

Guideline

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Exchange of state land for native title interests

Purpose

In situations where native title may continue to exist over unallocated state land (USL), there is a need to clarify when an exchange approach or revenue share arrangement is necessary.

Rationale

As native title may continue to exist over unallocated state land (USL) this land cannot be readily allocated to its most appropriate use; be it for use by Indigenous people or the wider community without firstly addressing native title issues under the *Native Title Act 1993* (NTA).

Under section 18A of the *Land Act 1994* (Land Act) there are opportunities for tenure outcomes benefiting both Indigenous people and the wider community through the exchange of land for the surrender of native title rights and interests under an Indigenous Land Use Agreement.

Such exchanges are potentially a way in which the aspirations of Indigenous people may be met while at the same time satisfying the land needs of the wider community.

The following is government policy: –

" a policy permitting the exchange of USL for the surrender of native title rights and interests over USL, including the flexibility to make freehold land available to native title holders under Indigenous Land Use Agreements."

This policy may be applied subject to the following:

1. *all exchange dealings are to be managed by the department; and*
2. *the value of USL proposed to be transferred to the native title party as freehold, must not exceed the value of the USL retained by the state over which native title is surrendered.*

An alternative approach includes up to a 50% revenue share arrangement as an additional negotiation option.

Guideline

Decisions about when an exchange approach or revenue share arrangement is necessary will be made jointly by Land and Surveying Services (LASS) and Indigenous Land Operations (ILO) representatives after consulting with other interested parties.

Exchanges can occur for site specific proposals, but as a rule they will be directed towards Indigenous Land Use Agreements that cover larger areas to provide a total solution for a particular

town, district or region, for all parties, both in terms of future land need and future acts requiring compensation.

Up to a 50% revenue share arrangement may also apply as an alternative to an exchange or in connection with an exchange package.

Decisions about the land to be included in the agreement will be made by LASS officers. Such decisions will be made following negotiations with ILO officers, native title holders and consultation with other relevant parties, such as local government and state agencies.

Agreements will be given effect by way of a registered Indigenous Land Use Agreement between the native title parties and the state.

It is essential to undertake appropriate land use planning prior to entering into detailed Indigenous Land Use Agreement negotiations so that the aspirations of the parties are matched with the most appropriate land and competing interests are identified and minimised. None of the parties involved would want to end up with land which cannot be used for its intended purpose or be in conflict with the other party when a ready alternative exists. These practical issues should be identified and addressed at the beginning of the process.

The NTA's registration requirements for Indigenous Land Use Agreements can only be met, if registered native title claimants, persons claiming to hold native title, or bodies representing these persons, have been identified through the authorisation and certification processes prescribed under the NTA. Once these processes have been completed there is certainty that any agreement is entered into with the correct native title parties.

It follows that these processes will also ensure that any freehold grants as part of an agreement will be made to the correct traditional owners who may be individuals, a group of individuals or an entity (e.g. corporation) established to represent their interests. Just as importantly the registration of the Indigenous Land Use Agreement will ensure validity of all dealings with the area and will bind all native title parties.

Note: These agreements do not replace the *Aboriginal Land Act 1991* (ALA) and *Torres Strait Islander Land Act 1991* (TSILA) arrangements for Indigenous communities.

Further it is recognised that for many Indigenous people, ALA or TSILA freehold remains the preferred tenure to meet community requirements.

Exchange approach

Under the exchange approach, the value (**inclusive of the cost of any survey, negotiation and authorisation costs as outlined below**) of the USL being allocated to native titleholders must be no more than the value of the USL that is capable of allocation in accordance with Chapter 4 Part 1 of the Land Act and for which native title is surrendered. For negotiation purposes, where the LAMS asset value is considered current this value may be used, otherwise the State Valuation Service will provide the department with current land values. As negotiations may span many months, this valuation advice may need to be reviewed to ensure relativity prior to finalising negotiations.

An exchange proposal for native title interests may not necessarily result in freehold grants in every case.

