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SUBMISSION TO REVIEW OF CROWN LAND MANAGEMENT - RECOGNISING AND PROTECTING THE VALUES OF COMMONS

INTRODUCTION

All legislation should be periodically reviewed to ensure it remains effecting in meeting its objectives, and that its objectives continue to be relevant. However, there is no necessary or logical connection between reviewing the *Crown Land Act 1989*, making the *Crown Land Management Act 2016* and abolishing the *Commons Management Act 1989* (the Act).

The Crown Land Management Bill was amended by Parliament in 2016 to remove the provisions for abolishing the *Commons Management Act 1989* and along with it the commons of New South Wales. The Department has, I understand, given some reconsideration to issues raised by commoners and parliamentarians at the time and since, and I am pleased to see the wording in the 'fact sheet' now seems to accord some recognition of the long histories and traditions of commons in New South Wales, and some understanding of the historical and social significance of commons, common trustees and commoners. I congratulate the Department on this positive development.

However, despite this new recognition of the historical significance and value of commons, the revised legislative proposal remains fundamentally unchanged from that defeated by Parliament in 2016, which is that commons will become no more than any other piece of Crown land subject to ministerial whims and preferences, with the historical rights and roles of commoners abolished and consigned to the ash heap of history.

I was opposed to the 2016 proposals regarding commons, and I remain opposed to the 2017 proposals where these are materially much the same as those of 2016.

Nevertheless, there are some useful elements in the 'fact sheet' that could be integrated into an updated *Commons Management Act 1989*, and my further comments are generally framed within that context.

COMMENTS ON SECTIONS IN THE 'FACT SHEET'

SECTION 1 THE RICH HISTORY OF COMMONS AND COMMONERS

It is good to see that this long history has been recognised and acknowledged.

The late Professor Manning Clark, one of Australia's more renowned historians, attributed to the enclosure and privatisation of the commons in Britain one of the principal factors in creating civil unrest in the cities and the consequent rise in prison populations that lead to the decision to colonise New South Wales with convicts.[1]

It is notable that a pioneer in landscape history in New South Wales, the late Helen Proudfoot, wrote in particular on the cultural significance of commons in 1987.[2]

It is even more significant that current historians such as Professor Emeritus Alan Atkinson and Dr Grace Karskens, both well-known and highly regarded, have recently published very well received histories that include analyses of the very important role commons and commonage played in facilitating colonial settlement, and in making visible the role of collective or

[1] Charles H Manning Clark, *Select Documents in Australian History 1788-1850*, Angus & Robertson, Sydney 1950/1977: pages 1-7
[2] Helen Proudfoot, 'The Hawkesbury Commons 1804-1987', *Heritage Australia*, Vol 6, No 4, Summer 1987: 23-25

communal development among local communities, as well as that of individuals, in Australia's historical development.[3]

Although a relatively under-researched area, the history of commons has attracted the attention of some important Australian historians. This indicates commons and commonage are of much greater significance in Australian history than is generally appreciated.

SECTION 2 THE MANAGEMENT OF COMMONS

The section states that commons are currently managed under the *Commons Management Act 1989*, and describes the current arrangements. It is important to note that the current Act is only the current iteration of a long genealogy that extends back to the *Epitome of existing Laws respecting Commons* issued by the Judge Advocate in 1805.[4] That was succeeded by variously named Commons Acts in 1847, 1873, 1886, 1895 and 1898. The *Epitome* confirmed as a basic principle that the interests of commoners and of the Governor (presumably now exercised by the minister) are mutual. It was not a relationship of superior and inferior, but of equality and respect between central and local control. This basic principle needs to be reaffirmed not abandoned. The history of legislation and regulation of commons in New South Wales is long and continuous, and it should not be abandoned for what seems to be simply ministerial or administrative convenience. The current Act should be retained and, where useful or necessary, amended or possibly a new Commons Act could be prepared.

Recommendation 1: The *Commons Management Act 1989* should be retained and, where required, amended.

