



**Appeals Convenor**  
**Environmental Protection Act 1986**

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**REPORT TO THE  
MINISTER FOR ENVIRONMENT**

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**APPEAL IN OBJECTION TO THE REQUIREMENTS OF A VEGETATION  
CONSERVATION NOTICE**

**CLEARING OF NATIVE VEGETATION ON CPS 8566/1 LOT 56 ON  
DP 29413 – 72 JORDAN ROAD, EAST CHAPMAN**

**NOTICE ISSUED TO: AARON CHARLES EDWARDS AND BARRY CHARLES  
EDWARDS**

**APPELLANT: BARRY EDWARDS**

Appeal Number 007 of 2020

**November 2020**

## Appeal Summary

This is an appeal by the part-owner of land east of Geraldton in objection to the requirements of a vegetation conservation notice applied to that land.

The notice was issued by the Department of Water and Environmental Regulation (DWER) in January 2020 following an investigation into alleged unlawful clearing at the property.

The notice contains a number of requirements, including that no further clearing take place, and that stock be excluded from the cleared area.

By his appeal, the appellant submitted that there was no reasonable basis to suspect unlawful clearing had occurred (or that it was caused by the appellant), that the requirements of the notice were outside the scope of DWER's power, and the requirements were otherwise inappropriate. The appellant requested that the notice be withdrawn, or in the alternative, the requirements amended to allow natural regeneration and to reduce the duration of the notice requirements from 20 years to 10 years.

On the basis of the information available through the appeal investigation, sufficient evidence was found to support a reasonable suspicion that unlawful clearing took place on the land, and that as a result, the decision to issue the notice was justified.

In relation to the requirements, each was found to be of a type and form that appears to be consistent with DWER's powers under section 70(2) and (4) of the *Environmental Protection Act 1986*.

As to the content of the requirements, they were found to be consistent with the intent of re-establishing vegetation in the area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred. However, in the absence of reasons as to why the duration of the notice was double that suggested in published guidance and in a notice referred to by the appellant, it is considered appropriate for the conditions to be modified to limit the duration to ten years from the date of the Minister's decision on the appeal.

### Recommendation

It is recommended that the appeal be allowed in part to the extent that the duration of the notice is reduced to ten years from the date of the Minister's decision on the appeal, with the option for this to be extended by DWER where vegetation has not been re-established to a condition as near as possible before the clearing occurred.

It is otherwise recommended that the appeal be dismissed.

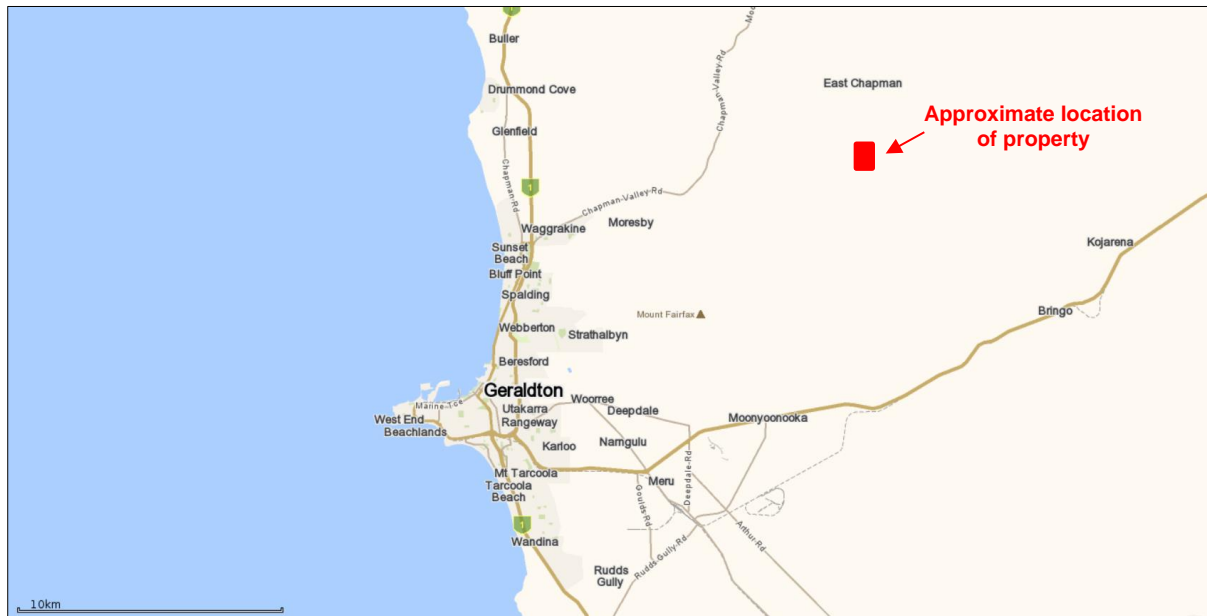
## INTRODUCTION

This is an appeal by Barry Edwards (the appellant) against the requirements of a vegetation conservation notice issued by the Department of Water and Environmental Regulation (DWER) in respect to suspected unlawful clearing at a property at East Chapman, in the City of Greater Geraldton. The appellant is a joint owner of the property.

