Submission to Crown Lands Legislation White Paper

Cross Sector — Submission to White Paper
June 2014
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1 Introduction

The proposed reforms presented in the White Paper are an important step in improving the efficiency and effectiveness in the management of Crown estate land in NSW. We support the aim of bringing all Crown estate land that will be managed under the new legislation into a single, simplified and modern framework.

The management of Crown land involves a mix of public policy objectives (social, cultural, environmental and regional development) and commercial objectives. The governance arrangements for Crown land need to accommodate these different objectives and provide a consistent approach to their management by different land managers across NSW.

However we note that the White Paper only outlines the proposed governance framework and funding arrangements for Crown estate land under the new legislation at a high level. It does not detail the precise roles and responsibilities of the various land owners and managers and how funding will be administered and allocated.

We consider that the governance framework and funding arrangements are key elements of the Crown Lands Management reforms that should be reflected in the new legislation.

In Section 2 of this submission we propose a model of roles and responsibilities of Crown estate land owners and managers that we consider could provide a sound basis for the governance and funding framework for future Crown estate land management. This is consistent with the business model recommended by the Crown Lands Management Review¹ and supported by Government².

As part of this model we support a market-based approach to rents for Crown land. This is consistent with our recommendations from reviews of the rental arrangements for two types of tenures over Crown land – communication towers and domestic waterfront tenancies. There should also be a transparent process for determining rebates and concessions so they are in the form of explicit (rather than implicit) subsidies.

Overall, the governance arrangements for Crown estate land should achieve the following principles:

▼ **Efficiency and consistency** in management, irrespective of who manages the land.

▼ **Transparency** in the processes for and outcomes of managing (eg, leasing or licensing) and disposing of land and in funding arrangements.

▼ **Accountability** of land managers (and owners).

A key mechanism by which these principles can be achieved and demonstrated is a publicly accessible Register of Crown estate land. We consider that this register should be included in the new legislation. We have made a recommendation in relation to establishment of a public register in answer to White Paper Question 2, below.

### 2 Suggested model for future Crown estate land management

As noted above, the White Paper does not detail the precise roles and responsibilities of the various land owners and managers and how funding will be administered and allocated under the new legislation. Clarity in these matters is essential to establish effective governance and funding frameworks under the new legislation.

We propose a model of roles and responsibilities of Crown estate land owners and managers, represented in the following flowchart at Figure 2.1 and explained further at Table 2.1. This model could provide a sound basis for the governance and funding framework for future Crown estate land management in NSW.
Figure 2.1  Suggested model for management of Crown estate land in NSW

Crown estate land

State land
Crown retains ownership

Local land
Ownership transferred to Councils

Land owner/representative
eg, Crown Lands Division or the new Public Trading Enterprise

Responsibilities include:
- Maintain public register
- Develop management and funding arrangements
- Apply market-based approach to rents

Management and funding agreement

Land managers
eg, Councils under LG Act or other managers under Crown lands legislation [NPWS, RMS]

Responsibilities include:
- Report performance measures for public register
- Day-to-day management and land maintenance in accordance with management and funding agreement
- Compliance and enforcement
### Table 2.1  Suggested model for management of Crown estate land in NSW

<table>
<thead>
<tr>
<th>Land owner role</th>
<th>Land manager role</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Public register of Crown estate land</strong></td>
<td></td>
</tr>
<tr>
<td>▪ Determine core performance measures to be reported by land managers to maintain the public register.</td>
<td></td>
</tr>
</tbody>
</table>

**Comment:** A public register of Crown estate land is fundamental to ensuring consistency, transparency and accountability in the management of Crown estate land. See section 3.2.3.

| **Management and funding agreements** | | |
| ▪ Determine the management responsibilities for land managers and/or categories of land manager. | ▪ Day-to-day management and land maintenance activities in accordance with management and funding agreement (this may include collection of rents). |
| ▪ Determine the funding arrangements for land managers and/or categories of land manager. | ▪ Apply for grants for projects on or improvements to Crown land. |
| ▪ Determine the powers of land managers (whether Ministerial approval is required). | | |
| ▪ Develop standard leases and licences, where appropriate. | | |
| ▪ Receive rents (or rental value that has been collected by land manager). | | |
| ▪ Administer the Public Reserves Management Fund. | | |

**Comment:** The land owner should enter into land management and funding agreements with land managers that determine the precise responsibilities of each party, consistent with the competency and expertise of the land manager. See section 3.3.

