FINAL REPORT

# Crown Land Management Regulations 2017

Regulatory Impact Statement

*Prepared for*
*Department of Industry — Lands*

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THE CENTRE FOR INTERNATIONAL ECONOMICS
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# 1 Introduction

This report is a Regulatory Impact Statement (RIS) for the proposed *Crown Land Management Regulations 2017*. This report focuses on the impact of the regulations only and does not cover changes covered in the *Crown Land Management Act 2016*.

The baseline for the analysis is the existing regulatory arrangements under the:

- *Crown Lands Act 1989*
- *Crown Lands (Continued Tenures) Act 1989*
- *Hay Irrigation Act 1902*
- *Irrigation Areas (Reduction of Rents) Act 1974*
- *Public Reserves Management Fund Act 1987*
- *Roads Act 1993*
- *Trustees of Schools of Arts Enabling Act 1902*
- *Wentworth Irrigation Act 1890*
- *Western Lands Act 1901*, and
- *Western Lands Amendment Act 2009*.

For each potential regulation between 2 and 4 options were considered. In general, our analysis found the draft regulations to be preferred compared to alternative options assessed.

## Background

### Crown lands management review

The NSW Government commenced a review of Crown land management in June 2012 (the terms of reference for the review are shown in box 1.1).[1] This was the first major review of Crown land management in more than 25 years and involved extensive consultation with the community and key stakeholders.[2]

[1] The review covered only Crown land managed by Crown Lands Division; national parks, state forests and community lands held by councils were out of scope.

[2] NSW Government, *Crown Lands Management Review*, pp. vi-vii.

### 1.1 Terms of reference for the Crown land management review[3]

To identify and recommend:

- key public benefits (social, environmental and economic) derived from Crown land
- the NSW Government's future role in the management and stewardship of Crown land
- the basis of an appropriate return on the Crown estate including opportunities to enhance revenue
- business, financial and governance structures that enable achievement of desired outcomes within financial and resource constraints
- opportunities for efficiency improvement and cost reduction, consistent with red tape reduction objectives and accountability
- introduction by NSW Government of incentives to enable the Crown Lands Division to manage and develop the Crown estate in line with NSW Government objectives, and
- a contemporary legislative framework.

The review was published in 2014, along with the government response and a white paper outlining policy options. The NSW Government's response to the white paper was published in October 2014.[4]

## *Crown Land Management Act 2016*

A key recommendation of the Crown Land Management Review was to develop new consolidated Crown land legislation. The NSW Parliament passed the new *Crown Land Management Act 2016* in November 2016. Matters covered by the Act include:

- Dedicated or reserved Crown land
- Management of Crown land
- Acquisition of land and vesting of Crown land
- Dealings involving Crown land and other related land
- Rents for holdings
- Alteration, withdrawal and forfeiture of holdings
- Native title rights and interests
- Protection of Crown land
- Investigation of compliance

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[3] NSW Government, *Crown Lands Management Review*, pp. vi-vii.

[4] NSW Department of Industry — Lands website, http://www.crownland.nsw.gov.au/crown_lands/comprehensive_review_of_nsw_crown_land_management/comprehensive-review-of-crown-land-management, accessed 21 March 2017.

- Enforcement
- Administration.

The key reforms embodied in the *Crown Land Management Act 2016* are summarised in table 1.2.

## 1.2 Summary of reforms

| Key theme | Response in *Crown Land Management Act* 2016 |
|---|---|
| Create a single, modern Crown land legislation | ▪ First step towards consolidating eight existing pieces of legislation into a single, streamlined and modern Crown land legislation that is easier to use and understand<br>▪ The white paper proposed that the *Commons Management Act 1989* would be repealed and consolidated into the *Crown Land Management Act*. However, amendments to the proposed bill meant that the proposal did not proceed into the Act. |
| Give Aboriginal communities greater recognition and rights in Crown land management | ▪ Acknowledge the importance of Crown land to Aboriginal people in legislation<br>▪ Refers to the need to facilitate the use of Crown land by Aboriginal people<br>▪ Provides protections for Aboriginal interests under Aboriginal land rights and facilitates compliance with native title legislation |
| Improve community engagement on major decisions | ▪ Requires the preparation of a community engagement strategy to better involve the community in major decisions on Crown land that affect the community |
| Involve local councils, which are best placed to own and/or manage locally-significant Crown land | ▪ Continues to allow land to be vested in local councils, which will occur through voluntary negotiation and be guided by criteria to determine land more suitable for local ownership<br>▪ Enables local councils to manage Crown reserves under the provisions of the Local Government Act 1993<br>▪ Other state legislation requires councils to undertake community consultation on significant strategic or land-use planning decisions on this land |
| Create greater flexibility on Western land leases to build the regional economy, while protecting the area's environment | ▪ Allows leaseholders to purchase land if it is required for urban expansion or is capable of being used for agricultural purposes<br>▪ Allows low impact activities, such as film making, farm tourism and small to medium scale energy generation to proceed without the Minister's approval<br>▪ Allows councils managing Crown reserves to do so solely under the robust requirements of the Local Government Act 1993, removing the complexity of operating under two different legal frameworks |
| Introduce stronger compliance provisions, including higher penalty levels and allowing longer periods to begin prosecution | ▪ Increases the maximum penalty for a range of illegal activities on Crown land from $2200 to $220 000 for corporations and $110 000 for individuals<br>▪ Increases time limit to bring offences to court from six months to two years |
| Cut unnecessary red tape | ▪ Allows Minister's consent to lodge development applications to be assumed for lower-impact proposals and where consistent with an approved plan of management<br>▪ Reduces current three-level structure for reserve management to two-levels — the reserve itself and a manager of the reserve |

*Source:* NSW Government, *Crown Lands for the future*, Crown Land Management Bill 2016, Summary brochure — October 2016, p. 4; NSW Department of Industry — Lands website, http://www.crownland.nsw.gov.au/crown_lands/comprehensive_review_of_nsw_crown_land_management, accessed 21 March 2017.

## *Parliamentary Inquiry*

Subsequent to the Crown land management review, a Parliamentary Inquiry into Crown land was established (see box 1.3 for the terms of reference).

**1.3 Parliamentary Inquiry into Crown land — terms of reference**

1 That, notwithstanding the allocation of portfolios to the General Purpose Standing Committees, General Purpose Standing Committee No. 6 inquire into and report on Crown land in New South Wales, and in particular:
   a) the extent of Crown land and the benefits of active use and management of that land to New South Wales,
   b) the adequacy of community input and consultation regarding the commercial use and disposal of Crown land,
   c) the most appropriate and effective measures for protecting Crown land so that it is preserved and enhanced for future generations, and
   d) the extent of Aboriginal Land Claims over Crown land and opportunities to increase Aboriginal involvement in the management of Crown land.
2 That the committee report by 13 October 2016.

The Parliamentary Inquiry was briefed on the outline of the proposed new Crown land legislation and made several recommendations that concerned the proposed legislation.[5] All recommendations were adopted by the Government, in whole or in principle.

## *Regulations to support the legislation*

Regulations to support the *Crown Land Management Act 2016* have been developed for public exhibition and the Government's consideration. This report seeks to measure the impact of these regulations.

### *Matters covered by the proposed regulations*

The matters covered in the regulations are summarised in table 1.4.

5 See https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2404#tab-reports

## 1.4 Summary of matters covered by the proposed regulations

| Part of Act | Matters covered in regulations |
|---|---|
| Part 1: Preliminary | ▪ Definition of a mineral<br>▪ Division of boundaries |
| Part 2: Dedicated or reserved Crown land | ▪ Prescription of the purpose, conditions and maximum term of short-term licence<br>▪ Change in the area of a building footprint that requires Minister's consent<br>▪ Types of development where Minister consent is always required |
| Part 3: Management of Crown land | ▪ Appointment of non-council managers to category 1<br>▪ The membership, procedures and functions of community groups<br>▪ Additional matters to be included in annual reporting<br>▪ Record keeping requirements for non-council Crown land managers |
| Part 4: Acquisition of land and vesting of Crown land | ▪ Local land criteria (criteria to determine if transferable Crown land is suitable for local use)<br>▪ Vesting of Crown land in other statutory corporations<br>▪ Indemnification for relevant conduct by local councils vested with former Crown land<br>▪ Surrender of lands and leases |
| Part 5: Dealings involving Crown land and other related land | ▪ Matters that are required or permitted to be in the terms and conditions of a holding<br>▪ Prescribed distance from an urban area for the sale of land in the western division<br>▪ Conditions of a licence granted for unauthorised users and occupiers of Crown land<br>▪ The manner and period within which a transferee must notify the Minister of the transfer of a licence benefiting other land that is sold or leased again<br>▪ The manner and period within which a transferee must notify the Minister of the transfer of an enclosure permit<br>▪ Activities prohibited on a public access easement<br>▪ Other structures that can be erected on a public access easement that does not require Ministers consent<br>▪ Defining the prescribed assessment principles |
| Part 6: Rent for holdings | ▪ Minimum base rent and rent base adjustment date |
| Part 7: Alteration, withdrawal and forfeiture of holdings | ▪ Modifications to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* for the payment of compensation from compulsory acquisition |
| Part 8: Native Title rights and interests | ▪ Contributions to, or indemnification against, compensation payable by the State for the impact of relevant conduct on native title rights and interests (including when to confer jurisdiction to the Land and Environment Court) |
| Part 9: Protection of Crown land | ▪ Prescribed activities that can be prohibited<br>▪ Provisions for care, control management of Crown land<br>▪ Materials that cannot be deposited on Crown land |
| Part 12: Administration | ▪ Fees for certain matters<br>▪ Interest rates for amounts owing<br>▪ Who should the Minister seek advice from when assessing the State Strategic |

| Part of Act | Matters covered in regulations |
|---|---|
| | Plan<br>▪ Manner in which documents can be served |
| Part 13: Miscellaneous | ▪ Disclosure of information about holders of enclosure permits and other holdings over Crown land to local councils<br>▪ Receipts and disbursements of statutory land managers |
| Schedule 3: Land in Western Division | ▪ Approving the carrying out of specified approved activities<br>▪ Method for calculating rent for continued Western lands leases<br>▪ Application for an extension of a term lease<br>▪ Application to convert a term lease to perpetual lease<br>▪ Manner and timing for payment of survey fees related to conversion of term lease to perpetual lease<br>▪ Where the Minister's consent for cultivation is not required<br>▪ Giving of notice to landholders affected by enclosure permits |
| Schedule 4: Purchaseable leases | ▪ Considerations when determining a purchase application for a perpetual lease<br>▪ |
| Schedule 5: Statutory Land Managers | ▪ Employment/engagement of secretaries and treasurers<br>▪ Procedures for calling and conduct of meetings |
| Schedule 7: Savings, transitional and other provisions | ▪ Standard form trust instruments over institutional private land<br>▪ Calling or conduct of meetings for trusts over institutional private land<br>▪ Short-term licences over community land |

*Source:* Department of Industry – Lands and Forestry.

## *Regulatory impact analysis requirements in NSW*

The regulatory impact analysis (RIA) process is simply a formal framework to help policy-makers think through the impacts of regulatory proposals in a disciplined and comprehensive way. This helps to ensure that policy decisions are based on best practice regulatory principles (see box 1.5) and the best available evidence, which may result in better policy outcomes for the community.

### 1.5 Better Regulation Principles[6]

**Principle 1:** The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

**Principle 2:** The objective of government action should be clear.

**Principle 3:** The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.

**Principle 4:** Government action should be effective and proportional.

**Principle 5:** Consultation with business and the community should inform regulatory development.

**Principle 6:** The simplification, repeal, reform or consolidation of existing regulation should be considered.

**Principle 7:** Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.

The NSW Government's regulatory policy framework is currently under review by an Independent Panel chaired by former Premier Nick Greiner.[7] In the interim, the Department of Finance, Services and Innovation has issued a revised interim *Guide to Better Regulation*. However, it is expected that the Guide will be revised again following completion of the independent review in 2017.

The current RIA requirements for regulations are set out in the the *Subordinate Legislation Act 1989* (SLA). Under the SLA, a regulatory impact statement (RIS) must be prepared before regulations are made. The matters that must be included in a RIS are outlined in box 1.6.

6 NSW Government, *NSW Guide to Better Regulation*, October 2016, p. 6.

7 NSW Department of Premier and Cabinet website, http://www.dpc.nsw.gov.au/announcements/nsw_regulatory_policy_review, accessed 4 January 2016.

### 1.6 RIS requirements under the SLA

A regulatory impact statement must include the following matters:

- A statement of the objectives sought to be achieved and the reasons for them.
- An identification of the alternative options by which those objectives can be achieved (whether wholly or substantially).
- An assessment of the costs and benefits of the proposed statutory rule (this includes economic and social benefits and costs). Wherever possible, costs and benefits should be quantified. If quantification is not possible, the anticipated impacts of the proposed action and of each alternative should be stated and presented in a way that permits a comparison of the costs and benefits.
- An assessment of the costs and benefits of each alternative option to the making of the statutory rule (including the option of not proceeding with any action), including the costs and benefits relating to resource allocation, administration and compliance.
- An assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.
- A statement of the consultation program to be undertaken.

## *Structure of the report*

The remainder of the report is structured as follows.

- chapter 2 sets out the case for government actions and the overarching objectives of the regulations
- chapter 3 assesses the impacts of regulations relating to the management of Crown land
- chapter 4 assesses the impacts of regulations relating to the Acquisition and vesting of Crown land
- chapter 5 assesses the impacts of regulations relating to dealings involving Crown land
- chapter 6 assesses the impacts of regulations relating to lands in the Western Division
- chapter 7 assesses the impacts of regulations relating to protection and enforcement relating to Crown land, and
- chapter 8 assesses the impacts of regulations relating to preliminary and miscellaneous items.

# 2 The case and objectives for government action

## The case for government action

The first step in the RIS process is to make the case for government action and to clarify the objectives. The case for government action in relation to Crown land management is clear; the Crown Lands Management Review establishes a clear rationale for the existence of Crown land — that certain land should be retained by the Crown for public benefit.[8] The government therefore needs a regulatory framework to manage the Crown estate. The regulations are intended to provide for more efficient and beneficial functioning of the *Crown Land Management Act 2016*.

The Crown Lands Management Review also makes a case for change on the basis that:

- the pre-existing regulatory framework was more than 25 years old
- community expectations have changed, and
- more efficient and flexible management systems for Crown land are needed.

## Objectives

The stated objectives of the *Crown Land Management Act 2016* are:

- to provide for the ownership, use and management of the Crown land of New South Wales
- to provide clarity concerning the law applicable to Crown land
- to require environmental, social, cultural heritage and economic considerations to be taken into account in decision-making about Crown land
- to provide for the consistent, efficient, fair and transparent management of Crown land for the benefit of the people of New South Wales
- to facilitate the use of Crown land by the Aboriginal people of New South Wales because of the spiritual, social, cultural and economic importance of land to Aboriginal people and, where appropriate, to enable the co-management of dedicated or reserved Crown land, and
- to provide for the management of Crown land having regard to the principles of Crown land management.

The legislated principles of Crown land management are:

- that environmental protection principles be observed in relation to the management and administration of Crown land

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[8] NSW Government, *Crown Lands Management Review*, p. ii.

- that the natural resources of Crown land (including water , soil, flora, fauna and scenic quality) be conserved wherever possible
- that public use and enjoyment of appropriate Crown land be encouraged
- that, where appropriate, multiple use of Crown land be encouraged
- that, where appropriate, Crown land should be used and managed in such a way that both the land and its resources are sustained in perpetuity, and
- that Crown land be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State consistent with the above principles.

The regulations are intended to support these objectives and principles.