The section states the approval of the minister is required for almost all dealings by commons trusts, and that the minister also has the power to revoke any common.

The role of ministerial (or departmental) approval for dealings has a long history in New South Wales, and is a prudent measure, provided it is used wisely, for oversight of commons trustees. However, it is an oversight measure to assist in the good management and governance of a common. It is not intended to surreptitiously take away the ownership or care and control of a common from its commoners.

With regard to a ministerial power of revoking a common, I note the minister's power to revoke a common has only existed since 2005, and was introduced to the Act by the obscurely-named *Statute Law (Miscellaneous Provisions) Act (no 2) 2005*. It is unlikely that any commoners would have been aware of this increase in the minister's powers at their expense, and it is unreasonable to expect they will now simply acquiesce to what appears to be a fairly arbitrary power to destroy their way of life. The Act should be amended to remove this arbitrary power.

Recommendation 2: Section 61A of the *Commons Management Act 1989* should be repealed.

SECTION 3 THE EVOLUTION OF THE COMMON

This section rests on a number of assumptions that are questionable.

[3] Grace Karskens, *The Colony: A History of Early Sydney*, Allen & Unwin, Crows Nest 2009: Chapter 4 ''Food from a common industry': Public farms and common lands' *passim* (winner, Prime Minister's Literary Award, 2010); Alan Atkinson, *The Europeans in Australia, Volume III Nation*, UNSW Press, Sydney 2014, Chapter 3 'Australia's rural code *passim*, especially Part III, pages 50-54 (winner, Victorian Premier's Literary Award and Victorian Prize for Literature, both 2015)

[4] 'Judge Advocate's Office', *Sydney Gazette*, 20 January 1805: 1

The first paragraph states that commons were traditionally established on the edge of small villages. This is true in many cases, however commons were also established on the edge of large towns and cities. The most notable include Sydney Common (1811, now partly Centennial and Moore parks) and the Field of Mars Common (before 1848, now partly Lane Cove National Park, Northern Suburbs Cemetery and Macquarie University campus). The section further states that new residents of villages are often unaware of any rights to be entered on the local commoners roll. Again, this may be the case, however given the many powers in the *Commons Management Act 1989* and its regulation for the minister to direct commons trusts to do all manner of things, such as section 10(2) which provides for the qualifications for enrolment as a commoner to be prescribed by regulation, this section raises questions of what have ministers and departments done to ensure potential new commoners are aware of such rights? The same can be asked, in the cases where commons management has been taken over by a local council, what efforts have those councils made to raise awareness among new residents of their rights and obligations as potential commoners? The section unfairly tries to blame all commons trustees for the claimed failures to advise new residents near some commons of their potential status as commoners. Raising awareness among new residents can be achieved by amendments to the *Commons Management Act 1989*.

Recommendation 3: the Commons Management Regulation 2006 should be amended to include provision for trustees making new residents of a local area aware of their potential to be enrolled as a commoner.

The second paragraph states that commons often provide green space for adjoining settlements. It then states that commons "are held for the sole benefit of a particular group of people. The broader public do not have rights...". The regulation (clause 5) makes it clear that the "particular group" means people living in the land district in which the common is located and who do not hold more than 20 hectares of land in the district, or who may have some other historical right to be enrolled. The second paragraph strongly implies that this 'particular group' are in some way elitist or otherwise an especially privileged group who retain some unfair advantages over an unfairly disenfranchised 'broader public'. As the regulation makes clear, this is a highly improbable scenario. My own experiences of engaging with commoners over the years confirms this.

There are many analogous examples of the broader public not having unfettered access to public or communal land, such as hunters not having uncontrolled access to national parks, or bushwalkers not having uncontrolled access to defence training land or electors not having uncontrolled access to every space in Parliament House. It can also be noted that no-one has an unfettered right to access private property such as freehold land (some commons are held by commoners in perpetuity as freehold land), and yet the State does not deem it necessary to try and demonise private freeholders as a 'particular group' denying the rights of the 'broader public' to unfettered access to their property.

