DEPARTMENT OF NATURAL RESOURCES & MINES
RESOURCE MANAGEMENT PROGRAM

HANDBOOK OF
LAND PLANNING GUIDELINES

PART G - CHAPTER G2

FORMS OF LAND TENURE

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Purpose of this Paper

This paper describes the forms of primary tenure which the Department of Natural Resources and Mines can offer when allocating State land for various public or private uses, to public or private entities.

Tenure is the major tool for implementing the outputs of planning of State land. This paper has been written to assist staff to understand tenure.

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1. BACKGROUND

1.1 Land tenure is the means of holding rights in land. Broadly, it can mean the mechanism by which the right to use and occupy land is allocated to individuals or organisations, reflecting a defined level of security and ownership rights. Strictly, the term 'tenure' refers only to legal 'interests' which convey secure **possession,** such as certain leases or freehold deeds (subject to native title). For convenience, in this paper the term is used to also embrace forms of occupation such as licences and permits to occupy, which convey rights to **use** and not to possess land, as well as State reserves.

1.2 In addition to the forms of tenure described below, the categories of **road licence** and **deed of grant in trust** are also available and several areas of land are **vested** in public authorities, notably in the ports. Specialist advice should be sought from the Department should dealings in these forms be envisaged.

1.3 Also, a number of existing forms of licence, lease and reserve have no modern equivalent in the 1994 *Land Act*. Mostly, these continue with their old title and status.

1.4 ***Statistical Summary***

Area of Queensland	173,660,000 ha
Freehold	14%
In process of freeholding	6%
Perpetual lease	13%
Term leases	53%
Licences and permits	1%
Roads and State reserves	3%
State forests and timber reserves	3%
National parks	4%
Unallocated State land	3%
(including other categories small in area).	

1.5 The sections which follow discuss forms of tenure listed in order of decreasing private interest and increasing State interest.

2. NATIVE TITLE

2.1 In June 1992, the High Court ruled in the 'Mabo' decision that 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of [most of] the land of the Murray Islands in the Torres Strait.' In reaching this conclusion, the majority of the Court held that the common law of Australia recognises a form of native title to the land.

2.2 The common law provides that the sovereign State governments could extinguish native title by valid exercise of their sovereign power. This could be by:

- legislation;
- granting a tenure (such as private freehold) which is inconsistent with the continued existence of native title;

- using the land in a manner inconsistent with the continued existence of native title.

2.3 Whether native title does or does not survive on a given parcel is therefore a question of fact, not of policy or discretion by governments, and depends upon two main considerations:

- whether there has been a lawful extinguishment of that title;
- whether the relevant Aboriginal or Islander people have maintained a continuous connection with the land.

2.4 Late in 1993, the Australian and Queensland Governments gave a legislative response to the Mabo decision by passing the Commonwealth *Native Title Act 1993* and the *Native Title (Queensland) Act 1993*. The objects of the legislation are to:

- validate past acts which may otherwise be invalid due to the existence of native title;
- set the standards for future dealings with land where native title exists;
- recognise and protect native title and provide for its co-existence with land management systems; and
- establish a mechanism for determining claims to native title and for compensation payments where native title has been extinguished or impaired by past acts.

2.5 After the passage of the *Racial Discrimination Act* which came into force on 31 October 1975, it became illegal throughout Australia to treat Aborigines or any other race in a discriminatory way. This means that governments could not and cannot arbitrarily expropriate land held under native title, just as they cannot expropriate freehold or leasehold land without paying fair compensation. However, the native title legislation validates titles issued after that date until 31 December 1993.

2.6 Many dealings over State (non-freehold) land can proceed under the provisions of the *Native Title Act* (as a 'past' act or 'future' act). Where that does not apply, it is obviously important, before allocating any parcel of State land, to establish whether native title may still exist. This may require an exhaustive search through old records to ascertain whether the subject land has ever been subject to a prior inconsistent tenure or use.

9.5 On 23 December 1996, the High Court in *Wik* delivered its decision in relation to various preliminary questions of law. By a majority of four to three, the High Court held that pastoral leases did not necessarily extinguish native title and that pastoral leases may co-exist with native title. If there were any inconsistency between the rights conferred under the statutory grant of a pastoral lease and the native title rights and interests, then the native title rights and interests must yield to that extent to the rights of the pastoralists.