| **Market-based approach to rents** | | |
| ▪ Apply a market-based approach to rents. | | |
| ▪ Determine statutory minimum rents. | | |

**Comment:** For tenures where rental value is not determined by the market, the land owner should determine rents that are market reflective, administratively efficient, transparent, consistent and, where possible, take into account external benefits. A fee schedule approach may be appropriate for some lower value sites to achieve a return without the costs of negotiation and administration. See section 3.4.

| **Explicit rebates or concessions for applicable tenures** | | |
| ▪ Develop a standard policy for consideration of rebates, concessions, hardship and the public benefit of certain uses of Crown land. | ▪ Apply schedule approach to rebates and concessions to applicable tenures. |
| ▪ Determine the rebates or concessions that will be applied under a schedule approach. | | |

**Comment:** Any rebates should be in the form of explicit (rather than implicit) subsidies, in recognition of the public benefit of certain land uses. A schedule approach to determining rebates or concessions may be appropriate to accompany the fee schedule for lower-value sites. See section 3.4.
<table>
<thead>
<tr>
<th>Land owner role</th>
<th>Land manager role</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Compliance and enforcement</strong></td>
<td><strong>Undertake compliance and enforcement activities in accordance with partnership agreement.</strong></td>
</tr>
<tr>
<td>▪ Manage a partnership model with land managers and other agencies that have compliance functions in relation to Crown estate land, including:</td>
<td></td>
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<tr>
<td>– training of authorised officers</td>
<td></td>
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<tr>
<td>– provision of guidelines, advice and standardised forms and templates.</td>
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</table>

**Comment:** A partnership model between land owners and managers, similar to the Food Regulation Partnership, may enhance the capacity and capability of land managers and agencies to undertake their compliance functions in a consistent manner. See section 3.5.2.

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### 3 Responses to White Paper questions

In addition to the general points raised above, we have the following comments on specific questions from the White Paper.

#### 3.1 One new piece of legislation to manage the Crown estate

**White Paper question 1:**

How would developing one new piece of legislation to manage the Crown land estate benefit the community?

**Response to question 1**

We support the development of one new piece of legislation to improve and modernise the management of Crown estate land in NSW. It is appropriate to remove any duplication in legislation. One Act will benefit the community if it provides a streamlined, consistent and transparent approach to Crown estate land management.

This review of Crown lands legislation may also provide an opportunity to:

▪ review the design and administration of some categories of licences, leases and tenures over Crown estate land and

▪ standardise, where possible, the terms and conditions of these instruments.
We note that the White Paper discusses standardising tenure provisions and developing standard lease and licence templates at section 6.1. The Licensing Framework\(^3\) and Licensing Guide\(^4\) developed for IPART as part of its review of licence rational and design in 2013\(^5\) may be useful tools in this exercise.

We also note that the Government’s Quality Regulatory Services (QRS) Initiative provides some useful principles that could be applied to Crown estate land management to reduce red tape and should be considered when designing the new regulatory framework. These principles are:\(^6\)

- Enable electronic transactions.
- Provide clarity in processing times.
- Provide transparent appeal mechanisms.
- Promote a risk based approach to compliance and enforcement.
- Require a greater focus on regulatory outcomes.

### 3.2 Objects and provisions for the new Act

**White Paper question 2:**

Are the objects and provisions proposed for the new legislation appropriate to support Crown land management in the 21st Century?

**Response to question 2**

#### 3.2.1 Objects in new legislation

It is good regulatory practice to include an objects clause in the new Crown lands legislation to clearly explain what the legislation is trying to achieve.

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\(^3\) PricewaterhouseCoopers (PwC), *A best practice approach to designing and reviewing licensing schemes*, 2013.


The management of Crown estate land for the benefit of the people of NSW requires balancing the public policy objectives (social, cultural and environmental) and the commercial objectives. To do this, land managers and owners will need to have their respective roles and responsibilities clearly defined.

The White Paper proposes 10 objects for the new Act, which is a relatively large number of objects. We consider these objects could be further developed and rationalised to provide greater clarity for the management of Crown estate land.

Some objects proposed in the White Paper appear to overlap or expressing a similar object in a different way. For example,

- Objects (a) and (f) appear to relate to a similar object: (a) to provide for the management of Crown land for the benefit of the people of NSW, and (f) to ensure that Crown land is put to its best use in the public interest.

