Submission on the draft Crown Land Regulation 2017

prepared by

EDO NSW
22 September 2017

About EDO NSW

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 30 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.

Submitted to:

Draft Crown Land Management Regulation comments
Department of Industry Lands and Forestry
PO Box 2185
Dangar NSW 2309

By email: legislation@crownland.nsw.gov.au

For further information on this submission, please contact:

Mr Nari Sahukar
Senior Policy & Law Reform Solicitor
EDO NSW
T: 02 9262 6989
E: nari.sahukar[at]edonsw.org.au

Ms Rachel Walmsley
Policy & Law Reform Director
EDO NSW
T: 02 9262 6989
E: rachel.walmsley[at]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 2412

Introduction

EDO NSW welcomes the opportunity to comment on the draft Regulations to underpin the *Crown Lands Management Act 2016* (**CLM Act**). When it commences, the CLM Act will repeal and replace the *Crown Lands Act 1989*, the *Western Lands Act 1901* and a number of other NSW laws relating to different types of Crown land.

The CLM Act and Regulations are significant because they will regulate the future management, use and potential transfer or sale of publicly owned land in NSW. As the Government's Crown lands review has recognised, NSW communities value their Crown lands in many different ways – culturally, environmentally, socially and economically.

This submission makes comments and recommendations on the draft Crown Lands Management Regulation 2017 (**draft Regulation**) in two parts.

Part A makes high-level comments on what is and is not addressed in the draft Regulation, how key concepts could be applied and strengthened; how the reform package fits together; and its interaction with other major reforms in progress. Key concepts and necessary clarifications include:

Community engagement strategies
Crown land management principles
Crown land management rules
Guidelines for draft Plans of Management
Principles of environmental protection should include ESD principles
Crown Land Commissioners
Travelling Stock Reserves
Effect of the new land clearing system (including set asides/offsets)
Open standing to enforce breaches is essential to a modern Crown lands legal framework

Part B comments on the details of the draft Regulation, which includes:

Part 1 Preliminary
Part 2 Use of Crown Land
Part 3 Management and vesting of Crown Land
Part 4 Dealings and holdings
Part 5 Land in Western Division
Part 6 Administration
Part 7 Miscellaneous
Schedules 1-4[1]

We hope this submission assists the Department and Minister to finalise the legislative package in a way that engages the community and diverse stakeholder interests, protects the unique environmental values of NSW for the present and future, and values the diverse contribution of NSW Crown lands in perpetuity.

[1] Schedule 1: Fees; Sch. 2: Penalty notice offences; Sch. 3: Standard form trust instrument (institutional private trust land); Sch. 4: Amendment of savings and transitional provisions of the CLM Act 2016. We have no specific comments on *Schedule 1*, *Schedule 3* or *Schedule 4*.

Part A - High-level comments on the draft Regulation

Complexity and effective engagement

Some length and complexity of Crown lands legislation is unavoidable given the various land types, values and historical uses of Crown land across NSW, and the endeavour to update and consolidate many laws into one new Act. Nevertheless, the ability for community members to engage, interrogate, understand and comment on the draft Regulations is limited by the need to work out how they interact with the new Act and the nature of the consultation (4-5 weeks by written submission only, limited detailed explanation).

We welcome separate, targeted and ongoing consultation occurring on areas such as community engagement strategies. However as noted below, the draft Regulation does not deal in detail with community engagement strategies, or a number of other significant areas in detail, and there is limited public information to piece together the Government's intention for how different parts of this complex reform will interact.

We **recommend** publishing clear, simple and prominently accessible explanatory material prior to the commencement of the CLM Act and Regulation, once finalised.

Applying and strengthening key concepts under the Act and Regulations

As noted, a number of areas important to the success of the Crown lands reform package are not fleshed out in the draft Regulation. In particular we refer to aspects that are important to deeper community engagement and environmental protection.

Community engagement strategies

Despite being an expected centrepiece of the new Crown land management system, the draft Regulation provides no further details on community engagement strategies (see CLM Act, Div. 5.3). Section 5.7 of the Act requires that such strategies (in relation to dealings or other action affecting Crown land use) must be in place by the time Division 5.3 commences.[2] The Act requires consultation and other procedures.

We **recommend** further consultation on draft community engagement strategies. We also **recommend** that community engagement strategies be informed by the Crown land management principles (for example, the principle at section 1.4(f) relates to community engagement on Crown land use, lease and sale in the public interest).

[2] *5.7 Requirements concerning approval of community engagement strategies*
(1) The Minister must, by the time this Division commences, ensure that one or more community engagement strategies have been approved for dealings or other action affecting Crown land use.
(2) A community engagement strategy has been approved for the purposes of this section even if it provides that no community engagement is required for dealings of the kind concerned.
(3) The Minister is to ensure that approved community engagement strategies are kept under regular and periodic review.