The property the subject of the notice is located at 72 Jordan Road (Lot 56 on Deposited Plan 29413), East Chapman, approximately 15 kilometres north east of Geraldton (see Figure 1)

**Figure 1 – Property location**

(Source: Whereis.com, 2020)



DWER identified a change in the condition of vegetation change in March 2019. A site visit was subsequently undertaken by DWER officers in June 2019, during which it was identified that native vegetation had been cleared.

DWER advised that at the completion of the inspection, the appellant confirmed that he had undertaken the clearing for the purposes of extending the cropping area for the property and to deal with feral pig problem.

In July 2019, DWER sent a letter to the appellant and other co-owner giving notice of intention to give a vegetation conservation notice. The letter included giving notice that the area suspected to have been unlawfully cleared (29 hectares (ha)) would need to be revegetated.

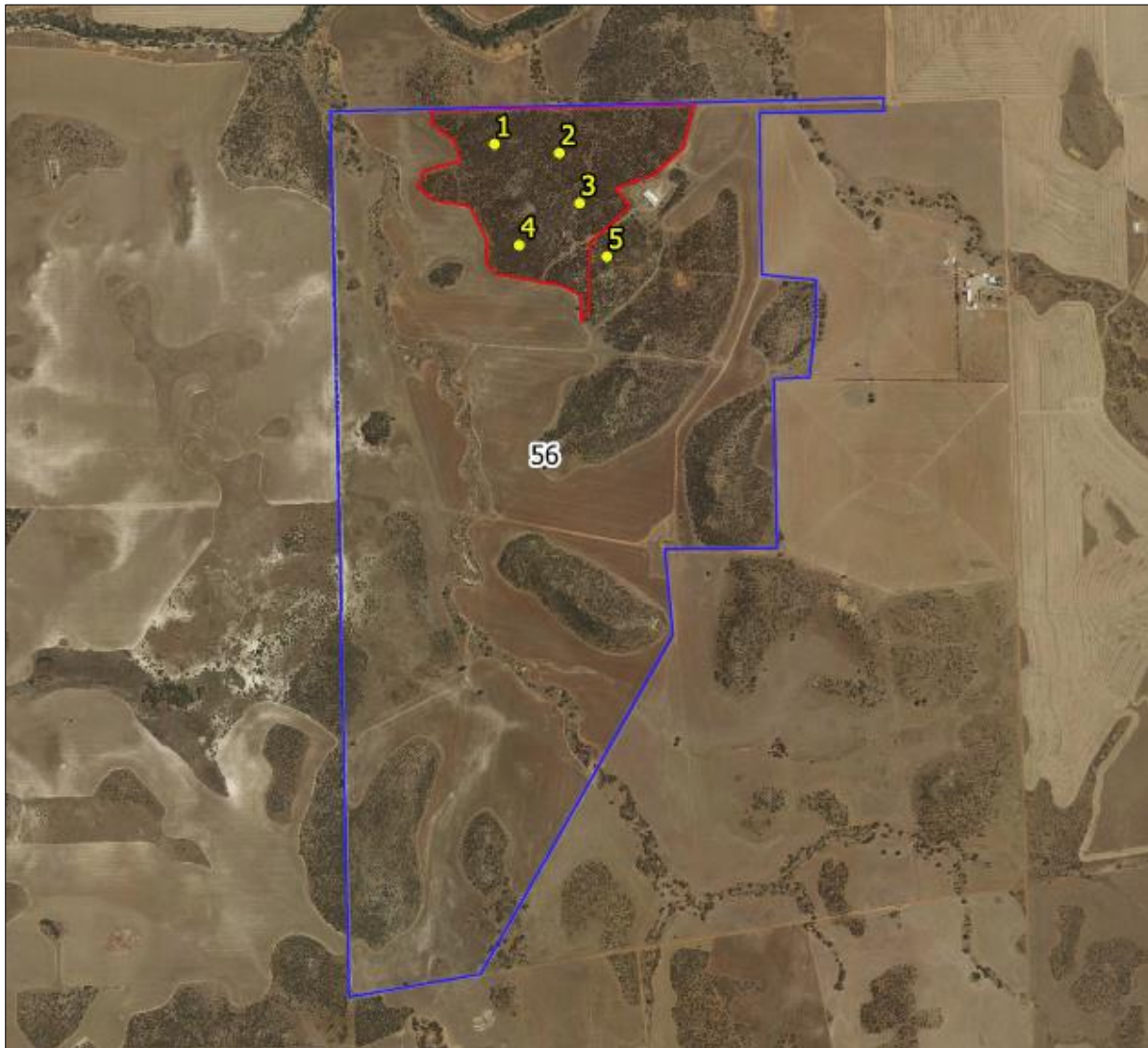
The appellant responded to the intention to issue a notice on 9 August 2019, offering:

- 1) A monetary contribution to the amount of \$20,000 or a figure agreed to go towards vegetation in an area of Western Australia that is needed
- 2) A reduction in the area to be revegetated to 8.7 hectares (due to previous planting of 16.89 hectares within Lot 56).

On 17 January 2020, after taking these submissions into account, DWER gave a notice to the property owners, which was received by the appellant 28 January 2020. The notice requires the persons served to do a number of things, including undertaking no further unlawful clearing and to re-establish and maintain vegetation within the area affected by the identified unlawful

clearing. The area the subject of the notice (and monitoring locations, discussed below) is shown in Figure 2.

