

## COMMONS MANAGEMENT BILL 1989

NEW SOUTH WALES



### EXPLANATORY NOTE

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The Local Government (Commons Management) Amendment Bill 1989 is cognate with this Bill.

The objects of this Bill are—

- (a) to make fresh provision for the establishment of trusts in relation to commons; and
- (b) to provide for the election of trust boards and, in certain cases the appointment of local authorities or administrators, to manage the affairs of those trusts; and
- (c) to provide for the care, control and management of commons; and
- (d) to repeal the Commons Regulation Act 1898 and certain other legislation relating to commons.

The Bill prescribes a completely new legislative framework for the management of commons and will enable commons to be used for various purposes in addition to those permitted by the Commons Regulation Act 1898. Under that Act, commons may be used only for grazing and watering of stock.

Under the Bill, a trust will be established in respect of each common and the affairs of the trust will be managed initially by an administrator and later, after the administrator has organised the election of members of a trust board, by a trust board. However, the Minister will have the option of establishing a trust whose affairs will be managed by a local authority appointed by the Minister. In certain cases the Minister will have power to appoint an administrator to manage the affairs of a trust (e.g. where an election of members of a trust board fails or a trust board has no members). In addition to being charged with the care, control and management of the common, a trust will be required to keep a roll of commoners, convene general meetings of commoners and, in certain circumstances, prepare a management plan for the common. A trust will also be empowered to make a by-law regulating the use of the common and, with the consent or authority of the Minister, will be able to enter into certain transactions in respect of its land.

## *Commons Management 1989*

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The qualifications for enrolment as a commoner are to be prescribed by regulations to be made under the proposed Act. The concept of commoners' rights, as they exist under the current Act, will not be continued by the proposed Act in respect of new commons. All rights to use a common will be derived from a management plan prepared and adopted in accordance with Division 5 of Part 2 of the proposed Act. However, it will be possible to change the purposes for which existing commons may be used only with the approval of the commoners concerned and certain existing rights will be protected by Schedule 5 to the proposed Act, which contains savings and transitional provisions.

The Bill makes provision for the holding of general meetings of commoners. A trust will be required to hold an annual general meeting of commoners at which the trust board will present a statement of accounts for its preceding financial year and a report of the trust's activities for that year. At every third annual general meeting, a general election of members and office bearers of the trust board will be held. If an elected member of the trust board vacates office, the trust will normally be required to hold a special general meeting of commoners to fill the vacancy.

The Bill makes special provision for the resolution of disputes arising between a commoner and the trust concerned. Such disputes will be resolved by determination of the Minister, but if, before making such a determination, the Minister considers it appropriate, he or she will be able to refer the dispute to the relevant local land board for inquiry and report.

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### PART 1—PRELIMINARY

**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides for the proposed Act to commence on a day or days to be appointed by proclamation made by the Governor-in-Council, except for proposed section 9 and clause 2 of proposed Schedule 5 which will commence on the date of assent.

**Clause 3** defines certain expressions that are used in the proposed Act. Among the expressions defined are "common", "commoner", "commoners' roll", "financial year", "management plan", "temporary licence", "transaction", "trust" and "trust board".

### PART 2—COMMONS TRUSTS

#### Division 1—Constitution and management

**Clause 4** will require the Minister to establish a trust in respect of every new common created after the commencement of the clause. (Commons will in future be created under the proposed Crown Lands Act 1989.) Such a trust will be a body corporate and will have a name assigned by the Minister. Bodies corporate established under the Commons Regulation Act 1898 will continue in existence as trusts under the proposed Act.

**Clause 5** provides that in the first instance the affairs of a newly established trust will be managed by an administrator appointed by the Minister, unless the Minister decides to appoint a local authority to manage the affairs of the trust in accordance with proposed section 7. An administrator will be responsible for establishing a commoners' roll and organising the election of the first members and office bearers of the trust board.

