THE NSW CROWN LANDS REVIEW: RISKS AND OPPORTUNITIES FOR ABORIGINAL PEOPLE IN NEW SOUTH WALES

J. HUNT
Series Note

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The NSW Crown Lands Review: risks and opportunities for Aboriginal people in New South Wales

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Introduction

The Crown Land Estate in New South Wales (NSW), managed by the Department of Primary Industries – Lands, totals 33 million hectares, covers 42% of the state, and is valued at approximately $11 billion. It does not include national parks and state forests managed by other government departments. By far the largest component (more than 30 million hectares) is the Western Division leasehold land, which is mostly under grazing and pastoral leases. The remaining lands comprise 34 000 reserves, including beach and estuary areas, rivers and other waterways, community and cultural facilities, sports and recreation reserves, caravan parks, and land used for grazing and as travelling stock reserves (TSRs).

In June 2012, the NSW Government began an internal interagency Crown Lands Management Review. Its stated aims were to ‘improve the management of Crown land and increase the benefits and returns from Crown land to the community’ (NSW Trade & Investment 2014a:vii). The report from the review was made public in 2014. Between 28 March 2014 and 20 June 2014, submissions were invited on the government’s response to the review, and specifically on a Crown lands legislation white paper that set out proposed legislative changes. The major reforms proposed in the white paper covered the overall management of Crown lands, their governance, financial aspects and the business model for future management. This included consolidating various pieces of legislation covering different types of Crown land, and distinguishing between land of ‘state’ and ‘local’ value so that land with predominantly local values would be owned or managed by local government councils in the future. The review also recommended a review of TSRs to determine their best future management, and a transition of Crown lands to a public trading enterprise (NSW Trade & Investment 2014b).

This paper explains the importance of Crown lands to Aboriginal communities in NSW and how certain elements of the review may affect land of significance to Aboriginal people, indicating risks as well as opportunities.

The Aboriginal Land Rights Act 1983 (NSW) and the Native Title Act 1993 (Cwlth)

In the late 1970s and early 1980s, Aboriginal citizens of NSW campaigned hard to bring about the Aboriginal Land Rights Act 1983 (ALRA). The ALRA established a network of Aboriginal land councils, including a peak body (the NSW Aboriginal Land Council, or NSWALC) and local Aboriginal land councils (LALCs), and enabled them to claim some Crown land, as defined in the ALRA (s. 36). Claimable Crown land is vested in Her Majesty, is not lawfully used or occupied, is not required for essential public purposes, and is not needed or likely to be needed for residential lands (in the opinion of the Crown Lands Minister). Since the Native Title Act 1993 (NTA) was passed, land that is subject to an application for the determination of native title or has an approved determination of native title is also excluded from claim.

Claimable Crown land is the only land that Aboriginal people can repossess, unless they purchase freehold land through the Indigenous Land Corporation (ILC) or other private sources. Funding and opportunities to obtain land through the ILC or other sources are very limited. As at 30 June 2015, about 39 148 land claims over Crown land in NSW have been made under the ALRA, and just over 28 000 are yet to be determined. Only 2660 have been granted, and some have been refused. Some 127 000 hectares of Crown land have now been transferred to Aboriginal land councils. Claimable Crown land is the only land that Aboriginal people is that it is the only land that can be claimed under the ALRA.

The NTA was passed in 1993 in response to the so-called ‘Mabo’ decision of the High Court in 1992, which overturned the myth of terra nullius or ‘empty land’. The NTA enables Aboriginal people in NSW to claim recognition of their native title rights over Crown land. Some successful native title claims have been completed in NSW, and around half the state is now claimed or under ongoing native title claims.

