



Submission on the NSW Crown Lands Management Review

prepared by

EDO NSW
20 June 2014

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EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

EDO NSW's **Indigenous Engagement program** provides for the employment of an Aboriginal solicitor to work on legal issues and matters that affect the heritage of Indigenous communities.

Submitted to:

Crown Lands Management Review
NSW Trade and Investment
PO Box 2185
Dangar NSW 2309

For further information on this submission, please contact:

Rachel Walmsley
Policy & Law Reform Director
EDO NSW
T: 02 9262 6989
E: rachel.walmsley@edonsw.org.au

EDO NSW

ABN 72 002 880 864
Level 5, 263 Clarence Street
Sydney NSW 2000 AUSTRALIA
E: edonsw@edonsw.org.au
W: www.edonsw.org.au
T: + 61 2 9262 6989
F: + 61 2 9264 2414

Introduction

As a community legal centre specialising in environmental and planning law, EDO NSW welcomes the opportunity to comment on the NSW Government's *Crown Lands Legislation White Paper* (released March 2014) (the **White Paper**), which follows the Government's internal Crown Lands Management Review report (the **Review**).¹

The Review and White Paper together propose major changes to the future management and legislative framework for Crown Lands in NSW (excluding national parks and state forests). EDO NSW has received a significant number of requests for advice from community groups and members, who have indicated their concern about the widespread implications of the proposed reforms.

Overarching comments and guiding principles

EDO NSW supports the need to consider how complex intersecting legislation for Crown lands management can be clarified and harmonised. Nevertheless, we note a range of upfront concerns about the process and direction of the Government's proposed reforms.

First, the White Paper proposes significant shifts in management and potential commercialisation or sale of Crown Lands, but provides limited analysis or detail about the implications of this in a number of important areas. These areas include:

- the rationale for removing long-standing environmental principles from the legislative objects and land assessment criteria;
- resourcing implications for local council management of additional Crown lands;
- the potential for lands in public use to be converted to operational land and sold;
- the rationale for increased conversion to freehold title (against the advice of the Western Lands Advisory Council);
- the role of Local Land Services and others in managing Travelling Stock Routes;²
- how proposed reductions in notification, consultation and reporting requirements accords with State Plan goals of increased public transparency and engagement; and,
- the consequences of these changes for other stakeholders and the environment.

This lack of detail makes informed consideration difficult, and raises significant concerns about a shift away from long-term ecologically sustainable management of Crown lands.

Second, the White Paper provides no detailed consideration of the significant social and environmental benefits provided by Crown land assets – either at present or future potential (notwithstanding the terms of reference to do so³). Such studies should also consider the ability of Crown Lands to address ongoing and emergent challenges such as biodiversity loss, native vegetation recovery, and climate change responses.

Third, while the Review recommends new benchmarks, performance indicators and accounting frameworks (which the Government supports), the White Paper provides no detail on what these will look like or how they will be developed. We believe it is essential that environmental values feature prominently across these factors. We are also concerned at proposals to remove ecological sustainability principles from the objects and land assessment criteria.

¹ See: www.lpma.nsw.gov.au/crown_land/comprehensive_review_of_nsw_crown_land_management

² Briefly discussed in *Crown Lands Management Review Summary and Government Response*, p 7.

³ White Paper, p 37: *'The specific aims of the Review were to identify and recommend: key public benefits (social, environmental and economic) derived from Crown land...'*

Fourth, the White Paper relies on a range of other legislative frameworks that are in a state of flux. A high level of uncertainty surrounds ongoing reforms to local government, state planning laws, biodiversity and native vegetation protections, Aboriginal land rights and cultural heritage protections. These relationships will need to be clarified and progressively revisited through community engagement to ensure proper coordination. In these circumstances, existing or proposed environmental safeguards in other laws cannot be relied upon in the name of reducing duplication under Crown lands legislation.

Finally, it is disappointing that the White Paper is the first opportunity for public input into the reforms. Noting that the Review started in June 2012, and given the aim of ‘improving management of Crown land and increasing the benefits and returns from Crown land to the community’, upfront community input could have shaped the direction of the reforms and tested some of the White Paper’s assumptions about ‘the changing needs of the community’. We recommend further public input, ongoing community participation in governance, and public consultation on exposure draft legislation. Also, the reforms should seek to *improve*, not *reduce*, public notification and consultation – in line with State Plan goals 30-32.

