



Government of **Western Australia**
Office of the **Appeals Convenor**
Environmental Protection Act 1986

Appeals Convenor's Report to the Minister for Environment

Appeal against undertaking to grant Clearing Permit
CPS 9009/1 Peppermint Grove Road Reserve and Lot 801 on
Plan 38278, Wagerup



Appellant	Urban Bushland Council WA Inc.
Applicant	Shire of Waroona Clearing Permit CPS 9009/1
Authority	Department of Water and Environmental Regulation
Appeal number	011 of 2021
Date	July 2021

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Cover image source: Shire of Waroona (August 2020).

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Acknowledgement of Country

The Office of the Appeals Convenor acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community.

We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past and present.

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1 Executive summary

1.1 Decision under appeal

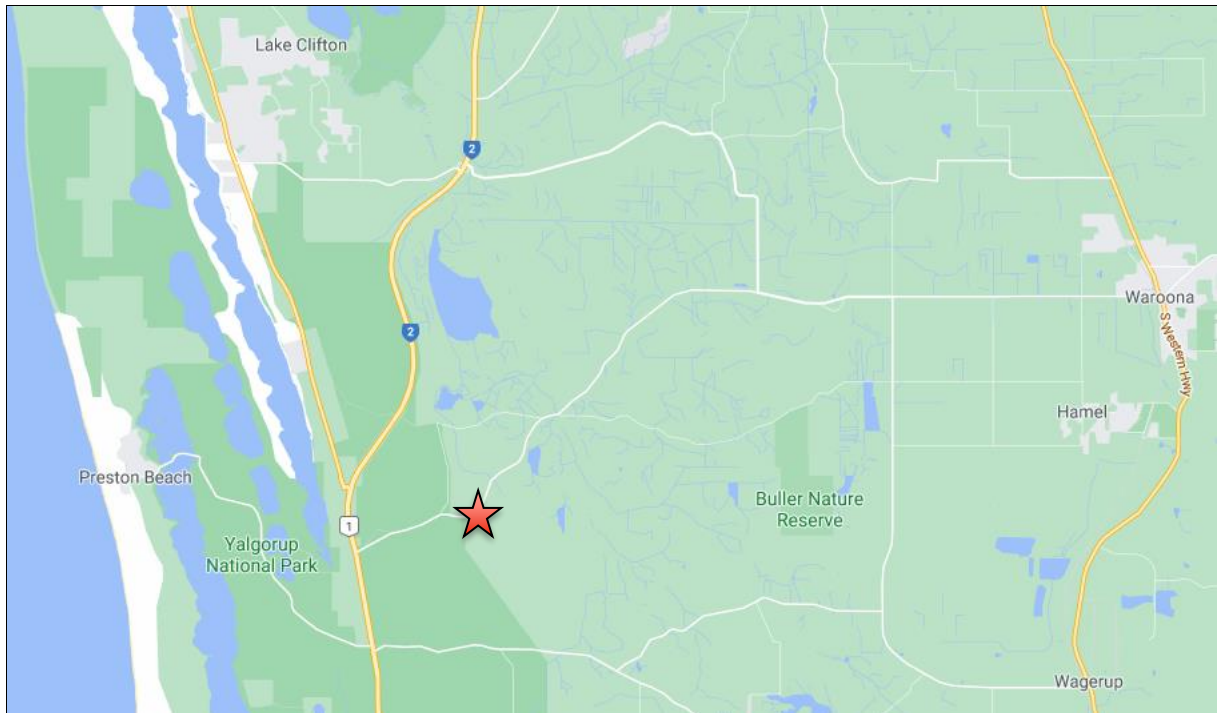
On 22 March 2021, the Department of Water and Environmental Regulation (DWER) issued an undertaking to grant draft clearing permit CPS 9009/1 (the draft permit) to the Shire of Waroona (the applicant), for clearing of not more than 5 native trees located alongside a section of Peppermint Grove Road in Wagerup (the application area).

The application area is located partly within the Peppermint Grove Road reserve (managed by the Shire of Waroona) and on privately owned land. A subdivision plan has been submitted to Landgate, which includes widening of the road reserve to include all of the application area. Granting of the permit is subject to evidence of land ownership being provided by the Shire to DWER by 22 March 2022.

This appeal is against DWER's decision to issue the undertaking to grant the draft permit.

Figures 1 and 2 show the site location and application area respectively.