**Figure 2 – Property boundary (in blue) and specified area (in red)** (Source: DWER, 2020)



It was in respect to the requirements of this notice that the appeal was submitted.

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**

To properly advise the Minister, the Appeals Convenor investigated the matters raised on appeal. The investigation included:

- a review of the appeal
- a review of the section 106 report from DWER received on 16 March 2020
- meetings with the appellant and/or his lawyers on 13 and 27 May, 15 July, and 11 September 2020
- additional officer-level advice from DWER
- additional draft (3 August) and final (5 October) submissions from the appellant
- a review of other information, policy and guidance as required.

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

## OUTCOME SOUGHT BY APPELLANT

The original appeal requested that the notice be withdrawn or set aside.

In the final submissions received in October 2020, the appellant submitted two alternatives in the event that the notice is not set aside, being variations on modifications to the requirements of the notice. These are considered following the consideration of the substantive appeal issues.

## STATUTORY CONTEXT

Section 70(2) of the EP Act provides:

- (2) If the CEO [of DWER] suspects on reasonable grounds —
  - (a) that unlawful clearing is likely to take place on any land; or
  - (b) that unlawful clearing is taking place or has taken place on any land,the CEO may cause a notice (a vegetation conservation notice) to be given requiring a person bound by it to ensure that no unlawful clearing, or no further unlawful clearing, takes place on the land.

'Unlawful clearing' is defined to mean anything constituting a contravention of section 51C or 51J of the EP Act. Relevant to this appeal, section 51C provides that clearing of native vegetation is unlawful unless it is:

- done in accordance with a clearing permit;
- in accordance with an exemption set out in Schedule 6 of the EP Act; or
- in accordance with an exemption set out in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2006* (the Clearing Regulations) and is not done in an environmentally sensitive area.

A notice made under section 70(2) may be given to the owner, occupier or such other person where the CEO considers it practicable for that person to comply with and give effect to the notice.<sup>1</sup>

Where the notice is issued under section 70(2)(b) (i.e. in respect to clearing that has occurred or is occurring), section 70(4)(b) of the EP Act states that the CEO may require any person bound by the notice to take certain measures, including to repair any damage caused by the clearing or re-establish and maintain vegetation to a condition as near as possible to the condition of the vegetation before the clearing occurred.<sup>2</sup>

Before giving a notice with requirements of the kind set out in section 70(4)(b), the CEO must give that person an opportunity to make submissions in response to the proposed measures.<sup>3</sup>

The right of appeal in this case is provided for in section 103(1) of the EP Act, which states:

- [A] person who is aggrieved by —
- (a) a requirement contained in a ... vegetation conservation notice ... given to that person ...

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<sup>1</sup> EP Act, section 70(3).

<sup>2</sup> EP Act, section 70(4)(b)(i) and (ii).

<sup>3</sup> EP Act, section 70(5).

may within 21 days of being given that notice lodge with the Minister an appeal in writing setting out the grounds of that appeal.

While the right of appeal is in respect to the requirements of the notice, the Minister is required to turn his or her mind to whether or not there is a reasonable basis to suspect unlawful clearing has occurred, or is occurring, on the land.

## **GROUND OF APPEAL**

The appellant submitted a number of grounds in support of the appeal, which are summarised as relating to:

1. the legal basis to the giving of the notice
2. the process followed by DWER in issuing the notice
3. the reasonableness of the requirements of the notice

While the right of appeal is in respect to the requirements of the notice, the Minister is required to turn his mind to whether or not there is a reasonable basis to suspect unlawful clearing has occurred, or is occurring, on the land. However, it is not the role of the Minister to determine questions of law, including in respect to reaching conclusions as to whether DWER breached rules of procedural fairness.

For the above reasons, the report does not examine or make any conclusions on questions of law. Rather, the report will consider the appeal grounds by reference to two questions relevant to the Minister's powers, that is:

1. whether there is a reasonable basis to suspect unlawful clearing has occurred; and if so,
2. whether the requirements of the notice are justified and appropriate.

## **GROUND 1 – REASONABLE BASIS TO SUSPECT UNLAWFUL CLEARING**

Relevant to this ground of appeal, the appellant submitted that:

There is no, or no substantial, evidence that if unlawful clearing of native vegetation did occur on the land:

- (a) The owner caused the alleged unlawful clearing; and or
- (b) The owner allowed the alleged unlawful clearing.

The appellant specifically submitted that:

Where the Department says that it considers that "significant environmental values have been lost", it is incumbent on the Department to have reached conclusions of fact, beyond reasonable doubt, as to (inter alia):

- (a) What environmental values existed in the first instance;
- (b) What made those environmental values significant;
- (c) What caused those significant environmental values to be lost; and
- (d) Whether the owner or occupier of the land or their authorized representatives caused those significant environmental values to be lost.

Where the Department considers and does issue a VCN to the owner of land, it is incumbent on the Department to find, as a matter of fact beyond reasonable doubt, that the unlawful clearing of native vegetation has occurred on that land, being a finding of fact that necessitated the prior determination of other facts, again beyond reasonable doubt, including (but not limited to) that the clearing was caused or allowed by the owner of the land.



The appellant submitted that the above requirement arises in the context of the effect of the notice, in particular, the impact on 'the freehold rights of the owner' and the fact that the requirements of the notice impose substantial financial and time input by the owner.

