

Submission

No 031

CONSULTATION ON THE MODERN MANAGEMENT OF COMMONS

Name: St Albans Common

Date received: 15/02/2017

SUBMISSION TO DEPARTMENT OF INDUSTRY - LANDS RE COMMONS

THE TRUSTEES OF THE ST ALBANS COMMON TRUST

Introduction

This Submission is made in response to a letter dated 24 January 2017 from David Clarke, Group Director, Governance and Strategy, NSW Department of Industry – Lands (the Department) addressed to the St Albans Common Trust (the Letter). Accompanying the Letter was a “Fact Sheet” entitled “Comprehensive Review of NSW Crown Land Management” (the Fact Sheet).

Further to discussions with the Department, the Trustee of the St Albans Common Trust (the Trustees) understand that, following the review of the Submissions, a Consequential Crown Lands Management Amendments Bill (the Amendments Bill) will be put to Parliament for its consideration. The Amendments Bill is the legislative mechanism by which a number of changes are made to the subject piece of legislation, namely the Crown Lands Management Act, which was passed on 9 November 2016 (Crown Lands Management Act).

From the Trustees perspective, the purpose of the Amendments Bill is to enshrine a new legislative framework for the future conduct and management of all NSW Commons within the new Crown Lands Management Act.

Summary of Submissions

- The St Albans Common is a well-run Common of significant historical, social, environmental, cultural and heritage significance.
- With the passage of time and increasing urbanisation and land use changes some Commons may no longer be effectively operating as Commons and therefore it is appropriate, from a policy perspective, to review their operations and status. The St Albans Common does not fall within this description.
- The St Albans Common is unique in its continuous operation and independent funding by the Commoners since 1824 and so to adopt a “one size fits all” approach is not relevant.
- It is not appropriate to now seek to have the St Albans Common brought under the umbrella of the Crown Lands Management Act. That issue was comprehensively decided by the NSW Legislative Council in the early hours of 9 November 2016. Nothing has changed which would in any way warrant or justify a revisitation of that issue.
- The proposed legislative framework effectively abolishes the concept of a Common and with it 200 years of NSW history. There is no justification for this.
- It is not appropriate to abolish the functions of the Common Roll, the Commoner, nor their right to elect the Trustees who manage the Common and substitute Land

Managers appointed by the Minister. This amounts to seizing control of a community asset paid for by the Commoners since its inception.

- To do so would be to fundamentally undermine the social contract between the St Albans/Macdonald Valley Community, the St Albans Common Trust and the State of NSW.
- It is not appropriate to vest sole authority in the Minister to appoint persons to manage the St Albans Common Trust. The potential for the control of the management of the St Albans Common to be wrested from the community and placed in the hands of those whose interests may not be aligned with the community is very real and should not be underestimated or treated lightly.
- There is no basis in either public policy or administrative efficiency which justifies unilaterally confiscating legal ownership of the St Albans Common and transferring it to the Government as Crown land.
- The future management of the St Albans Common, consistent with the overall objectives of the Fact Sheet, is best achieved by keeping the overarching legislative framework provided by the Commons Management Act 1989.
- Selective amendments to the Commons Management Act will ensure best practice administration of Commons such as the St Albans Common without abandoning nearly 200 years of historical, social, environmental, heritage and cultural significance.

Background to the St Albans Common Trust

The St Albans Common was granted in 1853 by Queen Victoria under a Trust in perpetuity to the then residents of the Macdonald Valley, having been used as such since 1824. Since that time the St Albans Common has, without interruption, continued to operate as a traditional Common. It has been well managed under the various legislative frameworks including most recently the Commons Management Act 1989 (the Commons Management Act).

In addition to the traditional uses by the St Albans Commoners (e.g. grazing of livestock) the Trustees have provided appropriately approved and supervised public and community access to the St Albans Common including an annual fishing competition, use by the Rural Fire Service for training purposes, an annual mountain bike and endurance horse riding event and participation in quarterly cattle musters. There is an unsealed public road which traverses the St Albans Common which affords the opportunity to everyone to safely enjoy its vistas, scenery and wildlife without risk to stock or person.

The St Albans Common is unique in terms of its significant historical, cultural and environmental attributes and the Trustees are acutely aware of their obligations, both legal and moral, to preserve the integrity of the St Albans Common for the benefit of future generations.

