



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL AGAINST REFUSAL TO GRANT A CLEARING PERMIT
CPS 7107/1: CLEARING OF 12.35 HECTARES OF NATIVE
VEGETATION – LOT 31 ON PLAN 13707, COWALLA**

PROPONENT: MR PAUL GLAVOCICH

Appeal Number C017 of 2017

May 2018

Appeal Summary

This report relates to an appeal lodged against the Department of Water and Environmental Regulation's (DWER) refusal to grant Clearing Permit CPS 7107/1 to Mr Paul Glavocich (the appellant) to clear 12.35 hectares of native vegetation on Lot 31 on Plan 13707, Cowalla, for the purpose of horticulture.

The appellant's key issue was that DWER overemphasised the significance of the Carnaby's black cockatoo foraging habitat. The appellant was of the view that the application area did not provide significant foraging habitat based on the moderate foraging value assigned in the targeted fauna survey report, relative size of the application area and its proximity to large conservation areas containing foraging habitat. The appellant also submitted that his proposed offset of securing the remaining 9.1 ha of native vegetation on the site in conservation covenant was adequate to address the environmental impacts of the proposed clearing.

DWER found that the proposed clearing was at variance to clearing principle (b) significant habitat for indigenous fauna; may be at variance to the clearing principles (a) high level of biodiversity, (d) threatened ecological community areas and (f) vegetation associated with a wetland or watercourse; and not likely to be at variance with the remaining principles.

DWER determined that the application area comprised significant foraging habitat for the Carnaby's black cockatoo and advice from the Department of Biodiversity, Conservation and Attractions (DBCA) received during the appeal investigation confirmed the significance of the foraging habitat, particularly in relation to the application area's locality and proximity to known breeding and roosting sites.

In calculating the suitability of the appellant's proposed offset, DWER used the Commonwealth *Offsets assessment guide* in accordance with the *WA Environmental Offsets Guideline* (2014), and had regard to relevant considerations such as the endangered status of the Carnaby's black cockatoo, the quality of the habitat within the application area and the impact of the offset. DWER found that the appellant's proposal to secure 9.1 ha of native vegetation in a conservation covenant would not sufficiently address the significant residual impacts.

Taking into account the information provided and the relevant policies and procedures, the Appeals Convenor was satisfied that DWER's assessment of the clearing permit application against the clearing principles was appropriate and supported by the available evidence and its decision to refuse to grant the clearing permit was justified.

Recommendation

The Appeals Convenor recommended that the appeal is dismissed.

INTRODUCTION

This report addresses an appeal lodged by Mr Paul Glavocich (the appellant) against the decision of the Department of Water and Environmental Regulation (DWER) to refuse to grant a clearing permit to clear 12.35 hectares (ha) of native vegetation on Lot 31 on Plan 13707, Cowalla, for the purpose of horticulture. The location and extent of the application area is shown in Figure 1.

