TAK-03 Taking Orders

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1 Taking Order

The Crown, any Crown Instrumentality or a local government has the right under Part 9 of the Land Administration Act 1997 (LAA) to take land or interests in land held by a person other than the Crown for the purpose of a public work. Such taking occurs by Ministerial Order known as a “Taking Order” and has effect immediately on registration of the Taking Order against the certificate of title or Crown title.

Interests in the Crown cannot be taken under the LAA. They must be acquired, cancelled, surrendered, forfeited or otherwise removed under the other Parts of the LAA. For example, where the Crown holds a fee simple interest in land that is required, the fee simple interest must be vested into the Crown estate and a new interest then granted. Only interests in land not owned by the Crown can be taken.

1.1 Content of a Taking Order

A taking order must:

- include a description of the land affected by the Order;

- either, identify any registered or any unregistered interest to be taken, or specify that the land is taken subject to any interests stated, that are to be preserved;

- specify that any interest taken is to be held as Crown land in the name of the State of Western Australia. This is subject to any specified interest (including the fee simple interest, lease of Crown land or easement) being disposed of or granted to the acquiring authority or any other specified person;

- designate that the land or interests in the land is required for the purpose of the public work;

- specify any covenants that will apply to the land or interests in the land for such public work if the
land or interest taken is to be held by a person other than the Crown; and

- bring the land under the operation of the TLA where the land is registered under another act. For example, if the land is under the Registration of Deeds Act 1856, a clear statement is needed in the Taking Order to enable that land to be immediately brought under the TLA on registration of the Taking Order. In addition, a Memorial of the Taking Order (in accordance with the Registration of Deeds Act 1856) should be lodged with the Taking Order.

1.2 Taking Order Process

After the period allowed to object to the subject of a Notice of Intention to Take ("NOITT") has expired, and any lodged objections have been determined or resolved, the Minister or acquiring authority may make a Taking Order consistent with the NOITT. An acquiring authority may also lodge a Taking Order without a NOITT where it has all necessary agreements and consents of affected persons.

After registration of the Taking Order, the relevant Minister must:

- cause an extract from the Taking Order to be published in a daily newspaper circulating throughout the State;

- send a copy together with forms for the claiming of compensation to the registered proprietor, all persons with a registered interest (which includes all encumbrances), occupier and any holder of native title, mining or petroleum interests, by certified mail or personally. They should also be advised of the procedures for compensation for interests taken, if they have not already been given that advice; and

- send a copy of the Taking Order to the Director General of Mines.

A Taking Order has the effect on registration according to the terms of the Taking Order and may:

- vest the land in the Crown, Crown instrumentality, local government or acquiring authority named in the Order;

- except as may otherwise be specified in the Taking Order, free the land from any encumbrances, rights or easements that burden the land. Any easements or rights that benefit the land are preserved, e.g. where the land taken is the dominant tenement of an easement;

- bring the land under the operation of the TLA where the taken land is registered under the Registration of Deeds Act 1856; and

- where specifically mentioned in the Taking Order, remove designations and conditions of the land including the use of the land e.g. where the land is dedicated as a road.

Where a Taking Order provides that “the Land” or “every registered and unregistered interest” is taken, every registered and unregistered interest in the land (including minerals and native title rights and interests) not preserved in the Taking Order, are extinguished and each person who had an interest (whether registered or unregistered) has that holding converted into a claim for compensation.

If the Taking Order does not provide that “the Land” is taken but provides specifically for the taking of a registered or unregistered interests, then only those interests declared in the Taking Order are extinguished and each person who held such interest has that specific holding converted into a claim for compensation. Every unregistered interest which is inconsistent with the effect and
purpose of the Taking Order is also extinguished and converted into a claim for compensation to the extent of the inconsistency.

A Taking Order that is subject to a NOITT must take the land within a certificate of title or Crown title as is set out in the NOITT i.e. a Taking Order cannot be for part of the land in a title and then another Taking Order for another part of the same title, where both Taking Orders are utilising the same NOITT. Where a NOITT comprises multiple titles, all the land in a title as set out in a NOITT may be taken in separate Taking Orders.

In most instances where a title is affected by a partial taking of a lot, a new title will issue for the land taken and a new title issued for the balance of the land. A taking order endorsement of the designation is added to the new title for the land taken and remains on the title until removed by further documentation (see Taking Order Designation below).

Where the balance title is a freehold certificate of title that has an issued duplicate title, a note is added in the statements section of the title to indicate that the new title has issued after a portion of the land was taken without the production of the existing duplicate title. The existing duplicate title remains the valid duplicate title for the land and the note is removed and the duplicate title replaced when it is next presented to Landgate.

Where the whole of the land in a freehold title is taken back to the Crown estate, the freehold title is converted to a Crown title with a new Volume and Folio number. The same lot and plan number for the land is usually retained in the freehold to Crown conversion. A taking order endorsement of the designation is added to the Crown title and remains on the title until removed by further documentation.

