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Draft Crown Land Management Regulation comments
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Submission on the draft Crown Land Regulation 2017

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Introduction

These draft Crown Land Management Regulations 2017 (CLMR) have been written in relation to the Crown Land Management Act 2016 (CLMA). They are intricately linked and our submission in places refers to both. The Act and the Regulations are of direct concern to the community because they will regulate the future management, use and potential transfer of public community land that has a long history and significant value to the community. It is therefore critical that the Act and its Regulations fully reflect community interests and protect NSW Crown Land (CL) in perpetuity.

The Draft Regulations have been written on the basis of an implicit assumption that local councils have been, and thus would be, careful, conscientious and competent Managers of Crown Land and thus fully compliant with Crown Land requirements.

However, this is not the case as there has been an ongoing record of widespread mismanagement by local councils under the Crown Land Act 1989, with anomalies ranging from rent-rorts to possibly illegal leasing, to questionable deals and privatisation of control over an entire reserve.

Recent decisions (both in the courts and outlined in the Legislative Council Crown Land Inquiry) demonstrate how local councils have not only ignored the basics of Crown Land law (refer cases related to Willoughby, Newcastle, Woollahra councils) but that councils either turn a blind eye to illegalities, or take active steps to pervert statutory due process for commercialised interests. This is always to the detriment of community in regard to the Crown Land involved.

With regards to Lane Cove Council's (LCC) noncompliance to the requirements set out for managing Crown Land, our community has experienced:

- Inadequate consultation by Lane Cove Council (LCC) including a failure to engage in consultation with the community on its desired conditions for the lease for Greenwich Baths.
- Council has no Plan of Management specifically for Crown Land in the municipality, as is required by the legislation/regulations.
- Council, in its recent approval of repair work on the Viva petroleum products pipeline (for which there is a lease between LCC and VIVA Energy), has demonstrated that it does not distinguish in terms of approvals between activities on land it owns in its own right and land for which it exercises a trustee or manager role
- Council currently has no trust account, a legislative/regulatory requirement for the management of money it receives in relation to Crown Land earnings and disbursements.

PART A

COMMENTS RELATED TO THE DRAFT CLMR 2017 IN RESPECT OF CROWN LAND RESERVES AND DEDICATIONS

Community Engagement

At the outset it must be noted that there was NO community input to the development of the CLMA 2016, making community engagement proposals now no more than tokenistic given the inseparability of the Act and its regulations.

Community involvement in regard to *Crown Land Reserves and Dedications* is of key concern for the NSW community and community groups. Further, with regard to the Draft Regulations, although there is much lip service paid to community engagement, it is clear that from a community perspective these have been written to allow for further streamlining of privatisation by way of local government processes.

Although the CLMA/CLMR allows for upfront community "engagement", which is an improvement on the lack of any such provision in CLA1989, there is no clear mechanism to ensure that the result will reflect actual community input, or to require transparency in regard to outcome. In its current form this may devolve down to mere lip-service, little more than a box ticking charade as we are currently experiencing locally. Moreover, there is NO provision whatsoever in either CLMA or CLMR whereby the community can protest or otherwise seek remedial action when the "engagement" input is perverted, or ignored.

The list of Penalty Points as specified in the Regulations are inadequate because Councils have a history of failure to comply themselves – much less seeking to ensure compliance by others. Where are the penalty mechanisms for non-compliant Councils? And what penalties should apply given that cost of payment falls to ratepayers. The reality is that the community will become the victim who ultimately pays the penalty.

Further the CLMR gives no indication of any way for the community to enforce compliance in regard to breaches. It is written out by its omission. Open standing to enforce law, as is included in many NSW laws (but are notably absent in the CLMA and its Regulations), allows any individual to bring civil proceedings in the Land and Environment Court to restrain or remedy a breach of the respective Act or Regulations. This is a glaring omission in the CLMA and CLMR and should be addressed.

Failure to act on community input is arguably why the CLA 1989 was so ineffectual. Excluding the right of the community to take action yet again exposes this new Act and its Regulations to legal challenges and ultimately failure.

It is clear that the draft Regulations provide no further details on what constitutes a community engagement strategy, despite Section 5.7 of the CLMA requiring that strategies must be in place

by the time Division 5.3 commences. It is essential that community engagement strategies must be informed by the CL management principles outlined in Section 1.4 especially in relation to CL use, lease and sale.

Local Government

Under CLMA 2016, the legislation suggests that Councils will have the option of accepting or declining their role as CL Managers.

However the Draft Regulations seem to imply that all Councils currently managing CL will automatically be required to take over the responsibility of being a CL Manager. The key question that has not been addressed is how is this to be implemented?

At the moment many Councils simply do not know the full list of all CL Reserves and Dedication located in their local area. This was revealed in the 4 Pilot programs that took place in 2016 alongside introduction of the CLMA. Lane Cove Council is no different in its inability to identify all of the *CL Reserves and Dedications* for which it is currently responsible.

Currently, neither CLMA nor CLMR have any requirement for local councils to identify and fully audit ALL of the CL that they manage. This is fundamental information, and should be in place prior to any implementation of the Act and its Regulations.