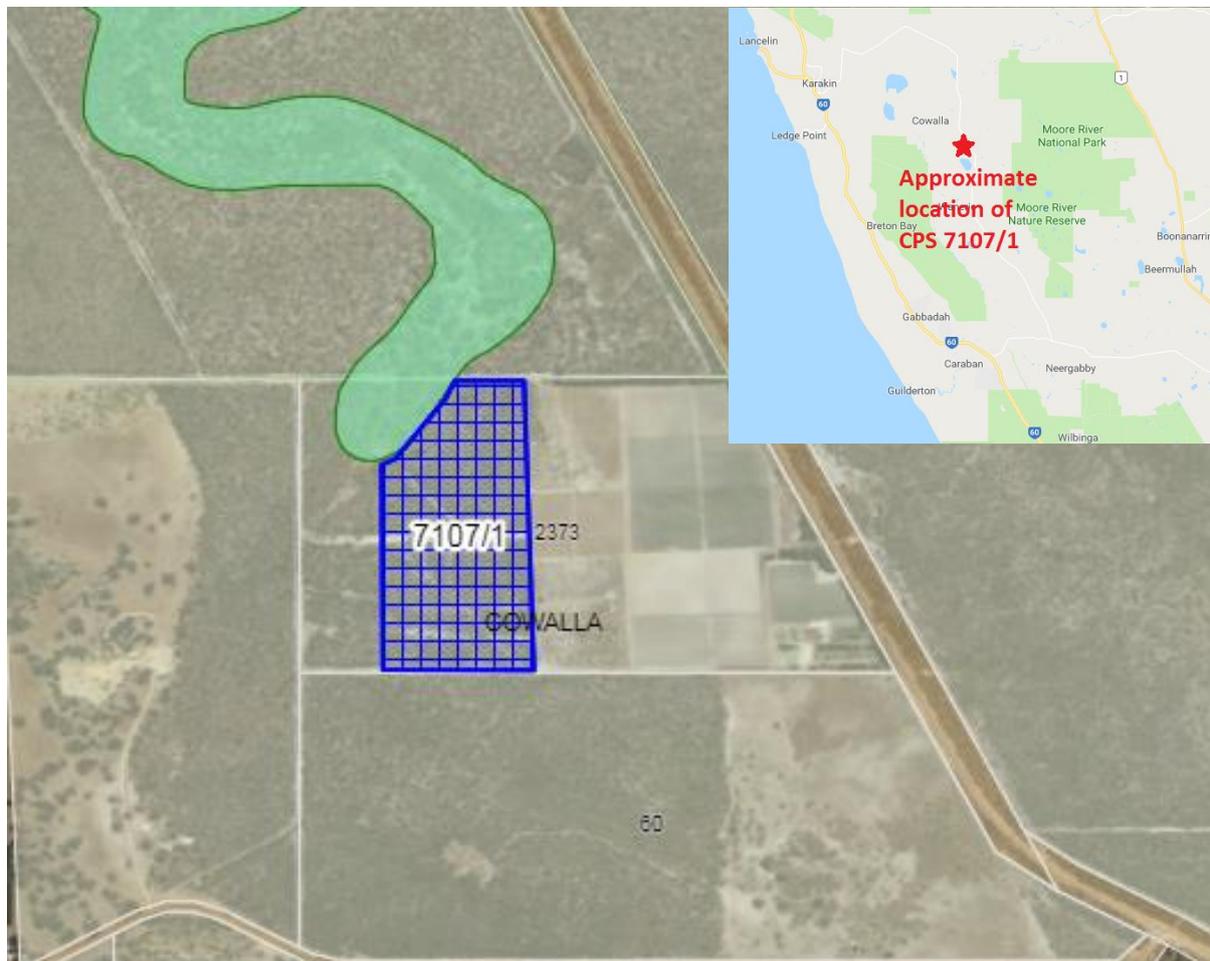


Figure 1 – Location and extent of the application area of CPS 7107/1

(Source: www.cps.der.wa.gov.au, 2018, Googlemaps, 2018)

Background

The appellant applied for an area permit to clear 13.53 ha of native vegetation on 7 June 2016 and the clearing permit application was advertised for public submission for 21 days on 11 July 2016. One public submission was received in response to the advertisement.

The public submission was in relation to the native vegetation providing good habitat, preventing wind erosion and recommended that a buffer be maintained around the conservation category dampland. DWER advised that these concerns were addressed under its assessment of the proposed clearing against clearing principles (a), (b), (f) and (g).

On 15 September 2016, DWER provided the appellant with a preliminary assessment that indicated the application was likely to be refused and listed the identified environmental impacts. The correspondence from DWER invited the appellant to provide additional information to address the environmental impacts within 30 days. In response to the preliminary assessment, the appellant commissioned targeted flora and fauna surveys, reduced the application area to 12.35 ha to avoid the conservation category dampland and offered to place a conservation covenant over 9.1 ha of the site.

Having considered the additional information from the appellant, including the proposed conservation covenant over 9.1ha of the site, on 3 March 2017, DWER provided a second preliminary assessment to the appellant advising that the application was unlikely to be granted and invited the appellant to provide additional advice and information on how the appellant intended to offset unavoidable impacts within 30 days, noting that offsets do not replace proper on-site environmental practices such as avoidance and mitigation. The appellant met with DWER on 17 August 2017 to discuss the application.

On 6 October 2017, DWER advised the appellant that the application had been refused in the absence of an adequate offset to counterbalance the environmental impacts. It is against this decision 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 matters raised in the appeal. During the appeal investigation the Appeals Convenor met with the appellant at the site to discuss the issues raised in the appeal.

The environmental appeals process is a merits-based process. For appeals in relation to a DWER decision to refuse to grant a clearing permit, the Appeals Convenor normally considers the environmental merits of the assessment by DWER based on principles as set out in Schedule 5 of the EP Act, as well as other environmental factors. Questions of additional information not considered by DWER, technical errors and attainment of relevant policy objectives are normally central to appeals.

