

A NEW FRAMEWORK FOR THE MANAGEMENT OF CROWN LAND

Submissions on the draft Crown Land Community Engagement Strategy

Issues raised and NSW Government response

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More information

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Glossary

Term	Definition
Act	Refers to the <i>Crown Land Management Act 2016</i> . Where other legislation is mentioned, the specific statute is referenced in full
activity	Refers to revocations of reservations or dedications of Crown land, or changes to a purpose for dedicated or reserved lands, plans of management, and the State Strategic Plan for Crown land
Crown land	Refers to the NSW Crown Land Estate
consult activity	Any activity which provides a means for community members who may be impacted by a proposed dealing or activity to provide feedback
current community use and enjoyment	Refers to the trigger for engagement adopted by the <i>Community Engagement Strategy</i> , which applies to Crown land the community currently uses and/or enjoys and to land that it expects to be able to continue to use and/or enjoy
dealing	Refers to sales, leases, licences, permits and vestings of Crown land
department	Refers to the NSW Department of Industry and its Lands & Water division. Where other agencies or departments are referred to, the specific department or agency name is referenced in full
department secretary	Refers to the secretary of the department
department staff	Refers to all accountable people in the department responsible for making decisions about Crown land
Guidance and Resources document	Refers to the <i>Community Engagement Guidance and Resources</i> document, a non-statutory document developed to support implementation of the <i>Community Engagement Strategy</i>
impact (on current community use and enjoyment)	The term 'impact' in the <i>Community Engagement Strategy</i> and in this context, refers to adverse or negative impacts on current community use and enjoyment
inform engagement activity	Any activity which provides a means for community members to receive information about a proposed dealing or activity
mandatory requirements	Refers to the requirements of the <i>Community Engagement Strategy</i> prescribed for the purposes of section 5.8 of the Act that responsible persons must comply with. Failure to demonstrate compliance with these requirements may result in the decision maker refusing to approve a dealing or activity. Further, where a dealings or activity has been approved, but has not been completed in accordance with the mandatory requirements, the validity of the dealing or activity may be challenged in court.
Minister	Refers to the minister who is responsible for administering the Act
Non-council CLMs	Refers to non-council Crown land managers (formerly referred to as reserve trust managers) who have been appointed to carry out the care, control and management of Crown land and any other functions specified under the Act Excludes local council Crown land managers. Where local council Crown land managers are mentioned in this document, they are specifically referenced as such

Term	Definition
	<p>'Category 1 CLMs' are professional bodies with higher levels of capabilities</p> <p>'Category 2 CLMs' will be for all other managers including, for example, voluntary boards and organisations</p>
NSW	Refers to New South Wales
NSWALC	Refers to New South Wales Aboriginal Land Council
NTSCORP	Refers to the Native Title Service Provider for Aboriginal Traditional Owners in New South Wales and the Australian Capital Territory
objects of the Act	Refers to the objects specified in Section 1.3 of the Act
participate activity	Any activity which provides a means for collaboration between community members and decision makers in the decision-making process for a proposed dealing or activity
principles of Crown land management	Refers to the principles of Crown land management specified in Section 1.4 of the Act
responsible person	Refers to responsible persons for dealings as specified in the Act, meaning either the minister, Lands Administration Ministerial Corporation, department secretary, department employees involved in administering the Act, or non-council CLMs
short-term	In connection with a lease or licence, short term means a period of one year or less
state	Refers to New South Wales
the Strategy	Refers to the <i>Community Engagement Strategy</i> , which is a statutory requirement of the Act

Introduction

This report has been prepared by the NSW Department of Industry—Lands & Water (the department), following the public consultation period for the draft *Community Engagement Strategy* (the Strategy) and the supporting draft *Community Engagement Guidance and Resources* document (the Guidance and Resources document).

These draft documents were released for an eight-week public exhibition and submissions period, which commenced on Monday 16 October and closed on Sunday 10 December 2017. The exhibition period was extended in response to stakeholder requests for a longer period in which to provide a submission.

This report identifies the key issues and suggestions made about the draft Strategy and outlines the NSW Government's response.

The department is grateful to everyone who made a submission. The issues raised and feedback provided through the public submissions and consultation process has been taken into consideration when revising the Strategy and Guidance and Resources documents.

