

# CHAPTER 03

## APPEALS TO GOVERNOR

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# 3. APPEALS TO GOVERNOR

## 3.1. INTRODUCTION

[Chapter 3](#) of this manual provides for the appeal to the Governor against certain decisions made by the Minister for Lands in the exercise of his or her powers.

A structured right of appeal to the Governor against a decision of the Minister is set out in Part 3 of the *Land Administration Act 1997* (LAA). This right of appeal is only available in 5 specific instances:

- forfeiture provisions (section 35 LAA);
- abandonment of a pastoral lease (section 133 LAA);
- cancellation of easements (section 145 LAA);
- setting of purchase price on surplus acquired land being disposed of (section 190 LAA); and
- removal of unauthorised structures (section 272 LAA).

## 3.2. APPEAL PROCESS

Section 37 of the LAA provides that a person who is aggrieved by a decision of the Minister in one of the above 5 instances, can lodge an appeal by serving a notice in writing of the appeal with the Minister under Part 3 of the LAA setting out the grounds of the appeal.

Once a notice of appeal has been served on the Minister, section 38 of the LAA provides that the Minister must prepare a document, to be delivered to the Governor, setting out the following matters:

- the background relating to the appeal;
- the grounds set out in the notice of appeal made by the appellant together with the Minister's comments on each of those grounds of appeal; and
- a recommended determination of the appeal.

On receiving a notice of appeal, the Minister may request the Department of Regional Development and Lands', Lands Division (RDL-LD) to provide a briefing note for submission to the Governor, in Executive Council, to assist with a determination.

The briefing note or Ministerial submission to the Governor should be prepared in the appropriate form and should contain the following information:

- the background relating to the appeal including the grounds set out in the written appeal made by the appellant;
- any comments of the Minister in relation to the grounds of appeal;
- a recommended determination in relation to the appeal that is whether or not the appeal has merit and should be upheld, or, whether the appeal should be dismissed and the reasons for the dismissal.
- an Executive Council Minute should also be prepared by RDL - LD reflecting the Minister's recommended determination of the appeal.

Upon receiving the document from the Minister, under section 39 of the LAA the Governor must consider the appeal. In so doing, the Governor may dismiss or uphold the appeal. In either case, the Governor must notify the Minister in writing of his determination. The Governor, in considering the appeal may seek advice from any person as he or she chooses.

Once the Governor has made his or her determination and advised the Minister in writing, the Minister must notify the appellant in writing of the outcome of the appeal and take such necessary action to give effect to the outcome of the Governor's determination: section 40 of the LAA.

### 3.2.1. WHERE IT IS PROPOSED TO RECOMMEND A DISMISSAL OF THE APPEAL

There is no delegation of responsibilities under sections 35(3) or 40 of the LAA. Where the Governor has determined to dismiss the appeal, or where the appeal was not received within the required period of time, RDL – LD should prepare a submission to the Minister containing the following matters:

- it should set out a summary of the actions;
- it should include the Governor's determination, if applicable; and
- a Forfeiture Order should be prepared and enclosed with the submission for the Minister's signature.

Once the Minister has signed the Forfeiture Order, it must be lodged for registration. Upon registration of the Forfeiture Order a letter should be forwarded to the appellant advising that the Forfeiture Order has been effected and the interest has been forfeited.

Where as a consequence of a notice of intention to forfeit, the lessee or other interest-holder rectifies the default which occasioned forfeiture action (eg. pays rent arrears), and it is decided that forfeiture should not proceed, LD officers should arrange for the Minister to advise the Governor to this effect, and that the appeal (assuming one has been lodged) should be upheld, with appropriate wording in the Governor's determination to specify that his decision solely reflects the lessee's rectifying action and the Minister's recommendation.

### **3.2.2. WHERE APPEALS ARE UPHeld BY THE GOVERNOR**

The Governor, in consideration of the appeal lodged by the appellant, may provide concessions or support further extensions of time to rectify breaches of conditions or covenants. Where the Governor upholds the appeal, the Minister should send a letter to the appellant: section 40 of the LAA.

RDL - LD should prepare the draft letter and forward a submission to the Minister setting out the following matters:

- a summary of the process, including the determination by the Governor; and
- enclosing a draft letter to the appellant, for the Minister's signature, advising of the Governor's determination and any conditions that may apply.

### **3.2.3. EFFECT OF A FORFEITURE ORDER**

Where a Forfeiture Order has been made, signed by the Minister and registered with the Registrar of Titles, the interest is forfeited and the land becomes unallocated Crown land: section 35(4) of the LAA.

If any existing subinterest or caveat is exempted from the forfeiture process by order of the Minister, that subinterest continues to have effect as the primary interest despite the Forfeiture Order and may be varied by agreement of the Minister for Lands and the interest holder. Any caveat exempted from the forfeiture process is retained and continues to give notice of an existing claim.

Under section 35(4) of the LAA the respondent cannot recover any moneys paid to the Minister in respect of the forfeited interest. The respondent remains liable to pay any moneys payable to the Minister in respect of the interest before the date of registration of the Forfeiture Order.

Sections 35(8) of the LAA allows the Minister to charge interest on any outstanding amounts at the rate determined under section 142(1) of the Supreme Court Act 1935 and recover the outstanding interest as a debt due to the Minister in a court of competent jurisdiction.

For further information on the consequences of a Forfeiture Order, see [Chapter 2](#) of this manual.

### 3.3. FORFEITURE PROVISIONS UNDER SECTION 35

The most common process handled within the Lands Division where an appeal is made to the Governor is where the Minister invokes the forfeiture procedure set out in section 35(1) of the LAA. For further information on the forfeiture process see [Chapter 2](#) of this manual.