Aboriginal people thus have the most significant stake in Crown Land – more so than any other citizens of the state. The significance of Crown land for Aboriginal people is that it is the only land that can be claimed under both the ALRA and the NTA. The ALRA was specifically designed as a compensatory mechanism to help both regenerate Aboriginal culture and provide a base for economic development. Claiming land rights or native title rights can help redress, to some degree, the original dispossession that Aboriginal people experienced as a result of European colonisation. This land is also important in terms of Aboriginal culture and heritage. Many significant Aboriginal cultural sites are on Crown land, and the task of protecting these sites and cultural landscapes is extremely important to both Aboriginal people and the nation. It is important to recognise that Australia has signed (with NSW Government agreement)
the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which includes clauses relating to the right of Indigenous people to control their own culture and heritage.

Indeed, Aboriginal citizens of NSW are rights holders rather than stakeholders in relation to land, culture and heritage matters. For this reason, their interests in, and claims on, Crown land are unique and need to be given particular consideration during this Crown lands reform process.

Changes in status of Crown land

The white paper gives greatest emphasis to disposal or transfer of Crown land by sale, or through transfer to local government or other community bodies. Transfer to freehold would make this land nonclaimable under the ALRA and ineligible for native title claims under the NTA. In the spirit of the ALRA, if the NSW Government no longer wants to retain Crown land, its first option should be to invite the LALC to claim it, or to transfer the land under existing provisions in the Crown Lands Act 1989.

Relationship of Crown land reform to the ALRA and the NTA

The white paper states that ‘the new Crown lands legislation will not amend the Aboriginal Land Rights Act 1983’ and that ‘Crown land will continue to be available under the provisions of that Act as compensation for the dispossession of Aboriginal people’ (NSW Trade & Investment (2014b:4). However, it is not clear whether:

- Aboriginal people will be given first option in relation to any lands to be transferred or otherwise disposed of
- the opportunity will be taken to proactively transfer Crown lands of high Aboriginal cultural significance or economic prospect to Aboriginal communities
- the categorisation of lands as either state or local will affect Aboriginal rights or potential rights in land.

Although provisions within the ALRA will not change as a result of the Crown Lands Review, the compensatory intent of the ALRA could be significantly and severely undermined if, as a result of the review, Crown land that should have otherwise been claimable (because the NSW Government no longer requires it) is moved beyond the reach of Aboriginal claim.

Nor is it clear what role is envisaged for the NSWALC or NTSCORP (the native title representative body for the state) in recategorising, leasing or disposing of Crown lands. They have not been specifically involved in the review; rather, their input has been considered along with all other public submissions. Submissions have not been made public. From an Aboriginal justice perspective, it is essential that any recategorisation of Crown land, or leasing or disposal of such land should not jeopardise or diminish the opportunity for Aboriginal land councils to claim such land, or the native title holders to gain recognition of their rights and interests in that land under the NTA.

State and local land

If Crown land is to be categorised as either state or local land, decisions about state land should involve the NSWALC, and decisions about local land should involve the NSWALC and LALCs. Land categorised as local, rather than automatically being transferred to local government, could instead be transferred to a LALC under the ALRA (with or without conditions applying – for example, about community access or use) or through existing mechanisms in the Crown Lands Act. Alternatively, it could be transferred to a prescribed body corporate, under the NTA, to manage and use for the benefit of the Aboriginal community and, where appropriate, the wider community. Crown land transferred to local government should remain open to claims under the ALRA, and have native title rights and interests recognised in the future. It should not be sold subsequently by the local government or be put to any uses that would preclude the option of future land rights or native title claims, unless agreed to by the NSWALC, NTSCORP and the relevant local Aboriginal people. However, it is not clear that this is what would happen. If land is transferred to local government to be managed under the Local Government Act 1993, such land would no longer be claimable under the ALRA or the NTA.

Four pilot projects concerned with refining and drafting the criteria for identifying local land have already begun with Warringah Council in Sydney, Tamworth Regional Council, Tweed Shire Council and Corowa Shire Council, but relevant LALCs have not been approached to participate. Information about these pilots is very hard to obtain. This suggests a lack of openness to the engagement of Aboriginal people in this critically important decision making. These pilots are expected to be completed by the end of 2015.
Reference in the white paper is also made to devolving land to other government agencies, and it is far from clear what implications this might have for the claiming of such lands.