The argument, such as it is, that attempts to cast commoners as unworthy elitists is disingenuous at best. It demeans the Department and the minister that such an argument is even attempted. A reasoned argument should not need to descend to such character criticism. The commoners of New South Wales value their roles as stewards of their commons, and will continue resisting attempts to remove their rights and traditions.

The third paragraph states "Today, commons can [be] and are used for multiple purposes", and "many commons could facilitate community uses in ways that would bring significant benefits to communities". There are two points to make here. Firstly, commons have always had multiple uses. The whole idea of commonage rights is that particular groups have rights to some common resources, other groups rights to other common resources, and so on, all in or

on the one piece of land. No common that I know of has ever been used for a single purpose, and the histories and traditions of commons are of managing several uses in such ways that those resources are continually conserved and renewed, and not used once and then lost to future generations. Secondly, the wording of this paragraph again attempts to unfairly position commoners as selfish elitists. The balancing of various uses is a basic function of commons trustees, and should be understood as the exercise of local democracy, of local people managing local resources for the local good rather than for the benefit of any one person. Multiple uses of commons have always been characteristic of commons, and have long been central to the whole idea of the common and commonage.[5]

The problem here is neither the Act nor the Regulation now clearly recognises multiple uses (as earlier legislation did), either traditional or contemporary, even though both provide for commons to have plans of management that are to be approved by the minister. Clause 30 of the Regulation clearly states the plan must specify the purposes for which the common may be used, and section 27 of the Act provides for the minister to adopt a plan, with or without further amendments. The minister already has the power to ensure any common is available for multiple uses (if for some reason it isn't already), and if such multiple uses are not occurring (although the 'fact sheet' suggests they are) then questions need to be directed to the minister, rather than implying an single-use common is a fault of the commoners. Revisions of the Act are much more likely to facilitate multiple uses in a socially and environmentally sensitive way that another attempt to homogenise commons management under ministerial control after the failure of that attempt in 2016.

Recommendation 4: the *Commons Management Act 1989* should be revised to more clearly provide for, and reinforce traditional practices of, multiple uses of commons.

Recommendation 5: any practices (casual or otherwise) that may be tolerated within government of insinuating or implying commoners are elitist or an otherwise unfairly privileged group should immediately cease.

SECTION 4 THE NEED FOR A NEW APPROACH

This section, despite the 'fact sheet' not having yet established any case for a new approach, is again based on a number of questionable assumptions.

The first paragraph continues to imply that commoners are elitist and unfairly privileged in statements such as "public land should provide benefits to the broader community rather than primarily to small groups of people". Not only are the insinuations of the previous section repeated, but this paragraph then confusingly counters the claim in the previous section that commons are used for multiple purposes "including commercial and recreational purposes". They can't both be a benefit only for a 'small group' and at the same time provide for multiple communal, commercial and recreational uses. The argument, such as it is, fails on its own internal contradictions.

The second paragraph states that there is "great diversity in how commons are being managed on a day to day basis". Given the previous argument about multiple uses, a claim that diversity in management is somehow inappropriate is, at the least, curious. Nevertheless, the paragraph goes on to claim that there is a problem because some trusts have vacancies in their membership or are not otherwise functioning at an optimal level, and that this has "affected public confidence in the management of commons". No proof or evidence is provided for this

[5] see for example GD Gadsden, *The Law of Commons*, Sweet & Maxwell, London 1988; Oliver Rackham, *Trees and Woodland in the British Landscape*, London 1976; Bruce Baskerville, 'Commons of Colonial NSW', *RAHS Conference Proceedings*, Ultimo 1994.

