



Appeals Convenor

Environmental Protection Act 1986

REPORT TO THE MINISTER FOR ENVIRONMENT

**APPEAL IN OBJECTION TO THE DECISION OF THE DEPARTMENT OF WATER AND
ENVIRONMENTAL REGULATION TO GRANT A CLEARING PERMIT**

**CLEARING PERMIT CPS 8150/1: STRATHERNE ROAD RESERVE,
CUBALLING, SHIRE OF CUBALLING**

APPLICANT: SHIRE OF CUBALLING

Appeal Number 046 of 2019

February 2020

Appeal summary

This is a report in relation to an appeal received against the decision to grant a clearing permit to the Shire of Cuballing to clear 20 native trees within a 2.06 hectare footprint along the Stratherne Road reserve. The proposed clearing is for the purpose of road widening.

The appellant submitted that the proposed clearing is seriously at variance to clearing principles (b) significant habitat for fauna, (e) significant remnant in an extensively cleared area, (f) vegetation growing in association with a watercourse and (i) deterioration in water quality and therefore should not have been granted. The appellant also submitted that the loss of a significant remnant in an extensively cleared area cannot be offset, and that the offset is inadequate in any event.

From its assessment DWER found that the proposed clearing will impact on a significant remnant in an extensively cleared area, and vegetation growing in association with a watercourse. DWER also found that the application area is not likely to comprise significant habitat for indigenous fauna. DWER concluded that these impacts can be managed, and granted the clearing permit subject to conditions including an offset requirement.

In relation to threatened fauna and in particular Carnaby's cockatoo (*Calyptorhynchus latirostris*), DWER advised that while the application area contains suitable foraging habitat, no evidence of threatened fauna was found within the application area during a site inspection or a habitat tree assessment, and there are no recent records of Carnaby's cockatoo within 12 kilometres (km) of the application area. In relation to red-tailed phascogales (*Phascogale calura*), the habitat tree assessment did not identify evidence of this species within the application area, however could not confirm its presence or absence.

The habitat tree assessment recommended that tree hollows be inspected prior to and during clearing. The applicant advised that it intended to inspect hollows in line with this recommendation.

Having considered the information provided during the course of this investigation, the Appeals Convenor considered that while DWER's assessment against the clearing principles was generally appropriate, however, found that the proposed clearing to be at variance to clearing principle (b) on the basis that the vegetation contains foraging habitat for Carnaby's cockatoo, and the application area is otherwise within the known range of the species.

The Appeals Convenor noted that the purpose of the proposed clearing is for a public benefit (being improved road safety), and supported DWER's conclusion that the proposed clearing should be approved, even though it is at variance to multiple clearing principles, subject to the impacts being managed and the significant residual impacts being counterbalanced. In this regard, the Appeals Convenor considered that the conditions should be strengthened.

Recommendation

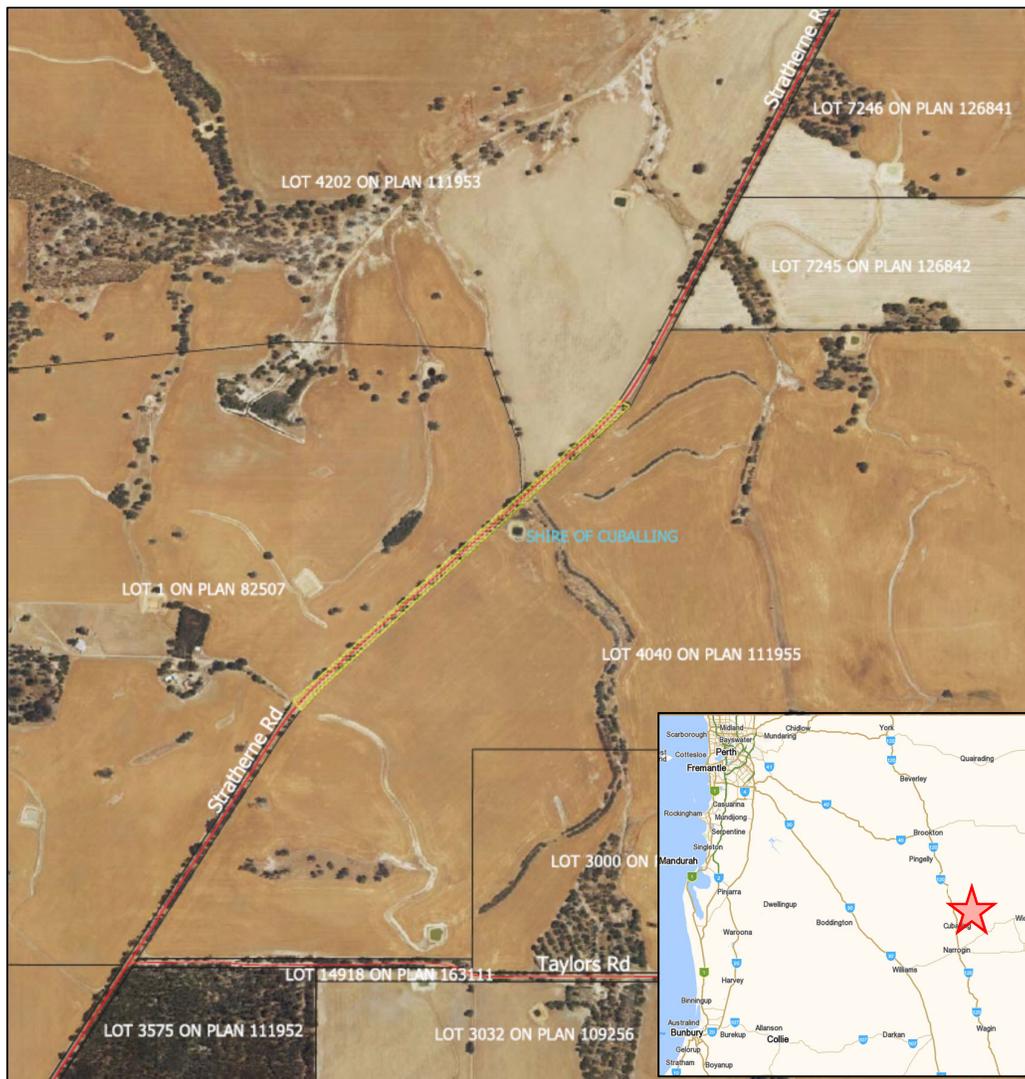
The Appeals Convenor recommended that the appeal be allowed to the extent that conditions are applied to the clearing permit requiring the applicant to:

