

# Land Allocation: Granting Land Volumetrically

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## Version History

Version	Date	Description/Comments
1	16/02/1999	Endorsed
1.1	11/10/2005	Converted to XML template
2	13/12/2007	Updated to reflect Land Act amendments. Endorsed by Scott Spencer, Director-General, Department of Natural Resources and Water.
2.1	11/02/2011	Minor updates to reflect departmental name change to DERM
2.2	24/10/2012	Minor updates to reflect departmental name change to DNRM
2.3	13/03/2013	Updated to change government logo
2.4	10/10/2013	New DNRM template
2.05	21/06/2016	Minor amendment to review and insert text on new template

## Approval

Position	Name	Date
Acting Director, Operations Support - Land	Amanda Kearnan	21/06/2016



# Table of contents

Purpose .....	1
Scope.....	1
Rationale .....	1
Policy.....	2
Legislation .....	4



## Purpose

To provide guidance on deciding on volumetric (in strata) allocation, including a volumetric deed of grant, lease or reserve, i.e. allocation of land either above or below the surface of land that is either unallocated State land, road, trust land (reserve and deed of grant in trust) or leasehold.

## Scope

This policy applies to any application under the Land Act for allocation of land either above or below the surface of unallocated State land, road, trust land or leasehold, and for conversion to freehold of a volumetric lease.

The Policy does not apply

1. generally to volumetric allocation over existing freehold title (other than a deed of grant in trust) which is dealt with under the provisions of the *Land Title Act 1994* and *Body Corporate and Community Management Act 1997*; or
2. for the issue of either a perpetual lease for transport land as defined in Schedule 6 of the Land Act for the purposes of Chapter 6; or
3. to the grant of freehold specifically provided for under another Act e.g. section 477A of the *Transport Infrastructure Act 1994*.

## Rationale

The *Land Title Act 1994* provides for airspace subdivision (reconfiguration of a lot) of freehold land and the creation of indefeasible titles for airspace lots. The lots are defined by three-dimensional co-ordinates (i.e. volumetrically).


The State has decided that for some projects of State significance e.g. development of railway stations, tunnel tollway, specific legislation will provide for the required tenure arrangements, without certain provisions of the Land Act applying.

The idea that ownership of land goes from "heaven to hell" is not interpreted literally but is generally interpreted to mean that land ownership ceases at the point the landowner may no longer make actual, beneficial use of the airspace and sub-surface space. However, generally land ownership is three-dimensional with actual height and depth specifications not stated.

There are some exceptions including in the Ipswich area where there are depth restrictions due to coal mining in that area.

Land volume above and below the surface is still "land", and the principles and provisions of the Land Act and other Acts (e.g. the Native Title Acts, *Coastal Protection and Management Act 1995*) still apply.

However, as the volumetric area is likely to be used for some other purpose than the surface land, the basic requirement is that the use of the surface land must not be unduly interfered with.



Further, a concern could be the proliferation of volumetric allocation (i.e. it may be difficult to visually identify both ownership and position), and the long term planning and management problems that may be generated. To counter this possible concern volumetric allocation would need to be associated with or integral to the use of the adjoining surface based land.

It would also be undesirable to allow volumetric title to exist where there was no ability to get to it from the surface i.e. no dedicated access and/or no clear surface area on which to construct supports etc. Therefore it is desirable that any allocation in strata be "tied" by covenant to an adjoining freehold lot or perpetual lease that contains enough land to enable appropriate structural support and access to the surface of the land - being "tied" by covenant to a term lease may not be sufficient as that lease could eventually revert to the State.

A covenant (section 373A of the *Land Act 1994*, and section 97A of the *Land Title Act 1994*) may be registered not allowing separate sale of lands subject to that covenant.

For land that has been subdivided in strata under the Body Corporate and Community Management Act, it would be sufficient to covenant to a freehold title (lot) which does not necessarily have direct "surface" connections, because under the Act's requirements the lot would have these access and support requirements through common areas. Alternatively, if the volumetric area was a common area, then the covenant would be to the common lot.

An exception however could be the State undertaking projects of some State significance e.g. a pedestrian bridge that may not be associated with other land.

A significant difference between leasehold and freehold, is leasehold (including airspace and sub-surface volumetric leases), may include conditions (over and above any development conditions that a local government or State agency may be able to require), including in relation to safety and the removal or maintenance of structures, and for a bond or bank guarantee to protect the State against risk. Under current legislation, the State is not able to include similar conditions on the issue of freehold title.