### Consideration

As noted above, a vegetation conservation notice may be issued where the CEO (and therefore the Minister on appeal) has a reasonable basis to suspect unlawful clearing of native vegetation has occurred on identified land.

By the appeal, the appellant questions whether any clearing has occurred, and if it has, there is no (or no substantial) evidence that the clearing was 'caused or allowed' by the appellant. By adopting this approach, the appellant did not claim to have cleared for an exempt purpose – rather he claims that there is insufficient evidence to support the exercise of the statutory discretion to issue a vegetation conservation notice.

In response to this ground of appeal, DWER set out the evidence on which it relied to issue the notice. This evidence comprised aerial and satellite imagery of the subject land; a site inspection that confirmed native vegetation had been cleared on the subject land; and an admission by the appellant that he personally undertook the clearing.<sup>4</sup>

In terms of imagery, DWER submitted two satellite images with its response to the appeal, one being from 2 October 2018 and the second from 4 June 2019, and which are reproduced as Figure 3 below.

**Figure 3 – Satellite imagery 2018 and 2019**

(Source: DWER 2020)

Sentinel 2 Satellite image , 2 October 2018



Sentinel 2 Satellite image, 4 June 2019



DWER advised that these images indicated a change in vegetation coverage that were the subject of a site visit in June 2019. DWER advised that the site visit 'confirmed that the area specified in the VCN identified in imagery review was cleared of native vegetation'.

<sup>4</sup> DWER, Advice in response to appeal 007/20, 16 March 2020, page 3.

Site visit photographs [not provided] were examined by an expert in flora identification within DWER, and that advice confirmed that the vegetation that was cleared was native vegetation.

At the site visit, DWER also noted that the appellant agreed to an interview, during which it was submitted he said that the area the subject of the site visit was:

...very good land that vermin were occupying and wild pigs ... are building in numbers. Kangaroos. And I've paid a lot of money for the property so decided to clear this 20 hectares to reduce the vermin and to also grow crops and run livestock to make some money.<sup>5</sup>

The appellant was provided with an opportunity to consider DWER's advice in April 2020.<sup>6</sup> At a subsequent meeting with the appellant's lawyers on 27 May 2020, the appellant was invited to comment on why the satellite imagery and record of interview conducted with the appellant are not sufficient to found a reasonable suspicion that unlawful clearing has occurred on the land.

By its additional submissions in October 2020, the appellant raised no further comment on the basis for the decision to give the notice, instead focusing on the requirements applied to the notice. The additional submissions nonetheless expressed reliance in full on the content of the original appeal, and concluded by (among other things) reconfirming the appellant's view that the notice should be withdrawn.<sup>7</sup>

The implication by the appellant that it was incumbent on DWER (and therefore the Minister, on appeal) to establish that the person served with the notice 'caused or allowed' the clearing is not supported: as noted above, section 70(2) provides that a notice may be given to the owner, occupier or such other person that is considered practicable to ensure compliance with the notice. It follows that a notice can be issued to any person, and explicitly to the owner of the land. Given the appellant is a part owner in the land, it is considered open to DWER to have given the notice to him and the co-owner.

In addition, the appellant indicated in the record of interview with DWER in June 2019 that he personally undertook the clearing.

While the appellant did not put forward any arguments that the clearing was exempt, the extent of the area and reasons given for the clearing in the record of interview do not identify any particular exemption that might apply to the clearing. In short, the appellant stated that the clearing was to remove an area that had been harbouring 'pests' and for cropping and grazing. No applicable exemption is identified in respect to these purposes.

## Conclusion

On the basis of the foregoing, it is considered that there is a reasonable basis for the Minister to suspect that unlawful clearing had occurred on the land between October 2018 and June 2019. As such, there is a rational basis for the notice to be given.

## GROUND 2 – WHETHER THE NOTICE IS EXPRESSED IN APPROPRIATE TERMS

The appellant raised objection to the form of the notice, submitting that:

No power exists under section 70(4) of the Act to impose the conditions under the following items of the VCN:

Item 1 - No unlawful clearing

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<sup>5</sup> DWER, Advice in response to appeal 007/20, 16 March 2020, page 4.

<sup>6</sup> Email to appellant's lawyers, 3 April 2020.

<sup>7</sup> Appellant, Supplementary submissions to the appeal, 5 October 2020, paras 1 and 36(a).



- Item 2 - Cultivation prohibited
- Item 3 - Exclusion of Livestock
- Item 5 - Revegetation
- Item 6 - Success of Revegetation
- Item 7 - Weed control
- Item 8 - Monitoring
- Item 9 - Records must be kept
- Item 10 - Reporting

The VCN is therefore inconsistent with both the legislative requirements, as set out in the Act, and the regulatory principles, as set out in 'Environmental Protection Act 1986, Part V; Effective and efficient regulation' released in July 2015 and 'Enforcement and Prosecution Policy' dated July 2013.<sup>8</sup>

### Consideration

By this ground of the appeal, the appellant is essentially asserting that there is no legal basis to apply any of the requirements set out in the notice.

In response to this ground of appeal, DWER advised:

... [s]ection 70(2) of the EP Act that states in relation to unlawful clearing, "the CEO may cause a notice (a vegetation conservation notice) to be given requiring a person bound by it to ensure that no unlawful clearing, or no further unlawful clearing, takes place on the land."

