

CHAPTER 10

COMPENSATION

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10. COMPENSATION

10.1. INTRODUCTION

Chapter 9 ([Paragraph 9.1.5](#)) of this manual provides that all land and interests in land, including native title rights and interests, can be taken for a public work.

Where land or interests in land are taken by the registration of a Taking Order, all rights and interests affecting the land are converted into a claim for compensation.

Section 51(xxxi) of the Australian Constitution expressly empowers the Federal Parliament to make laws for the acquisition of property on “just terms”. This power extends to any State or individual property in respect of which the Commonwealth Parliament has a law-making function.

The High Court decision of *New South Wales v Commonwealth (1915) 20 CLR 54* held that the sovereignty of each State Parliament empowers it to take or acquire land with or without payment of compensation.

The power vested in this State to take land or interests in land is set out in Part 9 of the *Land Administration Act 1997 (LAA)* and the compensation entitlement of owners of interests in land taken under Part 9 is set out in Part 10 of the LAA.

10.2. PERSONS ENTITLED TO COMPENSATION

10.2.1. GENERAL

Compulsory acquisition and compensation for that acquisition are statutory processes and depend purely upon the legislative provisions. Compensation for compulsory acquisition does not form part of the common law.

Acquiring authorities in Western Australia must comply strictly with the legislative requirements of the LAA. Where an acquiring authority exceeds the powers conferred on it by the LAA, the acquiring authority will be liable in damages for conduct that is contrary to the LAA.

Compensation can be claimed by certain persons, in relation to certain types of interests and rights and types of actions in relation to the land or interests in land using the appropriate sections set out in Part 10 of the LAA.

In general, acquiring authorities are responsible for meeting any compensation liability for the taking of interests. For this reason it is important that the acquiring authority is identified in both the Notice Of Intention To Take (NOITT) and Taking Order (see 9.6.3 and 9.8.5.1). Where it is intended that the purpose of any taking is to confer interests the Minister may enter an agreement with the person receiving the interest as to the amount that person will contribute to any compensation liability – section 167.

However, this section applies only where the person requests the Minister to take interests for the purpose of a grant of another interest in the land.

The provisions relating to claims for compensation include time frames within which certain actions must be taken by interest holders and an acquiring authority.

10.2.1.1. OWNERS OF REGISTERED INTERESTS IN LAND

With the exception of determined native title holders (as defined by the *Native Title Act 1993*), only owners of interests in land that are registered or notified in LANDGATE or the Registry of Deeds are entitled to claim compensation for their interest from the acquiring authority (see section 202 of the LAA). Compensation cannot be awarded to another person for the same land or interest in the land.

Compensation is not payable for conditional tenure land transferred under section 75 of the LAA except for improvements made to the land following the transfer or any consideration paid for the land: Section 202(3) of the LAA.

10.2.1.2. NATIVE TITLE RIGHTS AND INTERESTS

Determined native titleholders are entitled to claim for compensation under section 202 of the LAA. The National Native Title Tribunal pursuant to the *Native Title Act 1993* (NTA) maintains the Register of Native Title.

Division 5 of Part 2 of the NTA sets out provisions for the determination of compensation. Section 51(1) of that Act provides that native titleholders are entitled to just terms so as to compensate them for any loss, diminution, impairment or other effect on their native title rights and interests. Where the compensation is for the compulsory acquisition of those rights and interests, the principles or criteria set out in section 51(2) of that Act should be considered. Where other legislation provides principles or criteria for compensation rights for ordinary titleholders, those principles must be applied to native title holders (see section 51(3) of that Act).

Where non-monetary compensation is requested, the criteria set out in section 51(6), (7) and (8) of that Act must be considered.

Generally, for the determination of compensation where there is an entitlement to the native title holder, compensation is paid only once for essentially the same act, and due account should be taken for any compensation previously awarded under another State or Commonwealth law for the same act when calculating compensation to be paid. In this respect regard should also be taken for any agreements under the NTA (for example, agreements under the right to negotiate, future act determinations or indigenous land use agreements) which may have established the basis for meeting compensation liability.

