ROA-03 Roads and their Closure

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1 Overview

For the sake of clarity when the words "public road" are used they may be taken to include public street, highway or public thoroughfare. Where the words ‘private road’ are used they also include private right of way, walkway and pedestrian access way.

The subject to be discussed is the manner in which roads, both public and private, are created: what happens to the fee simple of the land in the road; how they are closed; and how the fee of the roads is dealt with, i.e.: the land comprising the road. Public roads were formerly shown coloured pink on surveys registered under the TLA and brown on the public plan series, however, colouring in no longer used on the creation of new deposited plans.

Dedicated roads on SmartPlan are coloured brown, however, some roads are still uncoloured (white) pending ongoing data capture action.

Part 5 of the LAA provides the current primary legislative basis for the creation/dedication of roads and closure of roads and private roads in Western Australia. Before the LAA was proclaimed on 30 March 1998, the Local Government Act 1960 was the primary legislation for administering the creation, management and closure of roads. The provisions relating to roads in the Local Government Act 1960 were repealed and replaced by Division 1 of Part 5 of the LAA.

A road consists of the road corridors which is the cadastral boundaries of a land parcel created for road purposes. The cadastral boundaries define the legal limits of the road. Generally, road corridors include the constructed bitumen road, the kerbing and verge areas (for example: street lawns in urban areas, road side vegetation in rural areas) up to the boundaries of abutting land parcels.

A road may have a 2-dimensional configuration (length and width) or a 3-dimensional configuration (length, width and height or depth or both) as specified on a deposited plan lodged with the Registrar of Titles. A road may be situated in airspace, waters or, on the surface of or below the ground (including the bed of waters). For example, a 3-dimensional road may be constructed in tunnels, bridges and overpasses.
2 Closure of Public Roads

Public roads are closed in the following ways:

- by registration of a Ministerial Order under s.58 of the LAA
- by a taking of all, or part, of a road for a public work under the LAA
- by the passage of an Act of Parliament

Public roads could formerly be closed by a notice to that effect published in the Government Gazette under the provisions of sections 287, 288A and 294 of the Local Government (Miscellaneous Provisions) Act 1960 but those sections were repealed on the introduction of the LAA (see s.66 of the Acts Amendment (Land Administration) Act 1997).

Where a road dedicated for public use is proposed to be closed, it may be closed at the request of Local Government under s.58 of the LAA. The Local Government must allow 35 days after the publication in a newspaper for objections and must consider any objection before requesting closure. Regulation 9 of the Land Administration Regulations 1998 specifies the procedural requirements of Local Government prior to submitting a request to the Minister for Lands.

Note: Where a road is closed or is to be closed and the land in the road is included in a new plan of subdivision, the matter of obtaining title to that land can be a prolonged operation. Action to obtain title should be commenced at the earliest possible time.

3 Disposal of Land in a Closed Road

Since the introduction of the LAA a road is closed by a Road Closure (Ministerial) Order document. As part of the closure process the Local Government informs the Minister of the proposed future disposition of the land in the closed road to adjoining land holders. Section 87 of the LAA provides the means for disposal of the land in a closed road by lodgement of a Conveyance and Amalgamation Order that allows for amalgamation of land into an adjoining land holder's land (see paragraph 12.3.1 of the Land Titles Registration practice manual).

3.1 After 29 October 1962 and prior to the introduction of the LAA

During this period all closed roads, being land under the TLA, were vested in the Crown and removed from the operation of that Act. On the same day the Land Act, Amendment Act 1962 came into operation and added Sections 118A to 118H to the principal Act.

These sections provided the means for disposal of closed roads, closed rabbit proof fence reserves, closed railways and any additional Crown land for the purpose of adjustment of boundaries. Any land disposed of under the authority of these sections was made the subject of a Closed Road Certificate issued by Department of Lands.

On the application of the person entitled, using a Application for a new/balance title form, the payment of the required fee, the production of the Closed Road Certificate and the duplicate certificate of title (if any) or Crown lease, a new certificate of title was created and registered or the Crown lease amended to reflect the inclusion of the closed road. With the introduction of the
LAA sections 118A to 118H of the Land Act 1933 as amended have been replaced with s.87 of the LAA.

3.2 After 1 July 1961 and prior to the introduction of the Local Government Act, Amendment Act No 381962

During this period there were no means whereby closed roads could be disposed of other than by a registered transfer of the closed road under the TLA or by the creation and registration of a Crown Grant in the case of a Crown road, due to the repeal of the Closed Roads Alienation Act 1932 by the Local Government Act 1960 and the failure to provide alternative legislative machinery to deal with closed roads.

3.3 Before the introduction of the Local Government Act 1960

During these period roads were controlled by Local Governments under the provisions of the Road District Act 1919 and the Municipal Corporations Act 1906. Roads in a municipal district were closed and the fee of a road was disposed of by an Act of Parliament passed for that purpose. Roads, not being Crown roads, closed under the Road Districts Act were disposed of under s.151(3) of that Act.

