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# Submission on the draft Community Engagement Strategy under the *Crown Land Management Act 2016* (NSW)

prepared by

**EDO NSW**

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## Introduction

Thank you for the opportunity to comment on the draft Community Engagement Strategy (**draft Strategy**), which is a statutory requirement under the *Crown Land Management Act 2016* (NSW) (**CLM Act**) expected to commence in early 2018.

EDO NSW is a community legal centre specialising in public interest environmental law. In recent years we have engaged with each stage of public consultation on new Crown lands legislation, including:

- comments on the NSW Government's 2014 Crown Lands White Paper,
- the 2016 parliamentary inquiry into the Crown Lands,
- the draft Crown Lands Management Regulation 2017,
- new land-clearing rules under the *Local Land Services Act 2013* (NSW), and
- strategic planning and management of Crown land Travelling Stock Reserves.

Our submissions have emphasised the diverse environmental, social and cultural heritage values of the NSW Crown lands estate; the need to maintain and improve those values, including unique and threatened biodiversity; and the expectation that Crown lands will be managed in partnership and dialogue with local communities, as well as being managed with respect for Crown lands' diverse values and local, regional, state and national significance.

The *Crown Land Management Act 2016* is a very significant reform. Once it commences (due in 2018), a diverse range of Crown land managers can be appointed, with more emphasis on local councils and others as managers and less emphasis on the Department itself. Local reserve trusts will continue to be Crown land managers, often with new rules of governance. The draft Strategy will apply to non-council managers (including agency and departmental staff) as the Act requires.

Consultation on the Crown land reforms demonstrated wide community interests in Crown lands management. In response, the CLM Act (Division 5.3) requires a Community Engagement Strategy, or Strategies, to be developed. Once finalised, the Strategy will require various Crown land managers (*other than* local councils[1]) to notify, consult or more deeply engage with the community about 'dealings and activities'. That is, how specific areas of Crown land are managed, leased or licensed for private purposes, vested in other agencies or sold for development.[2] This includes what consultation will be required on draft plans of management.[3]

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[1] ***Council managers*** will generally need to manage Crown lands in the same way that they manage "community land" under the *Local Government Act 1993* (NSW) (exceptions apply). This includes exhibiting *plans of management* that say how land can be used and managed. See for example *Crown Lands Management Act*, s. 3.23; *Local Government Act,* ss. 36-40A.

[2] See CLM Act 2016, s. 5.5(2): "*The purpose of a community engagement strategy is to set out any procedures and other matters concerning community engagement to be followed by responsible persons for dealings with Crown land."* ***Responsible persons*** include: the Minister, the Secretary, a *non-council* manager, the Ministerial Corporation, a relevant employee of the Department, or any kind of person prescribed by the regulations.

[3] See CLM Act 2016, s. 3.35. Separately, local council managers will consult on plans of management under the *Local Government Act 1993* (for example, see ss 36-40A). See also CLM Act 2016 s. 3.23.

EDO NSW appreciates the efforts of the Department of Industry, Crown Lands & Water (**the Department**) in preparing the draft Strategy and substantial guidance. Our comments and recommendations focus on the draft Strategy, in order to increase and improve engagement and consultation on the future of Crown lands, and ensure its diverse values, significance and resources continue to be protected.

In this submission EDO NSW calls for a reorientation of the draft Strategy from a narrow concern with present "use and enjoyment", to focus instead on the recognised importance of Crown land's long-term *values* and *significance*. We also advocate a more open and inclusive approach to engagement that recognises the many benefits of engagement, especially for informed decision-making. This reflects the new Act, its objects, and the management principles that have been carried over from the existing *Crown Lands Act 1989* (NSW).[4] It also reflects contemporary expectations of community engagement regarding long-term interests and diverse public lands.

In brief, we make the following comments and recommendations on the draft Strategy:

1. **Replace proposed "current use and enjoyment" trigger with a broader test that recognises the long-term values and significance of Crown lands**
2. **Community engagement and other criteria should inform impact assessment by Crown land managers**
3. **Significantly reduce exceptions and exemptions from community engagement**
4. **Engagement principles – Crown land managers should be Accountable and Responsive**
5. **The Strategy and the Regulation must require land managers to consider public submissions in decision-making**
6. **Format of the Strategy must be clear and enforceable.**

[4] The 1989 Act will be repealed along with several other Acts when the CLM Act commences.