In addition, subject to the requirement to pay compensation on just terms, the compensation cannot exceed the amount payable for the compulsory acquisition of a freehold estate of the land.

In some circumstances a claim for compensation under the LAA may be lodged by a party claiming to hold native title. Unless the party can provide evidence supporting a determination of native title under the NTA the claim for compensation should be held pending until a determination on the existence or otherwise of native title has been made.

10.2.1.3. DAMAGE SUFFERED BY NOTICE OF ENTRY

The LAA provides that a person who holds an interest in land, or who lawfully occupies the land, suffers damage by reason of entry or occupation of the land under Part 9 of the LAA, is entitled to compensation from the acquiring authority if the land or interest is not subsequently taken. Compensation claimed cannot exceed the value of the land had the land itself been taken.

For the different types of notices of entry onto land under Part 9 of the LAA, see Chapter 9 ([Paragraph 9.7](#)) of this manual.

10.2.1.4. MANAGEMENT BODIES

Management bodies, as defined in the LAA as a person with whom the care, control and management of a reserve or mall reserve has been placed under section 46(1) or 59(4) of the LAA, is entitled to compensation under section 204 of the LAA for the depreciated value of any structures and improvements lost as a result of the registration of a Taking Order.

The management body must not be an instrumentality of the State. A management body cannot claim compensation for the revocation or variation of the management order as a result of the Taking Order: Section 204 of the LAA.

As compensation is payable, it is necessary, when an acquiring authority is desirous of taking land that affects a managed reserve or mall reserve, to serve a Notice of Intention to Take on the management body, even though that management body does not, by definition, have an “interest” in the land. A compensation claim must also be forwarded to a management body affected by a proposed taking for any improvements that may exist.

Where a managed reserve is leased by the management body, the acquiring authority must identify whether or not the lessee has constructed improvements upon the affected land. If so, compensation is payable to the lessee. Where the management body has a joint arrangement with the lessee, or with the State of Western Australia, compensation may be payable in accordance with the terms of the agreement so that both the management body and the lessee will share the compensation payable following the taking of the land.

Policy 10.1.3 in the Government Land Policy Manual (please note this manual is not available on this website – please contact RDL’s Lands Division, State Land Services for further information) deals with this issue.

10.2.1.5. MINING AND PETROLEUM RIGHTS AND INTERESTS

Section 205 of the LAA provides that compensation may be payable for an interest in land held under any Act for mining purposes and that interest is taken. The compensation payable can only be claimed for actual loss sustained through damage to the mine or works connected to the mine. This suggests that compensation will only be payable in relation to an active mine that is compulsorily taken.

Section 162 of the LAA further reinforces the view that compensation is only payable in relation to an active mine by providing that it is possible to take underground interests without paying compensation if “...mines, underground workings etc...” are not injuriously affected.

Despite this, it should be recognised that section 177(5)(c) of the LAA requires that the Taking Order, together with a compensation claim form is served on each holder of a mining or petroleum right in the land. Legal advice has been given in the past that the holder of a mining tenement under the *Mining Act 1978* was an ‘occupier’ for the purposes of the *Land Acquisitions and Public Works Act 1902*, where such holder was in actual occupation of the land. As such they were entitled to claim compensation. The same principle may well apply under the LAA. Whether or not compensation is payable will be dependent upon legal advice or Court determination (whether the State Administrative Tribunal or otherwise). RDL Officers should refer to Policy 10.1.4 in the Government Land Policy Manual which deals with this issue.

10.2.1.6. CONDITIONAL TENURE (FORMERLY CROWN GRANTS IN TRUST)

[Chapter 6](#) of this Manual provides information on conditional tenures granted under section 75 of the LAA.

Conditional tenure land is fee simple land subject to “conditions” registered against the certificate of title. The “conditions” are such conditions (or restrictions) determined by the Minister, relating to the permitted use of the land.

The land has been transferred either for nominal value, or for a discounted price; reflecting the restrictions placed on the land’s use, and the value to the community of the service provided on the land (e.g. aged persons’ home, or church). The State’s equity in the land consists of the difference between the land’s unimproved market value at the time of transfer, and the price paid by the recipient of the title for the land. Where a nominal price was paid, the State’s equity is 100%.

