



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

APPEAL AGAINST DECISION TO GRANT A CLEARING PERMIT
**CLEARING PERMIT CPS 7946/1: CLEARING OF 8 HECTARES OF
NATIVE VEGETATION – LEARMONTH BUNDLE SITE, LEARMONTH
AND EXMOUTH GULF**

PERMIT HOLDER: SUBSEA 7 AUSTRALIA CONTRACTING PTY LTD

Appeal Number C007 of 2018

August 2018

Appeal Summary

This report relates to an appeal lodged against the decision of the Department of Water and Environmental Regulation (DWER) to grant Clearing Permit CPS 7946/1 authorising Subsea 7 Australia Contracting Pty Ltd (permit holder) to clear 8 hectares (ha) of native vegetation in Learmonth and Exmouth Gulf.

DWER concluded the proposed clearing is unlikely to have any significant environmental impacts and granted the clearing permit subject to certain conditions such as weed management measures to minimise the impact of weeds spreading to adjacent vegetation and revegetation of areas not required to remain cleared.

The appellant's key grounds of appeal were that the clearing permit should not have been granted in the absence of a thorough assessment and further survey work, the clearing is unnecessary for the purpose, and the conditions imposed are not sufficient to prevent, control, abate or mitigate environmental harm that may result from clearing.

In response to the appeal, DWER advised that additional surveys were not required as the clearing was unlikely to impact on the conservation status of priority flora or significant habitat for protected fauna species. DWER also considered that the conditions of the clearing permit are adequate to address the environmental impacts from the proposed clearing.

Nonetheless, DWER advised that the permit holder should be required to record and report on revegetation and rehabilitation activities, and that the clearing permit should have stated 'avoid, minimise and reduce the impacts and extent of clearing' instead of using the term 'etc'. DWER also recommended that condition 1 (purpose for which clearing may be done) be amended to replace 'associated works' with 'access tracks'.

During the appeal process, the permit holder advised it will undertake additional survey works to address the flaws identified with its flora and vegetation assessment. The permit holder proposed to use the results of this survey to inform a pre-clearance survey and, if priority flora is located within the application area, to avoid such species by adjusting tracks and drill pad locations within the approved clearing footprint area.

Having considered the information provided, the Appeals Convenor supported the additional conditions recommended by DWER. However, the Appeals Convenor was of the view that the clearing permit could be further improved by including an additional condition requiring the permit holder to avoid priority flora.

Recommendation

It is recommended that the appeal be allowed in part, to the extent that the clearing permit is amended as follows:

- in condition 1 (purpose for which clearing may be done), 'associated works' is to be replaced by 'access tracks';
- condition 7 (avoid, minimise and reduce clearing) is to state 'avoid, minimise and reduce the impacts and extent of clearing' with the term 'etc' removed;
- a condition is included to require the permit holder to record and report on activities undertaken in relation to condition 9 (revegetation and rehabilitation); and
- a condition is included to require the permit holder to, in the event priority flora is located within the application area, avoid such species by adjusting tracks and drill pad locations within the approved clearing footprint area.

INTRODUCTION

This report relates to an appeal lodged by the Cape Conservation Group (the appellant) against the Department of Water and Environmental Regulation's (DWER) decision to grant Clearing Permit CPS 7946/1 to Subsea 7 Australia Contracting Pty Ltd (permit holder).

On 11 January 2018, the permit holder applied for a purpose permit to clear 8 hectares (ha) of native vegetation within Lot 233 on Deposited Plan 219618, Lot 234 on Deposited Plan 193858 in Learmonth, and Lot 253 on Deposited Plan 219249 and Lot 1586 on Deposited Plan 72986 in Exmouth Gulf. The clearing permit application was advertised for public submissions for 21 days on 7 February 2018 and no submissions were received. DWER granted Clearing Permit CPS 7946/1 on 10 April 2018.

Clearing Permit CPS 7946/1 authorises the permit holder to clear 8 ha of native vegetation within a footprint of approximately 20 ha for the purpose of undertaking subterranean fauna sampling, geotechnical investigations and associated works. The location and extent of the application area is shown in Figure 1.