In relation to the VCN measures of Cultivation Prohibited, Exclusion of Livestock, Revegetation, Success of Revegetation, Weed Control, Monitoring, Records must be kept and Reporting measures are in accordance with Section 70(4)(b) of the EP Act that states, "in the case of a vegetation conservation notice given under subsection (2)(b), may require any person bound by it to take such specified measures as the CEO considers necessary...to re-establish and maintain vegetation on any area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred..."<sup>9</sup>

While this element of the appeal is expressed in terms of legal error (which are matters for a court), the form of the notice is a relevant consideration in the context of the Minister's appeal decision.

#### Item 1 – No unlawful clearing

Item 1 of the notice requires the person given the notice to 'ensure that no unlawful clearing, or further unlawful clearing, takes place on the land.' As noted by DWER, section 70(2) of the EP Act mandates that the notice includes a requirement that 'a person bound by [the notice] to ensure that no unlawful clearing, or no further unlawful clearing, takes place on the land.'

Item 1 is therefore entirely consistent with section 70(2), and this element of the appeal is without merit.

#### Item 2 – Cultivation prohibited

This requirement requires the person served with the notice to:

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<sup>8</sup> Appellant, Schedule to the Appeal, 18 February 2020, page 3.

<sup>9</sup> DWER, Response to appeal 007/20, 16 March 2020, pages 6 to 7.

Ensure no cultivation, including scraping, raking, ploughing or mechanical movement of soil, is carried out within the specified area other than for purposes required under this vegetation conservation notice or for the purpose of complying with a written firebreak notice.

As noted by DWER, section 70(4)(b) of the EP Act a vegetation conservation notice may require any person bound by it to take such specified measures as the CEO considers necessary for one or more of a number of purposes, namely:

- (i) to repair any damage caused by the clearing;
- (ii) to re-establish and maintain vegetation on any area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred;
- (iii) to prevent the erosion, drift or movement of sand, soil, dust or water;
- (iv) to ensure that specified land ... will not be damaged or detrimentally affected, or further damaged or detrimentally affected, by the clearing.

Item 2 of the notice is directed at (1) preventing further damage to native vegetation through disturbance of roots, seeds and lignotubers, and (2) assists in the reestablishment of native vegetation from stored seed and other propagative material. These requirements are considered to be consistent with (i), (ii) and (iv) above, and are therefore not considered to be outside of the scope of section 70(4) of the EP Act.

### Item 3 – Exclusion of livestock

This item requires the person served to:

Ensure that livestock are excluded from the specified area and not cause or permit livestock to enter or remain within the specified area.

It is understood that the purpose of this requirement is to ensure the area that has been suspected to have been unlawfully cleared is not further damaged by browsing stock or by the effect of trampling. This is therefore in similar terms to Item 2, and is considered to be justified for that reason.

### Items 4 and 8 – Monitoring quadrats and monitoring program

Item 4 requires the person served with the notice to mark out a control quadrat and four monitoring quadrats at the property.

Item 8(a) requires the person served with the notice to engage an environmental specialist to undertake a survey of the control quadrat in September or October of 2020 of species composition, structure, density and vegetation condition of native vegetation and the percentage cover of vegetation that is weed species.

Item 8(b) requires that (commencing in September or October 2020) an environmental specialist undertakes surveys every two years within the monitoring quadrats to determine the composition, structure, density and vegetation condition of native vegetation and the percentage cover of vegetation that is weed species.

The results of these surveys are then used to inform the requirement for revegetation, which is considered separately below.

In its additional submission, the appellant noted that the Environmental Protection Amendment Bill 2020 (the Amendment Bill) is currently before Parliament, and includes an express power to include the tasks of monitoring, record keeping and reporting in a vegetation conservation

notice.<sup>10</sup> The appellant submitted that no such express provisions are currently contained within the EP Act, and as a result, the Bill content supports his contention that the requirements for monitoring, record keeping and reporting as set out in Items 4 and 8 are beyond the power and are therefore ultra vires.<sup>11</sup> Citing the long title to the EP Act, the appellant additionally submitted that DWER provides no grounds or basis to establish how the monitoring requirements assist or conform to the object of the Act to:

- (a) prevent, control and abate pollution and environmental harm; or
- (b) conserve, preserve, protect, enhance and manage the environment.<sup>12</sup>

As noted above, section 70(4)(b) of the EP Act provides that the CEO may require any person bound by a vegetation conservation notice to take such measures as the CEO considers necessary to (among other things) re-establish and maintain vegetation on any area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred.

In order to establish that vegetation has been re-established to a condition as near as possible to how it was prior to the clearing, it is necessary for that area to be monitored. The requirements in Items 4 and 8 reflect this, and are considered necessary to ensure the vegetation is re-established.

While the content of the Amendment Bill is noted, for the above reasons, it is not considered that this reflects a lack of legal power for the application of Items 4 and 8 of the notice. Requirements for monitoring are routinely applied to vegetation conservation notices, and the requirements reflected in Items 4 and 8 of the notice the subject of this appeal are not considered to be exceptional in that regard.

#### Items 5 and 6 – Revegetation

These items provide:

##### **5. Revegetation**

Undertake revegetation within the specified area so as to achieve a species composition, structure, density and vegetation condition of native vegetation similar to pre-clearing species composition, structure, density and vegetation condition by:

- a) deliberately planting and/or seeding native vegetation; and
- b) ensure only local species are used in the revegetation; and
- c) ensure that the local species used in revegetation includes the species listed as required flora species; and
- d) Complete initial revegetation by 31 October 2020.

