

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 are necessary.

Rationale

As native title may continue to exist over 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 NTA.

Under section 18A of the *Land Act 1994* 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 ILUA.

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.

In accordance with government policy: –

"a general policy permitting the exchange of unallocated State land (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 is subject to the following:

- 1. all exchange dealings are to be managed by DNRME; and*
- 2. the value of usl being transferred must not exceed the value of the land 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 SLAM and ATSILS representatives after consulting with other interested parties.

Exchanges can occur for site specific proposals, but as a rule they will be directed towards ILUAs 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 SLAM regional officers. Such decisions will be made following negotiations with ATSILS officers, native titleholders and consultation with other relevant parties, such as local government and State agencies.

Agreements will be given effect by way of a registered ILUA between the native title parties and the State.

It is essential to undertake appropriate land use planning prior to entering into detailed ILUA 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 ILUAs 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 ILUA will ensure validity of all dealings with the area and will bind all native title parties.

Note: These agreements do not replace the ALA and 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 land that is capable of allocation in accordance with Chapter 4 Part 1 of the *Land Act 1994* 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), inclusive of **the cost of any survey of land to be granted under s.18A of the Land Act 1994 and any contribution by the State towards negotiations and/or authorisation costs of an ILUA**, is less than or equal to the value of State land 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 1994* and to which native title will be surrendered.

For example if the value of the land to be granted to the native title holders is \$100,000 and the cost of the survey of this land is \$5,000, then the value of the land 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 1994* must be \$105,000 or greater.

Similarly, if the value of the land to be granted to the native title holders is \$100,000 and the contribution by the State towards negotiation and/or authorisation costs of an ILUA is \$30,000, then the value of the land 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 1994* must be \$130,000 or greater. Further, if such land 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 ILUA's, SLAM 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 1994*. This action would only be initiated upon the registration of the ILUA.

Goods and Service Tax (GST)

For all exchange dealings of this nature the advice of the Manager, State Land Finance, State Land Asset Management 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.

Transfer (formerly Stamp Duty) - under the Duties Act 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 1994* in respect of land transactions:

- a. entered into on or after 3 May 2006; and
- b. undertaken for the sole purpose of giving effect to a registered ILUA and expressly contemplated by the ILUA, 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 (s.131 of *Duties Act 2001*).

Other Survey Costs - the cost of survey for -

- a. ALA or TSILA grants of freehold is to be borne by the department; and
- a. 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 ILUA with the native title party for the USL lots within a claim area where the future purpose of the USL parcels have not been identified at the time of the ILUA. The ILUA 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 ILUA 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.

If achieves cost and time savings due to efficiencies gained as it allows one ILUA to be negotiated as opposed to multiple ILUA'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 1994*.

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

- a. a satisfactory resolution of native title issues over land 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 & Vegetation Services, a 'project team' consisting of representatives of SLAM, ATSILS and regional Planning and Assessment will be established, and when necessary include officers from the State Valuation Services and the business units responsible for administering the Nature Conservation Act.

Negotiations must be supported by a Land Evaluation Report (section 16 of *Land Act 1994*) that will identify appropriate land uses having regard to State, regional and local planning strategies and guidelines and the objects of the *Land Act 1994*.

LAMS will be the source of land valuations for State land, 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.

ATSILS will arrange for the preparation and registration of an appropriate ILUA, however prior to any formal agreement to the ILUA 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 ILUA that provides for the surrender of native title rights and interests in State land for the

- exchange of a freehold grant,
- revenue share arrangement

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

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; and
- 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.

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 1994* –

- a. State land 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 1994* ; and
- b. State land intended to be granted in freehold under the *Land Act 1994* or the *Aboriginal Land Act 1991* to native title holders.

The agreement would be recognised in a consent determination of native title and an ILUA.

Legislation

Aboriginal Land Act 1991

Duties Act 2001

Nature Conservation Act 1992

Approval

Position	Name	Date
Director, Land and Native Title Services	Anita Haenfler	04/03/2019

Version history

1. Version	2. Date	3. 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

Further information

- Contact your nearest business centre (<https://www.dnrme.qld.gov.au/our-department/contact-us/state-land-lodgement-offices>), or
- Refer to <https://www.qld.gov.au/environment/land/state>, or
- Call 13 QGOV (13 74 68).

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