- more clearly exclude the majority of hollow-bearing trees from the scope of the approval by limiting clearing to within 8 metres of either side of the road centreline
- inspect any potential habitat trees for red-tailed phascogales (and other threatened fauna) immediately prior to clearing, delay clearing of any trees found to be occupied by these species until no longer in use, and install artificial nesting boxes to replace any confirmed habitat trees required to be cleared
- keep records on efforts in relation to the implementation of these fauna management conditions, and report to DWER as required.

INTRODUCTION

The Urban Bushland Council WA Inc. (appellant) appealed against the decision of the Department of Water and Environmental Regulation (DWER) to grant Clearing Permit CPS 8150/1 (clearing permit) to the Shire of Cuballing (applicant) to clear 20 native trees within a 2.06 ha footprint (PIN 11542346). The clearing is proposed along about 1 kilometre (km) of the Stratherne Road reserve (application area), north east of the town of Cuballing, for the purpose of road widening. The location and extent of the application area is indicated in Figure 1.

Figure 1: Location (red star) and extent (yellow cross-hatching) of application area



(Source: Whereis.com, October 2019; DWER CPS 8150/1)

On 25 July 2019 the applicant applied for a purpose permit to clear 20 native trees. DWER's decision report¹ states that the application was advertised for a 21-day public comment period and no submissions were received.

DWER decided to grant the clearing permit on 19 August 2019, subject to conditions to avoid, minimise and reduce the impacts of the proposed clearing, undertake weed and dieback control, provide an offset, keep records and report. It was against this decision that the appeal was lodged.

¹ Available at: <ftp://ftp.dwer.wa.gov.au/permit/8150/>

For context, it is noted that other sections of the road reserve have been the subject of previous clearing applications:

- CPS 1471/1 – permit granted 21 December 2006 for the clearing of 0.3 ha within a 1.96 ha footprint (PINs 11542351, 11542344), subject to conditions to avoid, minimise and reduce impacts, weed and dieback control, fauna management (threatened fauna), flora management (threatened species), revegetation and rehabilitation, offset, and record-keeping and reporting
- CPS 7523/1 – permit granted 15 November 2017 for the clearing of 0.4 ha within a 2.05 ha footprint (PIN 11523624), subject to an offset
- CPS 7870/1 – permit granted 9 August 2018 for the clearing of 0.6 ha within a 1.97 ha footprint (PIN 11523624), subject to conditions to avoid, minimise and reduce impacts, weed and dieback control, fauna management (Carnaby's cockatoo (*Calyptorhynchus latirostris*; endangered) and red-tailed phascogale (*Phascogale calura*, conservation dependent)), offset, and record-keeping and reporting.²

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the *Environmental Protection Act 1986* (EP Act), a report was obtained from DWER on the appeal. The applicant was also given the opportunity to address the matters raised in the appeals. During the appeals investigation, the Office of the Appeals Convenor consulted with the appellant and the applicant.

The environmental appeals process is a merits-based process. For appeals in relation to a DWER decision 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.

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

OUTCOME SOUGHT BY APPELLANT

The appellant is seeking for the Minister to overturn DWER's decision to grant the clearing permit.

STATUTORY CONTEXT

In considering a clearing permit application, the CEO of DWER is to have regard to the following (insofar as they are relevant):

- the clearing principles in Schedule 5 of the EP Act
- any applicable planning instruments and other matter.³

In addition, the extent to which conditions can be applied to prevent, control, abate or mitigate environmental harm or offset the loss of the cleared vegetation may also be relevant as to whether a permit is granted.⁴

As the Minister is remaking the decision of the CEO on appeal, the Minister is also required to have regard to these considerations, as they are relevant to the application and within the context of the appeal.

² Information obtained from: <https://cps.dwer.wa.gov.au/main.html> and <ftp://ftp.dwer.wa.gov.au/permit/>

³ Section 51O(2) and (4).

⁴ Section 51H(1)

GROUNDS OF APPEAL

The appellant raised a number of objections to the decision to grant the permit, which relate to the following:

1. fauna habitat
2. threatened flora
3. significant remnant in an extensively cleared area
4. underground and surface water quality
5. necessity of the proposed clearing; climate change
6. appropriateness of the offset; mitigation conditions.

These issues will be considered in turn.

