TAK-01 Taking Orders - Overview

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1 General

The power to compulsorily acquire land in this State was contained in the Public Works Act 1902, later known as the Land Acquisition and Public Works Act 1902, and now known as the Public Works Act 1902 again. The provisions dealing with the compulsory acquisition of land and compensation have been incorporated into Parts 9 and 10 of the Land Administration Act 1997 (“LAA”).

Under the Land Acquisition and Public Works Act 1902, land was set apart, taken or resumed only on gazettal of a proclamation by the Governor through Executive Council. Under the LAA, land or interests in land are now “taken” upon the registration of a Taking Order made by the Minister for Lands and his or her duly authorised delegates (being an acquiring authority) and lodged with the Registrar of Titles for registration under the Transfer of Land Act 1893 (“TLA”).

Upon registration of the Taking Order, the land or such interests in land specified in the Taking Order are converted into a claim for compensation. Other legislation may also express powers to an authority to acquire land.

The LAA requires that where the Minister for Lands or a delegate for the acquiring authority is directly negotiating the acquisition of land for a public work, the landowner must be informed of the procedures for:

- the taking of land and interests in land;
- payment of purchase moneys;
- compensation for land taken;
- rights of appeal; and
- rights relating to the future transactions for interests in land taken by agreement or compulsorily taken.

Takings by the Minister for Lands are prepared by officers within the Department of Planning,
Lands and Heritage ("the Department"). The Department may act as agent for other Government Departments, Statutory Authorities and Local Governments, arranging both the identification of the land required (usually by survey) and legal information in relation to notices, consents and documentation. Taking has effect from the registration of the Taking Order document at Landgate.

All types of land and interests in land, including native title rights and interests, can be taken for a public work. Where native title rights and interests are to be taken, the requirements of the Native Title Act 1993 must also be complied with. Where the Taking Order refers to the Land to be taken, all land and interests affecting that land will be taken and all rights and interests affecting that land will be converted into a claim for compensation. Where the Taking Order only refers to a particular interest in the land, only that interest is taken and converted into a claim for compensation.

Exceptions to the general rule include land or interests in land that are subject to:

- a Registrar’s caveat (section 188(7) of the TLA) or a Minister’s caveat (section 21 of the LAA). Caveats of that nature must be withdrawn before a Taking Order can be registered;

- the DBNGP or Rail Freight Corridors. The corridor interest cannot be removed by a Taking Order. (See section 7 below - Land Within the DBNGP Corridor or Rail Freight Corridor);

- a Crown Reserve. Land must be excluded from a Crown reserve prior to a Taking Order; and

- where the land is encumbered by a statutory memorial or notification which is not considered to be a right or interest that can be taken. The acquiring authority should consider the means for removal of the memorial or notification before lodging the Taking Order or whether the memorial or notification can or should be preserved in the Taking Order.

2 Crown Land

Where an acquiring authority requires an interest in Crown land or a reserve or management order to be granted, the normal processes under the LAA should be used and administered by the Department of Planning, Lands and Heritage. The LAA provides, in section 178(5), that any proposal by an acquiring authority to take Crown land for the purpose of granting a fee simple interest or granting any interest in that land requires the prior approval of the Minister for Lands, unless the statutory body effecting the taking has a specific delegation or an express statutory power which over-rides sections 178(5) and 18. Approval will not be given pursuant to section 18 of the LAA to a Taking Order purporting to convey a fee simple interest in Crown land to the acquiring authority.

Where Crown land is part of the Swan River Trust, is a Class A reserve, a State Forest, national park or has a conservation purpose, or any other reserve purpose or classification, that vesting, purpose or classification must be removed, and the tenure of the land brought back to unallocated Crown land status, before any portion of the land can be taken.

3 Freehold Land under the TLA

Taking Orders over freehold land usually request that the land once taken is to be held by the State of Western Australia as Crown land. An acquiring authority may also request that an immediate disposition of a fee simple in possession be granted to the acquiring authority or their
nominee upon the freehold land being taken.