OUTCOMES SOUGHT BY APPELLANT

The appellant is seeking for the Minister to grant the permit and for the appellant's proposed offset of 9.1 ha to be deemed adequate.

GROUNDINGS OF APPEAL

The appellant was of the view that a fair assessment of the clearing permit application was not carried out as DWER did not properly address the flora and fauna surveys, nor the issues raised during a meeting with DWER held on 17 August 2017. During the appeal meeting, the appellant reiterated that the key issues were in relation to DWER's assessment of the significance of the application area as foraging habitat for the Carnaby's black cockatoo and the suitability of the appellant's proposed offset.

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

1. impacts to the Carnaby's black cockatoo;
2. assessment against the clearing principles; and
3. offset requirements.

The appellant raised additional matters which are considered to be beyond the scope of the appeal. These matters are discussed under "Other Matters".

GROUND 1: IMPACTS TO THE CARNABY'S BLACK COCKATOO

The appellant contested DWER's determination that the application area provided significant foraging habitat for the Carnaby's black cockatoo.

During the assessment process, the appellant commissioned Dr Mike Bamford to undertake a targeted fauna survey and provided DWER with the resultant report (the Bamford Report). Noting that while the application area is comprised of good quality vegetation for foraging, Bamford stated the application area was not heavily used by the Carnaby's black cockatoo due to large areas of foraging habitat in the region and no breeding or roosting occurred nearby. From the foraging evidence found on site, Bamford estimated that a small number of birds (less than ten) visited the site occasionally. Having regard to the foregoing, Bamford gave the application area a 'moderate foraging value' score of six out of ten.

Noting the moderate foraging value assigned in the Bamford Report, the appellant was of the view that DWER overemphasised the significance of the foraging habitat. During the appeal meeting, the appellant asserted that the specific circumstances of the application area were not considered by DWER in its assessment of the impacts to the Carnaby's black cockatoo. These circumstances were that the application area:

- was in close proximity to National Parks and Nature Reserves that contain foraging habitat for the Carnaby's black cockatoo;
- was not heavily used and only visited occasionally by a small flock; and
- only constituted 0.031% of native vegetation within a 15 kilometre (km) radius of the application area.

Consideration

In assessing the clearing permit application, DWER advised that it had regard to the Bamford Report, the then Department of Parks and Wildlife's *Carnaby's Cockatoo (Calyptorhynchus latirostris) Recovery Plan (2013)* [Recovery Plan] and Geographical Information Systems (GIS) datasets. In finding the proposed clearing to be at variance to clearing principle (b), DWER considered that the application area comprised of Banksia woodland which provided suitable foraging habitat for the Carnaby's black cockatoo and, due to its proximity to a known nesting site, represented a significant foraging habitat.

In its Decision Report, DWER referred to the Recovery Plan and concluded:

The recovery plan for Carnaby's cockatoo defines breeding habitat as including nesting sites, and the foraging habitat and water sources within foraging distance of nesting sites (Parks and Wildlife, 2014). These areas are considered to be habitat critical to the survival for Carnaby's cockatoo (Parks and Wildlife, 2013). The loss or degradation of foraging habitat within 12 kilometres of nesting sites is considered to pose the greatest risk to Carnaby's cockatoo (Saunders and Ingram, 1998; Parks and Wildlife, 2013). The application area is approximately six kilometres from a known nesting site, and is therefore considered to represent significant foraging habitat for Carnaby's cockatoo.

In relation to the appellant's submission that DWER did not properly take into consideration the location of the application area, particularly its proximity to National Parks and Nature Reserves, it is noted that the Decision Report states:

... The long-term survival of a robust population of Carnaby's cockatoos depends on the availability of suitable woodland breeding habitat and tree hollows, and foraging habitat capable of providing enough food to sustain the population (Parks and Wildlife, 2013).

The extent of nearby suitable foraging habitat for Carnaby's cockatoo within both the Gngangara-Moore River State Forest (five kilometres west) and Moore River National Park (six kilometres east) is acknowledged. However, noting that the application area provides good quality foraging habitat on the Swan Coastal Plain, and evidence of foraging was identified within the application area (Bamford, 2016), it is considered to provide significant foraging habitat for Carnaby's cockatoo.