All submissions were considered in the finalisation of the Strategy.

The final Strategy was approved by the Minister for Lands and Forestry and is available on the department's website. It comes into effect when the *Crown Land Management Act 2016* commences later in 2018.

Background

The draft Strategy sought to meet community expectations for greater opportunities for meaningful engagement. The NSW Government's major review of Crown land management, which led to the 2014 *Crown Lands Legislation White Paper*, made it clear that community engagement needed to be improved. This was reiterated by the findings of the 2016 Parliamentary Inquiry into Crown land and the NSW Auditor-General's report on sales and leasing.

In developing the *Crown Land Management Act 2016* (the Act), the government has responded to these views and significantly, mandates for a *Community Engagement Strategy* to improve community engagement.

The draft Strategy set out engagement requirements for certain dealings and activities, as required by the Act. The draft Strategy, which was prepared with input from key stakeholders, sought to ensure an appropriate level of community engagement occurs for key decisions relating to Crown land under the Act.

Developing the draft Strategy required careful consideration of competing interests and priorities. It was important to ensure that community expectations were met while also providing a practical framework for engagement that the department and the Crown land managers, many of whom are volunteer organisations, would be able to implement.

The draft Strategy contained minimum mandatory engagement requirements and flexibility for the selection of appropriate engagement methods. The draft Strategy was designed to reflect a relationship between the level of impact of the dealing or activity and the level of engagement required; the higher the impact on the way the community currently uses and enjoys Crown land, the higher the level of engagement required.

There were 183 submissions received from individuals, community groups and from peak bodies representing a variety of stakeholder interests.

Submission review process

An independent consultant, Elton Consulting Group Pty Ltd, was appointed to review and consider all the submissions received on the draft Strategy and Guidance and Resources documents.

A summary of the key issues and themes arising from the submissions has been prepared by Elton Consulting Group Pty Ltd and is available from the department's website.

The key issues and themes include:

- the current community use and enjoyment test
- suggestions for additional engagement principles to be included in the Strategy
- the proposed engagement requirements for certain types of in-scope dealings and activities, including the role that public submissions will play when engaging about Crown land
- the importance of appropriate and culturally sensitive engagement with Aboriginal peoples and communities in Crown land decision-making
- the role that engagement outcomes will play in decision-making about a proposed dealing or activity
- clarity of the Strategy and Guidance and Resources documents, including language and format
- the exclusions, proposed exemptions and waivers to in-scope dealings and activities
- the timeframe for the first review of the Strategy.

The following section outlines the issues raised and the response that has been incorporated into the final Strategy.

Issues raised and responses

Community use and enjoyment test

Feedback in submissions

There were a number of concerns raised in relation to the current community use and enjoyment test. Several submissions asked whether engagement would be triggered where there was no active use of the land by the community but where the community was enjoying the land.

Feedback also suggested that the draft Strategy did not make it sufficiently clear that sales and plans of management would always trigger engagement, regardless of the impact on current community use and enjoyment of the land.

Government response—current community use and enjoyment test

The Strategy has been updated so it is clear engagement will be required in a broad range of circumstances and not just where there is current active use of the land by the community.

The Strategy has revised the definition of the ‘current community use and enjoyment test’, to make clear that engagement can be triggered where there may be an impact on how the community either uses or enjoys the land. The definition in the glossary of the Strategy is as follows:

“Current community use and enjoyment” refers to the test for engagement adopted by this Strategy, which requires consideration of whether the community current either uses or enjoys Crown land and whether a proposed dealing or activity may adversely impact upon that use or enjoyment.’

The assessment criteria for considering whether this test has been met not only asks about active use of the land by the community, but also whether the community is enjoying the land for its social, cultural or heritage values.

The Strategy also provides clarification about when this test is to be applied. The test will determine whether pre-decision engagement is required in relation to changes to reserves and dedications, vestings and licences. The level of that impact will determine the level of engagement to be carried out.

For leases, sales and plans of management, the Strategy specifies pre-decision engagement will *always* be triggered for these dealings and activities regardless of impact on current community use and enjoyment.

However, consideration of the *level* of the impact on current community use and enjoyment is required for leases, sales and plans of management. This is because in addition to the mandatory notification and/or submissions process, higher impact proposals will also need to conduct additional engagement from the ‘consult or ‘participate’ engagement categories.