Where the words:

“T he Land....”; or

“T he estate in fee simple in the land and every registered and unregistered interest therein.”

are shown in the Interest Taken panel of a Taking Order, the Registrar will interpret that it is the intention that the land is taken free of all encumbrances.

If the words:

“Fee Simple”

are shown in the Interest Taken panel of a Taking Order, the Registrar will interpret that it is the intention that only the fee simple interest is taken, and the land will remain encumbered by any current encumbrances at the time of the taking.

4 Freehold Land under the Registration of Deeds Act 1856

Where land is held in fee simple under the Registration of Deeds Act 1856, the land may be taken provided a Memorial of the Taking Order (in the form required under the Registration of Deeds Act 1856) together with the Taking Order is lodged with the Registrar of Titles. The Taking Order has the effect of bringing the taken land under the operation of the TLA.

5 Freehold Land under the Strata Titles Act 1985

Where the land comprises a strata lot under the Strata Titles Act 1985 (“STA”), the processes for a taking will depend on whether or not the land is land within a strata lot or, is common property.

When Taking land from a strata plan a new deposited plan is required showing a lot for the area being taken and a new lot for the balance of the strata plan.

If the land taken is common property only, a replacement sheet depicting the balance common property lot will be required. If the land taken is part of a strata lot, a new sheet of the strata plan that shows the lots and common property is also required. The new sheet must use the existing strata lot numbers.

Where the land being taken comprises part of the common property, the land description in the Taking Order should refer to the strata plan number in the Volume/Folio panel (e.g. SP12345). Where the land being taken comprises part of a strata lot, the land description in the Taking Order should refer to the certificate of title affecting that strata lot in the Volume/Folio panel. If that strata lot also includes common property, then the land description should also refer to the strata plan number.

6 Freehold Land held by the Commonwealth
Where land is held in fee simple by the Commonwealth of Australia, a Taking Order will not be accepted for registration as it is unlikely that the compulsory acquisition powers under the LAA apply to the Commonwealth Government (Commonwealth legislation prevails over State legislation). Where land or interests in land are required from the Commonwealth of Australia, they should be acquired by agreement and a transfer document lodged for registration.

This may also apply in acquiring land or interests in land held by some of the Commonwealth statutory bodies. In this respect legal advice should be sought prior to proceeding with an action.

7 Land within the DBNGP Corridor or Rail Freight Corridor

Where land or interests in land are required and are contained within the DBNGP Corridor and affected by the Dampier to Bunbury Pipeline Act 1997, they cannot be taken under Parts 9 and 10 of the LAA unless all the DBNGP rights and interests are preserved in the Taking Order. Where removal of the DBNGP rights and interests may be required, appropriate documentation from the DBNGP Land Access Minister will be necessary.

Based on the same principles as land contained within the DBNGP Corridor, land or interests in land that are required and are contained within the rail corridor defined in the Rail Freight System Act 2000 as corridor land cannot be taken under Parts 9 and 10 of the LAA unless all the Rail Corridor rights and interests are preserved in the Taking Order. Where removal of the Rail Corridor rights and interests may be required, appropriate documentation from the Rail Corridor Land Access Minister will be necessary.

8 Taking by Agreement

Land and interests in land may be acquired for a public work by agreement, or without agreement. Section 168 of the LAA empowers an acquiring authority to enter into an agreement to purchase interests in land with the owner of that interest, without necessarily preparing, lodging and serving a Notice of Intention to Take in accordance with the LAA.

To be able to acquire land by agreement, the written consent must be obtained from the registered proprietor, occupier, all registered interest and encumbrance holders and the holder of any native title rights and interests in the land.

9 Taking without Agreement

Land and interests in land may be taken compulsorily, that is, without agreement, for a public work. Compulsory acquisition should only be used as a last resort after best efforts to acquire by negotiated agreement have been exhausted.

Where land or interests in land are proposed to be taken without agreement, a Notice of Intention to Take (“NOTT”) and a Taking Order must be registered with the Registrar of Titles and notices served on the relevant persons set out in the LAA.

