in the Western Division. Reserves may be granted, for example, for such purposes as public recreation, conservation, kindergartens and depots. These and other diverse purposes recognise the unique social, economic and environmental interests and requirements of the Western Division.

(g) *To make other provision for the effective integration of land administration and natural resource management in the Western Division.*

- Land use is controlled through lease conditions and purpose.
- Controls are imposed on cultivation through consent conditions.
- Principles of ecologically sustainable development must be applied when considering the freeholding of certain types of leases and the sale of Crown land.

The regulation of the manner in which land in the Western Division may be dealt with provides for a comprehensive suite of mechanisms to deal with the circumstances of the lease; be it to transfer to another party, sub-divide, control land use, etc. Some additional mechanisms may be appropriate as discussed in Section 2.

Stakeholders have commented upon current provisions which they feel should remain. These are outlined in the sections below.

### 1.6.2 Retention of Rent Provisions

The Pastoralists' Association of West Darling and the Department of Primary Industries advocate that the current rent system applied to Western Lands rural leases must be retained as it remains the most equitable form of rent for landholders. In their view, the current appeals mechanism on rents applied to a lease should also be retained. The Pastoralists' Association also indicates that consideration could be given as to whether rents should be adjusted during droughts, and whether the formula for rent calculation in the *Western Lands Act 1901* is appropriate in the context of climate change.

### 1.6.3 Retention of Local Land Boards

The Pastoralists' Association of West Darling has stated that Local Land Boards must be retained as Land Boards are considered to provide the best mechanism to solve issues at a local level and prevent matters from escalating to much costlier means of dispute resolution such as the Land and Environment Court.

## 1.7 The Review Process

The review process comprises:

1. By letter dated 24 September 2007 the Director General invited all members of the Western Lands Advisory Council to identify issues they considered should be included in the review of the *Western Lands Act 1901*. Submissions were required to be received by 31 October 2007. The Western Lands Advisory Council membership is considered to be representative of all interests in the Western Division and members were encouraged to consult with the individuals and organisations they represent to identify issues they wished to have included in the review.
2. Preparation of an Issues Paper (following review of the submissions received).
3. Review of any further submissions received following the exhibition of the Issues Paper.
4. Preparation of a final report.

The Issues Paper now presented addresses identified or otherwise relevant issues which relate to the objects of this review.

The final report will address the following:

1. Whether the policy objectives of the *Western Lands Act 1901* remain valid;
2. Whether the terms of the *Western Lands Act 1901* remain appropriate for securing those objectives;
3. Recommended actions required to address any issues impacting on the effective operation of the *Western Lands Act 1901*.

## 2. THE IDENTIFIED ISSUES

A number of issues relevant to the review have been identified by the Western Lands Advisory Council, its member organisations and the Department of Lands. These are discussed below.

### 2.1 New Land Uses and Opportunities in the Western Division

A Western Lands Lease may be used only for the purpose for which it is granted and uses ancillary thereto. Diversification is possible by altering the purpose of the lease to include additional lease purposes. These provisions have, for many years, validated additional uses on grazing leases such as farm tourism, cultivation, feedlots, film making, recreational hunting etc.

During the Kerin Review, it was identified that there was a need for a provision in the *Western Lands Act 1901* to allow for tenures to issue to a third party, from time to time, over the top of a Western Lands Lease. The needs identified at that time included such uses as military exercises, gymkhanas, car rallies, Roads and Traffic Authority depots and others. In these instances, it was intended that the use of part of the leased land would be made by a party other than the Western Lands lessee for a purpose unrelated to the lease purpose. A sublease, by the lessee, was not considered an appropriate mechanism as it would require a change of lease purpose in the first instance and possibly survey in some instances.

The mechanism adopted was the issue of a Licence under the *Crown Lands Act 1989* over the Western Lands Lease. The amendment to the *Western Lands Act 1901* which makes provision for the grant of such licences is contained in Schedule 2 (applicable provisions of the *Crown Lands Act 1989*). This provision now enables the grant of licences over a Western Lands lease, but only with the consent of the Western Lands lessee (except where the licence is for the extraction of sand, gravel or rock, in which case the consent of the lessee is not required).

In recent times there has been an identifiable need to authorise the use of leased land for public purposes. These uses include communication towers and emergency airstrips. The grant of separate leases to authorise such uses would involve a compulsory withdrawal of the land from the underlying Western Lands lease, survey of the parcel of land affected and payment of compensation for the withdrawal. Traditionally the owner or occupier of the public facilities mentioned above was a public authority of some kind, which did not necessarily require exclusive possession of the land upon which its facility was located and as such a lease was generally considered unnecessary. Validation of the occupation may now sometimes be required however, and although a licence may achieve this, the consent of the Western Lands lessee is required. The Western Lands leaseholder retains the right to refuse to provide such consent. There may be circumstances where it is necessary that the land is used in the way proposed.