Engagement on future use of Crown land

Feedback in submissions

Submissions identified a concern about the use of the word 'current' in the test for engagement and suggested that the word 'future' be used.

Government response—current versus future use

The Strategy will provide adequate opportunities for engagement about the future use of Crown land. The Strategy provides for engagement in relation to the future use of Crown land in the context of plans of management and the state strategic plan. The Strategy also provides for engagement about proposed sales and leases, including sales and leases over land that the community is not currently using or enjoying.

Engagement on environmental matters

Feedback in submissions

A number of submissions suggested that the trigger for engagement be changed to include a focus on environmental matters rather than just community use and enjoyment.

Government response—environmental matters

Where the community is enjoying land for its environmental values, then this would meet the test for current community use and enjoyment and could trigger the pre-decision engagement requirements under the Strategy.

Environmental matters will be considered in decision making and the Strategy has been revised to include more clarity about this..

The Strategy outlines that the objects of the Act apply to all aspects of decision-making regarding the use and management of Crown land, including every dealing and activity covered by the Strategy. They are a fundamental consideration that will be applied to every decision under the Act.

The objects of the Act include requirements that environmental, social, cultural heritage and economic factors are taken into consideration in decision-making about Crown land. They require the principles of Crown land management to be considered and these include principles of environmental protection and the conservation of the natural resources of Crown land wherever possible (including the conservation of water, soil, flora, fauna and scenic quality).

The department has prepared guidance to support appropriate consideration of the objects and principles by decision makers. This will involve ensuring that there is appropriate consideration of environmental impacts before decisions are made.

Engagement processes for dealings covered by the Strategy will enable information about environmental impacts to be raised and considered—along with the other information from the community—before a final decision is made.

Community use and enjoyment test and Aboriginal interests in the land

Feedback in submissions

Submissions raised concerns that the draft Strategy did not give enough recognition of the importance of Crown land to Aboriginal people. In addition, concern was raised about whether engagement would be triggered where there could be impacts on the use and enjoyment of land by Aboriginal peoples and communities.

Government response—ensuring culturally sensitive engagement with Aboriginal peoples and communities

The overview of legislative framework in the Strategy has been updated to provide more detail about the framework's recognition of Aboriginal peoples' interests and rights in Crown land. This includes Aboriginal land rights, native title rights, and Aboriginal peoples' and communities' use and involvement in the management of Crown land.

The Strategy has been updated to address the concern raised that there would not be notification about critical proposals to sell, lease or approve a plan of management over Crown land.

The Strategy has been updated to require the department to carry out engagement on any land proposed for sale by a local council before deciding whether or not to consent to the sale.

Similar to the requirement for sales, the Strategy will now require a submissions process for all draft plans of management and all leases will be notified on the website.

The guidance for culturally sensitive engagement has been expanded and now includes contact details of groups representing Aboriginal interests, such as NTSCORP and NSW Aboriginal Land Council (NSWALC). Staff and CLMs are encouraged to engage with these groups to discuss proposed activities and dealings and to seek advice on engagement approaches.

More prompts and reminders have been included throughout the Guidance and Resources document and in the Strategy to refer staff and non-council CLMs to this important guidance.

The Strategy, Guidance and Resources document and training materials also direct decision makers to ensure compliance with the engagement requirements under the *Native Title Act 1993*.

The department is engaging Aboriginal groups in the development and delivery of training on the Strategy's requirements and training materials will emphasise how decision makers should consider whether the land is being used and enjoyed or is of cultural significance to Aboriginal people when completing the required assessments.

Making the current community use and enjoyment assessments enforceable

Feedback in submissions

Submissions raised concerns about the need for the assessment of community use and enjoyment and the level of the impact to be mandatory requirements.

Government response—mandatory requirements

The Strategy has been updated to ensure assessments that determine the engagement requirements are enforceable.

Two additional mandatory requirements have been added requiring responsible persons to:

1. apply the current community use and enjoyment test
2. if the test has been met, assess whether the level of that impact is minimal, moderate or high with regard to the:
 - degree to which current use or enjoyment is reduced
 - proportion of the local or broader community that will be affected.