# 3 Management of land

In this section, we review the impact of the regulations relating to:

- Management of Crown land (under Part 3 of the Act)
- Statutory Land Managers (under Schedule 5 of the Act)
- Receipts and disbursements of Statutory Land Managers (under Part 13 of the Act)
- Dedicated or reserved Crown land (under Part 2 of the Act)
- Native Title rights and interests (under Part 8 of the Act)

## Part 3: Management of Crown land

### Appointment of non-council manager to category 1

The authority of a Crown land manager (CLM) depends on their assigned category. A non-council manager may be assigned as either a category 1 or category 2 manager by the manager's appointment instrument, a notice published in the gazette or the regulations.[9]

Category 1 non-council managers have greater powers to lease and licence Crown land without the Ministers consent compared to category 2 managers.[10] For instance, category 1 managers are permitted to grant leases and licences for periods of up to 10 years, compared to up to 1 year for category 2 managers. Category 1 non-council managers are generally more experienced, and must indemnify the State against any liability incurred as a result of granting a lease or licence, but generally have greater autonomy, meaning that Ministerial approval is not required as often.

#### Options

Two options for the regulations relating to the appointment of non-council managers as either category 1 or category 2 have been considered:

- Option 1: Certain non-council CLMs are prescribed in the proposed regulation 16 as being category 1 managers. This would comprise the following managers:
  - NSW Crown Holiday Parks Trust
  - Northern Metropolitan Cemeteries Trust
  - Rookwood General Cemeteries Trust

9 *Crown Land Management Act 2016 No 58 [NSW]* s3.25

10 *Crown Land Management Act 2016 No 58 [NSW]* s3.26

  - Catholic Metropolitan Cemeteries Trust
  - Southern Metropolitan Cemeteries Trust
  - Rookwood Necropolis Trust
- Option 2: No regulation. Managers would be assigned as category 1 land managers as part of a manager's appointment instrument (used to appoint one or more persons to be a CLM for specified dedicated or reserved Crown land) or at any time by gazette.

### *Impact of the change*

In practice there is very little difference between the two options as the *Crown Land Management Act 2016* allows CLM managers to be appointed to a category at any time by gazettal. We expect appointing category 1 managers by gazettal or via a manager's appointment instrument would involve a similar administrative task as prescribing category 1 managers by regulation. The administrative task includes determining whether a CLM is suitable to be a category 1 manager and then procedurally assigning a manager to a different category.

For the organisations covered by option 1, there may be some value from the certainty of being a category 1 manager from the commencement of the *Crown Land Management Act 2016*, however, this benefit has not been quantified. This impact could potentially be large, if a CLM administers a large volume of medium term leases or licenses (from 1 to 10 years); under the Act a CLM would need to seek written notice from the Minister to grant such leases or licenses until they are designated as category 1 manager.

Option 1 is consistent with one of the objectives of Crown land management in that it provides clarity concerning the law applicable to Crown land, and is preferred to option 2 or no regulation.

## *Community advisory groups*

Non-council managers may be required to establish community advisory groups at the direction of the Minister.[11] The regulations may make provision regarding the giving of directions to establish community advisory groups as well as regarding the membership, procedure and functions of the groups.

### *Options*

Regulation 17 addresses these matters concerning the establishment of community advisory groups, by providing a function for advisory groups and ensuring they contain an appropriate representation of stakeholder interests.

The intent of the regulation is to provide that:

- community advisory groups are representative of all stakeholders with an interest in dedicated or reserved land under the management of the non-council manager, as determined by the Minister, and

11 *Crown Land Management Act 2016 No 58 [NSW]* s3.29

- the function of a community advisory group is to provide advice to the non-council manager regarding community views on proposed management of dedicated or reserved land, including the impact that proposed management of dedicated or reserved land may have on different members of the community.

Two options were considered and primarily differ with respect to the conditions – as directed by the Minister – that are placed on the make-up and governance of community advisory groups.

- Option 1 assumes no regulation. If there was no regulation the Minister could give directions in any manner he saw fit – and the membership, procedures and functions of the advisory group would be in accordance with the direction, if so provided.
- Option 2 outlines a number of requirements non-council managers must meet in forming and administering a community advisory body. This includes:
  - The community advisory group is to consist of the number of members directed by the Minister.
  - The non-council manager is to appoint members, in accordance with any directions of the Minister, that include persons that represent all of the community stakeholders who have an interest in the managed land.
  - The maximum term for a member is 5 years or any greater or lesser term directed by the Minister.
  - The office of a member becomes vacant if the member dies, completes a term of office and is not re-appointed, resigns or is removed from office by the non-council manager.
  - The non-council manager may remove a member from office only in the circumstances directed by the Minister.
  - The procedure for the calling of meetings of the community advisory group and for the conduct of business at those meetings is, subject to any directions of the Minister, to be as determined by the group.
  - The quorum for a meeting of the community advisory group is a majority of its members for the time being.

  Option 2 allows considerable flexibility, leaving the majority of conditions at the discretion of the Minister. Only the governance issues relating to determining a quorum and the conditions under which the office of a member becomes vacant are not left to the discretion of the Minister.

### *Impact of the change*

The difference between the two options relates to the conditions which are placed around the composition and governance of community advisory groups. However, in practice there is little difference between option 1 (no regulation) and option 2, given that option 2 provides significant flexibility through any directions of the Minister. For instance, the minister could provide direction for the non-council land manger to determine the composition of community advisory groups and governance, which would largely be equivalent to the no regulation option 1.

Providing these directions, however, are likely to support better governance and result in improved advice from community advisory groups. Non-council land managers may not have the expertise, resources or objectivity to develop community advisory groups that are able to provide appropriate advice. Further, the requirements outlined in option 2 are reasonable and would be consistent with standard governance procedures for an advisory group. In the absence of regulation associated with option 2, non-council land managers would be expected to put similar arrangements in place.

Option 2 is therefore the preferred option, as it is not particularly limiting for the Minister, provides guidance for non-council land managers and is likely to promote better governance of community advisory groups.

### *Record keeping and reporting*

There are two proposed regulations (18 and 19) relating to record keeping requirements of the annual report and non-council managers.

Requirements for non-council managers to provide the Minister with an annual report are specified in *Crown Lands Management Act 2016* s3.30, which states that the annual report must contain the information and other matters that may be prescribed by the regulations. The existing regulations require non-council managers to prepare an annual report within three months of the end of financial year, outlining activities over the past year, financial statements and the condition of assets.[12]

Requirements for record-keeping by non-council managers prescribed in s3.31 states that a non-council manager must keep any records in accordance with the regulations. The regulations may only make provision to certain matters,[13] including:

- the form in which records are to be kept
- the inspection of records
- the retention of records, and
- exemptions from the record-keeping requirements.

The *Crown Lands Management Act 2016* s3.31(1)(b) requires that non-council managers must furnish records to the Minister or an authorised officer if directed to do so or as required by the regulations. The existing regulations provide that non-council managers must keep the records specified in the regulation, which are required to fulfil annual reporting requirements.[14]

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12 *Crown lands regulation 2006 [NSW]* Regulation 32

13 *Crown Land Management Act 2016 No 58 [NSW]* s3.31(2)

14 *Crown lands regulation 2006 [NSW]* Regulation 33 and Schedule 4

### *Options*

#### *Regulation 18*

The proposed regulation 18 relates to additional matters to be included in the annual report. It maintains the existing regulation (regulation 32[15]) with some changes such as the extension of the requirement to include details of any management plans in place to include details of strategic, financial or business plans.[16] The proposed regulation 18 prescribes items of importance, which must be included in the annual report, such as financial statements setting out details of income, expenditure, assets and liabilities.

The alternative to regulation 18 is to have no defined requirements for annual reports.

#### *Regulation 19*

The proposed regulation 19 relates to the records that must be kept by non-council managers. It adopts the requirements of the existing regulations (regulation 33[17]), which refers to a list of records to kept.[18] Regulation 19 would have some changes relative to the existing regulation 33, such as additional requirements to record minutes of meetings and decisions made.

The first alternative option to regulation 19 is to have no requirements for records to be kept by non-council managers. A second alternative option would be add to regulation 19 the requirement that category 1 non-council managers must produce an Auditor's report.

### *Impact of the change*

The record-keeping requirements are likely to result in greater transparency as record keeping and reporting enable the Minister and public to hold Crown land managers accountable. This benefit is not quantifiable, but is consistent with one of the objectives of the *Crown Lands Management Act 2016* to provide for the consistent, efficient, fair and transparent management of Crown land.

Regulation 18 and 19 will all require additional time be spent by Crown land managers producing annual reports, and maintaining and furnishing records.

- Regulation 18 would result in a small increase in the administrative burden, compared to the existing regulations, by requiring Crown land managers to include details of strategic, financial or business plans. This may result in a small increase in administration costs, however:

15 *Crown lands regulation 2006 [NSW]* Regulation 32

16 *Crown lands regulation 2006 [NSW]* Regulation 32(2)(g)

17 *Crown lands regulation 2006 [NSW]* Regulation 33

18 *Crown lands regulation 2006 [NSW]* Schedule 4

  - this would be small, as we expect that this information would already be produced by Crown land managers and this requirement would result in existing information being included in annual reporting, and
  - any additional cost would likely more than be offset by increases in transparency and accountability.

  The alternative option to have no regulation would result in a significant reduction in administrative burden, and would greatly reduce transparency and accountability. This would not be consistent with objectives of the Act and would introduce the risks that Crown land managers are acting in a way that is not acceptable for the Minister or the wider public. We do not believe that no regulation would be a feasible option.
- Compared to the existing regulation, regulation 19 may result in a slight increase in administrative burden, however this is expected to be very small as Crown land managers likely already comply with the additional requirement. In the absence of regulation, we would expect the records outlined in the regulations to be collected anyway. In this case, the proposed regulation would have no impact compared to a no regulation option. The regulations however provide certainty for the Minister, that Crown land managers are collecting sufficient information to discharge their annual reporting requirements and is consistent with the objectives of the Act..

This analysis indicates that the proposed regulations, 18 and 19, which are very similar to the existing regulation, are preferred to the alternative options.

# *Schedule 5: Statutory Land Managers*

## *Secretaries and treasurers*

The regulations may make provision for or with respect to the employment, engagement or appointment of secretaries and treasurers for statutory land managers with boards.

### *Options*

Three options for the proposed form of regulation 21 have been considered.

Option 1 is to have no regulation concerning the employment, engagement or appointment of secretaries and treasurers. Instead, the provisions would be put in place through the appointment instrument.

Under option 2, a member of the statutory land manager board can be employed as the secretary or the treasurer and be paid for this work if the Minister gives approval. The board resolution that authorises appointment of a paid secretary or treasurer should clearly set out:

- the duties they are to perform
- the length of time for which they are appointed
- the award and the amount they are to be paid
- how that amount is calculated, and

- the Minister's approval date and any conditions.

In giving consent, the Minister must be satisfied that the statutory land manager can fund the employment from the proceeds generated from the reserves under management.

Option 3 is to adapt By-law 12 and 9 from *Crown Lands (General Reserves) By-Law 2006* with minor changes. This option for the proposed regulation 21 would provide that:

- one person may be appointed to the positions of secretary to, and treasurer of, the statutory land manager
- a member of the statutory land manager board may be appointed and employed as secretary or treasurer, but only with the approval of the Minister, and
- if a casual vacancy occurs in the office of the secretary or treasurer of the board, the board must elect or appoint a person to fill the vacancy and the person so elected is entitled to hold office for the unexpired part of the term of office of that person's predecessor.

### *Impact of the change*

Option 3 has been adopted and it proposes to continue the current arrangements that apply to the reserves listed in the Crown Lands (General Reserves) By-law 2006, and therefore compared to existing arrangements would result in no impact for those reserves. These rules will now be applied to all reserves which will ensure a consistent and equitable approach. This regulation provides clarity as to the power of the statutory land manager to appoint these office-bearers, and is consistent with the objective of the Act to provide clarity concerning the law applicable to Crown land.

Option 2 differs from option 3, in that land managers would require approval from the Minister to employ, engage or appoint secretaries or treasurers (for option 3, ministerial approval is only required were the treasury or secretary is a member of the board of the statutory land manager and is to be paid). This would impose a small administrative burden due to the requirement for ministerial approval, as these powers would not be devolved to the boards of land managers, despite board members being appointed by the Minister. The conditions outlined in option 2 would be included in an appointment instrument issued by the Minister. The appointment instrument could also be used for the appointment of secretaries and treasurers as described in option 1 but by placing these in the regulation it ensures consistency and clarity for statutory land managers.

There are only small differences between the options, however given option 3 conforms most closely with the objectives of the *Crown Land Management Act 2016*, this is the preferred option.

## *General procedures for boards*

Boards of statutory land managers are able to determine the procedures for the calling of meetings and the conduct of business at those meetings, subject to the procedures required by the *Crown Land Management Act 2016* and the regulations. The Act

prescribes certain matters relating to procedures for boards. For example, it prescribes that:

- the quorum for a meeting of the board is a majority of its board members,[19]
- a decision supported by a majority of the votes cast at a meeting of the board at which a quorum is present is the decision of the board, and
- the board may transact any of its business by the circulation of papers among the board members, and a resolution made in writing approved in writing by a majority of those members is taken to be a decision of the board.

The regulations may prescribe additional matters relating to procedures for boards.

### *Options*

The proposed regulations 22-25 would adapt by-laws 6, 7, 8 and 11 from the *Crown Lands (General Reserves) By –law 2006* with some changes. This would impose requirements in relation to board meetings, special meetings, prior notice of meetings and board committees. For example, regarding meetings, regulations 22-25 would require that:

- the statutory land manager board is to meet at least four times per year (the board may convene fewer times per year with Ministerial approval)
- board members are given sufficient prior notice of a meeting, and
- the board may form committees to perform specific duties or tasks.

The regulation would apply to all reserves not just those listed in the *Crown Lands (General Reserves) By-law 2006*.

The alternative option is to have no regulation concerning procedures for boards.

### *Impact of the change*

The proposed regulation provides a similar framework for board meetings and conduct as currently in place under the *Crown Lands (General Reserves) By –law 2006*, with the exception of allowing the Minister to allow boards to meet less than four times per year. This is likely to reduce the regulatory burden for small statutory land managers who are listed in the *Crown Lands (General Reserves) By-law 2006*.compared to current arrangements. Applying these regulation to all reserves will ensure consistency and equity and ensure that all reserves have good governance. While there may be an increased burden on those reserves that are not listed in the *Crown Lands (General Reserves) By-law 2006* this can be minimised as the Minister can allow the reserves to meet less than four times per year. Given the similarities with status quo, this option will have a small negative impact compared to existing arrangements. This regulation allows a continuation of the benefit of reduced instances of poor management of Crown lands.

The alternative option of no regulation could result in an administrative saving from fewer board meetings being convened, however, this would likely result in less

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19 *Crown Land Management Act 2016 No 58 [NSW]* Schedule 5 s17

accountability and professionalism of statutory land manager boards which may affect decision making. The intention of the requirements outlined in the regulation are to provide for rigorous and consistent procedures to be carried out by all boards.

The regulatory option is preferred.

# *Part 13: Miscellaneous*

## *Receipts and disbursements of statutory land managers*

The *Crown Land Management Act 2016* s13.5 authorises regulations to make provision for the functions of persons involved in the administration of the Act or the regulations, including the functions of statutory land managers.

### *Options*

The proposed regulation 20 would require that statutory land managers meet certain requirements for receipts and disbursements. This would continue existing provisions regulating reserve trusts (now statutory land managers) in clause 14 of the *Crown Lands (General Reserves) By-law 2006*. The requirements are that:

- Money received by the manager is to be deposited to the credit of an account with any authorised deposit-taking institution in the name of the land manager
- Each item of spending is to be authorised at a meeting of the land manager
- Cheques drawn on the manager's account are to signed by the member of the land manager board and one other approved person
- If an administrator has been appointed under the Act, cheques are to be signed by the administrator and one other person chosen by the administrator

The alternative of no regulation would not impose these requirements in relation to receipts and disbursements.

