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## CROWN LANDS AMENDMENT (MULTIPLE LAND USE) AMENDMENT BILL 2013

### Second Reading

**The Hon. DUNCAN GAY** (Minister for Roads and Ports) [4.18 p.m.]: I move:

That this bill be now read a second time.

The Crown Lands Amendment (Multiple Land Use) Amendment Bill 2013 amends the Crown Lands Act 1989 to ensure the legal validity of interests such as leases, licences and permits that have been granted over reserve Crown land. The Crown Lands Act establishes a system for managing and regulating the use of Crown land for the benefit of the people of New South Wales. Crown land in New South Wales comprises approximately 34 million hectares of land, or 42 per cent of the State. The Crown land estate plays an important role in supporting the New South Wales economy and is used for all kinds of community and business activities. Crown land that has been set aside for a public purpose is generally referred to as Crown reserve.

There are about 35,000 Crown reserves in the State, which contain much of the State's natural, cultural and open space—for example, local parks, heritage sites, community halls, nature reserves, showgrounds, caravan parks and travelling stock routes.
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Crown reserves are generally reserved for a specific or primary purpose but have commonly been managed to accommodate a wide variety of public and private purposes in accordance with the principles of the Crown Lands Act 1989. Section 11 (d) of the Act states, "that, where appropriate, multiple use of Crown land be encouraged". Consistent with this multiple-use principle, thousands of tenures have been issued over the years for community and commercial purposes over Crown reserves.

Over time, tenures have been granted for multiple use or uses secondary to the primary purpose of Crown reserves. These tenures permit activities as diverse as grazing and farming, surf clubs, Rural Fire Service sheds, kiosks, marinas, telecommunication towers, sporting clubs and tourist parks. The underlying premise for the issue of these tenures is that they do not frustrate the primary purpose of the reserve. In November 2012 the legal validity of many of these secondary use tenures was called into question by the New South Wales Court of Appeal in a decision referred to as the Goomallee claim in *Minister Administering the Crown Lands Act 1989 v NSW Aboriginal Land Council.*

In this case the court found that a grazing licence granted over a parcel of Crown land reserved for the purpose of public recreation was unlawful. The court's view was that the licence was not for the same purpose as the reserve, or in furtherance of or incidental to the purpose of the reserve. The effect of the ruling is to potentially make many secondary use tenures invalid. More broadly, the ruling undermines the multiple use principle enshrined in the Crown Lands Act which has guided the management and use of Crown reserves for many years. I will spell out the undesirable consequences for the people of New South Wales if the effects of the court's decision are not addressed by the passing of this bill.

First is the number of tenures potentially affected and the land area and income streams that are impacted and secondly is the compromise or potential disruption of community and business activities occurring on these sites. Information available from the Crown Lands Division's database suggests that there are over 8,000 secondary tenures issued by the New South Wales Government over Crown reserves in New South Wales. There is a good chance that up to 90 per cent of them are potentially subject to challenge because they are for purposes that are not in furtherance of or incidental to the primary purpose of the reserve. These tenures cover Crown reserves up to 12 million hectares in area, generating up to nearly $10 million in annual rent.

In addition, there are thousands of secondary tenancies issued by reserve trust managers such as councils and showground trusts that may also be subject to legal challenge. The income generated by these activities provides a source of funding for the maintenance of reserves and other priority activities of government. The tenures can also serve as a management tool to enhance the primary purpose of the reserve. For example, a commercial food outlet, such as a kiosk, can encourage greater patronage of a public recreation area and assist in reserve maintenance through tenure conditions. The range of tenure types potentially affected by the court's

decision is very broad. For example, many reserves have located on them Country Women's Association halls, Meals on Wheels kitchens, men's sheds, preschools, libraries, council chambers, community centres, tourist information centres, and State Emergency Service, Rural Fire Service and Marine Rescue facilities.