Crown land management principles

One of six objects in the CLM Act is 'to provide for the management of Crown land having regard to the principles of Crown land management.' (section 1.3(f)) The principles of Crown land management (**CLM principles**), set out at section 1.4 of the Act, are an important thread of consistent and responsible management carried over from the *Crown Lands Act 1989.*

Unfortunately the rest of the CLM Act, and the draft Regulations, are silent as to how this object is to be achieved, or the ways that CLM principles are to be considered and applied. We strongly **recommend** the draft Regulations give effect to the CLM principles by requiring decision-makers and land managers to refer to the principles at key decision-making points. In particular, we also **recommend** the CLM principles be given effect in 'CLM Rules' and Guidelines for plans of management, discussed below.

Crown land management rules

The CLM Act also provides for new Crown land management rules (**CLM Rules**) that apply to the management of dedicated or reserved Crown lands (section 3.15). The Act sets out a range of important matters such as proper conduct and environmental management.[3] The CLM Rules are also to be published in the Gazette. In the absence of further detail in the draft Regulation, we **recommend** the Government release a consultation draft of the CLM Rules before they are finalised and gazetted.

We also **recommend** that the Regulation state that CLM Rules must give effect to the CLM principles (among other things) to ensure consistency and reduce confusion about the interaction of different concepts under the Act.

Guidelines for draft Plans of Management

Division 3.6 of the CLM Act provides for the Minister to make Guidelines for draft Plans of Management for Crown land, to be published in the Government Gazette (Act section 3.34).[4] These Guidelines are important – for example, the Act says they may contain *environmental principles* and principles to facilitate Aboriginal use of Crown lands. In turn, Crown land managers must take these principles into account when drafting Plans of Management (section 3.34(2)).

In the absence of further detail in the draft Regulation, we **recommend** the Government release a consultation draft of the Guidelines before commencement.

---

[3] This may include, among other things (CLM Act s. 3.15(5)):

(g) reports and other information to be provided to the Minister,
(h) environmental standards or considerations to be taken into account in decision-making,
(i) public access to, and the use (including by the Aboriginal people of the State) of, dedicated or reserved Crown land,
(j) compliance with heritage requirements and with other requirements for the protection of dedicated or reserved Crown land,
(k) any other matters prescribed by the regulations.

[4] Excluding Crown land to be covered by a Plan of Management under the Local Government Act.

Principles of environmental protection should include ESD principles

Environmental protection of Crown lands remains at the heart of Crown land management 'in perpetuity' (CLM Act objects, section 1.3) and public expectations of ongoing stewardship by Government and land managers. For example, the CLM principles and the Guidelines for draft plans of management above seek to embed environmental (protection) principles in the Act's administration.

We **recommend** that *environmental principles* under the CLM Act and Regulation specifically include the principles of ecologically sustainable development (**ESD principles**) set out in section 6(2) of the *Protection of the Environment Administration Act 1991* (NSW).[5] Crown land managers should be expected to act consistently with ESD principles in order to achieve the objects of the Act (see CLM Act section 1.3(c)).

We also strongly **recommend** that Part 5 of the Regulations (on Western Division Land), and clause 40 (on conversion of Western Land leases to purchase agreements), require that Western Lands are managed consistently with the principles of ESD.[6] This is entirely consistent with the *Western Lands Act* that will soon be repealed (section 2(e)). Its aims include:

> *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,*

There is no indication why ESD principles are no longer appropriate, or inconsistent with the use, lease or sale of land in the public interest (as the CLM Act's objects require).

ESD principles have underpinned the legal framework for planning, environmental and natural resource management law – including the *Western Lands Act* – for decades. Experts such as Dr Allan Hawke have described ESD principles as the '[only] credible candidate for an integrative policy framework' that binds environmental, social and economic factors together in decision making.[7] Indeed, this is what the CLM Act objects require. Yet as Zada Lipman and Rob Stokes (2008) have noted in the context of planning law, setting out matters in the objects 'is no substitute for having ESD incorporated into the substantive provisions of the Act'.[8]

---

[5] For example: integrating environmental, social and economic factors in decision making; taking precautions against serious or irreversible environmental threats; considering the risks of various management options; meeting present needs without compromising future needs, and considering whether outcomes are equitable; building-in environmental and biodiversity considerations in a fundamental way; and valuing environmental costs and benefits that are often hidden from traditional decision-making processes (including via the polluter pays principle).

[6] For examples of ESD principles, see the footnote above.

[7] Hawke et al., *Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act 1999* (2009), available at www.environment.gov.au.

[8] Z. Lipman and R. Stokes, 'The technocrat is back: environmental land use and planning reform' (2008) *25 EPLJ 305* at 321.

Role of Crown Land Commissioners

The CLM Act establishes (or re-enacts) a new role for Crown Land Commissioners. However, the Regulations are silent on their functions, appointment or procedures.

Commissioners could play a key advisory or decision-making role in relation to Crown lands use, management, transfer or sale. The role is also important because when the CLM Act commences, the current Western Lands Commissioner position will be formally abolished. Along with the Western Lands Advisory Committee, the Western Lands Commissioner has played an important and trusted role in natural resource management and representation in the Western Division. A similar role should be established given the size of the Western Division Crown lands estate, and the potential for significant natural resource management decisions that will affect these lands and their future use, values and tenure.

We **recommend** that the Government consult on and clarify the role of Commissioners under the new Act before it the commences. For example, the regulations could provide more detail on their functions, appointment or procedures. They could also require the appointment of a Western Lands Commissioner (and other commissioners) to replace the existing position under the Western Lands Act.