### *Impact of the change*

The regulatory option proposed is a continuation of the existing provisions for those reserves listed in the *Crown Lands (General Reserves) By-law 2006* . It will apply more rigorous governance requirements for those reserves not listed in the *Crown Lands (General Reserves) By-law 2006*. Therefore, compared to the status quo, there is no impact associated with this option for reserves listed in the *Crown Lands (General Reserves) By-law 2006* and increased regulatory burden for those reserves not listed in the *Crown Lands (General Reserves) By-law 2006*.

The alternative no regulation option would result in an administrative cost saving for statutory land managers – this saving is expected to be small as the administrative requirements do not appear to be onerous. However, this would likely result in a deterioration of record keeping standards and poorer governance outcomes for statutory land managers. It would reduce accountability and expose statutory land

managers to financial risks. For example, allowing money received by the statutory land manager to be kept in cash by the statutory land manager could increase the risk of fraudulent activity by the statutory land manager, theft by others or reduce the ability of the statutory land manager to track incomes and expenditures. Therefore, there are likely to be net costs associated with no regulation.

The regulatory option is the preferred to no regulation.

# *Part 2: Dedicated or reserved Crown Land*

## *Prescription of the purpose, conditions and maximum term of short term licence*

Dedicated or reserved Crown land may only be used for the purposes for which it is dedicated or reserved, incidental or ancillary purposes, or any other purposes authorised by the *Crown Land Management Act 2016* or another Act.[20] The Minister may grant short-term licences over dedicated or reserved Crown land, for which the regulations may make provisions in respect of:

- any purposes for which the licence may be granted
- any conditions to which the licences are subject, and
- the maximum term for which licences may granted.[21]

Where activities are not prescribed by regulation, they are not permitted under a short-term licence.

### *Options*

There are three options for regulation 31:

- Option 1 maintains the current ability to issue short term licences under clause 31 of the *Crown Lands Regulation 2006* with appropriate changes to refer to short-term rather than temporary licences. Permissible purposes include advertising, camping, catering, filming, grazing[22] and markets. Clause 31 also provides that in addition to any other condition subject to which a temporary/short-term licence is granted, the licence is subject to the condition that the relationship of landlord and tenant is not created between the parties. Further, it provides that the prescribed period for the expiration of a temporary/short-term licence is one year from the date it was granted.
- Option 2 proposes two additional purposes:
  - environmental protection, conservation or restoration activities, and

20 *Crown Land Management Act 2016 No 58 [NSW]* s2.12

21 *Crown Land Management Act 2016 No 58 [NSW]* s2.20(1)

22 The original allowance of grazing as a purpose is derived from the *Crown Lands Act 1989* s108(1), however it is restated in Clause 31 of the *Crown Lands Regulation 2006*, therefore we assume that it remains a purpose in the proposed form of regulation 3.

  - community, training or education activities.
- Option 3 proposes no regulation. That is, no purposes, conditions, or maximum terms for short-term licences would be prescribed.

### *Impact of the change*

The first and second options are similar, and involve little to no change relative to the current regulation. The addition of two additional purposes in the second-regulation would expand the range of purposes for which a short-term licence can be granted. These additional purposes would have a low risk to the environment and are unlikely to have significant costs. There are currently about 45 short term licences active. It is difficult to evaluate whether there are likely to be net benefits from option 1 or 2 relative to the current regulation (clause 31).

There would be substantial negative impacts from the third option of no regulation. Without actions being prescribed they cannot be carried out under a short term license, which would result in the benefit of using Crown land for those purposes being foregone. There are also environmental and other risks associated with not licencing activities or prescribing conditions may result in activities being undertaken without permission and critically without the Department's oversight. The list of purposes in the proposed regulation contains only low risk activities and having a regulation allows these activities to occur.

Both option 1 and 2 are preferred to no regulation, with little difference in practice between the two.

## *Requirements for Ministerial consent*

In relation to dedicated or reserved Crown land, the Minister is taken to have given written owner's consent to the land's Crown land manager or the holder of a lease or licence over the land to make a development application in relation to certain kinds of development.[23] This includes the repair, maintenance, restoration or renovation of an existing building on the land if it will not: [24]

- alter the footprint of the building by adding or removing more than one square meter (or another area as prescribed by the regulations)
- alter the existing building height by adding or removing one or more storeys, and
- involve excavation of the land.

Further exclusions from the requirement to obtain Ministerial consent apply to the erection of fences, the use of land for purposes under the *Crown Land Management Act 2016*, the erection of signage, and other kinds of development specified in section 2.23(2)(b-h).

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23 *Crown Land Management Act 2016 No 58 [NSW]* s2.23

24 *Crown Land Management Act 2016 No 58 [NSW]* s2.23(2)(a)

These exclusions from the requirement to obtain Ministerial consent do not include developments that relate to subdivisions or any other kinds of development that the regulations specify are excluded.[25]

### *Options*

Two options have been evaluated for regulation 15, which are summarised below:

Option 1: No regulation, under which:

- One square metre is the default maximum area for building footprint alterations that can proceed without Ministerial consent
- All of the types of development that are listed in section 2.23 can be taken to have Minister's consent

Option 2: Regulation 15, which would:

- Allow alterations to a building footprint to proceed without the Minister's consent where changes are less than 10 per cent of the existing area, or 10 square metres (whichever is smaller).
- Mean that any alteration to a structure on a waterfront requires consent from the Minister. A domestic waterfront precinct would mean
  - submerged Crown land (including the bed of rivers and estuaries) extending seawards to the NSW territorial limit of three nautical miles,
  - terrestrial land that adjoins
    - submerged Crown land above the mean high water mark (for tidal lands), or
    - the bank of a river, creek or lake.

### *Impact of the change*

The proposed regulation 15 would reduce the regulatory burden for developments with a minor impact on the building footprint. For changes in footprint of the lesser between 10 per cent and 10 square meters, there would be unlikely to be significant risks of environmental or other damage associated with the development.

It is not possible to quantify the costs and benefits from changes to the building footprint threshold below which the Minister's consent is not required or to determine the optimal threshold. This would involve striking a balance between regulatory burden and ensuring the appropriate oversight over developments. However, it is likely that the increase from one square metre (which is very small) to the lesser of 10 per cent or 10 square metres would reduce regulatory burden more than it would increase risk. It is unclear how many developments would not require Ministerial consent as a result of the higher thresholds.

It is likewise not possible to quantify the costs and benefits from excluding domestic waterfront precincts. It similarly relies on striking a balance between regulatory burden and oversight. If domestic waterfront precincts pose a greater risk to the environment

25 *Crown Land Management Act 2016 No 58 [NSW]* s2.23(3)(b)+

and community then it is more likely that the benefits of oversight will outweigh the costs of regulatory burden. Domestic waterfront licences are granted "for the use of submerged and tidal Crown land where there is direct access to Crown land".[26] Built structures on this land may lead to overcrowding and interfere with public access to the foreshore. These structures may include jetties, boat sheds and ramps, and berthing areas. It is likely that the added risks associated with waterfront properties exceed the costs of obtaining Ministerial consent for these developments.

For regulation 15, the regulatory option (option 2) is preferred to no regulation.

## *Part 8: Native title rights and interests*

Local councils independently control Crown land that is vested with them, however do not necessarily bear the financial liabilities that arise under the Commonwealth *Native Title Act 1993* from the way they deal with land and their compliance with that Act. Under these arrangements, local councils may not take into account the State's liability under the native title legislation arising from some land uses, dealings and activities.

The *Crown Land Management Act 2016* provides scope to address this misalignment of incentives by allowing regulations to:[27]

- make provision for contributions to compensation payable for the impact of relevant conduct on native title rights and interests, and
- allow the Land and Environment Court to resolve disputes between the State and the persons who engage in relevant conduct to determine responsibility for payment of compensation.

### *Options*

Three options were considered relating to native title:

- Option 1: No regulation
- Option 2: Under proposed regulation 27, local councils are liable to indemnify the State for 100 per cent of any compensation payable by the State for the impact of any conduct of a local council in connection with any former Crown land that is or was vested in it. The liability would be shared between the Department of Industry - Lands & Forestry and the council, where the activity which has resulted in the liability was previously approved or permitted by the Department. Similarly, historical liabilities would be either shared between the Department of Industry - Lands & Forestry and the relevant council, or entirely borne by the Department where appropriate.
- Option 3: Provides that statutory land managers do not have to contribute because their assets, in practice, are not distinct from the Crown's.

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26 See http://www.crownland.nsw.gov.au/crown_lands/leases/waterfront_licences

27 *Crown Land Management Act 2016 No 58 [NSW]* s8.13(3)

### *Impact of the change*

The intention of regulation 27 is to address a market failure. A market failure occurs where the costs to the decision maker of an action are not reflective of the true or social costs of the activity. Under the 'no regulation' scenario, councils may not take into account the native title liability, which may arise from specific activities, and may allow these activities to occur in some cases where it is not socially efficient to do so. Activities are socially efficient where the benefits of an activity to the community are greater than or equal to the costs of that activity.

Based on these economic principles, option 2 will be superior to option 1. Option 2 will ensure that risks and costs related by native title are borne by the decision makers and accounted for in determining how land is managed, leading to better decisions. This may also result in better compliance with the *Native Title Act 1993*, as they will solely bear the risk.

Option 3, would allow an exception for statutory land managers as their assets in practice are not distinct from the Crown's. This option is unlikely to result in any benefits compared to option 2 and the exemption may create the perception that statutory land managers have a reduced obligation to comply with the *Native Title Act 1993*.

Taken together, option 2 is the preferred option.

# 4 Acquisition and vesting of Crown land

In this section, we review the impact of the regulations relating to:

- Acquisition of land and vesting of Crown land (under Part 4 of the Act)

## Part 4: Acquisition of land and vesting of Crown land

### Local land criteria

The Minister may vest specified transferable Crown land in a local council, provided that the following requirements are all met:[28]

- the land is wholly located within the local government area of the council
- the council has agreed
- if the land is the subject of a claim under the *Aboriginal Land Rights Act 1983* and written consent has been given by the relevant Local Aboriginal Land Council and the NSW Aboriginal Land Council (if they are making the claim), and
- the Minister is satisfied after taking into account the criteria in the regulations, that the land is suitable for local use.

Therefore, the regulations may prescribe criteria to be applied in determining whether transferable Crown land is suitable for local use.[29]

#### *Options*

The proposed regulation 26 endorses local land criteria, which are the matters that must be taken into account for identifying the land as "local". It prescribes, in simple terms, that the land currently, may in the future or has shown potential to:

- provide a public good[30],
- be used consistently with the functions of local government, or
- be managed as a community asset by local government or some other body.

The alternative option is to prescribe no criteria for identifying the land as "local". In this case, there will be no ability to transfer local land to councils as the regulations are required to give force to the power.

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28 *Crown Land Management Act 2016 No 58 [NSW]* s4.6

29 *Crown Land Management Act 2016 No 58 [NSW]* s4.6(2)

30 A good is not a public good if a person can be prevented from using it, or one person's enjoyment of it will not reduce another person's enjoyment of it.

*Impact of the change*

Regulation 26 provides criteria the minister must consider before transferring land to councils. In the absence of this regulation, the Minister would not be able to transfer land to councils under the *Crown Land Management Act 2016*. The impact of this regulation is linked to the costs and benefits of transferring Crown land to councils. A business case previously completed by the Department of Industry – Lands & Forestry outlined the rationale for the transfer of Crown land to councils and a range of benefits arising from divesting land.

According to the business case, the NSW Government adds little value to the management of land of predominantly local interest, a large proportion of which isalready managed by local councils under the devolved reserve trust arrangements in the existing Crown land legislation. Councils generally meet all management costs and the value of the land under management sits in council financial accounts. There is a strong rationale for ownership of the land to be transferred to councils who are responsible for managing the land and the associated risks. The business case indicated that this would result in a range of benefits:

- Councils would have greater flexibility in asset management. Councils are in a position to determine better uses of the land, which includes disposing of some land and re-investing the proceeds to improve the amenity of the community land estate. This should result in better asset management decisions.
- The removal of duplication in relation to requiring Minister's consent for activities such as granting leases on local land and the removal of the need for Councils to report to Department of Industry – Lands & Forestry. This will likely reduce administrative costs.
- Allowing councils to manage all land holdings as one entity ensures consistencies in the management and accounting for similar parcels of land. This should result in better decisions and may also reduce the administrative burden as all land holdings can be managed in accordance with local government legislation, removing overlapping administrative responsibilities between the NSW Government and councils.
- It would enable the NSW Government to focus on management and investment in the land remaining in the Crown land portfolio.
- Streamlining inefficient and complex processes and removal of overlapping administrative responsibilities will reduce the costs to stakeholders in using local land. For instance, councils need to obtain Department of Industry – Land & Forestry's approval for business operations on Crown land, even where the land is local land. Regulation that enables transfers to local councils would reduce these administrative costs.

The cost of allowing land transfers to councils would be the additional administrative costs associated with the transfer. A Local Land Pilot testing the concept of devolving local land to councils found that resourcing for the assessment of Crown land parcels was between 0.6 and 1.1 hours for councils (corresponding to a cost of between $20 and

$50 per parcel).[31] Assessing the suitability of land for transfer would be only part of the total costs of implementing a transfer – these other costs are difficult to identify. Given the numerous benefits provided by the regulation, it is likely that costs would be smaller than associated benefits.

Overall, we believe that this regulation is preferable to no regulation, as it makes transfer of land to councils possible. The transfer of lands to councils appears to offer a number of benefits, although we have not been able to quantify these and compare them against the costs of the program. The merits of this program have been detailed in the business case and make a strong case that transfers should occur. These regulations are required to give effect to the land transfers set out in the *Crown Land Management Act 2016* – the alternative of no regulation would prevent the benefits outlined in the business case being realised.

## *Vesting of Crown land in other Government Agencies*

The *Crown Land Management Act 2016* allows the Minister to vest land in other government agencies. This includes statutory corporations, with regulations providing the circumstances where this is permissible. The intent of this regulation is to define the circumstances for vesting in statutory corporations in order to facilitate the vesting of land in them where appropriate.

### *Options*

Two options were developed for this regulation:

- Option 1: No regulation, where no statutory corporations or situations where vesting can occur to these type of organisations are described. This would mean that Crown land could not be vested in these organisations.
- Option 2: Crown land can be vested in a statutory corporation which has responsibilities consistent with the purpose, functions and use of the land proposed to be transferred, and which has an express power to hold land, subject to the agreement of the Minister for Lands & Forestry and the Minister responsible for that statutory corporation.

### *Impact of the change*

Currently there are no provisions to vest Crown land with statutory corporations, and option 1 would be continuation of these arrangements.

Option 2 provides increased flexibility for the Minister to vest Crown land by identifying circumstances where this is permissible. Vesting land in statutory corporations may result in lower management costs if statutory corporations are more efficient at

[31] General Purpose Standing Committee no. 6 Inquiry into Crown Land in New South Wales, Questions on Notice hearing held on 29 Jun 2016, Sydney , accessed on 4 June 2017 at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/10199/AQON%20Minister%20for%20Primary%20Industries%20Lands%20and%20Water%2029%20July%202016R.pdf

managing the land. It may improve management decisions for the land, in particular where the statutory corporation is using the land to support delivery of its functions and responsibilities. This could result in better outcomes for the community.

We have not been able to quantify these benefits, however, we believe they are likely to be greater than the negligible costs associated with vesting land to statutory corporations. Also, the vesting of land is subject to the approval of the Minister for Lands & Forestry and the Minister responsible for the relevant statutory corporation, which should ensure transfers only occur where there are net benefits.

Option 2 is the preferred option.

