GOVERNMENT OF
WESTERN AUSTRALIA

Renewable Hydrogen Policy:
Consideration of highest and best use.

DECEMBER 2022

Purpose

To provide guidance and clarity to proponents of large-scale renewable hydrogen projects regarding State Government decision making processes for the land tenure pathway for both investigation and feasibility studies and final project land tenure. This policy sets out a preferred, transparent and timely process for managing situations where there are competing projects proposed for the same area of land and the use of a Highest and Best Use Assessment in these cases.

The State Government is committed to the diversification and decarbonisation of the State's economy, especially the transitioning to a future prosperous low-carbon economy and reaching net zero greenhouse gas emissions by 2050.

Scope

Consideration of the highest and best use policy only applies to Crown land suitable for large-scale renewable hydrogen projects where there are competing projects proposed for the same area of land. This can include two large scale renewable hydrogen projects or between a large scale renewable hydrogen project and (1) *Mining Act 1978 (WA)* exploration licence applications or (2) tenure proposals for new pastoral leases, tourism, carbon farming etc.

Legislative base

The Government is committed to the development of large-scale renewable hydrogen projects and will work within the existing legislative framework and this policy when making relevant decisions. Each Minister does however maintain discretion in decision making under the various statutes and legislative powers that apply, and each Minister is aware of the unfettered nature of that decision making process.

The Land Administration Act 1997 (LAA), provides the legislative base for both gaining access for short term investigation and feasibility studies (s91 licences), and for long term project development tenure (s79 leases) and easements for access and supporting infrastructure (s144).

This policy is based on the existing LAA noting that legislative amendments are being progressed as part of *Land and Public Works Legislation Amendment Bill 2022*, which includes the introduction of a new and more flexible form of leasehold tenure ("Diversification Lease") intended to co-exist with some forms of registered interests (such as easements) and statutory rights such as those held via mining tenements, and the rights and interests of Native Title Parties. In the event that these proposed changes become law, this policy will be amended accordingly.

Other approvals may still need to be obtained, for example under the WA Environmental Protection Act 1986, the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the WA *Aboriginal Cultural Heritage Act 2021*, and the Commonwealth *Native Title Act 1993 (NTA).*

The Government respects the rights of Native Title Holders and Registered Native Title Claimants and recognises that Native Title Parties have future act procedural rights under the NTA, including the negotiation and registration of an ILUA with project proponents. As with all land tenure grants involving a future act process (the negotiation of an Indigenous Land Use Agreement (ILUA)), project proponents are to bear all risks and should indemnify the State against liability (including for native title compensation)in respect of the relevant tenure.

Other potential and existing land uses, rights and interested parties

There are a range of other parties that could have an interest in a site, of which the key other parties are:

- Existing lessees, licensees, and easement holders (under the LAA);
- Existing granted mining and petroleum tenure holders (under the *Mining Act 1978*, the P*etroleum and Geothermal Energy Act 1967* and the *Petroleum Pipelines Act 1969*);
- Native Title Parties; and
- Government agencies.

Proponents of other hydrogen projects may also have an interest in the same site, and there may be other parties that have an interest in the site, for example, a tourist operator, easement for utilities or carbon project.

Two stages of land access

Two stages of land access are recognised:

Stage 1: Investigation and Feasibility is facilitated through s91 LAA licences.

Stage 2: Implementation (including construction and operation) is facilitated through s79 LAA Leases and easements under s144 LAA. As noted above, the *Land and Public Works Legislation Amendment Bill 2022* includes a proposal to introduce diversification leases which would, unlike the existing pastoral lease, allow for a range of uses, subject to the agreement of all affected parties.

The grant of an Option to Lease under s88 of the LAA may be considered by the Minister for Lands at either Stage 1 or 2, however will depend on the individual circumstances of the proposal and the

level of detail known in terms of the Project feasibility and definition. This is particularly relevant at Stage 1 as an Option to Lease is unlikely to be considered for large areas of land where project specific requirements are yet to be well understood. The Option to Lease is a contractual arrangement that provides security to a proponent that the Minister for Lands will grant long term tenure over an area, subject to conditions precedent being met such as the negotiation and registration of an ILUA, the written agreement for the surrender of an existing interest such as a pastoral lease and the approval of the Minister for Mines for the grant of the long term tenure pursuant to section 16(3) of the *Mining Act 1978*.

There is an option for the Minister for Mines and Petroleum to grant a temporary exemption over a defined area of Crown land under section 19 of the Mining Act 1978, which would preclude new applications for mining tenements for an initial period of two years. This could provide a greater level of certainty for hydrogen proponents and would allow those proponents time to undertake the necessary feasibility and geotechnical studies to determine their energy infrastructure footprints. The Ministerial Taskforce may request the Minister for Mines and Petroleum's consideration of a section 19 exemption area. This request may include information on the outcome of any "Highest and Best Use Assessment" that has been undertaken, however this will not fetter the Minister's decision making authority. It is noted a section 19 Mining Act exemption area can only be applied to Crown land not currently subject to any granted mining tenure or pending applications.