Recommendation: Overall, EDO NSW supports improved legislation, governance and management of Crown lands in accordance with the following principles:

- NSW Crown lands should be managed for the benefit of the people and environment of NSW in perpetuity, in accordance with the concept and principles of *ecologically sustainable development* (ESD).⁴
- Legal safeguards are needed to ensure short-term economic benefits (such as selling or commercialising crown lands) are not given precedence over long-term social, environmental and economic values.
- Good decisions require full valuation of environmental and social values of Crown lands, including diverse contributions of ecological services, now and in the future.⁵
- Land managers should be required to assess, protect and manage Crown lands in ways that maintain or improve environmental outcomes, based on leading practices.
- Good management and accountability requires proactive community engagement, transparent processes, and public participation in management and decision-making.
- Crown lands management should integrate with state environmental protection and planning laws and policies, including to address biodiversity loss and climate change.
- Travelling Stock Routes must be conserved and managed appropriately in perpetuity.
- Ensure ongoing protection of Aboriginal cultural heritage and land rights, via tailored engagement, appropriate safeguards and whole-of-government policy integration.
- Clear regulatory responsibilities and safeguards are necessary for good governance that achieves the legislative objects.
- Proper monitoring, enforcement, auditing and reporting on Crown lands management is needed, including open standing for community enforcement of legal breaches.

The Government’s specific proposals are considered in more detail below, with specific recommendations. These comments generally follow the structure of the White Paper.

⁴ In brief, these principles include the precautionary principle; intergenerational equity; conservation of biodiversity and ecological integrity as a fundamental consideration; and improved valuation mechanisms and pricing of environmental costs and benefits (including the polluter pays principle).

⁵ For example, recreation, biodiversity habitat, pollination, water quality, soil carbon, tourism, heritage.

Proposed Legislation (Part 3)

EDO NSW agrees that the laws governing Crown lands management are unwieldy, and broadly welcomes the intention to rationalise eight pieces of legislation into one.⁶ The various inconsistencies, overlaps and ambiguities identified in the Review and White Paper should be addressed through further legislative development, community and stakeholder consultation – including exposure draft legislation. While we would support this process, a number of proposals to ‘streamline’ specific processes require deeper interrogation.

For example, the White Paper notes that ‘comprehensive transitional provisions’ will be included to carry over ‘all necessary requirements’ from existing laws (p 10), but does not provide any detail at this stage. Similarly the White Paper proposes that ‘The new legislation will retain existing provisions for sale or other disposal of crown land *where it is in the public interest*’ (p 12, emphasis added). The meaning of this assessment, and the criteria that will inform it, must be clarified – and must go beyond financial benefits in determining the best course of action. As another example, while the new legislation will not amend the *Aboriginal Land Rights Act 1983* (NSW) (White Paper, p 4), the substantive impact of proposals to facilitate conversion of leases to freehold may limit future land rights claims.

Changes to the objects and the absence of ESD from the objects

EDO NSW is concerned at the proposed departure from the current *Crown Lands Act 1989* (NSW) objects, which include ‘management of Crown land having regard to the principles of Crown land management.’⁷ One of the important Crown land management principles is ‘that environmental protection principles be observed in relation to the management and administration of Crown land.’⁸ Other Crown land principles under section 11 also promote conservation of natural resource management, sustaining the land and its resources ‘in perpetuity’, multiple use, and public use and enjoyment. We submit that the existing objects and Crown land principles should be retained in law.

The new legislative objects outlined in the White Paper include (c) ‘to integrate social, economic and environmental considerations in decisions.’ While this is an appropriate evolution in line with ecologically sustainable development (ESD), it is not sufficient in itself. No guidance is given on how this will be achieved, and other proposed objects detract from this intention. As well as reinstating Crown land principles and environmental protection principles in the new objects, draft object (c) should ‘integrate social, economic and environmental considerations in decisions *by promoting and applying ecologically sustainable development*’. ESD should be defined with reference to accepted legal principles. This aligns with other NSW environmental, planning and natural resource management (NRM) laws,⁹ and provides essential guidance on how these factors can be integrated in decision-making.