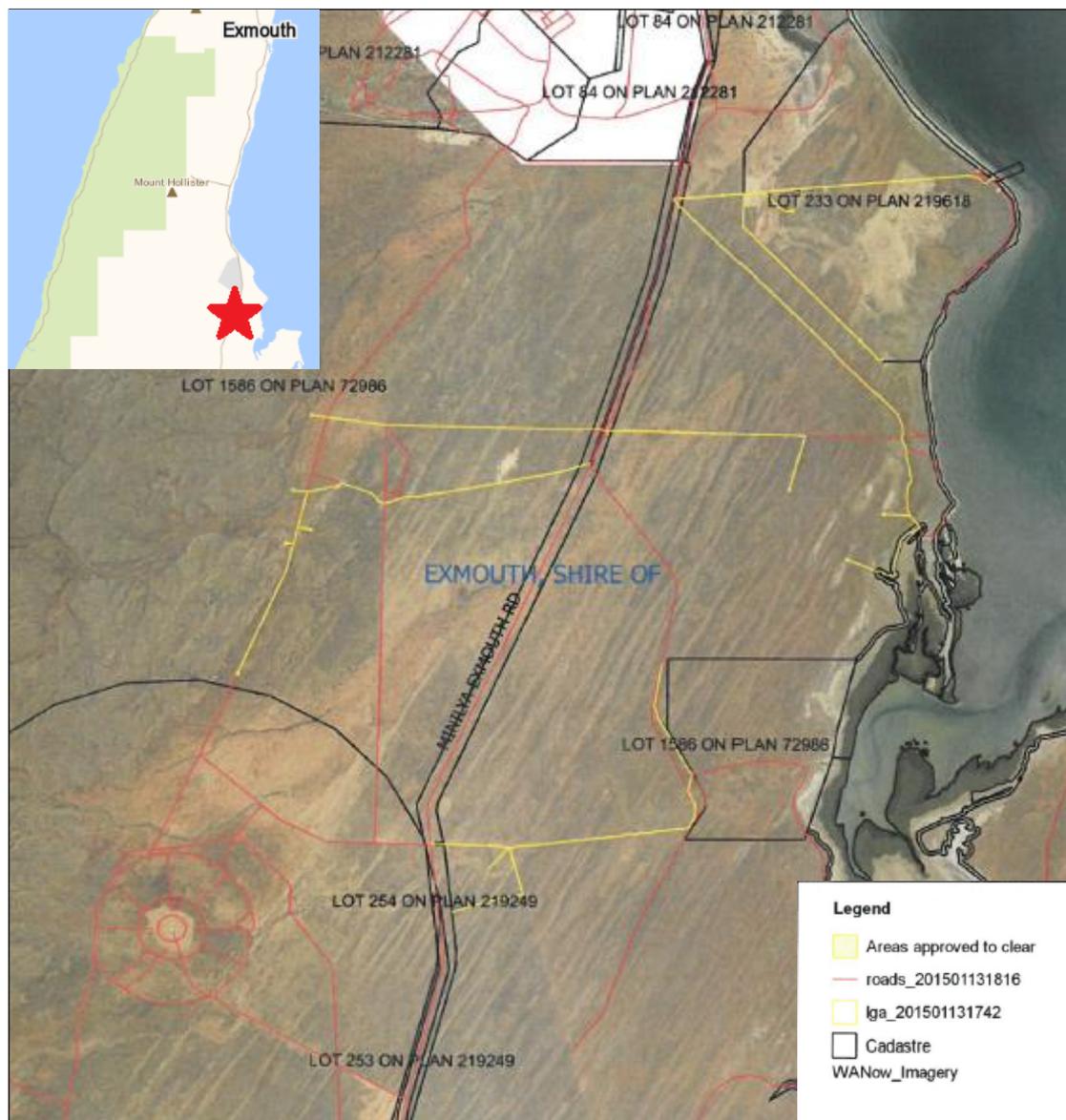


Figure 1 – Location and extent of application area (yellow) for CPS 7946/1

(Source: DWER, 2018, Whereis.com 2018)

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

OVERVIEW OF APPEAL PROCESS

In accordance with section 106 of the EP Act, a report was obtained from DWER in relation to the issues raised in the appeal. The permit holder was also given the opportunity to address the matters raised in the appeal. During the appeal investigation, the Appeals Convenor consulted the appellant and the permit holder in relation to issues raised in the appeal. The appellant requested a copy of DWER's report on the appeals, and provided a response which was considered during the investigation.