GROUND 1: FAUNA HABITAT

By this ground of appeal, the appellant submitted that the proposed clearing should have been found to be 'seriously at variance' to clearing principle (b). In support of this contention, the appellant stated that the habitat assessment:

... fails to account for the cumulative effect of clearing piece by piece. Black cockatoos drink the nectar of flowering Eucalypts and eat the seeds of *Allocasuarina* spp. There may well be opportunistic as well as targeted feeding by black cockatoos at this isolated island of vegetation on the Stratherne Road.

These trees would be shelter and islands of refuge for black cockatoos as well as other birds as they pass through the landscape. Some birds have a limited distance they will fly without cover, and the removal of most if not all of the trees is a significant threatening process to the ultimate survival of birds, including endangered species.

Birdlife WA has a brochure 'Birdwatching in the Central Wheatbelt.' 168 birds are listed in the species list from 21 reserves. Of course, not all these birds would be in the area, but the trees would be significant for many species.⁵

Consideration

Clearing principle (b) provides that native vegetation should not be cleared if it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna. From its assessment, which had regard for the findings of a habitat tree assessment⁶, a flora and vegetation survey,⁷ threatened fauna and flora databases, and observations from a site visit, DWER found that the proposed clearing was 'not likely to be at variance' to this clearing principle.

Specifically in relation to black cockatoos, the decision report noted:

A fauna survey undertaken in April 2019 ... identified 53 habitat tree [sic] with [sic] the application area which has [sic] a DBH greater than 300 millimetres. Of these trees, 46 of them are about 8-10 metres from the road centreline, and hence are considered the least likely trees to require removal. The remaining 7 trees are about 6 or 7 metres from the existing road centreline. These may or may not require removal depending on their actual position in relation to proposed road works. None of these closer trees contain hollows or apparent hollows. ... Noting the above, none of the habitat trees were identified as containing hollows suitable for, or in use by Carnaby's cockatoos (Ecoedge, 2019).

⁵ UBC, Appeal letter 046/19, 30 August 2019, page 1.

⁶ EcoEdge (2019) *Habitat Tree Assessment of Proposed Clearing Areas (CPS 8151/1) – Wandering-Narrogin Road (~SLK 25.16 to 27.23) – Shire of Cuballing*. Unpublished report prepared for the Shire of Cuballing, dated April 2019.

⁷ EcoEdge (2019) *Reconnaissance and Targeted Flora and Vegetation Survey, Wandering-Narrogin Road, Cuballing (~25.16 to 27.23), Shire of Cuballing*. Unpublished report prepared for the Shire of Cuballing, dated May 2019

Black cockatoos have a preference for foraging habitat that includes jarrah and marri woodlands and forest heathland and woodland dominated by proteaceous plant species ... Given the vegetation types present within the application area, the application area comprises of suitable foraging habitat for black cockatoos. However, noting the extent of the proposed clearing and that no evidence of foraging was observed during the fauna survey (Ecoedge, 2019), the proposed clearing is unlikely to have a significant impact on black cockatoo foraging habitat.⁸

Noting that DWER took into account the results of the habitat tree assessment and its site inspection, it is considered that this information demonstrated to DWER's satisfaction that none of the habitat trees located within the application area appeared to contain hollows suitable for black cockatoos, and no black cockatoos or black cockatoo foraging evidence were observed during the site inspection. It was therefore determined by DWER that the proposed clearing is not likely to significantly impact upon black cockatoos.⁹

In relation to other fauna values, DWER advised that the:

... assessment against clearing principle (b) is focussed on habitat for conservation significant fauna species, though the clearing permit assessment overall considers the value of the vegetation more broadly within the landscape. The Department considers that, in this way, its assessment adequately addresses potential impacts to any fauna species which may use the vegetation within the Application Area.¹⁰

The *Guide to assessment of applications to clear native vegetation*¹¹ (Guide to Assessment) published by DWER states that the aim of clearing principle (b) is:

... to maintain indigenous fauna species and assemblages of species in their local natural habitat. This principle protects habitat for threatened fauna and *significant habitat* for *meta-populations* of fauna.

...

Under this principle, a clearing proposal where only widespread fauna species are present, which are supported by the surrounding extensive, intact vegetation would not be at variance with this principle. An example could be common, widespread species of the Pilbara within extensive and intact Pilbara habitat.¹²

From the above, the Guide to Assessment appears to distinguish between the relative importance of habitat for threatened fauna compared to other fauna. This is reflected in the examples of where proposed clearing is likely to be at variance to clearing principle (b), including:

- habitat for specially protected or threatened fauna
- native vegetation that is necessary for the maintenance of habitat of priority, migratory, specially protected, threatened fauna or meta-populations of fauna.

As noted above, DWER found that the application area comprises suitable foraging habitat for black cockatoos. Given that the Guide to Assessment suggests that clearing of habitat for specially protected or threatened fauna would likely be at variance to clearing principle (b), additional advice was sought from DWER as to the basis for its conclusion against this principle.

In response, DWER advised:

[F]urther internal expert advice has been obtained ... [which has] concluded that the application areas are unlikely to provide significant habitat values for Carnaby's cockatoo, considering that:
- no suitable hollows were identified within the clearing area;

⁸ DWER, decision report for Clearing Permit CPS 8150/1, 19 August 2019, page 4.

⁹ DWER, response to Appeal 046/19, 17 October 2019, page 2.

¹⁰ DWER, response to Appeal 046/19, 17 October 2019, page 2.

