



Environmental Protection Act 1986

Hon Stephen Dawson MLC
Minister for Environment

MINISTER'S APPEAL DETERMINATION

APPEAL AGAINST REQUIREMENTS OF VEGETATION CONSERVATION NOTICE – LOT 56 ON DEPOSITED PLAN 29413, EAST CHAPMAN

Purpose of this document

This document sets out the Minister's decision on an appeal lodged under section 102 of the *Environmental Protection Act 1986* in objection to the requirements of a vegetation conservation notice. This document is produced by the Office of the Appeals Convenor for the Minister but is not the Appeals Convenor's own report, which can be downloaded from the Appeals Convenor's website at www.appealsconvenor.wa.gov.au.

Appellant:	Barry Edwards
Recipient of notice:	Aaron and Barry Edwards
Description:	Vegetation conservation notice issued for suspected unlawful clearing of 29 hectares of native vegetation
Minister's Decision:	The Minister allowed the appeal in part
Date of Decision:	19 November 2020

REASONS FOR MINISTER'S DECISION

Background

In March 2019, the Department of Water and Environmental Regulation (the Department) identified that there had been a change in vegetation condition on the land the subject of this appeal. This was determined using satellite imagery. In a subsequent site inspection in June 2019, Departmental officers confirmed that the areas identified through satellite monitoring had been cleared of native vegetation.

The appellant participated in an interview at the completion of the inspection, stating that the clearing was for the purposes of extending the cropping area for the property and to control feral pigs.

In July 2019, the Department gave the appellant notice of its intention to give a vegetation conservation notice. The appellant provided a response to this notice of intent, which is understood to have included an offer to pay \$20,000 to the Department, with the area of vegetation required to be restored being reduced to 8.7 hectares on the basis that the appellant had previously revegetated approximately 17 hectares of the property.

After considering this submission, the Department proceeded to issue a notice, and this was served on 28 January 2020. The notice contained a number of requirements, including that no further unlawful clearing occur, and that further cultivation or grazing is prohibited within the area suspected to have been unlawfully cleared.

The area of clearing was determined by the Department to be in the order of 29 hectares.

By the appeal, the appellant questioned the legal basis for the Department to have formed a reasonable basis to suspect unlawful clearing had occurred. The appellant also questioned the power to impose the requirements applied to the notice, and if they are valid, he submitted that they are unreasonable. The appellant requested that the notice be withdrawn, or that in the alternative, the area to be restored be reduced and the requirements amended, and in the further alternative, that the requirements be amended.

Decision

On the information available, the Minister considered that there is a reasonable basis to suspect unlawful clearing had occurred on the land, and that as a result, the decision to issue the notice was justified. The Minister further considered that the requirements applied to the notice are generally justified, but agreed with the Appeals Convenor that the duration of the notice be amended to ten years from the date of this decision.

It follows that the Minister allowed the appeal in part, and he requested the Department to give effect to this decision as soon as practicable.

The full reasons for the decision follow.

No reasonable basis to suspect unlawful clearing

By this ground of the appeal, it was submitted that there was no reasonable basis for the Chief Executive Officer (CEO) of the Department to suspect that the clearing was unlawful or that the clearing was caused or allowed by the appellant. The details of this ground of appeal are more fully set out in the Appeals Convenor's report, but in summary, are primarily to the effect that there was insufficient evidence to support a conclusion that unlawful clearing had occurred.

Section 70(2) of the *Environmental Protection Act 1986* provides that where the CEO suspects on reasonable grounds that (among other things) unlawful clearing has taken place on any land, the CEO may give a vegetation conservation notice requiring the person bound by it to ensure no further unlawful clearing occurs. 'Unlawful clearing' is defined as anything constituting a contravention of sections 51C or 51J of the Act. For current purposes, unlawful clearing means clearing that was undertaken without a permit or in the absence of a valid exemption.

As noted by the Appeals Convenor, satellite imagery indicated that there had been a possible change in native vegetation cover at the property between 2 October 2018 and 4 June 2019. A site visit conducted in June confirmed clearing had occurred, and the appellant stated that he had cleared the land to increase the cropping area and control feral pigs.

From this, the Minister considered that there is no dispute that native vegetation had been cleared, and that the clearing was undertaken by the appellant. Furthermore, the stated purposes of the clearing (being for expanding cropping and to control pests) are not considered to meet any category of exemption referred to in section 51C. As no permit had been issued for the clearing, the Minister considered there was (and remains) a reasonable basis to suspect unlawful clearing had occurred, and that as a result, this ground of appeal is dismissed.

Requirements of the notice are beyond power

By this ground of appeal, it was submitted that all the requirements of the notice (numbers 1 to 10) are beyond power and are therefore of no effect.

The right of appeal in this case is in respect to the requirements of the notice. While it is not the Minister's role to make findings of law, in considering the appeal, the Minister's decision must be in accordance with the law.

The Appeals Convenor's report sets out the consideration and recommendations in respect to this appeal ground. In short, it was considered that each of the requirements are consistent with sections 70(2) and (4) of the Act, and as a result, the Minister agreed with the Appeals Convenor's recommendation that this ground of the appeal be dismissed.

Requirements unreasonable; too onerous etc

The appellant submitted that the requirements of the notice are unreasonable. This includes that the cost of undertaking the requirements of the notice exceeds the value of the vegetation calculated if it was approved to be cleared and an offset was applied.

The Minister did not consider it appropriate to apply offset policy to determine the value of vegetation that is suspected to have been unlawfully cleared, or for a vegetation conservation notice to be otherwise negotiable on the payment of funds as compensation for the area cleared. Offsets are for consideration through a clearing permit application, and then only after the impacts of the proposed clearing are properly investigated and assessed.

In the above context, while the appellant's calculations for the cost of undertaking works and activities the subject of the notice were acknowledged, the question raised by this ground of appeal is whether those requirements are reasonable of themselves.

In support of the appeal, the additional submission referred to a vegetation conservation notice issued to Bias Holdings Pty Ltd in May 2018. The submission noted that while the works required in that instrument is essentially the same as that applied to the notice the subject of this appeal, the former applies for ten years while the notice applying to the appellant applies for 20 years. The appellant submitted that the additional duration is subjective and made without supporting justification. The appellant requested that the period within which the requirements of the notice apply be limited to ten years, consistent with the other notice.

Noting the appellant's acknowledgement that the requirements of the notice are largely in the same terms as that issued to Bias Holdings, and noting the requirements of the notice appear to be validly directed towards re-establishing vegetation to a condition as near as possible to the condition of the vegetation before the clearing occurred, the Minister did not consider the requirements to be unreasonable. The Minister agreed with the Appeals Convenor, however, that consistent with guidance published by the Department, the duration of the notice should be reduced to ten years from the date of this decision. If it becomes apparent that native vegetation will not be re-established to the extent required before the notice ends, nothing in the Minister's decision prevents the Department from extending the duration beyond ten years.

Note: this decision is published pursuant to the terms of section 110 of the *Environmental Protection Act 1986* and regulation 8 of the *Environmental Protection Regulations 1987*.

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