Additional engagement principles

Feedback in submissions

Submissions suggested that additional engagement principles should be included in the Strategy to increase the accountability and responsiveness of the department and CLMs when engaging with the community.

Government response—additional engagement principles

The engagement principles adopted by the Strategy are that engagements must be:

- evidence-based
- proportionate
- accessible
- timely
- transparent.

The suggested additional principles of accountability and responsiveness are incorporated under the above principles of timeliness and transparency.

Community engagement notifications

Feedback in submissions

Submissions recommended at least 42 days for public comment on high-impact proposals and on all draft plans of management. It was suggested the draft Strategy's proposal for 28 days was too short to enable community input into detailed and complex proposals.

Government response—extended public comment period

The Strategy has been updated and an increase in the public comment period from 28 days to 42 days has been adopted for all draft plans of management and those activities and dealings assessed as having a high impact on current community use and enjoyment of the land. It has also been decided to apply the longer period of 42 days to the exhibition of the draft state strategic plan.

Public submissions

Feedback in submissions

Submissions raised concern that proposed dealings and activities that are assessed to have minimal impact on current community use and enjoyment would only require an 'inform' level of engagement, consisting of a mandatory website notification. Several submitters felt that a public submissions process should be required in more circumstances, as providing notifications did not allow for the community to have their say on proposed activities and dealings.

Government response—increased public submission process

The Strategy has been updated to include a public submission process for all draft plans of management in addition to the State Strategic Plan, given their importance in setting future direction for Crown land.

A submissions process may also apply for any other relevant dealings and activities that are assessed as having a moderate or high impact on current community use and enjoyment.

The Strategy maintains the requirement for relevant activities and dealings assessed to have a minimal impact on community use and enjoyment to conduct engagement at the inform level. This is in line with the Strategy's engagement principle to ensure that the engagement is proportionate to impact.

The new centralised approach of having all notifications published on the department's website will be an improvement on current notifications that are advertised in local newspapers and are sometimes difficult to find.

Where following the publication of a notice, the community response indicates the impact may not be minimal, the Guidance and Resources document encourages staff to go back and reassess the level of impact and carry out a higher level of engagement.

Engagement outcomes and decision-making

Feedback in submissions

Submissions suggested the Strategy be amended to require the decision maker to consider the feedback from the community (such as public submissions) on a proposed activity or dealing and report back to the community about how engagement outcomes informed the decision.

Government response—decision making process

The final Strategy has been updated to include an additional mandatory requirement that where pre-decision engagement is required, responsible persons *'must give consideration to the issues raised in the engagement process prior to the decision being made.'*

The Strategy will maintain the requirement that decisions are published on the department's website.

Website notices will include information about the engagement process and the final decision. When the engagement includes a submission process, notices will include the number of submissions.

The Guidance and Resources documents also recommend that more detailed reasons for decisions should be provided to groups and individuals that participated in the engagement process.

Exclusions, exemptions and waivers

Feedback in submissions

Submissions raised concerns about the extent and scale of the exclusions, proposed exemptions and waivers.

Exclusions

Submissions raised concern that the Strategy does not include community engagement requirements for transfers of Crown land occurring under other Acts.

Submissions also called for further clarity regarding matters that are outside of the scope of the Strategy.

Government response—exclusions

Out-of-scope matters are those matters that, under the Act, the Strategy cannot apply to. The Strategy has been amended to give greater clarity about what is out of scope, including:

- fee increases
- automatic transfers of licences
- alterations to the conditions of leases and licences
- additions of purposes for reserved or dedicated land
- new reservations and dedications
- transfers of land that do not occur under the Act.

Transfers of Crown land under other legislation must still be undertaken in accordance with the requirements of those Acts. Fee increases, transfers, alterations, new reservations and dedications and additions of purposes are not dealings to which the Strategy applies under the Act.

Exemptions

A common theme in submissions was that there were too many exemptions from the Strategy. The following exemptions were questioned in the submissions:

- sales of leases to leaseholders with legal rights to purchase (or apply to purchase) leased land
- re-grants or renewals of leases and licences
- short term licences
- licences for unauthorised use and occupation of Crown land
- revocations to reservations or dedications to facilitate a sale, lease or vesting
- changes to a reserve purpose to facilitate a lease or licence.

