

Guideline

SLM/2013/581
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Tenure based options for unallocated state land in native title claims and Indigenous land use agreements

Purpose

To guide consideration of the use of appropriate land tenures:

- a) in the resolution of native title claims through negotiation; and
- b) to facilitate the Indigenous land use agreement (Agreement) negotiations.

Synopsis - general approach to tenure selection for unallocated state land (USL) in the resolution of native title claims and Agreement negotiations where following a most appropriate use (MAU) assessment it is decided to make tenure available to a native title party.

Rationale

There is a trend of tenure-based outcomes sought by both state negotiators of LNTS and native title parties to resolve native title claims and to facilitate Agreement negotiations.

The ability of the state to make areas of land available under appropriate tenure can be a very useful tool for the state negotiator to resolve native title claims and to reach an agreement to proceed by way of an Agreement.

Before making a decision about tenure, a MAU assessment under s. 16 of the Land Act must be carried out to assess the MAU and tenure for the land taking into account state, regional and local government strategies and policies and the object of the Land Act, (with special consideration given to Cape York agreement land).

These policies and objectives provide that the land must be managed for the benefit of the people of Queensland having regard to the principles of sustainability, evaluation, development, community purpose, protection, consultation and administration. The MAU assessment ensures that the aspirations of the Indigenous community, including the native title party and the values inherent in the land are considered.

The MAU assessment also ensures that when land tenure is granted to native title parties, the tenure chosen provides the best alignment between their aspirations and the values inherent in the land. Priority must also be considered prior to a tenure decision.

All tenures available under the Land Act including permits to occupy, esplanades and dedicated roads, term leases, reserves for various community purposes and freehold grants; as well as freehold grants under the ALA and TSILA should be considered when selecting the most appropriate tenure.

[Allocating Most Appropriate Use and Tenure of State Land in Coastal Areas \(PUX/952/096 =](#)

[SLM/2013/420](#)) also specifically deals with allocation of land on and near the coast.

[Exchange of State land for native title interests \(SLM/2013/361 = PUX/952/091\)](#) provides for USL exchanges involving native title and is underpinned by tenure outcomes to address native title issues. Note: following a MAU, land may be required to be retained by the state for allocation for other community needs e.g. for residential/commercial development of a town; an esplanade or suitable community purpose for coastal management; community recreational use.

Rationale for preferring tenure-based outcomes

Tenure-based outcomes offer significant advantages.

Greater rights and interests in land.

Negotiations with native title parties centred on tenure-based outcomes are more likely to produce practical and attractive outcomes for the native title parties i.e. a tenure-based approach may yield greater rights than a determination of native title without tenure, particularly in the case of a non-exclusive native title determination.

Greater certainty of rights and interests in land.

Existing non-exclusive determinations that have not included tenure have revealed uncertainties in respect of:

- a) The ability of native title parties to be recognised in state laws governing the use and development of land such as the *Planning Act 2016*, which do not recognise native title parties as land owners;
- b) Issues associated with lawful public access and management of trespass; and
- c) Responsibilities for maintaining the land free of pest plants and animals.

Flexibility to match the best tenure to the values inherent in the land and the aspirations of the native title parties.

Being able to choose from the full range of land tenures offers the flexibility to match the best tenure to the values inherent in the land and the aspirations of the native title parties. For example, if a particular native title party wishes to pursue a commercial venture, it is important that the land chosen is best suited to the intended use and that the tenure is best suited to this intended venture (such as freehold or leasehold which are proven tenures for commercial investment).

Effective land administration.

Certainty of interests created in land, including associated rights and responsibilities, is the cornerstone of good land administration-underpinning both the economy and protection of the values inherent in the land. Tenure-based solutions align with this.

Guideline

Section 404 of the Land Act provides in essence, that a person cannot use or occupy USL nor enclose, build upon or place or maintain any structure on or clear, dig or cultivate USL unless that person has a lawful excuse. A native title right of occupation or use of the land may provide such a lawful excuse.

In the context of where the state is seeking to resolve a native title claim through negotiation, or negotiate an Agreement and native title rights exist (or where the state is prepared to recognise such rights), it is appropriate to consider whether a tenure should be granted over the land. In other cases a native title parties' expectation to access and use USL for certain purposes may not be supported by native title rights (that the state will agree to recognise) and can only otherwise be met through the grant of land tenure by the state.

For situations where native title has been historically extinguished or a native title party to the Agreement holds or claims to hold native title rights and interests to the land, there is a provision for USL to be granted without competition to a person or corporation to be held on trust for the identified Aboriginal people or Torres Strait Islanders (the particulars of the USL to be granted, and to whom, must be identified in the Agreement).

There are four major tenure options to consider when deciding the appropriate tenure(s) for a particular case. They are freehold, ALA/TSILA freehold grants, leasehold or reserve.

The tenure will be influenced by the negotiations themselves which are generally voluntary and require the state and the native title party to ultimately agree about the tenure if there is to be any conclusion.