##### **6. Success of Revegetation**

Where, for any reason, revegetation is not achieved, each and every year for a period of twenty (20) years after the giving of this notice, or until, in the opinion of the CEO, revegetation is achieved, whichever is the lesser period, continue to revegetate the specified area in accordance with measure [5]

These items set a requirement to re-plant certain types of vegetation to (as far as possible) reinstate the vegetation to the condition it was prior to the clearing occurring. This outcome appears to be expressly contemplated in section 70(4)(i) and (ii) of the EP Act. This element of the appeal is therefore considered to be without merit.

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<sup>10</sup> Appellant, Supplementary submissions to the appeal, 5 October 2020, paras 29-30, citing section 64(3) and (4A)(b) of the Bill.

<sup>11</sup> Ibid, paras 32-33.

<sup>12</sup> Ibid, paras 34-35.

### Item 7 – Weed control

This item requires:

Each and every year for a period of twenty (20) years after the giving of this notice

- (a) Remove or kill weed species within the specified area during the month of July or August of each year so that the percentage cover that is weed species is equal a pre-clearing percentage cover, and
- (b) Complete initial weed control by 31 August 2020.

It is understood that weeds have the potential to compete with and therefore inhibit re-establishment of native vegetation. The requirement to control weeds throughout the duration of the instrument is therefore considered to be consistent with section 70(4)(i) and (ii) of the EP Act. The question as to whether the scope of the condition is overly onerous is considered under Ground 3 of this report.

### Item 9 and 10 – Records and reporting

Item 9 requires certain records to be maintained in relation to revegetation, including dates revegetation activities were carried out and the species used.

Item 10 provides:

For a period of twenty (20) years after the giving of this notice, provide to the *CEO*, within three (3) months of carrying out monitoring in accordance with measure eight (8), a written report of records kept under measure nine (9) of this notice for each biennial period 1 January (Year 1) to 31 December (Year 2). The first report is to be provided to the *CEO* on or before 31 January 2021.

As noted above in respect to monitoring, the appellant's additional submission questioned the capacity of the notice to include reporting and record keeping requirements of this kind, having regard to the content of the Amendment Bill.<sup>13</sup>

The requirements questioned in this case relate to records as to revegetation and weed actions. The requirement to keep and report on these activities is consistent with the head power in section 70(4), and is consistent with the notion that the proponent undertake works to rectify the damage caused by the clearing, and verifies that work has been undertaken to a satisfactory standard. For the reasons stated above in respect to monitoring, changes proposed in the Amendment Bill do not alter this view.

The question as to whether the scope of the condition is overly onerous is considered under Ground 3 of this report.

### **Conclusion**

For the reasons stated above, it is considered that the form of the notice is consistent with the requirements of section 70 of the EP Act, and that as a result, none of the requirements are identified as being out of scope of that section.

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<sup>13</sup> Appellant, Supplementary submissions to the appeal, 5 October 2020.

### GROUND 3 – WHETHER THE REQUIREMENTS OF THE NOTICE ARE APPROPRIATE

This ground of appeal relates to whether the requirements of the notice are appropriate.

While the original appeal did not set out specific concerns with the requirements of the notice, the following general observations were identified:

- unnecessarily harsh
- manifestly excessive
- not proportionate to the magnitude or seriousness of harm allegedly caused to the environment
- unreasonably and unnecessarily impacts the land owners' freehold rights to the use of the land.

#### Consideration

In response to this ground of appeal, DWER advised:

The measures of this VCN included: no further unlawful clearing, cultivation prohibited, exclusion of livestock, establishing monitoring quadrats and a control transect, revegetation, monitoring and reporting measures. These measures are considered appropriate to re-establish native vegetation to a preclearing standard across the 21 hectare cleared area.

On 9 August 2019, DWER received a submission to the proposed VCN providing two options:

1. A monetary contribution to the amount of \$20 000 or a figure agreed to go towards vegetation in an area of Western Australia that is needed (Monetary Offset).
2. A reduction in the area to be revegetated to 8.7 hectares (due to previous planting of 16.89 hectares within Lot 56).

The reduced areas are justified within the submission by previous plantings undertaken by the property proprietors.

This submission was considered by DWER prior to giving the final VCN in accordance with section 70(5) and (6) of the EP Act. Although consideration of a monetary contribution was considered appropriate, the offer made in the submission is significantly lower than the amount required to offset the environmental impact of the clearing. An area offset was not considered appropriate as there would be no means of enforcing the requirement or binding future owners and/or occupiers and would not be afforded protection under the EP Act as revegetation would not be defined as native vegetation.<sup>14</sup>

The 'offset' mentioned in this advice refers to a proposal by the land owners in August 2019 to pay a sum of \$20,000 as an offset for the loss of the vegetation. In response to this offer, DWER advised the land owners:

A review of the environmental value of the cleared area has indicated that the monetary figure provided [i.e. \$20,000] is substantially inadequate and only accounts for approximately 24% of the amount required to offset the alleged clearing. The DWER is not prepared to enter into ongoing negotiations of an acceptable monetary offset.<sup>15</sup>

During the appeal investigation, the appellant requested details of the criteria used to determine the environmental value of cleared land as referred to in the above letter (i.e. how the Department concluded that the monetary offer of \$20,000 equated to 24% of the amount required to offset the alleged unlawful clearing).<sup>16</sup>

This request was put to DWER, and it provided the following response:

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<sup>14</sup> DWER, Response to appeal 007/20, 16 March 2020, page 8.