9.5 The Commonwealth's response to the Wik decision was the passage of the *Native Title Amendment Act 1998*. Relevantly, the Act provides for the following:

- confirmation of the extinguishment of native title by grants of tenure which confer exclusive possession;
- validation of dealings/grants between 1 January 1994 (the commencement of the *Native Title Act 1993* (Cth)) and 23 December 1996 (the date of the *Wik* decision) in relation to areas previously subject to a freehold or leasehold interest;

- in regard to pastoral leases – all activities pursuant to, or incidental to, 'primary production' are allowed on pastoral leases, including farmstay tourism, provided that the dominant purpose of the use of the land is primary production.

2.9 The Queensland Government responded by passing the *Native Title (Queensland) State Provisions Act 1998*. It confirmed the extinguishment of native title by grants of tenure which confer exclusive possession; and also validated certain dealings between 1 January 1994 and 23 December 1996.

3. FREEHOLD LAND

3.1 Freehold title is the most complete form available of alienation of land from the State. Ownership by the title holder is not absolute, however, as the State is empowered to withhold certain rights such as the right to any minerals or petroleum. **Deeds of grant** from the State under the *Land Act* represent the transfer of land from the State to a private individual or corporate entity. This transfer leads to the creation of derivative **certificates of title** which are regulated by the *Land Title Act 1994*.

3.2 About 20 percent (one fifth) of Queensland's 173 million ha is freehold, or in the process of freeholding by means of **freeholding leases** (which lead to a deed of grant after the instalments are paid out).

3.3 Traditionally, owners of land also owned both the skyspace above stretching to the limits of the atmosphere, and the soil beneath down to the centre of the earth. This position is qualified by statute, which confirms reservations to the State of minerals and the products of extractive industries, and also by any limitations attaching to the original deed of grant. In addition, common law authorities now suggest that the ownership of airspace above the land might also be limited to such height as is necessary for the ordinary use and enjoyment of the land. This includes, for example, the right (subject to planning laws) to subdivide in strata and the right to object to trespasses by overhead cranes.

3.4 Any increase in the value of freehold land on account of population growth in the district (so that subdivision or some use of higher intensity becomes possible) belongs to the owner.

3.6 Freehold in the Name of the State of Queensland

3.6.1 The Queensland Government is empowered to hold and deal in land as freehold in the name of the 'State of Queensland'. This power facilitates market place transactions and allows governmental authorities to more efficiently exercise a commercial role. For State departments it provides an alternative to dealing in State land under the *Land Act.* This form of tenure is intended for 'operational' (*q.v.*) land and is not suitable for dealings in land which otherwise should be held as reserve or leasehold.

3.7 The Torrens Title System

3.7.1 Sir Robert Torrens, a South Australian, was concerned at the plight of people who lost their properties because they could not establish beyond doubt their legal title, so in the mid-1850s he devised a system known by his name. This was based on the creation of a single certificate of title the validity of which is guaranteed by the State. The previous system relied upon tracing numerous deeds back to the original root of title so that ownership could be established beyond doubt (a system which still operates in the UK).

3.7.2 The Torrens title system was designed for simplicity of operation. It was quickly adopted by other Australian States. A substantially similar system was adopted in New Zealand in 1870. Variations of this system have been put in place throughout the Asia Pacific region, as it is fair and simple and it provides governments with an orderly base for taxation and other purposes.

3.7.3 It should be noted that the Torrens system acts only by a central registry operated by the State. The State guarantees that the title is valid and that it does not belong to someone else. The registry does not intervene in land dealings between individuals.

4. PERPETUAL AND TERM LEASES

4.1 The *Land Act 1962* provided for some 20 different types of leases. Under the *Land Act 1994* there are just two: perpetual and term (in addition to freeholding leases, explained above). Some 66 percent of Queensland has been allocated under perpetual and term lease.

4.2 Grazing is the primary land use on some 8,000 leased holdings of varying sizes totalling 136 million hectares, or about three-quarters of Queensland. The Department also offers State land under lease for residential, commercial and industrial development.

4.3 Perpetual leases do not expire so have a level of security equivalent to that of freehold. Perpetual leases for grazing and agriculture cannot be held by corporations.

4.4 Term leases may be issued for up to 50 years or, where the purpose is a ‘significant development’ or timber plantation, for 100 years. Leases for business and commercial purposes are normally for 30 years. Renewal of course is possible and is normal, unless a higher form of land use appears to be desirable.

4.5 The State or trustees may lease trust land for a period not longer than 30 years, subject to defined conditions, including one that the lease must not diminish the public purpose of the reserve.

4.6 There are nearly 1600 term leases for pastoral purposes, the pioneer tenures, covering some 93 million ha or just over half the area of the State. They have an average size of 57,000 ha and generally occur in the remote areas.

4.7 Subject to native title, lessees enjoy peaceable occupation for the purpose for which the lease was issued. The Department does not normally intervene in the management of leased land. Leases can be bought and sold by private transaction, although the Minister's consent to transfer is required.

