

Easement PUX/901/527 Version 2

SLM/901/527 – Version 2

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Version history

Version	Date	Comment
1	28/05/1999	Endorsed
1.1	01/07/2005	Conversion Project - New WORD/XML template
2	02/01/2008	Updated to reflect Land Act amendments
2.1	15/10/2008	Minor amendment to omit the Sugar Industry Act no longer relevant
2.2	08/02/2011	Updated to DERM

Executive summary

An easement may be created over freehold land, including land granted in trust under the *Land Act 1994* (Land Act) and non-freehold land.

An easement may be granted only for a recognised easement purpose, e.g. right of way (access), services, or for purposes associated with a public utility service such as public thoroughfare, drainage, sewerage, the supply of electricity, gas, water, etc.

For a public utility service see section 369 of the Land Act.

Some purposes that are not acceptable for an easement include

- a. agribusiness (grazing) that may be provided for under a lease/sublease, or
- b. environmental that may be provided for under a covenant.

Note:

- An easement for access may not provide access to the public, unless the easement is a public thoroughfare easement.
- A public thoroughfare easement may provide access to the public but only for pedestrians and bicycles, and vehicles reasonably necessary for the building and maintenance of the easement. The grantee of a public thoroughfare easement may only be a local government or the State represented by the Department administering the *Transport Infrastructure Act 1994*.
- A public utility easement for water storage (see section 362 of the Land Act) may be created only for water storage
 - for a weir-on land upstream of the weir and within or outside the storage area at full supply level; or
 - for a dam-on land upstream of the barrier of the dam and outside the storage area at full supply level.

and for example not a private dam located on a property.

A (usual) easement has land burdened and benefited e.g. a person may require access to their property over their neighbour's land, or to run a water pipeline from a pump in a watercourse across their neighbour's land to supply water to their property.

An easement may be entered into. The land over which access is to be gained, or on which the water pipeline is to be located is the burdened land, with the land receiving the benefit of the access or water pipeline obviously is the benefited land.

However, a public utility easement does not need land benefited; only land that is burdened by the easement e.g. easements for a power line may run over burdened lands for several kilometres providing a service (i.e. electricity) to the public (wider community) without any particular land being benefited.

The person who receives the benefit of the easement is the grantee, and the person over whose land the easement is located, is the grantor, both for a usual easement or a public utility easement.

An easement may not be for exclusive use i.e. an easement may not exclude the use by the owner of the land on which the easement is located, but the owner's use is subject to the terms of the easement.

The Queensland Land Title Practice Manual provides further guidance on easements and easement purposes.

Purpose

To provide guidance for granting of easements over land administered under the Land Act, including over reserves and unallocated State land.

Under section 362 of the Land Act, approval is required for an easement to be created over land granted in trust or non - freehold land (State land) other than road. An easement may not be created over a road.

Land granted in trust is a deed of grant in trust issued under the Land Act.

Non - freehold land is generally a lease or occupation licence, a reserve or unallocated State land.

Such approval though is not required under section 390A of the Land Act for transport land or a perpetual lease to the State for marine facility purposes.

An easement needs to be registered in the appropriate register to be created.

A trustee of a deed of grant in trust, a lessee or licensee is the owner for the purposes of granting an easement.

The State represented by the Department of Environment and Resource Management - Land Act (department) is the owner for granting an easement over a reserve or unallocated State land, including if subject to a permit to occupy under the Land Act.

If a permit to occupy is over land subject to an easement, the rights of the grantee under the easement prevail, to the extent of any inconsistency, over the occupation rights comprising the permit.

Although a State Forest or timber reserve is not administered under the Land Act, in addition to Governor in Council approval, approval under the Land Act is required for an electricity easement over a State Forest or timber reserve - section 116A of the *Electricity Act 1994* .

Note: there is no provision for any other type of easement over a State Forest or timber reserve.

A public utility easement may continue when a deed of grant in trust, lease, licence, or reserve ends under section 372 of the Land Act.

Under section 369A of the Land Act, a public utility easement may be transferred with the Minister's approval to a recognized public utility provider, or a person approved to provide a particular public utility service, as outlined in the Rationale below.

SCOPE:

The policy applies to any application for a new easement over land administered under the Land Act, including over a reserve or unallocated State land, and an electricity easement over a State Forest or timber reserve, and continuation and transfer of a public utility easement.

This policy does not apply to the resumption of an easement or an omitted easement.

RELATED POLICIES:

Native title must be addressed in accordance with the State and Federal Native Title Acts.

Rationale

Most appropriate location

Allocated State land is granted or dedicated for a particular purpose and generally must be used for the purpose.

For land yet to be allocated i.e. unallocated State land, the State needs to ensure that the granting of the easement will not diminish any future use of that land.

For trust land (i.e. deeds of grant in trust and reserves) especially, section 30 of the Land Act requires that the community purpose for which the trust land was dedicated or the land was granted in trust is not diminished by granting inappropriate interests over the trust land.

Community purposes are listed in Schedule 1 of the Land Act.

There may be safety issues when considering an access easement over trust land that is generally available for use by the public.

Trust land, particularly for a community purpose, is also for the benefit of the whole community, and not for one person.

Public utility easement

To be able to be granted (or transferred) a public utility easement, the grantee needs to be a public utility provider.

A public utility provider is defined under Schedule 6 Definitions of the Land Act.