**Western Lands Leases**

Nearly all the land in the Western Division of NSW is held under Western Lands Leases, granted for grazing under the *Western Lands Act 1901*. This is a vast area of more than 30 million hectares, bounded on the east by a line from Mungindi on the Queensland border to the Murray River near Balranald. Currently, under the ALRA, land claims over this land are possible, although native title claims are not. If, as is proposed in the review, grazing leases can be converted to freehold land, land claims under the ALRA over such land would be prevented.

**Travelling stock reserves and commons**

TSRs are a special category of Crown land. They often provide very high biodiversity, and strong Aboriginal culture and heritage values because they tend to follow traditional Aboriginal pathways associated with sources of water. They are therefore of particularly high cultural value to Aboriginal people. It is critically important that the NSWALC, LALCs and NTSCORP be centrally engaged in determinations about their future. Since Local Land Services is developing criteria to review all TSRs, it is important that the NSWALC and its local land council network, as well as NTSCORP, are invited to contribute criteria for the review, and that they are engaged in the review and any subsequent decisions about the future of TSRs as active and equal partners with government.

Aboriginal people could be involved in future management of TSRs in several ways:

- An agreement could be made to co-manage a TSR with the NSW National Parks and Wildlife Service (many such agreements already exist for parks and reserves in NSW through memoranda of understanding).
- A TSR could be transferred to one or more LALCs to manage (potentially with conditions about how land should be managed, access arrangements, etc.). Such an arrangement could include an option of lease-back agreements should that be considered necessary (again, such agreements already exist in NSW for some national parks on Aboriginal-owned land).

- Management arrangements could be agreed through an Indigenous land use agreement (ILUA), where the TSR may be subject to a native title claim.

Commons, like TSRs, may also have significant Aboriginal heritage values, and it is therefore appropriate that, should they be converted to Crown land, they should also be eligible for claim under the ALRA and/or the NTA.

Commons and TSRs should be considered priority land for Aboriginal management, and discussions should be held with the NSWALC and NTSCORP about arrangements to facilitate such management. This is an opportunity for proactive engagement with Aboriginal organisations about tenure transfers or management arrangements.

**Co-management**

The objectives of the reform include ‘to encourage Aboriginal use and, where appropriate, co-management of Crown land’ (NSW Trade & Investment 2014b:11). However, they could have included ‘to enable transfer of Crown land to Aboriginal tenure through the ALRA, and to promote Aboriginal management of Crown lands’. While co-management may be preferable to Aboriginal people than no role in management, there seems to be no reason why Aboriginal management and ownership of Crown lands should not also be considered. Already in NSW, a number of Aboriginal groups very successfully manage conservation lands. For example, nine Indigenous Protected Areas in different parts of NSW are solely managed by Aboriginal people, and I see no reason why more such opportunities to manage Crown lands for conservation or other purposes could not be taken up by Aboriginal people and so contribute to Aboriginal economic development, employment and wellbeing. This would also contribute to the NSW Government’s OCHRE (opportunity, choice, healing, responsibility, empowerment) policy (NSW Government 2013) of encouraging Aboriginal employment. This suggests that Crown reserves dedicated for a specific purpose could be managed by a LALC or a native title prescribed body corporate, in addition to the other non-Indigenous bodies suggested in the white paper.