Many thousands of grazing licences issued over public recreation reserves, cemeteries and showgrounds may also be challenged despite the fact that they may not materially harm the primary purpose of the reserve and actually assist with weed and pest control. Mobile phone tower sites are often located on Crown reserves. These facilities may also be undermined by the court's decision, despite them being now regarded as community service essentials and not necessarily foreseen in 1989 when the Crown Lands Act was created. The continuation of these activities is desirable if they are not causing material harm to the primary purpose of the reserve. However, in light of the court decision these tenures are now vulnerable to challenge. This situation cannot be left unresolved. In the other place we heard the Opposition raise concerns about the material harm test. I will address these issues. The material harm test in the bill is described as follows:

> … to provide that a secondary interest (a lease, licence, permit, easement or right-of-way) can be granted in respect of Crown land that is reserved for a public purpose (a Crown reserve) so long as use and occupation of the land under the secondary interest would not be likely to materially harm the use and occupation of the land for the public purpose for which it is reserved,

The application of the material harm test would encompass consideration of the following questions in relation to the impacts of the secondary interests on the reserve purpose. Due to the variety of reserve purposes, types of secondary interests and different harms that may occur, these considerations should be examined on a case-by-case basis for each tenancy. The following questions could be asked in consideration of material harm to the reserve purpose. First, does the secondary tenancy frustrate the reserve purpose? Consideration should be given to whether the secondary tenancy will preclude or frustrate the reserve purpose and therefore give rise to material harm.

For example, if a reserve purpose is for access and the tenancy would permit the building of permanent structures that would require demolition for future access to be activated, then this tenancy would be regarded as materially harming the reserve purpose. However, a grazing licence on the same land, with minor works such as gates and fencing, might not be seen as materially harming the reserve purpose as the grazing activity has a minimal impact on the access function of the site currently or into the future. Many reserves are defined as for "future public requirements". At the time these reserves were declared the specific public purpose may not be identified. However, the intent of the classification is to not unduly limit short-term tenancies.

This allows for many options for current tenancies, which may not be consistent with "future public requirements" but are not frustrating the reserve now or into the future by their operation. A current example is a licence for beekeeping over a reserve for future public requirements at Currabubula near Tamworth. Second, what is the proportional impact of the tenancy? Consideration should be given to the proportion of area or time usage of the secondary tenancy. For example, a mobile phone tower which occupies a fraction of a large land parcel reserved for native habitat would not be considered of material harm. Similarly, a tenancy that was temporary and time limited, such as a filming licence or public event licence, would also be proportionally insignificant and therefore not be considered of material harm to the reserve purpose.
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It should be noted that many time-related temporary tenancies include conditions to return or repair the site to its original condition. On this basis the proportionality and the condition of the licence of a tenancy may not be materially harming the reserved purpose.

Thirdly, is the reserved purpose still in place? Many reserves and tenancies have been in place a considerable time. At the time of granting the tenancy the department considered the granting of the tenure to be consistent with its management responsibilities and thus not harmful to the reserved purpose. In retrospect, this has potential to be inconsistent with the reserved purpose and has subsequently been revoked. Regardless, the tenure may have been granted for a purpose inconsistent with primary reserved purpose and, therefore, may be considered unlawful.

Fourthly, is the secondary interest ancillary or complementary to the reserved purpose? Some reserves have structures under tenure that arguably may be harmful to the reserved purpose, but were issued with a view of being ancillary to or helpful to the reserved purpose. For example, a scout hall tenure issued over a reserve for nature conservation may be considered contrary to reserved purposes but provides services helpful to recreation or nature conservation. Another example may be where tenure for access across a nature conservation reserve concentrates traffic away from sensitive environmental areas.

I will clarify how this bill relates to the Aboriginal Land Rights Act 1983 under which the Goomallee claim was lodged. Under that Act Aboriginal land councils have the right to make a claim over Crown land, including Crown reserves, if they are not being lawfully used or occupied. In the Goomallee claim the Government submitted that the existence of a grazing licence was evidence of the land being lawfully used and occupied. However, the court found that the licence was evidence of non-lawful use and occupation. The court ruled it was for a purpose different from and not incidental to or in furtherance of the reserve. As a result the court ordered that the land be

granted to the Aboriginal land council in question. I emphasise that although this bill was precipitated by a claim under the Aboriginal Land Rights Act 1983 it is not the purpose of this bill to frustrate the land claims process or affect the rights of land councils.

