

24 July 2016

The Hon Paul Green MLC
Chair, General Purpose Standing Committee No. 6
Legislative Council
NSW Parliament
Macquarie St Sydney 2000

Submitted online:

<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/lodge-a-submission.aspx?pk=2404>

Dear Chair and Committee members,

NSW Parliamentary Inquiry into Crown Land 2016

Thank you for the invitation to make a submission to the Inquiry into Crown Lands. We welcome the opportunity to contribute to informed debate and community dialogue on this important and complex area, namely the future of Crown lands.

EDO NSW is a community legal centre specialising in public interest environmental and planning law. We assist NSW residents to protect the environment through the law, including legal advice, representation, law reform and community legal education. We also assist the Parliament, Government and its agencies to improve and scrutinise laws that affect the environment.

The term 'Crown lands' describes extensive and diverse landscapes; environmental, cultural and socio-economic values; public and private land uses; involving many tenures, owners and managers.

As you know, the Government has proposed wide-ranging reform to modernise Crown lands management. In the past two years we have made submissions on:

- the NSW Crown Lands Management Review (see **Attachment A**) and
- the NSW Travelling Stock Reserves State Planning Framework 2016-19 (**Attachment B**)

These submissions remain relevant to the current Inquiry as the Government's reforms are ongoing and draft legislation is anticipated later in 2016. To assist the Committee we summarise the main issues raised in those submissions below.

This submission covers 6 areas:

- i) **Crown lands review to date**
- ii) **10 principles for Crown lands management: TOR (c)**
- iii) **Travelling Stock Reserves & broader Crown land use & benefits: TOR (a)**

- iv) **Concerns about sale of Crown land and limited public input or safeguards under the *Local Government Act*: TOR (b)**
- v) **Increasing Aboriginal involvement in Crown land management: TOR (d)**
- vi) **Interaction with other reforms**

We broadly refer to the Inquiry terms of reference (**TOR**) in the order (c), (a), (b), (d).

i) Crown lands review to date

Since 2012, the Government has been reviewing the law and management of NSW Crown lands (excluding national parks and state forests). This included a Review Report and a public consultation process in 2014 which summarised the Review Report and a proposed Government response (**White Paper**). It is not clear why the Review Report was not released. However, the White Paper received over 600 submissions from local councils, Aboriginal groups, reserve trusts, NGOs and community groups.

EDO NSW supports considering how complex legislation for Crown lands management can be clarified and harmonised. Nevertheless, we noted a range of upfront concerns about the process and direction of the Government's proposals.

The Government provided a response to submissions in October 2015.¹ We welcome the general approach of summarising public feedback, Government responses and next steps. The Government acknowledged diverse views and concerns with the White Paper approach, both on substance and consultation process. However, Government responses to issues raised remained brief and high-level. As such, they are not a substitute for consultation on a draft Exposure Bill.

We **recommend** consultation on an exposure draft Crown Lands Bill prior to introduction to Parliament. This will improve the legislation and strengthen community confidence in the process and outcomes of any reforms.

We **recommend** community engagement on areas of 'state' and 'local significance'.

ii) EDO NSW submission – 10 principles for Crown lands management: TOR (c)²

Our June 2014 submission analysed Government proposals for Crown lands management and law reform. We reiterate the following overarching recommendation as a framework to guide Crown lands reforms.

¹ NSW Government, Response to Crown Lands Legislation White Paper - Summary of Issues and Government Response, October 2015.