As part of the appeal investigation, additional advice was sought from DBCA on the significance of the foraging habitat the subject of the appeal to the Carnaby's black cockatoo and potential impacts of the proposed clearing on the Carnaby's black cockatoo. Noting that the application area was within an important breeding region for the Carnaby's black cockatoo, DBCA advised that proximity to breeding and roosting sites increased the significance of foraging habitat.

DBCA advised that the application area is part of core foraging habitat as it is located within six km of a known nesting tree, 20 km from other nesting trees and that unrecorded nesting trees were likely to be in the surrounding area. Furthermore, DBCA advised that the application area is in close proximity to permanent water sources, the Moore River and Karakin Brook, which are important resources when in the vicinity of breeding and roosting sites.

DBCA noted that known roosting sites are within 13 to 40 km of the application area, with cockatoos often present in large numbers during the non-breeding season, and additional unrecorded roosting sites are also likely to be in the vicinity of the application area. DBCA further advised that cockatoos opportunistically use any areas of foraging habitat within the vicinity of a roost site, and will move from roost sites depending on resource availability.

In relation to the appellant's submission that the Bamford Report rated the application area as moderate foraging habitat and came to the conclusion it was unlikely there were Carnaby's black cockatoos breeding or roosting nearby due to lack of foraging evidence during breeding season, DBCA advised:

...not all foraging habitat is continuously suitable for foraging as changes in productivity, quantity, quality and nutritional value occur over time. For example, banksia flowering and pollination varies between years and this affects cone/nut and seed production. Black cockatoos will move between areas of foraging habitat depending on the available food and therefore use of the foraging habitat, and therefore the amount of foraging evidence, will also vary between seasons and years.

...

Although there are some known breeding sites in the northern area of the Swan Coastal Plain (SCP), the majority of the cockatoo population that visits the SCP during the non-breeding season migrates to the Wheatbelt for the breeding season. During the breeding season, there is usually only a small sub-population of Carnaby's cockatoos that remains on the SCP and therefore foraging evidence may not be as extensive as during the [non-]breeding season when large flocks are present. Therefore, lack of recent black cockatoo foraging evidence seen at the application site during breeding season does not necessarily mean that the vegetation is not a significant food resource during the non-breeding season. Sufficient food resources during the non-breeding season are essential for black cockatoos to recover from breeding, restore body mass and build reserves for the next breeding season, and for recently fledged birds to be able to grow and reach maturity.

DBCA reiterated the significance of foraging habitat within areas where breeding and roosting occur, during both breeding and non-breeding seasons, and advised:

Maintaining sufficient areas of viable foraging sources in the regional area surrounding known roosting and breeding sites, and within the non-breeding areas, is important for the long-term survival of the species. Insufficient foraging resources may lead to breeding failure, non-viable eggs, under-weight chicks, chick deaths, and even death of a

female if she has not been able to build enough body mass during the previous non-breeding season. The cumulative impact of the physical loss of foraging habitat combined with variation in productivity of the remaining areas therefore needs to be considered.

... the application area is utilised by Carnaby's cockatoo for feeding within a region that is important to this species for breeding and roosting. The maintenance of a range of vegetation areas within such an area is important for maintaining viable food sources through variation in seasons and years. The cumulative loss of such areas may lead to an incremental decline in the sustainability of the species.

Conclusion

It is noted that the application area comprises foraging habitat in good condition, is located on the Swan Coastal Plain, is located within 6 km of a known nesting site and 13–40 km of a known roosting site, is in proximity to permanent water sources, and had evidence of Carnaby's black cockatoo utilising the site for foraging.

Having regard to the information provided during the appeal, in particular the advice from DBCA that the maintenance of foraging habitat within regions of known breeding and roosting sites is important for the long-term viability of the species, it is considered that DWER's assessment of the significance of the application area as foraging habitat for the Carnaby's black cockatoo was appropriate and supported by the available evidence.

It is recommended that this ground of appeal is dismissed.

GROUND 2: ASSESSMENT AGAINST THE CLEARING PRINCIPLES

The appellant was of the view that the issues raised during a meeting with DWER on 17 August 2017 were not addressed properly and disagreed with DWER's assessment against clearing principles (a), (b), (d) and (e). Clearing principle (b) is discussed under Ground 1, and in regard to the other clearing principles the appellant was of the view that:

- clearing principle (a): a large portion of the application area is already disturbed (weeds and cleared tracks) and the local area retains 56.87% of native vegetation;
- clearing principle (d): the application area is not necessary for the maintenance of the Carnaby's black cockatoo, as supported by the Bamford Report, and the application area does not comprise breeding habitat. The '*Banksia* Woodlands of the Swan Coastal Plains' threatened ecological community (*Banksia* Woodlands TEC) was federally listed after the initial assessment and was therefore not a valid consideration; and
- clearing principle (e): there is 43,443 ha of native vegetation within 15 km of the site, therefore it is not significant as a remnant of native vegetation.