¹¹ Department of Environment Regulation (2014) *A guide to the assessment of applications to clear native vegetation – Under Part V Division 2 of the Environmental Protection Act 1986*. December 2014. Government of Western Australia.

¹² Guide to Assessment, pages 10-11.

- the vegetation may provide some foraging habitat and facilitate movement, however, there are no records of Carnaby's cockatoo east of the Stratherne Road application area to suggest that the area is used by cockatoos for movement; and
- the distance of nearest records of Carnaby's cockatoo is around 12 kilometres from the application areas, which is also the likely furthest extent of the daily foraging range for breeding cockatoos in the Wheatbelt.¹³

Notwithstanding this advice, DWER acknowledged that the Guide to Assessment supports a conclusion that the proposed clearing is 'at variance' with clearing principle (b).¹⁴

Advice was sought from Ron Johnstone at the Western Australian Museum as to the value of the Cuballing area for black cockatoo species, in particular the area in the vicinity of Stratherne Road. In response, Mr Johnstone advised that:

There are few records of Carnaby's cockatoo for the Cuballing area but breeding is recorded nearby at Dryandra and to the east at Wickepin. Some patches of Wandoo in that area have good hollows but there is little foraging habitat. There are also numerous records from around Narrogin of birds in Wandoo woodland. Forest Red-tails also occasionally wander to Narrogin.¹⁵

Through a review of available datasets from 2000, the Office of the Appeals Convenor confirmed that there have been multiple records of Carnaby's cockatoo east of Stratherne Road. Birdlife Australia's 'Great Cocky Count' identifies a number of roost sites in the Narrogin area, with 62 white-tailed black cockatoos identified at these sites in the last count in 2018, and 77 identified in 2017.¹⁶

In relation to tree hollows, the habitat tree assessment identified that 46 of the 53 habitat trees are more than 8 m from the road centreline and 'are considered the least likely ... to require removal', and the remaining seven trees are more than 6 m from the road centreline and 'may or may not require removal ...'¹⁷

The application area is understood to cover the whole road reserve, meaning that the 20 trees approved to be cleared could be anywhere within that area. Advice was sought from the applicant as to whether the 20 trees were able to be specifically identified, or otherwise whether the area within which clearing may occur could be limited to within 8 metres (m) of the road centreline. The applicant responded that limiting clearing to within 8 m each side of the road centreline was acceptable.¹⁸

Aside from black cockatoos, the habitat tree assessment identified a number of trees within the application area that are suitable habitat for red-tailed phascogales. That assessment included the following recommendations:

... the trees actually within the works footprint are specifically marked ... [and if] any of these trees ... [contain] hollows consideration should be given to employing a zoologist/suitably qualified fauna spotter during clearing works to supervise their felling. The task of the zoologist will be to ensure works are carried out in a manner that minimises the risk of death or injuring [sic] to any fauna that may be occupying hollows and in the unlikely event fauna are encountered, to facilitate their relocation into nearby, retained bushland, unharmed. It is also recommended that clearing, if possible, be undertaken outside of the documented breeding season of phascogales (~June to October).

During a meeting, the applicant acknowledged this recommendation, and advised that any trees proposed to be cleared that contain hollows would be inspected for use prior to and during clearing.

¹³ DWER, Memorandum to the Minister for Environment, 2 January 2020, page 1.

¹⁴ DWER, Memorandum to the Minister for Environment, 2 January 2020, page 2.

¹⁵ Johnstone, R, email to Office of the Appeals Convenor, 3 December 2019.

¹⁶ A. Peck, G. Barrett and M. Williams (Birdlife Australia), The 2019 Great Cocky Count Final Report, September 2019, page 62.

¹⁷ DWER, decision report for Clearing Permit CPS 8150/1, 19 August 2019, page 4.

¹⁸ Shire of Cuballing, email to Office of the Appeals Convenor, 6 February 2020.

From the above, the following is noted:

- records held by DWER (confirmed by the WA Museum) demonstrate the application area is within the geographic range of Carnaby's cockatoo
- the vegetation within the application area contains foraging habitat for Carnaby's cockatoo
- some of the habitat trees within the application area contain hollows which, while of insufficient size for black cockatoos, may be used by other fauna, including red-tailed phascogales
- the habitat tree assessment inferred that 46 of the 53 habitat trees within the application area are more than 8 m from the road centreline, and are therefore not likely to be cleared (though may be cleared as the authorised clearing footprint encompasses the width of the road reserve)
- the habitat tree assessment and the site visit conducted by DWER staff did not identify the presence of, or evidence of foraging by, black cockatoos within the application area
- DWER's Guide to Assessment supports a finding that the clearing of foraging habitat for threatened species (such as Carnaby's cockatoo) is at variance to clearing principle (b)
- the applicant does not object to the clearing permit being amended to limit clearing to 8 m from the road centreline, and to require pre-clearance fauna surveys of trees containing hollows.

Based on this, it is considered that while no evidence of black cockatoos was identified through the survey and inspection, it is open to find that the proposed clearing is at variance to clearing principle (b). This is on the basis of that Carnaby's cockatoo is a threatened species; the vegetation contains foraging habitat for the species, and the application area is otherwise within the known range of the species. It is taken, therefore, that the proposed clearing meets the criteria for being part of a habitat significant for fauna in WA. However, noting the absence of confirmed evidence of recent activity by the identified threatened fauna species within the application area, it is considered that the proposed clearing is unlikely to result in a significant residual impact that would require offsetting.