Where the taking order is for the whole of a freehold title and confers a fee simple in possession to the acquiring authority or their nominee, a new edition of the duplicate title is issued by the taking order. The previous edition of the duplicate is not requested, however, if they come into Landgate’s possession they will be cancelled.

2 Variance in Area with Taking Order and NOITT

A NOITT sets out the intention of an acquiring authority to acquire certain land or interests in land for a public work. On occasions the acquiring authority may not be in a position at the NOITT stage to identify the exact area of the land required. For some takings, a graphic for NOITT purposes only is created and a new deposited plan lodged prior to the taking order that accurately defines the taking area.

A Taking Order will be considered consistent with a NOITT where the shape and location of the land to be taken in the NOITT is similar to the land to be taken in the Taking Order and the area is within a ± 10% variation.

The Registrar will not register a Taking Order where the area shown in the Taking Order is less than 90% or greater than 110% of the area shown in the NOITT. In these instances, the Taking Order must be withdrawn from registration and the NOITT amended in accordance with the LAA.

The variations may be acceptable where an agreement is reached between all the interest holders and the acquiring authority, for the taking of land as to the variations between the NOITT and Taking Order. In these instances, the acquiring authority must confirm in writing that they hold the necessary consents and attach the confirmation to the taking order.
3 Amendment or Annulment of a Taking Order

A Taking Order may be amended or annulled at any time within 90 days after its registration. An amendment or annulment of a taking order document can only be lodged after a taking order has been registered and cannot be lodged to correct a taking order where the registration of that document has not been completed.

An Amendment of Taking Order document is to set out the number of the Taking Order being amended, the land description of those parcels of land to be amended and clearly state a description of the amendment.

An Annulment of Taking Order document is to set out the number of the Taking Order being annulled and all the land descriptions that are comprised in the taking order to be annulled. An Annulment of Taking Order cancels all the actions in the taking order. Where the intention is to annul a portion of a taking order then an Amendment of Taking Order should be used.

After registration of a Taking Order Amendment or Annulment, the relevant Minister must cause a copy of the Order to be published in a daily newspaper circulating throughout the State. Interest holders and the Director General of Mines must also be advised. A claim for compensation in these instances must be made to the acquiring authority within 60 days after the date of registration of the amendment or annulment of taking order, or within such longer period as the Minister may allow.

4 Taking Order Designation

Where land is acquired by taking order for a public work, the title for the land or interest is endorsed with the designated purpose the land or interest was acquired for. The designation is a notification on the register that publicises that the land or interest in land must be used for that purpose only.

Instruments that are lodged against land encumbered by a Taking Order must show the Taking Order as an encumbrance in the Limitations, Interests, Encumbrances and Notifications panel (where there is one) and the nature of the instrument must be compatible with the designated purpose shown on the title. Leases, however, may be granted for other purposes where the land taken is not presently or exclusively required for the public work. An easement, under certain conditions, over any land taken may be granted as the Minister thinks fit.

Where the land or interest in land is proposed to be used for a different purpose, or is no longer required for the public work, the designation must be changed or cancelled. A designation may be changed or cancelled by a Change of Designation document or a Designation Cancellation document lodged by the Department of Planning, Lands and Heritage.

Where only interests in Crown land were taken or freehold land was taken by agreement, the Minister may change or cancel the designation if satisfied that the land or interest is not required or not exclusively required for the public work.

Where freehold land was taken without agreement, the Minister may change or cancel the designation if satisfied that the land or interest is no longer required and either:

- the taking occurred more than 10 years ago;
- the land has been used for any public work;
- the land is not to be used for another public work other than that for which it was taken, or will not be sold;
- the land is a small portion taken at the previous owner's request;
- the land has been substantially improved since the taking; or
- the land is not a "lot" satisfying the P&D Act or cannot be amalgamated with other land held by the previous owner.

Where none of the above apply the land must first be offered, to the owner of the fee simple immediately prior to the taking, the first option to buy the land.

If a designation is cancelled in good faith, and the rights of the former owner have been overlooked, the cancellation and any subsequent transactions are deemed to be valid. Additionally, no person has any right of action or claim against the Crown, the Minister or an acquiring authority in relation to the cancellation and disposal of the land or interest in the land.

5 Easements Created by Taking Order

A Taking Order may be made to take an interest in land as required for the creation of an easement and create the easement simultaneously within the same document. The easement conditions should be set out on an additional page within the Taking Order. The Proposed Disposition/Grant section of the Order should indicate that an immediate easement is granted on the conditions as set out on the additional pages attached, and state to whom it is granted.

The easement conditions may additionally be set out in any prior NOITT relevant to the Taking Order.

6 Further Information

- TAK-01 Taking Orders – Overview
- TAK-02 Taking Orders – NOITT