## *Surrender of lands and leases*

The *Crown Land Management Act2016* states that the owner of any land or holder of any lease under the Act may, with Ministerial consent, surrender the land or lease to the Crown.[32]

### *Options*

The proposed regulation 41 makes provisions related to administrative obligations of holders of land or leases that they wish to surrender under s4.3 of the *Crown Land Management Act 2016*.

Two options exist for the proposed regulation 41.

- Option 1: The proposed regulation 41 imposes four requirements on those who wish to surrender Crown lands or leases:
  - If the Minister consents to surrender, the holder must lodge with the Department a surrender instrument in the form approved by the Minister together with the balance of the cost of dealing with the surrender, and the Crown grant or certificate of title relating to the land.
  - If the application for the consent to the surrender is made after the commencement of s4.3 of the *Crown Land Management Act 2016*, the surrender instrument for land or a lease that is mortgaged must be endorsed with the mortgagee's consent.

  Further, it grants two entitlements to those who seek to surrender Crown lands or leases:
  - If the fee for the application for consent to the surrender exceeds the cost of dealing with the surrender, the balance is to be refunded.
  - Ministerial consent or payment of the costs of dealing with surrender is not required of a holder of land or lease being surrendered if the surrender is being made at the insistence or for the benefit of the Crown.
- Option 2: no regulation, under which:
  - No form is prescribed for the surrender instrument

32 Per *Crown Land Management Act 2016 [NSW]* s4.3.

- The balance of the cost of dealing with the surrender need not be paid
- Mortgagee's consent is not required
- Ministerial consent is still required even if surrender is being made at the insistence of the Crown.

Option 1 reflects the current regulation under Clause 36 of the *Crown Lands Regulation 2006* with the addition of the requirements that mortgagee's consent is required.

### *Impact of the change*

Relative to the status quo, regulation 41 would impose the requirement that for the surrender instrument for land or a lease that is mortgaged, the application must be endorsed with the mortgagees consent. Requiring the mortgagee's consent would allow mortgagees to prevent the transfer of lands/leases in circumstances that would disadvantage the mortgagee. This would likely result in a benefit to affected mortgagees, However, there may be a cost to holders who wish to surrender land/leases in cases where surrender is beneficial for holders but not mortgagees. Holder and mortgagees may be able to negotiate to enable surrender in return for compensation to mortgagees if necessary. The harm caused by surrender to mortgagees is an external cost, and the regulation would effectively internalise this cost to the decision-maker (the holder). Thus this aspect of regulation 41 is preferred to the current regulation.

The impact of regulation 41 relative to no regulation depends on the circumstances under which the Minister would grant approval to applications to surrender land/leases.

However, if under no regulation these obligations were not imposed and entitlements were not given to applicants, then the regulation will have two benefits.

- By making the holder who wishes to surrender lands/leases liable for the costs of dealing with surrender, the regulation encourages surrender to occur in only those cases where the benefits of surrender are greater than the costs of dealing with it. Likewise, by making the Crown liable for costs when surrender is at the insistence or for the benefit of the Crown, the regulation would encourage surrender to occur in only those cases where the benefits are greater than costs.
- The regulation would likely result in administrative time savings for the Department by requiring surrender applications to be lodged in the form approved by the Minister. These savings have not been quantified, but are likely to be small for each surrender application.

Given these benefits, regulation 41 is the preferred option.

# 5 Dealings involving Crown lands

In this section, we review the impact of the regulations relating to:

- Dealings involving Crown land and other related land (under Part 5 of the Act)
- Rent for holdings (under Part 6 of the Act)
- Alteration, withdrawal and forfeiture of holdings (under Part 7 of the Act)

## Part 5: Dealings involving Crown land and other related land

### Holdings and provisions

The proposed regulation 29 prescribes the matters which may be included in the terms and conditions of holdings. The *Crown Land Management Act 2016* states that, without limitation, terms and conditions of a holding may include provisions about any of the following:

- the determination of rent for the holding
- if relevant, the granting of subleases
- the forfeiture of the holding
- the giving of notices or information
- access and inspection rights over the land under the holding, and
- any matter that is required or permitted to be included by a provision of the *Crown Land Management Act 2016* or the regulations.

This means that the regulations may prescribe matters required or permitted to be included in the terms and conditions of a holding.

#### Options

The proposed regulation 29 prescribes the following matters permitted to be included in the terms and conditions of holdings:

- insurance requirements
- requirements to provide indemnities
- obligations regarding land or water management
- obligations to prevent or minimise contamination of land
- obligations to return land and premises to the same condition as at commencement of the holding

The alternative to Regulation 29 is no regulation, under which the matters permitted or required to be included are as defined by the *Crown Land Management Act 2016*.

### *Impact of the change*

There are unlikely to be significant benefits or costs from this regulation. The additional requirements permitted to be included are not mandatory, and thus it is at the discretion of the Department to determine which matters are included in the terms and conditions of holdings. However, the regulation does provide greater clarity about what matters may be included in the terms and conditions. The *Crown Land Management Act 2016* states that without limitation, terms and conditions of a holding may include provisions about a selection of matters. This means that the list of matters permitted to be included does not limit the matters that may be included at the discretion of the Department (i.e. other matters can be included in the terms of holding, even if not prescribed by the regulations). Thus, the proposed regulation 29 will not substantively change the content of terms and conditions of holdings.

The proposed regulation 29 is consistent with the objectives of the *Crown Land Management Act 2016*, to provide clarity and to allow environmental, economic and other considerations to be taken into account in decision-making. Regulation 29 is preferred to no regulation.

## *Sale of land in the Western Division*

The *Crown Land Management Act 2016* prohibits certain land in the Western Division from being sold.[33] Land in the Western Division may be sold if the land is:

- in an urban area
- in an area required for urban expansion, or
- located within a distance prescribed by the regulations from an urban area and its sale will contribute to the economic growth of the region in which both the land and urban area are located.

The regulations may prescribe the distance from an urban area within which land may be sold.

### *Options*

Option 1 proposes no regulations; this would limit the range of land in the Western Division to be sold by not allowing land outside of an urban area to be sold unless one of the other criteria are met.

Option 2, the proposed regulation 30, prescribes that land in the Western Division within 20 kilometres of an urban area is able to be sold.

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33 *Crown Land Management Act 2016 No 58 [NSW]* s5.9(1)

### *Impact of the change*

The impact of this change depends on how much land is within 20km of an urban area yet does not meet the other requirements under s5.9(1) of the *Crown Land Management Act 2016*. In the Western Division there are around 6 700 parcels of Crown land within 20 kilometres of urban areas, with a total land area of around 244 000 hectares.[34] The large amount of land area is consistent with the large size of the Western Division, it is however difficult to determine what proportion of this land that would be sold.

Sales of land will transfer ownership to the person who places the greater value on the land. Additionally, the *Crown Land Management Act 2016* requires that the sale will contribute to the economic growth of the region in which both the land and urban area are located. Taken together, this should promote higher value use of Crown land, resulting in a net benefit.

Non-urban land may be prevented from being sold because of concerns about the environmental impact that would result if the land ceases to be regulated by the Crown land legislation. Land in the Western Division is often environmentally very fragile. By allowing only the urban areas (where there is likely to be most demand for land) and areas where there is demonstrable environmental resilience to high impact activities to be sold, the rest of the Division is protected. Given this regulation only gives the Minister the option, but not necessarily the obligations to sell land, we expect that the Department will be able to manage this environmental risk and not recommend sales where environmental impacts are expected to be large. Option 2 is therefore the preferred option.

## *Licences for unauthorised users or occupiers*

The proposed regulation 32 regards licences for unauthorised users or occupiers of Crown land. The *Crown Land Management Act 2016* states that the Minister may grant licences to authorise a person to use or occupy Crown land if the person is currently using or occupying the land without lawful authority.[35] The regulations may make provisions with respect to matters such as the payment of rent, the purposes or activities authorised by licences, and the expiry of licences.[36]

### *Options*

The proposed regulation 32 concerning licences for unauthorised use or occupation of Crown land makes the following provisions with respect to these licences:

- rent must be paid monthly and in advance
- the licence holder must maintain the area subject to the licence in a good condition

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34 This excludes Crown land which has a permanent lease, has been sold, is occupied by the Commonwealth and has a lease for extraction.

35 *Crown Land Management Act 2016 No 58 [NSW]* s5.26(1).

36 *Crown Land Management Act 2016 No 58 [NSW]* s5.26(4).

- the licence holder must comply with all laws in relation to the use of land to which the licence refers
- the licence holder must make good the licenced area to the satisfaction of the Minister
- the licence holder can only use the area for the purpose specified by the licence
- the licence holder must indemnify and release the Minister from any liability in connection with their use or occupation of the licenced area, and
- the Minister may terminate the licence at the Minister's absolute discretion.

This regulation would mean that these licences would automatically be subject to these conditions, whether or not they are expressed in the licence.

The alternative of no regulation would mean these provisions do not automatically apply. Prescribing conditions gives certainty as to the terms of these types of licenses. Without regulation the same conditions could be imposed, but would need to be done administratively.

### *Impact of the change*

There is no data available indicating the extent of unauthorised Crown land use. As a result, we have not quantified the benefits or costs of the proposed regulation 32.

This regulation is likely to improve the condition of the land by obliging licence holders to maintain the area. Requirements placed on unauthorised users will ensure consistency across users and will ensure that land is returned to the condition it would have been in had the licence holder not unlawfully used or occupied the land. Although not an economic impact, the regulations are likely to improve fairness of conditions across different licence types (i.e. unlicensed users would not be advantaged compared to current users who are licenced).

These regulations are likely to reduce the administrative costs incurred in granting and administering licences for unauthorised users and occupiers or land. Without regulation, the licence conditions would need to be applied administratively. Estimates of these costs savings are not available, but provide a further justification for regulation along with the benefits noted above.

There are likely to be net benefits from the proposed regulation 32 relative to no regulation, and it is the preferred option.

## *Transfer of licences*

The proposed regulations 33 and 34 prescribe requirements for notification of transfer of particular land that is benefited by a Crown land licence and enclosure permit respectively. Notification requirements for the transfer of this land and enclosure permits are intended to enable the Department to ensure that appropriate fees and rent are paid (and that where a licence is not transferred and is instead revoked, structures

are removed from the Crown land area).[37] Regulation 33 applies to the specific circumstance where a licence is attached to specific land (e.g. a domestic waterfront licence that benefits a freehold property). In this case, if the freehold land is sold then the licence may transfer to the purchaser of the freehold land, who becomes liable for all rent and arrears. In other circumstances instead of transferring a licence, the original licence would be cancelled and a new licence would then be created, and arrears would remain the liability of the original licensee.

The *Crown Land Managements Act 2016* s5.27(5) states that a licence transferee must notify the Minister in the manner and within the period prescribed by the regulations. The *Crown Land Managements Act 2016* s5.37(2) states that the person to whom an enclosure permit is transferred must notify the Secretary in the manner and within the period prescribed by the regulations.

### *Options*

The proposed regulation 33 is intended to ensure that when the benefited land is sold, the purchaser becomes the new licence holder and pays any rent and administrative fees owed under the licence associated with the land.

The proposed regulations 33 and 34 provide that a written notice must be lodged with an office of the Department of Industry - Lands & Forestry (accompanied by the relevant fee) within 28 days from the date of the transfer. The alternative option of no regulation would not impose any manner and period requirements for the lodgement of notification.

### *Impact of the change*

The impacts of these regulations are to provide a record of notification for the Department in a consistent format and sets expectations for when the Department must be notified, supporting administrative efficiency. In the absence of these regulations, there would be no prescribed manner and period for notification, which may prevent Department of Industry - Lands & Forestry from ensuring that rent and fees are paid.

It takes a few hours to fill out the form for notification of transfer and lodge the application fee. The time taken to do so under no regulation is similar as the same information needs to be provided to the Department. Processing time for the Department would be the similar for both the prescribed form and non-prescribed form since the same information is input and analysed.

Prescribing a time frame allows the Department to be informed of the transfer in a timely manner and avoids the possibility of new licence or permit holders accumulating a large financial debt over time. The longer the time period between the transfer and informing the Department of the transfer, the larger the financial debt which accumulates.

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37 See *Crown Land Management Act 2016 No 58 [NSW]* s5.27(3) regarding licence transfers and s5.37 regarding transfer of enclosure permits.

Therefore, there are likely small net benefits of these regulations associated with the benefit of providing a record of notification for the Department in a consistent format. This may reduce the incidence of errors in processing notification. Thus, regulations 33 and 34 are preferred to no regulations.

## *Activities and structures allowed on public easements*

Two proposed regulations relate to activities allowed on public easements. An easement for public access may be granted by the Minister and confers on the public a right to enter the land and carry on any activity, except those prescribed by the regulations.

Additionally, an owner or lessee of land over which there is a public easement cannot erect any structure unless the Minister gives written consent for it. However, Ministerial consent is not required for a fence or gate that does not unduly hinder public entry to the land, or any other kind of structure prescribed by the regulations.

### *Options*

The proposed regulation 35 specifies prohibitions on activities on easements for public access. It replicates the prohibitions set out in clause 22 of the *Crown Lands Regulation 2006* with some minor changes. This clause prohibits activities including camping, lighting fires, taking any animal onto the land and damaging of injuring any fauna or flora.[38] A selection of these prohibited activities may be carried out if so provided for by a sign. The proposed regulation makes the following changes to clause 22:

- 'setting traps' is permitted if so provided for by a sign, and
- clarifies that commercial and recreational fishing is permitted on an easement (notwithstanding other prohibited activities).

The alternative of no regulation would mean that, consistent with *Crown Lands Management Act 2016* s5.51(4), members of the public may carry out any activity on land subject to a public access easements.

The proposed regulation 36 specifies that cattle grids, pipelines and pumps may be erected on public access easements without Ministerial consent as long as they don't hinder public access to land. This replicates clause 23 of the *Crown Lands Regulation 2006*. The alternative option is no regulation, which would mean that only fences and gates can be erected on a public access easement without Ministerial consent (provided that they do not unduly hinder public access).

### *Impact of the change*

The impacts of the proposed regulation 35 relative to the current regulation of public access easements (under the *Crown Lands Regulation 2006* clauses 22 and 23) would be to permit 'setting traps' where provided for by a sign. It has not been possible to determine how many signs are likely to be erected permitting traps to be set. There may be environment benefits associated with pest eradication and costs associated with

38 *Crown Lands Regulation 2006 [NSW]* 22.

harm to native wildlife from setting traps. If signs are only erected in situations where there are unlikely to be costs greater than benefits, then the proposed regulation 35 is likely to lead to net benefits relative to the current regulation (clause 22).

Having no regulation would permit all activities on public easements without signage. This includes lighting fires, driving motor vehicles, depositing rubbish, and other activities. Failing to prohibit the activities prescribed by the proposed regulation 35 would likely lead to environmental harm, greater risk of personal harm, and hindering public access. However, some of these activities may be prohibited through other legislation. For example, littering is regulated by the *Protection of the Environment Operations Act 1997*. Thus, only activities that would not be possible on other land would cease to be prohibited on public easements under the option of no regulation.

The costs of prohibiting this behaviour are a reduction in the benefits these activities may deliver. For example, individuals may derive value from camping in these locations. For the selection of activities listed in Regulation 35, it is likely that the inhibition to public access and other negative impacts are greater than the private benefit from those activities. Therefore, regulation 35 is likely to have net benefits relative to no regulation and is the preferred regulation.

The proposed regulation 36 replicates the existing clause 23 of the *Crown Lands Regulation 2006*, and thus there are no costs and benefits of the new regulation relative to the existing regulation.

The impacts of the regulation relative to the alternative of no regulation are likely to be positive. The proposed structures for regulation 36 will not hinder public access, and serve other functions such as preventing cattle from crossing certain boundaries. Therefore, Ministerial consent is unnecessary for these structures to be erected on public easements and administrative time spent obtaining Ministerial approval be avoided. Ministerial consent would take approximately 3-4 weeks to obtain, including 3-4 hours of processing time at a cost of around $40 per hour. The number of such structures that are erected is not known.

