



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL AGAINST THE REQUIREMENTS OF A VEGETATION
CONSERVATION NOTICE CPS 7470/1**

**CLEARING OF NATIVE VEGETATION ON
LOT 2 ON DIAGRAM 57736
LAKES ROAD, NAMBEELUP**

APPELLANT: MR ROGER WILLIAM GRAHAM

Appeal Number 002 of 2018

June 2018

Appeal Summary

This report relates to an appeal against the requirements of a Vegetation Conservation Notice (VCN) issued by the Department of Water and Environmental Regulation (DWER) in regard to the suspected unlawful clearing of native vegetation at a property located in Nambeelup.

The appellant submitted that the clearing was exempt under the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations) as the clearing was carried out for pastoral maintenance and had been cleared within the past 20 years. In regard to the requirements of the VCN, the appellant submitted that the requirement to exclude livestock from the area and the duration of the VCN were unreasonable.

In response to the appeal, DWER advised that aerial and satellite imagery indicated the area had been cleared in the 1970s, but regrowth had been consistent from 1995 until the alleged unlawful clearing in 2016. Based on the images, DWER concluded that the exemption did not apply and that the clearing was unlawful. DWER advised that the requirements of the VCN were directed towards allowing the area to regenerate to its previous condition.

The VCN contained requirements for no further clearing to occur on the property, no cultivation of the cleared areas for a period of ten years and for livestock to be excluded from the cleared areas for a period of ten years.

Having regard to the available information, the Appeals Convenor was satisfied that there was sufficient evidence for there to have been a reasonable basis to suspect that unlawful clearing had occurred on the property and that the clearing was not of an exempt kind, and that the requirements applied to the VCN were reasonable and appropriate.

Recommendation

The Appeals Convenor recommended that the appeal be dismissed.

INTRODUCTION

This report addresses an appeal lodged by Mr Roger William Graham (the appellant) in objection to the requirements of Vegetation Conservation Notice (VCN) CPS 7470/1 given by the Department of Water and Environmental Regulation (DWER) in respect of the suspected unlawful clearing of 16.17 hectares (ha) of native vegetation at Lot 2 on Diagram 57736 Lakes Road, Nambeelup (the property). The appellant is the occupier of the property and Figure 1 shows the area suspected of unlawful clearing and the approximate location of the property.



Figure 1 – Area suspected of unlawful clearing (red outline) and approximate location of the property

(Source: DWER, 2018, Google Maps, 2018)

Background

DWER advised that analysis of satellite imagery and aerial photography between February 2016 and February 2017 identified clearing of native vegetation on the property, and that a site inspection undertaken on 14 February 2017 found that approximately 16 ha of native vegetation had been cleared.

DWER conducted a retrospective assessment of the clearing and determined that the clearing was at variance to clearing principles (a), (e), (f), (g) and (i), may be at variance to clearing principles (b), (c), (d) and (h), and was not likely to be at variance with the remaining clearing principle. In its retrospective assessment DWER identified, among other things, that the cleared area was a significant remnant of native vegetation, as it was mapped as a regionally significant natural area and provided an ecological linkage for fauna, and was located in an extensively cleared area. Additionally, DWER noted that the cleared area potentially contained eight threatened flora species and may contain suitable habitat for 22 priority flora species recorded within the local area.

In its Decision Report for the retrospective assessment, DWER noted that if the appellant had submitted a clearing permit application, it was likely to have been refused in the absence of the appellant addressing the environmental matters raised by DWER. Such matters included the presence of conservation significant flora and fauna, land degradation, impacts to surface water and how the environmental impacts would be avoided or minimised.

On 4 October 2017, the appellant and the registered proprietor of the property were given notice that DWER intended to issue a VCN and were invited to make a submission on the draft VCN within 30 days. In response to the notification, the appellant submitted that the clearing was exempt under regulation 5 item 14 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations), the designated wetland area was at the highest part of the property and the wetland area was covered in tea tree regrowth.

DWER issued VCN CPS 7470/1 to the appellant and the registered proprietor of the land on 18 December 2017, based on the suspicion that unlawful clearing of approximately 16 ha of native vegetation had taken place on the property. To allow the cleared area to revegetate, the VCN required that there be no further unlawful clearing on the property, no cultivation within the cleared area for ten years and the exclusion of livestock from the cleared area for ten years. It is in objection to these requirements of the VCN that the appeal was lodged.

This document is the Appeals Convenor's formal report to the Minister for Environment under section 109(3) of the *Environmental Protection Act 1986* (EP Act).

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the EP Act, a report was obtained from DWER in relation to the issues raised in the appeal.

During the appeal investigation, the Appeals Convenor consulted the appellant in relation to issues raised in the appeal. This included a site visit with a representative of the appellant.

The environmental appeals process is a merits-based process. Appeal rights in relation to VCNs are against the requirements of a Notice, that is, whether the requirements are adequate or appropriate.

