



GOVERNMENT OF
WESTERN AUSTRALIA

Renewable Hydrogen Guidance: Land tenure for large scale renewable hydrogen projects

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1. Government statement of support

The Western Australian Government supports 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.

The Western Australian Government supports the development of large-scale renewable hydrogen projects as they have the potential to:

- » result in economic activities in regional areas,
- » provide jobs during construction and skilled long term jobs in regional towns,
- » provide opportunities for Aboriginal people through jobs and leveraging their native title rights and interests,
- » reduce the carbon footprint in the State and support the State Government's commitment to achieve net zero emissions by 2050,
- » offer downstream manufacturing opportunities such as 'green steel',
- » offer an appropriate use of land assets, while providing opportunities for pastoralists, and
- » co-exist (except for areas of high density infrastructure) with mining and other land interests.

Western Australia offers an abundance of wind and solar resources for establishing renewable hydrogen projects. Project proponents wanting to progress their projects will need to consider the existing land tenure over the site being proposed, the underlying interest holders of the land, the various stakeholders with an interest in the site, and the legislative framework for gaining short and long-term access to the site.

The Government has produced this Guidance document to provide certainty and clarity for renewable hydrogen project proponents as they seek to gain access to land and legal tenure for their projects.

Government has also produced a policy which sets out a preferred, transparent and timely process for managing situations where there are competing projects proposed for the same areas of land. Please reference the Renewable Hydrogen Policy: consideration of highest and best use.

2. Purpose of this document

The purpose of this document is to provide guidance to proponents of large-scale renewable hydrogen projects regarding State Government decision making processes with respect to gaining access to land for both the investigation and feasibility studies stage and the final project implementation stage. It applies to Crown land, as defined by the Land Administration Act 1997 (LAA), throughout the State whether the subject of mining or petroleum tenure, a pastoral lease or reserved for conservation or other purposes.

The next section sets out Government expectations for renewable hydrogen proponents and projects including the assistance Government will provide, and the process to resolve any land use conflicts. The remaining sections describe the processes involved in gaining access and formal tenure for the site of a renewable hydrogen project.

3. Government's overall position

3.1. Legislative base

The Government will work within the existing legislative framework when making relevant decisions. Each Minister does however maintain discretion in decision making under the various statutes and legislative powers that apply.

The LAA provides the legislative base to provide legal access to Crown land for short term investigation and feasibility studies, and long term project development tenure.

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 s144 LAA easements.

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 non-exclusive leasehold tenure ("Diversification Lease"). In the event that these proposed changes become law, this Guidance will be amended as required. Section 4.4 gives an overview of the proposed diversification lease.

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 be dependent 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 Indigenous Land Use Agreement (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).

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.

3.2. Other potential and existing land uses, rights, 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 Petroleum and Geothermal Energy Act 1967 and the Petroleum Pipelines Act 1969),
- » Native Title Parties,
- » 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.

3.3. 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, can co-exist. This can include sharing the same land at the same time or facilitating sequential uses of the same land. Agreement to co-exist will involve good faith and best endeavours negotiations and agreement making based on the development of on-going working relationships. Where possible, proponents should consider the constraints that may arise because of other interests and land uses, and apply these in the early planning for the project. Early engagement with existing interest holders is encouraged so that mutually beneficial agreements can be reached. Where there are existing legal or statutory interests over the land, the agreement to co-exist will be demonstrated by the receipt of written consent by those existing legal or statutory interest holders.

3.4. Government support

Project proponents are expected to take the lead in negotiating a co-existence arrangement with other project proponents and interest holders and negotiating consents or agreements with existing interest holders. Where difficulties are being experienced, Government agencies can provide some assistance. In particular:

- » the Department of Mines, Industry Regulation and Safety (DMIRS) can assist with resource prospectivity assessments and to facilitate consultation with mining and petroleum companies with tenure over the land to minimise land use conflict. Contact landuseplanning@dmirs.wa.gov.au,
- » the Department of Planning, Lands and Heritage (DPLH) can assist with facilitation of negotiations with existing lessees, tenure investigation and the identification of existing interest holders. The contact for assistance and to submit applications is through Proposals@dplh.wa.gov.au and applicants will be directed to the appropriate team,
- » the Department of Jobs, Tourism, Science and Innovation (JTSI) can advise on renewable hydrogen projects and assist with project facilitation and negotiations with other Government agencies (<https://www.wa.gov.au/organisation/department-of-jobs-tourism-science-and-innovation/major-project-assistance>).