Conditional Tenure land replaced “Crown Grants in Trust” formerly issued under section 33(4) of the *Land Act 1933* (and similar provisions of preceding legislation) over reserved land, limiting the land’s use to a specific purpose.

Conditions relating to conditional tenure land can only be removed pursuant to an application made to the Minister, together with payment to RDL of the State’s equity in accordance with section 75(4)(b)(i) or (ii) of the LAA. If the Minister agrees to this payment, the conditions and covenants registered against the certificate of title may be removed by a cancellation of the conditions lodged pursuant to section 15 of the LAA.

Under section 75(7a) the Minister may, in prescribed circumstances and with the Treasurer’s prior approval, waive whole or part of this payment. No circumstances have been prescribed as yet (April 2002), and it is intended that section 75(7a) should be used very rarely, as circumstances justifying its use will be very limited.

Reflecting the provisions of section 75, section 202(3) of the LAA provides that no compensation is payable in respect to the taking of conditional tenure land other than in respect to lawful improvements made on the land after transfer and/or any consideration paid for the transfer of the land. That is to say, holders of conditional tenures or Crown Grants in trust are not entitled to compensation for land taken from their title, if they were granted the land for nil or nominal consideration; and can only claim compensation in relation to buildings on the land.

Where a government agency takes conditional tenure land, it should compensate RDL for the unimproved value of that land. This is in accordance with both the LAA and Treasury's "Transfer between Government Agencies" policy, under the Strategic Asset Management/Property Disposal Program.

RDL Officers should refer to Policy 10.1.6 in the Government Land Policy Manual which deals with this issue.

10.2.2. LIMITS TO PAYMENT OF COMPENSATION

Other than the limits and exceptions specifically set out in relation to the various types of interests in [Paragraph 10.2.1](#), compensation is only payable under section 202 of the LAA provided that it has not or would not have been payable under any other written law or instrument.

If any act is taken under Part 9 of the LAA and that act could have been done under another written law or instrument, no compensation is payable under section 203 which would not have been payable if the act had been done under the other written law.

10.3. REGISTRATION OF TITLE

10.3.1. THE VESTING OF VARIOUS INTERESTS BY TAKING ORDER

The LAA provides for the acquisition to be effected into the name of the acquiring authority by registration of a Taking Order. The single registration system (set out in detail in [Chapter 2](#) of this manual) will apply to registration of all instruments under Part 9 of the LAA.

10.3.2. THE IMPACT OF REGISTRATION PURSUANT TO A VOID TAKING ORDER

As all dealings under Part 9 of the LAA are registered under the TLA, the principles of indefeasibility of title will apply. This raises the issue of what is the effect of registration of a Taking Order that is void. The issue of whether or not a void resumption instrument invalidates the resumption process was considered by Mr Justice Lee in *Minister Administering the Environmental Planning & Assessment Act 1979 v. Hamilton (1983) 50 LGRA 180*. Mr Justice Lee held that, on the assumption that the resumption was invalid on the ground that the notice of resumption did not express the purpose thereof, the defendants could point to no action or conduct on behalf of the acquiring authority which would give rise to any equity entitling them to have the land restored to them. In reaching this conclusion, Mr Justice Lee was persuaded by the fact that registration of title even pursuant to a void instrument conferred an indefeasible title and accordingly, no personal equity vested in the owners of the resumed interest by which he could obtain re-registration of the resumed interest in his name despite the fact that the registration took place following an instrument that was void.

The consequences applied by this case suggest that an acquiring authority should, in all circumstances, abide strictly to the requirements set out in Part 9 of the LAA when seeking to compulsorily acquire land or an interest in land.

10.4. THE CLAIM

10.4.1. WHO MAY LODGE A CLAIM FOR COMPENSATION?

Any person who has a right title or interest in land or an interest in land that is taken or acquired under Part 9 of the LAA is entitled to compensation for that right title or interest from the acquiring authority: Section 202 of the LAA. This includes both primary (for example freehold land owners) and subsidiary interest-holders, such as lessees, mortgagees, etc.