The St Albans Common Trustees work closely with the wider St Albans community. This is evidenced by strong community support in well attended public meetings and petitions calling for the continued operation of the St Albans Common Trust as presently constituted.

There are a number of community-based cultural initiatives which are currently under consideration which reach out to the wider community.

Proposed New Legislative Framework

The Trustees understand that the proposed new legislative framework has a number of key features which are set out below.

Submission on the proposed Inclusion of Commons within the Crown Lands Management Act

In November 2016, the NSW Legislative Council passed the Crown Lands Management Act 2016.

As a result of, inter alia, concerns expressed by the Trustees and the wider St Albans/ Macdonald Valley Community, the Government elected to specifically excise Commons from the scope of the Crown Lands Management Act.

Explicit in this decision was a recognition that Commons were not in fact "Crown Lands" but rather a unique and historically significant form of land tenure which has been regulated for nearly 200 years by bespoke legislation, most recently the Commons Management Act.

The Amendments Bill again seeks to now include Commons within the Crown Lands Management Act notwithstanding that in November 2016 the NSW Legislative Council expressly considered this issue and decided against doing so.

One need look no further than the express and bi-partisan statement by the Legislative Council on the exemption of Commons from the Crown Lands Management Act as "This is democracy in action" and an appropriate response to "real concerns raised across the State" (Refer Hansard Tuesday 8 November 2016 Legislative Council Proof pages 82 & 83 00:32), (00:38) and (00:40).

To seek to now reverse that decision some three months later is a dishonest act of public betrayal. The reintroduction of a proposal which was so recently and categorically rejected by Parliament in circumstances where nothing has changed which would in any way warrant or justify a revisitation of that issue is capricious, fundamentally un-democratic and sets a very dangerous precedent.

By way of analogy, this is the equivalent of breaching the well-known jurisprudential principle of *stari decisis* whereby you are effectively seeking to pass the same legislation a second time notwithstanding that its passage had been previously defeated. This is akin to trying a person twice for the same crime.

The stated purpose of the current Comprehensive Review is to ensure that Commons and the values which they represent are protected within a legislative framework that recognises the history of Commons and at the same time seeks to ensure that Commons remain in the control of the local Communities and that the expertise of existing Commons and Trust Board members is retained.

The Trustees, while broadly in agreement with some of the stated aims of the Comprehensive Review, believe that those aims are best achieved by careful and concise amendments to the Commons Management Act, an Act which has proved to be very effective over a long period of time in successfully managing Commons. The Commons Management Act sets out in great detail a regulatory framework that has stood the test of time. The Trustees can see no reason for this legislation to be repealed.

The Trustees disagree with the premise which appears to be implied in the Fact Sheet that Commons are, or are intended to be, classified or in some way treated as Crown Land. What is stated in the Fact Sheet as a fact is clearly not a fact and that premise is entirely inconsistent with the decision by the Government to exclude Commons from the Crown Lands Management Act in the first place.

Submission on the Proposed Abolition of the Common Roll, Commoners and the right to elect Trustees

The functions of a common roll and the commoner lie at the very core of what constitutes a Common and are integral to both the historical significance of Commons as well as their operation and management.

A person is eligible to be a commoner, in the case of the St Albans Common Trust, if, broadly, they are a resident or land owner in the Macdonald Valley. Only a commoner can be elected as a Trustee. This eligibility requirement was decreed by Queen Victoria under the original grant of the St Albans Common in 1853 (a copy of which is attached as Annexure A). In modern day parlance, to be a commoner is to be a member. A key responsibility of a commoner is to vote for the Trustees who in turn manage the Common. This is a very important characteristic of a Common as it ensures close community control, connection and involvement.

It is important to clearly distinguish between the right to vote in regard to the appointment of Trustees who manage a Common and the right to use a Common. As stated above, the St Albans Common serves as a focal point for a number of appropriately regulated community uses, notwithstanding that the broader community does not have the right to nominate for the position of, or vote for, a Trustee.

It is proposed that, under the Amendments Bill, the common roll and the function of the commoner will be abolished, so therefore will the right of the commoners (and indeed anyone else) to elect those who manage the St Albans Common Trust.

In its place the Amendments Bill proposes that the persons who are to manage the St Albans Common will be appointed by the relevant Minister.