² Inquiry TOR (c): *the most appropriate and effective measures for protecting Crown land so that it is preserved and enhanced for future generations.*

EDO NSW supports improved legislation, governance and management of Crown lands in accordance with the following 10 principles:

1. **ESD:** *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).*³
2. **Legal safeguards:** *Safeguards are needed to ensure short-term economic benefits (such as sale or commercialisation) are not given precedence over long-term social, environmental and economic values. [NB: this is also relevant to Inquiry TOR (b).]*⁴
3. **Ecological services:** *Good decisions require full valuation of environmental and social values of Crown lands, including diverse contributions of ecological services, now and in the future. [Also relevant to Inquiry TORs (a) and (b).]*
4. **Maintain or improve environmental outcomes:** *Land managers should be required to assess, protect and manage Crown lands in ways that maintain or improve environmental outcomes, based on leading practices.*
5. **Engagement:** *Good management and accountability requires proactive community engagement, transparent processes, and public participation in management and decision-making. [Also relevant to Inquiry TOR (b).]*
6. **Integration:** *Crown lands management should integrate with state environmental protection and planning laws and policies, including to address biodiversity loss and climate change.*
7. **Long-term TSR protection:** *Travelling Stock Reserves must be conserved and managed appropriately in perpetuity. [Also relevant to Inquiry TOR (b).]*
8. **Aboriginal engagement:** *Ensure ongoing protection of Aboriginal cultural heritage and land rights, via tailored engagement, appropriate safeguards and whole-of-government policy integration. [Also relevant to Inquiry TOR (d).]*
9. **Governance:** *Clear regulatory responsibilities and safeguards are necessary for good governance that achieves the legislative objects. [Also relevant to TOR (b).]*
10. **Enforcement:** *Proper monitoring, enforcement, auditing and reporting on Crown lands management is needed, including open standing for community enforcement of legal breaches.*

³ In NSW crown lands, planning, pollution and environmental laws, ESD calls for the integration of environmental, social and economic considerations in decisions, based on the principles of ESD. These derive from the *Protection of the Environment Administration Act 1991* (NSW), s 6, and include:

- precautionary principle (scientific uncertainty should not delay action to avert serious harm);
- conservation of biodiversity and ecological integrity as a fundamental consideration;
- intergenerational equity (and intra-generational equity); and
- full valuation of environmental costs and benefits (including the *polluter pays* principle).

⁴ Inquiry TOR (b): *the adequacy of community input and consultation regarding the commercial use and disposal of Crown land.*

Furthermore, we strongly support:⁵

- retaining in law the existing ‘environmental protection principles’ and applying these to Crown Lands including Travelling Stock Reserves (TSRs);
- conservation of natural resources ‘wherever possible’;
- sustaining the land and resources ‘in perpetuity’ and related principles; and
- a ‘public interest test’ for sale/lease etc that is consistent with these principles, and that integrates short- and long-term considerations as required by ESD.

These principles and standards are consistent with the aim of managing Crown lands for the benefit of NSW people, present and future.

We **recommend** retaining the ‘environmental protection principles’ and related principles in any reform of Crown Lands law (see ss.10-11 *Crown Lands Act 1989*). These principles should be extended to the LLS Act and TSR planning framework. We do not support removing or weakening these principles.

Our full 2014 submission outlined more specific recommendations and analysis.⁶ These are summarised for the Committee at **Attachment A**.

iii) EDO NSW submission – Travelling Stock Reserves (TSRs): TOR (a)⁷

Our December 2015 submission recommended the draft *TSR Strategic Planning Framework (2016-19)* address and clarify the following 9 areas:

1. Integrate with other legislative, planning and biodiversity frameworks.
2. Assess environmental benefits, cumulative impacts and future threats.
3. Uses and values of Crown land/TSRs – comments on categories and criteria.
4. Community engagement, respect and dialogue about TSR roles in the future.
5. Recognise diverse Aboriginal interests in TSR management [see also TOR d].
6. Adequate resources and capacity.
7. Identifying, monitoring and reporting outcomes.
8. Pilot ecosystem services assessment and environmental accounting.
9. Legislative change must address community concerns about the wider Crown Lands Review.

We **recommend** the Committee consider issues raised in EDO NSW’s submission on Travelling Stock Reserves as relevant to broader Crown lands use/management. These include integrated laws; environmental benefits, impacts and ecosystem services; land use and values; community engagement; Aboriginal management and diverse interests; resourcing; monitoring & reporting; and environmental accounts.

⁵ See sections 10-11 *Crown Lands Act 1989*.