During the appeal investigation, further advice was sought from DWER, the Department of Biodiversity, Conservation and Attractions (DBCA) and the permit holder in relation to priority flora and conditions, and the responses received were considered.

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. For appeals in relation to the conditions of a clearing permit, the Appeals Convenor normally considers whether the conditions are adequate or appropriate taking into account an assessment of the proposal against the principles as set out in Schedule 5 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.

OUTCOME SOUGHT BY APPELLANT

The appellant is seeking for the Minister to overturn DWER's decision to grant Clearing Permit CPS 7946/1 and, in the alternative, for additional conditions to be included on the permit.

GROUND OF APPEAL

The appellant's ground of appeal have been summarised as follows:

1. significance of environmental impacts; and
2. adequacy of conditions.

GROUND 1: SIGNIFICANCE OF ENVIRONMENTAL IMPACTS

The appellant is of the view that the clearing permit should not have been granted in the absence of a proper and thorough assessment. In relation to the clearing principles, the appellant submitted the following:

- *Clearing principle (a) high biodiversity*: DWER appears to have relied on assumptions rather than a detailed study of vegetation in the area and clearing should not occur until a proper assessment is undertaken. DBCA identified 'a number of flaws' with the permit holder's flora and vegetation assessment (FVA) and DWER had not clearly explained why it was satisfied with the FVA. A consultant botanist reviewed the FVA and agreed that it was flawed as, among other things, the list lacked annual species, was incorrect or insufficient in identifying flora species, was undertaken after a period of below average rainfall and did not adequately define the likely values present.
- *Clearing principle (b) significant habitat for fauna*: the Decision Report stated that nine protected fauna species have been recorded in the area and that the application area may contain suitable foraging habitat. These factors were dismissed without explanation other than the existence of tracks, and a comprehensive assessment is required.

- *Clearing principle (e) significant remnant in an extensively cleared area:* under clearing principle (b) DWER stated that the area has been 'historically cleared', yet under clearing principle (e) stated that the wider area has not been extensively cleared. This contradictory reasoning should be clarified.
- *Clearing principle (f) watercourse or wetland:* the application area intersects minor non-perennial watercourses, which includes sites listed under the Directory of Important Wetlands Australia with some meeting the criteria of Ramsar wetlands. The tracks marked on the map are located adjacent to mangroves and any disturbance is unacceptable given the conservation status of mangroves. There is no reason given for why the clearing is not at variance, except that the application area is along existing tracks; however, there is no requirement on the permit holder to use those tracks.
- *Clearing principle (g) land degradation:* the Decision Report does not address one of the permit holder's supporting documents to its EPA referral, which identifies clearing could increase soil erosion and that this should be managed by minimising clearing.

The appellant noted approval under section 41A(3) of the EP Act is required for 'minor or preliminary works' undertaken in relation to a proposal referred to the EPA and submitted that it was unclear whether the EPA had granted approval for the proposed works associated with the clearing permit application. The appellant was of the view that the proposed works are related to the implementation of the proposal and therefore, the clearing is premature.

Noting that the broader area contains an extensive network of existing tracks and cleared areas, the appellant questioned the justification behind the 8 ha of clearing required and was of the view that such clearing is unnecessary. The appellant was of the view that DWER should take into account the purpose of the clearing and assess how clearing for that purpose can be minimised or avoided. Additionally, the appellant submitted that the size of the drill pads is larger than necessary for subterranean fauna surveys, and that some clearing for tracks do not appear to lead to drill pads and some proposed tracks run parallel to locations that could be easily accessed by existing tracks.

The appellant queried what 'geotechnical investigation' works are required and whether they assist the environmental impact assessment process or accelerate the development schedule. The appellant submitted that the term 'geotechnical investigation' should be better defined in the conditions of the permit and through locations on a map. In addition to seeking clarification on the term 'geotechnical investigation', the appellant submitted the term 'associated works' is vague and unclear, and that such works should be clearly defined in the clearing permit, to ensure clearing is limited to the stated purpose.

Consideration

This ground of appeal raises two issues for consideration:

- assessment of the clearing permit
- justification for the clearing

Assessment of the clearing permit

In its assessment, DWER determined that the proposed clearing may be at variance to clearing principle (f) watercourse and wetland, is not at variance with clearing principle (e) significant remnant in an extensively cleared area, and it not likely to be at variance to the remaining clearing principles.