- Objects (f) and (g) may overlap, depending on how the terms “best use in the public interest” and “public use” are defined: (f) to ensure that Crown land is put to its best use in the public interest, and (g) to encourage public use, enjoyment and, where appropriate, multiple use of Crown land.

We consider the objects for the new Act should include the principle – to provide efficiency, consistency, transparency and accountability in the management of Crown estate land.

Efficiency and consistency in management, irrespective of who manages the land; transparency in the processes for and outcomes of managing (eg leasing or licensing) and disposing of land and the funding arrangements; and accountability of land managers and owners are principles that should underpin the new Act.

Recommendations

1. The proposed objects for the new legislation should be reviewed to provide greater clarity and fewer objects. For example:
   - to provide for the management of Crown land for the benefit of the people of NSW
   - to establish a governance framework and funding arrangements for management of Crown land that are efficient, consistent, transparent and provide accountability.
3.2.2 Provisions in new legislation

The White Paper provides an outline of a number of provisions to be included in the new Act including:

- Powers.
- Land ownership.
- Tenures.
- Sales and disposal of land.
- Crown reserves.
- Compliance and enforcement.
- Administrative and miscellaneous matters.

Defining the powers to support the new governance arrangements for the Crown estate is a critical task in the development of new legislation. The explanation of these powers in the White Paper is at a very high level and the roles and responsibilities of the various parties involved in ownership and management of the Crown estate are not detailed.

For example, the White Paper provides that the new Act will define the powers to be given to the Lands Administration Ministerial Corporation. However, it is not clear if these powers will substantially change and if so what this means for the governance of the Crown estate.

At section 2 of this submission we have suggested a model of roles and responsibilities of Crown estate land owners and managers (including councils and other managers). We consider the model could provide a sound basis for the governance and funding framework for future Crown estate land management. These roles and responsibilities should be clearly defined by the regulatory framework.

We note that the roles of related entities and arrangements raised in the White Paper and the Crown Lands Management Review, such as the Lands Administration Ministerial Corporation, the new Public Trading Enterprise and the Public Reserves Management Fund, will need to be integrated in the new governance framework.

3.2.3 Register of Crown estate land

As discussed above, the principles of efficiency, consistency, transparency and accountability should underpin the management of Crown estate land.

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A key mechanism by which these principles could be achieved and demonstrated is a publicly accessible Register of Crown estate land. We note that councils are required under section 53 of the *Local Government Act 1993* (NSW) to develop a register of all land vested in it or under its control.

A register of Crown estate land could include the following information in relation to each parcel of land:

- the land manager
- the leases, licences, and tenures over the Crown estate land
- who holds each lease, licence or tenure
- when each lease, licence or tenure expires
- which leases, licences or tenures are subject to a competitive process
- rent associated with each lease, licence or tenure
- any rebates granted and the value and reason for granting (eg, public benefit or hardship)
- the value of any grant allocated to the parcel of Crown estate land over the past 5 years
- any easements over the land or other restrictions on use, including restrictions on land disposal.

A publicly accessible Register of Crown estate land could have many functions. The register information will allow the Crown management entity to demonstrate how Crown estate land is being put to its best use in the public interest. It will also enable it to more clearly demonstrate the community service reasons for providing rebates and any community service obligation payment made by the NSW Government.

For commercial users of Crown estate land, and potential commercial users, this information may assist them identify leases they wish to compete for, and result in further competition for leases and better outcomes for the State.

A register containing this information could provide an ongoing inventory of Crown estate land and its management to assist central government planning and policy development. To achieve this, it must include all Crown estate land, irrespective of who manages the land.

We note that the stocktake of the Crown estate, outlined in the Crown Lands Management Review Summary and Government Response, could be the opportunity to start developing and compiling base information for the register, as it is currently available for parcels of Crown estate land.

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Recommendations

2 The regulatory framework should clearly define the roles and responsibilities of the various Crown estate land owners, managers and other entities (including the Lands Administration Ministerial Corporation, Public Reserves Management Fund, and the new Public Trading Enterprise).

3 The new legislation should include an additional requirement to establish a publicly accessible register of Crown estate land in NSW.

3.3 Crown reserves

3.3.1 Allowing councils to manage Crown reserves under local government legislation

White Paper question 3:

Do you have any comments on the proposal to allow local councils to manage Crown land under local government legislation rather than under the Crown Lands Act?