4.8 However, leaseholders' use and enjoyment of land is subject to certain limitations. They must pay rent, they may use the land for only those purposes specified in the lease and (in the case of term leases) on expiry the right to another term may not be automatic. Lessees must of course also observe the conditions of the lease. Conditions include a general duty of care for the land and a requirement to obtain a permit for clearing trees. In common with other landholders, lessees are obliged to pay rates to the local government and are subject to regulatory controls such as statutory planning.

5. PERMITS TO OCCUPY

5.1 The Chief Executive may issue a **permit** to occupy unallocated State land, a reserve or a road (S.177). The purpose of the permit must be appropriate to the land. Permits may be terminated upon 'reasonable written notice' (S.180). Trustees may also issue permits not inconsistent with the community purpose of the trust land (S.60).

6. ROAD

6.1 Land may be dedicated as a road under S.94 of the *Land Act*. A road for the purposes of land administration is an area of land dedicated for public passage. Whether a pavement is constructed on it and whether it is trafficable by pedestrians or vehicles is irrelevant to its tenure. Roads have a long tradition in common law and provide legal access to allotments in addition to through passage. It is policy that every freehold allotment be served by a dedicated road. Along much of Queensland's coast and some of its rivers, there is a strip of land termed an *esplanade*. This is legally a road.

6.2 Most roads remain State land but are under management of the local government or (for declared main roads) the Department of Main Roads. If (among other considerations) the local government is able to certify that a road is not required for public traffic, it can be closed temporarily and licensed, or closed permanently and sold or reserved for a public purpose.

7. RESERVE

7.1 Land can be reserved in the form of **national** or **conservation parks** under the *Nature Conservation Act*, **State forest** under the *Forestry Act* or **State reserve** under S.31 of the *Land Act*. Some ten percent of Queensland is set aside in these ways, four percent as national park.

7.2 There are some 22,000 State reserves set aside under the *Land Act* for a variety of purposes. Prior to the 1994 *Land Act*, there was power to reserve land for the operational purposes of government such as works depots, hospitals and schools. That power is no longer available: reserves are restricted to community purposes such as parks and heritage purposes. Community purposes available are listed in Schedule 1. (The term 'public purposes' embraces both operational and community purposes).

7.3 Once gazetted, such reserves may be placed under the control of trustees, 'in trust' for the benefit of the community. Trustees can include State departments or other authorities, local governments, groups of interested people or individuals. Also, the official trustees (often the local government) can appoint a community committee in an advisory role, but it has no legal powers in relation to the reserve.

7.4 The Concept of a Reserve

7.4.1 Provision to reserve land from sale was included in the first Queensland land statute, *The Alienation of Crown Land Act 1860*. Even 138 years ago there was an awareness that not all lands should be alienated and that some should be held back for public purposes, to provide for the future. As time went on the State reserved land for activities such as grazing the State's cattle herds, and for the purposes of public roads and internal communications.

7.4.2 The term 'reserve' in land law is a peculiarly colonial one. Similar usage of the word 'reserve' can be found in the land policy of New Zealand and Canada but the term is not used

in English texts on land law. In the English system the entity closest to a reserve is the 'common'. This term denotes open and uncultivated ground over which owners and occupiers of enclosed land in the locality (known as commoners) have certain rights. Because commonage rights are shared solely by residents in the township or district it would be erroneous to equate a common with a reserve. The 1910 Act abandoned commons in Queensland and incorporated them in pasturage reserves.

8. UNALLOCATED STATE LAND

8.1 Unallocated State land (USL) is defined in Schedule 6 of the Act as the residual State land which is vacant and over which no interests have been granted to others. Some 3 percent of Queensland is USL. The previous term 'Crown land' in the 1962 Act was ambiguous and has been superseded.

Unallocated State in effect operates as a 'land bank' from which land is allocated and to which land is returned when previous tenures expire or are retrieved by the State. It includes most land below marine high water mark and the beds and banks of non-tidal watercourses where they form the boundary of an allotment. ('Banks' includes the area covered by normal mid-season flow of water, not the high land fronting the river. There is no State frontage along most rivers).

9. COLLECTIVE TERMS

9.1 State Land

9.1.1 Although not specifically defined in legislation this is a useful general expression which is implied by the definition of 'unallocated State land'. It embraces all land which is not private freehold land, and is not held as Aboriginal or Torres Strait Islander land or Commonwealth land and is not known to be held as native title. State land totals some 81% of Queensland's land area.

