



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

APPEALS IN OBJECTION TO DECISION TO GRANT A CLEARING PERMIT
CPS 7931/1: CLEARING OF NO MORE THAN 490 HECTARES OF
NATIVE VEGETATION FOR HORTICULTURE, EIGHTY MILE BEACH,
SHIRE OF BROOME

PERMIT HOLDER: SHELAMAR LEASING COMPANY PTY LTD

Appeal Number C009 of 2018

August 2018

Appeals Summary

This is a report on appeals lodged against the decision of the Department of Water and Environmental Regulation (DWER) to grant a permit to clear no more than 490 hectares of native vegetation for horticulture at Eighty Mile Beach, south-west of Broome.

Appellants' concerns included impacts to a declared rare plant species (*Seringia exastia*), the greater bilby, and conservation significant wetlands. Appellants also raised cumulative impact concerns, as well as risks posed by land degradation and development of new horticultural enterprises in the region.

In relation to *Seringia exastia*, the available information indicated the surveys undertaken were appropriate and that the unidentified species located within the application area were most likely a different *Seringia* species that is no longer considered to be of conservation significance.

In relation to the greater bilby, it is acknowledged that the implementation of the proposal will remove identified habitat for the species. To minimise the impact, and consistent with advice from the Department of Biodiversity, Conservation and Attractions (DBCA), it is recommended that the appeals be allowed to the extent that the conditions of the permit are amended to ensure that where recent bilby activity is identified through surveys, sufficient buffers are specified around these areas to allow all fauna species, including bilby, an opportunity to disperse/self-relocate away from the disturbance.

Concerns relating to wetlands and land degradation relate primarily to the future use of the land for horticulture, and the clearing of native vegetation of itself is not considered to pose a threat to these values.

In relation to cumulative impacts, the permit holder advised that it has no current plans to expand the operations beyond that which is contemplated by the current clearing permit approval.

Recommendation

For the reasons stated in this report, it is recommended the appeals be allowed to the extent that DBCA's recommendations that implementation of directional clearing towards remnant vegetation with buffers around recent fauna activity (including greater bilby) be included in the permit conditions. It is otherwise recommended that the appeals be dismissed.

INTRODUCTION

This report relates to two appeals lodged in objection to the decision of the Department of Water and Environmental Regulation (DWER) to grant a permit to Shelamar Leasing Company Pty Ltd (permit holder) to clear no more than 490 hectares (ha) of native vegetation south-west of Broome for the purposes of horticulture.

The boundaries of the clearing permit are shown in Figure 1.

Figure 1 – Area within which clearing is proposed to occur



(Source: DWER, 2018)

The permit holder applied for the permit in December 2017. The proposal is for the clearing of no more than 490 ha of native vegetation within a development area of 1,371.7 ha for the expansion of horticultural operations, including the installation of additional pivot-irrigated and drip-irrigated vegetable plots.

An earlier proposal to clear 1,470 ha of native vegetation on the property was assessed by the former Department of Environment Regulation (DER) in 2016. DER identified that the proposed clearing of 1,470 ha may impact on rare and priority flora and significant habitat for the conservation significant fauna. As no biological survey information was provided to support that application, the application was refused on 31 October 2016.

The clearing permit the subject of the appeal was granted on 4 May 2018. In coming to its decision, DWER determined that:

... the proposed clearing may be at variance to principles (a) (comprises a high level of biological diversity), (b) (comprises significant habitat for indigenous fauna) and (g) (likely to cause appreciable land degradation), is not at variance to principle (e) (significant as a remnant of native vegetation in an area that has been extensively cleared) and is not likely to be at variance to the remaining clearing principles.¹

¹ DWER, Response to appeals, 13 July 2018, page 2.

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 appeals. The permit holder was also given the opportunity to address the matters raised.

During the appeal investigation, the Appeals Convenor consulted the appellants and the permit holder in relation to issues raised in the appeals.

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

OUTCOMES SOUGHT BY APPELLANTS

Neither appellant set out what outcome they were seeking from the appeal. It is inferred that they were seeking to have the grant of the permit set aside, or in the alternative that the conditions are inadequate and should be improved.