It is not appropriate planning or management of the State's land asset to utilise volumetric freehold title to legalise illegal uses or temporary uses. So, for example, where there is an encroachment or overhang of a structure onto unallocated State land, road, trust land or leasehold, then legalising this by a volumetric deed would create a continuing interest in land. This is not considered appropriate land allocation practice. Where such encroachments etc. cannot be removed in the short term, an appropriate tenure would be a tenure that ceases once the structure is removed.

## Policy

Volumetric allocation will require the area either above or below the surface to be surrendered from a lease or deed of grant in trust, revoked from a reserve, or if road, permanently closed, other than possibly for the issue of a volumetric permit to occupy.

Accordingly, unless an Act states otherwise, all the requirements of the Land Act in allocating surface land also apply to the allocation of land above or below the surface, with additional considerations relating to the special nature of airspace or sub-surface parcels, as well as the added complications that multi-layered tenure and use may bring to the management of the (State) land.

Note however, that a deed of grant may not be issued for land below high mark, including whether above or below the surface of the land -section 14(3) of the Land Act.

Further, section 15(2) of the Land Act must be considered for the issue of any lease below high-water mark, and section 178 in respect of a permit to occupy. All Land Act and relevant government policies (e.g. preferred tenure on islands) also apply.

Appropriate agencies will need to be consulted, planning schemes considered and local government views sought.

Allocation also in no way guarantees, replaces or implies development approval.

Any allocation must not unduly restrict the purpose of, and continuing enjoyment of, the surface-based land, including for anyone with a secondary interest in that land e.g. an easement, nor with foreseeable future uses and the future utility of the land, and in relation to:


- Unallocated State land - have any material impact on the State further dealing with the surface of the land, or on access particularly for management and maintenance.
- Road - not interfere with the use of the land below or above the land (as applicable) as a road, including any public infrastructure considerations and transport network future requirements (e.g. water pipelines, transport tunnels) road maintenance, overhead signs/lights etc.. In addition, considerations of driver safety (e.g. visual distraction or obstruction) are obviously important.
- Trust Land - not unduly interfere with the use of the land for its purpose, and could include considerations as the amenity of the general locality, drainage, light for sporting activities or plant growth, tree roots, unimpeded access for birds and other fauna, access for management, The trustees would need to be consulted on the trustee's short and long term plans for the use of the trust land.  
Further, the proposed use of the volumetric title would have to be acknowledged and catered for in any management plan for the trust land.
- Lease - not interfere with the use of the land for the purpose of the lease.

In general, volumetric allocation also needs to be associated with, or, integral to, the use of adjoining surface based land and the adjoining parcel must be of sufficient size (or have sufficient common property) to enable appropriate support and physical access to be constructed, used and maintained.

Accordingly, any volumetric deed of grant or lease must be subject to a covenant that it cannot be sold separately from an adjoining surface-based freehold title or perpetual lease or adjoining freehold lot in a scheme under the *Body Corporate and Community Management Act 1997*.

However, individual circumstances need to be taken into account when dealing with the requirements of other government agencies, for example, volumetric allocation for a pedestrian bridge that may be dedicated as a reserve with the State as trustee, and is not specially associated with any other land.

Further, if it is desirable in the public interest to place some condition or requirement upon a volumetric title, such as a bond, or there are public liability issues e.g. a walkway between commercial buildings over a road, the appropriate tenure of the land is a volumetric lease; or as a covenant cannot "tie" two separate ownerships, for a volumetric parcel required



between two Lots in separate ownership, a jointly held volumetric lease is the appropriate tenure.

A volumetric deed of grant should not be used to legalise encroachments or illegally built constructions. Nor should it be used for minor or temporary structures, and a lease or in limited circumstances, a permit to occupy, may be considered, but subject to usual considerations under the Land Act, including any compliance matters.

## Legislation

- Section 5(2) of the *Land Act 1994* provides for layers and strata above and below the surface of land may be dealt with under that Act.
- Section 14 of that Act states that the Governor in Council may grant in fee simple, unallocated State land, other than for land below high water mark - section 14(3).
- Section 48D of the *Land Title Act 1994* for existing freehold provides for a volumetric plan defining land three dimensionally. The plan is registered under Section 50 of the *Land Titles Act 1994*.