Division 3, 26 of the draft Regulations will effectively allow Councils to ”vest” title – that is, transfer CL to its direct ownership and therefore this land will no longer “be” CL. Councils will then be able to manage this land under the Local Government Act.

Given that CL Reserves and Dedications currently owned by the Crown on behalf of ALL people in NSW will be handed over to a local council and thus “locally” owned, the NSW community will be the losers in what will be the biggest erosion of public land rights since the Reserve system was started in 1824.

Plan of Management Issues for Crown Land Reserves

Currently CLMA 2016 Division 3.6 specifies that all CL reserves must be managed according to a Plan of Management, but there is NO provision for ensuring this occurs, much less enforcing it. Notably the Regulations are silent and provide no guidance on the development of Plans of Management (PoM)

In fact, the reality is that there are very few existing PoM at a local government level. There are no PoM for *CL Reserves and Dedications* in the Lane Cove LGA. This in itself is a major complication in regard to both the feasibility and implementation of both the Act and its Regulations.

Both CLMA and CLMR require a PoM to be developed for each CL Reserve under a Council's control. Further, it is essential that any PoM must be developed in consultation with the community because this is where "engagement" is supposed to take place.

This will create a logistical nightmare for time-poor, cash-strapped local Councils, as existing PoM will require updating to comply with the new CLMA and so for this to happen, community engagement is required.

But even worse - there are so many CL Reserves and Dedications that have never had a proper Plan of Management. Compliance with this requirement of CLMA and CLMR means significant expenditure on the part of local councils which will significantly reduce their operating budget and ultimately impact on local residents.

This complexity is compounded by the time factor involved in establishing thousands of all-new plans of management.

We note also that the Regulations fail to clarify a fatal ambiguity in the CLMA in regard to PoM's. The Act says that Reserves and Dedications should be managed "as if" governed by the Local Government Act requirements for PoM's. "As if" means it is either optional or open to opinion; in short, it is NOT mandatory.

For sake of legal certainty, we submit that as a matter of urgency the PoM provisions in both the Act and CLMR must specify that *CL Reserves and Dedications* be managed by Council Land Managers "in accordance with" the PoM requirements of the Local Government Act.

The environmental protection objects of the CLMA, Section 1.3, require that CL is environmentally protected and this in turn must be reflected in the requirements in the Regulations for the development of PoM. It is therefore critical that the Regulations specifically reference the Protection of the Environment Act 1991 (NSW) principles of ecologically sustainable development and they require that CL Managers act consistently with the Protection of the Environment Act 1991 (NSW).

Aboriginal Rights

Under the Aboriginal Land Rights Act, there are approximately 30,000 outstanding claims, many involving NSW Crown Land. The CLMR require local Councils to be responsible for first-hand management at grass roots level. This means a major shift in responsibility away from the State government. The changes needed for this to happen will have major ramifications.

Councils will now require access to accurate information on aboriginal entities as well as land claim facts/status. This information is not easy to obtain even within the government itself. CLMR specifies that local Councils must employ staff as Native Title Managers or engage

consultants to handle ALRA matters. Such specialist expertise is costly and hard to find and may lead to diversion of Council resources away from other core activities.

Top-down Breaches of the Legislation

It should be noted that most of the Crown Land legal action that has been/is being undertaken is directly related to Council mismanagement of Crown Land as CL Reserve Trust Manager. The current CLA 1989 specifically included a three-tier "Trust" system for *Crown Land Reserves and Dedications* to prevent rorts and corruption by local Councils.

Re-instating a system whereby Councils will be again direct managers of such CL ignores history and in effect puts the foxes in charge of the hen-house, where they can act with impunity.

Further, the penalty provision of CLMR makes no provision for breaches by Councils or other Land Managers. Expecting the culprits to transparently and effectively investigate their own breaches and then penalise themselves is at best misplaced. *CL Reserves and Dedications* are significant public lands, and it is essential that CL Managers are answerable. The absence of any provision for meaningful probity checks is a major omission in both CLMA and CLMR, and must be rectified.

Audit and Compliance

Of particular concern is the fact that the recommendations of the CL Review by the NSW Audit Office 2016 have not been included in these Regulations. The absence of any recommendation with regards to the improvement of community engagement in decision making and the measurement of positive environmental and social outcomes is concerning.

Whilst there is provision for the Department of Primary Industry to audit compliance with the Act and appoint someone to undertake the audit, the problems arise with the fact that the appointment can be the CL Manager auditing itself. This raises major concerns related to conflict of interest. Who determines parameters, definitions and terms of reference? Who selects documentation, who determines what evidence is needed and what boxes should be ticked? These are basic ploys used to sideline issues or evade scrutiny.

While CLMA allocates specific roles to both the Minister and the Department for acting in the public interest, there is nothing in the Regulation to say when or how. To ensure the Public Interest is upheld, the CLMR should address such issues, but the Draft says nothing in this regard. It has no provision to ensure compliance at a practical level by CL Managers nor for third-party occupiers, users or people at large.