GROUNDINGS OF APPEAL

The appeals raised a number of issues which are summarised as relating to the following subject areas:

1. Flora and vegetation
2. Fauna
3. Surface and groundwater
4. Land degradation
5. Cumulative impacts
6. Offsets

Issues not related to land clearing were also raised, and these are considered in 'Other matters' at the end of this report.

GROUND 1: FLORA AND VEGETATION

By this ground of appeal, one appellant submitted that the vegetation survey conducted in support of the proposed clearing was undertaken at a sub-optimal time of year for identifying the presence of *Seringia exastia*. The appellant noted that records of *Seringia* species were recorded but could not be confirmed to species level. The other appellant submitted that without identifying plants, it is unknown whether a critically endangered plant will be destroyed.

One appellant also submitted that no information was available to indicate how the confirmed population of *Seringia exastia* will be protected and how other indeterminate records will be re-surveyed to ensure there is no clearing of threatened flora species.

Consideration

In its response to this ground of appeal, DWER advised that:

... advice was sought from DBCA [Department of Biodiversity, Conservation and Attractions] on the findings of the flora and vegetation assessment. DBCA advised that "It is noted that the large number of the *Seringia* plants recorded in the Emerge (2017) survey were not flowering, despite the survey being appropriately timed and there being good seasonal conditions. *Seringia* are known as fire bushes...which re-sprout and flower profusely after fire or physical disturbance...It would appear that in the absence of fire or other disturbance, it would not be unusual to record a high proportion of sterile plants...On this basis, the Emerge (2017) survey is considered adequate for *Seringia* species, despite the high number of *Seringia* records within the application area not able to be identified to species level". Based on this advice, DWER considers that the flora and vegetation assessment was undertaken at an optimal time of year, however, due to the absence of recent fire the majority of the identified *Seringia* plants were not flowering.²

As to how the confirmed population *Seringia exastia* will be protected, DWER advised:

... that the individuals identified during the survey as *Seringia exastia* are more likely to be *Seringia katatona*. Nonetheless, the clearing area approved through CPS 7931/1 avoids the location of these individuals, which are located approximately 550 m west of the clearing permit boundary at their closest point.

DWER is of the opinion that a 500 m buffer to these specimens will ensure adequate protection from clearing. DWER acknowledges that the Decision Report ... incorrectly states that the two *Seringia exastia* individuals were located approximately 550 m from the north-east portion of the application area ...

Advice from DBCA regarding the potential for the unidentified *Seringia* plants within the application area to be *Seringia exastia* states: "Due to complexities of distinguishing *Seringia* species in the La Grange region and recent changes in species concepts, it is recommended that the consultant resubmit their voucher specimens to the WA Herbarium. However, based on currently available information on the distribution on *S. exastia* and the understanding of the taxonomy based on the larger number of specimens from La Grange Project surveys, it would appear that there is low likelihood of the true *S. exastia* occurring within the proposal area". DWER therefore found that the proposed clearing is not likely to be at variance to principle (c).³

The advice of DBCA was not contradicted by appellants.

Based on the information available in respect to this element of the appeals, it is considered that surveys for *Seringia exastia* were appropriate, and that advice from DBCA is that there is a low probability of the species occurring with the project area. As a result, it is considered that DWER's assessment of impacts to this species was justified.

Conclusion

It follows from the above that it is recommended that this ground of appeal is dismissed.

GROUND 2: FAUNA

By this ground of appeal, one of the appellants submitted that this proposal, being one of many in the region, could result in significant net loss and ongoing degradation of greater bilby habitat. The appellant noted that DBCA is undertaking a regional survey for the species which the appellant submitted should be considered as part of the assessment of the application.

The appellant also stated that the clearing permit conditions for the greater bilby are inadequate in that the conditions require a fauna specialist to be engaged to relocate fauna

² DWER, Response to appeals, 13 July 2018, page 4.

³ DWER, Response to appeals, 13 July 2018, page 5.

found, but do not address the potential for individuals to be killed by clearing while sheltering in burrows.