This issue could be addressed by allowing the Minister for Lands to grant licences over Western Lands Leases without the leaseholders consent. This provision could be limited to instances where the proposed use of the land within the lease is considered to be a 'public purpose' and where the proposed additional use will have no more than a minimal impact on the leaseholder's exercise of its existing rights. Examples of these types of public purposes

could include communication towers, emergency airstrips, powerlines, pipelines or communication cabling.

It is noted that the construction of facilities similar to those identified above may result in some consequential disturbance of the existing interests, be it grazing or other, held in the land by the lessee. It is therefore appropriate that compensation for any loss of permitted use should be available to any leaseholder affected by such an action.

The *Crown Lands Act 1989* makes provision for Crown land to be sold, leased, licensed and exchanged and for easements to be created over it. These provisions are contained in section 34 of the *Crown Lands Act 1989*. The provisions apply generally in the Western Division except for the leasing and exchange provisions.

The *Western Lands Act 1901* enables the grant and administration of rural leases for such purposes as grazing and agriculture and for leases in urban areas for such uses as residence, community purposes and business. These provisions are considered adequate and appropriate for these land uses.

The *Western Lands Act 1901* does not adequately provide for the grant of a lease of Crown land for the development of infrastructure or significant commercial ventures.

Crown lands in the Eastern and Central Divisions of NSW are currently experiencing significant infrastructure and development proposals. The Department of Lands is issuing leases for these lands under secure long term arrangements under the leasing provisions incorporated in the *Crown Lands Act 1989*. Similar development opportunities are emerging in the Western Division of NSW.

This issue could be addressed by allowing the same mechanisms for issuing leases over Crown lands in the eastern and central parts of the State to be made available in the Western Division. This will contribute to ensuring that long term infrastructure investment and development projects on Western Region Crown land are not lost and that the State is in a position to enter into appropriate commercial leasing arrangements on Crown land to secure that investment.

## **2.2 Mining, Exploration and Agro-Forestry**

Access and rights to take various natural resources such as minerals, harvestable timber, and commercial fish are not conveyed in a lease issued under the *Western Lands Act 1901*. Access to these resources is by way of a permit, lease or licence issued by the Department of Primary Industries. Sand, gravel and rock are not a mineral (as defined in the *Mining Act 1992*) and a licence to access these resources has traditionally been issued from the Department of Lands.

In this context, the Department of Primary Industries has raised the need to facilitate use of the land for mining, exploration and agro-forestry. The Department of Primary Industries has suggested that the covenants and restrictions on title (set out in Schedule 1 of the *Western Lands Act 1901*) should be reviewed to consider whether they are consistent with the facilitation of mining, exploration and agro-forestry activities on land subject to Western Lands Leases. Under section 18 of the *Western Lands Act 1901*, each Western Lands Lease contains the covenants, reservations and exceptions set out in Schedule 1 of the *Western Lands Act 1901*. These reservations include, among other things:

- (k) Reservations in favour of the Crown of all minerals, metals, gems, precious stones, coal, and mineral oils, together with all rights necessary for ingress, egress, search, prosecution, and removal and all incidental rights and powers.

The Crown exercises its rights to search and obtain these minerals through the grant of authorities, mineral claims and opal prospecting licences under the *Mining Act 1992*. These titles are granted to third parties who effectively carry out the exploration and mining on behalf of the Crown and pay the Crown royalties on the minerals obtained.

Recently, a number of Western Lands leaseholders have sought approval for the grant of Conservation Agreements or Wildlife Refuges (under the *National Parks and Wildlife Act 1974*) over Western Lands Leases. The Minister for Lands has consented to a number of these over leasehold land. The issue of concern to the Department of Primary Industries is that the grant of Conservation Agreements and Wildlife Refuges may be inconsistent with the reservation in paragraph (k) of Schedule 1 of the *Western Lands Act 1901* in that the existence of a Wildlife Refuge or Conservation Agreement over the Western Lands Lease will prevent most exploration and mining activities from occurring on the land due to prohibitions contained in the *National Parks and Wildlife Act 1974* (see sections 70 and 71 of the *National Parks and Wildlife Act 1974*).