⁶ EDO NSW Submission on the NSW Crown Lands Management Review (June 2014) [Download PDF](#). June 2014 - [Download PDF](#). Also via: www.edonsw.org.au/planning_development_heritage_policy.

⁷ Inquiry TOR (a): *the extent of Crown land and the benefits of active use and management of that land to NSW*.

For further analysis and recommendations on TSRs and Crown lands management, please see our previous submissions and summaries at **Attachments A and B**.

iv) Concerns about sale of Crown land and limited public input or safeguards under the *Local Government Act*: TOR (b)

We welcome statements in the Government's response to White Paper submissions that the reforms are not aimed at cost-shifting or selling-off Crown lands (p 16). However, even if this is not the intent, the depth of community concern about potential sale by cash-strapped councils remains real, and are not fully addressed.

The Government response does not deal with the substance of community concern about additional safeguards around conversion from community to operational land under the *Local Government Act 1993 (LG Act)*. Rather, it appears to endorse existing LG Act processes, expand their scope, and express confidence that these are adequate for community input and oversight. The evidence for this view should be tested particularly given Government's own concerns about local council capacity.

We make three further related comments on TOR (b).

First, in the ongoing reforms to the LG Act, we have raised concerns on behalf of clients and communities about effectiveness and scrutiny over land conversion processes. For example:

EDO NSW ... supports the recommendation to include an independent public hearing process before community land has its dominant use changed, or is otherwise considered for disposal. Public land is often of great importance to the community and local environment. It is therefore important to ensure that there are safeguards surrounding inappropriate use and disposal. This should include clear local notification in relation hearings, and more generally, improved education for community engagement on public land holdings and their current and future uses.

...

Any change to community land management needs to ensure that natural, ecological or other community values of the land are properly recognised; that there is transparency in the way in which decisions are made; and there is an appropriate level of detail for the management of individual areas of land.⁸

Second, community (and council) submissions suggested the White Paper lacked proper consideration of environmental and social benefits of Crown lands. The Government response acknowledged these concerns, but it is not clear it addressed them. To compound this, LG Act reforms may weaken commitments to achieve ESD, and reduce reporting such as State of Environment reports by local councils:

EDO NSW remains concerned that the [LG Act] Taskforce's recommendations downplay the importance of local government in stewardship and management of the

⁸ EDO NSW *Submission on A New Local Government Act for NSW Final Report* (April 2014), p 6, 'Public land', [Download PDF](#).

*local environment. In particular, the Taskforce's recommendations on the purposes of the new Act remove all reference to the environment.*⁹

Third, these concerns are exacerbated by a lack of statewide environmental and NRM goals to guide Crown land and local council land management (see **Attachment C** for previous statewide targets). This makes local and regional goal-setting, monitoring and reporting more difficult, and reduces public confidence in the process.

We **recommend** the Government apply new safeguards in the *Local Government Act 1993* to increase public scrutiny over, and accountability for, any Crown lands transferred to local councils.

In particular new safeguards would include (as noted in **Attachment A**):

- appropriate legislative protections for devolved Crown land (including stronger safeguards around conversion from community to operational land);
- adequate resources and training for councils;
- best practice community engagement (see Government Response paper, p 12);
- strong environmental safeguards;
- clarification of state versus local assessment criteria; and
- effective reporting and accountability.

v) Opportunities to increase Aboriginal involvement in Crown land management: TOR (d)

We strongly support opportunities for Aboriginal people to manage Crown land. This should include, for example:

- joint management arrangements (such as for TSRs);
- as Crown land managers in their own right (such as through Traditional Owners/Native Title Groups and Aboriginal Land Councils);
- identified positions on Crown land management bodies;
- staff and board positions in LLS and local councils; and
- on community advisory bodies.

We **recommend** that the Government and its agencies prioritise early and culturally appropriate engagement with peak bodies and local Aboriginal groups on Crown lands reform. For example, Aboriginal people must be properly engaged on the question of freehold conversion, to ensure appropriate legislative and governance safeguards; and be engaged with to clarify interactions with NSW land rights law, federal native title and culture and heritage protection reforms.