Consideration

The greater bilby is listed under the *Wildlife Conservation Act 1950* as 'fauna that is rare or is likely to become extinct as vulnerable fauna'. It has a threat status of 'vulnerable' under State and Commonwealth legislation.⁴

At the Commonwealth level, the main factors that are the cause of the species being eligible for listing as 'vulnerable' category are that it is patchily distributed and has a small area of occupancy (reduced to 20 per cent of its former range); the population size is estimated to be fewer than 10,000 mature individuals nationally, and it is undergoing continual decline.⁵ Threats to the species include:

- predation by foxes and cats
- habitat loss and fragmentation
- increased frequency of fire
- introduced water points associated with pastoral activities (with anecdotal reports of fox expansion associated with increases in water points in the Pilbara).⁶

In assessing the impacts of the proposal to fauna habitat (clearing principle (c)), DWER noted:

... that greater bilbies occur within the application area, most likely as regular transients in small numbers, and occasionally as short term residents. The Fauna Assessment noted that no large areas of intensive and long term foraging were found, and there were no old burrows, which would be expected if greater bilbies were regular, long term residents.⁷

DWER's Decision Report also noted advice from DBCA confirming that the local population of the species will be impacted by the clearing, and that to minimise impacts, DBCA recommended that:

... targeted bilby pre-clearance survey(s) must be undertaken prior to any vegetation clearing ... The pre-clearance survey should be undertaken no less than two weeks before vegetation clearing activities commence (preferably 1 week or less immediately prior to clearing commencement to account for the nomadic nature of bilbies).⁸

DBCA recommended that draft 'Guidelines for pre-clearing searches to locate resident bilbies' should be followed.

DBCA's also recommended that a management plan approved by DBCA should be implemented, and should provide for:

... implementation of directional clearing towards remnant vegetation with buffers around areas of recent fauna activity, to allow all fauna species, including bilby and spectacled hare-wallaby, an opportunity to disperse/self-relocate away from the disturbance ... [and] relocation options if bilby do not disperse/self-relocate, noting that any relocation must be conducted under a licence to take/disturb fauna.⁹

In response to this ground of appeal, DWER noted that:

⁴ <http://www.environment.gov.au/biodiversity/threatened/species/pubs/282-conservation-advice-15072016.pdf>

⁵ Ibid, page 1.

⁶ Ibid, pages 2 to 3.

⁷ DWER, Clearing Permit Decision Report, 4 May 2018, page 6.

⁸ DWER, Clearing Permit Decision Report, 4 May 2018, page 6.

⁹ DWER, Clearing Permit Decision Report, 4 May 2018, page 6.

... the application area provides suitable habitat for the greater bilby and that evidence of this species was identified within the application area. Advice from DBCA ... included consideration of the (unpublished) findings of regional biodiversity surveys [referred to by the appellants].

To minimise direct impacts to the greater bilby, two fauna management conditions were added to the clearing permit. Condition 6 requires the Permit Holder to conduct clearing in a progressive manner from one direction to the other to allow fauna to move into adjacent vegetation. Condition 8 requires the Permit Holder to undertake clearance surveys and relocate any identified fauna. These conditions were based on recommendations made in the advice from DBCA.

DWER acknowledges that Condition 8 does not specify what actions are to be undertaken if active bilby burrows are identified. It is recommended that this condition be amended to address this.¹⁰

To give effect to this outcome, DWER recommended that:

That this ground of appeal is upheld in part, in so far as Condition 8 be amended to include the provision to identify and inspect all burrows for signs of occupancy and trap and relocate any individuals identified.¹¹

Condition 8(b) of the permit requires the permit holder to undertake a survey for the presence of greater bilby immediately prior to commencement of clearing. Condition 8(c) of permit provides:

Immediately prior to undertaking any clearing authorised under this Permit, the Permit Holder shall engage a *fauna specialist* to relocate any [greater bilby] found under condition ... 8(b) of this Permit, in accordance with a fauna licence pursuant to Regulation 15 of the *Wildlife Conservation Regulations 1970*.

The amendment proposed by DWER in response to the appeals is for the above condition to be amended to specifically reference inspection of burrows and to trap any bilbies identified.