Recommendations:

- NSW Trade and Investment should consult publicly on an exposure draft of any new Crown lands legislation.
- Parameters and criteria for sale and lease of Crown land ‘in the public interest’ must be clear and go beyond financial benefits only.

⁶ Including the Crown Lands Act, Crown Lands (continued Tenures) Act, Western Lands Act, Commons Mgt Act, Trustees of School Arts Enabling Act, Public Reserves Mgt Act, and the Hay Irrigation Act.

⁷ *Crown Lands Act 1989* (NSW) s 10(b).

⁸ *Crown Lands Act 1989* (NSW) s 11(a).

⁹ Including the *Protection of the Environment Administration Act 1991*, the *Environmental Planning and Assessment Act 1979* and the *Coastal Management Act 1979*.

- Aboriginal groups must be properly engaged on the question of freehold conversion, to ensure appropriate governance and legislative safeguards for Crown lands.
- The new Crown lands legislative objects reinstate principles of Crown land management, environmental protection, conservation and management 'in perpetuity', and ensure Crown land is dealt with in accordance with those principles.¹⁰
- In order to 'integrate social, economic and environmental considerations' (draft object (c)), the legislation should also aim to promote ecologically sustainable development (ESD) and apply ESD principles in decision-making and Crown lands management.

Management arrangements for Crown reserves (Part 4)

Devolution of Crown land to Local Councils under Local Government laws

The White Paper proposes shifting much, if not most, of the responsibility for the management of Crown land to local government.¹¹ This is to be achieved by allowing certain Crown land to be regulated under local governments' plans of management pursuant to the *Local Government Act 1993* or its successor. Although we do not oppose greater local management in principle, this proposal raises a number of questions about appropriate safeguards. The reforms must provide legislative protections for devolved Crown land; adequate resources and training for councils; best practice community engagement; strong environmental safeguards; clarification of state versus local assessment criteria; and effective reporting and accountability.

EDO NSW recognises the important role that local government fulfils in understanding and identifying local environmental challenges. If councils are to be increasingly responsible for Crown lands management, the new legislation needs to include adequate provisions to prevent the land from being sold off. This was a major point of controversy in the Local Government Act review.¹² Given the history and public benefit objectives of Crown land, it is not appropriate to entrust councils with managing Crown land, only for it to be sold off under local government legislation for a one-off, short-term economic gain. Noting the difficult financial position faced by many councils, legislative safeguards are needed for a more sustainable and long-term approach to maintaining the public benefits of Crown land irrespective of who the land manager is.

In proportion with any additional responsibilities, local councils must have sufficient capacity (including resources and training) to manage, monitor and uphold protection of Crown lands. However, the White Paper fails to identify any additional management funds for local government to deliver these services. In the absence of this, there is a concern that some councils may use their additional powers over Crown lands to monetise their use in unsustainable ways and councils who wish to maintain the environmental values of areas of Crown land may be financially unable to do so.

EDO NSW is also concerned about proposals to 'streamline' consultation processes relating to Crown lands, on the basis that communities 'will have greater involvement' under local government laws (White Paper, pp 13-14, 19). EDO NSW has recently assisted clients to preserve recreational land where the local council had failed to properly consult the

¹⁰ See *Crown Lands Act 1989* (NSW), ss 10-11.

¹¹ For example, the legislative objects in the White Paper include: '(d) to provide for the management of Crown land by local government, other entities and the community as well as by the NSW government'.

¹² See EDO NSW submissions to the Local Government Act review at: http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1368/attachments/original/1396581986/140404_-_A_New_Local_Government_Act_Final_Report_-_EDO_NSW_Submission.pdf?1396581986 (April 2014); and <http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/184/attachments/original/1380534706/130705SubmissiononewLGA.pdf?1380534706> (July 2013).

community over proposed reclassification of community land to operational land.¹³ Furthermore, local government laws are in a state of flux. Implementation of a Local Government Act Taskforce recommendation for public hearings where community land is proposed to be converted or sold (White Paper, pp 13-14) remains uncertain. In line with State Plan goals 30-31, the emphasis here should be on *improving* existing consultation processes and engaging communities, rather than 'streamlining' or cutting 'red tape'.¹⁴