In determining the relevance of the grounds of an appeal against the requirements of a VCN, the Appeals Convenor normally considers whether the Minister is able to form a reasonable suspicion that unlawful clearing has occurred and, if so, whether the requirements of the VCN are appropriate, having regard to the matters raised in the appeal, the objects of the EP Act and the operation of section 70 specifically.

OUTCOME SOUGHT BY APPELLANT

The appellant sought for the VCN to be withdrawn on the grounds that the clearing was not unlawful or, in the alternative, for the requirements of the VCN to be amended.

GROUNDINGS OF APPEAL

The appellant submitted that the clearing was exempt under the Clearing Regulations as the clearing was carried out for pastoral maintenance and had been cleared within the past 20 years. In regard to the requirements of the VCN, the appellant submitted that the requirement to exclude livestock from the area and the duration of the VCN were unreasonable.

The appellant's grounds of appeal have been summarised under the following grounds:

1. clearing under the exemptions; and
2. VCN requirements.

GROUND 1: CLEARING UNDER THE EXEMPTIONS

The appellant submitted that the clearing was exempt under regulation 5, item 14 '*Clearing to maintain existing cleared areas for pasture, cultivation or forestry*' of the Clearing Regulations. Based on a 1995 map of the property purchased from Landgate, the appellant was of the view that the property had been cleared within the past 20 years and that it had been continuously grazed during that period.

Consideration

This ground of appeal looks at whether there was a reasonable suspicion that unlawful clearing occurred on the property. Section 51C of the EP Act provides that it is an offence to clear native vegetation unless the clearing was undertaken in accordance with a clearing permit or was of an exempt kind as per the Clearing Regulations or Schedule 6 of the EP Act.

Regulation 5, item 14 '*Clearing to maintain existing cleared areas for pasture, cultivation or forestry*' of the Clearing Regulations exempts:

- Clearing of land that was lawfully cleared within the 20 years prior to the clearing if –
- (a) the land has been used as pasture or for cultivation or forestry within those 20 years;
and
 - (b) the clearing is only to the extent necessary to enable the land to be used to the maximum extent to which it was used in those 20 years.

DWER advised that aerial and satellite imagery showed that most of the area subject to the VCN had been previously cleared in the 1970s and images from 1995 showed consistent native vegetation regrowth until the present. Having regard to the aerial and satellite imagery, DWER did not consider the area had been cleared within 20 years of the alleged unlawful clearing in 2016 and determined that the exemption did not apply. Accordingly, DWER concluded that the clearing was unlawful and issued the VCN to prevent the

appellant from cultivating the land, grazing stock on the land and undertaking any further unlawful clearing on the property. Figure 2 shows images of the property from 1974, 1995, 2008 and 2016.