1. **Replace proposed "current use and enjoyment" trigger with a broader test that recognises the long-term values and significance of Crown lands**

Most significantly, we are concerned that the proposed test or trigger for community engagement is chiefly based on "detrimental impact on current use and enjoyment" of Crown lands (draft Strategy, p 9; and Part 4, p 22). This test is problematic for a number of reasons, including that it does not easily or fully capture certain environmental or Aboriginal cultural heritage values – even if it is intended to.

In particular, referring to "use *and* enjoyment" implies that detrimental impacts on land which may be "enjoyed" for its non-use values (such as conservation, or sacred significance that excludes use out of respect) may not trigger community engagement requirements.

Exclusive focus on *current* use (and users) is also problematic. The word 'current' should be deleted. Values and significance may relate to long-term cultural connections or historical practices; as well as positive, *potential opportunities* to use Crown land in appropriate ways in the future, or new opportunities to protect the land and resources for use in-perpetuity.[5] Consultation need not only deal with adverse impacts, but may also reveal positive efficiencies for land use, management and conservation affecting a dealing/activity.

We **strongly recommend** the "current use and enjoyment" test be replaced with a broader trigger for community engagement – one that better recognises the *values* and *significance* of a particular Crown land area, whether or not it is "currently used" or "enjoyed" for these values or significance. We also **recommend** that the Strategy is not limited to "detrimental impacts", but also triggered where local engagement can encourage positive change, informed decision-making or improved conditions (leading to more sustainable use for example).

These recommendations reflect the diverse objects and management principles of the CLM Act, including for environmental protection, conservation, cultural significance, multiple-use values, and sustaining the land's resources in perpetuity.[6] We recommend objective assessment criteria at 2 below.

There are a number of examples where the "current use and enjoyment" test is inappropriate. The following three examples demonstrate the need to consider values and significance.

First, Crown lands may be home to rare or threatened plants, animals and ecosystems, but little-known or inaccessible to the wider community. The Department or other land managers should not be able to change the use of this Crown land, or sell it to a private interest, without notifying and consulting with the community about the significant values on that land. Yet, many of these significant areas may not meet a "current community use and enjoyment" test. Statements in the draft Strategy confirm this. We **recommend** deleting draft propositions that re-

[5] Consistent with the objects and management principles that underpin the Act (ss. 1.3-1.4).
[6] See generally, CLM Act, ss. 1.3-1.4. Managers must take these principles into account in assessing or authorising dealings or activities: see ss. 1.3(f) and 1.4(f).

granting a 10-year lease or renewing a long-term licence has 'no impact' (pp 26, 28); and that Crown lands that are currently inaccessible do not need consultation (p 23).

Second, in addition to values that do not relate to 'access', the test for community engagement must also be broad enough to capture values that are newly discovered (or rekindled). For example, the scale of Crown lands means that many areas have not been properly studied for their biodiversity significance. We understand work is underway to improve this, and we support greater resourcing for this public benefit.[7] Local communities have an interest in access to the most up-to-date information about Crown lands, which will be increasingly important to help biodiversity adapt, cope and shift as Australia's climate changes and other extinction threats increase. Adopting a "current use" test implies that uses and values do not evolve in this way.

Third, as the Act recognises, Crown land, waters and biodiversity hold long-standing cultural significance. Aboriginal people may "currently use and enjoy" those lands, but in some cases, custodianship may be privately held rather than publicly known. In other cases, connections may have been lost (including for historical reasons of dispossession), barriers may prevent access, or cultural significance may be gradually being rediscovered. The "current use" test would exclude these voices.

Early public consultation on these areas – and in particular, tailored consultation with traditional owners, local Aboriginal communities and representative groups – can actively assist dialogue and awareness-raising on Crown lands' values that Crown land managers may not be aware of. This is also important to the second stage of the proposed test, which assesses the potential impacts of a dealing or activity as minimal, moderate or high.

In raising this example, we note and welcome the recognition of Aboriginal interests and land claims in the Act, the draft Strategy, the need for tailored consultation noted in the guidance, and engagement and consent where land claims exist. Importantly, this approach must be supported by broader recognition of values and interests beyond "current use", whether or not the land is subject to a land claim or native title. This would reflect the Act's objects to enable Aboriginal use and co-management.

## 2. Community engagement and other mandatory criteria should inform impact assessment by Crown land managers

The draft Strategy proposes a two-stage test for community engagement: first, whether the activity will negatively affect current use and enjoyment; and second, whether that negative impact will be minimal, moderate or high.[8] This in turn would define the level of community engagement required (*information*, *consultation* or *participation*).