Timelines

Given so much fundamental information about Crown Land itself is still not in place, especially in relation to the local Council level to (a) Reserves and Dedications and (b) Aboriginal Lands Rights and Native Title matters, we submit that both the CLMA and these Regulations are premature. To foist them onto Local Government is a recipe for disaster. It will repeat what failed to occur with the 1989 Act, which has been identified as the underlying cause of its deemed failure.

We submit that launching this 2016 Legislation, when the CL system itself is so demonstrably unready, is to actively invite further non-compliance. The result will be that the CLMA will be crippled before it commences, and provisions in the Draft CLMR will hinder this situation rather than help.

Additional Comment: Precedent Set by Removal of Commons from the CLMA

It must be acknowledged that there has already been a major amendment to the Crown Land Management Act 2016, notably the removal of all provision regarding the Commons. This removal was based on the recognition of the intrinsic value and historical significance of Commons.

The same public-interest/concern and historic significance as an essential component in NSW public life since 1824 can be argued for *Crown Land Reserves and Dedications*.

In land area, these are a miniscule part of NSW Crown Lands, but as an asset they belong to the people of NSW. They have a unique and much-valued role to play.

Moreover, *CL Reserves and Dedications* have for a long time had specific management processes (in Dedications involving parliamentary oversight) and are thus quite distinct and separate from the other 42 percent of the residual CL in NSW.

PART B: Some Specific Points with Regards to the Draft CLM Regulations

In this section we refer to specific clauses and raise issues and make recommendations for changes that are needed.

Part 1 clauses 1-3 must establish how decision making must relate to the key concepts of the CLMA.

Part 2 Division 1, 6(2) *Responsible manager may set aside parts of dedicated or reserved Crown land for certain uses*. There is no explanation provided for this clause. Specific guidance is needed.

The setting aside is subject to, and must be consistent with, any Plan of Management for the dedicated or reserved Crown land **and the principles of CL Management**.

The highlight should be added to the CLMR because Plans of Management may not be consistent with the Principles of Crown Land Management, nor be to the community's satisfaction generally. There must be relevant considerations for whether to set aside a part of dedicated or reserved Crown land for any purpose. Arguably the "lawful purpose" is already designated but the flexibility in the Act as to what can be permitted there despite this means this addition is warranted.

Activity 1 Clause 14(1)

Entering Crown land at a time when the Crown land is not open to the public. This needs qualification as currently there are examples of local councils changing access times without any consultation with the community or some providing access outside of opening times on a restricted basis.

Activity 2 Clause 14(1)

Entering any building, structure or enclosure or part of Crown land not open to the public. This needs qualification to ensure that access is not progressively limited to the point that the CL cannot be used for its designated purpose.

Activity 4 Clause 14(1)

Taking part in any gathering, meeting or assembly (except, in the case of a cemetery, for the purpose of a religious or other ceremony of burial or commemoration). This terminology is very broad and should be clarified.

Activity 6 Clause 14(1)

Displaying or causing any sign or notice to be displayed. This terminology is very broad and should be clarified.

Activity 7 Clause 14(1)

Distributing any circular, advertisement, paper or other printed, drawn, written or photographic matter. This clause should be deleted as is undemocratic especially as it has no criteria.

Clause 15(1)

For the purposes of section 2.23 (2) (a) (i) of the Act, the area of 10 square metres or 10 percent of the footprint of the building (whichever is lesser) is prescribed.

The effect of this clause is that the Minister's consent is not required for DAs by CL Managers or Lessees or Licensees for repair/restoration/renovation/maintenance involving up to 10m2 [or if lesser, 10%] additional or removed footprint development that is repair, renovation, restoration or renovation of an existing building, rather than only 1m2 additional footprint as under the Act (2.23(2)(a)(i)).

Therefore, this clause should be deleted.

Clause 26 *Local land criteria for vesting transferable Crown land in local councils*
For all of the reasons outlined above, our view is that Crown land must not be vested in local councils.

IN CONCLUSION

We have raised many issues in our submission with regards to the CLMA and CLMR. Giving even more direct power to local government in regard to control and management of *Crown Land Reserves and Dedications*, as the CLMA and CLMR combine to do, will do nothing to protect this community land for future generations.

We refer to inconsistencies between the CLMA and the CLMR.

In addition, we have highlighted significant omissions in the CLMR. These relate:

- to inadequacies related to community engagement including details on what constitutes community engagement and consultation,
- the absence of open standing for civil enforcement,
- the inadequacy of the specified penalties to act as deterrents,
- cost shifting from the State to local government,
- CL audit and breach issues,
- the non-existence of Plans of Management for each *CL Reserve and Dedication*,
- issues related to huge number of outstanding Aboriginal Land Claims,
- the absence of penalties for breaches by local councils or land managers,
- failure to include the recommendations of the CL Review by the NSW Audit Office 2016 in the CLMR,
- potential conflicts of interest with the possibility to appoint the CL Manager to conduct an audit of Council management of CL,
- the CL system itself is demonstrably unready for this change because fundamental information about CL itself is still not in place.

Thank you for the opportunity to make this submission.