"*Victoria, Queen ... We do give and Grant ... To Have and to Hold ... such Trustees and their Successors ... **for ever as a Common** to permit the use and benefit of the same to the ... Inhabitants for the time being of the District*" Grant of St Albans Common, 4 March 1853, Register of Grants, Book 105, Pages 290-299

assertion, and I am not aware of any commentary in the media or elsewhere of public concerns and worries about the commons of New South Wales. In fact, the failure of the attempt to abolish the commons in 2016 to even be noticed in the mainstream media (unlike local or social media) suggests this assertion has been made on the basis of little or no actual evidence of 'affected public confidence'.

Even so, this paragraph does open an opportunity to consider how the management of commons can be supported and, where necessary, reinvigorated. The third and fourth paragraphs acknowledge that commons in urban areas often have significant environmental values – but that the Act does not contain any provision for protecting those values. Similarly, commons often have significant cultural heritage, including Aboriginal heritage, which the Act fails to take into account. Again, things valued by "broader public" are "at risk", and generalised examples of overgrazing, unauthorised structures or inadequate fencing are cited, although without any specific examples or actual evidence. The solution outlined in the 'fact sheet' is simply to enact the 2016 proposals already rejected by Parliament – that is, for commons to be reduced to just standard parcels of Crown land, over which the minister has absolute power and authority to appoint anyone a land manager. Perhaps he might appoint an existing trustee or trustees as land manager, but perhaps he might not. Who knows? Somehow, whoever is appointed land manager that will solve the 'problem' of the Act not specifically providing for natural and cultural heritage management on commons, and assuage the concerns of the "broader public".

An alternate approach, of course, is to stop trying to force Parliament to backflip on its position taken just three months ago, and instead develop a new approach that is 'common-centred' or 'commoner-centred'. The *Commons Management Act 1989* could be amended to include provisions relating to recognising the natural and cultural heritage values of commons, and requiring those values to be managed by the trustees, probably through the plan of management process already provided for in the Act and Regulation. It could also provide for the trustees to be able to call upon expert advice when needed to manage those values, expert advice available either within the public or private sectors. Similarly, the fourth paragraph states the current enforcement and compliance provisions in the Act are insufficient, but fails to justify abolition of the commons as an adequate response when instead the Act can be amended to include relevant provisions.

This section of the 'fact sheet' in effect sketches a picture of commons in New South Wales as neglected and mismanaged lands controlled by out-of-touch elitists purely for their own personal benefit and to the detriment of a long-suffering 'broader public' whose rights are impinged and restricted by the mere existence of such communally owned and managed land. This picture is a fantasy, and its only real effect is to construct a problem-riddled 'straw common' for which the only solution is abolition of the commons, removal of the trustees and installing direct ministerial control of the land. If the 'straw common' is accepted as an accurate depiction, then it must also raise questions such as how has the Department and/or minister so comprehensively failed to prevent such issues arising, or subsequently dealing with them, over so many years given the extensive powers that are assigned under the Act? On the other hand, if the 'straw common' is not an accurate picture, then what is the rationale for the slights made on the many trustees that have managed their commons effectively and fairly over many generations?

Recommendation 6: the *Commons Management Act 1989* should be amended to include both objectives and provisions relating to identifying and managing natural and cultural heritage values on common lands as an integral part of commons management.

Recommendation 7: the *Commons Management Act 1989* should be amended to include updated compliance and enforcement provisions.

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SECTION 5 MODERN AND FIT-FOR-PURPOSE LEGISLATION

This single paragraph states that the legislative framework for commons needs to provide for managing multiple uses, recognition of the history of commons, ensure commons remain under the control of local communities, and that the expertise of existing commons trusts is retained.

I have no argument with those objectives, but I am at a loss to see how repealing the *Commons Management Act 1989* and abolishing commons will achieve them.

SECTION 6 PROPOSED FRAMEWORK

This section outlines six legislative changes to address the supposed problems identified in the 'fact sheet', but fails to mention these will be achieved by repealing the *Commons Management Act 1989* and bringing the parcels of land that will be left under the authority of the *Crown Land Management Act 2016*. This is the approach already rejected by Parliament in 2016.