Regulation 36 is preferred.

### *Removal of a covenant or restriction*

The Minister may impose restrictions on use or public positive covenants on Crown land.[39] If the restriction or covenant on Crown land was imposed by the *Crown Lands Act (1989)*, then the Minister may consent to its removal. Where the restriction or covenant was originally imposed under the *Crown Lands Act 1989*, under certain circumstances the Minister must consent to its removal, such as if:

- the land is being sold,
- the land is being purchased under a purchasable lease, or
- the purchaser or applicant requests its removal and provides the Minister with any documentation required for removal

39 *Crown Land Management Act 2016 No 58 [NSW]* s5.56

However, the Minister may not consent to the removal of such restrictions or covenants under certain circumstances such as if the land adjoins land dedicated under the *National Parks and Wildlife Act 1974* or a wilderness area.

The Minister also cannot consent to the removal of such restrictions or covenants if they were imposed under s77B of the *Crown Lands Act 1989* unless, having regard to prescribed assessment principles, it is appropriate to do so. The *Crown Land Management Act 2016* s5.57(5) provides that the regulations may make provision for the prescribed assessment principles.

#### *Options*

The proposed regulation 37 prescribes certain principles that should be applied to ensure conservation, habitat connectivity and biodiversity protection. It requires that the Minister consider the following principles:

- Natural and cultural conservation values should be maintained
- Habitat connectivity should be maintained
- There should be no increase in the number of severity of threats to biodiversity

The alternative of no regulation would mean that the Minister cannot consent to the removal of a restriction or covenant on Crown land that was imposed under s77B of the *Crown Lands Act 1989*.

#### *Impact of the change*

In the absence of regulation, these covenants could not be removed. Compared to current arrangements, the proposed regulation will increase flexibility for the Minister to remove covenants, as well as increasing certainty and transparency around what factors are considered in making the Minister's decision. The value of flexibility and transparency is not able to be quantified, however, these benefits are likely to be positive.

Given there is likely to be net benefit for this regulation, with no appreciable cost, the regulation is preferred to the no regulation option.

# *Part 6: Rent for holdings*

## *Minimum base rent and rent base adjustment*

The Act provides for the payment of rent for holdings of Crown Land, and states that rent for a holding is not to be less than the minimum rent, calculated at the date rent is due and payable.[40]

The Act specifies a formula for calculating minimum rent, which is function of the minimum base rent and CPI. The Act allows regulations to set:

40 *Crown Land Management Act 2016 No 58 [NSW]* s6.4

- the minimum base rent. This is $472 or any greater amount specified by regulations, and[41]
- the rent base adjustment date, which is 1 July, or if the minimum rent base is prescribed by the regulations, the date prescribed by the regulations as the rent base adjustment date.

When rent is payable, the minimum base rent is escalated by the Consumer Price Index for the last quarter for which this data is available. Where rents are payable across the year, and given the Consumer Price Index is published on a quarterly basis, minimum rent will increase four times per year.

The act proposes that a single minimum rent be applied across all Crown lands. Previous regulatory arrangements made special provisions for Western Lands, which were subject to a lower minimum rent of $100 for rural holdings and urban leases prescribed in the regulations associated with the *Western Lands Act 1901*.[42] Similarly, the *Crown Lands Regulations 2006* identify minimum rents in the Western Division:[43]

- the minimum annual rent of a holding is $70
- the minimum annual rent of an enclosure permit authorising the cultivation of the land enclosed is $70
- the minimum annual rent of any other enclosure permit is $50

These minimum rents were not indexed by CPI, which means that over time the real rent paid (i.e. the rent cost abstracting from the impacts of inflation overtime) would decrease.

Regulations may specify an alternative minimum base rent or rent base adjustment date, compared to that included in the Act, which is the date that the rental rate is updated for a specific lease.

### *Options*

Three options were developed:

- Option 1: No regulation, leaving the minimum base rent always at $472 and the rent base adjustment date always 1 July first occurring after the commencement of this section.
- Option 2: Update the minimum base rent to be whatever the rent is at the commencement of the Act and update the rent base adjustment date being set at the date the Act commences. Rent would then be indexed annually (i.e. the minimum rent would be calculated once per year, with the same rate being charged regardless of when rent is payable across the year).
- Option 3: Update the minimum base rent to be whatever the rent is at the commencement of the Act and update the rent base adjustment date being set at the

41 We understand that this rate was initially set to reflect the annual cost to maintain an individual holding account (i.e. rent is based on cost recovery).

42 *Western Lands Regulation 2011, under the Western Land s Act 1901 [NSW]* clause 8.

43 *Crown Land Regulations 2006* clause 39.

date the Act commences. Rent would then be indexed for each holding based on the date the holding commenced. Across a year, there would be four different minimum rents across the year, reflecting quarterly CPI data.

The minimum rent is calculated as follows:

$$Minimum\ rent = B \times \frac{C}{D}$$

Where:

- B is the minimum base rent
- C is the Consumer Price Index number for the last quarter for which a number was published before the due date for the rent.
- D is the Consumer Price Index number for the last quarter for which a number was published before the rent base adjustment date.

Based on this definition the minimum base rent is directly linked to the rent base adjustment date. The rent base adjustment date is the period when the minimum rent is equal to the minimum base rent. Overtime, the minimum rent increases from the minimum base rent at the rate of inflation. There would be very little rationale to change the minimum base rent using regulations, and to not change the rent base adjustment date, as this would fail to recognise the intrinsic link between these parameters, and would lead to the level of real rents being higher or lower. For instance:

- If the minimum base rent is increased without the rent base adjustment date changing (i.e. option 2), the minimum rent will be higher in real terms
- If the minimum base rent remains the same, but the rent base adjustment date is changed so that is more recent, the minim rents charged will be lower in real terms.

### *Impact of the change*

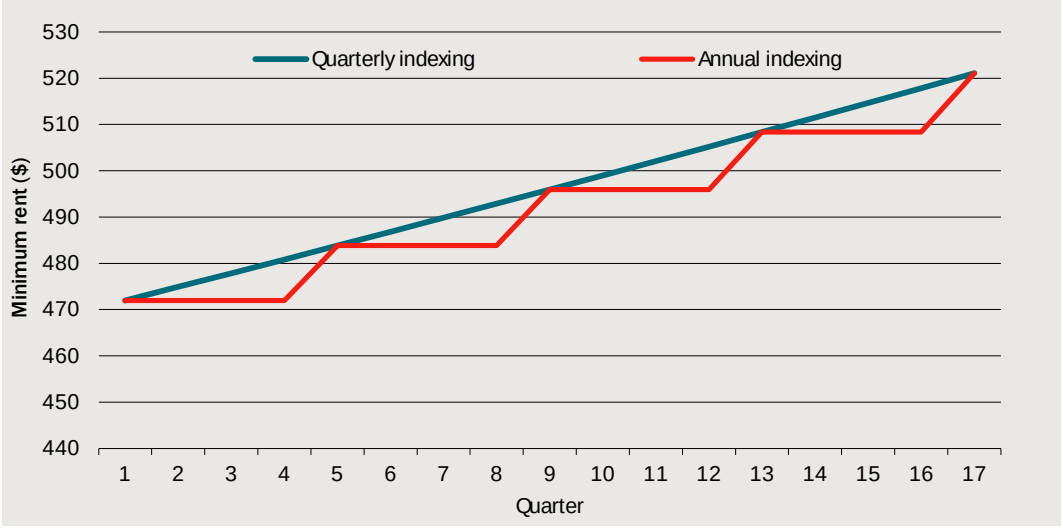
In practice option 1 and 3 are very similar administratively, and the choice between these two options will have little to no impact on the administrative burden of calculating the minimum rent.

Option 2 proposes to change the date at which the minimum rent is calculated. Currently, this is recalculated using the Consumer Price Index published most recently before the due date for rent – this is potentially four times per year (as per option 3). Option 2 proposes indexing rents for all land holdings once per year, with that rate being used for rent payments that are staggered across the year (i.e. although the minimum rent is calculated only once per year, payments are staggered through the year to help, like option 3). There are two key impacts of this:

- There could be an administration saving from not having to update minimum rents. This saving is likely to be very small as the minimum rent formula is very simple – we expect it would take less than five minutes to locate the correct Consumer Price Index data and calculate the appropriate rent for a given quarter.
- Moving from quarterly to annual indexing would result in lower rents in some quarters (see chart 5.1 for a comparison). Quarterly indexing sees the minimum rent increasing steadily over time whereas annual indexing sees rent jumping once per

year. Where rent is collected across the year, this annual indexing would recover approximately 1 per cent less rent than under quarterly indexing. Based on revenues from Crown land leases of $56.4 million in 2016,[44] annual indexing would come at an annual cost of around $525 000 in lost rent for Government (assumes annual CPI growth of 2.5 per cent). For an individual land holder the rent saving between option 2 and 3 is small, however the impact on Government across all land leases would cumulatively be material. Note this does not affect welfare, but is a transfer from Government to land holders. From an economic welfare perspective, there is little difference between option 2 and 3.

### 5.1 Quarterly vs Annual indexing of minimum rent example




*Data source:* CIE

Apart from these impacts, there may be a case that annual indexing is more user friendly for lessors. We do not believe this to be the case as the current arrangements are clearly articulated in the Act and published on the Crown lands website.[45]

Overall, there is little case for moving from quarterly to annual indexing as this would come at a financial cost to the Department, with no appreciable benefit. Option 3 is the preferred option for the Department.

Similarly, analysis indicates that option 3 is the preferred regulatory approach.

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44 NSW Department of Industry 2016, *NSW Department of Industry Annual Report 2015-2016*, p. 125

45 http://www.crownland.nsw.gov.au/crown_lands/leases

# Part 7: Alteration, withdrawal and forfeiture of holdings

## Circumstances where the provisions of the Land Acquisition (Just Terms Compensation) Act 1991 do not apply

The Act makes provisions for the Minister to withdraw land from a holding for public purposes. Public purposes include for a road, travelling stock reserve and for a camping reserve or other reserve.

Where land is withdrawn, compensation is generally payable under the Act, but is subject to the conditions or provisions for the relevant land holding. This payment of compensation is generally subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (*Land Acquisition Act 1991*) relating to the payment of compensation for land acquired by compulsory process with any modifications or exceptions prescribed by the regulations.[46]

Regulation 39 relates to any modifications to the provisions of the *Land Acquisition Act 1991*.

### Options

Two options for this regulation were considered:

- A status quo option, where the *Land Acquisition Act 1991* applies to Crown land when Crown land is withdrawn from holdings in the same way it applies to other land. This is consistent with current regulations.[47]
- A regulation option where the application of the *Land Acquisition Act 1991* is altered where there is an adjustment in the area of a Crown Lease. In this case, the tenant claim and interest is limited to the value of improvements at the date of taking only.

### Impact of the change

The impact of changes to compensation arrangements, in particular identifying instances where the *Land Acquisition Act 1991* is not applicable, cannot generally be quantified.

The regulation may improve long-term decision making regarding land acquisition and affect social welfare, where land withdrawal occurs or does not occur due to the level of compensation paid. This would occur when compensation currently does not reflect the true value of a holding in its current use and the regulation results in compensation being paid which is closer to the value of the holding in its current use. In this case compensation would better reflect the opportunity cost of the holding in the decision to withdraw land holdings. This would avoid instances where:

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46 *Crown Land Management Act 2016 No 58 [NSW]* s3.31(2)

47 *Crown Lands Regulation 2006 [NSW]* Part 6, clause 35.

- a social welfare reducing withdrawal of land holdings *does* occur because compensation is greater than the value of holding to current users (i.e. compensation is greater than the opportunity cost), or
- a social welfare increasing withdrawal of land holdings *does not* occur because the compensation is lower than the value of holding to current users (i.e. compensation is lower than the opportunity cost)

This impact cannot be measured, as this would require understanding the benefits and costs of withdrawing holdings. These are likely to vary significantly across the state and for different land uses.

If these changes do not result in change in decisions (i.e. the land withdrawal occurs or does not occur regardless of the amount of compensation), this regulation would have no impact on economic welfare, but would have an impact on the distribution of benefits. For instance, if compensation is reduced for a landholder, benefits will be redistributed from the landholder to the Government, while the overall social welfare benefit of changing the holding would be unchanged.

Given there is scope for the regulation to improve social welfare, the regulatory option is preferred over the status quo.

# 6 Land in Western Division

In this section, we review the impact of the regulations relating to:

- Land in Western Division (under Schedule 3 of the Act)
- Purchasable leases in the Western Division (under Schedule 4 of the Act)

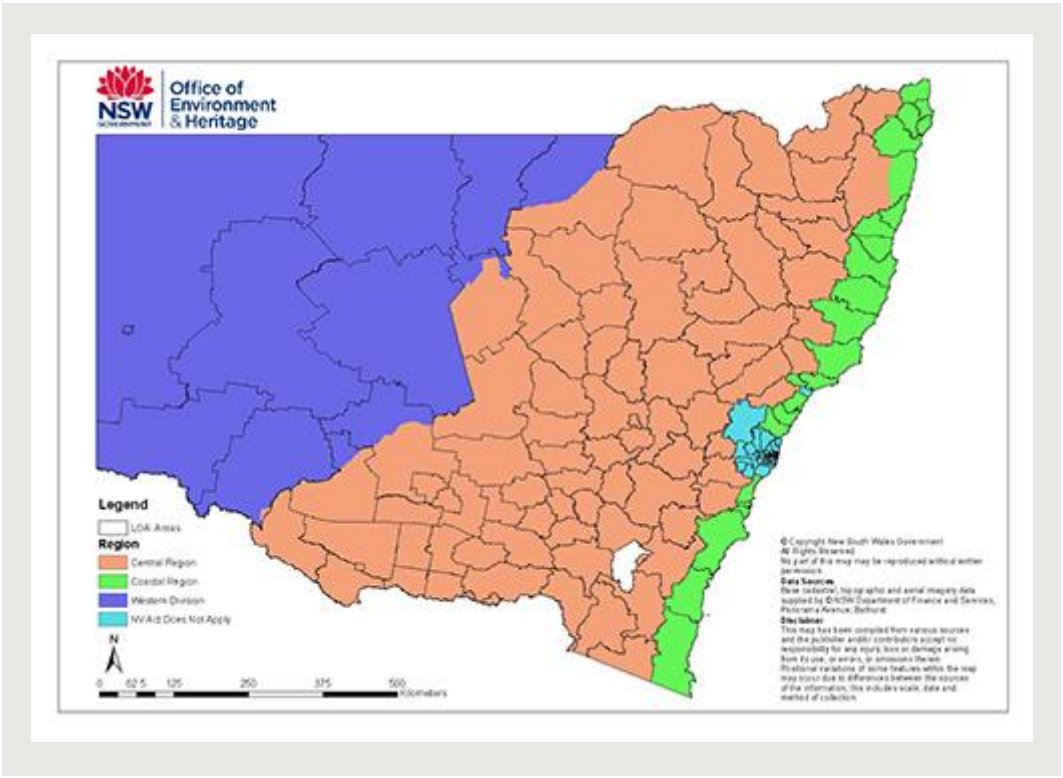
## Schedule 3: Land in Western Division

### Summary

The *Western Lands Act 1901* made special provisions for granting leases and incomplete purchases over Crown land in the Western Division. Schedule 3 makes special provision for these historical arrangements and also makes provisions which are applicable to certain land in the Western Division.

Almost half of NSW falls within in the Western Division, which covers more than 32 million hectares. The area is sparsely populated, with fewer than 2 000 primary producer enterprises. The mining communities of Broken Hill, Lightning Ridge and Cobar are the only urban population centres in the division with populations greater than 3 000. Figure 6.1 is a map showing the boundaries of the Western Division (shown in purple).