The appellant also submitted that the attainment of planning approval was not a relevant consideration as such an approval would not have been obtained in the absence of a clearing permit being granted. Additionally, the appellant noted that the land is zoned for horticulture with an existing development approval for the current market garden, and that further planning approval would be for an extension.

Consideration

DWER assessed the proposal against the ten clearing principles, as set out under Schedule 5 of the EP Act, and found the proposed clearing to be:

- 'at variance' to clearing principle (b) relating to significant habitat for indigenous fauna;

- 'may be at variance' to clearing principles relating to (a) high level of biodiversity, (d) threatened ecological community areas and (f) vegetation associated with a wetland or watercourse; and
- 'not likely to be at variance' with the remaining principles.

In relation to clearing principle (a), although the appellant was of the view that a large portion of the application area was disturbed, a DWER site inspection considered the majority of the vegetation to be in very good condition, with few weeds present throughout the application area. The site inspection noted that weeds were confined along cleared pathways and where edge effects occurred around the perimeter of the application area. The Bamford Report is consistent with DWER's site inspection, stating that most of the application area is in good condition with few weeds. In assessing the proposed clearing against clearing principle (a), DWER determined that the application area may contain a high level of biological diversity due to the presence of significant Carnaby's black cockatoo foraging habitat and vegetation mapped as *Banksia* Dominated Woodlands of the Swan Coastal Plain Interim Biogeographic Regionalisation for Australia Region priority ecological community which may also be representative of the *Banksia* Woodlands TEC.

In DWER's Decision Report under its assessment against clearing principle (d), DWER noted that the application area is largely consistent with the description of the *Banksia* Woodlands TEC and would meet the minimum size and condition thresholds in the Threatened Species Scientific Committee's *Approved Conservation Advice (incorporating listing advice) for the Banksia Woodlands of the Swan Coastal Plain ecological community* (2016) and determined that the proposed clearing may be at variance with clearing principle (d). Additionally, DWER noted that a level two flora survey would be required to confirm whether the application area is representative of the TEC and, if present, the extent. In regard to the *Banksia* Woodlands TEC being federally listed after the initial assessment, DWER advised the appellant during a meeting that current and updated conservation advice must be considered during the assessment.

While the appellant submitted that the application area was not a significant remnant of native vegetation, it is noted that in its assessment against clearing principle (e), DWER determined that the proposed clearing was a significant remnant because it contained significant foraging habitat for the Carnaby's black cockatoo. However, as it was not in an extensively cleared area, DWER found that the proposed clearing was not likely to be at variance with clearing principle (e).

While DWER did consider the lack of planning approval a relevant consideration, it was noted in the Decision Report that this was not a deciding factor in refusing to grant a clearing permit. It follows that, even if the appellant had obtained the relevant planning approval, the clearing permit would have still been refused.

Conclusion

It is noted that the potential classification of the application area as a TEC and the absence of planning approval, although relevant considerations, were not deciding factors in DWER's decision to refuse to grant the clearing permit.

Having regard to the available information and the consideration of Ground 1, it is considered that DWER's assessment of the clearing permit against the clearing principles was appropriate and supported by the available evidence.

It is recommended that this ground of appeal is dismissed.

GROUND 3: OFFSET REQUIREMENTS

The appellant submitted that the proposed offset of 9.1 ha was adequate considering, in the appellant's view, the impact to the Carnaby's black cockatoo was moderate and not significant. The appellant also questioned the appropriateness of using the Commonwealth *Offsets assessment guide* to calculate the suitability of offset proposals for State clearing matters.

Additionally, the appellant was not satisfied that DWER properly considered the mitigation and avoidance measures taken by the appellant, which included:

- carrying out targeted flora and fauna surveys;
- targeted flora survey confirming that the Priority 1 flora species, *Grevillea evanescens*, was not present within the application area;
- excluding the conservation category dampland and the Priority 4 flora species *Dodonaea hackettiana* from the application area; and
- offering to place the remaining 9.1 ha of native vegetation within the site under a conservation covenant.