Response to question 3

We support the proposal to allow councils to manage Crown reserves under local government legislation. In their submissions to IPART’s Review of Local government compliance and enforcement, some councils were concerned that the processes for dealing with a number of Crown land matters had a negative impact on businesses and the local community. They felt that removing such impediments would reduce red tape.9

We consider that allowing councils to manage Crown reserves under local government legislation, and streamlining approval processes for certain activities is likely to address the concerns of these councils.

Councils should still be accountable for their performance as land managers of Crown estate land. To enable the NSW Government to review the performance of land managers on a consistent basis and undertake its broader policy role in relation to Crown estate land, councils managing Crown reserves under local government legislation should report core performance measures in the publicly accessible register. This could include the leases, licences or tenures granted; when they expire; who holds each lease, licence or tenure; rental value; and any rebates granted and the reason for grant (e.g., public benefit or hardship).

**Recommendation**

4. To enable the NSW Government to review the performance of land managers on a consistent basis and undertake its broader policy role in relation to Crown estate land, councils managing Crown reserves under local government legislation should report core performance measures in the publicly accessible register.

### 3.3.2 New management structure for Crown reserves

**White Paper question 4:**

What are your views about the proposed new management structure for Crown reserves?

**Response to question 4**

It is important to ensure that the new management structure for Crown reserves achieves a consistent and transparent approach by the different land managers. It is not clear whether the removal of the reserve trust will change the roles and responsibilities of the Crown reserve managers.

It is essential that there is clarity in these roles and responsibilities and that the new management structure provides transparency, consistency and accountability. At section 2 of this submission we have suggested a model of roles and responsibilities of Crown estate land owners and managers that could provide a sound basis for the governance and funding framework for future Crown estate land management.
We propose that the land owner (or its representative) should enter into management and funding agreements with land managers, reflecting the expertise of the land manager and providing clarity and transparency around the responsibilities of each party. Land managers should be funded for their efficient costs in managing Crown estate land. Management and funding agreements are a mechanism by which the funding arrangements can be negotiated. Negotiations can take into account any existing funding contributions by the designated land manager as well as in-kind contributions.

Recommendations

5 The Government should ensure there is clarity in the roles and responsibilities of Crown reserve managers and that the new management structure provides transparency, consistency and accountability.

6 The Crown estate land owner should enter into management and funding agreements with land managers. These agreements should reflect the expertise of the land manager and detail the responsibilities of each party.

3.3.3 Stronger management requirements and fewer approval and reporting requirements for Crown reserves

White Paper question 5:

Do you have any further suggestions to improve the governance standards for Crown reserves?

Response to question 5

We consider there should be a core or base level of information reported to the NSW Government by all land managers to maintain the publicly accessible register. This will enable the NSW Government to review the performance of land managers on a consistent basis and undertake its broader policy role in relation to Crown estate land.

In addition, the monitoring and reporting arrangements between Crown land managers and the NSW Government should be targeted, appropriate and not unnecessarily burdensome.

10 This is consistent with our recommendations on a funding framework for Local Land Services NSW: IPART, Review of funding framework for Local Land Services NSW - Draft Report, September 2013, p 58.
In relation to approvals, there may be value in tailoring approval powers to match the competence and professional expertise of the Crown reserve manager. These powers could then form part of the management and funding agreement between land owner and manager. However, where possible, standard criteria or thresholds should be established to determine the approval powers of Crown reserve managers.

Recommendations

7 All Crown estate land managers should report core performance measures to the NSW Government to maintain the publicly accessible register. This will enable the NSW Government to review the performance of land managers on a consistent basis and undertake its broader policy role in relation to Crown estate land.

8 Where possible, standard criteria or thresholds should be established to determine the approval powers of Crown reserve managers.

3.3.4 Other streamlining measures

White Paper question 7:

Are there any other ways to streamline arrangements between State and local governments?

Response to question 7

Another area to consider streamlining is the regulatory or other tools and infrastructure to be provided by the NSW Government to councils and other Crown land managers. The provision of appropriate centralised support could include:

- online portal
- guidelines, advice and protocols
- model licences and leases
- standardised compliance tools (eg, forms and templates)
- workshops and training.

The Food Regulation Partnership between the NSW Food Authority and councils is an example of how arrangements could be streamlined. These arrangements are explained in more detail in the answer to Question 17 below.
3.4 Tenures and rents

3.4.1 Rental arrangements

White Paper question 9:

Do you support the concept of consistent, market based approach to rents, with rebates and waivers for hardship and public benefits for certain uses of Crown land applied where appropriate?

