Department of Natural Resources, Mines and Energy

Operational policy

Allocation of land in priority in terms of the *Land Act 1994*

SLM/2013/499

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Queensland Government

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Approval

Position	Name	Date
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1 Purpose

To provide guidelines to ensure a consistent approach to the interpretation of the sections of the *Land Act 1994* (Land Act) (Chapter 4, Part 1, Division 2) dealing with the grant of an interest in land without competition (i.e. in priority).

2 Rationale

The object of the Land Act (section 4) and the principles enunciated therein are highly relevant to consideration of applications for priority leasing or sale of state land assets. The priority provisions of the Land Act were put in place following community concerns about accountability in dealing with these valuable state owned assets. This policy gives further guidance on the application of the legislation. For further guidance for dealing with local government in priority, refer to the Allocation Provisions in the Procedure section of 'Allocation of land to state government departments and constructing authorities' (SLM/2013/418 = PUX/952/088).

3 Policy

3.1 Explanation of legislative provisions

Sections 120A to 131 of the Land Act deal with making land available without competition, that is, in priority. The main sections for consideration are 121, 122,123 and 123A.

Sections 121 and 122 share the same requirement that the decision to allocate the land as a lease or as a deed of grant (freehold) must be supported by a section 16 Land Act evaluation of the most appropriate tenure and use of the land.

Setting aside the application of sections 121 and 122 for grants of land to the state or a constructing authority, the differences between these two sections are:

a) only a lease may be issued; if the land is needed for a public purpose (this provision does not apply to the state or a local government)
b) only a lease may be issued if the land is not needed for a public purpose and exposure to public competition is deemed inappropriate
c) a lease or a deed of grant may be issued if the land is not needed for a public purpose and if one or more of the priority criteria (s.123) is satisfied.

Section 123A of the Land Act deals with granting unallocated state land without competition under Indigenous land use agreements (where the State is a party to the Indigenous land use agreement) to a person as trustee of a trust identified or identifiable as Aboriginal or Torres Strait Islander.

In providing for the grant of land, section 123A allows for the grant without competition, to the people who would have otherwise held native title, but for historical extinguishment of their native title rights and interests.

The particulars of the land to be granted, and to whom, must be identified in an Indigenous land use agreement.

The purchase price will be specified in the Indigenous land use agreement with the State of Queensland. Otherwise, it will be as prescribed in the Land Regulation.

3.2 Application of legislative provisions

3.2.1 Section 121 Leases of unallocated state land

Section 121 deals with the grant of leasehold tenure, which is usually applied to land where:

- the state wishes to retain some control over existing or future land use to protect the public interest; or
- the state wishes to ensure that development of land occurs in a timely manner; or
- the surrounding tenure landscape does not support freehold.

Legislation-

121 Leases of unallocated State land

(1) A lease of unallocated State land may be granted without competition if—

(a) the land is needed for a public purpose; or

(b) the Minister decides—

(i) the land is not needed for a public purpose; and

(ii) the intended use is the most appropriate use of the land; and

(iii) exposure to public competition is inappropriate or 1 or more of the priority criteria apply.

(2) To remove any doubt, it is declared that a lease may be granted to the State, without competition.

Taking each part of section 121, subsection (1) in turn:

Subsection (1)(a)

This provision may be applied where the most appropriate use evaluation of the land identifies a use that is consistent with a public purpose and it is appropriate to manage the land under leasehold tenure. Any lease issued for a public purpose must be suitably conditioned to ensure the land is used for that public purpose.

Subsection (1)(b)

This covers other situations, but is dependent upon satisfaction of the particular requirements of clauses (i) to (iii). The requirements of all three clauses must be satisfied before the Minister may validly decide the land can be granted without competition.

i. To apply Clause (i) of subsection 1(b) the land must not be needed for a public purpose; a position that must be supported by the section 16 Land Act evaluation.
ii. Under Clause (ii) of subsection (1)(b) the Minister must be satisfied that the intended use, i.e. the use for which the application is made, is consistent with the findings of the Land Act section 16 most appropriate use evaluation of the land.
iii. Clause (iii) of subsection (1)(b) has two parts, either of which must be satisfied.

Taking each part in turn:

Subsection (1)(b)(iii)

The initial part of this subsection **(1)(b)(iii)** deals with 'exposure to public competition is inappropriate'.

