

# Guideline

## Deciding the most appropriate tenure of state land

SLM/2014/1012 (Formerly PUX/952/106)

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## Approval

Position	Name	Effective Date
Acting Director – Operations Support – Land	Amanda Kearnan	06/07/2016

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## Purpose

The purpose of this notification is to provide guidance on implementing Operational policy – [Land allocation: deciding most appropriate use, tenure and management \(SLM/2013/481 = PUX/901/101\)](#) (policy) by the Department of Resources (department). This procedure applies to the allocation of unallocated state land (USL), and the renewal or conversion of existing leases.

The allocation process should be considered in a systematic way, a clear understanding of the hierarchy of importance of various matters. A methodology for determining most appropriate tenure includes the following considerations: high priority (state/regional) significance; local significance; specific policy direction; risk of degradation; regulatory controls; appropriate level of interest; and use of tenure-based instruments.

In conjunction with these considerations, a number of principles are presented for assessing the appropriate term and most appropriate manager in the context of evaluating most appropriate tenure.

## Rationale

Before land is allocated under the [Land Act 1994](#) (Land Act) the chief executive must evaluate the land to assess the most appropriate tenure and use for the land, and the evaluation must take account of state, regional and local planning strategies and policies and the object of the Land Act (s 16(1) and 16(2)).

The Minister must consider the following issues before making a decision:

- to offer to renew a lease whether part of the lease has a more appropriate use from a land planning perspective (s159(h) Land Act); or
- to offer to convert a lease whether part of the lease has a more appropriate use from a land planning perspective (s167(h) Land Act).

The foundation of the allocation process is the land evaluation report<sup>1</sup>, which assesses the most appropriate use of the state land under consideration.

An assessment of the most appropriate use and the tenure of the land must be based on the Objects of the Land Act as well as state and local planning objectives<sup>2</sup>, as follows:

1. Sustainable resource use and development
2. Land use is matched with land capability
3. Balance the economic, cultural and social opportunities and values in the land.
4. Consider the state's planning framework (state and local planning objectives)
5. Suitable land is set aside for community purposes

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<sup>1</sup> Procedure – [Undertaking a land evaluation report prior to lease renewal, lease conversion and state land allocation \(SLM/2013/577 = PUX/952/094\)](#) provides guidance about undertaking a land evaluation report.

<sup>2</sup> This list summarises the Object of the Land Act.

6. Environmentally and culturally sensitive land is protected
7. Appropriate consultation with stakeholders

### **Allocation decision is reviewable**

A decision to allocate tenure is a reviewable decision in terms of the [Judicial Review Act 1991](#) and therefore a decision maker must be able to provide an adequate statement of reasons. A statement of reasons must be provided in respect of an unsuccessful application to renew or convert an existing lease (if requested), and an applicant may appeal the decision.

### **Principles apply to allocation, renewal and conversion**

The decision-making process about renewing or converting an existing lease is slightly different to the land allocation process, because the decision-maker is dealing with land that has already been allocated. However, the principles still apply to the extent that it is possible that after considering the prescribed issues in the Land Act, part of the existing lease may be set apart for an alternative purpose, managed under another tenure arrangement.

### **Summary of most appropriate tenure policy**

In summary, the policy states that:

An evaluation of the land to assess its most appropriate use must precede the process of evaluating and deciding the most appropriate tenure.

The value of the land and the applicant's financial capacity to pay for the land is not an issue for consideration when determining the most appropriate tenure.

The decision to allocate tenure to a parcel of state land is to have regard to the following criteria:

- Freehold is the most appropriate where the state does not need to maintain proprietary oversight of use of state-owned land, because:
  - The (economic, environmental, social) values present on the parcel of state land are fully assessed and fully protected, and
  - The most appropriate use of a parcel of state-owned land is assured by a non-tenure method (such as regulatory provisions in a local government planning scheme, a statutory covenant/nature conservation agreement or other relevant mechanisms).
- Leasehold is most appropriate where the state needs to maintain proprietary oversight of use of state-owned land, because:
  - Native title is an issue – preventing the grant of freehold; or
  - A specific government policy exists that seeks to retain ownership of land by the state (such as land below high-water mark (HWM) and land on islands); or
  - A non-competitive allocation of state land is in the interest of the state's economic development; or
  - Environmental, social and/or economic value(s) on the land require protection which cannot be provided via existing regulatory mechanisms; or

- The land is degraded or at risk of degradation and there are not sufficient preventative regulatory controls; or
- The most appropriate use cannot be determined – and a short term (holding) tenure provides a temporary management arrangement; or
- A survey cannot be carried out.