Similarly, any person who has suffered any damage or loss as a result of a notice of entry pursuant to Part 9 of the LAA and the land or interest in land entered upon is not subsequently taken, is entitled to compensation for that damage or loss from the acquiring authority: Section 203 of the LAA.

Section 202 of the LAA sets out the persons that are entitled to compensation of land or interests in land taken under Part 9 of the LAA.

Where the person entitled to claim compensation is deceased, that person's executor or administrator may make a claim on behalf of the deceased's estate: Section 208(1) of the LAA.

Similarly, a claim on behalf of beneficiaries of trusts, wards or incapable persons may be made by their trustees or guardians: Section 208(2) of the LAA.

10.4.2. TIME LIMIT FOR MAKING A CLAIM FOR COMPENSATION

10.4.2.1. TIME LIMITS UNDER THE LAA

Where a claim for compensation is made under section 202 of the LAA (by a person whose interest has been taken under Part 9 of the LAA) or section 204 of the LAA (by a management body who is entitled to compensation for the depreciated value of structures or improvements erected on the land), the claim must be made within 6 months from the date of registration of the Taking Order: Section 207(1)(a) of the LAA.

Where a claim for compensation is made under section 203 of the LAA (by a person who has suffered damage or loss by reason of entry or occupation of land or removal of material under Part 9 of the LAA), the claim must be made within 6 months from the commission of the acts complained of: Section 207(1)(b) of the LAA.

The Minister has the power to extend this time limit (whether it has expired or not – section 207(2)) where he or she is satisfied that the application is reasonable and has been made in good faith. When considering compensation for the loss of native title rights and interests it is appropriate that agreement be reached enabling the claim for compensation to be dealt with once native title has been determined. In some circumstances agreements will be entered under the NTA establish compensation arrangements or defers the right of a party to later claim compensation under the LAA.

Where the time limit or extension has expired, no action can be taken against the acquiring authority in respect of any claim for compensation.

10.4.2.2. EXCEPTION WHERE THE CLAIMANT IS AN INFANT, INCAPABLE PERSON OR IS ABSENT FROM THE STATE

Where a person entitled to compensation is absent from the State, is an infant or incapable person and the time limit for lodging a claim has expired, the acquiring authority must offer an amount in compensation and apply to the State Administrative Tribunal for a direction (see section 210 of the LAA) as to whether -

- the offer is acceptable,
- the claim should be determined by the State Administrative Tribunal or,
- the claim should be assessed and moneys paid into the Supreme Court subject to section 249 of the LAA.

10.4.3. THE CLAIM FORM

10.4.3.1. WHAT IS A CLAIM FORM?

The claim form is the form submitted by the holder of an interest in land taken under Part 9 of the LAA to the acquiring authority for compensation. The purpose of requiring a claimant to provide a claim form is to enable the acquiring authority to evaluate the claim and determine who has interests in the land so that they may be adequately compensated.

The claim form must be made in an approved form as required under section 211 of the LAA. RDL Officers should refer to the approved claim Form LAA – 1026 entitled “Claim for Compensation”.

10.4.3.2. CONTENTS OF CLAIM FORM

The claim form must set out the following information as provided under section 211 of the LAA:

- The particulars identifying the land in respect of which the claim is made setting out the land description shown on either the certificate of title or the Crown title;
- The nature and particulars of the claimant’s interest in the land (for example, as owner in fee simple, mortgagee, lessee, occupier etc.);
- If the land or interest is charged or subject to a mortgage, lease, or subject to any easement, the particulars of the charge, mortgage, lease or easement including the dealing number for that document lodged with LANDGATE;
- Each matter on account of which compensation is claimed, with particulars of the nature and extent of the claim setting out full details of each item claimed and giving full particulars of the grounds, nature and extent of each item claimed; and
- The claimant’s full name and address for service.

Where the claim includes items other than monetary aspects of the claim (as may be made under section 212 of the LAA), full details of non-monetary compensation claimed in partial or total satisfaction of the compensation claim should be provided. For example, the claim may be by way of an exchange of land or the provision of goods or services. Where land is to be exchanged, the full land description as shown on the certificate of title or Crown title the subject of the exchange should be provided.