While these prohibitions are, strictly speaking, contained in the *National Parks and Wildlife Act 1974*, the Department of Primary Industries states that the process of seeking and approving such reservations should be considered as part of the *Western Lands Act 1901* review.

The Department of Primary Industries has suggested that regulation of the process for seeking and approving of wildlife refuges could be improved by:

- obtaining the concurrence of the Minister for Mineral Resources before giving consent to such a refuge; or alternatively
- seeking an amendment to the *National Parks and Wildlife Act 1974* that clarifies that a person carrying out prospecting operations or mining operations pursuant to a mining title over a Western Lands Lease is not committing an offence under s.70 or 71 of the *National Parks and Wildlife Act 1974*.

## 2.3 Access

### 2.3.1 Creation of Easement for Right of Way

The majority of roads or informal rights of way in the Western Division have not been formally withdrawn from leases through which they pass, nor do they have the legal status of roads or easements.

The *Western Lands Act 1901* was amended in 2002 to introduce new provisions (Part 9C) for the creation of public roads and easements. The amendments followed recommendations made in the Western Lands Review Final Report of April 2000. These amendments were strongly supported by Western Division residents, lessees and Shire Councils.



The amended *Western Lands Act 1901* makes provision for the Minister administering the *Western Lands Act 1901* to create easements to provide restricted access for 'bona fide' persons to land-locked properties only with the consent of the burdened lessee.

Part 9C Div. 2 Section 35S(2b) *Western Lands Act 1901* states:

“Such an instrument may only be made with respect to land held under a lease on the application of the lessee or lessees of that land.”

There is an existing policy of referencing both burdened and benefiting lessees to effect agreement to the location of any easement by co-signing identification diagrams and this will be retained.

In the context of this issue the Western Lands Advisory Council has suggested that any future policy include the statement that if there are conditions attached to a road easement that are not attached to the Western Lands Lease, then any change in the circumstances of either the burdened or benefiting parties be reflected in a new agreement/provisions to be negotiated between the parties and the Department of Lands. The costs of any significant changes in the legal road and easement provisions should be borne by the benefiting lessee.

The Pastoralists' Association of West Darling considers that consent from the burdened lessee should not be required for an existing access. However, with the removal from the *Western Lands Act 1901* of the requirement for this consent from the burdened lessee, the Association states that conditions need to be placed upon all lessees, to include:

1. Notification of maintenance to the burdened lessee.
2. That a condition be placed on the benefiting party that an agreement be sought from the burdened landholder for any drainage, deviation from agreed easement or works that may impact on the burdened leaseholder. These conditions would also include such things as borrow pits and travelling stock. This condition mainly applies to benefiting third parties such as electricity providers, communications companies or mining companies.
3. Agreement with the burdened leaseholder for the maintaining of gates and grids in a safe workable condition.

The Association also states that if a lessee requires an additional easement or an alternative access route the burdened party would then have to give consent and that if in the future, due to change of circumstances such as change of ownership of a lease or property amalgamation, the new owners require a new or different access route then there should be provision for the parties to negotiate a new agreement.

### **2.3.2 Access for Mineral Exploration**

The Department of Primary Industries has suggested that the interaction between the 'special easement' provisions under the *Western Lands Act 1901* and the rights of way provisions under the *Mining Act 1992* (particularly in relation to mineral claims at Lightning Ridge) should be clarified.

The Department of Primary Industries states that existing restrictions on Western Lands Leases may have the unintended consequence of restricting exploration and mining activities

by placing restriction on leaseholders that prevent them from gaining access to land for mining related activities. The Department of Primary Industries indicates that it would be appropriate to consider the extent to which provisions of the *Western Lands Act 1901* operate as a restriction on exploration and mining activities.

### 2.3.3 Wild Dog Management and Access to the Dog Proof Fence

Management of wild dogs is an important issue within the Western Division. Although the matter is generally covered by the *Wild Dog Destruction Act 1921*, the maintenance, safety and sustainability of the dog proof fence for the future is of critical importance. Section 9A of the *Wild Dog Destruction Act 1921* allows for any authorised person to enter upon land in the vicinity of the Queensland Border Fence or the South Australian Border Fence and erect and maintain a dog proof fence, however, the position is not conclusive with respect to the broad land management functions necessary to access and maintain the fence. Access to the fence and undertaking associated land management activity to maintain the fence, including on land in close proximity, is considered essential to ensure the ongoing operational efficiency of the fence.

