Key Points to assist Submission on Draft Crown Lands Management Regulations 2017

These draft Crown Land Management Regulations 2017 (CLMR) have been written in relation to the Crown Land Management Act 2016 (CLMA). They cannot be considered in isolation from the Act and community response must refer to both. Please note that while the Act and its Regulations apply to all NSW Crown Land (other than for Commons) many of our comments here will focus on impacts regarding Crown Land Reserves and Dedications. These CL Lands are an asset for ALL the people of NSW and have a unique role to play. They are both of historical significance and intrinsic value to the people of NSW and must be preserved. The right of the community to this land must be protected and preserved at all cost.

Introduction

The Draft Regulations are underscored by 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, there is a record of widespread mismanagement by Local Government Councils under the current Crown Land Act 1989, with anomalies ranging from rent-rorts to illegal leasing, to corrupt deals and privatisation of control over an entire reserve.

Recent decisions (both court and Inquiry) show how Councils have not only ignored the basics of Crown Land law (Willoughby, Newcastle, Woollahra are notorious) but that they will 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.

In our area, we outline an example of how this happens.

PLEASE ADD YOUR OWN LOCAL EXAMPLE/S

Our community experience says that if Councils have failed to comply with the priority of public interest as required by CLA1989, it is misguided to expect them to do so when the new rules give them such wide discretions. This is made worse by the financial factors involved. For instance: this handover to Local Government involves significant cost-shifting, such as with CLMR requirements re managing Native Title and Aboriginal Lands Rights matters.

PART A of OUR SUBMISSION

Giving even more direct power to local government in regard to Crown Land Reserves and Dedications, as the CLMA and CLMR combine to do, is an open door to disaster. The following points are based on our identified serious concerns, and we submit that these should be addressed before any Regulations are finalised.

1. 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 regards to Crown Land Reserves and Dedications is of key concern for the NSW community and community groups

With regard to the Draft Regulations, although there is much lip service paid to community engagement, it is clear that they can only be seen from a community perspective as having been written to streamline privatisation by way of local government processes.

Although CLMA/CLMR allow for upfront community "engagement" (this being 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, nor to require transparency in regard to outcome – that is results in reality. In its current form this whole aspect can devolve down to mere lip-service, little more than a box ticking charade. Moreover there is 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 is waste-space 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 them, when any cost comes from ratepayer funds. The community becomes the victim who ultimately pays the penalty.

Note also the CLMR gives no indication of any way for the community to enforce compliance in regards to breaches.

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 sets this new Act and its Regulations again up for legal challenges and failure.

2. 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 questin that has not been addressed is how it 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.

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 Reserves and Dedications currently owned by the Crown on behalf of ALL people in NSW will be handed over to a LOCAL corporation (ie "Council") and thus "locally" owned – making the rest of NSW as losers, and thus the biggest erosion of public land rights since the Reserve system was started in 1824.

3. Plan of Management Issues for Crown Land Reserves

Currently CLMA 2016 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.

There are very few existing Plans of Management (PoM). This in itself is a major complication in regard to feasibility and implementation. Both CLMA and CLMR require a PoM to be developed for EACH CL Reserve under a Council's control. Further, 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's 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 (in breach of CLA1989) 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.

4. Aboriginal Rights

Under the Aboriginal Land Rights Act, there are approx 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 - not easy to obtain even within the government itself. CLMR

specifies that local Councils must employ staff or consultants to as Native Title Manager to handle aboriginal ALRA matters.

Note how this extends these new "local" new responsibilities into the arcane corridors of Commonwealth law, as in the Native Titles Act. Such specialist expertise is few and far between as well as costly, but hard to find, let alone employ on a local level. Mandating it for every Council acting as CL Land Manager can only be seen as pie-in-the-sky.

5. 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 the CL Reserve Trust Manager. The current CLA1989 specifically included a three-tier "Trust" system for Reserves and Dedications to prevent rorts and corruption by local Councils.

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

The penalty provision of CLMR make no provision for breaches by Councils or other Land Managers per-se. 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. Yet the absence of any provision for meaningful probity checks is a major omission in both CLMA and CLMR, and must be rectified.

6. Audit and Compliance

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, 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 no Regulation to say when or how. To ensure the Public Interest is upheld, the CLMR should address such issues – but the Draft says nothing. It has NO provision to ensure compliance at a practical level by CL Managers as well as third-party occupiers/users/people at large.

7. Timeframes

Given so much fundamental information about Crown Land itself is still not in place – and especially as it relates at a 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 as-such on Local Government is a recipe for disaster. It will repeat what (didn't) happen with the 1989 Act, 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 CLMA will be crippled before it commences, and provisions in the Draft CLMR hinder rather than help.