Figure 1 Site location



(Source: *Whereis.com* June 2021)

Figure 2 Application area (hatched blue)



(Source: DWER Draft CPS 9009/1 March 2021)

1.2 Grounds of appeal and appellants concerns

The appellant is the Urban Bushland Council Inc. The matters raised in the appeal are: alternatives to clearing, black cockatoo habitat, ecological linkage and cumulative impacts.

We summarise the appellant's main concerns in Table 1.

Table 1 Grounds of appeal

Main concerns the appellant submitted	
Alternatives to clearing	The proposed clearing is unnecessary, as other road safety measures could be used to protect road users.
Black cockatoo habitat	The trees provide significant foraging habitat for black cockatoo and other birdlife. DWER did not properly consider the ecological linkage value of the trees proposed to be cleared
Cumulative impacts	DWER did not properly consider the cumulative impacts of clearing the roadside vegetation in a region which has been over-cleared.

1.3 Key issues and conclusions

From the appellant's concerns, we have identified the 2 issues at the heart of the appeal. We summarise our conclusions for these issues below. Section 2 of this report then details our reasoning.

Alternatives to clearing

Our conclusion is that DWER appropriately assessed the necessity of the proposed clearing consistent with relevant guidelines. The applicant undertook an assessment of the potential road safety risks associated with road improvement works along Peppermint Grove Road. The applicant advised that the roadworks were completed as part of the Australian Government Black Spot Program. Five trees were identified in the road safety clear zone and were recommended for removal. Alternatives to clearing, such as road safety barriers, were found not to be feasible.

We agree with this position and recommend that this ground of appeal be dismissed.

Assessment of environmental values

DWER officers inspected the application area, describing the vegetation within the application area as comprising *Corymbia calophylla* (marri) trees over grassy weeds.

DWER's mapping datasets identify the 5 trees the subject of the clearing application as being part of foraging habitat for conservation significant black cockatoo. In response to this ground of appeal, DWER advised that the local area [within 10 kilometres (km) of the application area] retains approximately 31 per cent (%) of native vegetation cover.

DWER was of the view that the proposed clearing will not significantly impact the availability of foraging habitat for black cockatoo in the local area (within 10 km of the application area) or sever an essential ecological linkage for black cockatoo.

Based on our review of the available information, we consider that DWER had appropriate regard for the environmental impacts associated with the application including cumulative impacts. As a result, this ground of appeal should be dismissed.

1.4 Recommendation to the Minister

It is recommended that the appeal be dismissed.

2 Reasons for recommendation

2.1 Alternatives to clearing

Our conclusion is that DWER adequately assessed the applicant's efforts to avoid and minimise the need for clearing, and has appropriately applied conditions to the draft permit which require the applicant to avoid and mitigate the impacts of clearing. We explain our reasoning below.

The appellant submitted that alternative engineering measures, such as road barriers, could be used rather than tree clearing. The appellant was of the view that it is very important the trees within the application area be retained.

Supporting information provided with the application, included: Peppermint Grove Road, Lake Clifton WA (Slk 1.7 - 3.4) Road Safety Audit Stage 4 - Pre-Opening¹ (Road Safety Audit).

The applicant advised that the 5 trees proposed to be cleared are less than 2 metres (m) from the edge of the carriageway of Peppermint Grove Road.

The Road Safety Audit states:

There are several mature trees on the outside of a curve located on the verge close to the traffic lane. The mature trees pose a risk to vehicle occupants in the event an errant vehicle leaves the roadway².

To address this risk, the Road Safety Audit recommended that a clear zone 5.5 m wide be established along the road. Where this is not possible, other measures such as road safety barriers, edge lines or speed restrictions should be considered³.

In response to this issue, the Shire of Waroona advised that it did not support the use of road safety barriers in this particular case, as in their view, barriers are not a cost effective method of controlling the risk⁴.

By section 51O of the *Environmental Protection Act 1986* (EP Act), in considering an application for a clearing permit, the CEO of DWER (and by extension, the Minister on appeal) is required to have regard to:

- the clearing principles so far as they are relevant to the matter under consideration; and
- any planning instrument, or other matter, that are considered relevant.

DWER's published Guide 2, *A guide to the assessment of applications to clear native vegetation*⁵ outlines the planning and other matters that might be relevant when making a decision on a clearing permit. Guide 2 states that other matters include the 'necessity' of the clearing.