<sup>15</sup> DWER, Letter to owners of Lot 56, 17 January 2020.

<sup>16</sup> Appellant, email to Appeals Convenor, 11 May 2020.

The offset calculator was used as a guide to determine what monetary value would have been attributed to the area of alleged unauthorised clearing if a clearing permit had been applied for the same area.

If an offset had been considered appropriate for a clearing permit application to clear 21 hectares within an extensively cleared landscape for farming purposes, the following offset conditions are likely to have been sought:

- a revegetation offset area of 54 hectares, which would need to be covered by a conservation covenant to provide assurance of the longevity of the offset; or
- a monetary contribution for the acquisition of 54 hectares of native vegetation within the Shire of Greater Geraldton of \$83,200 (\$1600 per hectare).<sup>17</sup>

At a subsequent meeting with the appellant on 13 May 2020, details of the calculation made and the assumptions relevant to those calculations were sought. Further clarification was obtained from DWER, which was that:

... the offset calculation was intended to be for internal use only, to provide an indication of what the monetary offset would have been if a clearing permit had been applied for before the area was cleared. It was used as a guide only to identify that the initial submission of the Appellant of a \$20,000 offset in lieu of the notice was not appropriate.<sup>18</sup>

In its final submissions, the appellant stated:

The value ascribed to the loss of the environmental value of the vegetation the subject of the VCN is said by the Department to be in the order of \$83,000. Arguably, in the example where the Appellant had applied for a clearing permit, in considering the inclusion of offset criteria, the Department would have used this value.<sup>19</sup>

Section 51H(1) provides that where a clearing permit is granted, the CEO may apply such conditions as are considered necessary or convenient for the purpose of (among other things) 'offsetting the loss of the cleared vegetation'. Without limiting this power, section 51I(2) sets out some kinds of conditions that may be attached to a permit, including to:

establish and maintain vegetation on land other than land cleared under the permit in order to offset the loss of the cleared vegetation, or make monetary contributions to a fund maintained for the purpose of establishing or maintaining vegetation.<sup>20</sup>

There is no similar provision applicable to the giving of, or requirements in, a vegetation conservation notice under section 70 of the EP Act. For these reasons, it is not considered open for an 'offset' of the kind contemplated in the appellant's submission to DWER in August 2019 to be applied in this case.

The Native Vegetation Regulation Advice dated 10 January 2020 described the condition of the vegetation that was suspected to have been unlawfully cleared to have been in pristine to excellent condition, and is of a vegetation type that retains only 16.3% of its original extent.

The appellant challenged this assessment, stating:

... it is not known whether the Department has taken into account (and if so, to what extent) ... the fact that the land, the subject of the VCN, had been extensively used for grazing cattle and sheep for more than 50 years. As such, the land had already been degraded and was not in a pristine or excellent condition as alleged by the Department. The Department provides no evidence to base its allegation that the land was in pristine or excellent condition.<sup>21</sup>

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<sup>17</sup> DWER, Email to Appeals Convenor, 13 May 2020

<sup>18</sup> DWER, Email to Appeals Convenor, 14 May 2020.

<sup>19</sup> Appellant, Supplementary submissions to the appeal, 5 October 2020, para 17.

<sup>20</sup> EP Act, section 51I(2)(b).

<sup>21</sup> Appellant, Supplementary submissions to the appeal, 5 October 2020, para 8. See also paras 9-11.



Given the finding under Ground 1 that there was (and remains) a reasonable basis to suspect unlawful clearing of native vegetation occurred, it was not possible for DWER officers to have assessed the values of the vegetation in its uncleared state: rather, this must be inferred from the best available evidence. In that regard, the Native Vegetation Regulation Advice relevantly states:

The vegetation cleared is mapped as vegetation association Geraldton Sandplains 35 which is described as shrublands; jam scrub with scattered York gum (Shepherd et al., 2001).

Images taken during a ... compliance inspection (DWER, 2019a), indicated the cleared vegetation consisted of scattered *Eucalyptus loxophleba* (York gum) over mixed *Acacia* scrubland, with a ground layer of scattered native tussock grasses ...

Analysis of images taken of remaining vegetation, during the site inspection (DWER 2019a) indicate that the vegetation cleared was likely to be in Pristine to Excellent (Keighery, 1994) condition, described as:

- Pristine or nearly so, no obvious signs of disturbance (Keighery, 1994).
- Excellent; Vegetation structure intact, disturbance affecting individual species and weeds are non-aggressive species (Keighery, 1994).<sup>22</sup>

The finding that the vegetation was in pristine to excellent condition is considered to be justified.

Given the above, and noting that had a clearing permit been applied for, vegetation and fauna surveys would likely have been required, it is considered that there could be no expectation that the clearing application would have been approved, and then whether an offset would have been contemplated. It follows that consideration of an offset in the context of the notice is beyond the scope of the appeal and is not considered further.