Audit Office recommendations – including social and environmental outcomes

We **recommend** the draft Regulation be amended to give effect to various recommendations of the NSW Audit Office report on Crown lands (2016).[9]
In particular, recommendation 4 to improve community engagement in decision-making, and to measure and achieve positive social and environmental outcomes:

> *By July 2017:*
>
> - *Improve consultation with stakeholders to provide opportunities for involvement in decision-making about Crown land sales and leases, especially in cases where a change to the way the land is used is proposed.*
> - *Include meaningful and specific performance measures that drive positive environmental and social outcomes in its future business plans and clarify accountability for achieving these outcomes.*

To ensure accountability, the Regulation should demonstrate how it gives effect to the changes recommended in Audit Office's report.

Travelling Stock Reserves (TSRs)

The Act and Regulations, or consultation and guidance material, need to clarify how the new legislation will affect the future management of TSRs. For example:

- Do the general CLM Act provisions apply to TSRs as Crown reserves?
- What is changing, and what remains the same?
- Do different parts of the CLM Act affect TSRs in certain regions in different ways (e.g. Western vs Central and Eastern Divisions)?

[9] NSW Audit Office, *Sale and Lease of Crown Land* (2016), available at: http://www.audit.nsw.gov.au/news/sale-and-lease-of-crown-land.

- What is the interaction between the CLM Act and the LLS Act (for both general management [LLS Act Part 6] and new land-clearing laws [Part 5A])?

Effect of the new land clearing system on Crown land (including set asides and offsets)

The Act and Regulations, or consultation and guidance material, need to clarify how Crown lands may be affected by land-clearing applications under LLS Act Part 5A; as well as any application of the Biodiversity Assessment Method (**BAM**) or Biocertification under the *Biodiversity Conservation Act 2016*, which commenced in August 2017.

In considering this interaction ourselves, we note for example:

- Part 5A of the LLS Act (rural land clearing) generally applies to all areas of the State, with some exclusions. The system does not apply to national parks, conservation areas, or land dedicated or reserved under the *Crown Lands Act 1989* for similar public purposes.[10]
- The rural land clearing regulations suggest that the use of a land management Code to clear native vegetation, and the establishment of 'set aside areas' to compensate for such clearing, can be permitted on Crown land – each with the written consent of the Minister for Crown lands.[11]
- Issues that remain unclear include:
    - Who is eligible to apply to clear native vegetation on Crown land;
    - Who the Minister may be able to delegate decisions to, in particular on whether to give written consent to clearing, or establishing set asides;
    - Whether set asides on Crown lands can be established to compensate for clearing on private land that is contiguous with the Crown lands (we would not support this); and
    - What procedures the Government will establish to ensure adequate public consultation prior to any decision to permit land-clearing on Crown lands (noting these opportunities are generally not available under Part 5A of the LLS Act, which generally concerns private land).

Open standing to enforce breaches is essential to a modern Crown lands legal framework

Many NSW laws on planning, pollution, environmental protection and natural resource management include 'open standing' to enforce the law. Open standing allows any person to bring civil proceedings in the Land and Environment Court to remedy or restrain a breach of the Act or regulations. To date, neither the CLM Act nor the draft Regulation provide for open standing for civil enforcement.

[10] LLS Amendment Act 2016, s. 60A(b): …
(viii) land dedicated or reserved under the *Crown Lands Act 1989* for similar public purposes for which land is reserved, declared or listed under the other Acts referred to in this paragraph,…'

[11] See LLS Amendment Regulation 2017 (now part of the LLS Regulation 2014), clause 125 – Owner's consent required for clearing under codes (s 60S (4) (c)); and clause 128 – Owner's consent for set aside areas (s 60ZC), respectively.

Given the aims of the Crown lands reforms are to modern the legislative framework, including the protection of Crown lands through up-to-date enforcement powers, we strongly **recommend** provisions to allow any person to seek to remedy or restrain a breach of the Act or Regulation.[12] If this requires an amendment to the parent Act, rather than taking effect in the Regulation, then we would strongly support an amendment to the CLM Act to provide for open standing.

[12] For example:

> *'(1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.'*

See this and related provisions in the *Protection of the Environment Operations Act 1997* s. 252; see also the *Environmental Planning and Assessment Act 1979* (NSW) s. 123 (among other Acts).

Part B – Comments on Detailed Provisions of the Draft Regulation

Part 1 Preliminary (clauses 1-3)

Consistent with our comments above, we **recommend** Part 1 and Part 2 of the Regulation establish how key concepts under the Act will be given effect in decision-making.

Part 2 Use of Crown Land (clauses 4-15)

Clause 6 Responsible manager may set aside parts of dedicated or reserved Crown land for certain uses

We **recommend** a note (which is non-binding) explaining the purpose and implications of this clause, and how it is envisaged to be used. The only limitation (as drafted) is that the land, building or enclosure can be set aside for a lawful purpose on that land, subject to and consistent with any plan of management.