Compliance with this criterion could be satisfied in the following cases:

- The applicant has already been through a competitive public process managed by a state government agency, such as the Co-ordinator General, the Department of State Development, Manufacturing, Infrastructure and Planning or Natural Resources, Mines and Energy to identify the preferred lessee.
- Where the Coordinator-General has declared the intended use a 'significant project' in terms of the *State Development and Public Works Organisational Act 1971*.
- Where a significant development* has been approved on other nearby land and the unallocated State Land (USL) applied for is required to provide essential ancillary services to support the development; for example land required for employee housing. The issue of a lease in this instance is to ensure that development of land for essential ancillary services occurs in a timely manner.

[*Significant development. Within the context of this criteria, the term significant development is defined as a development that will:

i. involve a high level of investment requiring extensive development; and

ii. have a significant impact on the environment or the economic and social development of a locality, a region or the state. (For example as a new power station or a new coal mine)]

A community need (that is not a public purpose) is able to be met, for example:

- a lease for a privately run non-profit community facility previously out-sourced by local or state government (e.g. respite facilities, disability services) and whose application for the land has the support of the state or local government agency to who's outputs the applicant is contributing; or
- a lease for a service, the provision of which is in the public interest, but it is not a public purpose. Examples are sporting facilities and community clubs that operate as 'not for profit' organisations.

The final part of this subsection (1)(b)(iii) deals with 'one or more of the priority criteria apply'.

See the section below dealing with Section 123 Priority Criteria for satisfaction of the priority criteria.

Subsection (2)

This subsection makes provision for the state to be granted a lease over USL without competition. Application of this subsection will need to be supported by the most appropriate tenure and use evaluation made under section 16 Land Act.

Note: The definition of 'the state' is taken to be a state government agency who's Administrative Unit is named in the most recent Order in Council - Administrative Arrangements Order found on the Department of the Premier and Cabinet website: http://www.premiers.qld.gov.au

Notwithstanding the above, any legislative authority under an Act other than the Land Act that directs the parcel in question should be granted to 'the state' as a lease is not dependent upon the support given by sections 16 and 121(2) of the Land Act. For example, section 240 of the *Transport Infrastructure Act 1994*, directs that where land is acquired for a rail transport corridor and such land becomes USL, then the land must be leased to the state.

3.2.2 Section 122 Deeds of grant of unallocated state land

Section 122 deals with the grant of freehold tenure, which is usually applied to land where the state does not wish to retain some control over existing or future land use and the surrounding tenure landscape supports freehold.

The grant of freehold tenure is also the preferred tenure for allocation of land to a state or local government where such authority requires the land for service delivery (for example, police station, emergency services, school, library, waste water treatment plant, depot).

Legislation

1. *A deed of grant of unallocated state land may be granted without competition if the grant is to the Urban Land Development Authority or if the Minister decides:*
    a) *the land is not needed for a public purpose; and*
    b) *the intended use is the most appropriate use of the land; and*
    c) *1 or more of the priority criteria apply.*
2. *A deed of grant of unallocated state land may be granted without competition to a constructing authority if the Minister decides the land is needed for a public purpose.*
3. *The Minister must decide the purchase price for the land in the way prescribed by Regulation.*

Note: a constructing authority includes the state.

Subsection (1)(a) & (b)

The details for the application of these criteria are the same as for section 121(1)(b)(i) and (ii).

Note: a priority deed of grant may issue to the Economic Development Queensland or land that has become USL following revocation under section 33(1)(d) of the Land Act relating to a reserve, and cancellation under section 38(1)(e) of the Land Act relating to a deed of grant in trust.

Subsection 1(c)

For direction on the application of subsection 1(c), see the clauses below under 'Section 123 Priority criteria'.

Subsection (2)

This subsection provides for a deed of grant to be issued to a constructing authority which includes the state if the Minister is satisfied:

- the section 16 Land Act evaluation has determined that the most appropriate use for the land is a public purpose and the most appropriate tenure is freehold. In addition, the Minister must

consider the constructing authority is the most appropriate owner for the proposed use of the land.

- that in conjunction with section 33(c) Land Act (if part of an operational reserve) freehold tenure would be more appropriate for the purpose of a reserve for which the land is used. (e.g. a Reserve for Local Government - Depot).

A priority deed of grant may issue to the state over rail land and a section 16 Land Act does not apply.

Note: for reference, a trustee may also apply for a priority deed of grant over the whole of an operational reserve in terms of section 34I of the Land Act (a section 16 Land Act assessment applies).

Subsection (3)

This subsection requires the Minister to decide the purchase price for the land in a way prescribed by Regulation. The Minister's decision should be consistent with the Queensland Government Land Transaction Policy, which requires that unless specific approval of the Treasurer is obtained to the contrary, the purchase price for land offered for sale in priority must be equivalent to the market value of the land.