### **Allocating to other tenures**

Although the policy does not explicitly address when to allocate state land as reserve, permit or licence, the following principles are recommended:

- A reserve is the most appropriate tenure where there is a high priority community value/interest which must be protected and other tenure instruments (such as a covenant or easement) over a freehold or leasehold tenure is not sufficient to protect such values. The following criteria should be considered:
  - If all or part of the subject land has high priority values/interests of state/regional significance, (such as a national park) gazetted under another Act, or Land Act reserve.
  - If all or part of the subject land has values or interests of high priority local significance, those values or interests should be protected by way of priority as a Land Act reserve.
- A permit should be considered where regulatory controls are not considered sufficient to protect values and no permanent structures and no transferable interest are appropriate. A permit is a permission to use land for a short-term use and minor uses and is not designed to be a primary tenure (such as a lease) and should only be granted over USL in the absence of a primary tenure. It is not to be used as a tenure solution where native title needs to be resolved.
- A licence should only be granted by the state where the state's interest is concerned and cannot be obtained under the local laws of the relevant local government. A licence is not designed to be a primary tenure and should only be granted over a temporarily closed road.

## **Guideline**

### **A method for allocating most appropriate tenure**

The allocation process should be considered in a systematic way, with a clear understanding of the hierarchy of importance of various matters. The following hierarchy of issues is presented as a methodology for determining most appropriate tenure:

1. High priority significance
2. Local significance
3. Specific policy direction
4. Risk of degradation
5. Regulatory controls
6. Appropriate level of interest

## 7. Use of tenure-based instruments

### **Preliminary considerations**

The following preliminary considerations should always be investigated prior to assessing most appropriate tenure:

- Is native title an issue and how might this affect the future use and tenure of the land?
- What existing interest(s) are there in the land and how might it affect its future use and allocation – such as: existing lessee; existing interest (public utility easement); or native title holder/claimant?
- Does any individual or company satisfy the priority criteria under s123 of the Land Act?
- Is native title an issue and how might this affect the future use and tenure of the land?
- What existing interest(s) are there in the land and how might it affect its future use and allocation – such as: existing lessee; existing interest (public utility easement); or native title holder/claimant?
- Does any individual or company satisfy the priority criteria under s123 of the Land Act?

### **Consideration 1 - High priority significance**

**Are there very high values/interests of state/regional significance or indigenous significance needing protection – which override other values and/or stakeholder interests?**

Protection of very high values/interests of state/regional significance (4), or indigenous significance (5) is the first priority. Where all or part of the subject land has values/interests of state/regional significance, those values or interests should be appropriately protected in priority by way of a:

- state reserve (such as a national park) or Land Act reserve to protection conservation values; or
- Land Act reserve to protect community values; or
- Freehold grant to accommodate essential government operations or protect commercial timber operations; or
- (An appropriate tenure) to facilitate a development of state/regional significance.
- (An appropriate tenure) to recognise indigenous values/interests.

Where the significance relates to specific indigenous values/interests, a number of options may be available, according to the attributes of the land, the locality and the desire of the indigenous party. In keeping with the legislative framework provided under the [Aboriginal Land Act 1991](#) (Aboriginal Land Act), as well as government policy decision concerning Guideline – [Exchange of state land for native title interests \(SLM/2013/361 = PUX/952/091\)](#), USL is approached on the basis that it has indigenous significance. Unless other significant (state/regional) values/interests are present, the indigenous interests should receive priority.

While Guideline – [Tenure based options for USL in native title claims and Indigenous land use agreements \(SLM/2013/581 = PUX/952/098\)](#) specifically addresses tenure based options for USL in

the context of a native title claim or Indigenous land use agreement negotiation, it can be considered as a general guide in respect of allocating USL which is of indigenous significance.

## **Consideration 2 - Local significance.**

**Are there very high values/interests of local significant (6) needing protection – which override other values and/or stakeholder interests?**

## **Consideration 3 - Specific policy direction**

**Is there a specific policy direction relating to the dealing (e.g. island, subdivision, amalgamation)?**

There are a number of specific policies which provide a clear tenure specific freehold prohibition, such as: islands, land below high-water mark, non-competitive allocations.

## **Consideration 4 - Risk of degradation<sup>3</sup>**

**Is there risk of degradation? Is the country considered fragile/non-resilient?**

Land that is not degraded (or not at risk of degradation), can be safely converted to freehold. Where risk exists, the key issue is how best to minimize the potential harm – see consideration 5.