Clause 9 Conduct prohibited in dedicated or reserved Crown land

We generally support the added detail provided in clause 9 (e.g. prohibiting damage, introduction of pests, waste etc. See also clause 13 on Dumping of materials).

Clause 9 prescribes a maximum penalty of 50 penalty units ($5,500). Schedule 2 prescribes a penalty notice of $220 only. At a minimum we strongly **recommend** increasing this penalty notice amount to be proportionate with the need to deter the unlawful conduct and reflect the ecological and management costs of such damage.

Prohibited conduct also includes interfering with, removing or destroying 'any Aboriginal rock carving, its surroundings or any other *Aboriginal object*[13] in or on the land'. We support protection of Aboriginal cultural heritage and strongly **recommend** consulting with Aboriginal people and peak representative groups on this clause.

Subject to the views of Aboriginal people and peak representative groups on clause 9, we also **recommend**:

- specifically referring to scar trees in addition to 'rock carving', and
- noting that Aboriginal objects and declared places are protected under the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**), including obligations to report when an object or evidence is found, and offences for damage, and
- being clear that any offence or penalty under the CLM Act and Regulation is in addition to any offence or penalty under the NPW Act or its successors.

[13] Under NPWA 1974, ***Aboriginal object*** means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

We note that there may be a need to build in protections related to new cultural heritage legislation if it is enacted in NSW next year.[14]

Clause 10 Destruction or taking plants or animals

This clause states that nothing in Division 1[15] prevents a Crown land manager from authorising destruction of *pest* plants or animals (as defined in the *Biosecurity Act 2015*).[16] Nothing prevents authorising taking 'of any plant or animal that [in the manager's opinion] has assumed pest proportions or is required for scientific purposes' (subject to any Act).

We **recommend** the Government consider clarifying clause 10, such as by referring only to pests declared in the Biosecurity Regulation. We also **recommend** including an additional clause (at a minimum a note) about prohibitions and offences for harm of protected animals and threatened species, under the CLM Act and/or the Biodiversity Conservation Act.

Part 3 Management and vesting of Crown Land (clauses 16-41)

Clause 17 Community advisory groups for non-council managers

The CLM Act (section 3.29) notes the Regulations may provide for giving directions; and community advisory group membership, process and functions.

We strongly **recommend** adding a reference to community advisory groups giving advice regarding impacts on community *'and the environment'*. This draws on local people's knowledge and interests, and is consistent with integrating environmental factors in decision-making under the Act.

The Government's FAQs state that community advisory groups will only be established where there are conflicting views on the future use of Crown lands. The Regulations could provide further guidance or examples on when these groups will be established. This need not be limited to when there are conflicting views.

Clause 18 Annual reports for non-council managers

We **recommend** annual reports should be required to report on:

- any applications for land-clearing and details of any approvals or refusals (number and extent);
- details of licences and leases should include *permits* (e.g. enclosure permits);

[14] See: http://www.environment.nsw.gov.au/achreform/index.htm.
[15] Protection of dedicated or reserved Crown land
[16] See for example *Biosecurity Act 2015* (NSW) section 15, *Pests:*
(1) A ***pest*** means a plant or animal (other than a human) that has an adverse effect on, or is suspected of having an adverse effect on, the environment, the economy or the community because it has the potential to [see (a)(-j)]: …
(2) A ***pest*** includes any thing declared by the regulations to be a pest for the purposes of this Act.

- any detectable change in the status of environmental assets on the land, including the presence or absence of declared pests and weeds, threatened species and ecological communities (including their condition and extent);
- whether (and how) management operations are achieving or progressing positive social and environmental outcomes on the land (consistent with performance measures recommended by the NSW Audit Office (2016).[17]

Clauses 19-25 Statutory land manager procedures and other record keeping

Clauses 19-25 of the Draft Regulation deal with administrative processes of non-council managers and statutory land managers of Crown land (appointed via Division 3.2 of the Act). However the draft Regulations do not require any particular transparency of their operations.

We **recommend** these clauses explicitly require transparent record-keeping and reporting that is proportionate and reasonable, assisted by department guidelines.

Clause 26 Local land criteria for vesting transferable Crown land in local councils

Draft Division 3 of Part 3 relates to the important issue of vesting of Crown land. That is, the transfer of management and ownership so that it ceases to be Crown land.

Clause 26 is particularly important as it sets out criteria to determine whether Crown land should be vested in local government authorities (see CLM Act, section 4.6(2)). The criteria are a mandatory consideration before the Minister can vest the land in a local council. The Minister must be satisfied the land is suitable after considering the criteria (CLM Act section 4.6(1)(d)). Once vested, the land is no longer Crown land, although the reserved purpose may be retained.[18] Local councils will own and manage the land as community or operational land (under the *Local Government Act 1993* (NSW) depending on the type of land and the process under the CLM Act.

We **recommend** that the local land criteria include additional requirements to assess:

- the significance of the environmental values on the land; and
- future potential of the land to protect, maintain or recover biodiversity and ecological services (for example as part of a comprehensive, adequate and representative reserve system, a regional park or a state wildlife corridor, or an area of outstanding biodiversity value[19]); and
- the local council's capacity and intention to continue managing the land for the public good (as identified or assessed under draft Regulation clause 26(1)(a)).