Just as land obtained for community use can be granted under a range of tenures, a flexible mix of tenures including freehold, ALA or TSILA freehold grants, and a range of reserves under Indigenous trusteeship, is available. The tenures would be chosen to best match the values inherent in the land, intended use, location and aspirations of the relevant indigenous people.

Although reserves may be allocated or re-allocated as part of exchange proposals, they remain ultimately in state ownership, and will therefore have a neutral effect in assessing the relative value of land exchanged for surrender of native title.

Therefore, a section 18A exchange may only be considered where the value of USL to be allocated in freehold to the native title holders (including ALA or TSILA freehold where native title is surrendered), inclusive of **the cost of any survey of land to be granted under s.18A of the Land Act and any contribution by the state towards negotiations and/or authorisation costs of an Indigenous Land Use Agreement**, is less than or equal to the value of the USL that has been identified under a s.16 assessment as being capable of allocation in accordance with Chapter 4 Part 1 of the Land Act and to which native title will be surrendered.

For example, if the value of the USL to be granted to the native title holders as freehold is \$100,000 and the cost of the survey of this USL is \$5,000, then the value of the USL to which native title will be surrendered and available to the state for allocation in accordance with Chapter 4 Part 1 of the Land Act must be \$105,000 or greater.

Similarly, if the value of the USL to be granted to the native title holders as freehold is \$100,000 and the contribution by the state towards negotiation and/or authorisation costs of an Indigenous Land Use Agreement is \$30,000, then the value of the USL to which native title will be surrendered and available to the state for allocation in accordance with Chapter 4 Part 1 of the Land Act must be \$130,000 or greater. Further, if such USL also required survey at a cost of \$5,000, the value of the land to which native title will be surrendered and available to the state for allocation must also include that cost, and therefore be \$135,000 or greater.

To give effect to exchange Indigenous Land Use Agreements, LASS officers will need to seek Governor in Council approval to grant freehold title to the native title holders in terms of section 18A of the Land Act. This action would only be initiated upon the registration of the Indigenous Land Use Agreement.

Goods and Service Tax (GST)

For all exchange dealings of this nature the advice of the department's, Finance business unit must be sought. GST may not be payable if the land is determined as being not improved within the definition by the Australian Taxation Office Ruling 2006/6.

Please note for exchange Indigenous Land Use Agreements:

- Current valuations for the lots to determine GST amounts will be required. The values at the time of the Indigenous Land Use Agreement are not used as the supply is occurring at the time of the exchange.
- The native title party is required to provide a Recipient Created Tax Invoice for the value of native title surrendered. The value of the native title surrendered will be the GST inclusive value of the land being granted e.g.

- If the supply of land is taxable and the value of the land is \$100,000K, the value of the surrender of native title will be \$110,000,
- If the supply of land is GST-free and the value of the land is \$100,000K, the value of the surrender of native title will be \$100,000.
- Regardless of the GST treatment of the supply of the land, the invoice from the native title party will have no GST as surrender of native title is not a taxable supply.

Tax invoice/s will be issued by the department when the deeds of grant issue.

Transfer (formerly Stamp Duty) - under the *Duties Act 2001* relief from transfer duty may be provided to native title claimants or anybody receiving the grant of freehold land under section 18A of the Land Act in respect of land transactions:

- entered into on or after 3 May 2006; and
- undertaken for the sole purpose of giving effect to a registered Indigenous Land Use Agreement and expressly contemplated by the Indigenous Land Use Agreement, in settlement of a native title claim registered on the Register of Native Title Claims.

To qualify for relief for transactions the land must be used solely or almost solely by or for the native title claimants for traditional or residential purposes, and not used for commercial purposes.

Further detail about transfer duty can be found at: <https://www.qld.gov.au/housing/buying-owning-home/other-transfer-duty-exemptions>

Grants made in accordance with the ALA or TSILA are exempt from stamp duty (section 131 of *Duties Act 2001*).