If a person who proposes to provide a service is not a recognised public utility provider, e.g. the State, a local government, an electricity entity (i.e. Powerlink, Energex or Ergon), a telecommunications carrier (e.g. Telstra), the person may seek approval to be considered as a public utility provider for a particular public utility service (for public utility service, see section 369 of the Land Act).

A public utility provider though needs to be providing the particular service to the public i.e. the wider community.

No exclusive use

An easement may not provide for exclusive use.

The State does not wish to diminish the purpose for which land is granted or dedicated.

Easement over a State lease over a reserve

If a lease under the Land Act has issued over a reserve (a State lease), generally the State is unable to enter into an easement agreement over the underlying reserve.

The only exemption that may be considered is if the State lease is for grazing purposes only, as a grazing lease, particularly over a reserve, is considered as a non exclusive lease.

Only an electricity easement may be considered over a State Forest or timber reserve.

Conditions on which an easement may be granted.

The Minister's approval will require that the easement contain conditions that will protect the State's interest.

The State as any owner is entitled to fair payment when granting an easement.

Continuing easements

Unless a public utility easement, an easement ends when a deed of grant in trust, lease, licence or reserve ends - section 372 of the Land Act.

A public utility easement though may only continue with the Minister's approval which may be on conditions.

Policy

Most appropriate location

The person who requires the easement will need to demonstrate (and the department determine) that the State land is the most appropriate location for the required easement.

However, access easements are not to be granted over trust land for recreation or any other trust land used by the public where public safety might be affected.

Further, an easement will not be considered over community purposes trust land to provide additional access to private land that already has dedicated access.

Public utility easement

A public utility easement may only be granted or transferred to a public utility provider.

If a person is seeking approval to provide a particular public utility service i.e. to be a public utility provider, the person will need to supply evidence to the department that

- the person has the authority to provide the service e.g. a special approval under the *Electricity Act 1994* for the supply of electricity, or a pipeline licence under the Petroleum and Gas (Production and Safety) Act 2004 <<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PetrolmGasA04.pdf>> for the supply of gas, or the person is authorised under the Water Act 2000 to supply water; and
- the service is being provided to the public i.e. the wider community.

If the service is not being provided to the wider community, approval is unable to be given to a person to be a public utility provider e.g.

- a mining company may have special approval under the *Electricity Act 1994* to supply electricity to its mine, however, as that supply is only for a private purpose, and not to the wider community, the mining company would be unable to be approved as a public utility provider; or
- if water is being supplied to a number of land owners under a private agreement between those land owners, again as the supply is only for private purposes, approval would be unable to be given for those owners to be a public utility provider.

and a usual easement i.e. land being burdened and benefited will be required.

No exclusive use

An easement is unable to provide for exclusive use e.g. an easement may not be granted for an electricity substation, or a compressor station for a gas pipeline. Infrastructure of this nature would need to be located on land which provides exclusive use, such as freehold.

The department's preferred position is such infrastructure is to be located on land other than State land i.e. the department would prefer where possible not to excise any area from existing State land, particularly trust land, for the issue of an appropriate tenure for the infrastructure, as the excision may diminish the use of that State land.

Easement over a State lease over a reserve

Once an easement has either be granted or resumed over a State lease, a similar easement may be considered over the underlying reserve but only if the State lease is for grazing purposes.

The above may also apply for an electricity easement over a State Forest or timber reserve (subject to a State lease for grazing) provided Environment and Nature Conservation is consulted and the Governor in Council's approval to the easement is firstly obtained.

Note: only an electricity easement is to be considered over a State lease issued over a State Forest or timber reserve as the land is still State Forest or timber reserve (only an electricity easement may be granted over these lands).

Conditions on which an easement may be granted

Conditions for the grant of any easement over State land will include the following:

1. The grantee must indemnify the State, and the lessee, licensee or trustee as applicable against all actions.
2. Public liability insurance must be provided.
3. Provision must be made for the removal of any of the grantee's above ground infrastructure and improvements when the easement is terminated or is no longer required.
 - For safety reasons, above grounds infrastructure and improvements include to at least a depth of 60 cm (2 feet) below the surface of the ground e.g. that part of a pipeline that may rise to the surface for a safety inspection point.
 - Below ground infrastructure and improvements may generally remain in the ground if there is no likelihood of environmental harm or contamination, unless other legislation deals with removal of the specific infrastructure and improvements.

Neither the grant of the easement nor any condition therein is to impose a cost to the State.

The easement is to only contain clauses that relate to the relationship between the grantor (if not the department) and grantee, and should not attempt to bind the State.

In addition to the above requirements, for an easement over a reserve or unallocated State land, the following requirements also apply

1. Easements are to be granted only on some suitable consideration.
2. The easement is to carry a clause appointing the State as grantor as the attorney of the grantee to effect a surrender of the easement upon the default of the grantee of any condition, covenant or clause, or if applicable, on termination of the pipeline licence or other similar authorities e.g. special approval under the *Electricity Act 1994* .

If over a reserve, the consent of the trustee to the easement will also be required.

Continuing easements

A public utility easement may continue with the Minister's approval but a condition of the approval may include that the terms and conditions of the easement are to be amended to include the department's requirements to ensure the objects of this policy are satisfied.

Responsibilities

Officers with the appropriate delegations under Chapter 6, Part 4, Division 8 of the *Land Act 1994*.

Legislation

LEGISLATIVE BASIS:

Chapter 6, Part 4, Division 8 of the *Land Act 1994* provides, amongst other things, that with the Minister's written approval, an easement may be created over land granted in trust and non-freehold land, other than a road, by registering the document creating the easement in the appropriate register.