There are a number of exceptions when a NOTT is not required and the land is being taken compulsorily:
- where the written law clearly specifies otherwise. For example, under section 191 of the Planning and Development Act 2005, a local government need not issue a NOIT when it wishes to take land comprised in a planning scheme, with the consent of the Governor;

- where land or interests in land is proposed to be acquired for the construction of a railway authorised under a special Act (section 183 of the LAA); and

- where a notice of entry under section 186 of the LAA has occurred. In this case, a NOIT is not required if the Minister is satisfied that it is necessary for the land to be used for a proposed public work and because of the urgency of the work, or the difficulty in tracing the proprietors of the land, it is unreasonable or impractical to delay entry onto the land until the land has been taken.

10 Authorisation Order

In addition to general public works, land and interests in land may also be taken where a written law enables the grant of any estate, interest, right, power or privilege in, over or in relation to the land. A taking of land or interests in land authorised under section 165 of the LAA is deemed to be a taking for a public work and the purposes of the grant deemed the purposes of the public work.

The Minister for Lands under section 165 of the LAA may authorise a taking for the purposes of conferring that land or interest to another person where the Minister is of the opinion that the grant of that land or interest confers an economic or social benefit on the State, relevant region or locality. That authorisation is a form of Ministerial Order known as an Authorisation Order and is effective upon registration.

Any instruments lodged after an Authorisation Order must show it as an encumbrance in the Limitations, Interests, Encumbrances and Notifications panel (where there is one). An Authorisation Order can be revoked, amended or replaced with another Order. Whereas a NOIT may expire and be removed from the register, an Authorisation Order remains on the register until revoked.

11 Resumptions (Prior to the Introduction of the LAA)

The Crown, a Crown Instrumentality or a Local Government had the right under the Public Works Act 1902 to take or resume land for the purpose of public works. Notice of such resumption was published in the Government Gazette and took effect immediately on publication.

The resumption, whether total or partial, was noted in the Register by the creation of a Sundry document as soon as it was practicable. The original title was endorsed showing the sundry document number, the date of resumption and the identity of the resuming authority.

The duplicate titles were not called in or amended but if for some reason a totally resumed title comes into Landgate’s possession it is cancelled.

When part of the land in a certificate of title was resumed, the sketch on the original title was amended to show the new boundaries of the land and the date of the resumption noted. When the duplicates of those titles were next in Landgate they were either updated to mirror the original title or a new title was created for the balance of the land left after the resumption.

Any instrument lodged against land subsequent to a partial resumption of that land, had to include in the land description panel and following the description of the land, the words “less portion
resumed”. Digital titles affected by partial resumptions where the land in the partial resumption no longer forms part of the title, are endorsed in the Second Schedule “Excludes road shown on Plan (insert number)”, or similar wording.

Where freehold land was resumed, the resuming authority could, by application, request a new certificate of title for the resumed portion to be created and registered for the land in the name of the resuming authority. Alternatively, the land once resumed could, by notice published in the Government Gazette, be removed from the operation of the TLA and become Crown land administered in accordance with the provisions of the Land Act 1933.

A resumption had the effect of:

- vesting the land in the Crown, Crown Instrumentality or Local Authority named in the notice;
- freeing the land from any encumbrances, rights or easements burdening the land. Any easements or rights which were to the benefit of the land were preserved, e.g. where the land resumed was the dominant tenement of an easement; and
- bringing the land under the operation of the Act where the resumed land was registered under the Registration of Deeds Act 1856.

A resumption could be annulled within 90 days by a notice in the Government Gazette and the notice was effective to restore the Register to its original state. A copy of the notice was filed in a sundry document and the annulment of the resumption was endorsed on the title.

With the introduction of the LAA, resumptions are no longer carried out by the Minister for Works under the Public Works Act 1902. The relevant sections of the Public Works Act 1902 have been repealed and incorporated into Part 9 of the LAA. Under the LAA, Resumptions are now called Taking Orders and they are carried out by the Minister for Lands or the relevant delegated authority.

12 Further Information

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