### 6.1 Boundaries of the Western Division




*Note: The Western Division area is shown in purple.*

*Data source:* NSW OEH (http://www.environment.nsw.gov.au/vegetation/buffer.htm#map)

## *Activities permitted without Ministerial consent*

The Act allows regulations to identify approved activities, which leaseholders can carry out without prior Ministerial approval on perpetual Western land leases.[48] Regulation 43 relates to specifying these activities.

Similarly, there are provisions in the Act for prescribing conditions where cultivation can occur without the consent of the Minister.[49] This it to give flexibility as generally the Act does not allow for the cultivation of land unless:

- there is a cultivation consent for it, and
- the cultivation complies with the relevant consent.

Regulation 59 relates to specifying the circumstances where a cultivation consent and compliance with that consent is not required.

### *Options*

Two options were considered for regulations 43 and 59 (see table 6.2)

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[48] *Crown Land Management Act 2016 No 58 [NSW]* schedule 3, clause 19(1).

[49] *Crown Land Management Act 2016 No 58 [NSW]* schedule 3, clause 42(5).

## 6.2 Options for regulations 43 and 59

| Regulation | Option 1 | Option 2 |
|---|---|---|
| Regulation 43 | No regulation (no approved activities) | Applying only to land held under a perpetual lease in the Western Division, the Minister is taken to have given consent for the activities, subject to conditions, noted in table 6.3. |
| Regulation 59 | No regulation (cultivation consent is always required) | Develop regulations similar to clause 18 and schedule 3 of the Western Lands Regulation 2011. There would be a number of changes to schedule 3, including:<br>▪ Excluding the notification/authorisation requirements (i.e. there would be no need to for approval)<br>▪ Remove conditions allowing cultivation to be carried out as a firebreak<br>▪ Change the maximum size of cultivation allowed from 10 hectares to 100 hectares for fodder production, but only if fodder is for on farm use. |

*Source:* The CIE.

## 6.3 Regulation 43, activities permitted without ministerial consent

| Category | Description |
|---|---|
| Conservation | The lessee must not restrict Forestry NSW from accessing crown timber for harvesting purposes in accordance with the Forestry Corporation of NSW's rights under the *Forestry Act 2012*. |
| Tourism and farm tourism | Limited to 20 guests at any one time and using only existing farm buildings and infrastructure. Note: Camping in connection with tourism and farm tourism is not limited to 2 nights at a time (as per the condition on recreation below). |
| Feedlots (except if they are for the purposes of designated development under the *Environmental Planning and Assessment Act 1979*) | Must comply with any requirements applicable to the activity under the *Environmental Planning & Assessment Act 1979* and other relevant laws. |
| Aquaculture | Must comply with the *Environmental Planning & Assessment Act 1979* and other relevant laws. |
| Sporting and leisure events | There must be appropriate public liability insurance in place which covers the duration of events on the land of at least $10 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover. |
| Recreation | Camping in locations without camping facilities cannot be for no more than two nights at a time.<br>The lessee must ensure the activities are covered by public liability insurance which covers the duration of activities, of at least $10 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover. |
| Military exercises | Exercises must be conducted and authorised by the Australian Defence Department.<br>The lessee must ensure that appropriate public liability insurance is in place which covers the duration of the exercises of at least $20 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover. |
| Recreational shooting | Shooters must be licenced to carry firearms under the *Firearms Act 1996*.<br>Warning signs must be displayed on the perimeter of the land.<br>Only feral animals are to be hunted unless hunters are authorised to take or kill fauna under the *National Parks and Wildlife Act 1974*.<br>There must be appropriate public liability insurance in place of at least $20 million in respect |

| Category | Description |
|---|---|
| | of each and every occurrence, and unlimited in the aggregate for any period of cover. |
| Dog kennel | The kennel must be operated in compliance with any relevant Local Environmental Plans under the *Local Government Act 1993*. |
| Cattery | The cattery must be operated in compliance with any relevant Local Environmental Plans under the *Local Government Act 1993*. |
| Cultivation | Cultivation is only permitted for:<br>• improved pasture, up to a maximum of 1000 hectares<br>• fodder production for on farm use, up to a maximum of 100 hectares<br>• rabbit control and noxious weed control<br>• saltbush planting<br>• plantation of a pre-approved species, up to a maximum of 50 hectares |
| Film making | The leaseholder must give at least 28 days prior notice of the activity to the Department.<br>Fees charged by holders must reflect the holder's costs only.<br>Film makers must be required to comply with safety measures and appropriate operational requirements.<br>There must be appropriate public liability insurance in place which covers the duration of filming on the land of at least $10 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover. |
| Motorsport rallies | The leaseholder must give at least 28 days prior notice of the activity to the Department.<br>There must be appropriate public liability insurance in place which covers the duration of rallies on the land of at least $20 million in respect of each and every occurrence, and unlimited in the aggregate for any period of cover. |
| Construction, operation and maintenance of telecommunication facilities by non-commercial telecommunication operators | The facility must be for the purpose of personal or farm use only. |
| Fishing | Limited to recreational fishing only (no commercial operators)<br>Must be carried out in compliance with the *Fisheries Management Act 1994* |
| Fossicking | Must be carried out in compliance with the *Mining Act 1992* |
| Small to medium scale renewable energy generation | Small to mid-scale renewable energy generation project should be defined as a project which:<br>▪ Uses any type of technology (i.e. is technology neutral)<br>▪ Is less than or equal to 5MW in size |

Source: Department of Industry – Lands and Forestry.

### *Impact of the change*

Prescribing a range of activities that people can conduct on Crown land without requiring consent reduces the administrative burden to the Department of Industry and individuals wishing to undertake approved activities. Where a formal approval process is not expected to result in better environmental or social outcomes (i.e. less damage to the environment, or impacts on other users), there is a strong case for activities to be exempt from Ministerial approval.

For instance, under option 1 for regulation 43, landholders would be required to seek approval for any activity they wish to undertake. Each application takes around three to four hours to assess, at a cost of around $150 per application.[50] Because the activities listed in the regulations would be low risk, temporary or localised activities, it does not appear that an application process would result in demonstrably better environmental or social outcomes. Any activities which could have a substantial impact are subject to conditions to minimise this impact, or are covered by other existing legislation.

Therefore, option 2 is preferred for regulation 43.

Similarly, allowing cultivation to occur in appropriate circumstances without a cultivation consent will result in net benefits where the environmental and social impacts of not having obtained approval are smaller than the administrative cost saving. Given the existing regulations permit cultivation for areas of up to 10 hectares, which is relatively small, we expect that the risks of cultivation without approval are small – in this case the no regulation option is expected to be inferior to the status quo.

For option 2 for regulation 59, increasing the area of cultivation permitted without requiring approval to 100 hectares is not expected to result in a very large environmental or social impact or administrative saving. In 2015-16 there were 17 applications to cultivate Crown land – of these around 1 or 2 applications were for areas less than 100 hectares. Assuming an administrative cost per application of around $150, this regulation is not expected to result in a significant saving. Cultivation up to 50 hectares is not expected to result in significant negative environmental or social impacts. Option 2 is expected to result in slightly higher net benefits than the status quo and is preferred to option 1, the no regulation option.

## *Method calculating rents and fees*

The Act makes provisions for regulations to outline the method for calculating the rent for continued Western lands lease.

### *Options*

Regulations 44-54 relate to the methods to be used to set the rent for Western land leases. A no regulation option is considered alongside an option to adapt the current framework established under the *Western Lands Act 1901*.

The existing framework for determining rents is set out in sections 20 through to 27A of the *Western Lands Act 1901* and clauses 7, 9 and 10 of the *Western Lands Regulation 2011*. This option proposes to make the following changes:

- Change references to the Commissioner to the Minister
- Omit clauses 27A(2) which refers to the need for the Minister to consult with the Western Lands Advisory Council. Under this regulation, consultation would not be required.

[50] The fee charged to the applicant is around $151, which we understand reflects the cost of assessing the application.

### *Impact of the change*

The no regulation option would not be feasible as it would create significant uncertainty around rents. This could result in highly inequitable outcomes, with rents for similar land holdings varying significantly.

The regulation, which proposes to adapt existing parts of the *Western Lands Act 1901* and the *Western Lands Regulation 2011*, does not result in a material change in regulation. The proposed regulations 44-54 are the preferred option.

## *Applications to change the terms of a lease*

Lessees of Western land are able to apply:

- for an extension of the terms of a lease, or [51]
- to convert a term lease into a perpetual lease.[52]

The *Crown Land Management Act 2016* allows regulations to determine the manner and form of these applications.

Where an application to convert a term lease to a perpetual lease is granted for only part of a lease holding a survey may be required. The *Crown Land Management Act 2016* states that cost of any surveys must be paid for by the holder of the new perpetual lease, with regulations prescribing the manner and time of payment.[53]

### *Options*

Two options were considered for both extensions of the terms of a lease (regulations 55-56) and conversion of a term lease into a perpetual lease (regulations 57-58):

- Option 1: No regulation (ad hoc application method)
- Option 2: Apply current regulations from the *Western Lands Regulation 2011* to the Crown lands regulation.

Similarly with regards to the manner and time of payment for necessary surveys, a no regulation option (options 1) and the continuation of the current regulations from *Western Lands Regulation 2011* (option 2) were considered.

### *Impact of the change*

Having established arrangements for making an application is likely to provide useful guidance to applicants, ensuring that they provide the appropriate information required to assess their application, and that they do not unnecessary spend time preparing material which is not used in the determining the application. Similarly, provisions around payment arrangements are likely to provide greater clarity to lease holders.

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51 *Crown Land Management Act 2016 No 58 [NSW]* schedule 3, clause 32(3).

52 *Crown Land Management Act 2016 No 58 [NSW]* schedule 3, clause 33(2).

53 *Crown Land Management Act 2016 No 58 [NSW]* schedule 3, clause 35(2)(f).

Based on this principle, option 2 for each pair of regulations is strongly preferred to option 1, the no regulation options.

Option 2 proposes a continuation of existing regulations, which has no impact.

## *Giving of notices about applications for enclosure permits*

Under the *Crown Land Management Act 2016*, the Minister may, on the application of a holder of land, grant a permit to the holder of the land to enclose certain parts of their land such as Crown roads or Crown watercourses.[54] This permit is referred to as an enclosure permit.

### *Options*

There are two options available regarding giving notice to affected landholders of applications for enclosure permits.

- Option 1: under the proposed regulation 60, the Minister is to give notice of the time and place appointed for consideration of an application for an enclosure permit over Crown land in the Western Division to the holder of any land that appears to be directly affected by it.
- Option 2: no regulation, under which notice is not required to be given

Option 1 replicates the current *Western Lands Regulation 2011* clause 19, which relates to applications for permission to erect a "give-and take" fence, or exemption for facing a boundary, or other related permissions/exemptions. Clause 19 requires that the Western Lands Commissioner must give notice of the time and place appointed for consideration of such an application to the holder of any land that appears to be directly affected by it.

### *Impact of the changes*

Option 1 has replicates the current regulation, however refers to enclosure permits rather than the specific list of permissions/exemptions referred to in clause 19 of the *Western Lands Regulation 2011*.

Relative to no regulation, this regulation would involve a small administrative cost of identifying and notifying relevant landholders. However, the benefit is that is enable these affected landholders to be informed about and potentially object to enclosure permits. This may prevent disagreements related to enclosure permits between holders and affected landholders. Additionally, it increases the transparency of the process by which enclosure permits are granted.

Therefore, option 1 is the preferred option.

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54 *Crown Land Management Act 2016 [NSW]* s5.34.

# Schedule 4: Purchasable leases

## Purchase applications for perpetual leases in the Western Division

The *Crown Land Management Act 2016* schedule 4 s5(2) provides that the Minister may grant a purchase application for Western Division Crown land under a perpetual lease if the Minister is satisfied that the applicant was entitled to make the application. Land subject to a perpetual lease may be sold if it meets the requirements of the *Crown Land Management Act 2016* s5.9, which generally relate to the land being in or near an urban area or having soil that is capable of sustaining higher impact land use such as cultivation.

In addition to these requirements, the regulations may prescribe any other considerations that may or must be taken into account in in determining whether to grant or refuse applications to purchase perpetual leases.

### *Options*

The proposed regulation 40 prescribes the matters that the Minister must consider when determining a purchase application for a perpetual lease in the Western Division. The listed matters include whether:

- the land has areas developed for agricultural uses
- the land has legal access
- land contains Travelling Stock Reserves
- the land has any easements or third party access arrangements
- there are any outstanding compliance issues associated with the land
- there are any outstanding payments owing on the land
- the land has extractive materials required by the State
- the land is likely to be required for a future public purpose
- any part of the land is protected for environmental/conservation purposes
- the land is likely to be required for public infrastructure

The alternative of no regulation would prescribe no matters to be considered in addition to eligibility under s.5.9. Other matters are still able to be considered, but the Minister is not obliged to consider any particular matters.

### *Impact of the change*

The impact of this change will be to promote certainty for applicants to purchase perpetual leases. The list of matters to be considered have been tested with key stakeholders. The cost of considering additional matters is the cost of time spent by Department staff and/or the Minister in considering these matters. However, if these are appropriate matters to be considered, then the benefits of better decision making may outweigh the cost of additional time spent processing applications. These matters generally need to be considered to protect State and third party interests, and to ensure

that appropriate easements and other rights as part of the sale. This can result in a number of benefits. For instance, rights to access neighbouring properties can be protected by conditions in the lease. As the lease is removed on sale, it is necessary to put an easement in place as a condition of the sale to ensure that this right is protected, and the associated access benefits are not lost.

We have not quantified the cost of additional time spend processing applications, because data on this time is not available. Additionally, the benefits of better decision-making are highly uncertain, although likely significant in this context. It is unclear whether this regulation would lead to net benefits or costs, although we expect it is more likely this regulation would result in net benefits. In particular, if, as suggested, the additional regulatory time is small or these matters are considered anyway, then there are likely to be net benefits from regulation 40 relative to no regulation.

Regulation 40 is the preferred option.

# 7 Protection and enforcement relating to crown lands

In this section, we review the impact of the regulations relating to:

- Protection of Crown land (under Part 9 of the *Crown Land Management Act 2016*)
- Enforcement (under Part 11 and Part 13 of the *Crown Land Management Act 2016*)

## Part 9: Protection of Crown land

Crown land is protected under the *Crown Land Management Act 2016* by conditions placed on permissible activities. These are similar to provisions under the *Crown Lands Act 1989* that give the ability to control how Crown land is used.

This is enforced by:

- regulations that proscribe the activities that authorised officers, crown land managers and the Minister may direct a person to stop or prohibit (regulation 14)
- regulations that make provisions for care and control management of Crown land (regulations 5-11 and 13).

In general, these regulations seek to resolve uncertainty around the powers of specific persons in ensuring compliance with the *Crown Land Management Act 2016*.

Current restrictions around proscribed activates are outlined in *Crown Land Regulations 2006* clause 46. Regulation 14 seeks to update these activities, in particular updating the regulations to reflect current technology. Provisions for the care and control management of Crown land are outlined in clauses 16 – 22, 42 and 43 of the *Crown Lands* (G*eneral Reserves) By-law 2006.*

### *Options*

Two options were assessed for regulation 14, relating to proscribed activities which can be prohibited on Crown lands and regulations 5-11 and 13 relating to regulations concerning, care control and management of Crown Lands. These are summarised in table 7.1.