Guide 2 outlines that native vegetation clearing should only be considered after all other reasonable attempts to mitigate adverse impacts have been exhausted, and that potential environmental impacts should be addressed using the impact mitigation sequence:

- avoid – avoid impact altogether

¹ Brad Brooksby Consulting, Peppermint Grove Road, Lake Clifton WA (Slk 1.7 - 3.4) Road Safety Audit Stage 4 - Pre-Opening, 2 June 2020.

² Ibid., page 5.

³ Ibid., page 6.

⁴ Shire of Waroona's representative, Email response to the appeal, 11 May 2021.

⁵ Department of Environment Regulation, A guide to the assessment of applications to clear native vegetation – Under Part V Division 2 of the *Environmental Protection Act 1986*, Guide 2, December 2014, pages 39-40.

- minimise – limit the severity of the impact
- rehabilitate – restore maximum environmental value of the impact
- offset – offset significant residual impacts.

Guide 2 also states that in determining the necessity of the clearing, higher priority will be given to clearing for public use than private benefit or commercial gain.

Consistent with the impact mitigation sequence, the applicant undertook an assessment of the potential road safety risks associated with road improvement works along Peppermint Grove Road. Five trees were identified in the road safety clear zone and recommended for removal. The Shire of Waroona has advised that other alternative engineering measures, which would avoid the proposed clearing, are not feasible.

DWER has also applied Condition 1 to the draft permit to minimise the impact of clearing.

Condition 1 requires the permit holder to:

- avoid the clearing of native vegetation
- minimise the amount of vegetation to be cleared
- reduce the impact of any clearing on any environmental value.

Conditions 3 and 4 require the permit holder to maintain records and report to DWER on the above measures (among other things).

We find DWER's approach in assessing the matters raised under this ground of appeal was appropriate and supported by the available evidence. As a result, we recommend that this ground of appeal be dismissed.

2.2 Assessment of environmental values

Our conclusion is that DWER's assessment of the clearing application in relation to the environmental values was appropriate and justified by the available evidence. We explain our reasoning below.

The appellant submitted that the permit should be refused on the basis that the 5 trees within the application area provide foraging habitat for black cockatoo and other fauna in a region which has been over-cleared. The appellant noted photographs of the 5 trees provided in the clearing permit application, and questioned whether the trees have been correctly identified as marri. The appellant was of the view that the 5 trees within the application area provide essential ecological linkage for black cockatoo.

The issues raised under this ground of appeal have been summarised under the following headings:

- black cockatoo habitat
- cumulative impacts.

Black cockatoo habitat

The appellant noted that the closest breeding site of black cockatoo was recorded as being approximately 2.7 km to the north-west of the application area. Given this, the appellant was of the view that the 5 trees within the application area would likely provide forage for black cockatoo and other birdlife.

DWER advised that officers from the Department inspected the application area with the applicant's representatives on 5 October 2020. The officers described the vegetation within the application area as comprising marri trees over grassy weeds.

The DWER officers identified the 5 trees within the application area as marri trees as the trees were bearing the large fruits distinctive of the species⁶. DWER's Site Inspection Report⁷ states that no hollows suitable for breeding by black cockatoo were identified. DWER confirmed through aerial imagery that the application area and surrounding area had been impacted by fire in early 2016, which may have changed some visual characteristics of the trees in question⁸.

DWER noted that mapping datasets identify the 5 trees the subject of this application as being part of foraging habitat for black cockatoo. The local area [within 10 kilometres (km) of the application area] contains approximately 8,276 hectares (ha) of mapped foraging habitat for black cockatoo (see Figure 3).

In the Decision Report, DWER states that the application area is within the vicinity of known black cockatoo breeding sites. The closest being approximately 2.7 km north-west. DWER acknowledged that the marri trees proposed to be cleared may provide suitable foraging habitat for black cockatoo. However, given the limited scale of the proposed clearing (5 trees) and the significant amount of suitable foraging vegetation within the local area, DWER considered that the clearing was unlikely to significantly reduce the amount of food available to breeding black cockatoo or affect chick survival rates⁹.

DWER's published *Clearing Regulation Fact Sheet 16: Risk-based assessment of clearing permit applications*¹⁰ outlines that DWER's risk-based assessment approach for clearing permit applications considers the following:

- the size of the area to be cleared
- location of the area to be cleared
- sensitivity of the environment and the environmental values that occur within or adjacent to the area under application
- purpose of clearing and urgency of the application
- and public interest in the application.

Consistent with this guidance, DWER has considered the risk to habitat values from the proposed clearing, and determined that it is unlikely to significantly reduce the amount of black cockatoo foraging habitat in the local context. We accept DWER's position.