Any devolution of responsibility for the management of Crown land must maintain the strongest level of environmental protection. This should include a 'highest environmental denominator' approach where plans of management requirements differ under different laws. Under the Local Government Act, community land can be categorised in a number of different ways. The core objectives differ across the categories and it is worth noting that only section 36N contains a reference to sustainability.¹⁵ On the other hand, while Crown land is not subject to a mandatory Plan of Management, Crown reserve land when controlled by a reserve trust is subject to a level of environmental protection that ensures that:

*'before deciding whether or not to carry out an activity which may have an impact on the environment, reserve trusts must ensure the activity and its impacts are ecologically sustainable.'*¹⁶

In the event that additional Crown reserves are managed under a local government plan of management, this requirement of ensuring that the activity and impacts are ecologically sustainable must be clarified and maintained under the relevant local government legislation.

The White Paper proposes a new distinction between 'state' and 'local' land under the new Act. Where the reserve has primarily local significance it will be managed by a local council, presumably as part of a plan of management under the Local Government Act (p 16). The White Paper also proposes changes to *approval* and *reporting* requirements for Crown reserves managed by local councils (p 16). These proposals lack important details.

The White Paper provides no clarity on the criteria or process for distinguishing between Crown land of 'state' or 'primarily local significance'; or what may constitute a 'significant proposal' that would require approval.¹⁷ EDO NSW recommends further consultation on criteria and processes for this approach before any pilot or final policy decisions are made. Finally, EDO NSW does not support a shift to remove proactive reporting on Crown reserve management. Reporting should be efficient and effective, but should not be replaced with passive requests by the Minister for information. This is contrary to State goals to improve government transparency, public trust and community involvement (State Plan Goals 30-32). As above, reporting requirements should be updated and improved, not downgraded or removed.

¹³ See *Save Little Manly Beach Foreshore Incorporated v Manly Council (No 2)* [2013] NSWLEC 156, judgment at: <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=167216>.

¹⁴ See NSW Government State Plan, *NSW 2021* (2011). Goal 30: *Restore trust in state and local government as a service provider*; Goal 31: *Improve government transparency by increasing access to government information*; Goal 32: *Involve the community in decision making on government policy, services and projects*.

¹⁵ *Local Government Act 1993* (NSW), ss 36E to 36N.

¹⁶ Reserve Trust Handbook, p 102.

¹⁷ We note the Review recommended a strategic assessment of Crown lands to distinguish land categories, and a pilot to 'test and refine' decision criteria (recommendations 1 and 2).

New management structure for Crown reserves

The White Paper refers to the complexity of current legislative arrangements that prescribe a three-tier system for Crown reserve management.¹⁸ The White Paper proposes to abolish reserve trusts and reserve trust managers, to be replaced by a directly appointed Crown reserve manager (established as a corporation) to manage one or more reserves. While the White Paper suggests there is no advantage to maintaining trusts (p 14), an important requirement of a trust is to “*only make decisions and take actions concerning the reserve if those decisions and actions are in the interests of the reserve and the public*” and “*reserve trust managers must be able to demonstrate that all expenditure and the use of reserve trust funds is reasonable, acceptable, has been necessary and is incurred for the general purposes of the reserve trust*”¹⁹. We suggest that any incorporated bodies must have same responsibility as compulsory terms of incorporation. Corporate structures will also need to be supported by adequate public funds to ensure appropriate management of conservation values. Finally, the legislation must also ensure there is sufficient community representation in any future governance structures. EDO NSW welcomes the further views of reserve trust members on the issue of management structures.

Recommendations:

- Any shift to devolve greater Crown land management responsibilities to local councils must be accompanied by appropriate safeguards, including legislative protections for devolved Crown land; adequate resources and training for councils; best practice community engagement; strong environmental safeguards; clarification of state versus local assessment criteria; and effective reporting and accountability.
- If reserve trusts are to be replaced by incorporated reserve managers, incorporated bodies must have responsibility for ensuring all decisions and investment are in the interests of the reserve and the public as compulsory terms of incorporation. Reserve managers must be supported by adequate public funds to ensure appropriate management of conservation values.
- Legislation should provide for local community representation and participation in reserve management and governance.