The primary purpose of the bill is to restore the multiple-use principle contained in the Crown Lands Act 1983 and to ensure the legal validity of secondary tenures affected by the decision, most of which are not under Aboriginal land claim. I add that if the bill is passed it has specific provisions that will allow all claims under the Aboriginal Land Rights Act 1983 that existed prior to the Goomallee decision to proceed as if the bill had never been passed. In other words, existing claims will still be determined in line with the court's interpretation of the Goomallee claim. New claims lodged after the Goomallee decision on 9 November 2012 will not be able to rely on that decision.

I will now highlight some of the specific elements of the bill. The bill will validate existing secondary tenures, but only if they are not causing, or likely to cause, material harm to the primary purpose of the reserve. The bill also includes a dispute resolution mechanism that will require persons who wish to prevent harmful activities from occurring under tenure to first make application to the Minister before rushing off to court. In considering such an application, the Minister may amend the conditions to the tenure to prevent the harmful activities from continuing. Alternatively, if satisfied that the tenure is itself necessarily harmful to the reserve the Minister may decide to cancel it altogether. For example, the councils at Byron Bay, Ballina, Coffs Harbour and Clarence have located mine rescue facilities on public recreational reserves.

If someone complains about those facilities then the Minister could consider the complaint and any evidence submitted, and undertake independent investigations. The Minister could then either: First, place additional conditions on the tenure to prevent disruption to the amenity of the reserve; secondly, limit the activities or expansion of the facility; or, thirdly, terminate the tenure altogether. It is important to note that the bill does not prevent the participants to any dispute resolution process from appealing the Minister's decisions to the court. The dispute resolution approach is considered appropriate in two ways. First, it provides practical ways to resolve disputes about secondary use of reserve land without invalidating the entire tenure and, thereby, negatively impacting on business or community services.

Secondly, it minimises litigation and provides a cost-effective and accessible way of managing disputes about competing community, private and public interests. A maximum period of six months will be provided for parties to make submissions to the Minister regarding the alleged harm. This period allows for the department to access the matter, to develop appropriate management responses and for the Minister to make a decision. During this time the tenure would continue to be valid and operations could continue. If the Minister fails to make a decision within the prescribed period then the tenure would not automatically be invalidated but would be open to legal challenge.

The bill is to apply retrospectively to existing tenures that, in the light of the recent court decision, may arguably have been invalidly granted, as well as to future tenures granted over Crown reserves. The Government has carefully considered this retrospective approach and believes it is the appropriate course of action. The alternative would be to immediately cancel up to 7,000 tenures, add a new purpose to the reserve and then reissue each of the tenures. The tenure activity would have to cease and access to these facilities revoked whilst the gazettal process is undertaken. The process could take anywhere from three months to three years. That process is estimated to cost at least $4 million for the Government-issued tenures alone.

Significant further costs and disruption would also be imposed on reserve trust managers, tenure holders and the Government for the revocation and the reissue of trust-issued tenures. The uncertainty for tenure holders during such an extended administrative process would significantly jeopardise the ongoing community and business activity on Crown reserves. As noted earlier, safeguards will be put in place to ensure the tenures that are or could materially harm the reserved purpose will be identified. The amendments to the Crown Lands Act 1989 will also provide for versatility and innovation in the use of the Crown land estate. As noted earlier, there are temporary uses, such as mobile phone towers, that may not have been anticipated when the reserve was created, and do not cause material harm to the reserve purpose. There are also legacy users on Crown reserves such as community and emergency service organisations.

These facilities would be regarded as an appropriate use of Crown land from the community's perspective but may fail the test of ancillary to, in furtherance of, or incidental to the reserved purpose under the current Act. In summary, this bill will provide certainty for land users and continuity for activities across Crown reserves. It reflects the important multiple-use principle in the Crown Lands Act 1989 that encourages the use of Crown reserves for multiple community and economic purposes. As noted earlier, safeguards will be put in place to ensure that tenures that are materially harming or could materially harm the reserve purpose will be identifiable. The bill is essential to the lawful and effective administration of Crown reserves. It will provide certainty for government, the community, business and Aboriginal land councils regarding the lawful use of Crown land. Most importantly, it will enable the economic and social value of the Crown estate to be maximised. I commend the bill to the House.
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