**7.1 Options for regulations 5-11, 13 and 14**

| Regulation | Option 1 | Option 2 |
|---|---|---|
| Regulation 14 | No regulation | Use existing regulation *Crown Land Regulations 2006* clause 46 making the following changes:<br>▪ updating references to the *Crown Land Management Act 2016* |

| Regulation | Option 1 | Option 2 |
|---|---|---|
| | | ▪ updating the technology that cannot be used at a volume likely to cause a nuisance to any person, by replacing "cassette and record player", with "computer or other electronic device". |
| Regulations 5-11 &13 | No regulation | Use existing regulation:<br>▪ Part 3 Division 1 of *Crown Lands (General Reserves) By-laws 2006*<br>▪ By-law 42 and 43 of *Crown Lands (General Reserves) By-laws 2006*. |

*Source:* The CIE.

### *Impact of the change*

Options 2 for both regulations 14 and 5-11 & 13 will have no impact compared to current arrangements for reserves listed in the *Crown Lands (General Reserves) By-law 2006*, as these options are essentially the same as current regulations. This option applies these protections to all reserves, not just those listed on in the *Crown Lands (General Reserves) By-law 2006.* However, this will not increase the regulatory burden on reserve managers as the regulations are optional or do not require the manager to undertake any extra activity.

Updating technology that is referred to in regulation 14 is expected to have a negligible impact as both prohibit electronic devices, which covers all technologies. These conditions also do not necessarily restrict activities, but rather give authorised officers and the Minister the ability to limit these activities in specific contexts. Where these activities are not harmful, the regulations and the *Crown Land Management Act 2016* allow these proscribed activities to occur.

However, many of the types of matter prohibited by regulation 14 are also prohibited from being littered by the *Protection of the Environment Operations Act 1997 No.156 [NSW]* (*POEO Act 1997*) Part 5.6A. Littering is an offence under that Act, and litter is defined to include any solid or liquid domestic or commercial refuse, debris or rubbish, and any other matter that is deposited disorderly or detrimentally affects the proper use of that place. Thus, the matter which is prohibited under regulation 14 is generally already prohibited by Part 5.6A of the *POEO Act 1997*.

Therefore, there are unlikely to be benefits of regulation 14 in addition to the existing prohibitions in the *POEO Act 1997*. This regulation would likewise be unlikely to impose additional costs on individuals or government in addition to those due to the *POEO Act 1997*.

However, the no regulation option for regulations 14 and 5-11 and 13 would create uncertainty for Crown land users, so the regulatory option (option 2) is preferred.

# Part 11: Enforcement

## Penalties and penalty amounts

Penalty notices may be issued by authorised officers to persons who commit certain offences. Penalty offences may be either offences against the *Crown Land Management Act 2016* or offences prescribed by the regulations as a penalty notice offence. The amount payable for a penalty notice is the amount prescribed by the regulations.

### Options

This regulation relates to the listing of penalty notice offences in the regulations and prescribing the amount payable for a given penalty notice. Two options were considered:[55]

- Option 1 proposes no regulation. In this case, there would be no list of penalty notice offences and offences could only be enforced through the courts.
- Option 2 proposes to list penalty notice offences from the *Crown Land Management Act 2016* in the regulations. Offences include:
  - failure to comply with a direction to remove an unauthorised structure or materials (*Crown Land Management Act 2016* s9.9)
  - failure to comply with a notice to stop an unsafe/unlawful activity (*Crown Land Management Act 2016* s9.18-19), and
  - obstruct or impersonate an authorised officer (*Crown Land Management Act 2016* s10.5).

  See table 7.2 for proposed penalty notice amounts.

### 7.2 Proposed penalty notice amounts

| CLMA section | Activity | Proposed penalty amounts | |
|---|---|---|---|
| | | Individuals | Corporations |
| | | $ | $ |
| 3.45 | provision of records | 1 100 | 1 100 |
| 5.27 | provision of information on transfer of benefited land | 330 | 330 |
| 5.37 | provision of information on transfer of enclosure permits | 330 | 330 |
| 5.39 | compliance with cancellation of enclosure permits | 1 100 | 2 200 |
| 5.42 | compliance with a direction associated with an enclosure permit | 1 100 | 2 200 |
| 5.51 | prescribed activity on an easement | 220 | 220 |
| 9.2(1) | unauthorised use of Crown land | 1 100 | 2 200 |
| 9.3 | pollution or contamination involving Crown land | 1 100 | 2 200 |
| 9.4 | stop use of a structure or other land use | 1 100 | 2 200 |
| 9.5 | using a structure or the land in a way prohibited by a notice | 220 | 440 |

55 *Crown Land Management Act 2016 No 58 [NSW]* s11.3(2) and (4)

| CLMA section | Activity | Proposed penalty amounts | |
|---|---|---|---|
| | | Individuals | Corporations |
| | | $ | $ |
| 9.6 (3) | interfere or alteration of a sign which gives directions about vehicles on Crown land | 330 | 330 |
| 9.6 (6) | entry, use, parking or storage of vehicles on Crown land prohibited by a sign or other direction | 220 | 220 |
| 9.9(4) | failure to comply with a direction to remove an unauthorised structure or materials | 1 100 | 2 200 |
| 9.18(2) | failure to comply with a notice to stop an unsafe activity | 1 100 | 2 200 |
| 9.19(2) | failure to comply with a notice to stop an unlawful activity | 1 100 | 2 200 |
| 10.8 | return an identity card | 110 | 110 |
| 11.17 | failure to comply with an order | 1 100 | 2 200 |
| Offences under the Regulation | | | |
| Clause 5 (12) | Access to Crown land | 220 | 220 |
| Clause 8 | unauthorised entry to a reserve | 220 | 220 |
| Clause 9 | Use of or conduct in a reserve which is prohibited by a publically displaced notice | 220 | 220 |

*Source:* NSW Crown Lands, CIE.

### *Impact of the change*

Listing penalty notice offences under option 2 provides greater certainty for stakeholders and is likely to result in administrative cost savings, by enabling offences to be enforced outside of the court system. The value of greater clarity is difficult to measure, while the saving in administrative costs is difficult to measure without further information on the resource costs involved in applying penalty notices through the courts.

The collection of revenues through penalties is not an economic benefit because it merely represents a transfer from individuals/corporations to the government.

Although we are not able to quantify the size of the impact, we expect the regulatory option (option 2) to be preferred to no regulation.

## *Notices under Crown Lands (General Reserves) By-law 2006*

Under certain clauses of the *Crown Lands (General Reserves) By-law 2006* public notices could be issued with regards to the following matters:

- Clause 16 — public access to reserves
- Clause 18 — fees and charges in respect of use of reserves, parking, use of utilities, rubbish disposal or removal of effluent from reserves, and
- Clause 19 — entry to reserves.

Clauses 16, 18 and 19 of the *Crown Lands (General Reserves) By-law 2006* correspond to Clauses 5, 7 and 8 of the proposed regulations.

However, the *Crown Lands (General Reserves) By-law 2006* are to be repealed with the commencement of the regulations, which would impact the status of these notices.

### *Options*

Two options are available for the proposed regulation 12.

- Option 1: The proposed regulation 12 would provide that a public notice that had effect for a reserve under Clauses 16, 18 or 19 of the *Crown Lands (General Reserves) By-law 2006* continues in effect for the same land under the corresponding provisions (clauses 5, 7, and 8 respectively) of the Regulations as if the notice had been displayed by the responsible manager of the land.
- Option 2: no regulation, under which the public notices will not continue to have effect with the repeal of the *Crown Lands (General Reserves) By-law 2006*.

### *Impact of the change*

The proposed regulation 12 would have no effect relative to the current regulations, because it would merely ensure that public notices with effect for a reserve under the current regulations continue to have effect.

The option of no regulation would be expected to have net costs to society because it would create uncertainty for stakeholders about access, fees and entry to reserves. Additionally, these notices may have to be recreated, which would have an administrative time cost.

Thus, regulation 12 is preferred to no regulation.

# 8 Preliminary and miscellaneous items

In this section, we review the impact of the regulations relating to:

- Preliminary matters (under Part 1 of the Act)
- Interest rates for amounts owing (under Part 12 and Schedule 4 of the Act)
- Privacy (under Part 11 of the Act)
- Administration (under Part 12 of the Act)
- Savings, transitional and other provisions (under Schedule 7 of the Act)
- Use of approved forms

## Part 1: Preliminary

### Definition of a mineral

Where the *Crown Land Management Act 2016* refers to minerals this means a mineral as defined in the *Mining Act 1992* and any other substance prescribed by the regulations. The *Mining Act 1992* states that the substances considered minerals are prescribed in the *Mining Regulation 2016*, which contains a list including coal, copper and oil shale.[56] The definition expressly excludes petroleum as a mineral.

Minerals are referred to in the *Crown Land Management Act 2016* in a number of sections. The main provision regarding minerals (s13.2) states that a sale, lease or other disposal of land under the *Crown Land Management Act 2016* does not include any minerals contained in the land.

#### Options

The proposed regulation 67 would extend the definition of minerals to include petroleum. The alternative of no regulation would limit the definition to the list in Schedule 1 of the *Mining Regulation 2016*.

#### Impact of the change

It is unclear what impacts this definitional change would have. Many parts of the *Crown Land Management Act 2016* relate to minerals. Importantly, minerals are excluded from the sale, lease or other disposal of land under the *Crown Land Management Act 2016*. Extending the definition in the *Crown Land Management Act 2016* provides certainty

56 *Mining Regulation 2016 [NSW]* Schedule 1

and clarity that the ownership of petroleum does not transfer with the sale of land.[57] This does not result in a change in economic value, but rather clarifies the allocation of property rights and ensures that the definitions of minerals in the *Crown Land Management Act 2016* does not result in misinterpretation of the act. Regulation 67 is preferred to no regulation.

## *Division boundaries*

The *Crown Land Management Act 2016* s1.6(4) states that the boundary between the Eastern and Central Division and the Western Division may be altered or redefined by the regulations. However, the Minister is not to recommend the making of a regulation for this purpose unless a notice describing the alteration has been published in the manner prescribed by the regulations. This regulation relates to the manner in which notices of proposals to change boundaries are published.

### *Options*

Two options have been considered:

- Option 1 prescribes that notices of proposals to change boundaries should be published in
  - a newspaper circulating in the locality in which the alteration is to be made,
  - a newspaper circulating generally in NSW, and
  - on the website of the Department

  This replicates the requirements of *Crown Lands Regulation 2006 [NSW]* s6 but with the addition of on-line notification.
- Option 2 proposes no regulation, which would mean no manner would be prescribed for the notice.

### *Impact of the change*

Compared to current arrangements, option 1 has little impact. The addition of on-line notification would likely result in slightly increased administrative costs for the Department of Industry – Lands and Forestry as on-line notification requires a small amount of administrative time to implement. On-line notification on the Department's website may not be viewed as widely as newspapers, and notification may be less effective. This may be particularly true for communities where internet access is less readily available. On the other hand, the Department's website may have more exposure among Crown land managers and other stakeholders. The overall difference in exposure is unclear. Provided that accessibility issues are accounted for by the Department using both newspaper and on-line notification, this change is likely to have net benefits relative to the status quo.

Option 2, no regulation, is expected to result in a small cost saving for government associated with publishing the notice in the prescribed manner. However, failing to

[57] All petroleum is owned by the Crown– see s 6 of the *Petroleum (Onshore) Act 1991*.

prescribe a manner could result in insufficient notice being given, which may impact on landholders obligations and rights without their knowledge. It is beneficial to give notice of changes to boundaries so that affected landholders may comply with requirements under the Act, and thus prevent the consequences of non-compliance or disputes.

Given the cost increase is expected to be small, and the consequences of not notifying a landholder could be very disruptive, option 1 is the preferred option as it will reach the widest proportion of the community.

## *Interest rates for amounts owing*

Interest accrues on amounts owing under the *Crown Land Management Act 2016* that are not paid within 28 days (or any other period prescribed by the regulations) of the due date. The *Crown Land Management Act 2016* s12.12(2) provides that the regulations prescribe the interest rate charged on amounts outstanding. These provisions do not apply to amounts payable in respect of an incomplete purchase, where a separate interest regime applies.

### *Options*

There are 2 options for prescribing the interest rates for amounts owing per s12.12.

- Option 1: the proposed regulation 63 would prescribe that the interest rate is the sum of the Premium rate and the Market rate, where those rates are as follows:
  - Premium rate: 8 per cent
  - Market rate: equal to the Bank Accepted Bill rate (which has the same meaning as in *Taxation Administration Act 1996* s22(4).

  The premium rate is intended to deter late payment, while the market rate is not a penalty. This replicates clause 42 of the *Crown Lands Regulation 2006*. The premium rate can also be interpreted as the average risk premium.
- Option 2 would involve no regulation. Under this option there would be no interest rate charged on amounts owing.

### *Impacts of the changes*

Interest rates are the cost of borrowing and are affected by two elements:

- the availability of capital – this is generally measured using the risk free interest rate, which can broadly be proxied by the Bank Accepted Bill rate, and
- the risk that the borrower will not make their future repayments – this is the risk premium that is the amount that lenders must be paid in order for them to expose themselves to this risk. In a number of options in the above analysis this is proxied by the premium rate of 8 per cent, which we interpret as the average risk premium for unsecured borrowings.

The interest rate applied in the regulations should only reflect these two elements.

The first option for the proposed regulation 63 reflects best practice. It would provide a disincentive for late payment, which would avoid incurring costs of recovering debts through debt collectors or other costly means. The amount of the rate reflects the rates prescribed under the *Taxation Administration Act 1996* s22. This rate approximates the funding cost for individuals (excluding their individual risk as a borrower) and thus reduces the incentive for individuals to pay late.

There would be net benefits from a reduction in late payment from charging an interest rate. It is not possible to quantify these benefits given the amount of late payment with and without an interest rate is not known.

For these same reasons, the proposed regulation 63 would reflect best practice and result in net benefits relative to no regulation. If the prescribed interest rate is lower than this amount then payers would have an incentive to delay payment since this rate is below their funding cost.

# *Part 11: Miscellaneous (related to privacy)*

## *Regulation making power and privacy*

Section 13.5 of the Act makes allowances for regulations to be made in order to give effect to the Act. One regulation relates directly to this section on privacy.

Regulation 66 relates to section 13.5(2)(m) which allows regulations to enable the disclosure to councils of information about holdings and enclosure permits (including information about their holders) so that councils are able to charge rates.

### *Options*

Two options were considered and are summarised below.

- Option 1: No regulation
- Option 2: Allow information about holders of enclosure permits and other holdings of Crown lands to be disclosed to councils for charging council rates. Information would include:
  - Holder's name
  - Holding number
  - Commencement date
  - Description of the property to which the holding attaches
  - Holder's postal address
  - Purpose of holding
  - Area of land to which the holding applies

### *Impact of the change*

Regulation 66 is not expected to have any impact. We understand that currently this information is provided to councils to enable rates to be levied – the purpose of this regulation is to articulate and codify these existing arrangements. Under the no regulation option, we expect that this information would still be provided by councils. If this information were not provided to councils significant costs would be incurred and councils could suffer significant losses. Regulation 66 is preferred to no regulation because it codifies the existing arrangements, providing clarity and certainty for stakeholders.

# *Part 12: Administration*

## *Advice for the Minister when assessing the State Strategic Plan*

The Secretary of the Department of Industry – Lands and Forestry must submit a copy of the draft State strategic plan for Crown land to the Minister for approval.[58] In assessing the plan, the Minister may seek the advice of any person or body. The Minister is required to seek the advice of any person or body required by the regulations, and must take into account advice provided within the time required by the Minister.

### *Options*

The proposed regulation 64 states that the Minister must seek advice from the following entities likely to be impacted by, and have an interest in, the State Strategic Plan:

- The Office of Local Government
- NSW Aboriginal Land Council
- NTSCORP
- Office of Environment and Heritage
- Department of Planning and the Environment

Under the alternative of no regulation, there would be no bodies from which the Minister is required to seek advice.

### *Impact of the change*

This regulation would provide certainty for the listed bodies and stakeholders that the Minister would be required to seek advice from these entities. The Minister may already seek advice from these bodies under the *Crown Land Management Act 2016*, however the proposed regulation 64 makes it a requirement to seek advice from these entities. Receiving advice from these entities may improve decision-making. It would also improve the relationship between the Department and these bodies since they are being consulted about the strategic plan.