**Clause 6** provides for the constitution of trust boards. A trust board may have no more than 7, and no fewer than 3, members as determined by the Minister. In the case of a body corporate which was constituted under the Commons Regulation Act 1898 and which is continued in existence as a trust under the proposed Act, the trustees of the body corporate are to be regarded as the members of the trust board.

*Commons Management 1989*

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**Clause 7** will empower the Minister to appoint a local authority to manage the affairs of a trust instead of appointing an administrator or whenever there is no trust board elected to manage those affairs, but only if the authority consents to the appointment. However, except in the case of a common in the Western Division, a local authority may be appointed to manage the affairs of a common only if the common is located within the authority's local government area. A local authority will be able to terminate its appointment as the manager of a trust's affairs by giving not less than 6 months' notice of its intention to do so. The maximum term for the appointment of a local authority as the manager of a trust's affairs is to be 3 years, but the Minister will be able to renew such an appointment with the authority's consent.

**Division 2—Functions of trusts**

**Clause 8** prescribes the functions of a trust. A trust will be responsible for the care, control and management of the common for which the trust is established. The clause will also empower a trust to invest its surplus funds in trustee investments and to employ staff.

**Clause 9** will empower a trust to make a by-law in relation to the common for which it is established. Such a by-law will, among other things, give effect to any management plan that has been adopted in relation to the common and make provision for the care, control and management of the common. A by-law will not have effect until approved by the Governor-in-Council. After the Bill is enacted, the trustees of an existing common will be able to make a by-law that will have effect in respect of the common when proposed section 4 commences. If no such by-law is made and approved by the Governor before the commencement of that section, a model by-law that is to be prescribed by the regulations will have effect in respect of the common. A trust will, with the approval of the Governor-in-Council, be able to amend its by-law or replace it with another by-law and will be able to do this even if its by-law is the model by-law. A trust will be required to exhibit a copy of its by-law at at least one conspicuous place on the common. The clause also will enable a by-law to create an offence punishable by a penalty not exceeding 5 penalty units (\$500). Penalties for such offences will be payable to the trust concerned.

**Division 3—Commoners' rights etc.**

**Clause 10** will require a trust to keep a commoners' roll for the common for which it is established. Any person who has the qualification for enrolment as a commoner will be entitled to have his or her name entered on the roll. The qualification for enrolment will be prescribed by regulations under the proposed Act.

**Clause 11** will entitle a person to appeal to the local land board against any decision of a trust refusing to enter the person's name on the commoners' roll that is to be kept by the trust.

**Clause 12** provides that the rights of commoners will be exercisable only by persons whose names are entered on the relevant commoners' roll.

**Division 4—Trust property**

**Clause 13** provides that Division 4 will not affect the provisions of any other Act relating to a particular trust or the common for which the trust is established.

**Clause 14** provides that a trust will have an estate in fee simple in the common for which it is established.

**Clause 15** will empower a trust, with the approval of the Minister, to acquire, or take a lease of, other land for use in connection with its common and to spend money on improving that land.

*Commons Management 1989*

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**Clause 16** will prohibit a trust from entering into land transactions in respect of its land except in accordance with the Division. A trust whose common is located in the Western Division will not be able to alienate any of its land by sale or exchange. However, with that exception a trust will be able to engage in most kinds of transactions in respect of its land with the specific consent, or under the general authority, of the Minister.

**Clause 17** provides that a mortgage of land comprised in a common may include a power of sale. This clause will not, however, apply to mortgages of land comprised in commons situated in the Western Division.

**Clause 18** provides that land transferred or conveyed to a person by a trust will vest in the person free from all trusts to which it was formerly subject.

**Clause 19** will enable the Minister to appoint a person, other than the relevant trust board or local authority, to execute on behalf of a trust instruments designed to give effect to land transactions entered into by the trust.

**Clause 20** provides for the disposal of the proceeds of a sale, lease or mortgage of, or a grant of a licence over, land that is vested in it. Such proceeds will be required to be applied in accordance with any directions given by the Minister and in the exercise of the functions of the trust under the proposed Act.