### 3.4. DIFFERENT NOTICE PERIODS FOR APPEALS

The five different provisions in the LAA that provide for appeals to the Governor contain different notice periods in which an appeal should be made. The period of notice for enabling an appeal to be made is very important.

The rights of appeal under sections 35, 133 and 145 of the LAA may be made within 30 days of the event set out in the respective sections of the LAA or such longer period as the Minister may decide.

The rights of appeal under sections 190 and 272 of the LAA may be made within 21 days of the event set out in either of these sections or such longer period as the Minister may decide.

#### 3.4.1. SECTION 35

Section 35(2) of the LAA provides that the interest holder/respondent who has been given a forfeiture notice has 30 days in which to lodge an appeal with the Minister against the proposed forfeiture order.

Section 35(1) provides that, if the Minister intends to forfeit a Crown interest, he or she must “give to the holder of that interest” (or that freehold owner, in the case of conditional tenure land) notice of the nature of the breach and of that intention.

Section 35(2) then provides that the respondent (being the interest holder) may lodge an appeal with the Minister “within the period of 30 days after the giving to him or her of a notice under subsection (1)”.

#### 3.4.2. SECTION 133

Section 133 of the LAA provides that the Minister may, upon advice from the Pastoral Lands Board of Western Australia (“the Board”), authorise the Board or its agents (by instrument in writing) to enter upon land held under a pastoral lease and assume temporary care, control, and management of the land.

Under section 133(2) and (3) a pastoral lessee, who is aggrieved by the issue of an instrument in writing by the Minister, may lodge an appeal within 30 days after the Board has entered the land.

#### 3.4.3. SECTION 145

Under section 145 of the LAA, the Minister has power, after serving a notice in writing (in an approved form) on the grantee of an easement and on any lessee or management body of the Crown land, to cancel the easement.

Section 145(2) provides that the grantee of the easement may lodge an appeal with the Minister “within the period of 30 days after the service on him or her of the notice under subsection (1)”.

#### 3.4.4. SECTION 190

Section 190 of the LAA provides that where fee simple land was taken or resumed without agreement less than 10 years ago or has not been used for any public work and subject to the conditions set out in that section, the holding authority must advertise the fact that the land is no longer required for the purposes of the work for which it was taken or any other purpose ancillary or incidental to that purpose.

A “qualified” person who wishes to be given an option to purchase the fee simple interest in the land must apply in writing to the holding authority within 30 days: section 190(5) of the LAA. Where the holding authority is satisfied that the applicant is a “qualified person”, the holding authority must grant an option to purchase the fee simple to the applicant and so advise the applicant within 60 days after the applicant has applied to the holding authority of its wish to purchase the fee simple interest in the land.

Under section 190(9) of the LAA, the option granted by the holding authority may be granted on such terms and conditions as the holding authority requires and may include a condition prohibiting the option holder from assigning the option.

Any person aggrieved by a decision of the holding authority in

- Refusing to grant an option under this section;
- Ordering the priorities of options;
- Setting the purchase price; or
- Other terms and conditions of an option

may lodge an appeal within 21 days after receipt of the notice of decision by the holding authority: section 190(10) and (11) of the LAA.

In this context the term holding authority has a special meaning defined in the LAA.

#### 3.4.5. SECTION 272

Section 272 of the LAA gives owners or occupiers of alleged unauthorised structures on Crown land a limited right to appeal against a decision of the Minister (made under section 270 of the LAA) to remove the alleged unauthorised structure and its contents and any fixtures, materials and objects in the vicinity of the alleged unauthorised structure from the Crown land within a period specified in the notice.

Section 272(2) of the LAA provides that the appeal can only be made on the grounds that the structure to which the notice relates is not an unauthorised structure. The aggrieved person must lodge an appeal within 21 days after service on him or her of the notice under section 270(4) of the LAA.

### 3.5. CALCULATION OF NOTICE PERIOD FOR APPEALS

The wording of the different notice periods set out in the relevant sections of the LAA are important in that they all mean the same as the service of a notice. The right of appeal may be lost if the prescribed timeframes are not met. The careful consideration of time in serving notices is set out in the *Interpretation Act 1984*.

In summary, the rules for calculating time and counting when the 30 or 21 days has expired are as follows:

- The date of the forfeiture notice and the date of posting of the forfeiture notice should **not** be counted in calculating the date of deemed delivery.
- The actual date of service of the notice itself should **not** be counted as part of the notice period of 30 or 21 days.
- The notice period commences on the day **following** the date of service of the notice.
- The end of the 30 or 21 days occurs at midnight on the 30<sup>th</sup> or 21<sup>st</sup> day of the notice period. This is calculated **without** counting the date of posting or the deemed date of service.

In calculating the period of notice, care should be taken to consider the service of notices provision set out in section 274 of the LAA. Where posting a letter effects service, that letter is deemed to be delivered in the ordinary course of the post. This will depend upon where the letter is to be posted:

- Within the metropolitan region – on the **next** business day after the letter was posted; section 274(4)(a)
- Outside the metropolitan region but within the State – the **second** business day after the letter was posted; section 274(4)(b)
- Outside the State, but within Australia – on the **third** business day after the letter was posted; section 274(4)(c)
- Outside Australia – on the **fourteenth** business day after the letter was posted section 274(4)(d).

The phrase “after the letter was posted” means “**after the day** on which the letter was posted”.

In calculating dates of service, care should be taken to ensure that the computation of time accords with section 61 of the *Interpretation Act 1984* that is where the date of service is a Saturday, Sunday, public service holiday, bank holiday or public holiday throughout the State, the date of service will be calculated as being the next day.