One approach to address this issue may be to include within the *Western Lands Act 1901* a power to create easements for access and maintenance works across all NSW land parcels adjoining or in the vicinity of the fence. Assignment of a 100m wide (or similar width as appropriate) easement for the entire length of the fence could be an effective way of ensuring the viability of the fence in the future. This would enable maintenance vehicles to access the fence and allow critical maintenance and associated activities to be undertaken. This approach would also ensure that the legal right for access and maintenance is appropriately recorded on Title.

## 2.4 Boundary Fencing

An emerging issue throughout the Western Division at present is the introduction of shedding/exotic breeds of sheep for meat production and disputes arising between leaseholders in regard to boundary fencing upgrades, maintenance and replacement to limit fibre contamination with wool sheep.

Currently the *Western Lands Act 1901* imposes obligations on leaseholders to fence the boundary of the leased property, and seek contributions from an adjoining landholder. Section 18A of the *Western Lands Act 1901* states that the Commissioner is to be of the opinion that the fence will be sufficiently useful and substantial.

These leaseholder obligations do not allow for upgrading fences to a reasonable or sufficient standard on an ongoing basis and only allow the Western Lands Commissioner to enforce repair work to a boundary fence to the standard of fencing when the lease was granted.

There is no power to enforce an upgrade and this is a critical difference when compared to the effect of the *Dividing Fences Act 1991*.

The *Dividing Fences Act 1991* applies to the Western Division and, therefore, leaseholders are able to utilise the *Dividing Fences Act 1991* to determine any dividing fence disputes between them. Under the *Dividing Fences Act 1991*, one party may serve a notice to fence on the other party and if agreement is not reached the matter may be referred to the Local Court or the Local Land Board.

However, it is considered that the *Dividing Fences Act 1991* alone is inadequate to deal effectively with the problem that new sheep breeds pose for leaseholders. This inadequacy arises from the fact that there are no standards established that the Western Land Commissioner can utilise in determining what constitutes reasonable land use for the purposes of fencing or to guide the Local Court or the Local Land Board in reaching consistent and appropriate decisions on these issues.

The Pastoralists' Association of West Darling has stated that a landholder should maintain a boundary fence to a standard that will contain whatever stock they choose to run within reason so as to minimise any financial impact on a neighbour or neighbours. The Association considers that if a dispute between two neighbours cannot be solved by amicable discussion the dispute should be referred to a Local Land Board and the Commissioner should have the power to enforce the decision of the Local Land Board. Further, in the Association's view, any boundary fence reference, applicable to Western Lands Leases for grazing, should stand alone within the *Western Lands Act 1901* and not be able to be overridden by the *Dividing Fences Act 1991* as otherwise the Western Lands Commissioner would lose control.

The Western Division Council of the NSW Farmers Federation considers that the review of the *Western Lands Act 1901* should investigate options for strengthening the language defining boundary fencing within the Western Division.

To address this issue the *Western Lands Act 1901* could be amended to include fencing definitions, standards and requirements that are currently in the *Dividing Fences Act 1991* (this might include Sections 3, 4, 6, 7, 20 and 25), as well as the inclusion of provisions for the Western Lands Commissioner to prescribe other fencing standards where necessary.

This approach could empower the Western Lands Commissioner to determine and enforce fencing standards and conditions through Section 47 notices under the *Western Lands Act 1901*. Under this Section, a notice to carry out fencing can be issued, and if not complied with, action can be taken in the Local Court.

## **2.5 Western Lands Commissioner Powers**

The Pastoralists' Association of West Darling has expressed concern at what it views as the diminished role of the Western Lands Commissioner. The Association wishes for the functions of the Commissioner not to be diminished in any way.

The Association states that the amended *Western Lands Act 1901* was developed following a period of extended drought, high debt, high absentee ownership and a considerable amount of land in the hands of financial institutions due to land holders becoming insolvent. The Association states that Western Lands lessees are being increasingly regulated by departments and agencies other than their landlord, adding considerably to the bureaucratic red tape that has to be dealt with.

The Association would like to see more power and responsibilities returned to the Commissioner especially in the area of approvals for property improvements and developments with final authority in respect of these matters remaining with the Commissioner. The Association states the Commissioner should have an overriding authority for the final approval of activities such as lake bed cropping, dam construction, woody weed

control, rabbit control and other land care related activities which require the approval of a number of departments and agencies.

## 2.6 Carbon Rights and Ecosystem Services

The NSW Farmers Association Western Division Council has proposed that Part 9D Carbon sequestration and related forestry rights of the *Western Lands Act 1901* be amended to link these forestry and carbon rights to the perpetual Western Lands Lease in which it is located. This proposed amendment is intended to give the lease holder of that land the opportunity and the means to manage the natural resources contained within the lease in an economically and environmentally sustainable manner.