Further, in any decisions on most appropriate tenure and use, regard is required to be made to the following policy documents of the Department of Natural Resources, Mines and Energy (the department):

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

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

Current USL in a freehold environment

When dealing with USL located in a freehold environment and where freehold tenure would be the preferred tenure e.g. to provide for housing and business opportunities for a native title party (if native title was not an issue), it is preferable to issue a freehold grant by way of exchange (see [Exchange of State land for native title interests SLM/2013/361 = PUX/952/091](#)).

For freehold grants obtained outside of the exchange of state land for native title interests the native title party will need to meet any administrative costs (such as survey) and pay the purchase price for the land in accordance with normal practice.

When a grant of USL without competition has been identified in an Agreement, the purchase price and survey costs will be determined by the Agreement or as prescribed by regulation.

Under the *Duties Act 2001*, relief from transfer duty may be provided to native title in respect of land transactions undertaken for the sole purpose of giving effect to a registered Agreement and expressly contemplated by the Agreement, in settlement of a native title claim registered on the Register of Native Title Claims.

As a general position freehold grants under the ALA and the TSILA are usually not suitable tenures to issue in a freehold environment.

Current USL in or near Indigenous communities (where DOGIT tenures predominate)

Grants of ALA or TSILA freehold (restricted) are the preferred tenure generally in the vicinity of existing Indigenous communities. Native title does not need to be surrendered for an ALA or TSILA freehold grant.

Current USL outside of Indigenous communities where that USL has high intrinsic value to the Indigenous community.

In areas of high Indigenous cultural heritage value for Indigenous communities, a reserve (for Aboriginal or Torres Strait Islander purposes) is appropriate. A reserve of this type could reasonably accommodate a caretaker's residence/outstation development. Aboriginal or Torres Strait Islanders reserves are however not a suitable tenure where the primary purpose is long-term residential/housing or commercial purposes. An ALA/TSILA freehold grant may also be appropriate in some circumstances.

Current USL outside of Indigenous communities where that USL has high intrinsic community value as well as high intrinsic value to the Indigenous community

When dealing with land outside Indigenous communities that has high intrinsic value beyond the Indigenous community (i.e. community purposes recognised under the Land Act) as well as high intrinsic value to the Indigenous community, some form of reserve tenure under the Land Act or NCA, is usually appropriate. The exact nature of the reserve and its trustee/management arrangements needs to be worked through on a case-by-case basis.

The Department of Environment and Science (specifically Tenure Services) should be included in negotiations where significant environmental values exist. In these circumstances, a range of trustee arrangements may be considered, including joint trustee options (such as between the native title party and Tenure Services).

Other current USL

For areas outside of Indigenous communities and areas where freehold would not normally be applied, ALA and TSILA freehold grants are usually appropriate, particularly where these areas adjoin, or are in reasonable proximity to, Indigenous communities.

Leasehold tenure (a term lease) may also be appropriate where the native title party has expressed an interest in this form of tenure.

Interim or the staging of tenures over current USL

Staging tenures over current USL may be considered as an interim measure and may be applied in the following circumstances to support Indigenous aspirations:

- a) Where a MAU and tenure assessment has revealed that a freehold grant under the ALA or TSILA is appropriate and the native title parties involved want an interim tenure to the land; a reserve for Aboriginal purposes or Torres Strait Islander purposes or cultural purposes may

be appropriate. For example, an existing and established organisation (such as a Native Title Representative Body) may need to hold trusteeship until such time as the ALA or TSILA processes have resolved future trustee arrangements; or

- b) An interim reserve may be established under Tenure Services trusteeship for purposes such as environmental, cultural and strategic land management in circumstances where a lease which has been purchased by Tenure Services for national park purposes becomes USL while Tenure Services establishes management and tenure arrangements with the native title parties under the NCA.

Attachment 1 provides a guide for tenure selection, setting out an analysis of all the available tenure options.

Definitions

ALA	<i>Aboriginal Land Act 1991</i> DOGIT -deed of grant in trust "freehold environment" - where the majority of the land near or in the vicinity is freehold land "freehold grant" other than when used in the context of the ALA or TSILA means a grant of freehold under the <i>Land Act 1994</i>
Agreement	registered Indigenous land use agreement
LNTS	Land & Native Title Services
Land Act	<i>Land Act 1994</i>
MAU	most appropriate use
"native title party"	includes a claimant, registered claimant, prescribed body corporate and determined holder of native title
NCA	<i>Nature Conservation Act 1992</i>
NEP	non extinguishment principle
The department	Department of Natural Resources, Mines and Energy
NTA	<i>Native Title Act 1993 (Cth)</i>
SLAM	State Land Asset Management of DNRME
TSILA	<i>Torres Strait Island Land Act 1991</i>
USL	unallocated state land.

Legislation

Land Act 1994

Aboriginal Land Act 1991

Torres Strait Islander Land Act 1991

Native Title Act 1993

Nature Conservation Act 1992

Planning Act 2016

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.