Substantial compliance with the claim form has been held to be sufficient, and the fact that the form has not been fully completed will not mean that a claimant cannot still claim compensation. The specific facts of each case must be considered.

10.4.3.3. SERVICE OF CLAIM FORM AND ALL RELEVANT DOCUMENTS

Under section 213 of the LAA the claim and all relevant documents relating to the claim must be served on the acquiring authority in the manner set out in a Notice of Intention to Take, or where no Notice of Intention to Take has been issued, by delivery to the acquiring authority or by certified mail addressed to the Minister for Lands at RDL or her delegate. If the further and better particulars are not furnished within 60 days, or as extended by a Supreme Court Judge, the claim is time-barred, that is, it expires.

10.4.3.4. REQUEST FOR FURTHER AND BETTER PARTICULARS

Under section 214 of the LAA, where the claimant has not provided sufficient particulars of any matter in his or her claim form, the acquiring authority may request further details from the claimant by notice in writing within 30 days after receiving the claim form.

10.4.3.5. ACQUIRING AUTHORITY MAY DISPUTE CLAIM

If the acquiring authority disputes the claimant's title to the interest in land, or part of the interest, the acquiring authority must serve a notice on the claimant in an approved form within 60 days after the service of the claim, or, where further particulars were requested, within 60 days after the particulars have been furnished: Section 216(1) of the LAA. RDL Officer should refer to the approved FORM LAA-1028 entitled "Notice of Dispute as to Title".

Under section 216 of the LAA, where a claimant has been served with a Notice of Dispute as to Title, he or she may apply to a Judge of the Supreme Court, after giving 8 days notice in writing to the acquiring authority, for an order –

- for a trial of any factual issues which may be necessary to determine the question of title: Section 216 (1)(a) of the LAA; and
- that the Court gives an opinion on any question of law arising from the dispute as to his or her title to the interest: Section 216(1)(b) of the LAA.

10.5. DEALING WITH THE CLAIM

10.5.1. OFFERS OF COMPENSATION

Once a claim has been made and served upon the acquiring authority, then, subject to the acquiring authority not disputing the claim (in the manner provided in [Paragraph 10.4.3](#)), under section 217 of the LAA the acquiring authority has:

- 90 days from the date of service of the claim,
- 90 days after the receipt of any further particulars sought by the acquiring authority from the claimant under section 214 of the LAA,

in which to examine the claim and prepare a report as to the value of the interest acquired and the damage sustained by the claimant by reason of the taking.

Where a dispute arose as to the compensation claimed and the Supreme Court confirms the claimant's title to the interest under dispute, the acquiring authority has 90 days after judgment of the Court to examine the claim and prepare a report as to the value of the interest claimed as confirmed by the Court and the damage sustained by the taking.

As soon as possible after the preparation of a report, the acquiring authority must serve on the claimant an Offer of Compensation in an approved form: Section 207(3) of the LAA. RDL Officer should refer to Form LAA – 1007 - "Offer of Compensation".

Acquiring authorities should note that an offer made by an acquiring authority is an admission by the acquiring authority of the claimant's title to the interest: Section 217(5) of the LAA.

After an offer has been made and before a claim is settled in full, the claimant may require the acquiring authority to amend the claim only as to the amount claimed. This can only be done where proceedings have not commenced in or before the State Administrative Tribunal for a determination of the amount of compensation: Section 218 of the LAA.

Claimants should note that they must reject the offer or amended offer of compensation within 60 days after service of the offer or amended offer. The notice of rejection must be in an approved form. If a notice of rejections is not given within that time, the claimant is deemed to have accepted the offer of compensation or amended offer: Section 219 of the LAA.

Approved forms for the rejection of an offer of compensation may be obtained from RDL.

10.5.2. GENERAL SETTLING OF A COMPENSATION CLAIM

If the claimant rejects the acquiring authority's offer or amended offer of compensation and serves the Notice of Rejection of Offer form on the acquiring authority, the compensation is then determined by one of three different methods set out in Section 220 of the LAA:

- by agreement between the acquiring authority and the claimant;
- by an action for compensation by the claimant against the acquiring authority under Part 10 of the LAA; or
- by referring the claim to the State Administrative Tribunal in accordance with Part 10 of the LAA.