**Culture and heritage**

Another objective of the reform is ‘to preserve cultural heritage (Aboriginal and non-Aboriginal) on Crown land’ (NSW Trade & Investment 2014b:11). This is welcome, but it is not clear by what mechanism any new Act
would ensure such preservation. Under the UNDRIP, article 31 makes clear that ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ...’. A parallel reform process is under way in NSW, led by the Office of Environment and Heritage, in relation to Aboriginal cultural heritage. Its recommendations, which have been provided for comment by Aboriginal people, fail to reflect Indigenous rights as set out in the UNDRIP (Hunt 2014). Any new Crown land legislation should reflect UNDRIP principles in relation to Aboriginal culture and heritage. This reinforces the significance of this Crown land reform process for Aboriginal rights holders.

Carbon and other rights

Carbon sequestration rights and intellectual property rights in relation to plants or other species are further areas in which Aboriginal people may have strong interests. In northern Australia, Aboriginal people are generating economic development based on carbon rights and careful fire management (Altman & Kerins 2012). The potential for Aboriginal economic development through owning intellectual property rights in relation to medicinal plants or other species is unknown, but may be significant. The allocation of these rights is therefore of considerable significance to Aboriginal people, and proposals to allow the Crown Lands Minister to grant or approve carbon or other rights on Crown land should take this into account. I would argue that, as a compensatory measure, such rights should by default be attributed to the recognised native title holders or local traditional owners, Aboriginal owners (under the ALRA), or, where none are evident, the relevant LALC. It could similarly be argued that forestry rights on Crown land should first be offered to Aboriginal people before being offered to other citizens.

Enforcement

The white paper observes that enforcement provisions relating to offences on public land have been poorly implemented. Certainly, there have been cases of Crown land being returned to Aboriginal people in a very poor state, with major clean-up of rubbish and dumped material required, including pollutants and toxins, as well as noxious weeds that have not been managed. The NSW Government was forced to set up a special program to support Aboriginal people to clean up such polluted lands; however, funding for this is limited. Better enforcement would have the support of most Aboriginal people.

Notification and engagement

It goes without saying that, if Aboriginal people are to be actively involved in decisions about the future of Crown land, they need to be informed that decisions are pending. Notifications about all possible changes in the status of Crown land (i.e. recategorisation, disposal, leasing or any changes to the purpose of a reserve) need to be provided in media that will reach Aboriginal people. Such provisions would include adequate notice to inform the NSWALC and NTSCORP, and, where relevant, LALCs and native title prescribed bodies corporate. Notice would also be disseminated through the NSW Government Gazette. Aboriginal people must then have the opportunity to be fully informed about what is proposed, consider their options and have time to respond. In other words, there must be a genuine Aboriginal engagement process and a fair negotiation about the future of all Crown land, based on the principle of free, prior and informed consent. To date, this has not been the case.

Crown Lands Division as a public trading enterprise

Little information is provided about the government’s proposal to establish the Crown Lands Division as a public trading enterprise, and what the implications might be for Aboriginal people. If such an authority were to control leasing or sale of Crown land, it would be important that this not conflict with the opportunity for Aboriginal people to claim native title or land rights over such land. The relationship between the NTA, the ALRA and any new body would need to be clear, and not to the detriment of Aboriginal people.

Conclusion

There are very significant risks for Aboriginal people who might wish to make native title or land rights claims over Crown land in the future. Crown land that is now claimable may, as a result of this review, be disposed of, or transferred, or have its tenure changed. Once such land is no longer Crown land, Aboriginal people lose any opportunity to make claims. However, there are also opportunities in this review, should the NSW Government choose to take advantage of them, to transfer some Crown land to Aboriginal land councils or, in the case of land subject to native title claim, to prescribed bodies corporate under the NTA. In particular, there are special opportunities in relation to TSRs and land currently classified as commons, which may be of particular
cultural significance, to transfer them to Aboriginal ownership or to make co-management arrangements. The NSW Government’s OCHRE policy has a strong emphasis on culture and identity, as well as the need for economic empowerment of Aboriginal people. Exploring opportunities for transferring Crown land to Aboriginal ownership or management could assist in these objectives.

Notes

1. Data provided by the NSW Aboriginal Land Council, 6 August 2015.

References