A finding that the proposed clearing is at variance to a clearing principle does not prevent the proposed clearing being approved. The scale of the impact, purpose of the proposed clearing, other clearing principles, and planning context are all relevant to the final decision, and are considered further below.

GROUND 2: THREATENED FLORA

By this ground of appeal, the appellant submitted that the proposed clearing ought to have been found to be at variance to clearing principle (c) based on numerous threats to, and significance of, Eucalyptus wandoo. The appellant noted in this regard research into wandoo crown decline, and the value of the species to other ecological processes:

The Department of Environment and Conservation in 'EUCALYPTUS WANDOO (WANDOO) WOODLAND' states that, 'on average, it takes 150 – 180 years for hollows to develop, although a hollow in a 100 year old tree has been recorded....Many birds, reptiles, mammals and insects use the hollows, bark and canopy of E. wandoo. (Hussey; Manning and White)'

As two of the E wandoo on Stratherne Road are reported as having hollows, these trees may be of similar age, that is from 100 years or greater. The loss of extent of Wandoo is now so serious that every remaining patch or individual requires retention and protection. Therefore the clearing should not be permitted.¹⁹

Consideration

Clearing principle (c) provides that native vegetation should not be cleared if it includes, or is necessary for the continued existence of, threatened flora. 'Threatened flora' is defined as flora that has been listed as a threatened species under section 19 of the *Biodiversity Conservation Act 2016*.²⁰

¹⁹ UBC, Appeal letter 046/19, 30 August 2019, page 2.

²⁰ A threatened species under may also include a rediscovered species under section 26(2) of that Act.

In response to this ground of appeal, DWER advised:

Eucalyptus wandoo is one of the species of the Commonwealth-listed Threatened Ecological Community (TEC) 'Eucalypt Woodlands of the Western Australian Wheatbelt' (the Wheatbelt Woodland) which is also the State listed Priority Ecological Community (PEC). While the Wheatbelt Woodland community is a TEC under Commonwealth legislation, *Eucalyptus wandoo* is not listed as a threatened species and so was not addressed under principle (c). It is noted that *Eucalyptus wandoo* is also not listed as a priority species, indicating that the species is not considered to be under threat of extinction.²¹

Noting that wandoo is not listed as threatened under the *Biodiversity Conservation Act*, it is not within the scope of clearing principle (c). As a result, it is considered DWER's assessment of, and conclusions in respect to, this principle were justified.

The appellant's concerns are noted, however, and are considered in the context of clearing principles (b) (above in relation to hollows) and (e) (below, in relation to significance as a remnant).

GROUND 3: SIGNIFICANT REMNANT IN AN EXTENSIVELY CLEARED AREA

By this ground of appeal, the appellant submitted that DWER ought to have concluded that the proposed clearing was 'very seriously at variance to' clearing principle (e):

The assessor notes that the proposed clearing is within the Avon wheatbelt IBRA region (retains approx. 1.5% of its pre-European vegetation extent and has 1.84% of extent in DBCA Managed Lands) and is also mapped as 1023 (retains approx. 10.84% and 1.13% extent in DBCA Managed Lands). The wheatbelt woodlands are critically endangered under the EPBC Act as less than 10% remains. With a paltry 1.5% vegetation remaining in this seriously over-cleared landscape, it is of paramount importance that all remnants be retained.²²

The appellant also questioned the justification for the significant residual impacts identified under this clearing principle to be offset (the application of an offset in this case is considered below).

Consideration

Clearing principle (e) provides that native vegetation should not be cleared if it is significant as a remnant of native vegetation in an area that has been extensively cleared.

DWER found the proposed clearing to be at variance to this principle, on the basis that:

- Avon Wheatbelt IBRA²³ bioregion has approximately 18.5 per cent of its pre-European vegetation extent remaining
- the vegetation to be cleared is mapped as Beard vegetation association 1023, which has approximately 10.84 per cent of its pre-European extent remaining
- the local area retains approximately 15.58 per cent of its original extent.²⁴

DWER's Guide to Assessment provides the following examples of impacts that are likely to be at variance to clearing principle (e):

- clearing of native vegetation which contains habitat for a threatened fauna species and is below the national target and objective for biodiversity conservation (i.e. 30 per cent of the pre-European extent)
- clearing of biologically diverse remnant vegetation within an extensively cleared landscape

²¹ DWER, response to Appeal 046/19, 17 October 2019, page 3.

²² UBC, Appeal letter 046/19, 30 August 2019, page 3.

²³ Interim Biogeographic Regionalisation for Australia

²⁴ DWER, decision report for Clearing Permit CPS 8150/1, 19 August 2019, page 5.

- clearing of remnant vegetation which is part of a significant ecological linkage and is located within an extensively cleared landscape
- clearing in landscapes where the existing vegetation is required to maintain ecosystem services (e.g. hydrological processes), or to compensate for a high degree of fragmentation.

Noting the finding in Ground 1 above that the proposed clearing is at variance to clearing principle (b) on the basis that it forms part of a habitat that is significant for Carnaby's cockatoo, and noting that the indicators cited by DWER confirm that vegetation levels are significantly below the 30 per cent identified in the relevant national objectives, the proposed clearing is at variance to clearing principle (e).