For sale of operational reserve land to a local government, see 'Revenue share policy for local government operational trust land' (SLM/2013/579 = PUX901/211)

Note: The definition of 'the state' is taken to be a state government agency who's Administrative Unit is named in the most recent Order in Council - Administrative Arrangements Order found on the Department of the Premier and Cabinet website: http://www.premiers.qld.gov.au

Notwithstanding the above, where legislative authority is given under an Act other than the Land Act for land to be granted to 'the state' in fee simple (freehold) such action is not dependent upon the support given by section 122 (2) of the Land Act. For example, section 23 of the *Queensland Treasury Corporation Act 1988* supports that state land acquired by the Queensland Treasury Corporation (Corporation) (which represents the state) shall be granted to the Corporation in fee simple. The deed of grant is issued under the Land Act, but the authority for the issue is the *Queensland Treasury Corporation Act 1988*.

3.2.3 Section 123 priority criteria

Section 123 establishes the priority criteria that apply to s.121 and s.122 Land Act. The priority criteria are:

Subsection (a) - the applicant is an adjoining registered owner or lessee, and selling or leasing to anyone else would be considered inequitable:

This criterion applies to situations where leasing or selling the land to someone other than an adjoining registered owner or lessee would interfere with an existing right on the applicant's adjoining land.

For example, those situations where allocation of the land to a person other than the adjoining registered owner or lessee would interfere with the applicant's riparian rights or practical access to the applicant's land.

Other examples may include:

i. where the land applied for cannot stand alone as a viable lot; or where the land applied for is viable as a separate lot but there is no demand or competition for the land and from a land planning perspective the most appropriate use is for allocation and amalgamation with the applicants land; or

ii. where the applicant controls substantial property holdings adjoining the USL and the applicant proposes a major redevelopment on the applicant's land and the USL, which from a land planning perspective will provide an improved and holistic outcome. It is envisaged that the area of the USL parcel would contribute to no more than 20% of the total redevelopment area and an offer to allocate the USL in this instance would be conditional on the applicant gaining the required development approvals before tenure is issued.

Subsection (b) - no other persons are likely to be interested in obtaining the land;

This criterion may be applied to the following situations:

1. where a recent offer of the land (within the last 2 years and there is no evidence of an increase in demand for property in the area) by public competition (i.e. by auction, tender or ballot) has failed to achieve a sale in a particular locality;

2. where a number of vacant allotments similar to the applied for land existing in a town and little or no interest has been shown in those allotments by either the public or by government agencies (including the local government);

3. where selling or leasing the land is not viable in the open market place. For example, the combined cost of preparing the land for sale and actually selling the land exceeds the value of the land. However, in this example, the interests of other landholders in the immediate area are not to be adversely affected by the sale or lease and the applicant agrees to meet all costs associated with the sale, such as the cost of survey.

For 2 and 3 above the same principles apply as indicated under Remote/Small Townships within this document.

Subsection (c) - the applicant held a significant interest in the land before it became unallocated state land; (example of significant interest - a deed of grant in trust or a long term lease).

As mentioned in the legislation, an example of significant interest would be a deed of grant in trust or a long term lease. A long term lease could be regarded as a lease issued for more than twenty years that would be sold at close to freehold value.

To remove doubt a significant interest in land does not include a Permit to Occupy or an Occupation License. Also, interests under the *Mineral Resources Act 1989* are not interests in land and do not constitute a long term lease for the purposes of section 123(c) Land Act.

This subsection is not designed to work in conjunction with section 167(1)(h) Land Act. Land excluded from a converted tenure (and, for that matter, a renewed lease) is unallocated state land in its truest sense.

It could be appropriate though to apply subsection 123(c) in instances where part of a lease has a more appropriate use from a land planning perspective and the lessee is prepared to surrender this part of the lease, the definition of which satisfies a long term lease. This situation can arise when the part in question is small relative to the parent lease (less than 10% of the area of the parent parcel). In considering section 123(c) the value of the parent lease must reflect the value of the lease for the purpose for which it was issued and not its development potential if it were held under freehold title. If a lease is within the last say 5 years of its term it would be inappropriate to apply section 123(c) as the land planning issues can be better dealt with through the lease renewal process.

If it is necessary to also ensure delivery of some other highly desirable community outcomes, then it may be appropriate to utilise a development style lease over the proposed development area, say for up to 5 years, to ensure such outcomes prior to the issue of a deed.

However, to reduce the potential for speculation in such leases, consideration should be given to requiring a substantial upfront payment of perhaps 50% of the land's unimproved value. It is not appropriate to issue such leases to, in any way, subsidise the lessee's proposed development.