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58 *Crown Land Management Act 2016 No 58 [NSW]* s12.21(1)

The costs of this regulation are that the Minister must spend time considering the advice from these entities, and this means the State strategic plan may take longer to be completed. This additional time is likely to be small if advice is already sought from these bodies by the Minister. Thus, the benefits of this regulation are likely to outweigh the costs.

## *Service of documents*

A document that is authorised or required to be served on any person may be served by personal delivery, post, or any other method prescribed by the regulations.[59]

### *Options*

The proposed regulation 65 allows the electronic service of documents if the recipient consents to receive notices and documents in this way and for that purpose. The alternative of no regulation would not provide for electronic service of documents.

### *Impact of the change*

This change is consistent with the Better Regulation Principles, which state options should include digital solutions to make existing or new requirements easier to meet. Some individuals may find it more convenient and get time savings from digital service of documents. This regulation only gives the option to serve documents digitally at the discretion of the recipient. Thus, there is no risk of disadvantage to those for whom digital service is not convenient, because they may elect not to receive documents digitally. The Department of Industry – Lands and Forestry indicates that times for servicing would be similar and that there are very few individuals for whom documents need to be served. Thus, this regulation is likely to lead to either zero or small net benefits.

## *Fees for services*

The Act allows fees to be changed for services provided by the Department in connection to Crown land.[60] Fees can be set and changed by regulation, in the act or by the Minister.

It appears that the intent of charging fees is recover the Department's costs relating to the specified services. Recovering costs for specified services can improve economic efficiency by forcing the regulated community to consider the cost of administering the regulatory framework in their decisions. A well designed user charge can discourage the overuse of regulatory services and reduce regulated activities to a socially optimal level.

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59 *Crown Land Management Act 2016 No 58 [NSW]* s12.26(1)

60 *Crown Land Management Act 2016 No 58 [NSW]* s12.8

### *Options*

Two options have been considered for this regulation. Option 1 proposes to leave fees unchanged at their current levels (see table 8.1). Option 2 proposes to increase fees incrementally to the levels shown in table 8.1, with a future increase in 2 years time. At the time of the future increase, fees will be at the same level in real terms as they were 17 years ago. That is, inflation over that period will be accounted for in the nominal amount of the fees.

In the past fees have not been indexed to inflation. This means that over time the real value of fees falls and the fees do not reflect the cost of providing services over a period of time.

## 8.1 Fees for services options

| Type of fee | Previous fee | Proposed fee |
|---|---|---|
| | March 2017 $ | March 2017 $ |
| **Licences** | | |
| Application for licence (general) | 384 | 438 |
| Application for licence (domestic waterfront) | 438 | 501 |
| Application for short-term licence | 33 | 37 |
| Application to transfer Domestic Water Front licence | 151 | 180 |
| Application to transfer non Domestic Water Front licence | 384 | 438 |
| Application to terminate a licence that benefits land being sold | NA | 602 |
| **Leases** | | |
| Application for lease | 603 | 641 |
| Application to transfer a lease | 186 | 221 |
| Application for redetermination of rent | 230 | 274 |
| Application for alteration of conditions or purpose of a holding | 151 | 180 |
| Application for exemption from condition attaching to a holding or land | 151 | 180 |
| Application to surrender land or lease | 236 | 281 |
| **Enclosures** | | |
| Enclosure permit application | 151 | 180 |
| Application for additional enclosure permit | 151 | 180 |
| Application for amalgamation of enclosure permits | 151 | 180 |
| Notice of transfer of land subject to an enclosure permit | 57 | 68 |
| Application for improved access to Crown road or enclosure structure | 151 | 180 |
| Application for authority to cultivate enclosed road | 151 | 180 |
| **Continued Holdings** | | |
| Application to transfer or otherwise deal with land without Ministerial consent | | 180 |
| Application for approval to subdivide land under a Western lands lease or incomplete purchase | 338 | 402 |

| Type of fee | Previous fee | Proposed fee |
|---|---|---|
| | March 2017 $ | March 2017 $ |
| Application for term extension of a Western lands lease | 186 | 209 |
| Application to convert a term lease into a perpetual lease | NA | 625 |
| Application for cultivation consent | 529 | 594 |
| Application to release a special easement | NA | 237 |
| Application to purchase land comprised in a lease | 398 | 474 |
| Other Dealings | | |
| Application to buy Crown land | 438 | 501 |
| Application for grant of an easement (including a special easement) | 247 | 294 |
| Application for owner's consent to lodge a development application | 66 | 75 |
| Application to remove restriction or covenant on Crown land | 450 | 536 |

*Source:* Department of Industry - Lands

### *Impact of the change*

In general terms, regulatory services provided by government can be funded through general taxation revenue or through some form of cost recovery arrangement. A well-designed cost recovery arrangement can have several advantages over general taxation funding. These advantages include:

- improving efficiency by forcing people and businesses to take into account the cost of operating the regulatory framework in making their decisions
- improving equity by ensuring that the beneficiaries of a regulatory framework pay for it;
- reducing the call on general taxation revenue, and
- instilling cost consciousness in regulatory agencies.

These benefits rely on:

- the cost recovery arrangements are well designed, and
- fees being largely linked to costs (i.e. fees are as close as possible to the cost of providing a given service).

In comparing the two options, we have not considered the design of the fees or whether the fees were cost reflective at the time they were set.

The key difference between the two options is that option 1 does not index the fees to current values. If they were originally set at a cost reflective level, the current fees under option 1 will not be cost reflective. Increases in prices would mean that the fees are set too low.

The benefit of staging the increase in fees over 2 years is that the impact on stakeholders will be more gradual. Having a transition period allows for stakeholders to adjust their behaviour and prepare for the increase in fees.

Option 2, would therefore be preferred.

# Schedule 7: Savings, transitional and other provisions

## Institutional Private Trusts under Trustees of Schools of Arts Enabling Act 1902

The *Crown Land Management Act 2016* makes certain provisions in relation to land under the *Trustees of Schools of Arts Enabling Act 1902*. The *Trustees of Schools of Arts Enabling Act 1902* is to be repealed on the commencement of Schedule 8(g) to the *Crown Land Management Act 2016*.[61] The repeal will not affect any trust over institutional private trust land.[62]

The *Crown Land Management Act 2016* enables the regulations to make provisions with respect to standard form trust instruments for these trusts. Further, the regulations may make provisions for the calling or conduct of meetings for considering resolutions to adopt standard form trust instruments.

### *Options*

The proposed regulation 69 provides a standard form of trust instrument for institutional private trust land. The alternative of no regulation would allow any form of trust instrument for this land.

### *Impact of the change*

The impact of regulation 69 relative to no regulation is to provide a standard form trust instrument that institutional private trusts may choose to adopt. There are between 10 and 50 private Schools of Art which could use the trust deed. The cost of government to draft the standard form trust was approximately $5500. Thus, the benefits to each School of Art that were to adopt the standard form trust would be approximately $5500. Thus the benefits of the standard form trust in saving private Schools of Art from drafting their own trust deeds would be between $55 000–$275 000. This suggests there are substantial net benefits from the proposed regulation. These benefits may be less if not all private Schools of Art adopt the standard form trust instrument.

## Short-term licences over community land

The *Crown Land Management Act 2016* makes provisions with respect to the management of land as community land. Specifically, it provides that during the period

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61 See the status information for the *Trustees of Schools of Arts Enabling Act 1902 No 68 [NSW]*, available here: http://www.legislation.nsw.gov.au/#/view/act/1902/68

62 For the purposes of these provisions, an institution means a Mechanics' Institute, School of Arts or other institution for public instruction or amusement. Institutional trust land means any land reserved dedicated or granted under any Act or instrument, or held in any other way, immediately before the repeal day for the purposes of an institution. This land may be public (vested in the Crown) or private. See *Crown Land Management Act 2016 No 58 [NSW]* Schedule 7 s20-22.

of 3 years after the commencement of the Act,[63] the nature and use of community land must not be changed pending the adoption of a plan of management.

### *Options*

There are two options relating to short-term licences over community land.

- Option 1: The proposed regulation 70 creates an exemption from this requirement for the grant of short-term licences by a council manager over dedicated or reserved Crown land.[64]
- Option 2: No regulation, under which s3.23 of the *Crown Land Management Act* will still apply and a short-term licence may not be granted in respect of dedicated or reserved community land until a plan of management is in place.

### *Impact of the change*

At present, the *Crown Land Management Act 2016* s3.23 requires council managers to establish a plan of management within 3 years of the commencement of the Act. Until a plan of management is adopted, s 44 of the *Local Government Act 1993* would apply such that the nature and use of the land could not be changed. So even if existing tenures could be renewed or regranted on for the same purpose, councils could not issue any new short term low impact tenures. Regulation 70 would allow council managers to issue short-term licences during this period so that they could continue to deal with Crown land for these purposes where there is no plan of management. Under no regulation, no short-term licences could be issued until the plan of management is in place so no dealings for new purposes could occur.

Without the ability to issue new short-term licences during this period, the use of the land enabled by short-term licences would be reduced.

These benefits likely outweigh the cost of this regulation, which is primarily that use of community land may be approved through short-term licences before a plan of management is in place. Therefore option 1, proposed regulation 70 is recommended.

## *Continuing SLMs as the same legal entity as the relevant reserve trust*

The *Crown Land Management Act* Schedule 7 s11 provides that on the repeal day (of the previous *Crown Lands Act 1989* all reserve trusts are abolished. Further provisions relate to trusts with boards, trusts under administration and other matters.

### *Options*

Clause 1 of Schedule 4 of the proposed regulations replaces Schedule 7 s11 of the *Crown Land Management Act* with a version of s11 that has been changed slightly. The changes to s11 have the effect that statutory land managers created to take the place of abolished

63 *Crown Land Management Act 2016 No 58 [NSW]* s3.23.

64 Per *Crown Land Management Act 2016 No 58 [NSW]* s2.20.

reserve trusts are taken for all purposes (including the rules of private international law) to be a continuation of, and the same legal entity as, the former reserve trust.

The alternative option to Clause 1 is to have no regulation, under which the current version of s11 would remain.

#### *Impact of the changes*

If no regulation were made, the current savings and transitional provisions may not adequately mitigate the operational impacts of the abolition of the trust layer on Crown land managers. This could lead to confusion and significant administrative burden for existing reserve trusts regarding reliance on existing contracts, insurances and ABNs, as well as financial reporting and tax implications for the affected entities. Thus the proposed Clause 1 is preferred to no regulation (the status quo).

### *Ensuring continuation of existing reservations and dedications*

Reservations and dedications of Crown land were able to be made under Part 5 of the *Crown Lands Act 1989*. The repeal of the *Crown Lands Act 1989* with the commencement of the *Crown Land Management Act 2016* means that the status of these reservations and dedications under the *Crown Land* Management *Act 2016* would have been somewhat uncertain without provision for these dedications and reservations.

Under the *Crown Land Management Act 2016* Schedule 7[17] provides that any land dedicated or reserved under Part 5 of the *Crown Lands Act 1989* is taken to be dedicated for the same purposes for which it was dedicated under the *Crown Lands Act 1989*. However, the status of dedications and reservations **taken to be made** under the *Crown Lands Act 1989* (or previous Acts) is unclear.

#### *Options*

There are two options available relating to the continuation of existing reservations and dedications:

- Option 1: land **taken to be** reserved or dedicated under the *Crown Lands Act 1989* is also taken to be reserved or dedicated under the *Crown Land Management Act 2016.*
- Option 2: no regulation, under which dedications and reservations made prior to the *Crown Lands Act 1989* may not be continued under the *Crown Land Management Act 2016*.

#### *Impact of the changes*

This regulation has the effect of clarifying that land taken to be reserved or dedicated under the *Crown Lands Act 1989* (or previous Acts) is also taken to be reserved or dedicated under the *Crown Land Management Act 2016*. Relative to the status quo (where Schedule 7[17] is unmodified), this regulation will avoid administrative costs for the Department of Industry – Lands and Forestry, avoid administrative costs and

uncertainty for stakeholders, and promote the effective management of Crown land through dedications and reservations that have already been made under previous Acts.

Therefore, option 1is preferred.

## *Ensuring that continuation of reservations and dedications does not in itself change land ownership*

Clause 7(1) of the *Crown Land Management Act* Schedule 7 sets out types of land that will become Crown land upon commencement of the CLM Act. Clause 7(2) clarifies that certain land does not become Crown land. Some of the land captured by clause 7(2) will be subject to a dedication, which should be continued under clause 17 of Schedule 7.

However, clause 17 continues dedications by deeming land to be 'dedicated Crown land' under the CLM Act. This is inconsistent with the effect of clause 7(2) which expressly provides that the land should not be Crown land.

### *Options*

There are two options that relate to land ownership for continued dedicated and reserved Crown land:

- Option 1: the proposed regulation ensures that the continuation of a dedication does not operate to change the ownership of land.
- Option 2: no regulation, under which clause 17 would remain unaltered.

### *Impact of the changes*

This regulation ensures that land which does not become Crown land under Division 2 of Schedule 7 does not become Crown land merely because of the continuation of a dedication or reservation.

Under no regulation, uncertainty remains about whether certain dedicated land comes into the Crown estate. This may lead to inadvertent changes in ownership of certain land. This clearly harms the certainty that landholders may have about dedicated or reserved Crown land.

Therefore, option 1 is preferred to no regulation.

## *Land vested in trustees by Crown grant for the purposes of an institution*

Clause 7(2) of the *Crown Land Management Act 2016* Schedule 7 provides that land vested in trustees by Crown grant for the purposes of an institution does not become Crown land.

However, some of that land currently falls within the definition of 'institutional public trust land', because it was vested in the Crown before it was dedicated for the purposes of an institution (see clause (b) of the definition of institutional public trust land in clause 20 of Schedule 7).

### *Options*

Two options are available that relate to land vested in trustees by Crown grant for the purposes of an institution:

- Option 1: ensures that, consistent with Schedule 7, land vested in trustees by Crown grant for the purposes of an institution does not become Crown land.
- Option 2: no regulation – means certain land will inadvertently come into the Crown estate.

### *Impact of the changes*

This regulation (relative to the status quo of no regulation) would provide certainty and clarity for private institutional trusts that land vested in them by Crown grant does not become Crown land. There are unlikely to be significant administrative costs or benefits created by this change. By improving the clarity with which the *Crown Land Management Act* 2016 operates, this change may reduce costs of legal claims brought by or against stakeholders.

## *Use of approved forms*

The *Western Lands Act 1901* and the *Crown Lands Act 1989* make provisions in various sections for individuals to the use the forms approved by the Minister in making applications regarding Crown land for various purposes.[65]

This regulation is intended to continue these existing requirements under existing arrangements in the new legislation and regulatory arrangements. The intent of this regulation is to ensure where standard application forms exist they are used by applicants.

### *Options*

Two options were considered for this regulation:

- Option 1: no regulation, so that applications can be made in a variety of ways
- Option 2: applications must use the approved forms displayed on the Crown lands website

### *Impact of the change*

Under current arrangements, applicants are required to use forms which have been approved by the Minister. This ensures that applications contain all relevant information required to assess the application and means that information is provided in a consistent format, which is likely to help streamline the processing of applications.

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65 For instance, *Crown Lands Act 1989 No 6 [NSW]* s35A and *Western Land Act 1901 No 70 [NSW]* s3A

As option 2 is a continuation of existing arrangements, there would be no impact arising from this regulation.

Option 1, the no regulation option, would likely result in net economic costs due to increased administrative costs. These costs would arise as a result of applicants not providing the necessary information or providing information in a format from which it is difficult or time consuming to identify the relevant information.

Option 2 is therefore preferred.


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