Although the draft Strategy describes this impact assessment stage as mandatory, there are no mandatory criteria to inform it. The wording on pp 22-23 regarding considerations ('such as'…), weighted criteria scores and 'local factors' suggests

[7] For example, the NSW Environmental Trust has granted funds to assess the biodiversity values of TSRs. The EPA has developed an improved method to predict koala habitat which could also apply.
[8] See draft Strategy, p 22; and Part 7, *Engagement required for in-scope dealings and activities*, p 40.

these are only examples.[9] There is also no clear requirement for public input to inform (or change) the level of engagement required if this initial assessment is wrong.

We **recommend** the draft Strategy be updated to:

- include specific criteria for Crown land managers to consider in deciding the 'significance' of an impact (minimal, moderate or high) on community use and enjoyment, and of potential impacts on the *values or significance* of the land;
- ensure that *moderate* or *high* impacts at least require public consultation; and
- require that if initial engagement reveals higher levels of community interest or impacts, the scale of engagement must be proportionately increased (for example, *inform* to *consult*), consistent with the draft Strategy's principles.[10]

In addition, we note that the '*inform* only' category may create a mismatch with public expectations. It is also unclear whether 'inform' implies the decision has already been made, or will be made after 28 days notification. We agree that prior notification should be a default requirement. Nevertheless, upfront notice of a change to Crown land creates an expectation that interested people can: (a) readily contact someone to find out more; and (b) provide input that will be considered as part of a decision (rather than 'one-way' notification). From a preliminary review of the suggested 'scoring' process in the guidance material, we are concerned that actions with significant impacts may still only result in 'information only' to the public.

We **recommend** reconsidering and clarifying the lower tier of engagement (*inform)* to allow interested people to provide input during the 28 days. If this recommendation is not accepted, then the type of dealings and activities which result in one-way 'information only' must be minimised.

### 3. Significantly reduce exceptions and exemptions from community engagement

The draft Strategy lists several pages of dealings and activities that are automatically exempt or excepted from the Strategy's community engagement requirements (see Part 5 pp 24-32; and Part 7 overview). In other cases engagement can be waived (removed) for a variety of reasons at the Minister's discretion. We are very concerned that the wide scope of these exclusions could undermine public trust in the Strategy as a whole.

We **strongly recommend** the exceptions, exemptions and waivers be scaled back significantly before the Strategy is finalised. See details and five examples below.

[9] Without commenting in detail on the guidance document, we are concerned that 'high' or 'moderate' impacts on community use may still result in a 'score' that only requires one-way notification. The guidance doesn't assess impacts on *values* or *significance*.
[10] Page 37: *Evidence based*, *Proportionate*, *Accessible*, *Timely* and *Transparent*. See point 4 below.

### *Leases, licences, renewals & enclosures exempt from public exhibition or comment*

First, the proposal that many dealings will only require "notification on completion" is out of step with current expectations of public participation. It may also have perverse consequences for other land users, or for conserving land and resources.

Opportunities for input lead to more informed communities and decision-makers. For example, we **recommend** the Strategy give local communities upfront notice and opportunities for input where:

- a long-term lease or licence is proposed for renewal, transfer or 're-grant';
- a short-term lease or licence is proposed for a purpose *inconsistent* with the dedicated or reserved purpose (a situation we have noted with concern[11]); or
- application is made for an enclosure permit that includes a watercourse (for interested community members who aren't adjoining landowners).

It is inappropriate that the draft Strategy requires no consultation on these matters, only notice that these dealings are complete.[12] Exempting 10-year lease and licence renewals and re-grants, enclosure permits, and all short-term (one-year) licences risks contradicting the Act's objects. It could discourage sustainable and evolving multiple uses, exclude Aboriginal groups with local interests, and deprive land managers of important local information to make fair and informed decisions in the best interests of the NSW people (including on licence conditions to protect land).

This could include where an existing licensee has a history of non-compliance, where other Crown land users have been excluded, or their interests damaged (such as Aboriginal cultural heritage values). Even in these circumstances the draft Strategy would privilege the existing user, as the community need not be consulted or notified until *after* a licence is renewed.[13] Without consultation, the land manager may not be aware of these concerns, and local people may feel unfairly excluded.

Exempting short-term licences may also create a loophole that allows these licences to be repeatedly re-granted with no consultation, even for an 'inconsistent' purpose.

### *Exemptions because consultation should occur elsewhere*

Second, in some cases it appears certain dealings or activities have been exempted (such as changing or revoking a reserve purpose) because consultation will occur in relation to an associated sale, lease or licence (according to the draft Strategy).[14] It is unclear why both stages of this process should *not* be the subject of public notification and input, either separately or at the same time.