## **Consideration 5 - Regulatory controls<sup>4</sup>**

**Are there existing regulatory controls to protect values?**

If the land is degraded or at risk of degradation, consideration should be given to whether there exist regulatory controls sufficient to protect the productive and other values of the land.

Regulatory controls may derive from local government in the form of local laws or in the planning scheme, or from state government in the form of state planning policies (such as the coastal management strategy, protection of good quality agricultural land). A judgement needs to be made whether any of the existing regulatory controls address the protection of the high-level values/interests present on the land, or whether the risk of degradation would be minimised.

Where there are sufficient regulatory controls in place, freehold tenure is the best option, or where a specific statutory entitlement exists (7) or the tenure landscape does not support freehold tenure (for example, offshore islands), a perpetual lease may be considered. If native title is an issue, a permit to occupy for a use that does not require the development of permanent structural improvements is a low impact act and will not affect native title. If there is an existing lease in place, a new lease for the

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<sup>3</sup> Values or interests of very high state or regional significance are: conservation, values as advised by Environment and Nature Conservation, commercial timber as advised by Department of Agriculture and Fisheries (DAF); Schedule 1 community values that have a benefit beyond the local government boundary.

<sup>4</sup> According to s.4 of the Aboriginal Land Act, an Aborigine/Aboriginal people are particularly concerned with land if the Aborigine/Aboriginal people – a) have a particular connection with the land under Aboriginal tradition; or b) lives on or uses the land or neighbouring land. In s.5 native title interest means the communal, group or individual rights and interests of Aboriginal people in land or waters if – a) the rights and interests are possessed under Aboriginal tradition; and b) the rights and interest of Aboriginal people, by Aboriginal tradition, have a connection with the land or waters; and c) the rights and interests are recognized by common law of Australia.



same purpose is permissible. Native title may also be addressed via an Indigenous land use agreement, allowing for greater interest in the land, in accordance with the agreement made.

Where there are not sufficient existing regulatory controls, consideration should be given to the best tenure option to achieve a suitable level of protection. The first option is to consider a temporary tenure, limiting the interest (and use rights) granted in the land – see consideration 6. Where a more substantial interest is decided, consideration should then be given to the use of tenure-based instruments, such as a covenant to protect the values in the land – see consideration 7.

## **Consideration 6 - Appropriate level of interest<sup>5</sup>**

### **Is it more appropriate to grant a temporary interest – in favour of a long-term interest (exclusive possession)?**

Where regulatory controls are not considered sufficient to protect values, a short-term tenure, restricting the levels of interest granted in the land, may be an effective option. A permit to occupy is a temporary permission to use land which is issued on a yearly basis. It does not allow for any permanent structural improvements or significant works and does not allow the interest to be transferred (sold), nor any further interest to be created (such as a mortgage). A short-term tenure is most relevant where a low level of security is acceptable, and the use is minor and/or ancillary to an associated primary economic unit.

In the case of a temporary use of a road, it is preferable for the local government to issue a permit/license where the authority to do so exists under the local government's local laws.

## **Consideration 7- Use of tenure-based instruments<sup>6</sup>**

### **Would the use of tenure-based tools (e.g. covenants) be appropriate to protect values in land?**

In the case where there are insufficient regulatory controls and a more substantial interest is warranted, a tenure-based instrument such as a covenant should be considered as a way of protecting the relevant values.

Where native title is an issue, a term lease for the same purpose, as well as a relevant covenant is appropriate.

Where native title is not an issue, freehold with a covenant is appropriate. Where a specific statutory entitlement exists (7) or the tenure landscape does not support freehold tenure (for example, offshore islands), a perpetual lease with a covenant (or suitable conditions), is appropriate.

## **Consideration 8 - Most appropriate term<sup>7</sup>**

- Short term
  - Permit (<5 years)

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<sup>5</sup> Values or interests of local significance are schedule 1 community values that are only significant within the boundary of an individual local government area.

<sup>6</sup> An example of a 'specific statutory entitlement' is found in s166(2) of the Land Act which provides for the conversion of a term lease for pastoral purposes only to a perpetual lease.

<sup>7</sup> For the purpose of this practice guideline, 'term' refers to how long an interest in state land is granted.