The most common is by agreement.

10.5.2.1. BY AGREEMENT BETWEEN THE ACQUIRING AUTHORITY AND CLAIMANT

Before litigation proceeds, the acquiring authority and the claimant should attempt to reach an agreement as to the compensation payable in respect of the taking and consider alternative assessments of the compensation payable.

10.5.2.2. BY INSTITUTING AN ACTION FOR COMPENSATION IN AN ORDINARY COURT

A claimant may commence an action for compensation against an acquiring authority in a court of competent jurisdiction to be heard and determined in the same manner as ordinary actions with ordinary rights of appeal on the amount of compensation awarded or to any question of law or fact or a mixture of both. No question of law or fact may be determined by a jury.

Section 223 of the LAA enables an action to be instituted by a claimant in an ordinary court in only two instances:

- after it has rejected the acquiring authority's Offer or amended Offer of Compensation in accordance with Division 3 of Part 10 of the LAA, or
- the acquiring authority has failed to serve an offer of compensation on the claimant within 120 days after the relevant date: Section 221 of the LAA.

The relevant date is the latest of -

- the date of service of the claim,
- the day of service of any amendment to the claim, or
- the day of compliance with any requirement for further particulars

or

- where the claimant's title is disputed and the Supreme Court has upheld the claimant's title in whole or in part, the Day of Judgment.

Where a claimant wishes to commence proceedings under section 223 of the LAA, the claimant must give the acquiring authority 30 days notice.

The acquiring authority may apply to the Court for any other person claiming compensation in respect of the taking of any interest in that portion of land claimed by the claimant to be joined as a plaintiff to the proceedings. If such person fails to join as a plaintiff in the action within the time specified in the Court Order, that person is prohibited from ever litigating his or her compensation claim in an ordinary court or referring to the State Administrative Tribunal: Section 223 (4) and (5) of the LAA.

The jurisdiction of the court in relation to the amount of the compensation claim and the type of claim is an important factor. Where the total compensation claimed in the case of a joinder of plaintiffs in a claim for compensation exceeds the jurisdiction of the court concerned, the matter may be referred by any party to a court of competent jurisdiction: Section 223(6) of the LAA.

Where the title of the claimant to the interest is disputed, the proceedings under section 223 of the LAA should be adjourned until a judgment of the Supreme Court under section 216 of the LAA on that issue has been made: Section 223(7) of the LAA.

Claimants should note that where an action for compensation is commenced in an ordinary court, the court can only determine the amount of compensation payable by the acquiring authority to the claimant in respect of the taking of the interest in land, having regard only to the provisions of Part 10 of the LAA and the matters prescribed in Division 5 (on assessing compensation) and section 256 (on awarding easements in lieu of compensation) of that Act. Where two or more persons are entitled to share the compensation, the court can only determine the amount payable to each person and the manner in which it is to be paid. The costs of the action will be at the discretion of the Court.

10.5.2.3. BY REFERRING THE CLAIM TO THE STATE ADMINISTRATIVE TRIBUNAL

As an alternative to instituting an action in an ordinary court, a claimant can refer his or her claim to the State Administrative Tribunal: Section 220 and 221 of the LAA.

To do so, the claimant must serve on the acquiring authority notice of the appointment of an assessor (Form LAA – 1089 or 1090) together with copies of the assessor's consent and declaration in an approved form: Section 224 of the LAA.

If the acquiring authority has not appointed an assessor or settled an offer of compensation after 30 days of being served, the claimant may request the President of the State Administrative Tribunal to choose a consenting person: Section 224(4) of the LAA.

More information on the constitution of the State Administrative Tribunal and the procedures to be followed is set out in [Paragraph 10.6](#).

10.6. THE STATE ADMINISTRATIVE TRIBUNAL

10.6.1. GENERAL

The State Administrative Tribunal was established under section 7 of the *State Administrative Tribunal Act 2004* and, in relation to compensation proceedings is dealt with generally in Division 4 Part 10 of the LAA sections 226-231. The LAA was amended to this effect by the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004*.