As to whether it should be found to be seriously at variance to the principle, the vegetation within the application area is in 'degraded' to 'completely degraded'²⁵ and is linear in nature with significant edge effects. It is not, therefore, considered of such a character to qualify as 'seriously' at variance to the clearing principle. DWER's assessment, and its findings, are therefore supported. DWER considered the proposed clearing within a highly cleared landscape to be a significant residual impact that could be offset, which is considered separately below.

GROUND 4: UNDERGROUND AND SURFACE WATER QUALITY

By this ground of appeal, the appellant disagreed with DWER's finding that the proposed clearing is at variance to clearing principle (i):

The UBC ... believes that the proposed clearing is likely to be seriously at variance to this Principle.

As the Clearing Permit points out, 'Groundwater salinity within the application area is mapped between 7,000 - 14,000 mg/l total dissolved solids which is considered to be saline and highly saline (Mayer, Ruprecht and Bari, 2005)'. (page 7) This salinity would have been caused by clearing in the wheatbelt so further clearing would not be indicated. Rather, extensive planting of trees to decrease salinity, would be indicated.²⁶

The appellant also raised clearing principle (f) in its appeal, but noted that it supports the assessment carried out by DWER. It is thus considered that the appellant has no objection to that principle.

Consideration

Clearing principle (i) provides that native vegetation should not be cleared if the clearing of the vegetation is likely to cause deterioration in the quality of surface or underground water.

In response to this ground of the appeal, DWER stated:

[T]he review of the risk potentials for mapped soil subsystems determined that 10 per cent to 30 per cent of the map unit has a moderate to high salinity risk or is presently saline and that groundwater is already saline to highly saline. Based on this, [it] considered it unlikely that the limited clearing proposed would result in further deterioration of surface and groundwater.²⁷

The appellant's concerns appear more directed towards land degradation (clearing principle (g)), rather than water quality: nonetheless, it is considered that DWER's assessment was appropriate in either case. The area of clearing is small, and the incremental impact on groundwater levels or changes to water quality is not considered likely to be at variance to either principle. Furthermore, highly saline groundwater in the Wheatbelt largely reflects the geological history of the landscape, rather than being a result of clearing.²⁸

²⁵ DWER, response to Appeal 046/19, 17 October 2019, page 4.

²⁶ UBC, Appeal letter 046/19, 30 August 2019, page 3.

²⁷ DWER, response to Appeal 046/19, 17 October 2019, page 5.

²⁸ Hatton, T et al, Preclearing hydrology of the Western Australia wheatbelt: Target for the future, Plant and Soil, December 2003, page 341.

GROUND 5: NECESSITY OF THE PROPOSED CLEARING; CLIMATE CHANGE

By this ground of the appeal, the appellant submitted that given the level of variance to the clearing principles, it is disappointing that:

... the proponent is applying for continuing clearing permits when the Shire of Cuballing and Main Roads have been advised of methods available that will provide a public benefit including road safety, without the removal of trees.²⁹

The appellant also questioned how this section of Stratherne Road was determined to be 'unsafe', and submitted that the following alternatives ought to have been considered:

- relocation of the road through adjoining land, thus avoiding any clearing.
- reducing the speed limit
- installing steel ropes and roadside barriers
- audible edge lining.

The appellant also submitted that:

We are in a climate emergency where the future of life on earth is threatened and transformative change is needed. For the first time in recorded history, levels of CO₂ in the atmosphere have risen to over 400 ppm, from 280 ppm in the interglacial period. Trees absorb CO₂ and the cumulative effect of clearing is significant.³⁰

Consideration

By section 51O(4) of the EP Act, the CEO (and Minister on appeal) is to have regard to any planning instrument or other matter that the CEO considers relevant. A 'planning instrument' is defined to include a planning scheme, strategy or plan.

Planning instruments

As the proposed clearing the subject of this appeal relates to a road, and the Shire of Cuballing planning scheme is largely directed at 'zoned land' (i.e. not land reserved for public purposes), it is not considered to contain any content that is relevant to the proposed clearing. The appellant did not raise any aspect of the proposed clearing relevant to planning instruments in any event.

Other matters

The appellant raised issues relating to road safety/public benefit and climate change, which are considered to be within the scope of section 51O(4) and are considered below.

Road safety; public benefit

In assessing the proposed clearing, DWER noted 'that upgrades to the road will provide a public benefit including improved road safety.'³¹ The reference to a 'public benefit' is taken to be a reflection of the Guide to Assessment, which relevantly provides:

Native vegetation clearing should only be considered after all other reasonable attempts to mitigate adverse impacts have been exhausted ...

In determining the necessity of the clearing higher priority will be given to clearing for public use than private benefit or commercial gain.³²

²⁹ UBC, Appeal letter 046/19, 30 August 2019, page 1.

³⁰ UBC, Appeal letter 046/19, 30 August 2019, page 4.

³¹ DWER, decision report for Clearing Permit CPS 8150/1, 19 August 2019, page 7.

³² DER, *A guide to assessment of applications to clear native vegetation*, December 2014, page 40.

In response to issues raised on appeal, DWER advised:

In determining the Application, the purpose of the clearing is a relevant matter. The Application is part of the project to widen the Stratherne Road to provide contemporary road safety and asset management.

The Appellant's views that alternative planning strategies could avoid the need for clearing, consideration of the relative merits of alternative proposals, or that broader planning decision should be considered, are noted. However, the Department will assess all clearing permit applications on a case-by-case basis. It is noted that the Permit Holder is responsible for planning, building, and maintaining the road network within its jurisdiction.

