

Sale or lease of Crown land by direct negotiation

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Policy Statement

This policy sets out the framework by which the NSW Department of Industry—Lands & Water (the department) will consider entering into direct negotiations for the sale or lease of Crown land.

As a general principle, the department will use competitive processes for the sale or lease of Crown land however, there are circumstances where it may not be possible or practical to use a competitive process. For these instances this policy provides transparency in the approach the department will adopt for direct negotiations.

For those seeking a direct negotiation, this policy provides clarity and confidence on how they will receive consistent, transparent and fair treatment in the assessment of an application for the sale or lease on Crown land by direct negotiation.

Scope

This policy applies to the allocation of Crown land via sale or lease by a direct negotiation as directed by the *Crown Land Management Act 2016* (the Act).

Nothing in this policy requires the department to enter into a direct negotiation, even in circumstances where a direct negotiation may be permitted under this policy.

Requirements

Any proposal for sale or lease by direct negotiation will only progress if the proponent is deemed to be an acceptable proponent, having regard to the fit and proper criteria contained in the Leasing of Crown land policy (IND-O-253).

1. General

A proposal for direct negotiation may be initiated by either the department or a proponent. Requests from a proponent—including those invited by the department—must be received by the department in writing, and include the following:

- a. a detailed description of the parcel of Crown land
- b. the background of the person/s or entity/ies making the request
- c. justification (with reference to this policy) for why direct negotiation is appropriate in this instance.

Where requested by the department, the proponent must provide additional information in the nominated format and within the required timeframe.

2. Approval for direct negotiations

The written approval of the Executive Director Crown and must be obtained for Crown land to be allocated by direct negotiation with a proponent.

Prior to considering proposals to enter into direct negotiation with a proponent, regard must be given to the Independent Commission Against Corruption's (ICAC) *Direct Negotiations – Guidelines for Managing Risks in Direct Negotiations, 2006*. There must be written evidence on file to show that these guidelines have been considered and appropriate risk controls will be in place.

The department requires that a proponent enter into a negotiation protocol for all leasing proposals and for all high value sale of Crown land proposals, and in any situation where the department considers the probity risk sufficiently high.

The department may also require an independent probity advisor to be appointed to oversee the process where probity risk is considered sufficient to warrant appointment or for large-scale projects.

3. *Circumstances where direct negotiations will generally be permitted*

Direct negotiation in respect to a sale of Crown land will normally be approved where the sale meets one or more of the following conditions:

- a. The purchase of land comprising a Crown road that has been closed at the request of an adjoining land holder.
- b. The conversion of a leasehold interest into a freehold interest by a lessee, where that lessee has a statutory right under the Act or under the lease.
- c. Sale of improved land comprising an applicant's principal place of residence, where evidenced by legitimate occupation.

Direct negotiation in respect to a lease of Crown land will normally be approved where the lease meets one or more of the following conditions:

- a. The grant of new leases to existing lessees following the subdivision of a Western Lands lease under Clause 17 of Schedule 3 of the Act.
- b. Addition of a closed Crown road or a closed public road that is unformed to adjoining Western Lands leases as part of the rationalisation of the legal road network.
- c. The grant of a residential lease to holders of residential mineral claims at Lightning Ridge.
- d. The grant of a new lease of improved land comprising an applicant's principal place of residence, where evidenced by legitimate occupation.
- e. The grant of a lease as a result of the exclusion or excise of an area from a perpetual lease which is subject to a purchase of lease application.

The department may decide not to proceed through direct negotiation even though one or more conditions have been demonstrated above. Such a decision will only be made where an overriding, or exceptional circumstance is determined to exist. The proponent will be advised of this circumstance.

The department's final decision may also be subject to advice from the NSW Department of Premier and Cabinet.

4. *Circumstances where direct negotiation may be permitted*

Direct negotiations with a proponent may be considered in circumstances where:

- a. the proposal is limited to an exchange of freehold land for Crown land where it is considered to be of strategic value to the state
- b. the proposal involves Crown land that is only of material benefit to the proponent
- c. the proposal involves Crown land that is of a value that is less than the anticipated cost of conducting a competitive process
- d. the proposal is for a lease and involves Crown land that commands an annual market rent that is less than the anticipated cost of conducting a competitive process
- e. the proponent owns land (or occupies land subject to a Western Lands lease) abutting the relevant Crown land and is the only person who could feasibly use the Crown land for the intended purpose
- f. the proponent holds a current lease of the subject Crown land—including a lease on holding-over provisions—and is seeking to renegotiate the tenure conditions of the lease, including proposing significant investment, and there is no substantial change in expectations of the use of the site, and the department has received no other interest expressed
- g. the proponent is a not-for-profit, and is a community service, charitable, sporting, recreational or government organisation that seeks to lease Crown land for a help or service facility of benefit to the general community, or to provide an active sporting or passive recreational facility
- h. the proposal relates to an emergency situation to protect public health and safety—to mitigate damage to the environment or a serious legal or financial risk to Government
- i. a previous competitive process failed to identify a successful proponent and it is considered that repeating the process will produce the same result

- j. both the proposal and its proponent satisfy the uniqueness test as detailed in the NSW *Government's Unsolicited Proposals – Guide for Submission and Assessment 2014*
- k. the proposal is considered to be value for money to the state—noting that a comprehensive value for money assessment will be conducted should the proposal be approved to proceed to direct negotiation.