- Long-term future use not determined; or
  - Temporary authority to use or occupy USL, extending up to 5 years (notwithstanding yearly renewable requirement); or
  - Where a low-level of security is acceptable, and use is generally minor and/or ancillary to an associated primary economic unit (not viable on its own); or
  - No secondary interest allowable, non-transferable interest, or
  - No permanent structural improvements.
- Licence (< 5 years)
    - Long-term future use unlikely to be determined (e.g. a road may need to be re-opened); or
    - Only used as a secondary interest in respect of temporarily closed roads; or
    - Long government to grant according to local laws, only relevant to state when state interest is a primary concern: or
    - Transferable interest; or
    - No permanent structural improvement (other than what is allowable under s. 104(b) of the Land Act).
- Medium term
    - Term lease (5 to 20 years)
      - Long-term future use unlikely to be determined or temporarily deferred – pending allocation to an alternative future use; or
      - Most appropriate term for most commercial and industrial leases – parity with private sector.
- Long term
    - Term Lease (30 to 50 years)
      - Long-term future use likely to be determined; or
      - Where a high-level of security is required; or
      - Generally a significant economic unit on its own; or
      - Provision of essential community infrastructure<sup>8</sup>, but only where the tenure landscape does not support freehold tenure
    - Term Lease (50 to 100 years)
      - Long-term future use likely to be determined; or

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<sup>8</sup> Essential community infrastructure is taken to be works that are essential for the delivery of services by the Commonwealth, state or local governments, statutory authorities and government-owned corporations.

- Where the intended development involves existing improvements that required a high level of investment to which a high level of security is required; or
  - Generally a significant economic unit on its own; or
  - For a significant development<sup>9</sup>; or
  - For a timber plantation.
- Indefinite term
    - Perpetual lease (indefinite term)
      - Where statutory entitlement applies or the tenure landscape does not support freehold tenure (for example, offshore islands); or
      - Long-term future use is determined; or
      - Where a high level of security is required; or
      - Generally a significant economic unit on its own; or
      - Native title is not an issue; or
      - No community values which warrant maintenance of state oversight; or
      - Not appropriate for developments below HWM or in strata.
    - Reserve (generally indefinite term)<sup>10</sup>
      - Long-term future use is determined; or
      - Overriding community values requiring direct state/local government control; or
      - Generally indefinite term, with some exceptions such as strategic land management or where community needs/values have changed.
    - Freehold (indefinite term)
      - Long-term future use is determined; or
      - Where a high level of security is required; or
      - Generally, a significant economic unit on its own; or
      - Native title is not an issue; or
      - No community values which warrant maintenance of state oversight.

## **Consideration 9 - Most appropriate manager**

Appointing an appropriate manager is a critical aspect of the allocation process and is reflected in the 'Development' principle in the object of the Land Act as follows:

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<sup>9</sup> The meaning of significant development lease is defined in s128 of the Land Act.

<sup>10</sup> Reserves are generally indefinite, except in some cases such as strategic land management (or similar purpose), where an expectation of a limited time period may be appropriate.

*When land is made available, allocation (must be) to persons who will facilitate its most appropriate use that supports the economic, social and physical wellbeing of the people of Queensland.*

Matters to consider when appointing a manager include:

## **Specific statutory considerations**

### **Primary considerations**

- Objects of the Act (s4 'Development') – when land is made available, allocation to persons who will facilitate its most appropriate use that supports the economic, social and physical wellbeing of the people of Queensland.
- Duty of care provision (s199) – all leases, licences, and permits are subject to the condition that the lessee, licensee or permittee has the responsibility for the duty of care for the land.
- Priority criteria (s123) – certain persons have 'priority' in obtaining an interest in state land.
- Lease for a significant development (s129) – Minister to obtain an independent assessment of the applicants' financial and managerial capabilities.
- Lease renewal criteria (s159) – the Minister must consider the interests of the existing lessee before making a decision to offer to renew a lease. It also states that existing degradation and whether lease conditions have been complied with are relevant considerations.
- Lease conversion criteria (s167) – existing degradation and whether lease conditions have been complied with, are relevant considerations.
- Remedial action notice (s214) – the Minister may issue a remedial action notice to take remedial action where a lease is being used beyond its sustainable capacity, where a lessee is not fulfilling a duty of care, where serious degradation is occurring.

### **Other statutory considerations**

- S35 – the way land is granted in trust by the Governor in Council must not be inconsistent with the community purpose for which it was granted.
- S38 – the Governor in Council may cancel a DOGIT if the affairs of the trust are not properly managed in the public interest or, if it is not used in a way that is consistent with the purpose of the trust.
- S65 – the Minister may cancel a trustee lease or permit for non-compliance with conditions.
- S108 – the Minister may sell a permanently closed road which is an inadequate area) to an adjoining owner.
- S133 – a person is eligible for an additional area if they have demonstrated a duty of care in the management of their land and is financially capable of fulfilling the conditions of the lease.
- S142 – minors cannot apply to buy or hold land under the Land Act.
- S143 – departmental officers cannot hold land without approval.
- S206 – personal residence conditions apply to leases obtained in a ballot, or where the Ministers considers they should apply.