The fee of the road so closed:

- reverted to being part of the location or lot from which it was originally taken

- and for the same estate or interest

- vested in the owner of that lot or location (where there were two adjoining owners each took one half of the closed road)

and

- was subject to any encumbrances on the land to which it reverted.

On the application of the person entitled, the payment of the required fee and the production of the existing duplicate certificate of title (if any), a new title is created and registered incorporating the portion of the closed road to which the applicant is entitled.

The fee of the roads, being Crown roads closed under the Road Districts Act 1919 was disposed of under the provisions of the Closed Roads Alienation Act 1932. A closed road certificate was issued from the DoL for the part, or whole, of the closed road. On the application of the person entitled, the payment of the prescribed fee, the production of the closed road certificate and the duplicate certificate of title (if any) or Crown lease, a new certificate of title was created and registered or the Crown lease was amended.

4 Closure of Private Roads and Rights of Way by Application

The owner of the fee simple of a private road or right of way may close it by application to the Registrar on an Application form. For such an application the following should be noted:
- the application must be made by the registered proprietor of the fee of the road or right of way
- any easement granted expressly by transfer must be the subject of a formal surrender by the dominant owner. Any encumbrancer of the dominant tenement must consent to the surrender
- the proprietor of the original lots on the plan of subdivision that abut the road or right of way must also execute a formal surrender of their implied rights. If an original lot has been subdivided, surrenders must be obtained from all the proprietors of all the new lots that formed part of the original lot, not just the part of the subdivided lot that abuts the road or right of way
- all surrenders must be stamped by the Office of State Revenue (Stamp Duties Division) but the application is not dutiable

and

- a consent in writing must be obtained from all encumbrancers of any land the proprietors of which have implied rights of way over the private road or right of way.

A deposited plan of subdivision incorporating the land the subject of the closed road or right of way may be lodged at Landgate but no action may be taken on the plan until the road or right of way is closed. After closure of the road or right of way an application for a new title the subject of the plan is required. This application (using Application for a new/balance title form) may be lodged simultaneously with the application to close the road or right of way.

Where no new deposited plan of subdivision is being lodged to incorporate the road or right of way being closed, the land therein, for the purpose of identification, reverts to its original lot. An application for a new title for the closed road or right of way must be made. This application (using Application for a new/balance title form) may be lodged simultaneously with the application to close the road or right of way.

The title for the land in the road or right of way to be closed must be produced unless it is partially cancelled and held by Landgate.

After lodgement, each application to close a road or right of way is submitted to the Commissioner for approval and if satisfied that the requirements have been met, effect will be given to the closure.

5 Closure of Private Roads and Rights of Way at the Request of Local Governments

Freehold private roads may be closed under s.52 of the LAA, by way of an Acquisition Order made by the Minister or under s.56 (dedication), at the request of a Local Government. However, closure of PAWs and ROWs vested in the Crown under s.152 of the P&D Act (formerly s.20A of the TP&D Act) is dealt with differently (see paragraph 8.4.5 of the Land Titles Registration practice manual).

Generally, road closures will not be approved by the Minister or his or her delegate unless the road is to be totally amalgamated into adjoining land or is reserved with a management order to an appropriate management body. In general, it is the preference of Department of Planning, Lands and Heritage that management responsibility for the land once the road has been closed is undertaken by local government.
Private roads (for the purposes of this paragraph) generally consist of land set aside in older subdivisions of freehold land as laneways at the rear of residential lots. Fee simple title to the land in private roads usually remains in the name of the original subdivider, but who in fact has no further real interest in the land. Commonly, such landowners are long since deceased, or defunct land development companies. The private road may be subject to implied easements under s.167A of the TLA in favour of the residential lots created by the relevant plan of subdivision.

Registration of an Acquisition Order under s.52 extinguishes all rights, interests and encumbrances affecting the subject land and revests the land as Crown land. Where a private road is closed by an Acquisition Order under s.52 of the LAA, compensation is not payable to any person with an interest in the land (including the owner of the fee simple interest in the land) nor any person who may have the benefit of an easement over the private road created under s.167A of the TLA.

Before Local Government can request the Minister for Lands to close a private road, Local Government must comply with the requirements set out in s.52 of the LAA and regulation 6 of the Land Administration Regulations 1998.

As part of the closure process the Local Government informs the Minister of the proposed future disposition of the land in the closed road to adjoining land holders. s.87 of the LAA provides the means for disposal of the land in a closed road by lodgement of a Conveyance and Amalgamation Order by DPI that allows for amalgamation of land into an adjoining land holder’s land (see paragraph 12.3.1 of the Land Titles Registration practice manual).

