Law Society of NSW Comments on the Crown Lands Management Bill 2016
November 2016

The Law Society has identified the following issues in relation to the Crown Lands Management Bill 2016 (NSW).

General

- As a general comment, the Bill does not adequately reflect the long term stewardship responsibilities the State government owes to the people of NSW for the maintenance and appropriate use of the Crown estate.
  - The overarching requirement to ensure that the land is managed for the benefit of the people of NSW, having regard to the principles of Crown land management contained in the current Act (ss 10,11) which requires that environmental protection principles be observed, and where appropriate natural resources be sustained " in perpetuity", are not reproduced in the Bill.
  - The objects should also make reference to the need to facilitate the fulfillment of public policy clearly embedded in the *Aboriginal Land Rights Act 1983* (NSW), that Crown land that is not being lawfully used and is not needed for an essential public purpose, is to be available for transfer to an Aboriginal Land Council to be held and used in accordance with that Act.

- With the numerous options provided by the Bill for the State government to transfer management of, or the actual land itself, to other bodies, the Bill should contain guiding criteria as to which Crown lands must remain with the State government due to their long term value for the benefit of the people of NSW.

- Page 2 of the Explanatory Memorandum refers to a two-stage process contemplating a 2017 Bill dealing with consequential amendments to other legislation and possible further repeals. It is far preferable for any such Bill to be available for consideration and scrutiny at the same time as the principal Bill, rather than the process currently proposed. It is unclear why the legislation is being rushed.

Public Notification

- The Bill removes the existing requirements for the Minister to give notice of intention to sell Crown land or revoke reservations over Crown land. Currently, the Minister is required to give at least 14 days' notice (by publication in a newspaper) of such an intention. While it is intended that there be a community engagement strategy (Div 5.3), the content of such a strategy is uncertain. There are no minimum standards. The content is left to the Minister and may be altered from time to time. The community engagement strategy can include a requirement that "no community engagement is required" for certain dealings (cl 5.8(3)). Given the importance of public notification as a mechanism for participation in decisions affecting Crown land, the uncertainty of the proposed scheme is unsatisfactory. The notice requirements should be contained in the Bill.

- We are also concerned that the Bill notes that any non-compliance with a community engagement strategy will not affect the validity of a dealing or other action affecting Crown land, which effectively means the community consultation requirement does not provide for any safeguards for non-compliance.

- We submit that there should also be public notification prior to the transfer to Councils and other bodies.

- Clause 3.15 provides for the creation of crown land management rules, and no consultation with councils or other relevant stakeholders is required.

Clause 2.18 and 2.19

- The relationship between clause 2.18 and 2.19 is unclear. Clause 2.19 appears to be negated by clause 2.18 of the Bill. Clause 2.18(1) of the Bill seems to cover the field by providing that "Despite any other provision of this Act, the Minister may grant a lease, licence, permit, easement or right of way over dedicated or reserved Crown land for any of the following purposes...(b) any other purpose the Minister thinks fit." While clause 2.19 of the Bill appears to provide limitations on the Minister's power to grant a lease, licence, permit, easement or right of way over dedicated or reserved Crown land, it is still subject to clause 2.18(1)(b) of the Bill and therefore appears to have no effect. We query whether this is a drafting error.

Vesting in councils

- An integral part of the revised approach to Crown land management under the Bill is the vesting of Crown land in local councils, under Division 4.2 of the Bill. Under clause 4.6 of the Bill, one of the conditions for vesting of Crown land in a local council is if the Minister is satisfied that having regard to any approved local land criteria, the land is suitable for local use. However, under subclause 4.6(2) of the Bill, the Minister may, by order published in the Gazette, approve the relevant local land criteria. It is not appropriate for such a critical aspect of the new model to be left to Ministerial discretion. The local land criteria should be contained in the Bill.

- Clause 4.8(2) provides that the Minister may declare that land is to be vested in a council as operational land under the *Local Government Act 1993* (rather than as community land) if the council satisfies the Minister that the land could not continue to be used and dealt with as it currently can. Under Part 2 Division 1 of the LGA, reclassification of land from community to operational by a Council requires public notification and submissions (section 34) and a public hearing (section 29), before the reclassification put into effect by the making of an LEP (section 27). A reclassifying LEP which releases land from a reservation must be approved by the Governor (section 30). If Crown land to be vested in a Council has been the subject of a reservation that might be inconsistent with it being vested in the Council as operational land, against what criteria is the Minister to be satisfied as proposed by clause 4.8(2)? The classification of vested land as operational should only be made after a public consultation process, and be assessed against clearly stated criteria. It would be best if that were enshrined in the Bill, but an alternative approach might be to amend Part 2 Div 1 of the LGA to require Council to engage in the same public consultation process before making any submission to the Minister to vest Crown land in the Council as operational land.

Vesting in government agencies

- Clause 4.12 provides for the vesting of transferable Crown land in a government agency. This power is very wide. There are only limited constraints on its exercise and insufficient safeguards. There is no ongoing oversight of how the land is used after the vesting.

Licences for unauthorised users or occupiers of Crown land

- Clause 5.26 of the Bill allows the Minister to grant a licence to authorise a person to use or occupy Crown land if the person is currently using or occupying the land without lawful authority. This appears to be unnecessary, particularly when there are other remedies available to deal with unlawful use or occupation of Crown land. It may also potentially be abused to legitimise unlawful activity.

Native title and land claims under *Aboriginal Land Rights Act 1983 (ALRA)*

- Broadly, we are concerned that the removal of notification provisions in the Bill (which is discussed above) will impact on the ability of Aboriginal land councils to makes claims to land which might otherwise no longer be lawfully used or occupied or needed for an essential public purpose.

- We submit that there should also be public notification prior to the transfer to Councils and other bodies.

- Clause 7, Part 8 of Schedule 8 of the Savings and transitional provisions in the current Crown Lands Act specifies that: *this clause does not affect any land claim (within the meaning of the Aboriginal Land Rights Act 1983) made before 9 November 2012 (the date of the decision in Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim) [2012] NSWCA 358)*. This provision protects land claims lodged prior to this date. However, it is not clear if the Bill retains this safeguard.

- We are also concerned that Division 4.2 of the Bill, which allows the Minister to vest transferable Crown land in a local council, will detrimentally affect the ability of Local Aboriginal Land Councils to make land claims under the ALRA. If such land subsequently becomes surplus and no longer used or occupied or needed or likely to be needed for an essential public purpose, the land will not be 'claimable' as the land will no longer be Crown land. Land which might otherwise be made available to achieve the legislative objects of the ALRA, will therefore not be available for that purpose, and presumably can be simply sold by the local council.

- The shifting of native title obligations onto Councils is also problematic - there is an argument that where native title might exist on land, management and control should remain with the State.

- We query the utility of native title certificates (Part 8). They cannot circumvent the requirements of the *Native Title Act* 1993 (Cth). They will not prevent invalidity of Council action if they are incorrectly issued.