Clearing principle (a)

During its assessment, DWER sought advice from DBCA on priority flora and the adequacy and timing of the FVA. DBCA noted the FVA survey area corresponded with a small part of

the clearing permit application area and that the likelihood of species occurrence had been based on suitable habitat and known records within a 10 kilometre radius. DBCA advised that discounting the likelihood of species occurring based on such a short distance is not acceptable. Additionally, DBCA advised that if the area is within the known distribution and suitable habitat exists then it should be considered 'likely' and where it is outside the known distribution and suitable habitat exists then it should be considered 'possible' for the species to occur.

DBCA considered that eight species determined in the FVA to be 'unlikely' to occur should have been identified as 'likely' or 'possible'. This included *Acacia ryaniana* (Priority 2) and *Acanthocarpus rupestris* (Priority 2) which should have been identified as 'likely', and *Sclerolaena stylosa* (Priority 1) and *Daviesia pleurophylla* (Priority 2) which should have been identified as 'possible'. Two Priority 2 species, *Tephrosia* sp. North West Cape and *Abutilon* sp. Quobba were identified by DBCA as possibly occurring within the survey area, and any impacts to these species would be considered significant. DBCA was concerned that, as the above species were assessed as 'unlikely', they were not specifically targeted during the survey and the actual impacts to priority flora are unknown.

Although the survey was preceded by below average rainfall, DBCA did not consider this a limitation as the FVA stated there was a high number of flowering species but also noted that a number of species were not able to be identified to species level indicating either they were not in flower or specimens were poorly collected.

In response to the appellant's concern regarding the assessment of the clearing permit against clearing principle (a), DWER noted DBCA's advice and acknowledged that the broader proposal referred to the EPA has the potential to impact priority flora. However, as the clearing permit application area is linear along existing tracks in a mostly degraded condition within an area that is not extensively cleared, DWER maintained its view that the proposed clearing was unlikely to impact on the conservation status of priority flora and that additional surveys were not required to inform the assessment.

As part of the appeals investigation, the permit holder was provided with a copy of the DBCA advice and, after considering DBCA's advice, provided the following additional information with the intention of addressing the flaws in the FVA by proposing to:

- reassess the priority species which are possible or likely to occur within the Learmonth Bundle Site development area;
- conduct a targeted survey across the Learmonth Bundle Site development footprint for possible or likely priority species (approximately eight species) in the first week of August 2018, to coincide with the EPA's recommended survey timing of six to eight weeks post wet season (72mm of rain in mid-June)¹;
 - collecting samples of the eight species that were not fully identified in the FVA;
- where priority flora is identified during the targeted survey, conduct a wider search beyond the development footprint to determine the extent and implement avoidance measures, such as relocating infrastructure where possible;
- use the targeted survey results to inform the pre-clearance survey across the clearing permit application area; and
- in the event priority flora is located within the application area, to avoid these species by adjusting tracks and drill pad locations within the approved clearing footprint area.

The permit holder agreed to the inclusion of the last point as a condition on the clearing permit.

¹ Environmental Protection Authority 2016, *Technical Guidance – Flora and Vegetation Surveys for Environmental Impact Assessment*, EPA, Western Australia. Page 15.

During the appeal investigation, advice was sought from DBCA as to whether the permit holder's above proposed additional survey works and avoidance measures addressed its concerns, and in response DBCA advised that the approach outlined by the permit holder is generally acceptable.

Clearing principle (b)

In relation to the appellant's concerns in relation clearing principle (b), DWER advised that five of the nine identified fauna species are marine based or only found in the Northern Territory and thus were not discussed further. In regard to the curlew sandpiper, great knot and eastern curlew of which suitable habitat may occur within the wetland area, DWER noted that the wetland has been historically cleared and considered that the application area itself is not likely to contain significant habitat for these species as it follows well-worn tracks as shown in Figures 2 and 3. As the black-flanked rock-wallaby is a highly mobile species and the local area retains extensive vegetation in a better condition, DWER considered that the degraded vegetation within the application area is unlikely to contain significant habitat for this species.