Subsection (d) - there is no dedicated access and the only practical access is through the applicant's land.

This covers the situation where the land applied for is landlocked by the applicant's land.

3.2.4 Section 123A Deeds of grant of unallocated state land under Indigenous land use agreements

Section 123A may be applied where the native title holder does not meet the priority criteria under section 123. This applies to situations where native title rights and interests have been historically extinguished prior to the native title party holding or claiming to hold those interests in the land.

Subsection (1) lists the criteria for using section 123A:

(a) the state is a party to the Indigenous land use agreement; and

(b) the Indigenous land use agreement provides for the grant of unallocated state land to a person as trustee of a trust, the beneficiaries which are identified or identified as Aboriginal or Torres Strait Islander people; and

(c) a native title party to the Indigenous land use agreement holds or claims to hold native title rights and interests in relation to the land or would have held native title rights and interests in relation to the land but for any prior extinguishment of those native title rights and interests.

Subsection (2) states that a deed of grant of the land may be granted to the person without competition.

Subsection (3) details that the purchase price for the land is:

(a) if consideration is provided for under the Indigenous land use agreement – that consideration; or

(b) otherwise – the consideration decided by the Minister in the way prescribed by regulation.

Subsection (4) explains that the definition of a native title party is the same as defined in the *Native Title Act 1993 (Cwlth).*

Subsection (5) defines the meaning of a native title party, in relation to an Indigenous land use agreement as:

(a) a registered native title body corporate; or

(b) a registered native title claimant; or

(c) a person who claims to hold native title in relation to land or waters in the area of the Indigenous land use agreement.

3.3 Specific occasions when priority may be granted

Sections 124 to 127 Land Act describe specific circumstances when priority may be granted, namely:

3.3.1 Section 124 - Leases of state forests and national parks

If land has been surrendered by a person and has been reserved as state forest or dedicated as national park, the person may be granted, without competition, a lease over all or part of the forest or park. This would generally apply as a result of the area being surrendered from a lease as part of a conversion or renewal action.

However, a lease in priority under this section 124 should only be considered if the lessee was paid for the surrendered land, and the issue of a lease was part of the terms of that surrender.

Otherwise, the priority provisions of the Land Act and this policy would need to be considered.

(i.e. to issue a lease in priority when the lessee has been paid for the land, unless the terms of the payment included the issue of a lease, would be inappropriate as the lessee has already been "compensated" for the land).

3.3.2 Section 125 - Deeds of grant in trust and leases over reserves

1. A deed of grant in trust may be granted without competition. This is because it can only be granted for a community purpose. The section 16 Land Act evaluation must assess that the land is needed for a community purpose and the most appropriate tenure is a deed of grant in trust, rather than a reserve – see “Creation of Trust Land” (PUX/901/207 = SLM/2013/479) for guidance when deciding on the most allocation tenure for land that is required for community purpose trust land.
2. A lease of a reserve may be granted without competition. This would generally apply similarly to section 124 as a result of the area being surrendered from a lease as part of a conversion or renewal action, and the same requirements when considering priority as outlined for section 124 would apply.

3.3.3 Section 126 - Strategic port land

If land above high-water mark is needed as strategic port land for a port authority, the port authority may be given, without competition, either a lease or deed of grant.

However, if land below high-water mark is needed as strategic port land for a port authority, the port authority may be given, without competition, only a lease.

3.3.4 Section 127 - Reclaimed land

If a person has reclaimed land under the authority of an Act, the Governor in Council may issue to the person, without competition, a deed of grant over all or part of the land. The Minister may issue to the person, without competition, a lease over all or part of the land.

3.3.5 Sections 128 to 130 deal with leases for significant development

In terms of section 128 a significant development is a development that will:

a) have a significant impact on the environment or the economic and social development of a locality, a region or the state; and
b) involve a high level of investment, a substantial development period and lease conditions requiring extensive development.

Unlike sections 124 to 127 the Land Act does not state explicitly that a lease for development purposes may be issued without competition. However as section 129 (1) states: "*If an application for a lease under this division is for a significant development*…", and 'this division' referred to is titled 'Interests in land available without competition' there is no doubt the legislation provides for the grant of leases without competition.

Further evidence of this intent is found in section 245 of the Land Act, which states: "*If a lease issued without competition for development purposes is forfeited, all project plans, feasibility studies and the results of investigations for the lease that have been given to the chief executive by the lessee become the property of the state*".