10.6.2. CONSTITUTION OF THE TRIBUNAL

Under section 226 of the LAA, when dealing with compensation proceedings, the State Administrative Tribunal is to be constituted by a judicial member or a senior member who is a qualified person, and 2 assessors, one appointed by the claimant and the other, by the acquiring authority.

The claimant and the acquiring authority may agree, in writing, that the claim be heard and constituted solely by a judicial member or a senior member who is a qualified person.

Claims other than the claim for which the State Administrative Tribunal is constituted under Part 10 of the LAA to hear may be heard by the State Administrative Tribunal if agreed in writing by both the claimant and the acquiring authority: Section 229 of the LAA. Either party may appear personally before the Court, or by counsel: Section 39 of the *State Administrative Tribunal Act 2004*.

10.7. ASSESSING COMPENSATION

10.7.1. GENERAL

Division 5 of Part 10 of the LAA deals with assessing compensation where land or interests in land are taken. Compulsory acquisition legislation in Australia is designed to ensure fair and just compensation. To clarify assessments of compensation and limit the criteria by which compensation is payable, the methodology for assessing compensation in Western Australia has been designed specifically to limit the assessment of compensation solely on the matters referred to in section 241 of the LAA. The court or the State Administrative Tribunal appear to be confined to the categories of actual financial loss and disturbance that can be identified in section 241 of the LAA.

10.7.2. DATE OF ASSESSING COMPENSATION

Where the interest is taken for a railway or other work authorised by a special Act, the value of the land is assessed on the first day of the session of Parliament in which the Act was introduced: Section 241(5) of the LAA.

Where the interest is taken by agreement under section 168 of the LAA, the value of the land is assessed on the date of execution of the agreement unless otherwise provided in the agreement.

Where the interest is taken in any other case, the value of the land is assessed on the date of the taking which is the date upon which the taking order was registered at LANDGATE.

10.7.3. EFFECT OF REGISTRATION OF NOTICE OF INTENTION TO TAKE

Where a NOITT was registered before the date of assessing compensation set out in [Paragraph 10.7.2](#) and a transaction relating to the land was made between the registration of the NOITT and the date of assessing the compensation set out in that Paragraph which affected the value of the claimant's interest, the Court or the State Administrative Tribunal shall have regard to the value of the interest assessed as at the date of assessing compensation set out in that Paragraph discounting the effect of that transaction: Section 241(3) of the LAA.

Where any improvements were made to the land after the registration of a NOITT without the consent of the Minister, no regard will be had to the value of such improvements: Section 241(4) of the LAA. The exception to this is that the value of improvements is allowed in the case of a railway or other work authorised by a special Act. Where those improvements are made after the 1st day of the session of Parliament when that Act was introduced, but before the registration of the taking order. Such improvements will be allowed provided that the costs of the improvements do not exceed their actual cost: Section 241(5) of the LAA.

10.7.4. OTHER FACTORS TO BE CONSIDERED IN ASSESSING COMPENSATION

Section 241(6) of the LAA provides for a list of other factors affecting the loss or damage sustained by the claimant that can be considered in an assessment of compensation pursuant to a compulsory acquisition of land or interests in land under the LAA. These factors are listed as follows:

- removal expenses;
- disruption and reinstatement of a business;
- the halting of building works in progress at the date when the interest is taken and the consequential termination of building contracts;
- architect's fees or quantity surveyor's fees actually incurred by the claimant in respect of proposed buildings or improvements which cannot be commenced or continued in consequence of the taking of the interest; or
- any other facts, which the acquiring authority, the court, or the State Administrative Tribunal considers it just to take into account in the circumstances of the case.

10.7.4.1. SEVERANCE AND INJURIOUS AFFECTION

Where the fee simple in land is taken who is also the holder of adjoining land, the principles of severance and injurious affection are to be considered and regard is to be had to the amount of damages suffered by the claimant as a result of the severance of the land from the adjoining land or, due to a reduction of the value of that adjoining land by the public work on the land taken.