Hierarchy of processes

Co-existence of projects

The State Government has a preference that where more than one project proponent has an interest in the same area of Crown land, that those project proponents and any existing interest holders, such as a pastoral lessee, agree how the projects and those interests can co-exist. This will involve good faith negotiations and best endeavours to ensure that these proposed projects and the existing land uses can co-exist and the development of on-going working relationships.

Where possible all parties should consider the constraints that may arise as a consequence of other land uses and apply these in early project planning. These negotiations can occur with the support of the Senior Officers Group made up of officers from Department of Jobs, Tourism, Science and Innovation (JTSI), Department of Mines, Industry Regulation and Safety (DMIRS) and Department of Planning, Lands and Heritage (DPLH).

A co-existence arrangement at the feasibility stage can involve separate locations of infrastructure and could involve sharing of access to that infrastructure.

A co-existence arrangement at the implementation stage may involve the grant of separate tenure for where significant infrastructure is to be located, for example solar panels and wind turbines, and possibly sequential use of the same land, if feasible.

Senior Officers Group is to present any agreed co-existence arrangements, or that an agreement could not be reached, to the Ministerial Taskforce which includes the relevant Ministers. The Senior Officers Group can also present its own recommended arrangements for co-existence.

The decision-making Minister can wait until the outcome of any negotiations is complete before making a relevant decision and will give due regard to any agreed coexistence arrangement recommended by the Ministerial Taskforce, however it will not fetter the decision- making powers of the Minister and that the Minister's obligations pursuant to the legislation involved.

It is noted that the proposed highest and best use assessment does not relate to the Minister for Lands' compulsory acquisition powers, noting there is no intent in the first instance to compulsorily acquire any rights and interest in the land. Compulsory acquisition of interests is undertaken on a case by case basis at the Minister for Lands' discretion based on the considerations in sections 161 and 165 of the LAA. It is not proposed that compulsory acquisition will be utilised as a tool to resolve competing proposals that are the subject of a 'highest and best use' assessment.

Co-existence agreement not reached

Where the good faith negotiations and the best endeavours of the relevant parties do not lead to a co-existence arrangement, including at the feasibility stage, the Ministerial Taskforce will consider a "Highest and Best Use Assessment" as carried out by Senior Officers Group between the competing projects to recommend the preferred project to the decision-making Minister(s) who will give due regard to the outcome of the Highest and Best Use Assessment recognising that their decision(s) are ultimately unfettered. The Senior Officers Group will only agree to carry out a Highest and Best Use Assessment if it can be demonstrated that real efforts have been made to resolve any impasse.

The Highest and Best Use Assessment is to be based on:

- information submitted as part of each project application,
- other information including referral and consultation information about the projects over the same area of land,
- relevant assessments/analysis by the Departments responsible for supporting the relevant decision-making Ministers including each project proponent's record for genuinely engaging with Aboriginal people and communities, its capacity to provide social and economic benefits to Aboriginal people and communities in the long term, and its previous record on respecting and protecting Aboriginal culture and heritage and,
- the efforts that have been made to reach a co-existence arrangement

Where a Highest and Best Use Assessment is to be carried out, project proponents are also expected to provide information that addresses the criteria as listed below and all project proponents and existing interest holder will be afforded an opportunity to respond to the information that has been presented and will be considered by the Senior Officers Group.

Highest and best use assessment

Application

Highest and best use assessments are likely to require information about the final project and which will only occur after good faith and best endeavours negotiations have been exhausted for a co-existence arrangement. The Government has a strong preference to facilitate co-existing projects and land uses at the investigation and feasibility stage, and this will form part of considerations when determining competing applications for renewable hydrogen land tenure and/or mining tenure.

A Highest and Best Use Assessment may be undertaken in one or more of following situations:

(a) where a co-existence arrangement cannot be reached between two hydrogen project proponents,

(b) where a co-existence arrangement cannot be reached between applicants for mining tenements and a hydrogen project proponent,

(c) where a co-existence agreement cannot be reached between applicants for a hydrogen project and applicants for any new tenure proposals for projects (e.g. carbon projects).

The interests of existing land uses and interest holders are recognised and the rights afforded under the relevant legislation. Existing legislative processes can occur to resolve land use conflicts where relevant. Government encourages project proponents to engage with interest holders early to reach a mutually beneficial agreement.

Criteria

The following criteria will be used to assess whether a project will deliver the highest and best use of the relevant Crown land:

- Alignment to Government Strategic Policy
- Interaction of tenure types and potential for co-existence
- Financial Capability
- Value and Opportunity for the State
- Size and impact on the Crown land concerned
- Infrastructure and servicing
- Environmental, Social and Governance responsibilities
- Local Content
- Timeframes
- Regulatory applications
- Synergies with other industries
- Consent of existing interest holders

As part of the criteria each project proponent's record for genuinely engaging with Aboriginal people and communities, their capacity to provide social and economic benefits to Aboriginal people and communities in the long term, and their previous record on respecting and protecting Aboriginal culture and heritage will be considered.

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