Government response—exemptions

The Strategy now applies community engagement requirements to the following:

- licences for unauthorised purposes
- revocations or removals/alterations to purposes for reserves and dedications where they are linked to another dealing under the Strategy, that is, a sale, vesting, lease or licence. The final Strategy requires that where a revocation or removal/alteration to a purpose is linked to another dealing (excluding exempt dealings—see below), engagement must be undertaken. The one engagement process will cover both the revocation or removal/alteration of a purpose and the other dealing.

The Strategy has been updated to provide additional clarification that community engagement requirements in relation to certain revocations do not apply under the Strategy. These include revocations linked to:

- certain exempt sales including conversions of Western Lands Leases under the Act
- transfers of Crown land that are occurring under other Acts.

The application (or otherwise) of various requirements are set out in Table 3 in the Strategy.

The exemption for short-term licences has been retained as these are often needed to be issued in short timeframes for emergency and environmental works and it would be impractical to require engagement processes to be conducted.

The exemption for re-grant or re-issue of licences has been retained as these decisions do not represent a change to the way the land is currently used and enjoyed and do not impact on the community's current use and enjoyment of the land.

Ministerial waivers

A key theme in submissions was concern about the minister's discretion to waive the mandatory engagement requirements of the Strategy. In particular comments noted that:

- waivers that apply to the sales of Crown lands could interfere with the rights of Aboriginal groups
- it is not appropriate that waivers be used where CLMs do not have the resources or capacity to carry out the necessary community engagement
- a waiver may interfere with the ability for the community to provide feedback on matters of importance.

Government response—Ministerial waivers

The power to waive engagement requirements has been considerably constrained.

The Strategy provides that the minister will not be able to waive engagement requirements:

- for relevant sales, plans of management or the state strategic plan
- retrospectively
- in circumstances where the cost of undertaking the engagement would outweigh the benefits of engagement
- where CLMs do not have the resources or capacity to do the engagement. In this circumstance, the department will assist CLMs to carry out the engagement.

The Strategy requires a notice of the minister's decision to waive community engagement to be placed on the department's website.

Ensuring the requirements of the Strategy are clear

Feedback in submissions

Submissions recommended that the style and language used in the Strategy and the Guidance and Resources documents be revised to help ensure compliance.

Government response—review of style and language

The Strategy has been updated to improve its clarity.

Sections within the Strategy have been numbered to reflect its status as a statutory document and it has been restructured to ensure that the mandatory requirements are easily identifiable and clear.

All requirements of the Strategy are now also centrally located in Part 3 of the Strategy. Any requirements which are mandatory for the purposes of section 5.8 of the Act are also clearly identified.

Consequences of non-compliance

Feedback in submissions

Submissions raised concerns that the consequences of non-compliance should be set out more clearly within the Strategy. Submissions also raised the implementation of the Strategy and were keen to ensure that there would be measures in place to ensure compliance with the Strategy.

Government response—non-compliance consequences

The Strategy has been updated to provide that:

- the decision maker will need to be satisfied that the mandatory requirements have been complied with. If they have not, the decision maker may refuse to approve the dealing.
- detailed procedures and systems will be in place to support compliance
- random audits of decisions will be periodically carried out by the department.

In addition, it has been clarified in the Strategy that the Act states that if the mandatory are not followed, the dealing or activity is not automatically invalid. However, this **does not** prevent the validity of such dealings from being challenged in a court.

A Crown Land Commissioner will be appointed to provide independent advice about application of the Strategy. The Commissioner will have independent powers to investigate and report on the implementation of the Strategy to ensure appropriate oversight and accountability

Strategy review period

Feedback in submissions

Submissions recommended that the Strategy review period be reduced from five years to three years.

Government response—review period

The compulsory minimum review period for the Strategy will remain unchanged, consistent with the five-year review period set for the Act, to ensure a comprehensive and streamlined review process.

Conclusion

The department is very grateful to all those organisations and individuals who took the time to prepare a submission. The submissions have now been published on the website.

As outlined above, the Strategy and Guidance and Resources document have now been updated and many of the suggestions have been adopted. It has been approved by the minister.

The Strategy will commence when the CLM Act commences on 1 July 2018.

The department looks forward to the introduction of the new framework and an improved approach to engaging with the community about Crown land.