The relevant enquiry is whether or not there has been a diminution in the value of the remaining land, caused by the compulsory acquisition. The loss due to injurious affection must result directly from the nature of, or the carrying out of, the purpose for which the interest in land was acquired.

It should be noted that section 176(1) of the LAA provides that the claimant may, in certain circumstances, require the acquiring authority to acquire the remainder of the land if it is less than 1000 square metres in area.

Section 241(7) of the LAA provides that where the value of any freehold land is increased by the carrying out of the public work, that increased value is offset against the amount of compensation that would be payable for any loss or damages suffered as a result of the severance or following any injurious affection to the adjoining land.

10.7.4.2. SOLATIUM

Where the land or interest is taken without agreement, payment for solatium limited to an additional 10% more than the amount otherwise awarded or offered can be made. Solatium is an expression used to describe an award of some amount to cover inconvenience and other intangible factors caused by compulsory taking of land. Solatium is usually paid in a lump sum and can be made in exceptional circumstances to cover such additional factors like disruption, nuisance, distress and inconvenience to the dispossessed party. To be payable, there must be a causal connection between the events that arose before the acquisition occurred and the acquisition itself that gave rise to a claim for solatium: Section 241(8) of the LAA.

10.8. PAYMENT OF COMPENSATION

10.8.1. WHEN SHOULD COMPENSATION BE PAID?

Where agreement is reached between the claimant and the acquiring authority, compensation is usually paid in accordance with that agreement. It is usually appropriate to prepare an agreement to record the terms of the settlement of the claim. Legal assistance may be obtained to prepare a suitable agreement.

Where compensation has been determined by a court of competent jurisdiction, compensation is usually paid upon issue of the court order.

Where compensation is awarded by the State Administrative Tribunal, the decision of the Tribunal has effect immediately after it is given (section 82 of the *State Administrative Tribunal Act 2004*). The Tribunal may then make an order under section 87-89 of the *State Administrative Tribunal Act 2004*, for payment of compensation and other costs. The claimant may then enforce the order by filing the order in a court of competent jurisdiction, whereupon the order becomes an order enforced accordingly (section 85 of the *State Administrative Tribunal Act 2004*).

In other cases, where a claim for compensation is still being negotiated, the acquiring authority may offer the claimant an advance payment pending settlement of the claim (section 248 of the LAA). Payment of such amount does not prejudice the rights of the claimant under Part 10 of the LAA.

Section 167 of the LAA also enables the Minister to enter an agreement in relation to the payment of compensation with a person who requests the Minister to take interests to grant another interest – see [Paragraph 10.2.1](#).

10.8.2. TO WHOM SHOULD COMPENSATION BE PAID?

There are a number of avenues for acceptance of compensation. An acquiring authority may pay compensation into the Supreme Court for a fair and equitable distribution of moneys. Until such time as the moneys are distributed in accordance with an order of the Court, the Principal Registrar of the Supreme Court must invest the moneys and pay the claimant annual proceeds of the rents and profits of the land.

10.8.3. EASEMENTS OR OTHER LANDS AWARDED IN LIEU OF COMPENSATION

Sections 255 and 256 of the LAA sets out processes whereby an acquiring authority and the State Administrative Tribunal or a Court may grant to the claimant an easement or other right, privilege or concession in relation to the land designated for the public work in part payment or full satisfaction of the compensation claimed by that person.

The Minister has power under section 257 of the LAA, to grant to the claimant with his or her consent, any interest in Crown land available to be granted or disposed of in partial or full exchange of any compensation claimed by the claimant. However, in such a grant, the value of the interest and any monetary compensation must not exceed the amount which the Minister would have paid by way of compensation.

10.8.4. OUT OF WHAT FUNDS SHOULD COMPENSATION BE PAID?

Compensation is paid by the Minister out of moneys appropriated by Parliament for the public work in respect of which the claim for compensation arises: Section 258(a) of the LAA.

Where compensation is money paid by the acquiring authority, then such compensation is usually paid out of the funds of the acquiring authority made available for such purposes: Section 258(b) of the LAA.