THE LAW SOCIETY
OF NEW SOUTH WALES

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15 October 2013

The Hon. Andrew Stoner, MP
Deputy Premier
Crown Lands Minister
PO Box 3120
West Kempsey NSW 2440

By email: office@deputypremier.nsw.gov.au

Dear Deputy Premier,

Crown Lands Amendment (Multiple Land Use) Bill 2013

I write to you in relation to the Crown Lands Amendment (Multiple Land Use) Bill 2013 ("the Bill") on behalf of the Indigenous Issues Committee ("Committee") of the Law Society of New South Wales.

The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of Aboriginal and Torres Strait Islander people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee understands that the Bill has been introduced in response to the Court of Appeal's decision in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)* (2012) 194 LGERA 1 ("*Goomallee*") which identified that some leases and licences have been unlawfully issued over land reserved and dedicated under Crown lands legislation.

The Committee notes the following by way of background:

(1) *Goomallee* did not make any new law. It simply applied a long line of cases which provide that reserves are a restriction on the use of land, and that interests cannot be granted that are not for or ancillary to the reserve purpose.[1] It is unclear to the Committee why interests might have been issued contrary to that well established principle.

(2) Given the issue appears to be one whereby the Department of Lands has acted contrary to its own legislation, Aboriginal people should not be disadvantaged

[1] See for example *New South Wales v Commonwealth* (1926) 38 CLR 74 *(The Garden Island case); Attorney General v Cooma Municipal Council* (1962) 8 LGRA 111; *Waverley Municipal Council v Attorney General* (1979) 40 LGRA 419; *Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council* (1992) 75 LGRA 133 and *Minister Administering Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379.

by it. Indeed, it is to be remembered that the *Aboriginal Land Rights Act 1983* ("ALRA") was itself, in part, enacted as compensation for the fact that Aboriginal reserves had been unlawfully revoked. The Government validated those revocations[2] at the expense of the interests of Aboriginal people. That injustice should not be repeated.

(3) The Committee notes that the licence at issue in *Goomallee* was issued on 20 June 2002. The *Crown Lands Act* 1989 (NSW) ("CLA") has since already been amended to incorporate procedures to allow the Minister administering the CLA to add additional purposes of the reserve (s 121A, CLA), and to allow for leases and licences to be issued for purposes other than the reserve purpose (s 34A, CLA). Those provisions provide ample flexibility to allow for additional purposes to be added to the reserve and for a broad range of interests to be granted. They have been in existence since 2005. It is unclear to the Committee why they have not been utilised.

Against that background, the Committee is concerned about the following aspects of the Bill:

1. Retrospective Validation

Clause 7 of Schedule 8 of the Bill proposes to validate interests since the *Goomallee* decision. Given the *Goomallee* decision only confirmed the existing law, the justification for that approach is difficult to follow. The effect of such a measure would be to retrospectively impair the rights of Aboriginal people in relation to land claims lodged after that date. The Committee believes that Aboriginal Land Councils are entitled to rely on the law as it exists when making land claims under the ALRA. The Committee is of the view that the validation provision should only take effect from the date of assent. More specifically, the Committee submits that the validation of any "existing secondary interests" pursuant to the Bill should only affect land claims made after the date of assent.

2. Validation Limited to Current Interests

Proposed s 34AA(4) will allow further validation in future where an interest is granted contrary to the scheme of the CLA. The Committee finds it odd that the Government would legislate to allow for non-compliance with its legislation. If s 34AA(1)-(3) are enacted, there will be more than sufficient scope for the Minister to create broad interests over Crown reserve land. It should not be assumed that those provisions will not be complied with. Crown lands legislation is important legislation governing the management of public assets. The usual principle is that there be strict compliance with Crown lands legislation.[3]

However, if validation is to be allowed in future, it should only apply where there is validation of an interest which would otherwise be current at the date of validation. If the licensee no longer needs the licence or it is expired, then there is no reason to validate it. In the Committee's view, it would be unfortunate if an otherwise invalid interest was validated, not to enable the licensee to continue to use the land, but simply to defeat an Aboriginal land claim.

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[2] See generally, the *Crown Lands (Validation of Revocations) Act* 1983 and *Coe v Gordon* [1983] 1 NSWLR 419.

[3] See generally, *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Kinchela Claim)* (2009) 166 LGERA 137 per Lloyd J at [72]-[77].

3. Notice of Challenge to Validity

Proposed s 35A will require 6 months notification prior to challenging the validity of an interest. The Committee believes that this measure is unnecessary, excessive and unreasonably interferes in the judicial process and restricts a Court's ability to decide legal questions in a manner and timeframe that the Court determines to be appropriate.

The disclosure of an intention to challenge the validity of a lease or licence will occur in most proceedings through the process of pleading and the provision of particulars. In Aboriginal land claim matters, although formal pleadings are not provided for, there are now requirements for the exchange of statements of facts and contentions at the time evidence is filed, and well in advance of any hearing. There is no reason to duplicate those processes. Further, notice of an intention to challenge the validity of an interest in Crown land is a matter which is best left to case management under the supervision of the Court. In any event, it is unclear why notice of 1 month would not be sufficient.

The policy lawyer with carriage of the Committee is Vicky Kuek, A/ Principal Policy Lawyer, who can be contacted on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

John Dobson
President