A private road may also be closed by subsequently dedicating it to public use under the provisions of s.56 of the LAA. This is considered by the Local Government on:

- the request of the owner of the street or right of way made to the Local Government

- the request of the owners of rateable property abutting the street or right of way or at least the owners of more than one half of the sum of the rateable values of the abutting properties

or

- where the public has had uninterrupted use of the street or right of way for a period of not less than ten years.

Local Government may then in accordance with the regulations request the Minister to dedicate the land as a road. Where the Minister grants the request, the Dedication Order, which is endorsed on the freehold title, has the effect of transferring that private road to the Crown in the name of the State of Western Australia and revesting the land as Crown land on registration of that Order. Any encumbrances or implied rights under s.167 of the TLA that may be attached to the land are extinguished by the dedication.

5.1 Closure by local government prior to the introduction of the LAA

Prior to the introduction of the LAA private roads could be closed following a resolution to that effect by a Local Government and the approval of that resolution by the Governor in Council. This course of action was initiated by the registered proprietor or some other person applying to the Local Government. Procedures to be followed by the Local Authority were laid down in the Local Government (Miscellaneous Provisions) Act 1960, s.297A.

Upon publication in the Government Gazette of the resolution of the Local Government to close the
private road and the registration of an approved plan in Landgate, the private road was:

- closed

- freed from the right of any person to use the same as a private road

- divided in accordance with the resolution of the Local Government and each portion is vested in the owner of an adjoining lot in accordance with the plan, and

- made part of the lot to which it is attached in Landgate’s records.

The closure was noted on each title and the inclusion of the closed road was effected automatically when any dealing was lodged on affected land for which the duplicate certificate (if any) was produced.

Inclusion in the appropriate dealing is effected by adding at the end of the normal land description the words:

"Including the fee of the closed private street. s.297A Local Government (Miscellaneous Provisions) Act, 1960."

Where no dealing is contemplated, applications (which are free), may be made to include in a new title the closed private way or portion thereof to which the applicants are entitled.

Using application Form A6 the Reason for Application panel should be completed as follows:

"to include in the new title being created and registered the portion of the road closed pursuant to s.297A of the Local Government (Miscellaneous Provisions) Act 1960 the fee of which is comprised in Title Volume ...... Folio ...... to which the applicant is entitled."

The existing duplicate certificate of title (if any) must be produced.

Section 297A of the Local Government (Miscellaneous Provisions) Act 1960 has been repealed by the introduction of the LAA (see s.67 of the LAA).

5.2 Conversion of private road or right of way to public road prior to the introduction of the LAA

Prior to the Introduction of the LAA a private street or right of way could be dedicated as a public street under the provisions of the Local Government (Miscellaneous Provisions) Act 1960 (s.288) on:

- the request of the owner of the street or right of way made to the Local Government

- the request of the owners of rateable property abutting the street or right of way or at least the owners of more than one half of the sum of the rateable values of the abutting properties

or

- the request of the Local Government, where the public has had uninterrupted use of the street or right of way for a period of not less than ten years.

All of the above requests were implemented by a request from the Local Authority made to the Minister for Lands and processed by DPI. Section 288 of the Local Government (Miscellaneous Provisions) Act 1960 has been repealed by the introduction of the LAA (see s.66 of the Acts Amendment (Land Administration) Act 1997). This process is now available under s.56 of the LAA.
6 Closure of Pedestrian Accessways and Rights of Way Vested under Section 20A of the Town Planning and Development Act 1928

As PAWs and ROWs created under s.20A of the TP&D Act are owned in freehold by the State of Western Australia, this category of thoroughfare, defined as a private road under the LAA, can be closed by simply revesting the land under s.82 of the LAA by registering a Revestment Order with the Registrar of Titles.

PAWs and ROWs are created as part of a land planning requirement in new subdivisions to provide access for a number of users and for access to a range of facilities. Local Government must assess the impact of closing a PAW or ROW and in considering a closure request, a balance needs to be found between resident accessibility to facilities and public transport, and security and amenity. Where Local Government proceeds with a closure request, it is required to prepare a summary report for DPI that also includes confirmation that the Local Government has resolved to recommend the closure.

Generally, a PAW or ROW will only be closed when it can be sold to the adjoining landowners or reserved and vested in an appropriate agency for public utility purposes. Where the land is to be sold, the Local Government informs the Minister of the proposed future disposition of the land in the closed PAW or ROW to adjoining land holders. Section 87 of the LAA provides the means for disposal of the land by lodgement of a Conveyance and Amalgamation Order by DPI that allows for amalgamation of land into an adjoining land holder’s land (see paragraph 12.3.1 of the Land Titles Registration practice manual).

Alternatively, a PAW or ROW may also be closed by subsequently dedicating it to public use as a road under the provisions of s.56 of the LAA. Where the Minister agrees, a Dedication Order, which is endorsed on the freehold title, has the effect of revesting the land as Crown land on registration of that Order.

7 Also see

- ROA-01 Creation of Private Roads
- ROA-02 Creation of Public Roads