The permit holder was given an opportunity to consider DWER's advice on this aspect of the appeals. In response, it advised that it accepted the rationale for the recommendation, but suggested that trapping of the greater bilby may not be preferred due to the potential for injury. As an alternative, the permit holder recommended bilbies should be encouraged to disperse independently. To achieve this, the permit holder put forward the following protocol where an active bilby burrow is identified:

1. The burrow's location would be flagged.
2. Clearing would be completed to within 5 metres of the burrow during the day.
3. The burrow would be monitored with cameras and/or by partially blocking entrance with vegetation. It would be expected that the bilby would relocate during the night once the area surrounding its burrow had been disturbed. If an image is triggered or blocked vegetation is moved then it can be determined if the animal has moved in or out.
4. Monitoring would continue for 3 to 5 nights or until it is certain that no animals remain.¹²

The permit holder's advice is consistent with DBCA's advice to DWER, which explicitly favours providing the species with an opportunity to disperse and self-relocate away from the disturbance. In the event individuals remain and require relocation, as DBCA advised, this will require a permit under the *Wildlife Conservation Regulations*. It is considered this is the appropriate mechanism to regulate relocations. It is recommended, however, that condition

¹⁰ DWER, Response to appeals, 13 July 2018, page 5.

¹¹ DWER, Response to appeals, 13 July 2018, page 6.

¹² Emerge, Email to Office of the Appeals Convenor, 1 August 2018.

8 of the permit be amended to ensure DBCA's recommendations that implementation of directional clearing towards remnant vegetation with buffers around recent fauna activity be included.

Conclusion

On the information available with respect to this ground of appeal, the proposal will impact on the local population of greater bilby. Noting the conservation status of the species (primarily its significantly reduced range since the 1800s), it is considered that the proposal is at variance to clearing principle (b), in that the vegetation proposed to be cleared comprises part of a significant habitat for the species.

On the basis that the area appears to be primarily of transient value, with no large areas of intensive and long term foraging identified, the decision of DWER to grant the permit is considered to be acceptable, subject to appropriate fauna management conditions.

For the reasons stated in this report, it is recommended that this ground of appeal be allowed to the extent that the conditions of the permit are modified to ensure DBCA's recommendations that implementation of directional clearing towards remnant vegetation with buffers around recent fauna activity (including greater bilby) be included.

Nothing in this recommendation removes requirements for the proponent to obtain necessary approvals in relation to interference with fauna under the *Wildlife Conservation Act 1950*.

GROUND 3: GROUND AND SURFACE WATER

By this ground of appeal, one appellant asserted that a proposal at a nearby property has the potential to impact on springs 15 km from the borefield, and that as a result, similar risks are posed by the current proposal. The appellant submitted that there is insufficient evidence available to determine whether the Ramsar listed Eighty Mile Beach and Jinmarnkur Conservation Park will not be impacted by the current proposal.

Consideration

In response to this ground of the appeal, DWER advised that there are no watercourses or wetlands mapped within the application area and that the nearest watercourse is mapped 3.5 kilometres (km) to the west. It went on to advise that it is likely the appellant's concerns:

... relate to hydrological impacts to the Eighty Mile Beach Ramsar site, resulting from the abstraction of groundwater for irrigation, rather than the clearing of native vegetation authorised by the clearing permit.

Such impacts are assessed by DWER through the assessment of a licence to take groundwater, rather than through the clearing permit process. The applicant currently has a licence to take up to five gigalitres per annum, which includes a small portion of the current application area (comprising two 40 ha pivots). To support a further application for a licence to take groundwater to irrigate the entirety of the application area, the applicant will be required to submit a H3 Hydrogeological assessment report to DWER. The H3 report will quantify potential impacts to the aquifer and the groundwater dependent environment including the Eighty Mile Beach Ramsar site.

Any risk of impacts would be managed through a groundwater monitoring program which will advise appropriate triggers and operational responses. DWER notes that a H3 report has not yet been submitted by the applicant. It should be noted that a condition of the clearing permit requires the applicant to plant crop species within three months of clearing. As the crops will need to be irrigated to survive, it is noted that this requirement will ensure that no clearing occurs until a licence to take groundwater is issued for the stated purpose of the clearing (horticulture).