6.1 The first provision is to retain the current commons trusts by the minister appointing them as land managers under the *Crown Land Management Act 2016*. Such appointments may, or may not, be made. It is entirely in the prerogative of the minister of the day. More fundamentally, the provision will at the expense of disenfranchised local commoners who will have lost their right to elect their own trustees, a right recognised since 1805. This is same proposal that was rejected by Parliament in 2016. It is the rejected provision presented again, unchanged, as though it is something new.

6.2 The second provision is for land that was a common under the *Commons Management Act 1989* and is to be managed under the *Crown Lands Management Act 2016* by a ministerially-appointed land manager (who may or may not be a current common trustee) will "be able" to continue to be named as a common. The NSW Geographical Names Register currently lists 35 places with the class-name 'common' in their title, although not all are working commons or, in some cases, have ever been commons, while other commons of which I know do not have their names listed in the Geographical Names Register. I agree that the class-name 'common' should be retained for all commons as a distinct type of land tenure and traditional communal land management. This can be achieved by an amendment to the *Commons Management Act 1989* requiring commons trustees to register the name of their common with the Geographical Names Register.

6.3 The third provision states that existing common trustees will continue as members of the "new Crown land manager entity". As with my comment above on point 6.1, this is no different to the rejected provision, and importantly still relies upon the absolute discretion of the minister as to whether any existing trustees is appointed to a replacement 'entity', or if appointed, how long that appointment will continue. This is same proposal that was rejected by Parliament in 2016. It is the rejected provision presented again, unchanged, as though it is something new.

6.4 The fourth provision sates that the former common will become Crown land reserved for three purposes: common, community use and environmental protection, and the land manager will be responsible for ensuring all uses of the land will be consistent with these purposes. As already argued in this submission, this same outcome can be achieved by amendments to the *Commons Management Act 1989* without the associated abolition of commons trusts or abolition of the communal form of local land management. When this provision is considered against the objectives of the *Crown Land Management Act 2016*, especially sections 1.3 and 1.4, it will be obvious that this is same proposal that was rejected by Parliament in 2016. The

Crown Land objectives could be usefully modified or provide a model for similar 'commons-centred' objectives to be added to the *Commons Management Act 1989*. However, the provision outlined in the 'fact sheet' is the rejected provision presented again, unchanged, as though it is something new.

6.5 The fifth provision provides for the minister, presumably at his discretion, to have a notation made on the title to a parcel of land that was previously under the *Commons Management Act 1989* that the land had previously been used as a common and continues to be reserved for a common and for other purposes. This is argued to ensure the recognition of traditional usages. I support the idea in this provision, especially in light of the proposed privatisation of the land registry, and media reports that the privatised registry resource will be a "single source of truth".[6] However, there is no particular advantage to giving a minister a power or discretion to make such a notation. The same outcome can be achieved by an amendment to the *Commons Management Act 1989* requiring trustees to request the notation, and/or requiring the land title authorities (whoever that may be in the future) to make such notations.

6.6 The sixth provision states that the new land managers will be able to apply for grants and other funds from a fund established under the *Crown Land Management Act 2016*. What is not stated is whether, if the commoners don't surrender their commons, the government's current neglect in providing funds and other support to commons trusts, and then blaming the trusts for all perceived and asserted problems in commons management, will continue? If the lands that are now commons do come under the *Crown Land Management Act 2016*, their ministerially appointed land managers (who may or may not include some current trustees), will be able to access these funds – but only because they are no longer actual commons, but parcels of Crown land that may be named a 'common'. The commons trustees should be able to access public funds, especially where this allows them to draw upon external expertise to assist in managing their common (such as heritage expertise), without having to surrender their traditional rights as commoners. This is same proposal that was rejected by Parliament in 2016. It is the rejected provision presented again, unchanged, as though it is something new.

Recommendation 8: the *Commons Management Act 1989* should be amended to include provisions requiring commons trustees to register the name of their common with the Geographical Names Register.