[17] See Audit Office recommendation 4, at http://www.audit.nsw.gov.au/news/sale-and-lease-of-crown-land.
[18] Under the CLM Act, the vesting notice may specify limitations and exceptions; the land continues to be dedicated or reserved for the same purposes, as prior to vesting; and the land cannot be sold or disposed of (CLM Act s. 4.9(3)). Other rules apply if it is 'excluded land' related to native title (CLM Act s. 4.9(4) and Part 8).
[19] 'AOBVs' can be declared under Part 3 of the Biodiversity Conservation Act. They replace and expand 'critical habitat' under the former *Threatened Species Conservation Act 1995* (NSW).

Relatedly, we note that the CLM Act excludes national parks and similar land from being vested to local councils (section 4.5). However, significant environmental values are not limited to national parks or conservation reserves. By requiring specific consideration of the land's significance and potential for state or regional environmental and conservation purposes, the new system can plan for more strategic protection of significant environmental assets for the future, and help to achieve positive social and environmental outcomes.

Finally, it is unclear what is meant by 'in a way that is consistent with local planning instruments' under draft clause 26. The meaning and intent should be clarified by redrafting or an explanatory note, including as to what is a *local planning instrument*.

Clause 28 Vesting of Crown land in statutory corporations

The CLM Act's vesting provisions for statutory corporations or agencies appear to have more significant effects on the future use of Crown land compared with vesting provisions related to local councils. Once the land is vested in a statutory corporation or agency (subject to the vesting notice), the land's dedication or reservation is revoked. This puts particular importance on the regulations that govern this process.

The Act permits the regulations to specify the agencies, or kinds of agencies, that may receive land via the vesting provisions (section 4.11(1)). The Draft Regulations define the 'kind' of agencies very broadly (clause 28).

Given the extent and breadth of Crown land across NSW, we **recommend** the Regulations provide more transparency around the types of agencies that Crown land may be vested in and the purposes for which land may be put after vesting.

A note could also explain how the Government expects 'vesting' will be used in practice.

Finally we **recommend** clause 28 be strengthened to ensure that a statutory corporation is required to own and manage vested land in accordance with the purposes for which the land is dedicated, reserved or used.

As drafted, clause 28 has a discretionary gap in this regard. It requires only that the corporation is 'permitted or required to exercise its functions… consistent with' the relevant purpose; and that the relevant other Minister consents to the land transfer. Clause 28 should actually require the corporation to act consistently with the reserved purpose (etc). If that purpose is no longer appropriate, there should be a community engagement process to change the purpose while there is still an opportunity to do so – that is, while it is still Crown land.

Part 4 Dealings and holdings (clauses 29-41)

Clause 30 Sale or disposal of Crown land in Western Division within 20km of urban areas

The CLM Act says the Minister can only sell or dispose of Crown land in the Western Division if satisfied of one of the criteria listed in section 5.9. For example, the land is in an urban area, or necessary for urban expansion, or within a prescribed distance of an urban area. The draft Regulation prescribes this distance as 20 kilometres. That is, Western Crown land within 20km of an 'urban area' may be sold, if it cannot be sold otherwise under section 5.9.[20] The basis for prescribing 20km is not readily apparent.

Given the environmental fragility of Western lands (acknowledged in the RIS), their long-term public ownership and their environmental significance, we **recommend** reviewing and reducing this prescribed distance, in consultation with the Natural Resources Commission and the Office of Environment and Heritage.

We also **recommend** the Regulation clarify the meaning of certain terms used in section 5.9[21] – including the meaning of 'urban area', 'rural area' and 'substantial areas' of the land (with regard to its soil class[22]). All of these terms are important in determining whether Western Division Crown land should be retained or can be sold.

Clause 31 Short-term licences over dedicated or reserved Crown Land

Clause 31 prescribes *purposes* for which a short-term licence may be granted under the CLM Act (s 2.20).[23] We remain concerned about permitting a licence even if the purpose granted is *inconsistent* with the dedicated or reserved purpose (section 2.20(3)).

We **recommend** confirming a general pre-condition under clause 31: 'provided the short-term licence is in the public interest, and causes no material harm to the purpose for which the land is dedicated or reserved.'[24] To provide accountability, this should link to mechanisms to monitor and report on use and condition of the land, and to risk-based compliance systems.

We note the Regulations can add to considerations of 'material harm' in relation to granting secondary interests in dedicated or reserved lands (2.19(3)(f)). We **recommend** additional consideration of '*cumulative impacts* of past, present and likely future (approved) activities on the land, and pressures on the environment.'

We **recommend** the Regulations prescribe conditions or limits on grazing – related to sustainability and avoidance of harm to land, soil, water, and biodiversity.

---

[20] See Regulatory Impact Statement (RIS) for the Crown Land Management Regulations 2017, Centre for International Economics (2017), pp. 36-37.
[21] CLM Act, subsection 5.9(2) contemplates that the Regulation will clarify the detail of various terms.
[22] CLM Act, subss. 5.9(1)(e)-(f) enable land to be sold if 'substantial areas' meet certain soil classes.
[23] For example, cl.31 prescribes purposes such as access, camping, equestrian events, grazing, mooring boats, sport and recreation, stabling and 'storage'. The Act (s. 2.20(1)) says the Regulations may prescribe purposes, conditions and the maximum term of short-term licences (1 year: see cl. 31).
[24] Consistent with protections that apply to licences (as secondary interests) under the Act, s. 2.19(2).