- S209 – a lease, license and permit may be subject to a performance security for failure to comply with conditions.
- S234 – lease may be forfeited for non-payment of rent, breach of conditions.

### **Purpose for which the state land will be managed**

The purpose of which the state land will be managed is the primary tenure consideration and reflects and nature of the values present on the land and its intrinsic capability. Values vary from: environmental, aesthetic/scenic; primary production; commercial/industrial/residential; social/community; cultural (indigenous/European): indigenous. The most appropriate manager is one who is best able to protect the specific value(s) present on the state land.

### **Duty of care**

The most appropriate manager is one who has the greatest capacity and willingness to fulfill the duty of care to the land. Where doubts exist, it is the responsibility of the Minister's delegate to take steps to ensure that a particular applicant is capable of fulfilling the duty of care.

### **Other interests**

In most cases, there are a number of interests/values in the land, other than the primary purpose for which the land is being allocated. These interests may include: environmental, productive, community, indigenous interest/values, existing secondary legal interests (easements, covenants, profit a prendre, etc.). The most appropriate manager is one who will protect other interests in land, as well as not detrimentally affect future alternative uses (particularly if the proposed tenure is a short-term interest).

### **Secondary interest (sub lease, trustee lease)**

A grantee of a secondary interest must be prepared not to impinge on the primary tenure. In the case of secondary lease, the lessee of the primary tenure is still responsible for maintaining the lease conditions.

### **Multiple interests/values**

In some cases there are multiple (community) interests/values in land and it may be decided to allocate land to two or more parties – by way of joint trusteeship, or other tenure options. In these cases, the most appropriate managers are they who have a responsibility for managing very high values/interests of state/regional/local significance or Indigenous significance and are willing to work collaboratively with another manager to protect all of the values in the land.

### **Accountability**

The most appropriate manager is one who must be willing and able to be accountable for complying with the purpose of the grant, conditions and other statutory responsibilities.

## Capacity

The most appropriate manager is capable of fulfilling their:

- financial responsibilities (such as rental, market consideration and/or performance bond (where required); and/or
- conditions of a grant; and/or
- Land Management Agreement (in respect of agreed land management arrangements).

## Where allocation to most appropriate use and/or most appropriate manager is not possible.

Sometimes it is not possible to allocate land to its most appropriate use because an appropriate manager cannot be appointed. This is particularly the case in relation to securing an appropriate trustee for a proposed reserve to protect state land with values of high state/regional or local significance.

If an appropriate manager cannot be appointed, consideration should be given to allocating a short-term interest in the land, providing there is no risk of detrimentally affecting the values requiring protection. In this case, the temporary manager is responsible for the maintenance of the land. If allocation to a short-term interest is not possible, the land must remain as USL. In this case, the department becomes the responsible agency for the management of these areas – especially in respect of fire, pests and general land condition.

In both cases, the land should be periodically evaluated until such time that it can be appropriately allocated.

The department should not be considered as a trustee of a reserve. While the department is responsible for maintenance of USL, it is not the lead agency for managing and protecting values of high state/regional significance. It has no resources in relation to maintenance and physical development of a reserve, not the ‘capability’ (human, environmental, indigenous, heritage, cultural heritage, etc.)

## Legislation

*Aboriginal Land Act 1991*

*Judicial Review Act 1991*

*Land Act 1994*

## Related documents

Operational policy – [Conversion of leasehold tenure \(SLM/2013/397 = PUX/952/121\)](#)

Guideline – [Permit to occupy \(SLM/2013/482 = PUX/952/118\)](#)

Operational policy – [Leases over reserves \(SLM/2013/495 = PUX/901/210\)](#)

Procedure – [Allocation of land to state government departments and constructing authorities \(SLM/2013/418 = PUX/952/088\)](#)

Guideline – [Exchange of state land for native title interests \(SLM/2013/361 = PUX/952/091\)](#)

Procedure – [Undertaking a land evaluation report prior to lease renewal, lease conversion and state land allocation \(SLM/2013/577 = PUX/952/094\)](#)

Guideline – [Tenure based options for USL in native title claims and Indigenous land use agreements \(SLM/2013/581 = PUX/952/098\)](#)

Guideline – [Allocating most appropriate use and tenure of state land in coastal areas \(SLM/2013/420 = PUX/952/096\)](#)

## 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.

## Further information

- Contact your nearest business centre ([https://www.resources.qld.gov.au/?contact=state\\_land](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).