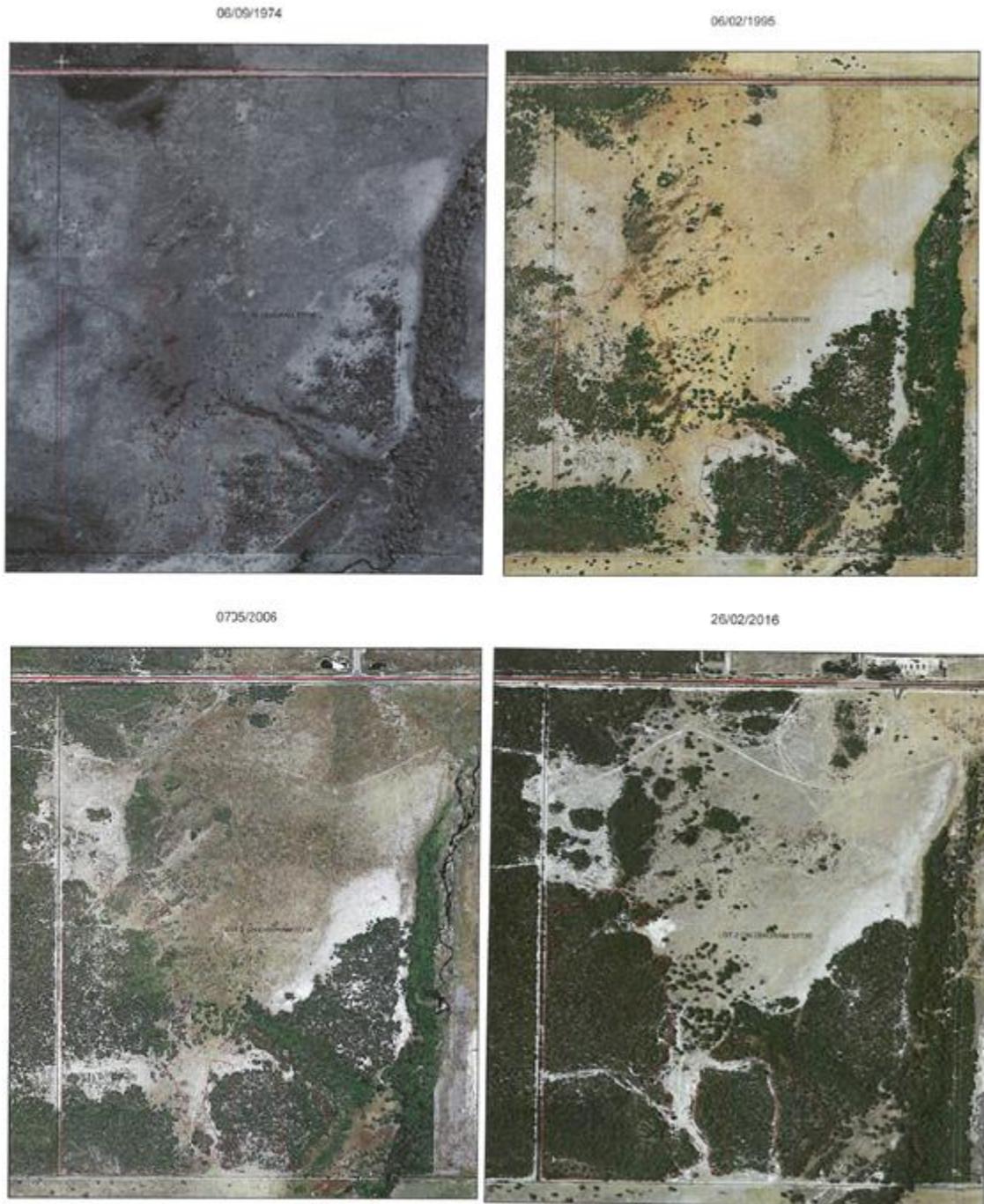


Figure 2 – The property in 1974, 1995, 2006 and 2016 (clockwise from the left)

(Source: DWER, 2018)

Conclusion

Having regard to the above, it is considered that the appellant did not have a clearing permit to clear the vegetation, and that the clearing was not of an exempt kind. Therefore, it is considered that there was a reasonable basis to suspect that unlawful clearing had occurred.

GROUND 2: VCN REQUIREMENTS

Noting that tea tree growth is aggressive, the appellant was of the view that the timeframes imposed by the VCN were unreasonable and should be reduced.

The appellant also submitted that the requirement to exclude livestock from the area was unreasonable as it would involve installing fencing around the areas which would be of significant expense and would result in limited value. The appellant stated that the area had been used for cattle grazing throughout the past 14 years and that this has not appeared to hinder revegetation. Acknowledging that he was unaware that the wetland was an Environmentally Sensitive Area (ESA), the appellant indicated that he would be amenable to fencing off the wetland areas.

Consideration

Section 70(4)(b) of the EP Act provides that a VCN can require specified measures that the CEO considers necessary for purposes which include repairing damage caused by the clearing, and re-establishing and maintaining vegetation, to a condition existing before the clearing occurred.

DWER found that the cleared area was likely to contain a high level of biodiversity within the local area as it forms part of an ecological linkage for fauna, may provide significant habitat for fauna, may contain eight threatened flora species, likely to be significant in the maintenance of flora diversity across the landscape, contains potential habitat for 22 priority flora species and is a significant remnant of native vegetation in an extensively cleared area.

DWER advised that the vegetation described as 'tea tree' at the property by the appellant is *Kunzea glabrescens*, which is a common native shrub found in damp and sandy areas on the Swan Coastal Plain. It is noted that DWER's site inspection report acknowledged that 'the area is likely to return to a *Kunzea* thicket within a short period of time if no further clearing is conducted'. Additionally, a site visit was undertaken during the appeals investigation and regrowth was observed, with most *K. glabrescens* having a height of approximately one metre.

The growth rate of *K. glabrescens* is noted, however the purpose of the VCN, among other things, was to repair damage caused by the clearing and to re-establish vegetation as near as possible to the condition prior to the clearing. It is noted that *K. glabrescens* was not the only species cleared and in its retrospective Decision Report, DWER noted that rare flora, if present within the site, has the potential to return with time. It is considered that the current ten year period on the VCN is adequate to ensure the objective of the VCN is met and is therefore appropriate. It is noted that should the appellant be able to demonstrate that the objective of the VCN has been achieved prior to the end of the ten year period, the appellant may apply to DWER to have the VCN revoked or requirements amended under sections 65(4) and 70(8) of the EP Act.

In regard to the requirement to exclude livestock, it is noted that the VCN does not specify how this is to be undertaken. It is therefore open to the appellant to consider the available options to achieve the stated outcome of the VCN.

Conclusion

Having regard to the foregoing, it is considered that the requirements of the VCN are reasonable and appropriate.

CONCLUSION AND RECOMMENDATION

Based on the available information and for the reasons stated above, it is considered that there was a reasonable basis to suspect that unlawful clearing had occurred on the property and DWER's decision to issue the VCN subject to requirements was appropriate.

Taking the above into account, it is considered that the requirements applied to the VCN were appropriate and supported by the available evidence.

Therefore it is recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Cassie Chew, A/Senior Appeals Officer