Figure 2 – Wetland area (green) and application area (yellow)

(Source: DWER, 2018)



Figure 3 – Existing tracks through the wetland area

(Source: DWER, 2018)

Clearing principle (e)

DWER's assessment had regard to the pre-European and current extent of the mapped Beard vegetation associations (BVAs), and extent of remnant vegetation in the local government authority area and the Carnarvon Bioregion, all of which were above the recommended 30 per cent threshold level², and determined that the application area was not located in an extensively cleared area. In response to the appellant's query about inconsistent statements, DWER advised that references in the Decision Report to degraded and cleared areas related to the application area, mainly the existing tracks, and not the wider surrounding area that is considered under clearing principle (e).

Clearing principle (f)

DWER noted that the FVA stated a majority of the wetland area had been historically cleared and that where the Littoral land system (which includes mangrove forest) either intersects or is adjacent to the application area, the clearing will follow existing tracks. Based on this, DWER advised that the proposed clearing would not impact on the Littoral land system. The permit holder also advised:

No mangroves were mapped in the flora and vegetation survey of the bundle envelope... that survey included the two drill holes covered closest to the coast. Proposed holes S4 and S5 are located more than 500 m away from the mangrove area. These holes will be accessed by the existing tracks running parallel to the mangroves.³

In relation to the appellant's concern that the permit holder was not required to use existing tracks through the wetland, DWER referred to condition 3 of the clearing permit which restricts the permit holder to clearing up to 8 ha within the yellow shaded area, as shown in Figure 1. DWER advised that clearing outside this boundary is not authorised and the permit holder is required to record and report on the location of clearing undertaken.

Clearing principle (g)

In response to this element of the appeal, DWER advised that the broader Learmonth Bundle Site proposal (170 ha) will be assessed by the EPA which will include the consideration of impacts from clearing. In regard to the clearing permit under appeal, DWER advised that its assessment determined the proposed clearing is not likely to cause appreciable land degradation as there will be adequate native vegetation remaining to act as a buffer. Furthermore DWER advised that as the majority of the application area is along existing tracks, wind erosion is not likely to be significant and noted that areas will be revegetated if not required to remain cleared.

Justification for the clearing

In response to the appellant's submission that the clearing is related to the implementation of the proposal which is currently the subject of assessment by the EPA, DWER advised that it had sought advice from the EPA on this matter during the clearing permit assessment process. The EPA advised that the proposed works in the clearing permit application are investigation works for the purpose of informing the EPA's assessment and do not involve implementation of the proposal. Having regard to this, the EPA considered that the works may be approved by Decision-Making Authorities as outlined in section 3.4.1 of the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2016* and *Procedures Manual 2016*. Additionally, the EPA was of the view that the proposed investigation works were unlikely to have a significant impact and therefore would not require a separate referral. The permit holder noted that 'the approval of CPS 7946/1 does not accelerate the

², Species loss appears to accelerate exponentially at an ecosystem level in ecological communities with an extent of below 30 per cent of native vegetation existing pre-1975 (pre-European).

³ Subsea 7 Contracting Pty Ltd, Response to the Appeal, page 9.

development schedule of the project – the permit merely allows investigation works to be undertaken so that the PER [Public Environmental Review] level of assessment process can commence'.⁴

In regard to the appellant's submission that the clearing is unnecessary for the stated purpose, DWER advised it assessed the proposed clearing of 8 ha, which is for access for geotechnical survey and subterranean fauna sampling, and determined it was unlikely to have significant environmental impacts. DWER was of the view that condition 7 (avoid, minimise and reduce clearing) provides a clear intent that the permit holder should balance the need for clearing with other options and noted that section 3 of the Decision Report also lists the environmental management measures the permit holder proposes to implement in order to minimise the impact of clearing. In relation to this matter, the permit holder advised:

In designing the location of drill holes, the mitigation hierarchy was applied... In identifying the location of each hole we have considered the location of existing tracks, geological mapping of the area, the likelihood of intercepting water and also the boundaries of the Cape Range Subterranean Waterways dataset.⁵

In response to the appellant's query on drill pad size, the permit holder advised:

As the drilling will be required to intercept groundwater (to enable stygofauna sampling to be undertaken) large drill pads are required for the control of intercepted groundwater, and to enable a safe working environment.⁶

Noting the appellant's concern regarding the vagueness of the term 'associated works', DWER advised that 'associated works' primarily meant access tracks but allows flexibility should additional works be required. Nonetheless, DWER recommended that the clearing permit should be amended to state 'access tracks' instead of 'associated works'.