**Clause 21** will empower the Minister to direct a trust to set aside funds for the payment of its debts and will require a trust to which any such directions have been given to comply with those directions.

**Clause 22** will empower a trust to grant temporary licences for grazing and other purposes that may be prescribed in regulations to be made under the proposed Act.

**Clause 23** provides that, where a common or part of a common ceases to be set aside as such, any lease of, or licence granted over, the common or part will be terminated.

**Clause 24** provides that a trust will be dissolved if the common for which it is established ceases to be set aside as such. The clause will empower the Minister to dispose of any property of a trust that is dissolved by the operation of the clause.

**Division 5—Management plans**

**Clause 25** provides for the preparation of draft management plans for the management of commons. The Minister will be able to prepare a draft management plan for a common or, alternatively, will be able to direct the relevant trust to prepare a draft management plan for the common. A trust will also be able to prepare a draft management plan on its own initiative.

**Clause 26** will enable the Minister to refer to the relevant trust for its consideration a draft management plan prepared by the Minister. However, in the case of a draft management plan relating to an existing common, the Minister will be required to refer the plan to the relevant trust for its consideration. The clause also provides for the Minister to place a copy of a draft management plan on public display and to publish in a local newspaper a copy of the draft plan or a notice specifying the place where the draft plan can be inspected. The Minister must then serve on the trust concerned a notice requiring the relevant trust to convene a public meeting to consider the draft management plan. On receiving the notice, the trust concerned will be required to hold a public meeting to consider the plan and the Minister will be required, when deciding whether or not to adopt the plan, to take into account any resolutions passed at the meeting. The Minister will also be required to take into account any representations made with respect to the plan.

*Commons Management 1989*

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**Clause 27** will empower the Minister to adopt a draft management plan, either with or without alterations, or to reject the plan. However, if a draft management plan relates to an existing common, the Minister will be prohibited from adopting the plan unless it has been approved by not less than 75 per cent of the commoners present at a special general meeting of the commoners concerned. When a management plan has been adopted, the trust to which it relates will be required to give effect to the plan as soon as practicable after being notified of its adoption.

**Clause 28** will empower the Minister to cancel a management plan adopted under clause 27, either with or without adopting another plan in its place. The clause also makes provision for alterations to existing management plans.

**Division 6—Administrative matters**

**Clause 29** will require a trust to designate its principal place of administration and to notify the address of that place to the Minister. A trust will also be required to notify the Minister of any change of address of its principal place of administration.

**Clause 30** will require a trust to keep its accounting and other records at its principal place of administration, unless the Minister has consented to those records being kept at some other place. A commoner will have a right under the clause to inspect records of the trust on whose commoners' roll he or she is enrolled.

**Clause 31** will require a trust to hold an annual general meeting of commoners at least once a year and within 3 months after the end of its last financial year. The trust will be required to submit to the commoners at its annual general meeting properly audited accounts relating to the income and expenditure of the trust during, and the assets and liabilities of the trust at the end of, its last financial year. The meeting will also consider the annual report of the trust for that year.

**Clause 32** provides for the election of the members of a trust board. Unless the trust's affairs are being managed by a local authority or an administrator, a general election of members of a trust board will be held at every third annual general meeting of commoners to fill the vacancies that will arise when the terms of office of the current members come to an end.

**Clause 33** makes provision for the filling of casual vacancies in the membership of a trust board.

**Clause 34** deals with both general elections of members of trust boards and elections to fill vacancies occurring in the membership of such boards. All elections are to be held in accordance with the procedure to be prescribed by regulations made under the proposed Act. The clause will require the president of a trust board to notify election results to the Minister and will enable the Minister to validate elections where minor irregularities occur.

**Clause 35** provides for the holding of special general meetings of commoners. Such meetings are to be held whenever a trust thinks necessary and will be required to be held—

- (a) on the requisition of not less than 20 per cent of the commoners; or
- (b) if the Minister directs such a meeting to be held; or
- (c) where it is proposed to adopt a draft management plan relating to an existing common and the plan contemplates a change in the purposes for which the common may be used or the use of the common for additional purposes.