We support the proposed maximum term of short-term licences as 1 year (clause 31(3)). We **recommend** clarifying whether they can be renewed. Appropriate safeguards must prevent short-term leases from becoming long-term impacts.

We also **recommend** clarifying the use of land as 'storage', noting its potential to be broadly interpreted and to conflict with prohibitions on waste, damage, pollution etc.

Clause 32 Licences for unauthorised users or occupiers of Crown land

The CLM Act permits the Minister to grant a binding licence on someone (without their consent) who is already using or occupying Crown land unlawfully (section 5.26). We **recommend** a note linking to offences under the Act for unauthorised use or occupation, and stating that imposing a licence does not prevent other enforcement.

Section 5.26 permits the regulation to provide for compensation or fines. Clause 32 of the Draft Regulation requires the licence holder to 'make good the licensed land' including by 'reinstating the land' to its prior condition. We **recommend** a provision that states that if remediation is inadequate or not occurring the Minister may rehabilitate the land and recover the costs as compensation.

Clause 35 Prescribed activities prohibited on easements for public access

The CLM Act deals with creation of easements for public access (section 5.51).

We **recommend** clause 35 explicitly prescribe (prevent) activities that exclude reasonable public access, consistent with the spirit of public access easements. We note that this may be the general intent of the clause and the Act (section 5.52), subject to relevant exceptions, but recommend this be made more explicit.[25]

Clause 36 Structures that may be erected on easements for public access

Draft clause 36 allows cattle grids, pipelines and pumps to be erected, without the Minister's consent, on easements for public access (in addition to fences or gates that permit access). We **recommend** clause 36 clarifies that pipelines and pumps need all necessary approvals (with examples), and must comply with any conditions of approval.

Clause 37 Prescribed assessment principles for granting consent to remove covenants or restrictions

This is a significant clause that presents environmental risks, and affects both past and future covenants and restrictions imposed on Crown land for the public benefit.[26] Given the ecological value and in many cases the sensitivity of Crown lands, the rationale for removing covenants at the request of potential purchasers under the

[25] Clause 35(2) allows certain prescribed activities with the Minister's authority; and s. 5.52 allows lessees and landholders to construct fences and gates that do not hinder public access. Elsewhere the Act allows cultivation permissions if denying public access during that period is justified for contiguous cropping (s. 5.43).
[26] For example, see note to s. 5.57 of the CLM Act.

CLM Act is questionable. For example, by contrast the former Nature Conservation Trust (**NCT**) has had considerable success in purchasing lands, applying conservation covenants and selling them as part of a revolving fund model.[27]

Division 5.10 of the CLM Act relates to restrictions and covenants on Crown land. It replaces Part 4A of the *Crown Lands Act 1989*, with some changes. Section 5.56 of the CLM Act enables the Minister to impose restrictions and covenants. Section 5.57 enables the Minister to remove them.

We have significant concerns about the breadth of section 5.57 without further clarification in the Regulations. It states that the Minister 'must' remove restrictions and public positive covenants on Crown land if the land is being sold; and the holder of a purchasable lease requests the removal.[28] For restrictions made under s. 77B of the 1989 Act, the Minister must first be satisfied that it is appropriate to remove the restrictions, after considering the *assessment principles* (in Draft Regulation clause 37). There is no requirement, for example, to consider the *reasons* the restrictions exist.

We **recommend** the draft principles be strengthened. At present the principles state that natural and cultural conservation values and habitat connectivity 'should' be maintained; and that there 'should' be no increase in the number and severity of threats to biodiversity.

While these are laudable aims, we **recommend** they be strengthened in five ways:

- First, the Minister must consider the reasons the restriction or covenant was imposed (for example, to protect significant natural assets or provide offsets).
- Second, the Minister's determination must be based on best available evidence and up-to-date information, such as recent environmental studies and baseline conditions, to measure potential or predicted future impacts.
- Third, replace the existing words 'should' with 'must' to provide clearer, more certain criteria.
- Fourth, the Minister should be satisfied that equivalent measures are in place to protect any public values concerned, if the protective restrictions or covenants are to be removed before sale.
- Finally, the assessment principles must include ESD principles,[29] in deciding whether it is appropriate to consent to the removal of a restriction or covenant.

Finally we query why section 5.57(5) of the CLM Act only refers to existing covenants (etc) under section 77B of the *Crown Lands Act 1989* (subdivision and separate dealings), and does not extend the *assessment principles* to restrictions or covenants under section 77A (protecting environmental, cultural, heritage and other significant public values). Indeed, the subject matter of the draft principles in clause 37 reflects section 77A values. In-principle we support that focus, and as noted, propose that it be strengthened.