Under s 51O of the EP Act, the Department's CEO shall have regard to planning instruments or other matters considered relevant. In addition to identified environmental values and impacts from clearing, the CEO will consider the purpose and safety of roads.³³

For its part, the applicant advised that:

- the State Government's *Roads 2030 – Regional Strategies for Significant Local Government Roads – Wheatbelt South*³⁴ provides a strategic approach to allocation of funding across the road network in the Great Southern, and identifies that Stratherne Road is a RAV³⁵ Network 4 road that should be upgraded (sealed) to a minimum 'Type 5' standard
- the Wheatbelt South Regional Road Group manual³⁶ which sets out treatment details for upgrading roads of regional significance to meet adopted standards
- a report prepared by R Munns Engineering Consulting Services,³⁷ which identifies that:
 - a road to 'Type 5' standard has a minimum 10 m carriageway and 7 m seal width to safely accommodate heavy vehicles (Stratherne Road currently has a 7 m carriageway and 3.6 m seal width)
 - the minimum desired clearing width for a 10 m wide carriageway is 19 m to provide sufficient table drainage and allow access for annual maintenance by a grader, however to reduce the clearing impact the applicant reduced this to 16 m (Stratherne Road currently has a 13 m maintenance zone)
 - alternative measures (to clearing) were considered, including realigning Stratherne Road onto nearby farmland, installing barriers around trees, and implementing speed restrictions, however were found to be either unaffordable, impractical, unviable or legally not possible.³⁸

It follows from the above that safety was taken into account as a justification for permitting the proposed clearing, and this is considered to be entirely appropriate and consistent with the intent of section 51O(4) and the Guide to Assessment.

Contribution to climate change

In response to this matter, DWER advised that while clearing of native vegetation contributes to climate change, it considers the contribution of 20 native trees to be trivial in this regard.

DWER's position is accepted: the small scale of the proposed clearing is not considered to have any material implications for climate change.

³³ DWER, response to Appeal 046/19, 17 October 2019, page 5.

³⁴ Main Roads WA and Western Australian Local Government Association (2013) *Roads 2030 – Regional Strategies for Significant Local Government Roads – Wheatbelt South*. Government of Western Australia.

³⁵ Restricted access vehicle

³⁶ Wheatbelt South Regional Road Group (2015) *Local road project funding multi criteria assessment model – user manual*. Main Roads WA Wheatbelt South Region, May 2015.

³⁷ R Munns Engineering Consulting Services (2019) *A Report on Clearing Impact Mitigation and/or Avoidance by the Shire of Cuballing*. Unpublished report prepared for the Shire of Cuballing, November 2019.

³⁸ Shire of Cuballing, additional information provided in response to appeal, 18 November 2019

GROUND 6: APPROPRIATENESS OF THE OFFSET; MITIGATION CONDITIONS

By this ground of appeal, the appellant questioned the appropriateness of an offset, in circumstances where the impacts to environmental values are significant:

The 'offset' of 0.37 hectares of Crown Reserve 2556, although calculated using the Commonwealth Offsets Assessment Guide, cannot be compensation for the loss of 20 trees - Eucalyptus wandoo and Allocasuarina spp. In addition, the shape and size of the 'offset' would not protect its qualities into the future should the surrounding vegetation on the Crown Reserve be cleared for gravel mining or for any other reason. The map showing the small amount of 'offset' ... just illustrates the inappropriateness of the policy of offsetting.

The hierarchy of the policy is Avoid, minimise and reduce the impacts and extent of clearing. Thus the avoid policy should have been used in this case.³⁹

Consideration

Section 51H of the EP Act provides that the CEO can grant a clearing permit subject to conditions considered necessary for the purposes of 'preventing, controlling, abating or mitigating environmental harm or offsetting the loss of the cleared vegetation'. While 'offsetting' is not defined in the EP Act, it is taken to mean undertaking an activity or activities that counterbalance the environmental impact of the primary activity (being the clearing of native vegetation).

While the appellant's focus is on the appropriateness and adequacy of the offset, this section also examines the extent to which conditions can be applied to the proposed clearing to prevent, control, abate or mitigate environmental harm.

Offset

The WA Environmental Offsets Policy and Guidelines⁴⁰ provide that offsets may be applied to counterbalance significant residual impacts that remain after avoidance and mitigation measures have been undertaken, and state that applicability will be determined on a case-by-case basis. The Guidelines includes a 'residual impact significance model' which identifies 'unacceptable impacts' as being those 'which are environmentally unacceptable or where no offset can be applied to reduce the impact'. While the Guidelines do not provide any specific guidance as to what types of impacts would be unacceptable, examples of the types of impacts that require offsetting are provided.

DWER's published guidance on the application of offsets states:

Offsets are required when a clearing application is determined by the Department of Environment Regulation (DER) or Department of Mines and Petroleum (DMP) to be at variance with one or more of the biodiversity related clearing principles (principles a – f, h) and a significant residual impact remains following application of the mitigation hierarchy.⁴¹

From the above, offsets can be required as a condition of a clearing permit, and the circumstances in which an offset can be contemplated is broad and determined on a case-by-case basis.

In this case, DWER considered that the loss of 20 native trees that are considered significant as a remnant of native vegetation in an area that has been extensively cleared is a significant residual impact. DWER considered that this significant residual impact could be counterbalanced through the conservation of 0.37 hectares of Crown Reserve 2556 as an offset.⁴²

³⁹ UBC, Appeal letter 046/19, 30 August 2019, page 4.