Recommendation 9: the *Commons Management Act 1989* should be amended to include provisions requiring commons trustees to have the land title to each parcel of land under their care, control and management annotated with a statement that the land has traditionally been, and continues to be, used as a common, and for the annotation to remain in perpetuity.

Recommendation 10: the *Commons Management Act 1989* should be amended to provide for commons trustees to seek grant and other public funding for the purposes of engaging expertise that will assist in the management of their common.

GENERAL COMMENTS

The strengths of the current system need to be conserved and valued, and supported by appropriate changes to existing legislation and management approaches where needed.

The fundamental principles to guide commons management in New South Wales should include:

1. Supporting the principal of continuing care and management of each common by its own commoners or their chosen representatives,

[6] Esther Han, 'Billions at stake in sale of land titles registry', *Sydney Morning Herald*, 2 February 2017: 3

2. Supporting the continuing operation of stand-alone commons legislation and regulations, and the periodic review of such legislation and regulations to ensure they are kept up to date,
3. Recognising the historical and cultural significance of commons in New South Wales since 1805 in conserving natural resources and providing open space, and the significance of commoners and their representatives as one of the oldest forms of local democracy in New South Wales,
4. Encouraging local people everywhere to investigate whether they have surviving rights to be enrolled on the commoners roll for their local common, and to otherwise take an active interest in caring for and ensuring the continuity of their local commons,
5. Encouraging local councils that have been appointed trustees of a local common to actively engage local communities in revitalising the management of such commons by local commoners as part of community-building and social cohesion approaches, and
6. Recognising and celebrating the diversity of ways in which local commons are cared for as a reflection of the social and environmental diversity within and across local areas, and contrary to pressures for state-wide homogenisation of commons and communities that fails to account for cherished local identities and differences.

CONCLUSIONS

The *Commons Management Act 1989* should be retained, with updated provisions as required. The commons of New South Wales have very old and deeply significant historic and traditional values that remain important to many communities. They should not be abolished but instead cherished and assisted to continue over many generations into the future.

I have set out in this submission 10 recommendations, and 6 principles, for what I believe would contribute to a 'common-centred' approach to establishing an updated or new framework for managing commons into the future. These would assist trustees with their continuing management of commons, and at the same time revitalise the whole concept of commons and commonage to re-engage with potential new commoners and other members of local communities. There will always be an important oversighting role for the State, but that should be in partnership with rather than at the expense of local communities, local character and local democracy.

Commoners have for centuries managed the natural and cultural resources of commons. Sometimes they got it wrong, but mostly they quietly succeeded. Commons, as an institution, have survived and thrived for over 780 years, despite many attempts at abolition, and arrived in New South Wales as part of the common law and cultural practices of the settlers. They have been adapted to the particularities of New South Wales, and even more so the characteristics of local communities of many different types. Commoners today, more than anyone else, are the stewards of this ancient legacy. As an institution, commons are inherently flexible and changeable while at the same time maintaining traditions and communal life. They are too significant to be simply swept away in the interests of present-day administrative efficiencies or passing political or ideological beliefs.

Commons are about local people and local communities as much as they are about local environments. They have survived and often thrived for over seven centuries because of the inherent resilience of the commons ideals and practices, and the character of the commoners. This surely is of some cultural value to the State of New South Wales?

The Department has acknowledged, in the 'fact sheet', the continuing historical values of commons, and it is to be warmly commended for doing so. However, the current push to remove commons from the care and control of their commoners, and place them at the whimsy of ministerial prerogative, is directly contrary to this long history. I strongly urge the

Department to abandon this already-failed approach, and re-think the whole question of commons.

There is now an opportunity to revitalise the management of all commons, and to re-engage local communities with their commons in places where those links have been obscured or forgotten. I encourage the Department to refocus, through a timely and 'commons-centred' vision, on approaches that will support commons and their commoners well into the future.