[27] NCT was established under the *Nature Conservation Trust Act 2001*, repealed on commencement of the *Biodiversity Conservation Act 2016* and establishment of the Biodiversity Conservation Trust.
[28] The Minister must not remove restrictions on Crown land within 100m (only) of national parks or wilderness areas unless the OEH consents (CLM Act s. 5.57).
[29] As set out in the *Protection of the Environment Administration Act 1991* (NSW), s. 6(2).

We **recommend** section 5.57(5) of the CLM Act be amended[30] to preserve restrictions and public positive covenants pursuant to section 77A of the *Crown Lands Act 1989*. At a minimum, strengthened assessment principles should apply to section 77A matters – namely public environmental, cultural and heritage values protected by Crown land restrictions or covenants.

Clause 40 Purchase applications

This clause is important as it sets out considerations that the Minister must take into account before granting or refusing a purchase application for Crown land under a perpetual lease in the Western Division.

As a starting point, we **recommend** protected areas, TSRs and other significant public or environmental values should not be sold. If there are exceptions to this, protective restrictions should not be removed (see the NCT example above).

We **recommend** the Minister must also consider the ecological significance and conservation potential of the land under the perpetual lease (in addition to other uses). This should be in addition to 'whether any part of the land is protected for environmental or conservation purposes (such as conservation reserves or environmental offsets)' (draft clause 40(1)(i)). That is, the Minister's considerations should go beyond existing conservation status, to consider whether *additional* conservation status is warranted, either prior to or instead of granting a purchase. For example, the land may contain valuable TSRs that are no longer used for stock. Successive *State of the Environment* reports note the ecological value of TSRs: 'In many of these areas, TSRs… provide the best or only opportunity for improved conservation of threatened species or communities. '[31]

It is also important that sale of Crown land does not result in perverse outcomes under the new rural land-clearing system (LLS Act), such as:

- additional clearing of endangered species and ecological communities; or
- offset/stewardship or carbon payments to retain and improve the value of native vegetation where those payments do not deliver genuine, additional protection (compared to the land if it had remained in Crown ownership, and subject to any prior restrictions or covenants[32]).

We **recommend** that relevant agencies, including Local Land Services and the Office of Environment and Heritage, consider the interaction between the CLM Act and Regulation (including for purchasable Western leases), and the new Part 5A of the *Local Land Services Act 2013* (NSW) (**LLS Act**) – to avoid and minimise any perverse outcomes relating to native vegetation clearing or financial incentives.

[30] (if possible via a Schedule to the Regulation)
[31] NSW EPA *State of the Environment 2012* www.epa.nsw.gov.au/soe/soe2012/chapter5/chp_5.3.htm See further NSW EPA *State of the Environment 2016* chapter 14: 'TSRs are located on Crown land, and are often found in environments that are poorly represented in the public reserve system, heavily disturbed and in poor condition..' at www.epa.nsw.gov.au/soe/soe2015/14Protected-Areas.htm.
[32] For example under Part 4A of the *Crown Lands Act 1989* or equivalent (see clause 37 above).

As part of the application survey fee (if any, under clause 4 of Schedule 4 to the Act), we **recommend** the Regulations should enable this to include the cost of a Biodiversity Stewardship Site Assessment Report (or other relevant and scientifically valid ecological survey), to determine the potential ecological significance of the land before a grant or refusal of purchase. This is consistent with Audit Office (2016) recommendations to achieve positive social and environmental outcomes.[33]

We also **recommend** that clause 40(1)(a) be clarified to ensure that the Minister must take into account whether any agricultural development has been done 'lawfully'.

Finally we **recommend** the title of clause 40 refer specifically to Western Crown lands under perpetual leases (otherwise dealt with under Draft Regulation Part 5).

Part 5 Land in Western Division (clauses 42-60)

As noted, the Western Lands Act has for decades required Western Lands to b used in accordance with ESD principles, consistent with their importance and fragility. We **recommend** the Regulations continue to require Western Lands to be managed in accordance with ESD principles. There is no clear case for removing requirements on Western Land holders and managers to consider the short-term and long-term consequences of management actions; take precautions against serious or irreversible threats; consider present and future generations; ensure biodiversity and ecological integrity are fundamental considerations; and ensure the environmental costs and benefits of different options are properly identified and weighed up.

Clause 43 Approved activities on land under perpetual Western land leases

Clause 43 is given effect by clause 19 of Schedule 3 of the CLM Act.[34] It says the Regulation may set out approved activities (see column 1 of clause 43) provided they do not become the primary use and are carried out in accordance with the Regulation (see column 2). Proposed activities include Conservation (while not excluding Forestry Corporation harvesting), Feedlots, Recreation, Recreational shooting (subject to perimeter warning signs and public liability cover), Cultivation, Motorsport rallies (with 28 days notice to Secretary) and Renewable energy generation.

Some of the proposals for 'approved activities' could have environmental impacts on fragile Western lands, and impacts on cultural heritage (for example, sport and leisure events, motorsport rallies and cultivation). Some of the activities also have the potential to cause danger, nuisance or other concerns to neighbours (such as recreational shooting, motorsport rallies and other sport and leisure events).