Submission on the Proposed Election of Trustees versus appointment by the Minister- Third Bullet point- Fact Sheet

Under the new proposed regime of Ministerial appointment any interested person could seek appointment to the St Albans land management committee, regardless of any prior connection to the land or place or community.

It is apparently perceived that this “freewheeling” approach would somehow benefit the community at large more than the controlled commoner election process which has worked successfully for more than 160 years.

The proposed approach completely ignores the local community of St Albans, its historic links to the St Albans Common lands and the very real potential for adverse effects from self interest groups dictating the use of land in a historic area, beyond motherhood statements relating to the environment and culture.

The rationale for the proposal appears to be that local use is somehow elitist and exclusive. The facts clearly indicate otherwise. The St Albans Common lands are used for a range of appropriate community events. The Trustees of the St Albans Commons Trust are the custodians of the St Albans Common on behalf of everybody and they take this responsibility extremely seriously. The same cannot be said of managers appointed by the Minister who may have little or no connection with the culture and history of the community.

Further, the St Albans Common is held as a sacred trust for the benefit of more than the enrolled Commoners. While the St Albans Common Roll has approximately 135 Commoners, in a little over a week in November 2016 approximately 6,000 concerned members of the local and wider community signed a petition to protect it.

The Trustees agree that the existing Trustees should continue to manage the St Albans Common. The regime currently enshrined in the Commons Management Act where Commoners inscribed on the Common Roll democratically electing the trustees should be retained as these rights lie at the very core of what constitutes a Common.

Submission on the Proposed Revocation of Title - Fifth Bullet point- Fact Sheet

Currently the land tenure of the St Albans Common is characterised as a Fee Simple Torrens Title represented by Real Property Act Certificates of Title in the name of the St Albans Common Trust.

The Amendments Bill seeks to revoke the St Albans Common Trust’s right of Title and in its place vest title and ownership in the Crown coupled only with a short notation on title that the land is reserved for use as a common and such other purposes as the Minister sees fit.

This is tantamount to “nationalisation “of a community asset. There is no administrative, policy or legal basis for this blatant appropriation of a community asset which is currently represented by an unencumbered indefeasible valid title under the Torrens system.

The Trustees agree with the proposed notification regime but only on the basis that it is intended to provide greater clarity and certainty of the important historical and social role played by Commons not only in the past but for the benefit of future generations.

However, and very importantly, this is in the context of the title to the land remaining in the name of the St Albans Common Trust, and not being transferred to the State as Crown Land under the Crown Lands Management Act, as has been proposed.

There is no basis in either public policy or administrative efficiency which would justify the unilateral vesting of legal ownership of the St Albans Common lands in the Crown.

General Submissions

The proposed regulatory framework for Commons such as the St Albans Common and the foundations upon which the Amendments Bill is premised displays a fundamental misunderstanding of the role and significance of the community, from a social, cultural, environmental and historical perspective, in the management of the St Albans Common.

There is very considerable historical, cultural and community significance attached to the St Albans Common Trust and all that goes with it, such as the Common Roll, the functional notion of Commoner and the election of Trustees. The origins of Commons in NSW can be traced back as far as 1804 and in England back to 1235.

There is a very strong, deep and powerful connection between the St Albans/ Macdonald Valley community and the St Albans Common Trust. This connection underpins not only its orderly control and management but the passion, belief and conviction that was harnessed to bring about the decision not to include Commons within the scope of the Crown Lands Management Act in the first place.

Indeed, this connection goes beyond simple land management but raises a range of important cultural and heritage considerations, key amongst which is; heritage status can attach not only to the built environment but also to land and culturally important and historical institutions such as the St Albans Common. The concept of “living heritage” is neither new nor novel. Administrative expediency can never justify riding roughshod over heritage and cultural significant social institutions.

The proposed new framework for the future management of the St Albans Common Trust will fundamentally and irrevocably break that connection and in so doing all the history and culture that goes with it. There is no policy or administrative advantage that can in any way justify such action.

Management of the St Albans Common will inevitably be bureaucratized when the link between its community, its culture and its land is broken. The Amendment Bill will affect this break.

The St Albans Common lands will not, in the future, be managed by elected local commoner Trustees but by whoever campaigns or lobbies most effectively and successfully for grant of those rights by the Minister of the day. This leaves it vulnerable to corruption and undue influence. To think otherwise is to display complete naivety of the political process.