If a trust fails to convene a special general meeting in accordance with a commoners' requisition, any of those commoners will be able to convene such a meeting themselves.

*Commons Management 1989*

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**Clause 36** sets out the prerequisites for the holding of an annual or special general meeting of commoners. In particular, a trust will be required, at least 14 days before the meeting, to send to each commoner whose name appears on the commoners' roll of the trust notice giving details of the meeting.

**Clause 37** will require a trust to prepare an annual report in respect of the trust's activities for its immediately preceding financial year. The clause will also require a trust to provide information in response to a request of the Minister.

**Clause 38** will give effect to Schedule 4 which deals with the procedure to be followed at general meetings of commoners.

**Clause 39** will require a trust to keep minutes of meetings of the trust board, or the local authority that is managing the trust's affairs, and of general meetings of commoners.

**Division 7—Financial provisions**

**Clause 40** provides for the financial year of a trust.

**Clause 41** will require a trust to keep proper accounting records which explain its transactions and its financial position.

**Clause 42** will require a trust, not less than 14 days before an annual general meeting of commoners, to make out an income and expenditure account for its last financial year and a balance sheet made up to the last day of that financial year. The clause will also require the trust to take all reasonable steps to ensure that its accounts are audited by its auditors not less than 14 days before that meeting.

**Clause 43** will require a trust to have an auditor and provides for the appointment and election of auditors of trusts.

**Clause 44** provides for the removal or resignation of a trust's auditor. An auditor of a trust will be removable from office only on a resolution passed at a general meeting of commoners.

**Clause 45** provides that the reasonable fees and expenses of an auditor of a trust are to be paid by the trust.

**Clause 46** prescribes the powers and duties of auditors with respect to the accounts of a trust. The auditor of a trust will be required to form an opinion as to whether the auditor has obtained all the information and explanations that the auditor has asked for and whether or not the trust has kept proper accounting and other records as required by the proposed Act. The powers and duties are similar to those that are applicable to a company incorporated under the Companies (New South Wales) Code.

**Clause 47** will make it an offence, punishable by a maximum penalty not exceeding 20 penalty units (\$2,000) or imprisonment for 12 months, or both, to obstruct an auditor of a trust in the exercise of the auditor's powers or duties with respect to the accounting and other records of the trust.

**Division 8—Power of Minister to appoint an administrator in certain circumstances**

**Clause 48** will empower the Minister to appoint an administrator to administer the affairs of a trust where—

- (a) an election to elect members of a trust board has failed; or
- (b) after receiving notice that it has contravened a provision of the proposed Act, a trust or the trust board commits further contraventions of the proposed Act, or continues to contravene the proposed Act; or

*Commons Management 1989*

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(c) following an inquiry into the affairs of a trust, the Minister forms the opinion that it would be in the interests of the commoners concerned for such an administrator to be appointed; or

(d) the trust has a trust board which currently has no members and it appears to the Minister that there is no prospect of filling the vacant positions.

Where an administrator is appointed under the clause, the members of the trust board (if any) will cease to hold office and the administrator will assume responsibility for the management of the trust's affairs.

**Clause 49** will empower the Minister to give an administrator a direction to convene a general meeting of commoners to elect persons to take office as members of the trust board when the administrator's appointment comes to an end.

**Division 9—Settlement of disputes involving trust boards and commoners**

**Clause 50** will entitle a commoner to complain to the Minister in relation to certain matters concerning the management of the affairs of a trust.

**Clause 51** will enable the Minister to hear and determine a complaint lodged under clause 50 or to refer the complaint to a local land board for inquiry and report.

**Clause 52** will require a local land board to which a complaint has been referred to inquire into the complaint and report its findings to the Minister.

**Clause 53** prescribes the various determinations that the Minister may make in respect of a complaint lodged under clause 50. If the Minister upholds the complaint, the Minister will be able to require the trust, or the trust board or local authority, concerned in the complaint—

(a) to refrain from acting in a manner inconsistent with the proposed Act, a management plan or a decision of the commoners; or

(b) to carry out a requirement of the proposed Act, a management plan or a decision of the commoners.