The appellant noted that no mention of an offset was made during the initial stages of the application and also raised philosophical concerns regarding offsets, questioning whether offsets should be able to justify clearing native vegetation that has been identified to be significant.

Consideration

The Western Australian Government has adopted a policy of applying offsets to counterbalance significant residual impacts of projects. The *WA Environmental Offsets Policy* (2011) [Offsets Policy] outlines that offsets will be used to compensate for residual environmental impacts and be designed to achieve long-term outcomes, building upon existing conservation programs and initiatives.

The *WA Environmental Offsets Guidelines* (2014) [WA Offsets Guidelines] state that offsets will be applied to counterbalance significant residual impacts that remain after avoidance and mitigation measures have been undertaken. The WA Offsets Guidelines provide examples of what may constitute a significant impact such as the potential to cause flora or fauna species to become rare or endangered, or impacts on vegetation providing important ecological functions.

In accordance with the Offsets Policy and the WA Offsets Guidelines, it is understood that offsets only occur after avoidance and mitigation options have been pursued. In this regard it is noted that the letter accompanying the first preliminary assessment invited the appellant to demonstrate how the impacts would be avoided or minimised. Consequently, the avoidance and mitigation measures taken by the appellant were then taken into account by DWER in the second preliminary assessment when considering the suitability of the appellant's proposed offset in relation to the remaining environmental impacts.

Taking into consideration the appellant's abovementioned avoidance and mitigation measures, DWER determined that while the revised application was unlikely to impact on conservation significant flora or the conservation category dampland, the revised proposal was at variance with clearing principle (b) as the application area provided significant foraging habitat for the Carnaby's black cockatoo. DWER concluded that the proposed clearing would result in a significant residual impact and considered that the appellant's proposed offset area of 9.1 ha was not adequate.

In this regard, DWER advised the appellant that it had undertaken a preliminary calculation of an appropriate offset using a calculation broadly consistent with the Commonwealth *Offsets assessment guide*. DWER advised that providing a conservation covenant over 9.1 ha of native vegetation would offset approximately 18.48 per cent of the residual impacts to Carnaby's black cockatoo feeding habitat and that this was not adequate.

DWER advised that it calculated the adequacy of the proposed offset in accordance with the WA Offsets Guidelines and the Commonwealth *Offsets assessment guide*. DWER took into account, among other things, the endangered status of the Carnaby's black cockatoo, the quality of habitat in the application area, risk of loss of native vegetation without and with the offset and the impact of the offset. It is noted that the quality of habitat being impacted was given a value of six out of ten, which is consistent with the Bamford Report's moderate foraging rating of six out of ten.

While the appellant's concern regarding the use of the Commonwealth *Offsets assessment guide* is noted, it is understood that to ensure consistency and alignment of offsets made under the *Environment Protection and Biodiversity Conservation Act 1999*, the WA Offsets Guidelines provide that the Commonwealth *Offsets assessment guide* is an appropriate tool to quantify the suitability of offsets.

Conclusion

It is considered that DWER's calculation of the suitability of the proposed offset was appropriate and in accordance with published policies and procedures and the use of the Commonwealth *Offsets assessment guide* was appropriate.

It is recommended that this ground of appeal be dismissed.

OTHER MATTERS

The following matters were raised by the appellant as being relevant, but are considered to be outside the scope of the appeal. Nevertheless these matters have been included in this report for information.

The appellant raised the following concerns with the perceived inequity of the clearing permit application process:

- financial hardship to the appellant if the land cannot be cleared to allow for farming operations to meet contractual obligations, as the appellant is unable to afford to acquire land for the offset;
- the disproportionate impact on small farmers who are more likely to be unable to afford to purchase land as an offset, unlike larger operations;
- the State Government "taking" land by not permitting clearing to occur with no compensation provided;
- potential buyers should be given notification that clearing on the Swan Coastal Plain is unlikely to be approved; and
- incongruences with planning documents, such as the Gingin Coast Structure Plan which contemplates the agricultural and horticultural capability of the land.

CONCLUSION AND RECOMMENDATION

For the reasons outlined in this report, it is considered that DWER's assessment of the proposed clearing against the clearing principles and the conclusions reached were appropriate, supported by available evidence, took into account relevant considerations and was undertaken in accordance with published policies and procedures.

It follows that it is considered that DWER was justified in refusing to grant the clearing permit and it is recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Cassie Chew, A/Senior Appeals Officer