The Association indicates this proposed amendment would encourage producers to conserve their natural resources and manage them in a way that will benefit the whole of society. The Association believes that by giving the leaseholder a potential revenue stream from maintaining native vegetation and invasive native species it would enable existing wooded areas to be retained whilst still allowing for a viable business enterprise on the land.

In addition the Association suggests this approach would encourage other leaseholders within the Western Division to create tree plantations and carbon sinks to gain an alternate revenue stream. However, the Association recognises as with all types of production, these areas will need to be managed to decrease risk of fires and invasion of pests and weeds.

The Association believes that access to carbon rights would encourage the leaseholder to actively manage these areas to gain maximum benefit for the leaseholder and the community.

## 2.7 Ecologically Sustainable Development

The Department of Primary Industries has stated that climate change will influence decisions on what is ecologically sustainable and consideration should be given as to how these decisions will be made and whether the *Western Lands Act 1901* should give some direction in these matters. The probable impacts from climate change in the Western Division should be reviewed to determine whether the *Western Lands Act 1901* will facilitate appropriate responses in terms of social, economic and environmental goals.

The Department of Primary Industries has stated that when the drought abates there is likely to be a major restructuring of agriculture. In the Department of Primary Industries' view, consideration should be given to whether such a restructuring of agriculture is likely to occur in the Western Division and, if so, whether the *Western Lands Act 1901* will enable this to occur in an efficient manner.

The Department of Primary Industries also proposes that consideration be given to whether the ecologically sustainable development requirements under the *Western Lands Act 1901* are unnecessarily onerous, having regard to recent Land and Environment Court decisions, notably the decisions in *Gray v Minister for Planning (2006) 152 LGERA 258* and *Drake Brockman v The Minister for Planning (2007) NSWLEC 490*.

## **2.8 Western Lands Advisory Council**

### **2.8.1 Membership**

The Department of Primary Industries has stated that mining is of increasing importance in the Western Division and consideration should be given to amending the composition of the Western Lands Advisory Council to include a representative of the NSW Minerals Council or similar industry body.

### **2.8.2 Appointment**

It has been suggested that the *Western Lands Act 1901* be amended to enable Western Lands Advisory Council members to be appointed for a period of up to three years and allow for staggering of appointments to build flexibility into the process and ensure that the expertise and knowledge within the Council can be retained and used to develop and enhance the skills of new Council members.

The Pastoralists' Association of West Darling has stated that the appointment process and term of three years for Advisory Council Members should remain. The Association further states that any proposed changes to a four year term with a staggered appointment process for organisations which have more than one member would over-complicate the process.

The Association also states that three years is a considerable amount of time to be given by an individual however, those still wishing to contribute are going to feel more comfortable taking on a second term of three years, this possibly being a better way of ensuring continuity of expertise. The Association recognises that there needs to be a way of creating a balance between continuity of expertise and introducing new members with fresh ideas. The Association states that the current system would appear to be the best way of ensuring this.

## **2.9 Conversion to Freehold**

A private individual making a submission to the Western Lands Commissioner has recommended that the *Western Lands Act 1901* be amended to permit any Western Lands Lease, including a grazing lease, to be converted to freehold. It has been suggested in this submission that conversion should be permitted where, on a subjective test, it would promote ecologically sustainable development. The submission states that making it easier and less expensive to freehold Western Lands Leases will encourage investment in NSW. The private submission also recommends that 'stranded leases', that is small leases surrounded by freehold lands, should also be able to be converted to freehold.

As discussed in 1.5.3 of the paper, the Kerin Review considered the freehold conversion of Western Land Leases held for the purposes of 'grazing'. The review recommended that leases held for the purposes of grazing should not be eligible for conversion to freehold as it was considered that a system of leasehold tenure was the most relevant to extensive low productivity areas of rangelands due to the ability of leasehold tenure to accommodate multiple uses as opposed to exclusive use by freeholding.

### **3. OTHER MATTERS RAISED**

Certain other matters have been raised by stakeholders that are not related to the operation of the *Western Lands Act 1901* and are summarised below.

- Under-funding of the Legal Road Network Project.
- Clearing of invasive native scrub under native vegetation legislation.

#### **4. RESPONSES TO THE PAPER**

Responses to this Issues Paper are invited as follows:

Mr Geoff Woods

Western Lands Commissioner

PO Box 1840

Dubbo, NSW 2830

The closing date for submissions is Friday 29 February 2008.

A report on the outcomes of the review will be submitted to Parliament in mid 2008.