Based on DWER's advice, it is apparent that the proposed clearing will not directly impact on ground or surface water values, and any impacts attributable to water abstraction are appropriately a matter for consideration under the *Rights in Water and Irrigation Act 1914*. Specifically in relation to the Ramsar wetland, DWER advised that this is approximately 16 km from the proposal area.

Conclusion

For the above reasons, it is recommended this ground of appeal be dismissed.

GROUND 4: LAND DEGRADATION

By this ground of appeal, one appellant submitted that recommendations in the former Department of Agriculture and Food Western Australia's (DAFWA) 2016 publication "*Pindan Soils in the La Grange area, West Kimberley: land capability assessment for irrigated agriculture - Resource management technical report 396*" regarding the protection of the environment have not been incorporated into the proposal, specifically recommendations to:

- retain drainage lines under native vegetation for land developments greater than about 500 ha;
- keep vegetation buffers of at least 200 metres (m) wide adjacent to drainage lines and wetlands; and
- incorporate soil conservation measures on area with slopes greater than one per cent to minimise the risk of soil erosion. Measures could include grade banks, strip planting and cover crop.

Consideration

In response to this appeal ground, DWER noted that in the assessment of the earlier clearing permit application, the Deputy Commissioner of Soil and Land Conservation raised the potential for the proposed clearing to result in accelerated soil erosion. On the current proposal, DWER advised:

Based on information received from the Deputy Commissioner of Soil and Land Conservation, principle (g) determined [sic] that the proposed clearing is not likely to cause appreciable land degradation via waterlogging, salinity or eutrophication.

However, noting the soil type, topography and high intensity rainfall, the proposed clearing may result in appreciable land degradation in the form of wind and water erosion.

To minimise the risk of wind and water erosion impacts, DWER advised that condition 7 was applied to the clearing permit requiring the Permit Holder to plant crops over the cleared areas within three months of the date of clearing. DWER considered that condition 7 to be sufficient to prevent significant erosion impacts.

DWER also advised:

Aside from the identified soil erosion risk, [the appellant's] other references to the DAFWA 2016 report focusses on the potential impacts of from the irrigated agriculture activities on water quality (eutrophication).

On 23 May 2016, the Deputy Commissioner of Soil and Land Conservation provided advice for a previous application ... [and that] advice did not identify eutrophication as a potential impact, and noted that the soils within the application area have a moderate to high capability for the intended land use. DWER notes that eutrophication would have been identified by the Deputy Commissioner of Soil and Land Conservation if it was likely to result in significant impacts, and therefore did not see this as a limiting factor in determining to grant a clearing permit. The applicant also provided a number of measures that will be undertaken to prevent impacts associated with the end land use,

with specific reference to minimising potential nutrient loss, as detailed in "other matters" in the Decision Report.

Having regard to the above, it is considered that the erosion risks posed by the clearing of native vegetation were adequately considered by DWER, and a condition was applied to the permit requiring crops to be planted within three months of the clearing occurring.

Conclusion

For the above reasons, it is recommended that this ground of appeal be dismissed.

GROUND 5: CUMULATIVE IMPACTS

By this ground of appeal, the appellants submitted that the cumulative impacts of incremental clearing are likely to be significant and that successive smaller applications will combine to result in large areas of clearing. In this regard, the appellants noted that a previous proposal to clear a larger area was refused, and that by allowing a smaller area, an aggregation of smaller proposals would ultimately result in a larger area being cleared without appropriate justification.

One appellant noted that within the La Grange area, 50,000 ha have been identified as land suitable for irrigation.

Consideration

In response to this ground of appeal, DWER advised:

The clearing provisions of the EP Act require the clearing of native vegetation within Western Australia to be authorised by a clearing permit, unless the clearing is subject to an exemption ...

Where a clearing permit application may form part of a larger project, the applicant cannot be required to apply for the whole project or subsequent stages. However, proponents who have identified their longer term intention of a larger proposal will generally meet with a range of Departmental officers, under the Department's "One Stop Shop" approach, to determine relevant approvals, including whether the proposal is significant and warrants referral to the Environmental Protection Authority (EPA) ...