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[11] See EDO NSW *Submission on the draft Crown Land Regulation 2017*, p 14. See also CLM Act s. 2.20(3); and draft Regulation, cl. 31, *Short-term licences over dedicated or reserved Crown Land*.
[12] Permits to enclose Crown roads/watercourses should not be exempt from notification, as proposed.
[13] See for example, draft Strategy, Table 1 (*Exempted in-scope dealings and activities*) p 28.
[14] The draft Strategy also notes that if a sale, lease or licence does not proceed, an associated change to the reserve purpose would not proceed. See Table 1, p 30.

By analogy with the planning system, public consultation on rezoning isn't prevented because consultation will occur on a development proposal for that land. Rather, in some cases the public can comment first on the rezoning of land from one use to another, and later on a specific development proposal. In other cases the rezoning and development application are exhibited together.

We **recommend** that the Strategy require public engagement on certain dealings or activities (such as a change of reserve purpose), even if consultation may also occur on a specific lease or licence proposal for that purpose. In some cases it may be appropriate to consult on both at once. This will allow the community to consider both the general and the specific change.

### *Exemptions for dealings to permit unauthorised occupation*

Third, the reason for exempting licences to permit *unauthorised* occupation is unclear. While this form of licensing is a quasi-enforcement tool, other people with interests in the Crown land that is being misused may well be affected by any 'legitimising' licence and conditions. Affected stakeholders may also have valuable information or evidence that assists separate enforcement action that may occur.

### *Exemptions for applications and dealings to purchase Crown land under leasehold*

Fourth, the draft Strategy states that sales of Crown land to lessees do not require consultation or prior notification because the lessee has a right to purchase (p 19). We disagree with this assessment. Rights to purchase Crown land are not absolute, and are not purely private transactions. The draft Strategy states: 'This exemption is provided for in the Act.' However no reference is provided for this statement.[15]

As our submission on the Regulation noted, the CLM Act may require the Minister to be satisfied of various matters in the public interest before granting a purchase of Crown land. Conditions including covenants may be placed or retained on the sale.[16]

We **recommend** the Strategy give communities the right to comment on public interest matters and purchase applications prior to the Minister deciding to sell Crown land to a leaseholder, including in the Western Division.

### *Waivers of community engagement requirements*

Finally with regard to waivers (draft p 32), we **recommend** deleting the following two discretions for 'waiving' community engagement requirements:

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[15] See draft Strategy, table p 31. As we read CLM Act, s.5.4, in effect it says the Strategy will apply to:
*(b) the selling, transferring or vesting of Crown land under this Act (except if it is required or permitted under the Aboriginal Land Rights Act 1983),*
*(c) the granting of leases (except purchasable leases), licences or permits over Crown land, …*
The exception for granting of 'purchasable leases' does not in our view refer to applications for sale.

[16] See EDO NSW *Submission on the draft Crown Land Regulation 2017* (Oct. 2017), pp 14-18. See also CLM Act ss. 5.9, 5.56; and draft Crown Land Regulation, Part 4. In particular clauses 30, 37, 40.

- ‘to enable the undertaking of approved NSW Government priorities that require Crown land’; or
- ‘where the Minister is satisfied that a CLM does not have the capacity to undertake the engagement.’

At a minimum these powers to waive engagement must be clarified and limited.

With regard to the first reason above, the term “approved NSW Government priorities” is too broad and vague. If this is intended to mean “approved” major projects (State significant development or infrastructure) which have already proceeded through public consultation under the planning system, then this waiver should be specifically so limited. Otherwise it should be deleted.

The second reason above creates risks in relation to resources and competency. We recognise that resourcing and skills are both important facets of Crown land managers’ governance and effectiveness. However, if ‘capacity’ refers to *resourcing*, this creates a risk that the Minister could waive community engagement processes instead of ensuring Crown land managers are sufficiently resourced to do their job.[17] If ‘capacity’ refers to *skills*, there is a risk that engagement requirements could be waived if the land manager is not competent, instead of addressing the underlying governance issues. At a minimum, this reason should be clarified to ensure sound use of resources while avoiding unintended consequences. Otherwise it should be deleted.

## 4. Engagement principles - Crown land managers should be Accountable and Responsive

Part 6 of the draft Strategy proposes five engagement principles to guide land managers and staff (p 37). It states that engagement should be: *Evidence based*, *Proportionate*, *Accessible*, *Timely* and *Transparent*. In addition to these principles – which we support – we would add two more.