Response to question 9

We support a market-based approach to rents. This is consistent with the recommendations from our reviews of Crown land rental arrangements for domestic waterfront tenancies and communication towers. Further, there should be clear principles and a transparent process for determining rebates, including concessions for hardship and pensioners.

Key principles

We have reviewed rents for 2 different uses of Crown land: domestic waterfront tenancies in 2010/11 and communication towers in 2012/13. Drawing on our experience from these reviews, we consider that Crown estate land rental arrangements should be based on the following key principles:

- **market return**: rents should be based on the market’s willingness to pay for the site
- **administrative efficiency**: arrangements for determining rents should be simple to administer and cost effective
- **transparency**: rents should be calculated in a manner that is clear and easily understood
- **consistency**: arrangements for determining rents should be applied consistently across different Crown land management agencies

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11 We reviewed rents for domestic waterfront tenancies administered by Department of Primary Industries and Roads & Maritime Services. Domestic waterfront tenancies are occupancies of areas of waterfront public land for private structures (eg, jetties, swimming pools, boatsheds).

12 We reviewed the rental arrangements administered by 3 land management agencies (NSW National Parks & Wildlife Service, Forestry Corporation, and the then Catchment & Lands Division of DITIRIS for communication infrastructure and equipment located on Crown Land.)
**external benefits:** to the extent possible, rents should take into account any social benefits from services provided by site users.\(^{13}\)

The sections below outline how we applied these principles in our reviews.

**Communication towers**

**Rental arrangements**

We recommended a 2-tiered rental arrangement for communication sites:

1. A published fee schedule for standard sites, which:
   - Sets 1 level of rent for all users in nominated location categories, with an accompanying schedule of rebates for eligible users.
   - Determines rent at the level that the majority of market evidence suggests is current for commercial businesses.
   - Is subject to independent review every 5 years, to ensure it reflects market based commercial returns. In between reviews, it is indexed annually by CPI.

2. Open tender or negotiation process for a limited number of high value sites, where cost effective.\(^{14}\)

An advantage of using the fee schedule approach is that it provides a commercial market return, without the cost and time involved in negotiating every site. We considered that that the cost of negotiation for many sites would likely exceed the benefits, particularly in rural areas. The fee schedule covers the majority of sites and therefore treats users in a consistent and transparent manner.

**Rebates**

To enhance transparency, we recommended that any rebates to the fee schedule should be provided explicitly, at the relevant Minister’s discretion. It should be based on the individual circumstances of the user, and in recognition of the social and community benefits they provide.\(^{15}\)

We identified appropriate rebates and the types of users eligible for these rebates. Users that may be eligible for rebates included:

- Community groups run on a not-for-profit basis that deliver services with social and community benefits.\(^{16}\)

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\(^{14}\) Ibid, pp 3-6.

\(^{15}\) Ibid, p 40.

\(^{16}\) Ibid, p 41.
• Budget funded users – NSW Government agencies or authorities that deliver core services to the public and typically cannot fully capture the value they create through user fees. Examples include NSW Police and the State Emergency Services.\(^{17}\)

Rebates were not recommended for government businesses, based on the principle of competitive neutrality, since they should pay the same rents as commercial users.\(^{18}\)

**Domestic waterfront tenancies**

**Rental arrangements**

In the absence of robust data on market rents for domestic waterfront tenancies, we recommended that the rental arrangements comprise 2 parts:

• A rental charge set using a formula that is market reflective, transparent, consistent across domestic waterfront tenancies and relatively easy to update.
  - The formula multiplies an estimate of the value of a domestic waterfront tenancy by a rate of return and includes a discount multiplier\(^ {19}\).
  - The rate of return is based on the best available proxy for market rents for domestic waterfront tenancies (ie, net rental returns in the residential housing market).

• An administration fee, allowing the land management agencies’ to recover their outgoings in administering domestic waterfront tenancies.
  - The fee covers the agencies’ efficient administrative costs, relating to activities such as debt collection, handling enquiries and compliance.\(^ {20}\)

The combination of the rental charge and administration fee allows agencies to receive a net return similar to that achieved in the residential property market.

**Rebates**

We recommended concessions apply to these rental arrangements for a limited set of circumstances, such as for hardship, pensioners and water access only properties.