Other ‘streamlining’ measures – Ownership, assessment, consent, notification (Part 5)

EDO NSW notes a number of concerns with proposed streamlining measures relating to ownership, assessment, landowner consent and notification (White Paper, pp 17-19). First, any simplification of land ownership options under the new legislation must enshrine high environmental standards and best practice management across all Crown lands. Specific issues in relation to commons are discussed further below.

Second, EDO NSW notes its concern about the future management and protection of Travelling Stock Routes (TSRs). While not discussed in the White Paper, the Review recommends that Local Land Services²⁰ (LLS) review TSRs in conjunction with other stakeholders (a recommendation supported by the Government).²¹ TSRs have ongoing

¹⁸ White Paper, p 14. Steps include: 1. Crown land dedicated or reserved by the Minister for a specific purpose, 2. The establishment of a reserve trust, 3. Appointment of a reserve trust manager to manage the affairs of the trust..

¹⁹ Trade and Investment Crown Lands (2007) *Trust Handbook: A handbook for trusts managing Crown land reserves and commons, and trustees of schools of arts* Available at:

http://www.lpma.nsw.gov.au/_media/lands/pdf/trusts_handbook/Reserve_Trust_Handbook.pdf

²⁰ In 2014 Local Land Services replaced Catchment Management Authorities and certain other bodies

²¹ *Crown Lands Management Review Summary and Government Response*, p 7.

prospects for low-impact multiple uses and are known for their high conservation values.²² They are likely to be of increasing ecological importance in a climate changed future. Accordingly, we submit that these areas, which in many cases provide biodiversity corridors, need to be conserved and managed appropriately and 'in perpetuity'.²³ The long-term public benefits of TSRs should not be compromised by giving land managers (whether LLS or other bodies) the power to divest these important assets in response to under-resourcing. Consultation on TSR management should closely involve the Office of Environment and Heritage (given TSRs' statewide conservation values), as well as local landholders, Aboriginal land councils, environment groups and volunteers. EDO NSW supports further consultation on the future management of TSRs on this basis.

Third, EDO NSW does not support the proposal to abolish land assessment requirements in the name of reducing 'unnecessary red tape' (p 18). While we support integration of Crown lands management with broader planning, environmental management and NRM laws and policies, this proposal does not accord with the reform objectives for best use and evidence-based planning for Crown lands. The White Paper provides no data on problems with the existing approach (or how often assessment requirements have been 'waived'). The proposed approach also relies on a new draft planning framework whose status is highly uncertain. If the sale, lease, dedication or reservation of Crown lands is to rely on a public benefit test, the 'relevant considerations' associated with that test need to be clearer. These should align with Crown management principles including environmental considerations and ESD principles.

Fourth, it is difficult to reconcile 'streamlining' notification of Crown lands dealings (White Paper pp 18-19) with commitments to improve consultation and 'strengthen local decision making'.²⁴ We agree that publicising proposals for use or disposal of Crown land must be transparent, simple and accessible. However, the White Paper's proposals are ambiguous and lack detail. We submit that the reforms should emphasise community *engagement* rather than purely 'notification'; that consultation should include minimum legislative requirements that can be tailored to suit local needs; and that proactive transparency and opportunities for input should be improved, not reduced. For example, creating an online notification portal (p 19) would be useful to supplement newspaper notices or similar methods; but if this implies that the community has to track this portal instead of local notification of local issues, this is not appropriate.

Finally, EDO NSW is concerned about the lack of detail on activity approvals that may qualify for a 'streamlined processes' for landowner's consent. The White Paper uses a jetty as an example of low impact development (p 18) however the construction of jetties can lead to alienation of public land and construction in sensitive marine environments potentially has significant impact on those environments. EDO NSW disagrees with this example in determining an appropriate benchmark for low-impact activities, and believes that further consultation is required on what would appropriately constitute a low impact development.

Recommendations:

- Any simplification of land ownership options under the new legislation must enshrine high environmental standards and best practice management across all Crown lands.
- Travelling Stock Routes must be conserved and managed appropriately in perpetuity. Further consultation on TSR should involve OEH, LLS, local groups and landholders.
- Legislation should retain land assessment requirements prior to Crown land dealings.