⁴⁰ Government of Western Australia (2011) *WA Environmental Offsets Policy* and (2014) *WA Environmental Offsets Guidelines*. Available at: <http://www.epa.wa.gov.au/policies-guidance/wa-environmental-offsets-policy-2011-and-guidelines>

⁴¹ Department of Environment Regulation (2014) *Clearing of native vegetation – Offsets procedure – under the Environmental Protection Act 1986*. August 2014. Government of Western Australia. Available at: <https://www.der.wa.gov.au/our-work/clearing-permits/48-guidelines-clearing-permits>

⁴² As set out in: DWER, decision report for Clearing Permit CPS 8150/1, 19 August 2019, page 1.

DWER advised that while the offset refers to the conservation of a portion of Crown Reserve 2556, the applicant will arrange for the purpose of the entire reserve to be changed, as portions have been used to satisfy the offset requirements of other clearing permits.⁴³

DWER advised that it had regard for the applicant's endeavours to minimise clearing, and the public benefit of road safety, in assessing the clearing application and deciding to grant the clearing permit subject to an offset. In this context, it is considered that despite the proposed clearing posing a significant residual impact to a significant remnant in an extensively cleared area, and the findings in this report that the proposed clearing is at variance to clearing principle (b), there is justification to grant the clearing permit based on the purpose of the proposed clearing.

The WA Environmental Offsets Guidelines provide for a number of different offset options and states that direct offsets may be achieved through land acquisition or rehabilitation/revegetation of areas outside of the project area. The Guidelines also state that environmental offsets must relate to the environmental value that is being impacted and that in some instances it may be necessary to offset a value with a similar but not identical value.

The decision report sets out that DWER assessed the suitability of the proposed offset using the Commonwealth *Offsets Assessment Guide*,⁴⁴ and determined that the proposed offset is adequate to counterbalance the significant residual impact. The decision report also states that Crown Reserve 2556 is located about 20 km north-east of the application area, is mapped as Beard vegetation association 1023, and is dominated by wandoo and *Allocasuarina* spp.

For its part, the applicant advised that the proposed clearing had been minimised as far as possible to selected trees located within 0.5 m either side of the existing road formation (top of back-slope).

Based on the above, it is considered appropriate that the significant residual impact is required to be offset, consistent with section 51H(1) of the EP Act and relevant policy, and that DWER's findings on the adequacy of the offset in this case are appropriate.

Conditions to mitigate etc environmental harm

In Ground 1 of this report, it was found that the proposed clearing is at variance to clearing principle (b), as the application area is part of a habitat significant for Carnaby's cockatoo. The application area may also be part of habitat of other species of fauna, including the red-tailed phascogale.

Consistent with the above findings, and noting commitments given by the applicant, it is considered that additional conditions could be applied to the clearing permit to better define the area within which the proposed clearing of the 20 trees may occur, and to provide for the inspection of any identified tree hollows before clearing to ensure threatened fauna is not present.

These additional conditions provide greater certainty that the majority of hollow-bearing trees will not be cleared, and that threatened fauna, if present, will be afforded additional protection if clearing is approved.

CONCLUSION AND RECOMMENDATION

In summary, the applicant proposes to clear 20 native trees within a 2.06 ha footprint along a 1 km stretch of road. From its assessment DWER found that the proposed clearing will impact on a significant remnant in an extensively cleared area, and vegetation growing in association with a watercourse. DWER concluded that the impacts can be minimised and managed, and the significant residual impacts could be offset.

⁴³ Information obtained from: <https://cps.dwer.wa.gov.au/main.html> and <https://offsetsregister.wa.gov.au/public/home/>

⁴⁴ Available at: <http://www.environment.gov.au/epbc/publications/epbc-act-environmental-offsets-policy>

On the basis of the information provided in respect to this appeal, I conclude that while DWER's assessment against the clearing principles was generally appropriate, the proposed clearing is found to be at variance to clearing principle (b). This is on the basis that the vegetation contains foraging habitat for Carnaby's cockatoo (a threatened species), the application area is otherwise within the known range of the species.

The purpose of the proposed clearing is for a public benefit, namely improving road safety through replacing a current single lane seal with a two lane seal. Consistent with DWER's Guide to Assessment, this purpose supports a conclusion that the proposed clearing should be approved, even though it is at variance to multiple clearing principles.

The significant residual impacts identified by DWER should appropriately be counterbalanced. On the information available to me, I consider the offset in this case meets that objective, and is consistent with relevant policy.

I recommend, however, that the conditions of the clearing permit are amended to:

- more clearly exclude the majority of hollow-bearing trees from the scope of the approval by limiting clearing to within 8 m of either side of the road centreline; and
- require a qualified person to inspect any potential habitat trees for red-tailed phascogales (and other threatened fauna) immediately prior to clearing, and if they are identified:
 - delay clearing of any trees found to be occupied by these species until no longer in use; and
 - install artificial nesting boxes to replace any confirmed habitat trees required to be cleared.
- keep records on efforts in relation to the implementation of these fauna management conditions, and report to DWER as required.

The final wording of the conditions is a matter for DWER under section 110 of the EP Act, should the Minister determine to amend the conditions in this way.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Emma Bramwell, Senior Environmental Officer
Jean-Pierre Clement, Deputy Appeals Convenor