



fact sheet



CROWN LANDS AMENDMENT (MULTIPLE LAND USE) BILL 2013

On the 12 September 2013 the *Crown Lands Amendment (Multiple Land Use) Bill* (the **Bill**) was introduced into the NSW Parliament.

The Bill is the NSW Government's response to decisions made by the Courts to grant a land claim known as 'Goomallee'. As a result of the Goomallee case¹, any tenure (leases/licences) that has been granted over crown land reserved for a public purpose are likely to be invalid unless they are for the same purpose as the reserve or promote the purpose of the reserve (such as a licence for a kiosk over a reserve for public recreation).

The Government has taken the view that it needs to develop legislation (the Bill) to give certainty to tenure (lease/licence) holders who are affected by the Court decision.

Background - the Goomallee Case

A land claim was made on 16 January 2006 over a parcel of land within a larger rural property called "Goomallee". On 26 August 2010 the Minister administering the *Crown Lands Act* refused the claim on the basis the land was "*lawfully held and used pursuant to [a licence] for the purpose of grazing*".

NSWALC appealed the Minister's decision to the Land and Environment Court and was successful. The Minister then appealed the decision made by the LEC. The key issue in this case was whether the licence issued by the Minister was valid given that it was issued for grazing over crown land reserved under the *Crown Lands Act 1989* for "Public Recreation".

In November 2012, the NSW Court of Appeal held that the licence was invalid and the Minister did not have grounds for refusing the land claim, because the land under claim had been reserved for 'public recreation', and the grazing licence issued over the land was *not for, or in furtherance or ancillary to that reserve purpose*.

As a result of the Goomallee case, under current law, it is likely that any tenure (licence or lease) issued over crown land reserved for a present public purpose, such as public recreation, would be invalid if it is not for, or in furtherance or ancillary to that reserved purpose.

The *Goomallee* case is significant as the Government appears to have previously issued many licences for various uses over crown land without proper regard to the reserve purpose.

¹ A copy of the NSW Court of Appeal judgment *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (Goomallee Claim) [2012] NSWCA 358 can be accessed online at: <http://www.caselaw.nsw.gov.au/action/PJUDG?s=1000,jgmid=161676>

The Limbri Case

A similar case, known as *Limbri*, is currently on appeal to the NSW Court of Appeal. This case involves a licence for grazing issued over land reserved for “*future public requirements*” (as opposed to Public Recreation). The Land and Environment Court has held that those licences are also invalid. The Minister has appealed this decision.

The *Limbri* case, if NSWALC is successful, would extend *Goomallee* so that under current laws, any tenure (lease/licence) for a private purpose such as grazing issued over Crown land reserved for future public requirements would likely be invalid.

It is important to note that the *Crown Land Amendment (Multiple Land Use) Bill 2013* will only affect *Goomallee* and *Limbri* type land claims – that is, land claims where tenures (leases/licences) have been invalidly issued over reserved Crown land. The Bill does not directly have any effect on the *Aboriginal Land Rights Act 1983* including the right to make land claims, the test that applies to the determination of land claims, or the right to bring appeals under the *Aboriginal Land Rights Act 1983*.

Implications of the Crown Lands Amendment (Multiple Land Use) Bill 2013 for land claims

Overall, the Bill allows the Government to grant tenure (leases/licences) for private purposes (such as grazing) over land that is reserved for public purposes. The Bill provides new powers for the Minister to more easily grant tenure (leases/licences) over Crown reserves into the future and to correct any tenure (leases/licences) that may be invalid and otherwise be unlawful. It also requires that six (6) months notice be given to the Minister before the validity of any tenure (lease/licence) is challenged in Court.

- **For land claims lodged *before* 12 November 2012**

Goomallee and *Limbri* type land claims (land claims where licences/leases have been invalidly issued over reserved Crown land) lodged prior to 12 November 2012 are protected from the effect of the Bill. The determination of such land claims will be based on the *Goomallee* decision.

If NSWALC is successful in the *Limbri* case then any licence or lease for a private purpose (such as grazing stock) issued over Crown land reserved for future public requirements would likely be invalid and the land claimable under the ALRA.

- **For land claims lodged *after* 12 November 2012 but before the Bill becomes law**

Goomallee and *Limbri* type land claims lodged after 12 November 2012 but before the date of the Bill’s assent (when the Bill becomes law) are not protected from the effect of the Bill. As a result of the Bill, potentially invalid leases or licence will be made valid (even back to before the time of claim) and *Goomallee* and *Limbri* type land claims lodged between 12 November 2012 and the date of the Bill’s assent will be refused on the basis that the land is now (and was at the time of claim) lawfully used or occupied and is not claimable under the ALRA.