⁹ Ibid, p 2.

vi) Interaction with other reforms

The Crown lands review is one of at least 6 concurrent areas of major reform relating to NSW planning, environment and natural resource management laws. It is often difficult for communities (and agencies) to work out how different reforms piece together. Other reforms that simultaneously affect crown land management include:

- *Coastal Management Act 2016*, related mapping and Coastal SEPP;
- LLS Amendment Bill (native vegetation) and Biodiversity Conservation Bill;
- Reforms to the *Environmental Planning and Assessment Act* and SEPPs;
- Reforms to the *Local Government Act*, separate to council amalgamations;
- Proposals for new standalone Aboriginal culture and heritage protection laws.

We support the ongoing review of law and policy to best serve the community and our environment. Nevertheless, the number of in-progress reforms can limit the ability of community members, law-makers and government agencies to oversee, understand and effectively participate in so many concurrent reforms.

We **recommend** agencies take every opportunity to engage and explain proposed reforms and their interactions clearly. This includes making clear the roles and responsibilities of different agencies, and how different laws may interact.

Thank you for considering our submission. If there are any matters that you would like to discuss please do not hesitate to contact the EDO NSW Policy and Law Reform team on (02) 9262 6989 or by email.

Yours sincerely,
EDO NSW



Mr Nari Sahukar
Senior Policy & Law Reform Solicitor

ATTACHMENTS

Attachment A:
EDO NSW, *Submission on the NSW Crown Lands Management Review (2014)* and recommendations summary

Attachment B:
EDO NSW, *Submission on the NSW Travelling Stock Reserves State Planning Framework 2016-19 (December 2015)*

Attachment C:
Natural Resource Commission statewide NRM targets (2010-15)

Attachment A:

EDO NSW, *Submission on the NSW Crown Lands Management Review (June 2014)* and summary of 2014 recommendations

Download PDF. Via: www.edonsw.org.au/planning_development_heritage_policy.

Our overarching recommendation from this submission is reiterated above. We summarise our more specific recommendations to Government in 2014 below.

Summary of EDO NSW recommendations – 2014 Crown lands submission

Proposed legislation

- 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.
- 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.
- 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

- 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

- 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 Reserves (TSRs) 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
- 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

- 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

- '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

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

Minor legislation

- Legal safeguards should be provided for existing commons, to enable local communities to have principal say over future use and management.
- Further analysis and consultation should address concerns about a proposed shift to Crown Lands Division as a 'Public Trading Enterprise'.

Attachment B:

EDO NSW, *Submission on the NSW Travelling Stock Reserves State Planning Framework 2016-19* (December 2015)

Download PDF. Via: www.edonsw.org.au/planning_development_heritage_policy.

Attachment C:

Natural Resource Commission statewide NRM targets (2010-15)

NSW Natural Resources Monitoring, Evaluation and Reporting Strategy 2010–2015, Appendix 1:¹⁰

By 2015 there is an increase in native vegetation extent and an improvement in native vegetation condition.

By 2015 there is an increase in the number of sustainable populations of a range of native fauna species.

By 2015 there is an increase in the recovery of threatened species, populations and ecological communities.

By 2015 there is a reduction in the impact of invasive species.

By 2015 there is an improvement in the condition of riverine ecosystems.

By 2015 there is an improvement in the ability of groundwater systems to support groundwater dependent ecosystems and designated beneficial uses.

By 2015 there is no decline in the condition of marine waters and ecosystems.

By 2015 there is an improvement in the condition of important wetlands, and the extent of those wetlands is maintained.

By 2015 there is an improvement in the condition of estuaries and coastal lake ecosystems.

By 2015 there is an improvement in soil condition.

By 2015 there is an increase in the area of land that is managed within its capability.

Natural resource decisions contribute to improving or maintaining economic sustainability and social wellbeing.

There is an increase in the capacity of natural resources managers to contribute to regionally relevant natural resource management.

¹⁰ Source: NSW Natural Resources Commission (2007), *State-wide Targets for Natural Resource Management Fact Sheet*, Sydney.