Related documents

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

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

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

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

Approval

Position	Name	Date
Director, Land Services	Anita Haenfler	12 May 2020

Version history

Version	Effective Date	Comments
1.00	14/02/2005	Endorsed
1.1	29/06/2005	Conversion Project -New WORD/XML template
2	19/12/2008	Reviewed and updated
2.2	11/02/2009	Amended status of Notification from "NRW only" to "Public access"
2.03	13/05/2014	Updated to new DNRM template
2.04	22/6/2016	Updated to new DNRM template
3.00	12/05/2020	Updated to include amendments due to NROLA (GDA2020) effective 26/02/2020

Further information

- Contact your nearest business centre (https://www.dnrme.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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Attachment 1

Tenure based options for unallocated state land (USL) in native title claims and Indigenous land use agreement negotiations where following a MAU it is decided to make tenure available to a native title party

Note: following a MAU, land may be required to be retained by the state for allocation for other community needs e.g. for residential/commercial development of a town; an esplanade or suitable community purpose for coastal management; community recreational use.

Tenure Option	Implications for Native title determinations
Issue Permit to Occupy	Occupancy short term occupancy arrangement, NEP would otherwise apply under terms of an Agreement or by the use of Subdivision L of the NTA (not available post determination). Rights –does not provide ongoing certainty about rights as permit can be cancelled at short notice. Rent is payable. MAU– state may have some residual interest in the USL and the MAU still requires implementation. Evidence of resource entitlement – the department (would generally refuse, particularly if structures are proposed). Structures not appropriate for authorisation of permanent structures, living areas, etc. Indigenous aspirations – not suitable as a long term option, interim measure only.
Set apart as a Reserve for Aboriginal or Torres Strait Islander (and possibly other Community purposes) and Appoint Indigenous trustees	Occupancy Interim tenure for establishing an outstation where ALA/TSILA grants are proposed in the long term-NEP would otherwise apply under terms of Agreement or by the use of Subdivision L of the NTA (not available post determination). Rights may increase certainty about rights through the appointment of native title parties as trustees. However, a reserve may be revoked by Minister and trustee appointments cancelled. MAU-state may have some remaining interests in the USL and the MAU still requires implementation. Evidence of resource entitlement – the department (although it is expected that a reserve would not be developed in most instances). Structures not appropriate for authorisation of permanent structures associated with living areas, etc. Although, structures associated with outstations purposes are appropriate provided the reserve is not done under Subdivision L of the NTA. Indigenous aspirations –Suitable as a long term option for environmental and Indigenous cultural heritage protection only. Preferred tenure for the protection of environmental and/or cultural heritage values. Also suitable as an interim tenure, where a more permanent tenure is intended in the future.
Issue Term Lease Note: the Land Act does not support the issue of a perpetual lease	Occupancy long term occupancy, NEP would apply under terms of Agreement or alternatively native title may be surrendered under an Agreement. Rights will increase certainty about rights, eliminates other potentially competing interests. Rent is payable. MAU – state has decided MAU, low to medium intrinsic community values, no land use conflicts, no public access requirements, and regulatory protection adequate. Evidence of resource entitlement – the department. Structures appropriate for authorisation of permanent structures, living areas, grazing enterprise, mortgage, proposed arrangements to sublet to other parties, etc. Indigenous aspirations –suitable as a long term option but rent is payable.
Grant of freehold under Land Act	Occupancy secures tenure and highest level of certainty about rights, native title must be surrendered under an Agreement. Rights will increase certainty about rights, eliminates other potentially competing interests. A purchase price may be payable. MAU – state has decided MAU, low to medium intrinsic community values, no land use conflicts, no public access requirements, and regulatory protection adequate. Owner’s consent – as required under the <i>Planning Act 2016</i> – no authorisation needed by the department Indigenous aspirations – provides maximum flexibility for long term occupancy, development, mortgage, subleasing or disposal. Preferred tenure in a freehold environment.
Grant of freehold under the ALA or TSILA	Occupancy secure tenure and highest level of certainty about rights – native title not affected by the grant. Rights will increase certainty about rights, eliminates other potentially competing interests and recognises those that can coexist with this tenure (e.g. existing interests as defined under ALA or TSILA). Purchase no purchase price is payable. MAU – state has decided MAU, land has low intrinsic community values, is resilient and in good condition, no public access requirements, adequately regulatory protection, no conflicting interests. Owner’s consent – as required under the <i>Planning Act 2016</i> , if applies Structures – no authorisation needed by the department if effected by holders of the grant. Indigenous aspirations – provides maximum security for long term Indigenous occupancy, development for Indigenous purposes and management of cultural heritage and native title. Cannot be mortgaged, leased or sold. Effect on Native Title native title not affected by a grant under ALA or TSILA. However native tile may need to be considered by the trustees in their subsequent actions on the freehold grant Preferred tenure for Indigenous communities where DOGITs predominate.