5. *Referral to Department of Premier and Cabinet*

Where an unsolicited proposal is received which meets any of the below criteria, the department will determine whether it needs to be referred to the Department of Premier and Cabinet for additional review, prior to making the final decision:

- a. high value Crown land
- b. Crown land that is in a sensitive location
- c. Crown land that will be or is part of a major project.

6. *Advice of outcome*

The department will determine whether the proposal can proceed on the basis of applicable policy. If it cannot proceed the proponent will be advised in writing the reasons why the application has been formally refused.

If it can proceed, the department will assess the proposal against the identified criteria and will request additional supporting information from the proponent as necessary.

If the proposal is assessed and meets one or more of the identified criteria, approval must be obtained from the Executive Director Crown Lands for the direct negotiation to occur.

If direct negotiation is not approved by the Executive Director Crown Lands, the proponent will be advised in writing of the reason for that decision.

In advising a proponent that a direct negotiation was not approved by the Executive Director Crown Lands, details of when the subject Crown land will be made available by a competitive process in which the proponent is also able to participate may be included where appropriate. If direct negotiation is approved by the Executive Director Crown Lands, the proponent will be advised in writing.

The department will then complete a detailed assessment of the proposal in accordance with the relevant policy.

Guidelines

The following documents provide further information to support compliance with this policy.

- Guideline—management of Crown land leases
- Guideline—allocation of Crown land leases
- Guideline—sale of Crown land

Roles and responsibilities

- *The department:*
 - a. review and respond to requests in accordance with this policy and associated procedural guidance
 - b. comply with all legislative, policy and delegation requirements relating to sale or lease transactions
 - c. respond to proponents in a timely manner with information that is truthful and accurate
- *Proponents:*
 - a. respond to the department in a timely manner with information that is truthful and accurate
 - b. abide by the terms of sale or leasing processes, including probity requirements whether by competitive process or direct negotiation.

Safety considerations

This policy does not negate any work Health and safety requirements.

Delegations

The approval for direct negotiation rests with the Executive Director Crown Lands.

Definitions

For the purpose of this policy, the definitions below are not provided for by the Act, and are defined in this policy to provide guidance and ensure consistency.

- **Acceptable proponent:** a proponent considered acceptable, having regard to the 'Fit and Proper' criteria (See Annexure A to the Leasing of Crown land policy – IND-O-253)
- **Competitive process:** a non-exclusive process designed to introduce competition between more than one party
- **Direct negotiation:** negotiating directly with one proponent in accordance with the criteria specified in this policy
- **Holding-over:** the continued approved occupation of the premises by the tenant after the lease term has expired
- **Interest expressed:** an unsolicited proposal made by one or more applicants at any time during the life cycle of a lease and must be site specific. General, non-specific, interest expressed will not be considered or recorded. Refer to Guideline—allocation of Crown land leases.
- **Material benefit;** any commercial return or economic benefit from the land could only be obtained by the adjoining land holder
- **Proponent:** a person or organisation that submits an application to lease Crown land
- **Proposal (or application):** a request to lease Crown land
- **Significant investment:** the amount of capital expenditure that is proposed to be invested in the site. Refer to Guideline—leasing of Crown land.

Legislation

- *Crown Lands Management Act 2016.*

Related policies

- Leasing of Crown Land Policy (IND-O-253)
- Sale of Crown Land Policy (IND-O-251)
- NSW Department of Industry Fraud and Corruption Prevention Policy (2016)
- NSW Department of Industry 2016, Code of Conduct (IND-P-184)
- NSW Department of Industry 2012, Conflicts of Interest Policy (IND-P-183)
- NSW Department of Industry 2015, Procurement Policy (TI-A-169)

Other related documents

- Guideline—allocation of Crown land leases
- ICAC Guidelines for Managing Risks in Direct Negotiations (2006)
- Unsolicited Proposals - Guide for Submission and Assessment (2014)

Revision history

Version	Date issued	Notes	By
1	14/03/2016	New policy as a result of practice and governance improvements	Group Director Governance & Strategy
2	28/8/2016	Amendment of clauses 5.1 and 5.3 in response to feedback from ICAC. Amendment to 5.5 and 7 to clarify who is responsible for determining when consultation with DPC is required.	Group Director Governance & Strategy
3	01/07/2017	Updated to support the <i>Crown Land Management Act 2016</i>	Director Crown Property Services
4	20/09/2018	Minor update made to policy	Director Crown Property Services

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