Other Survey Costs - the cost of survey for -

- ALA or TSILA grants of freehold is to be borne by the department; and
- dedication of community reserves is to be borne by the trustee; but if the trustee is a native title stakeholder the cost of survey is to be borne by the department.

Up to a 50/50 Revenue share approach - the revenue share arrangement can be applied only through negotiating an Indigenous Land Use Agreement with the native title party for the USL lots within a claim area. The future purpose of the USL parcels need not be identified at the time of the Indigenous Land Use Agreement. The Indigenous Land Use Agreement will provide that when the USL parcels do become freehold then up to 50% of the nett proceeds from the sale is provided to the native title party.

The benefit of this approach is that only one Indigenous Land Use Agreement is required. Dealings can focus on the USL to be allocated initially, whilst transactions on the remainder of the claim area can occur at any time in future without native title implications.

Other benefits are -

The native title party is not burdened by those things relating to holding the land as freehold pending a possible sale i.e. rates, public liability, maintenance, weed and pest management etc.

It is a potential revenue stream for the native title party i.e. as the USL parcels are allocated over time.

The benefit for the state is that it provides a better path for the administration of unidentified USL parcels pending the sale of these parcels.

It assists the settling native title claims.

It achieves cost and time savings due to efficiencies gained as it allows one Indigenous Land Use Agreement to be negotiated as opposed to multiple Indigenous Land Use Agreement's over time and provides greater business certainty.

Approach

Negotiations for these agreements of state land for the surrender of native title will be based on the principle that the outcome should provide an optimal long-term benefit for the relevant Indigenous people and the people of Queensland, as is provided for in the objects of the Land Act.

The scope of each 'project' should include all USL within the area of interest and provide for –

- a. a satisfactory resolution of native title issues over USL which the State has an immediate and/or strategic requirement (e.g. securing land for future growth and community benefit), and
- b. an appropriate tenure solution or arrangement to meet the aspirations of native title holders and the State.

Under the leadership of the Regional Manager, Land, a 'project team' consisting of representatives of LASS and ILO will be established, and when necessary include officers from Planning and Assessment, the state Valuation Services and the business units responsible for administering the *Nature Conservation Act 1992*.

Negotiations must be supported by a Land Evaluation Report (section 16 of Land Act) that will identify appropriate land uses having regard to state, regional and local planning strategies and guidelines and the objects of the Land Act.

LAMS will be the source of land valuations for the USL, or if not available, as determined by a registered valuer (State Valuation Services). Notwithstanding that a LAMS value may be available, the valuation should be reviewed to ensure that it reflects current values.

ILO will arrange for the preparation and registration of an appropriate Indigenous Land Use Agreement, however prior to any formal agreement to the Indigenous Land Use Agreement being reached between the state and the native title parties (**including the authorisation thereto**), the appropriate regional **Senior Land Officer(s) must endorse all negotiated tenure arrangements and associated timeframes.**

Negotiations may provide a number of tenure outcomes to compliment the use, opportunity and protection desired by the native title holders and the state. These tenures will be primarily assigned to the following categories: -

Community - Dedication of land as a Reserve for Community purposes (as defined in Schedule 1 of the *Land Act 1994*) where the land has certain values that should be preserved and maintained for the benefit of present and future generations.

This is primarily because of its natural resources, its environmental, recreational, historical, social or cultural significance, or because it has special strategic value or location.

The local government and/or an appropriate indigenous body, as trustee, would control these reserves.

Land dedicated under this category may require the extinguishment/surrender of all native title rights and interests.

ALA and TSILA Grant - Grants of Aboriginal Land Act or Torres Strait Islander Land Act freehold (restricted) generally in the vicinity of existing indigenous communities and where the native title holders require access to the legislative provisions of the ALA or TSILA.

These grants would be on the grounds of traditional affiliation or historical association. Native title may not need to be surrendered for an ALA or TSILA freehold grant.

Enterprise - Grants of unrestricted freehold to native title holders to provide for housing and business opportunities.