⁶ Advice received from the Shire of Waroona indicated that the 5 trees were *Eucalyptus marginata* (jarrah). However DWER's advice is accepted, given it is based on the 5 trees displaying the large urn shaped woody fruits distinctive of marri.

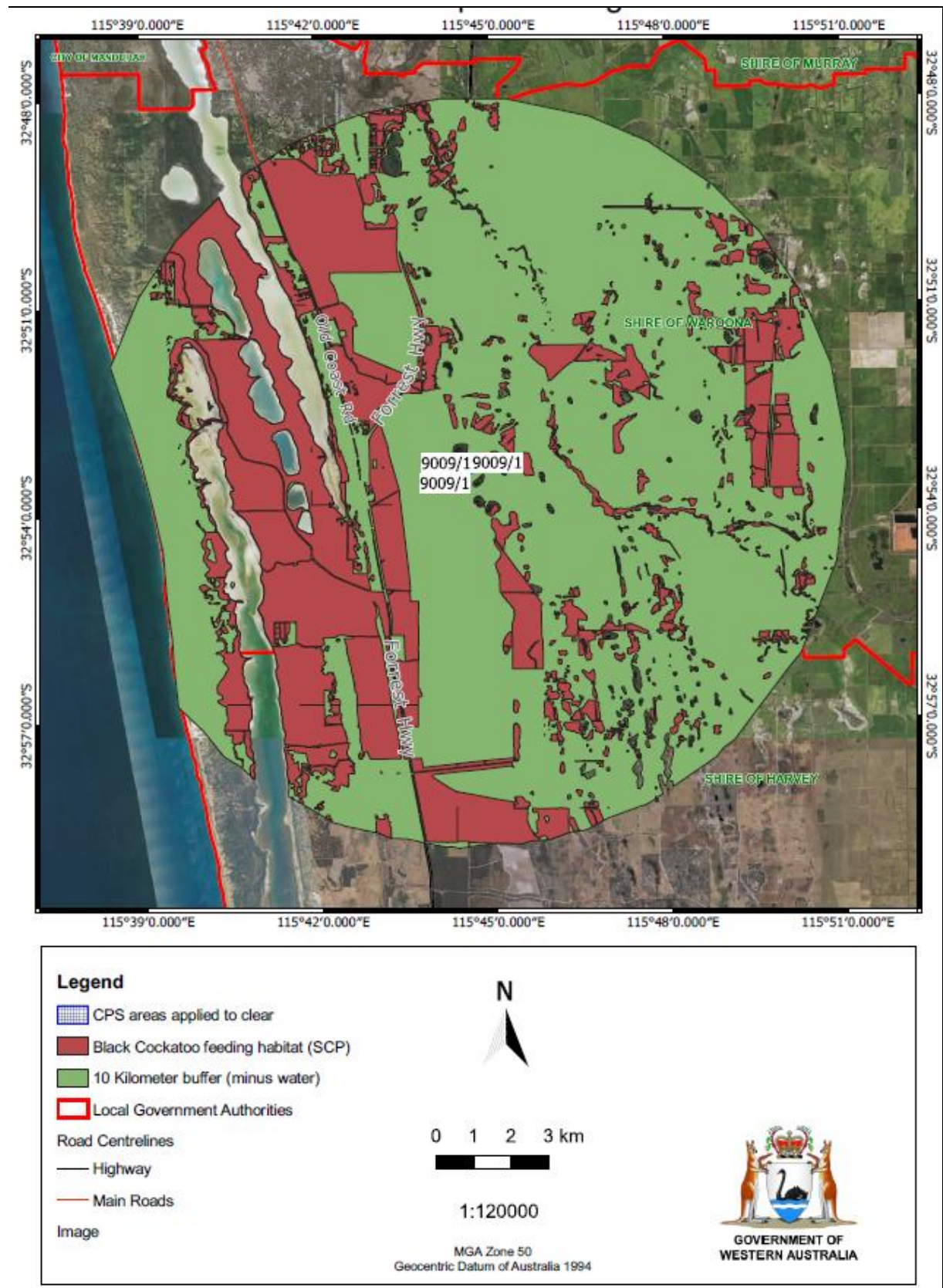
⁷ DWER, Clearing Permit Application Site Inspection Report CPS 9009/1, 5 October 2020, page 4.

⁸ DWER, Response to the appeal, 28 May 2021, page 5.