The appellant's concern regarding the necessity of tracks and the location of drill pad areas is noted; however, a majority of the application area follows existing tracks and the proposed clearing for tracks end in drill pads.

Conclusion

Based on the available information, it is considered that DWER's assessment of the clearing permit against the clearing principles was appropriate; however the appellant's concerns regarding the adequacy of the FVA are acknowledged.

The permit holder's approach to undertaking further survey works to address the flaws identified in the FVA and avoid impacts to priority flora, is noted and supported. However, in recognition of the appellant's concerns, it is considered that the clearing permit could be improved by including a condition requiring the permit holder to, in the event priority flora is located within the application area, avoid such species by adjusting tracks and drill pad locations within the approved clearing footprint area.

Although noting that the 'associated works' term was used to allow flexibility, DWER recommended that condition 1 (purpose for which clearing may be done) is amended to replace 'associated works' with 'access tracks'.

Based on the above, it is recommended this ground of appeal be allowed in part to the extent that the clearing permit be amended in the manner detailed above.

⁴ Subsea 7 Contracting Pty Ltd, Response to the Appeal, page 2.

⁵ Ibid. page 2.

⁶ Ibid. page 11.

GROUND 2: ADEQUACY OF CONDITIONS

The appellant was of the view that the conditions applied to the clearing permit are not sufficient to prevent, control, abate or mitigate environmental harm that may result from clearing and do not create an enforceable obligation on the permit holder to minimise or reduce environmental harm. The appellant submitted that the management measures listed in section 3 of the Decision Report and the suggested measures as advised by DWER (water licensing) in the 'Planning instruments and other relevant matters' section of the Decision Report should be included as conditions to ensure environmental harm is reduced.

Consideration

Section 51H of the EP Act provides that a clearing permit may be granted subject to conditions as the Chief Executive Officer considers necessary or convenient for the purposes of preventing, controlling, abating or mitigating environmental harm or offsetting the loss of cleared vegetation. In response to this ground of appeal, DWER advised that the conditions applied were adequate to address the impacts from the clearing as its assessment did not identify any significant environmental impacts.

However, noting that there is no requirement for the permit holder to record and report on revegetation and rehabilitation activities, DWER advised that such a condition should be included on the clearing permit. Additionally DWER recommended that management condition 7 (avoid, minimise and reduce clearing) should be amended to state 'avoid, minimise and reduce the impacts and extent of clearing' instead of using the term 'etc'.

During the appeals investigation, further advice was sought from DWER on whether the measures listed in the Decision Report should be added as conditions. DWER responded that additional conditions to mitigate against impacts to water resources or drainage lines were not necessary as DWER (water licensing) had advised that 'the intersections of proposed clearing with minor waterways drainage lines are along existing cleared tracks and are not of significant to require a bed and banks permit'. Furthermore, DWER noted that some of the management measures listed under section 3 of the clearing permit are already covered by conditions in the clearing permit.

Conclusion

It is considered that DWER was justified in granting the clearing permit subject to certain conditions. However, having regard to the above, it is agreed that the clearing permit could be improved and it is recommended that this ground of appeal be allowed in part to the extent that the clearing permit is amended to require the permit holder to record and report on activities undertaken in relation to condition 9 (revegetate and rehabilitate) and that condition 7 (avoid, minimise and reduce clearing) is amended in accordance with DWER's advice.

CONCLUSION AND RECOMMENDATIONS

Having regard to the available information, it is considered that DWER's assessment of the clearing permit application against the clearing principles was appropriate and its decision to grant the clearing permit subject to certain conditions was justified.

It is noted that the permit holder committed to undertaking additional survey work to address the issues identified with its FVA and has proposed avoidance measures in relation to priority flora.

Based on the reasons set out in this report, it is considered that the clearing permit could be improved by the inclusion of conditions and the clarification of terms used. Therefore, it is recommended that the appeal be allowed in part, to the extent that the clearing permit is amended as detailed in this report.

The final wording of the conditions is a matter for DWER under section 110 of the EP Act.

It is otherwise recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
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