\(^{17}\) Ibid, p 42.

\(^{18}\) Ibid, p 37.

\(^{19}\) The discount multiplier is intended to reflect differences between the value of privately owned waterfront freehold land and the value of adjoining occupancies.

Crown Estates

If managers on Crown Estates are to administer rental arrangements for communication towers or domestic waterfront tenancies, they should apply the same approach that has been developed by IPART for other managers of these particular types of land. It is important to ensure that a consistent approach is applied to communication towers or domestic waterfront tenancies, irrespective of the land manager.

Recommendations

9  Crown land rental arrangements should be market reflective, administratively efficient, transparent, consistent and, where possible, take into account external benefits.

10 Any rebates should be in the form of explicit (rather than implicit) subsidies, in recognition of the public benefit of certain land uses. Further, the Government should develop a standard policy for consideration of concessions, hardship and the public benefit of certain uses of Crown land.

11 Crown estate land managers of communication towers or domestic waterfront tenancies should apply the same approach that has been developed by IPART for other managers of this type of land.

3.4.2 Statutory minimum rents

White Paper question 10:

Is five years a reasonable amount of time to give tenure holders who currently pay below the statutory minimum rent to move to paying the minimum level of rent as required under new legislation?

Response to question 10

We consider that 5 years is a reasonable period in most circumstances, to adjust to the statutory minimum rent.

We made a similar recommendation for implementing the new fee schedule for communication towers, for example. To moderate the impact on existing users, we considered that the fee schedule should be phased in over a 5-year period, starting from the next rent review date.21

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Recommendation

12 The statutory minimum rent should be applied over a 5-year period to users who currently pay rent below this amount, subject to applicable rebates and concessions.

3.4.3 Rent arrears

White Paper question 11:

To avoid rent arrears issues for incoming tenure-holders, should the new legislation automatically transfer any rental debt to a new tenure-holder on settlement, or require any outstanding arrears to be paid prior to transfer or settlement?

Response to question 11

We consider that rent arrears should be settled by the tenure-holder responsible for incurring the debt. Transfer or settlement provides an opportunity to ensure debts are paid, rather than allowing them to accumulate with transfer to a new tenure-holder.

We also note the White Paper discusses unauthorised use of Crown estate land. This could be addressed in a number of ways, including:

- Fines, imposed by the land manager through its compliance and enforcement activities, or
- Ministerial power to issue a licence for the use of land where a user has not applied for a licence, that will require the payment of rent (as proposed in the White Paper).

These responses may be appropriate, depending on the circumstance and use of the land. Land managers may need to exercise discretion to determine the appropriate response.

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3.4.4 Carbon sequestration and forestry rights

White Paper question 13:

Should Crown land be able to be used for all forms of carbon sequestration activities?

Response to question 13

There are several methods of carbon sequestration, including:

- **Soil sequestration** - enhancing the storage of carbon in soil.
- **Plant sequestration** - enhancing the storage of carbon in forests and other vegetation.
- **Geosequestration** - storing carbon in underground geological formations (e.g., natural reservoirs).23

We consider that Crown land should be available for all forms of carbon sequestration activities, provided there is a consistent and transparent approval process for these activities. Additionally, if Crown land is being used to generate a commercial return through carbon sequestration, the user (both government and private sector) should be liable to pay market reflective rents.

If Crown land is used by the Government or by the direction of the Government for carbon sequestration activities, then an explicit Community Service Obligation should be paid to the land owner equivalent to the market reflective rent.

Recommendations

13 Crown land should be available for all forms of carbon sequestration activities, provided there is a consistent and transparent approval process for these activities.

14 If Crown land is being used to generate a commercial return through carbon sequestration, the user should be liable to pay market reflective rents.

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3.5 Compliance and enforcement

3.5.1 Compliance and enforcement framework

White Paper question 16:

What are your views about the proposal to strengthen the compliance framework for Crown lands?

Response to question 16

We agree that the new governance framework needs to be supported by an effective compliance framework with modern and flexible enforcement tools and sanctions.

An example of similar compliance reforms can be found in the United Kingdom’s Regulatory Enforcement and Sanctions Act 2008 (RES Act)\(^\text{24}\) that was passed as part of the reforms creating the Local Better Regulation Office (LBRO).\(^\text{25}\) The RES Act was designed to give local authorities a broader range of effective enforcement tools that could be used across regulatory areas.