In assessing the Application against this clearing principle, DWER had regard to the pre-European and current extent of remnant native vegetation from the regional landscape to the local area scale, and the national objectives and targets for biodiversity conservation to prevent clearance of ecological communities with an extent less than 30 per cent of that present pre-1750 ...

With regard to [the] suggestion that the proposal should be referred to the EPA for assessment under Part IV of the EP Act, DWER notes that anyone may refer a significant proposal to the EPA. In this case, DWER's assessment determined that the impacts of the proposed clearing were not significant and therefore did not consider it necessary to refer the proposal.

[One appellant] also submitted that the proposal should be referred under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). DWER notes that referrals under the EPBC Act can only be made by the person proposing to take a controlled action or on request of the Minister responsible for the administration of that Act.¹³

The proposal before DWER (and the Minister on appeal) is for the clearing of no more than 490 ha of native vegetation for the purposes of horticulture at Shelamar Station. The

¹³ DWER, Response to appeals, 13 July 2018, pages 2-3.

previous grounds of appeal have considered concerns raised by appellants in respect to the impacts of the proposed clearing. Overall, it is considered DWER appropriately assessed these risks, and that it was therefore justified in granting the permit to clear in this instance.

In the present case, it is understood from discussions with representatives of the permit holder that no other development of the land is proposed at this time, and that the 490 ha proposed to be cleared represents the extent of currently proposed activities.

To the extent that the permit holder proposes to develop other areas into the future, or there are other areas proposed to be developed for horticulture in the area, these are beyond the scope of the current clearing permit. As DWER has advised, any person may refer a 'significant proposal' to the EPA for assessment under the EP Act.

Conclusion

It is considered that DWER appropriately assessed the impacts of the clearing proposed in this case. As such, it is recommended that this ground of appeal is dismissed.

GROUND 6: OFFSETS

By this ground of appeal, one the appellants submitted that the proposal is likely to result in significant residual impacts, and as such, consideration should have been given to requiring an environmental offset.

Consideration

In response to this ground of appeal, DWER advised:

The WA Environmental Offsets Policy states that the use of environmental offsets will not replace proper on-site environmental practices, such as avoidance and mitigation. The related WA Environmental Offsets Guideline states that environmental offsets will only be applied where residual impacts of a project are determined to be significant, after avoidance, minimisation and rehabilitation have been pursued.

The assessment against the clearing principles did not identify significant residual environmental impacts resulting from the proposed clearing and therefore offsets were not considered necessary for this clearing permit.¹⁴

Based on this advice, and in the absence of any information from the appellant as to why it considers the impacts of the proposal are such that offsets should be applied, DWER's position is supported.

Conclusion

For the reasons stated above, it is recommended this ground of appeal be dismissed.

OTHER MATTERS

Cane toad habitat

One appellant submitted that the approval of new irrigated agricultural proposals in the region will provide habitat for cane toads, potentially extending their range.

In response to this issue, DWER advised:

The requirement to control vermin such as cane toads is the responsibility of the landowner/land manager, and the potential for areas of irrigated agriculture to create

¹⁴ DWER, Response to appeals, 13 July 2018, page 7.

conditions ideal for cane toads is outside the scope of clearing permit conditions. DWER notes that the cane toad is a declared pest under section 22(2) of the *Biosecurity and Agriculture Management Act 2007*. Biosecurity, which includes the management of the risk of animal and plant pests and diseases entering, emerging, establishing or spreading in Western Australia is managed by the Department of Primary Industries and Regional Development.¹⁵

CONCLUSION AND RECOMMENDATIONS

For the reasons stated in this report, it is recommended that the appeals be allowed to the extent that DBCA's recommendations that implementation of directional clearing towards remnant vegetation with buffers around recent fauna activity (including greater bilby) be included in the permit conditions.

It is otherwise recommended that the appeals be dismissed.

If the Minister agrees with the above amendment, the precise wording of the changes to the conditions will be determined by DWER in giving effect to the decision under section 110 of the EP Act.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Jean-Pierre Clement, Deputy Appeals Convenor

¹⁵ DWER, Response to appeals, 13 July 2018, page 7.