Specific Submissions Addressing the “Proposed framework to deal with this issue” in the Fact Sheet

Submission on the First and Second Bullet points- Fact Sheet

A new definition of a “Common” to which the Commons Management Act applies should be inserted. This definition should state that the Commons Management Act only applies to those “eligible” Commons listed in a new Schedule to the Commons Management Act. The St Albans Common would be one such “eligible” Common to be included on that Schedule. Other “eligible” Commons may also be included in that Schedule.

Eligible Commons could be defined along the following lines;

“A functioning Common in good standing under the Commons Management Act whose management and operations are carried on in a manner which is consistent with the purposes of a Common:”

To the extent that some existing Commons are no longer operating or should no longer be characterised as Commons then they would not be considered to be “eligible” and would therefore not be listed on the Schedule. Their status and the applicable regulatory regime could be determined by the Minister under Section 61A of the Commons Management Act.

This approach will ensure that the current management and framework under which Commons operate (including the St Albans Common) is continued seamlessly and effectively.

There is no reason in either law or as a matter of sound policy or practice to change the description of Commons Trust to “Crown Land manager”. To do so is contrary to one of the stated aims of the Comprehensive Review which is to recognise the history of the Commons.

That the name of the “Common” might be retained is disingenuous when the rights, functions and utilities of “commoners” and common trust are to be eradicated and replaced by land management committees, the members of which are Ministerial appointees.

It is both misleading and deceptive to characterise a Common as Crown Land when it is clearly not as it has been specifically excluded from the Crown Lands Management Act by Parliament.

For the same reasons that the Government refused to support proposed amendments to the Crown Lands Management Act, which would have had the effect of changing the term "Crown Land" to "State Land" or an equivalent contemporary term, the Trustees see no justifiable reason to destroy nearly 200 years of history and culture which attaches to the concept of a Common Trust managed by duly elected trustees of that Commons Trust.

Similarly, there is no substantive reason in law nor any policy or operational benefit to be derived by changing the description to "Land Manager" as is being proposed.

The Trustees agree that the St Albans Common should continue to be referred to as such but for the reasons outlined above reject the proposed change to St Albans Common Land Manager.

Submission on the Fourth Bullet point- Fact Sheet

The rationale underpinning this point is that land should not be reserved for the sole purpose of a Common but for a broader purpose.

The Trustees agree with the stated three purposes of "a common, community use and the protection of cultural and environmental values".

However, recognition of these worthy aims and broader purposes is best achieved by working within the existing known framework of the Commons Management Act.

For greater clarity and certainty, the Commons Management Act could be specifically amended to require all Trustees from time to time of all Commons to have express regard to those three stated aims and purposes and to administer their Commons at all times in a manner consistent therewith.

For the record, the Trustees believe that they currently manage the St Albans Common in a manner which is entirely consistent with these aims and purposes.

Submission on the Sixth Bullet point- Fact Sheet

The Trustees agree with the proposal that the St Albans Common should have access to the Public Reserves Management Fund.

Conclusion

The St Albans Common is a well-run Common of significant historical, social, environmental, cultural and heritage significance.

It is acknowledged that, with the passage of time and increasing urbanisation, some Commons may no longer be effectively operating as Commons and therefore it is appropriate, from a policy perspective, to review their operations and status. However, the St Albans Common Trust is not one of those and so to adopt a “one size fits all” approach is inappropriate.

The Trustees believe that the future management of the St Albans Common, consistent with the overall objectives of the Fact Sheet, is best achieved by keeping the overarching legislative framework provided by the Commons Management Act and making selective amendments (as discussed above) to ensure that the administration of Commons such as the St Albans Common, while consistent with modern best practice, does not abandon nearly 200 years of historical, social, environmental, cultural and heritage significance. This significance has come about by the personal exertion and financial sacrifice of the Commoners over this extended time period with no government funding.

Land the subject of Commons has never been Crown Land and it is not relevant to categorise or regulate it as such in the manner proposed. To do so will be to forever extinguish 200 years of Commons Trust culture, community and heritage from the history of NSW for no substantive reason or benefit.

Exposure Draft

Public access to an Exposure Draft of the Consequential Bill with reasonable time to consider its terms and respond is sought.

Authorised for and on behalf of the St Albans Common Trust by a unanimous resolution of the Trustees of the St Albans Common Trust

15 February 2017