The Government has established a Renewable Hydrogen Ministerial Taskforce, which is supported by a Senior Officers Group, to provide advice to Government and the relevant decision-making Ministers on matters related to renewable hydrogen projects.

4. Recommended process for hydrogen proponents

4.1. Preliminary investigations and site selection

Project proponents should carry out preliminary investigations leading to the selection of the preferred area of Crown land. This should include site suitability for the project, and identification of existing land uses, stakeholders, and mining/petroleum interests. Early engagement with DPLH can assist with identifying relevant interest holders and key issues to consider.

Once the preferred area of Crown land has been selected the proponent should submit a request for a s91 LAA licence to the Minister for Lands via DPLH. If granted, a s91 LAA licence would allow the project proponent access to the Crown land to complete its on-site feasibility and geotechnical studies and to define the actual proposal footprint and land requirements of its project.

4.2. Granting of s91 LAA licence

The grant of a section 91 Licence is subject, but not limited to:

- » obtaining written consent from Native Title Holders or Registered Native Title Claimants,
- » obtaining written consent from the existing lessee if the land is subject to a lease agreement,
- » obtaining consent from the Minister for Mines and Petroleum (on advice from DMIRS), where the licence intersects granted mining, petroleum or geothermal energy tenure as required under section 91(5) LAA. DMIRS will work with project proponents to mitigate land use conflict in terms of temporary infrastructure placement. Early engagement with DMIRS is recommended,
- » where the proposed licence does not intersect a granted mining, petroleum or geothermal energy tenure, advice must be sought from DMIRS regarding any impact on access to State resources, and
- » obtaining written agreement from other interest holders.

The grant of a single proponent section 91 LAA licence can be considered in certain circumstances (see Appendix 2).

4.3. Final land tenure s79 LAA lease

Following the grant of a s91 LAA licence, the project proponent can proceed to carry out the investigation works and feasibility and geotechnical studies in preparation for an application for a s79 LAA lease/s. This work will involve a clear definition of the disturbance footprint and preferred location for infrastructure and access requirements within the proposed section 79 lease area.

The project proponent may be granted an Option to Lease agreement with conditions to be met prior to the grant of formal tenure as outlined in section 3.1 Legislative base above. An Option to Lease is typically granted after receipt of a Project Definition document and a level of feasibility and geotechnical works have been carried out to demonstrate viability of project. The grant of legal tenure is subject but not limited to:

- » a registered ILUA with the Native Title Holders or Registered Native Title Claimants, which ILUA the State is a party to, and on terms acceptable to the State,
- » obtaining consent from an existing lessee or interest holder to surrender its lease or interest over the required area of Crown land,
- » obtaining consent from the Minister for Mines and Petroleum as required under section 16(3) of the Mining Act 1978, (on advice from DMIRS). Early engagement with DMIRS is recommended to mitigate land use conflict, and
- » obtaining written agreement from other interest holders.

4.4. Proposed LAA diversification lease

As noted above, legislative amendments are being progressed as part of *Land and Public Works Legislation Amendment Bill 2022*, which includes the introduction a "Diversification Lease". The advice below, therefore, is based on Government's intention for a diversification lease.

The proposed purpose of a diversification lease is to allow a lessee to conduct single, or multiple land uses on a large area of Crown land, where the primary land use can coexist with other land uses. This new type of lease would co-exist with other rights and interests, including mining and petroleum interests, native title rights and interests, and the right for Aboriginal people to access unenclosed and unimproved parts of the lease land to seek sustenance in their accustomed manner.

A renewable hydrogen or other project proponent could pursue this option following completion of the on-site feasibility and geotechnical studies including determining the final proposal footprint and land requirements. Any existing LAA lessee would need to surrender its lease in whole or in part over the Crown land required for the diversification lease, but the conditions of the new lease could still allow that lessee to use the site, for example for cattle grazing, via a sub-lease provided this is compatible with the renewable hydrogen or other project proponent and approved by the Minister for Lands.

The Minister for Mines and Petroleum has an approval role for any Crown land tenure change. This is administered via section 16(3) of the *Mining Act 1978*. It is intended for diversification leases to interact with the resources industry in a similar manner as pastoral leases.

While there is no minimum or maximum allowable area being proposed for a diversification lease, the Minister for Lands, on advice of the Pastoral Lands Board, could determine that the remaining pastoral lease area is economically unviable and/or ecologically unsustainable which might impact on the Minister's decision to grant the diversification lease or might result in the whole of the pastoral lease having to be surrendered or amalgamated with an adjoining pastoral lease(s).