8. Precedent Set by Removal of Commons from the CLMA

There has already been a major amendments to the Crown Lands Management Act 2016, notably removal of all provision regarding the Commons, based on recognition of their intrinsic value and historical significance.

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

In land area, these are a miniscule part of NSW Crown Lands, but as an asset belonging 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 CL in NSW.

We submit that the rights of the community to **this** CL land to be managed **this** way must be protected and preserved as a priority.

Conclusion

We hereby call for similar recognition of CL Reserves and Dedication to that of Commons, with similar removal from the generics of the CLMA and its Draft Regulations.

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

1. Part 2 Division 1, 6(2) Responsible manager may set aside parts of dedicated or reserved Crown land for certain uses
   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 Crown Land Management*. This should be added because Plans of Management may not be consistent with the CLPs, 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.

2. Part 2 Division 2, 14 Activities that can be prohibited on Crown land by direction or notice under Part 9 of Act. With reference to Activity 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 simply (whenever they feel like) unilaterally changing access times without any consultation with the community

3. Part 2 Division 2, 14 Activities that can be prohibited on Crown land by direction or notice under Part 9 of Act. With reference to Activity 2
Entering any building, structure or enclosure or part of Crown land not open to the public. This needs qualification as there is little if any consultation with the community on the defacto privatisation that has been occurring with CL. Further, there are virtually no Plans of Management in existence so there has been no community consultation on usage and so forth.

4. Part 2 Division 2, 14 Activities that can be prohibited on Crown land by direction or notice under Part 9 of Act. With reference to Activity 4
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 inclusion is both inappropriate and offensive without specific criteria or qualification such as…. *in a manner likely to cause nuisance to any person*

5. Part 2 Division 2, 14 Activities that can be prohibited on Crown land by direction or notice under Part 9 of Act. With reference to Activity 6
Displaying or causing any sign or notice to be displayed
This inclusion is offensive and requires either removal or rewriting

6. Part 2 Division 2, 14 Activities that can be prohibited on Crown land by direction or notice under Part 9 of Act. With reference to Activity 7
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.
The effect of this is that the Minister's consent is not required for DAs by CLManagers 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)). See also proposed additional clause 15(2)(b).

7. Part 2 Division 2, 14 Activities that can be prohibited on Crown land by direction or notice under Part 9 of Act. With reference to Activity 16
Climbing any tree, building, fence, seat, table, enclosure or other structure
This clause should be deleted. It is ridiculous that we can be prohibited on no criteria from climbing trees in Crown/Council reserves now

8. Part 2 Division 2, 15(1) When Minister taken to give consent for certain development applications over dedicated or reserved Crown land
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.
This clause should be deleted because its effect is to increase to 10m2 (or 10% if lesser) the area of renovation etc. that the Minister's consent is not required for, rather than 1m2 as currently in the Act.

9. Part 3 Division 3 Vesting. 26(1) Local land criteria for vesting transferable Crown land in local councils
(1) For the purposes of section 4.6 (2) of the Act, the following criteria are prescribed:

These criteria effectively set the test for one of the criteria under the Act for when land can be vested in council (the other criteria in the Act for that are that the land is within the relevant LGA, the Council has agreed to the vesting, and, where there is an ALC, the LALC/NSWALC have given consent).
Thus whether this clause is acceptable depends on your view of what CL Council should get.
If you want most significant (e.g. land of significance to the State) to remain CL not managed by Council, I would agree to this clause.
If you want significant AND minor ("local" significance) CL managed by Council, I would delete (a) and also probably (b)

IN SUMMARY

The main problematic clause from the community's point of view is 15(1), because this expands the limit in the Act on the size area DAs for renovation etc. of buildings on CL that do not need the Minister's consent to 10m2 (or 10% if less) not 1m2.

This clause must definitely be deleted to control for the CLMA damage.

Clauses that should be be amended are:

6(1): Add "and the principles of CLM" to the matters a land manager must consider before setting aside reserved or dedicated land for other uses for which the land may be used - see comments in document.

14: Add restrictions on when stop directions can be given to holding meetings, distributing circulars, putting up signs, and delete the reference to climbing trees as conceivably these are all purposes people might like to use CL for in legitimate exercise of democratic protest & gathering - and unfettered powers seem inappropriate.

15(1): Delete the clause.

26: Delete (a) and (b) if you are in favour of Council managing land (including "state" significant land not just "local" land) rather than DPI - see comments in doc.