We **recommend** the Strategy be revised to include the further engagement principles, ‘*Accountable*’ and ‘*Responsive*’. We **recommend** these and other engagement principles be given effect in both the final Strategy *and* the final Crown Lands Management Regulation (below we use the draft Strategy table format, p 37):

| ***Engagement principle*** | ***Why it is important*** |
|---|---|
| **Accountable** | Crown land managers are legally required* to consider community submissions when making decisions, to ensure that public participation is meaningful, trusted and accountable.<br>**[We recommend] This is given effect in the Regulation.* |
| **Responsive** | Crown land managers are required to give statements of reasons for their decisions on dealings and activities (proportionate to the scale of impact), and to state how public submissions were taken into account and influenced the outcome of a decision. |

[17] There is already another reason the Minister can rely on if engagement costs outweigh the benefit.

We also **recommend** mandatory information notices go beyond the Department website; for example, to include local council bulletins (draft Strategy pp 36, 41-46).

We also **recommend** at least 42 days for public comment on 'high impact' proposals and on detailed draft plans of management (regardless of current use; draft p 51).[18]

## 5. Strategy and the Regulation must require land managers to consider public submissions in decision-making

While the draft Strategy includes *'mandatory minimum engagement requirements'* (see p 40), it appears there is no requirement on decision-makers (land managers) to consider public submissions received as a result.

As noted above, it is vital that Crown land managers' decisions on dealings and activities are accountable and responsive. This ties in with the draft Strategy's concept of 'closing the loop' (p 53). It requires *explaining* not just notifying a decision.

We **recommend** the final Strategy and Crown Land Regulations include clear legal requirements for decision-makers to take community submissions into account when making decisions in relation to dealings and activities. Where these or related requirements already exist by law, this should be cross-referenced in the Strategy.

Notably, the general requirement for community engagement on a *plan of management* for Crown land is limited to: 'any community engagement on a draft plan of management required by a community engagement strategy'.[19] It is therefore vital that the Strategy and Regulation specify that submissions must be considered.

## 6. Format of the Strategy must be clear and enforceable

As noted, the Community Engagement Strategy (or strategies) is a statutory or legal requirement. In some cases the draft Strategy refers to 'mandatory requirements' (see pp 40 and 46). In other cases the CLM Act itself cross-references the yet-to-be-created Strategy, requiring Crown land managers to comply with its requirements.[20]

To ensure public trust in the Strategy and the new Act as a whole, the community must be assured that engagement requirements are binding and enforceable. In some cases the language and style of the draft Strategy makes this difficult.

We **recommend** the style and language of the Strategy be reviewed to be clear about which requirements are mandatory ('must', 'required to'); which are voluntary ('should', 'could', 'such as'); which are tied to provisions in the Act that cross-

[18] Consistent with public comments on draft plans under the *Local Government Act 1993*, s. 38(3).
[19] CLM Act, s. 3.35. See s. 3.36 on prerequisites for additional purposes in plans of management.
[20] For example, s. 3.35 on draft plans of management to be consulted on as required by a Strategy.

reference the Strategy; and how a land manager would demonstrate they fulfil the mandatory requirements (or others may demonstrate requirements were not met).[21]

Particular care should be taken in the over-use of advisory language if the intent is in fact to be *directive*. For example, if the Strategy uses the word "should", this means that *not* following the process that "should" be done is unlikely to be a breach.

In other cases, accountability is difficult due to the breadth of decision-makers' discretion. In particular, on the two crucial limbs of the engagement trigger:

- deciding whether a dealing or activity will impact on current community use and enjoyment (as drafted); and if so,
- deciding whether the impact is likely to be low, moderate or high (to determine the level of community engagement required – *inform*, *consult* or *participate*).

Apart from reducing accountability, the lack of objective decision-making criteria also raises corruption risks, because broad discretion (particularly combined with low transparency) may disguise corrupt influences, attempts and misconduct.

We **recommend** the draft Strategy elaborate on these key tests, and insert clear, mandatory criteria that underpin these decisions. Otherwise it maybe very difficult to demonstrate whether a decision-maker has complied with them, and the aim to improve the quality and consistency of Crown land management and decision-making will not be achieved.

## Conclusion

Thank you for considering this submission. We hope our six main recommendations, and further detailed comments, assist the Department of Industry to finalise an open, inclusive and positive Community Engagement Strategy under the *Crown Land Management Act 2016* (NSW). We look forward to further engagement on the new system. For questions or feedback, please contact EDO NSW on (02) 9262 6989.

[21] The lack of explicit open standing for the community to enforce a breach under the Act or draft Regulation is a surprising omission that is out of step with modern legislative enforcement principles. See EDO NSW *Submission on the Draft Crown Land Regulation 2017* (Oct. 2017), p 8.