²² See for example, National Parks Association of NSW, *Our Heritage Under the Hammer: The imminent fire sale of Crown leasehold lands in NSW, their outstanding conservation values, and how they can be saved* (2005).

²³ See *Crown Lands Act 1989* (NSW), 'Principles of Crown land management', s 11(e).

²⁴ See *Crown Lands Management Review Summary and Government Response* (2014), p 11.

- Public notification/engagement requirements for use or disposal should be improved.
- Proposals to reduce requirements for landowner/agencies' consent should be limited.

Provisions for tenures and rents (Part 6)

The White Paper proposes a default position that all Crown lands will accrue 'market rent' (pp 21-22). EDO NSW notes that many community organisations hold leases or other rights over Crown land. We welcome the Government's response that 'There is no intention to require community organisations to pay market rents' (p 12), although details of this are unclear. The White Paper does not provide any analysis on the impact of minimum rents on existing users of Crown land sites. The Government needs to clarify the circumstances in which waivers would or would not apply. In addition, there must be a positive obligation for reduction of community use fees, both upon councils and other land managers, rather than a broad ministerial discretion.

EDO NSW is concerned about the proposal to allow retrospective issuing of licences where Crown land is being used for purposes without permission. Any ministerial power to retrospectively issue Crown land licences must be strictly limited. These limitations should include a prerequisite that continued use, under licence, satisfies clear 'public interest' criteria. Uses that could degrade fragile environments or that show negligent, reckless or deceptive behaviour must not be licensed. Any such approach must avoid perverse incentives to use or occupy Crown land without permission.

Finally, in relation to carbon sequestration rights (White Paper, pp 23-24), EDO NSW recommends that carbon capture projects that change the nature of the land to a lower environmental standard or that use non-native species or species in monoculture should not be permitted.

Recommendations:

- Application of fee reductions and waivers for community uses must be clarified. Land managers should be under a positive obligation to reduce rents for community uses.
- Any ministerial power to retrospectively issue land use licences must be strictly limited, and such use must first be required to satisfy clear 'public interest' criteria.
- Carbon capture projects that change the nature of the land or that use non-native species or species in monoculture should not be permitted.

Western Lands leases (Part 7)

EDO NSW does not support any proposal to water down or remove 'ecological sustainability' requirements where Western Lands agricultural or cultivation leases are proposed to be converted to freehold title (White Paper, pp 25-26). The White Paper does not include any analysis of the pros and cons of existing ecologically sustainable approaches. It also seems to question the need for these requirements, while using them as a justification for additional conversion of Crown lands with cultivation approvals (p 25).

Any consideration of the ecological sustainability test for Western Lands conversion should ensure it is meaningful and workable in practice, that it accords with Crown land principles under the Act, and ultimately promotes ESD. This analysis should be based on the best scientific information available, and involve the Western Lands Commissioner and Advisory Council, and state agencies such as the Natural Resources Commission and/or Office of Environment and Heritage. A possible enhancement of this test could include a requirement to demonstrate that future uses will 'maintain or improve environmental outcomes'.

EDO NSW does not support the proposal to allow conversion of grazing leases to freehold. We support the Western Lands Advisory Council's view that perpetual leases are appropriate and effective in limiting damage to sensitive rangelands (White Paper, p 25). As environmental impacts can last for decades, long after poor practices have ceased, these areas require binding conditions for appropriate stewardship, and ongoing oversight by the Western Lands Commissioner and Advisory Council. We also note concerns that an increase in freehold conversion may have negative impacts on future Aboriginal land claims.

EDO NSW is concerned about additional 'flexibility and streamlining measures' for Western Lands, such as fodder production without consent (White Paper, p 26). These proposals are vague and lack sufficient safeguards given the sensitivity of Western Lands and the ongoing threat of land clearing in NSW. Any proposals for additional activities without consent should be required to be sanctioned by the Western Lands Commissioner and Advisory Council in consultation with the Natural Resources Commission.