[33] The Audit Office recommended (at http://www.audit.nsw.gov.au/news/sale-and-lease-of-crown-land):
By July 2017:
- *Improve consultation with stakeholders to provide opportunities for involvement in decision-making about Crown land sales and leases, especially in cases where a change to the way the land is used is proposed.*
- *Include meaningful and specific performance measures that drive positive environmental and social outcomes in its future business plans and clarify accountability for achieving these outcomes.*

[34] Land in Western Division - Approved activities on land under perpetual Western land leases.

We strongly **recommend** the Regulations include heritage and environmental assessment requirements, and public or neighbourhood consultation and (if approved) notification requirements for activities with potential impacts. Where assessments and approvals are already required under planning and environmental laws, or the CLM Act itself, the Regulations must clearly refer to the need to obtain and comply with these.

There is a significant risk of negative environmental and social impacts if the conditions in clause 43 are the *only* assessment requirements and conditions required. For clarity and consistency, and safe and orderly development, it is important these activities require assessment and oversight via the planning system.

We note further recommendations with regard to cultivation below.

Clause 59 Circumstances in which cultivation consent not required

We **recommend** the Draft Regulation clarify the meaning of cultivation. In particular, include a note in Division 7 of Part 5[35] to the effect that *cultivation* does not include native vegetation clearing to which a condition applies (as per the definition of *cultivate* under Schedule 3 to the Act[36]). We are concerned at including cultivation of up to 1000 hectares of improved pasture without adequate ecological protections of grasslands and soils (clause 43, table item 12). We **recommend** this be reduced.

We also **recommend** that fragile soils and native vegetation of ecological value (including threatened species and ecological communities) and Aboriginal Cultural Heritage should be protected from cultivation consents. The Regulation could do this by clearly excluding these areas.

As above, we **recommend** clarifying the interaction with rural land-clearing under the amended LLS Act.

Clause 60 Giving of notices about applications (Division 8 Enclosure permits)

We **recommend** the Minister give *public notice* of the time and place for considering enclosure permit applications – not only notice to directly affected landholders. These permits may be of interest to a range of users and stakeholders beyond landholders. Clause 60 should also include direct notice to any other interested parties that are known, or ought reasonably to be known, by the land manager.

---

[35] Part 5, Division 7 – Cultivation consents under Part 5 of Schedule 3 to Act (on Western Land)

[36] See CLM Act 2016, clause 41 to Part 5 of Schedule 3:

> ***41 Definitions***
> *In this Part: …*
> ***cultivate****, in relation to applicable Western land, includes the preparation of the land for cultivation and the further cultivation of the land if it has previously been cultivated, but does not include any clearing of native vegetation (as defined in the Native Vegetation Act 2003), or clearing of State protected land (as defined in clause 4 of Schedule 3 to that Act), to which a cultivation condition applies.*
> ***cultivation condition*** *is defined in clause 44 (3).*
> [Clause 44(3) says: 'A cultivation consent may be granted unconditionally or subject to any conditions (cultivation conditions) that the Minister may decide to specify in the consent.']

Part 6 Administration (clauses 61-66)

Clause 64 Advice on draft State strategic plans for Crown land

Under the CLM Act (section 12.21) the Minister is to seek advice from various sources (listed in the Regulation) on a draft State strategic plan received from the Secretary.

We **support** the requirement to consult the entities proposed at clause 64 (Office of Local Government, NSWALC, NTSCORP, OEH and the Planning Department).

In addition, we **recommend** the Natural Resources Commission and the Biodiversity Conservation Trust or Biodiversity Conservation Advisory Panel be consulted and listed at clause 64.

The Act requires the Secretary to do 'any' community engagement required by a community engagement strategy (section 12.20). In addition, we **recommend** that clause 64 of the Regulations itself require *public consultation* on a draft State plan. This would ensure that an engagement strategy is made, and that the Minister is *required* to take into account the community's advice (as a source listed under section 12.21(2)).

Part 7 Miscellaneous (clause 67-70)

Clause 69 Standard form trust instruments for trusts over institutional private trust land

Clause 69 and the standard form under Schedule 3 could include a note, explaining in plain language the types of Crown land to they apply (along with Sch 7 of the Act).

Schedule 2 Penalty notice offences

The Government's FAQs note that penalty notice are one means of protecting Crown land, and that some penalty amounts have been increased from the previous Acts. Penalty notices are generally a low-tier enforcement method for minor infringements. Schedule 2 lists on-the-spot penalty amounts for offences against the CLM Act and Regulation. However, the penalties listed in Schedule 2 are quite low (including when compared with licence application fees under Schedule 1). Penalties range from $220 to $1100 for individuals (up to $2,200 for corporations). In many cases we do not consider that these amounts reflect the need to deter unlawful conduct, or the potential damage or danger that may arise from unlawful conduct on Crown land.

We **recommend** reviewing penalties against other recent environmental or planning law amendments, and increasing penalties in proportion with the conduct prohibited.

We have no specific comments on Schedules 1, 3 or 4 of the Draft Regulation. [37]

[37] Schedule 1: Fees; Schedule 2: Penalty notice offences; Schedule 3: Standard form trust instrument for trust over institutional private trust land; Schedule 4: Amendment of savings and transitional provisions of the CLM Act 2016.