A lease for significant development may be granted, without competition, however in these instances the decision to grant a lease must be taken subject to the provisions of section 121 and the related requirements of this Policy and provided:

- under section 128 the development will have a significant impact on the environment or the economic and social development of a locality, a region or the state; and involve a high level of investment, a substantial development period and lease conditions requiring extensive development; and
- under section 129(1) the chief executive is satisfied that an independent assessment of the applicant's financial and managerial capabilities qualifies the applicant to be a suitable lessee for the development.

3.4 Permit to Occupy

Although a permit to occupy may be offered by way of public auction, tender or ballot (refer s.112 Land Act), they are not subject to the priority criteria set out in section 123 Land Act. These criteria only apply to deeds and leases. Due to the nature of the tenure, a permit to occupy is only likely to attract public competition when the proposed use of the land is limited either seasonally or regionally. For example, the requirement for apiary site permits during the 'honey flow season' or the requirement for grazing sites during periods of drought.

3.5 Occupation Licence

An Occupation Licence (OL) may not issue under the Land Act

However, an OL issued under previous legislation is taken to be a licence issued under the Land Act - see section 480.

Unlike a lease, there is no provision in the Land Act for an OL to be renewed or converted.

Accordingly, an assessment under section 16 of the Land Act for the most appropriate tenure and use and consideration of priority are required prior to any decision on an allocation of the land in an OL.

Native title will also need to be addressed e.g. by the lessee under an Indigenous land use agreement.

Some of the considerations in an assessment under section 16 will include

- if not part of an “aggregation”, whether the OL is a standalone living area/sustainable parcel;
- whether the use of the area as grazing is the most appropriate use; and
- if located within Cape York, the objectives of the government for the Cape, if relevant to the OL.

Regarding priority, a licensee of an OL is not considered as having a significant interest under section 123(c) of the LA,

However, if an assessment under section 16 determines

a) a lease is the most appropriate tenure and
b) grazing (an OL is for grazing purposes only) as the most appropriate use

the licensee could be dealt with in priority for the issue of a lease but only for grazing, as it could be considered that exposure to public competition is inappropriate

- as the existing use of the land is remaining unchanged i.e. grazing;
- as the licensee has an interest that is able to be transferred
- as the licensee may carry out improvements or development work on the licence (only) with the Minister’s written approval; and
- if the licensee has addressed native title e.g. through an Indigenous land use agreement for the issue of a lease for grazing purposes.

Although individually the above considerations may not satisfy the requirement of exposure to public competition is inappropriate, collectively it is considered that the considerations satisfy that requirement.

If a lease is to issue, and the OL is part of an existing aggregation, a condition of the offer of the new lease is that the lease be tied to the other leases/land by a covenant under section 373A of the LA.

The above applies only to an OL issued over USL i.e. not to an OL over state Forest etc.

3.6 Remote/Small Townships

Where an application to lease or purchase has been received from a person/entity for an area of unallocated state land in a remote township or a town with a small population and the findings of an evaluation of the land, in accordance with S.16 of the Land Act, has determined the most appropriate

tenure and use supports making the land available, the following process may be implemented to determine if no other persons are likely to be interested in obtaining the land.

1. Advice is to be sought from the Land and Allocation Sales officer and/or State Valuation Service (SVS) officers as to whether or not in their opinion there is a market demand for land in the town; and
2. If no demand, place an advertisement in the local newspaper notifying that the Department of Natural Resources, Mines and Energy (the department) is considering releasing the land for sale (or lease) and requesting persons interested in purchasing (leasing) the land to notify the department of their interest (you do not have to notify under what conditions or purchase price/rent will apply); and
3. Any adjoining landholders are to be requested, in writing, to advise if they have an interest in acquiring the land.

If in the opinion of the Regional Property Services officer/SVS officers there is no demand in the town and the adjoining landholders are not interested and you do not get any expressions of interest from the advertisement, then it would be a logically informed decision that no other persons are likely to be interested in obtaining the land.

Under these circumstances the application could be regarded to satisfy priority criteria s123(b) of the Land Act.

If an adjoining owner or another person expresses an interest in the land you will need to further assess the priority criteria to determine whether the other person has priority to the land. If the priority criteria are not able to be satisfied the land will need to be offered by competition.

4 Definitions

Public purpose - a purpose for which land may be taken under the *Acquisition of Land Act 1967* or a community purpose.

5 Related documents

Allocation of land to state government departments and constructing authorities (SLM/2013/418 = PUX/952/088)
Creation of trust land (PUX/901/207 = SLM/2013/479)
Revenue share policy for local government operational trust land (SLM/2013/579 = PUX901/211)

6 Legislation

Land Act 1994 - Section 16 LA; Chapter 4 Part 1 Division 2 (sections 120A to 131)
Native Title Act 1993 (Cth)

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**.**

7 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).