Recommendations:

- 'Ecological sustainability' requirements for Western Lands conversion must be retained. This test should be meaningful and workable in practice, accord with Crown land principles under the Act, and ultimately promote ESD.
- EDO NSW does not support proposals for conversion of grazing leases to freehold.
- Any proposals for activities without approval must be sanctioned by the Western Lands Commissioner in consultation with the Natural Resources Commission.

Stronger enforcement provisions (Part 8)

EDO NSW strongly supports proposals to harmonise and modernise investigation and enforcement mechanisms for Crown lands (White Paper, pp 28-31). More specifically, we support a broadening of remediation, removal and stop work orders by authorised officers; longer limitation periods; as well as court orders and civil penalties for contravening orders under the new legislation. It is also appropriate that proceedings be expanded to the Land and Environment Court (LEC) in addition to local courts, noting the specialist expertise of the LEC.

EDO NSW also recommends the inclusion of open standing for third party (community) enforcement of breaches of the new Crown lands legislation. This would align with proposals for 'best practice' enforcement tools. For example, we note the long-standing commitment to open standing under NSW planning and pollution laws, from which the White Paper takes its cues (p 31).²⁵ Open standing would also reflect the likelihood of greater local governance and oversight of Crown lands, should those proposals proceed.

Recommendation:

- Open standing for third party (community) enforcement of breaches should be included in new and comprehensive enforcement provisions for Crown lands.

Minor legislation (Part 9)

The White Paper notes that some commons are poorly managed and overstocked etc, and proposes to remove this category and convert commons to Crown land (p 33). It is difficult to draw conclusions on the future management and governance of commons in the absence of perspectives from trustees and beneficiaries of these historic areas. Nevertheless, EDO

²⁵ See the *Protection of the Environment Operations Act 1992*, s 252; and the *Environmental Planning and Assessment Act 1979*, s 123.

NSW has assisted community members in Camberwell with a struggle to retain local community ownership of a common, which was revoked and licensed to a mining company to facilitate an open-cut coal mine next to the village.²⁶

As part of any legislative reforms, EDO NSW recommends that legal safeguards be provided for existing commons, to enable local communities to have principal say over future use and management. In light of the potential fragility of commons to be transferred and radically converted from customary uses under current law, the legislation should ensure these historic areas remain for long-term public benefit, not short-term private economic gain.

Recommendation:

- Legal safeguards should be provided for existing commons, to enable local communities to have principal say over future use and management.

Transforming Crown Lands Division into a ‘Public Trading Enterprise’

This proposal is not significantly covered in the White Paper, but is outlined in the *Review Summary and Government Response* and accompanying FAQs.²⁷ We understand that a ‘PTE’ would have authority over all the Crown land not placed under the control of local councils. While the FAQs acknowledge that this proposal requires further detailed analysis, testing and consultation, this approach does raise a number of concerns.

First, the objective of a PTE model for Crown Lands Division seems to be primarily to ‘deliver a better [financial?] return on the portfolio of Crown Land in NSW’, with less consideration of other objectives such as the long-term conservation and enjoyment of the NSW environment. This contradicts the statement that objectives are ‘non-conflicting’, particularly in the absence of robust environmental and ESD objectives in the legislation (see above). Second, while a PTE is the Government’s ‘preferred business model’ for the future of Crown Lands Division, it is unclear what other options have been considered. Finally, there is very little clarity around future processes and timeframes for analysis and consultation.

Recommendation:

- Further analysis and consultation should address concerns about a proposed shift to Crown Lands Division as a ‘Public Trading Enterprise’.

²⁶ See *Olofsson v Minister for Primary Industries & Ors* at:

http://www.edonsw.org.au/protected_areas_public_land_management_cases; see further, <http://www.theherald.com.au/story/1954948/camberwell-common-land-fight-not-over/> (5/12/2013).

²⁷ The FAQ states that:

A Public Trading Enterprise will enable Crown lands to operate under a structure where management has clear and non-conflicting objectives, to enable it to be held accountable for both commercial performance and the delivery of social and environmental outcomes. Social and environmental expenditures (such as community service obligations) will be identified through the budget process, thereby making investments in these programs transparent and will enhance accountability. A PTE would report to the NSW government while delivering a better return on the portfolio of Crown land in NSW. In a nutshell this means that Crown Lands will function as a more accountable and transparent business.