9.1.2 State land therefore includes freeholding leases, freehold land held by the Queensland Government, perpetual and term leases, licences, permits to occupy, land set aside for public purposes and unallocated State land.

9.5 Public and Private Land

9.2.1 These terms are not defined in legislation. 'Public land' is a useful general expression to cover land managed by all kinds of public authorities for public purposes. It therefore includes most State land except that leased to private individuals or companies; in addition to land held by local governments under various tenures. 'Private land' includes freehold and leasehold land held by private individuals or companies.

9.3 Government Land

9.3.1 This term is not defined in legislation but is a useful expression to cover land held by the State Government under any tenure for any purpose including operational purposes closed to public access. It excludes land held by local governments.

9.4 Government Land: Community vs. Operational

9.4.1 To facilitate appropriate allocation of tenure, land controlled by State and local public authorities has been categorised as being either **community land** or **operational land**, defined as follows:

- *community land*. This is land which 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. Examples are scenic reserves and land on which there are buildings of historical significance;

- *operational land*. This is land required for ordinary government business, having limited intrinsic value should the governmental operation or service be discontinued or moved to an alternative site. Examples are sites of hospitals, police stations, offices and depots. Older government buildings can develop heritage significance in which case the designation as operational land may move to one of community land.

9.4.2 This categorisation has been useful in encouraging rational review of the State's land portfolio, but care must be exercised in its application because:

- land classed as 'operational' is also managed by public authorities for the 'community'. The terms are relevant only in land tenure policy and imply no judgement as to the degree of public benefit;

- activities which are manifestly operational in nature are sometimes undertaken on land which is equally obviously of community significance. For example, ports are regarded as operational, but are located on land of high intrinsic significance along the coast. Conversely, community functions such as sports are sometimes undertaken on land which has few unique features and could just as well be sold for development should its function no longer be required by the community.

9.5 Aboriginal and Torres Strait Islander Land

9.5.1 In traditional Aboriginal society, land was not regarded as a commodity which could be traded, a concept of land tenure different from the Western one. Prior to the 1900s and up to the present date, Aboriginal reserves were created for the use and/or benefit of Aboriginal or Islander inhabitants and placed under the trusteeship of a State department. In 1978, the Mornington Island and Aurukun Shire Lease Lands were established under the *Local Government (Aboriginal Lands) Act*. In 1985, deeds of grant in trust were issued under the *Land Act* over Aboriginal and Torres Strait Islander community land. These deeds are mostly held by Aboriginal community councils and Torres Strait Islander councils in trust for the benefit of Aboriginal or Islander inabitants.

9.5.2 From 1991, Aboriginal and Torres Strait Islander people were able to gain ownership of land under the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* by way of a transfer of land or a grant of claimable land. The transferred land or successfully claimed land is held by an incorporated land trust. The land trust acquires freehold title to the transferred or claimed land. This form of freehold cannot be sold. (A lease will be granted only on land claimed successfully on the grounds of economic or cultural vaibility. Any claimed national park must be leased back to the State in perpetuity for national park purposes). Transferred land or granted claimable land is known as Aboriginal land or Torres Strait Islander land within the meaning of the Acts.

10. REGAINING PROPRIETORSHIP

10.1 Should the State require a person's property, it must pay adequate monetary compensation. The State can acquire land by three methods: voluntary ***purchase***, by contract of sale, like any other buyer of freehold land; voluntary ***acquisition by agreement***; or ***compulsory acquisition*** (also called ***resumption***):

- *purchase.* The State or a local government has the power to hold freehold land in its own right and to deal commercially with land in the market place. A standard REIQ contract may be used;

- *acquisition by agreement*. If the landholder consents to the acquisition, the two parties enter into a s.15 agreement, given effect by a proclamation;

- *compulsory acquisition* or ***resumption***. If the landholder does not consent, certain public authorities including local governments may proceed under the *Acquisition of Land Act 1967* to compulsorily acquire the land, subject to payment of compensation. A Notice of Intention to Resume must be given to the landholder who has a right to object. Unless objections are upheld, the land may then be taken by proclamation published in the *Government Gazette*. Freehold is no more immune to compulsory acquisition than leasehold. Except in limited circumstances the State cannot resume a person's land for a private purpose, that is, in order to lease or sell to another private person or company.

Properties must be of high cultural or biophysical significance and required for a public purpose to justify dispossession of the landholders, an act not taken lightly and rarely done for resource management purposes.

End of Chapter G2

Updated from the 20 April 1998 version to include references to the Wik case and the Government's legislative response; and also to vary the definition of Aboriginal and Torres Strait Islander land; and also to relinquish some material to B2.

Further edits done 2 July 2002 to reflect Departmental name change