Notwithstanding the above, the appellant is of the view that in effectively 'valuing' the vegetation that was cleared as being in the order of \$83,000, the requirements of the notice should not be so onerous such that the cost of rectification is substantially greater than the value ascribed by DWER. In that regard, the appellant calculated that the cost of performing the tasks required by the notice would be in the order of \$192,000 to \$420,000.<sup>23</sup> In the view of the appellant, there is 'no information, data or evidence that this level of expenditure is necessary and reasonable in these circumstances.'<sup>24</sup>

The appellant also submitted that DWER applies vegetation conservation notices inconsistently, citing a notice issued to Bias Holdings Pty Ltd in Dandaragan in 2018:

The following points are observed on a review of [the Bias Holdings] vegetation conservation notice:

- (a) the affected land area was 17.8 hectares, being on 3.2 hectares less than the area within the VCN;
- (b) the works required are essentially the same as those within the VCN; and
- (c) the works required are over a 10 year period, not 20 years as in the VCN.

... [T]here appears to be an inherent inconsistency in the Department's approach, at least with respect to the period of time which it imposes for the works to be carried out. On this issue, the Department provides no information, data or evidence that, at the end of the 20 year period, the specified measures will achieve, or "as near as possible" achieve, pre-cleared levels of vegetation. The imposition of the 20 year time period appears to be nothing more than subjective guesswork imposed (without any supportive evidence) by the Department.<sup>25</sup>

<sup>22</sup> DWER, Native Vegetation Regulation Advice, 10 January 2020, page 1.

<sup>23</sup> Appellant, Supplementary submissions to the appeal, 5 October 2020, paras 19 to 20.

<sup>24</sup> Ibid, para 24.

<sup>25</sup> Ibid, paras 26 to 27.

As the appellant noted, the requirements of the Bias Holdings notice were in similar form to those applying to the notice the subject of this appeal. The only material difference cited by the appellant is the duration: in the case of the Bias Holdings notice, it applied for ten years rather than the 20 applying to the appellant's notice.

Guidance on the duration of vegetation conservation notice is provided in a fact sheet published by DWER:

The VCN will specify a duration that the CEO considers necessary for the completion of the measures. This is commonly 10 years, but may be varied as required. The measures usually include success criteria. If the success criteria are not achieved within the duration, the period of the VCN may be extended.<sup>26</sup>

No guidance is apparent from the material provided by DWER as to why a duration double that identified in the fact sheet was appropriate in this case. Noting the fact sheet states that where specified outcomes (i.e. success criteria) are not achieved, the duration of a notice can be extended, it is considered appropriate in this case for the duration to be amended to be limited to ten years from the date of the Minister's decision on the appeal.

In relation to the other requirements of the notice, noting the appellant's acknowledgement that they are consistent with those applying in the Bias Holdings notice, and that the purpose of the notice is (among other things) to re-establish and maintain vegetation on any area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred, the requirements are considered to be reasonable and appropriate.

## Conclusion

For the reasons stated above, it is recommended this appeal be allowed in part to the extent that the duration of the notice is reduced to ten years from the date of the Minister's decision on the appeal, with the option for this to be extended where vegetation has not been re-established to a condition as near as possible before the clearing occurred. It is otherwise recommended that this ground of appeal be dismissed.

## ALTERNATIVE OPTIONS PUT FORWARD BY THE APPELLANT

As noted above, the appellant's supplementary submissions set out three alternate outcomes from the appeal, being:

1. the notice be withdrawn
2. the notice be amended to (among other things)
  - a. reduce the 'specified area' from 21 ha to approximately 8 ha;
  - b. the reduced area to be fenced to exclude stock;
  - c. initial revegetation be limited to planting or seeding 300 York gums;
  - d. if natural regeneration has not commenced within two years, undertake revegetation with local species;
  - e. removal of requirements to set a reference site and four monitoring sites.
3. the notice be amended as in 2 above, but with no modification of the specified area (21 ha) and no requirement to fence that area.

For the reasons stated in Ground 1 of this report, option 1 is not supported, as there is a reasonable basis to suspect unlawful clearing had occurred.

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<sup>26</sup> Department of Environment Regulation, Vegetation Conservation Notices (VCN) Fact sheet, May 2015, page 2.

In relation to option 2, a reduction in the area to be re-established is not supported for the reasons stated in Ground 3 of this report: the requirements of the notice are considered to be reasonable and appropriate, and are consistent with the purpose of section 70(4)(b)(ii) of the EP Act. Similarly, and also relevant to option 3, the other changes to the requirements are not considered necessary or appropriate: as the appellant acknowledged, the requirement to revegetate the area suspected to have been unlawfully cleared is consistent with that applying to Bias Holdings. It is also consistent with section 70(4)(b)(i) and (ii).

## **CONCLUSION AND RECOMMENDATIONS**

For the reasons stated in this report, it is recommended that the appeal be allowed in part to the extent that the duration of the notice is reduced to ten years from the date of the Minister's decision on the appeal, with the option for this to be extended where vegetation has not been re-established to a condition as near as possible before the clearing occurred. It is otherwise recommended that the appeal be dismissed.

If the Minister agrees with this recommendation, the decision will be given effect by DWER under section 110 of the EP Act as soon as practicable.

Emma Gaunt  
APPEALS CONVENOR

**Investigating Officer:**  
Jean-Pierre Clement, Deputy Appeals Convenor