- **For future land claims lodged over existing tenure (lease/licence)**

Goomallee and *Limbri* type land claims lodged over land which is subject to leases or licences that were issued prior to the assent of the Bill are not protected from the effect of the Bill. As a result of the Bill, potentially invalid leases or licence will be made valid and *Goomallee* and *Limbri* type land

claims lodged between 12 November 2012 and the date of the Bill's assent will be refused on the basis that the land is now lawfully used or occupied and is not claimable under the ALRA.

- **For future land claims over new tenure (leases/licences) issued after the date of the Bill's assent**

Goomallee and *Limbri* type land claims are likely to not succeed in future because under the Bill the Minister administering the Crown Lands Act only needs to 'hold the opinion' that the lease or licence would not 'materially harm' the use or occupation for the reserved purpose, for the lease or licence to be validly issued.

In addition, if leases and licences are invalidly issued after the Bill becomes law, the Minister has the ability under the Bill to make the lease or licence valid from the time it was issued through provisions for retrospective correction and validation.

- **Notice requirements**

The Bill also sets out a requirement that six (6) months notice has to be given to the Minister administering the Crown Lands Act before challenging the validity of any tenure (lease/licence) on any grounds. NSWALC is concerned about this as it interferes with the judicial process.

Position of the NSW Aboriginal Land Council

The NSWALC has considered the Bill and has adopted the following position:

- **That the protection of Aboriginal land claims provided by the Bill should extend to the date of assent**

NSWALC does not support legislation that extinguishes land rights claims that have been lodged legitimately in accordance with the ALRA since the 9 November 2012. NSWALC believes that these claims should be determined in accordance with the law as it stood when the claims were lodged.

- **That there must be safeguards to make sure that invalid licences that cause material harm to Crown Reserves are not validated**

The Minister indicated (in the NSW Parliament in the second reading speech of the Bill, available: <http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/D5E4BBF26BD28C66CA257BE2001CB42B>) that there will be some process in place to ensure existing tenure (leases/licences) that cause 'material harm' are not automatically validated. The Bill, however, does not reflect this statement and instead provides blanket validation of all existing secondary interests.

Additionally, the Minister indicated (again in the second reading speech of the Bill) that there will be a dispute resolution mechanism to challenge the Minister's assessment of 'material harm'. However, the Bill does not provide any process for a person who is concerned about harmful activities to apply to the Minister to reconsider the assessment. There is no dispute resolution mechanism in the Bill, it simply provides that a person must give the Minister 6 months notice before they challenge the validity of a lease or licence in Court.

As such, NSWALC believes that safeguards must be in place to make sure that invalid licences that cause material harm to Crown reserves are not validated.

- **That the proposed ways of issuing and then subsequently correcting and validating new tenure (leases/licences) over Crown land (the material harm test which is the subjective test conducted by the Minister and the ability to retrospectively correct and validate licences) are opposed**

NSWALC has serious concerns about the increase in power and the subjective role afforded to the Minister administering the Crown Lands Act to grant tenure (leases/licences) over the reserved land if the Minister holds the 'opinion' that the tenure (lease/licence) is not likely to 'materially harm' the Crown reserve.

NSWALC is concerned with the threshold test of 'material harm' as well as the provisions for retrospective correction/validation, as it is not clear what this means or how it is to be interpreted and the Bill does not give any guidance regarding this. Nevertheless, it is clearly a much broader discretion to grant licences and other tenure (leases/licences) over Crown reserves than is currently provided in the Crown Lands Act.

- **That the requirement to give the Minister six (6) months notice before challenging the validity of any tenure (lease/licence) in Court is opposed.**

NSWALC opposes this notice requirement as it interferes with judicial process.

Copy of the Bill and Second Reading Speech

A copy of the Bill and Second Reading Speech can be access on the NSW Parliament website at: <http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/0/D5E4BBF26BD28C66CA257BE2001CB42B>.

The previous Network Message dated 16 September 2013 regarding the Bill is available at <http://www.alc.org.au/newsroom/network-messages.aspx>.

The content of this fact sheet is current as at the 3 October 2013.

Please contact the Legal Services Unit on 9689 4444 if you would like to discuss the Bill, or issues relating to the Bill.