4.5. Highest and best use assessment where co-existence cannot be negotiated

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 may consider assistance to resolve the issues being contested and, where appropriate, recommend the preferred project where more than one is proposed for the same area of Crown land. The decision-making Ministers will give due regard to the advice of the Ministerial Taskforce recognising that their decision(s) are ultimately unfettered.

All efforts must be made to provide a workable co-existence arrangement prior to engaging the Ministerial Taskforce to consider the matter. However, where co-existence arrangements cannot be reached between existing granted rights and interests (such as pastoral leases, native title holders and granting mining, petroleum or geothermal energy tenure) and a hydrogen project a highest and best use assessment will not be considered.

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 JTSI, DMIRS and 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 are 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.

It is noted that the proposed highest and best use assessment does not apply 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 and is not proposed under this policy to be utilised as a tool to resolve competing proposals that are the subject of a 'highest and best use' assessment.

See Appendix 1 for the criteria used in carrying out the highest and best use assessments. Please reference the Renewable Hydrogen Policy and Consideration of the Highest and Best Use.

5. Other approvals

This Guidance only applies to approvals for land access and tenure. Other approvals will 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*.

6. Helpful hints

Below are some helpful tips for project proponents considering land tenure options in Western Australia under the LAA.

- » early engagement with DPLH can help to identify interest holders and provide advice on key issues relevant to your project and selected area of Crown land.
- » consider legal access to the proposed area of Crown land and who you need to negotiate with to get that access.
- » seek the agreement of pastoral lessees to access Crown land within the pastoral lease for initial site investigations (if the current tenure is a pastoral lease), and also acknowledging the likelihood that the area of land that is being applied for will need to be surrendered from the relevant pastoral lease.
- » there is a requirement for approval from Minister for Mines and Petroleum under the LAA and the *Mining Act 1978* prior to section 91 licences and tenure being granted under the LAA. As such, proponents are advised to choose an area of low prospectivity and be mindful of existing mining/petroleum tenements and operations when selecting locations for the projects infrastructure to reduce land use conflict. Early engagement with the Department of Mines, Industry Regulation and Safety's Land Use Planning Branch is recommended.
- » engage early with all Native Title Parties as consent will be required for access to land pursuant to a s91 Licence, and when looking to apply for a lease an ILUA will need to be negotiated and registered prior to the granting of legal tenure. Proponents are encouraged to work with Native Title Parties in the development of projects, including the development of joint ventures and other economic opportunities for Aboriginal People. Information about native title, including the contact details for parties, can be found at the National Native Title Tribunal website. Remember that a key consideration of the Government will be each project proponents 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.
- » ensure that good relationships are built and maintained with all parties that have interests in the land.
- » liaise with the Local Government Authority to understand any planning, zoning and development requirements.
- » understand potential environmental and heritage constraints, existing mining/petroleum rights and approval requirements.

7. Appendix

Appendix 1 – Highest and best use criteria

Please refer to the Renewable hydrogen policy: consideration of the highest and best use. The following criteria will be used to assess the highest and best use for the site:

- » 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.

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.

Appendix 2 – Considerations for when a single proponent s91 LAA licence is granted

The Minister for Lands retains discretion in the granting of s91 LAA licences. The Minister may consider the granting of exclusive for hydrogen s91 LAA licences in certain circumstances, and the following guidance is provided:

- » maximum area for exclusivity is 12,000 square kilometres but with flexibility to provide exclusivity beyond the maximum if a justifiable reason has been provided by project proponents,
- » non-exclusive consent required from relevant interest holders,
- » exclusive, free and informed consent from the Native Title Party,
- » section 91(5) LAA approval being obtained from the Minister for Mines and Petroleum (Department of Mines, Industry Regulation and Safety) if the area intersects mining, petroleum or geothermal energy tenure, or otherwise DMIRS' agreement,
- » a development plan is submitted with the application,
- » the licensee to demonstrate an ongoing requirement for the land through annual reporting,
- » a maximum period for exclusive licences of two years plus a two year extension,
- » exclusivity for s91 LAA licences would only be from competing renewable energy or hydrogen projects, and
- » on referral of a s91 LAA licence application from DPLH to DMIRS a File Notation Area will be made public on Tengraph/Geoview



Department of
**Jobs, Tourism, Science
and Innovation**

Department of Jobs, Tourism, Science and Innovation
Level 11, 1 William Street
Perth WA 6000

T: +61 (08) 6277 3000

E: investandtrade@jtsi.wa.gov.au

W: www.investandtrade.wa.gov.au

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