The Minister will also be able to quash a decision of the trust that is contrary to the proposed Act or a management plan and to give directions as to the manner in which the trust's affairs must be managed in future.

**PART 3—SUPPLEMENTARY MATTERS**

**Clause 54** will empower the Minister or a person authorised by the Minister to enter a common or the premises of a trust for the purposes of carrying out an inspection of the common or those premises.

**Clause 55** will empower the Minister to appoint a person as an inspector to investigate the conduct of the affairs of a trust. The clause prescribes the powers of such an inspector. These powers include the power to enter the premises of a trust, the power to inspect records kept on those premises, and the power to put questions to members of the trust board or local authority that is managing the trust's affairs and to employees of the trust.

**Clause 56** empowers a member of a trust board, or of the local authority that is managing a trust's affairs, or an employee of the trust authorised by the board or authority to remove unauthorised persons from the common concerned.

**Clause 57** prescribes certain offences relating to the powers conferred by the provisions of proposed sections 54–56. For instance, a person who hinders or obstructs the Minister, an inspector or other person in the exercise of any of those powers will be guilty of an offence. The maximum penalty for such an offence will be 10 penalty units (\$1,000).

*Commons Management 1989*

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**Clause 58** will empower the Minister to delegate to a specified person any of the Minister's functions under the proposed Act. A delegate will be empowered to subdelegate a delegated function with the approval of the Minister.

**Clause 59** provides that, where a provision of the proposed Act provides that a member of a trust board or local authority who is in default is guilty of an offence, the reference to the member in default is, in relation to a contravention of the provision, to be taken as a reference to any member of the trust board or local authority who was, by act or omission, directly or indirectly knowingly concerned in or party to the contravention.

**Clause 60** provides that proceedings for offences against the proposed Act, or against regulations or by-laws under that Act, are to be dealt with summarily before a Local Court constituted by a Magistrate.

**Clause 61** makes it clear that nothing in the proposed Act will affect the operation of section 27 of the Forestry Act 1916 as regards any Crown-timber lands located within a common.

**Clause 62** will empower the Governor-in-Council to make regulations for the purposes of the proposed Act.

**Clause 63** gives effect to Schedule 5 which sets out savings and transitional provisions consequent on the proposed repeal of the Commons Regulation Act 1898 by proposed section 64.

**Clause 64** provides for the repeal of the Commons Regulation Act 1898, the Commons Regulations 1928 and rules and regulations made by trustees under section 15 of that Act.

**Schedule 1** contains provisions relating to administrators appointed under clauses 5 and 48. The Schedule provides for the appointment of an acting administrator, the circumstances in which an administrator ceases to hold office and the duties of an administrator.

**Schedule 2** contains provisions relating to the eligibility of persons for appointment or election to membership of a trust board, the circumstances in which members of a trust board vacate office, the filling of vacancies in the membership of a trust board and the exclusion from civil liability of members of a trust board and persons acting under the direction of the board for acts and omissions of the trust or the board done or omitted to be done in good faith. The Schedule also contains provisions which require the members of a trust board to disclose their pecuniary interests in contracts or proposed contracts with the trust. A member who has disclosed a pecuniary interest in a contract or proposed contract will not normally be permitted to be present during any deliberation or decision of the board concerning the contract or proposed contract.

**Schedule 3** contains provisions relating to the procedure for calling and holding meetings of a trust board. Those provisions provide for the quorum for meetings of a trust board, the person who is to preside at meetings of the board and voting at those meetings.

**Schedule 4** contains provisions for the conduct of general meetings of commoners. The Schedule includes provisions for the quorum of commoners required for such meetings, the persons who may preside at such meetings, and voting at such meetings.

*Commons Management 1989*

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**Schedule 5** contains savings and transitional provisions consequent on the proposed repeal of the Commons Regulation Act 1898.

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