⁹ DWER, Clearing Permit Decision Report, CPS 9009/1, 22 March 2021, pages 3-4.

¹⁰ DER, *Risk-based assessment of clearing permit applications*, Fact sheet 16, February 2015.

Figure 3 Mapped black cockatoo foraging habitat within a 10 km radius of the application area



(Source: DWER, 28 May 2021)

Cumulative impacts

The appellant noted the Decision Report states that only 14.85% of the pre-European extent of native vegetation in the Swan Coastal Plain Interim Biogeographic Regionalisation for Australia (IBRA) bioregion is located in lands managed by the Department of Biodiversity, Conservation and Attractions (DBCA). Also, only 5.00% (of pre-European extent) of the Bassendean Complex-Central and South vegetation complex remains in DBCA managed lands.

The appellant referenced the National Objectives and Targets for Biodiversity Conservation 2001-2005¹¹, which include a target to have clearing controls in place that prevent clearance of ecological communities with an extent below 30% of that present pre-1750. Noting the above, the appellant was of the view that cumulative losses of roadside native vegetation are unacceptable, and that the permit should be refused.

DWER advised that the local area (within 10 km of the application area) retains approximately 31% of native vegetation cover. DWER noted that the minimum 30% target of pre-European extent of native vegetation, includes vegetation in secure and non-secure tenure.

The Decision Report states that the native vegetation within the application area is not consistent with the mapped vegetation type Bassendean Complex-Central and South, which is described as:

... vegetation ranges from woodland of *Eucalyptus marginata* (Jarrah) - *Allocasuarina fraseriana* (Sheoak) - *Banksia* species to low woodland of *Melaleuca* species, and sedgelands on the moister sites. This area includes the transition of *Eucalyptus marginata* (Jarrah) to *Eucalyptus tottiana* (Pricklybark) in the vicinity of Perth (Hedde et al, 1980).¹²

Based on the above, DWER determined that the 5 trees within the application area are not a significant representation of the Bassendean Complex-Central and South vegetation complex. We accept DWER's conclusion.

Conclusion and recommendation

Noting the above, it is considered that DWER appropriately considered and addressed the appellant's concerns in relation to black cockatoo habitat and cumulative impacts. We therefore recommend that this ground of appeal be dismissed.

¹¹ Commonwealth of Australia, *National Objectives and Targets for Biodiversity Conservation 2001-2005*, Canberra, 2001.

¹² DWER, Clearing Permit Decision Report CPS 9009/1, 22 March 2021, page 5.

Appendix 1 Appeal process

The Minister assesses the merits of a decision

Environmental appeals follow a merits-based process. This means the Minister can consider all the relevant facts, legislation and policy aspects of the decision and decide whether it was correct and preferable.

For appeals relating to a decision to grant a clearing permit, including the conditions of that permit, the Minister can consider the environmental merits of the assessment by DWER based on the clearing principles set out in Schedule 5 of the EP Act, as well as planning and other relevant matters. Questions of additional information not considered by DWER, technical errors and attainment of relevant policy objectives are normally central to appeals.

We report to the Minister, as does the decision-making authority

To decide an appeal's outcome, the Minister for Environment must have a report from both:

- the Appeals Convenor [see section 109(3) of the EP Act], and
- the authority that originally made the decision under appeal [see section 107(1)].

To properly advise the Minister, our investigation included:

- reviewing DWER's report and response from the applicant's representative
- a meeting with the appellant's representatives on 16 April 2021
- discussing the appeal with the applicant's representative on 10 May 2021
- reviewing other information, policy and guidance as needed.

See Table 2 for the documents we considered.

Table 2 Documents we reviewed in the appeals investigation

Document	Date
Brad Brooksby Consulting, Peppermint Grove Road, Lake Clifton WA (Slk 1.7 - 3.4) Road Safety Audit Stage 4 - Pre-Opening	2 June 2020
Department of Environment Regulation, A guide to the assessment of applications to clear native vegetation – Under Part V Division 2 of the <i>Environmental Protection Act 1986</i> , Guide 2	December 2014
DWER, Clearing Permit Application Site Inspection Report CPS 9009/1	5 October 2020
DWER, Clearing Permit Decision Report, CPS 9009/1	22 March 2021
DWER, Draft Clearing Permit, CPS 9009/1	Undated
DWER, Response to the appeal	28 May 2021
Shire of Waroona's representative, Email response to the appeal	11 May 2021