In particular, the enactment of these ‘broad brush’ tools, such as civil sanctions, stop notices and enforcement undertakings, aimed to increase the flexibility, consistency, appropriateness and proportionality of regulatory action. This was to address what had been identified as a “compliance deficit” in some regulatory areas; whereby regulators could not respond to breaches with appropriate and proportionate responses, and therefore did not respond at all.\(^\text{26}\)

Research indicated that the anticipated savings from implementation of the RES Act may range between $2.05m and $59.75m – made up of savings to Courts; reduced operating costs for regulators; and savings for businesses from not needing to go through Court.\(^\text{27}\)


\(^{25}\) The former LBRO is now incorporated into the Better Regulation Delivery Office (BDRO) within the Department for Business, Innovation & Skills (BIS).


It is reasonable to expect that similar reforms in relation to the compliance framework for Crown lands could also achieve greater efficiency in compliance and result in associated savings.

We also note that under the governance arrangements suggested by the White Paper, there will be a variety of land managers and other government agencies that may have a role in the Crown lands compliance framework. The roles and responsibilities of the various land managers and other agencies must be clearly defined to ensure the compliance framework is used effectively and consistently across the Crown Estate land.

3.5.2 Improved compliance and enforcement provisions

White Paper question 17:
Do you have any suggestions or comments about proposals for the following:

- Auditing
- Officer powers
- Offences and penalties
- Other provisions?

Response to question 17

Auditing

We agree that auditing provisions should be included in the new legislation as an important part of the compliance toolbox. We support a risk-based approach to auditing whereby businesses or individuals with a strong record of compliance are audited less frequently than those that those with poorer performance or higher risk. A risk-based approach to auditing and enforcement should minimise costs and enhance regulatory outcomes.

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28 IPART’s Energy Savings Scheme Compliance and Monitoring Strategy is an example of a risk-based approach to auditing. Under this strategy, each application for accreditation of a certificate provider is scored according to the risk factors associated with the application. The score then determines the audit requirements, including frequency and timing. See IPART, Compliance and Monitoring Strategy: Energy Savings Scheme, April 2014, pp 30-32.
Officer powers

We agree that the Protection of the Environment Operations Act 1997 (NSW) is the current benchmark for effective provisions relating to the appointment, powers and protection of authorised officers and that authorised officer powers should apply consistently across all land falling under the new legislation.

Given that there will be a variety of land managers under the new legislation, it will be important to ensure that all authorised officers under the new legislation receive appropriate training and support to achieve improved compliance across Crown estate land. The responsibilities of authorised officers should also be negotiated as part of the management and funding agreements between land owners and managers.

Compliance sharing

In relation to compliance sharing with other agencies, we note the Food Regulation Partnership (FRP)\(^\text{29}\) as an example that has been recognised by councils and other stakeholders as an example of regulatory best practice.\(^\text{30}\) The FRP model includes a comprehensive program to support and assist council roles in food regulation by the NSW Food Authority (the Food Authority). This includes:

- assistance with high level enforcement
- development of operational guides
- facilitation of networks (such as regional and state surveillance and liaison groups)
- providing technical advice
- maintaining ‘real-time’ communication with emails and newsletters.\(^\text{31}\)

A similar regulatory model may be appropriate for sharing compliance functions under Crown lands legislation with other appropriate NSW Government agencies.

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\(^\text{30}\) See submissions to IPART, Regulation Review - Local government compliance and enforcement – Issues Paper, from Orange City Council, November 2012, Campbelltown City Council and NSW Business Chamber, October 2012.

Recommendation

15 NSW Trade & Investment should adopt a partnership model with land managers and other agencies that may have compliance functions in relation to Crown estate land, similar to the Food Regulation Partnership between the NSW Food Authority and councils. A partnership model may enhance the capacity and capability of land managers and agencies to undertake their compliance functions. It could include:

- clear delineation of compliance roles and responsibilities
- training of authorised officers
- a risk-based approach to compliance, supported by a compliance and enforcement policy
- use and publication of reported data to assess and assist land managers and compliance agencies
- consultation forums for strategic consultation with land managers and compliance agencies
- ability for land managers and compliance agencies to recover their efficient compliance costs
- a system of periodic review and assessment of the partnership model
- centralised support and assistance including:
  - an online portal
  - guidelines, advice and protocols
  - standardised compliance tools (eg, forms and templates)
  - coordinated meetings, workshops and training with councils and other land managers.