Land granted under this category would require the prior extinguishment/surrender of all native title rights and interests.

Administrative process

Upon registration of an Indigenous Land Use Agreement that provides for the surrender of native title rights and interests in USL for the

- exchange of a freehold grant,
- revenue share arrangement

LASS officers will initiate the required actions in accordance with the documented procedures and other relevant guidelines issued by the department.

Scenario

This scenario might concern the proposed resolution of native title and land requirements over a larger area in a native title claim process. The department might negotiate with native title claimants, on behalf of other state agencies and the local government, for the surrender of native title rights and interests over all USL and reserves in an area comprising a large regional town and surrounding hinterland (or the entire claim area). Surrender of native title over land within the town area, in particular, would enable the state agencies and the local government to progress much needed projects which will create employment and economic opportunities for the whole community.

In this scenario, following the negotiations, agreement might be reached by the parties for the surrender of native title rights and interests over the whole of the town area to enable the state to further deal with some of the USL and reserves where native title is surrendered in exchange for a package of land tenure issued to the native title claimants comprising –

- a. the grant of some ALA freehold over several sites located near the town and close to an existing indigenous community;
- b. dedication of several reserves for Aboriginal and Environmental purposes, with the claimants appointed as joint trustees with the local government;
- c. the grant of some freehold land within the town area for which the indigenous people may choose to construct some housing and business activities, and retain the balance of the land

for their future needs, which may include the sale of some of this land to reinvest in other activities that would benefit indigenous people; and

- d. retention of areas of USL for future allocation under Chapter 4 Part 1 of the Land Act.

Some parcels may also be agreed for disposal by the state subject to the 50% revenue share arrangement.

Under this scenario only the following land may be valued and considered within the context of an exchange in terms of section 18A of the Land Act–

- a. USL to which native title will be surrendered and that has been identified as **not being required** to be dedicated for a community purpose; that is, land capable of allocation in accordance with Chapter 4 Part 1 of the Land Act; and
- b. USL intended to be granted as freehold to native title holders under section 18A or granted as freehold under the ALA (on the basis that native title has been surrendered over the USL).

The agreement would be recognised in a consent determination of native title and an Indigenous Land Use Agreement.

Legislation

Aboriginal Land Act 1991

Duties Act 2001

Land Act 1994

Nature Conservation Act 1992

Human Rights

The department is committed to respecting, protecting and promoting human rights. Under the *Human Rights Act 2019*, the department has an obligation to act and make decisions in a way that is compatible with human rights and, when making a decision, to give proper consideration to human rights. To the extent an act or decision under this document may engage human rights under the *Human Rights Act 2019*, regard will be had to that Act in undertaking the act or making the decision.

Approval

Position	Name	Date
Executive Director, Land and Native Title Services	Graham Nicholas	28/01/2020

Version history

Version	Date	Description/Comments
1	05/11/2003	Endorsed
2	28/06/2005	Conversion project - New WORD/XML template
3	15/01/2008	Updated to reflect Land Act amendments
4	09/09/2008	Updated to include ILUA changes

4.1	11/02/2009	Amended status of Notification from "NRW only" to "Public access"
4.2	08/02/2011	Updated to DERM
5	16/11/2011	A 50% revenue share arrangement
5.1	15/03/2012	Minor amendment to change up to a 50% revenue share arrangement
5.2	20/06/2013	Updated with MOG changes
5.3	15/08/2013	Minor amendment to when 50% share applies
6.00	11/01/2017	Updated to include transfer duty webpage
6.01	04/03/2019	Minor amendment to remove reference to PMC and CBRC requirements
6.02	28/01/2020	Minor amendments to update business names and provide clarity on applying the guideline
6.03	06/07/2022	Minor amendment to clarify GST and exchange dealings

Further information

- Contact your nearest business centre
(https://www.resources.qld.gov.au/?contact=state_land), or
- Refer to <https://www.qld.gov.au/environment/land/state>, or
- Call 13 QGOV (13 74 68).

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