



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

Appeal Convenor's Report to the Minister for Environment

Appeal against grant of Clearing Permit CPS 9742/1
Old Vasse Road reserve, Yeagarup, Shire of Manjimup



Appellant	Mr Julian Sharp
Applicant	Shire of Manjimup
Authority	Department of Water and Environmental Regulation (DWER)
Appeal No.	045 of 2022
Date	March 2023

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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 past, present and emerging.

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1 Executive summary

1.1 Decision under appeal

This report relates to an appeal against the decision of the Department of Water and Environmental Regulation (DWER) to grant Clearing Permit CPS 9742/1 under Part V of the *Environmental Protection Act 1986* (EP Act). The clearing permit was granted to the Shire of Manjimup on 21 December 2022, and authorises the clearing of up to 0.45 hectares (ha) of native vegetation (including 24 trees) within a broader 2.8 ha footprint within the Old Vasse Road reserve, Yeagarup (application area; Figure 1). The clearing purpose is for road construction and hazard reduction.

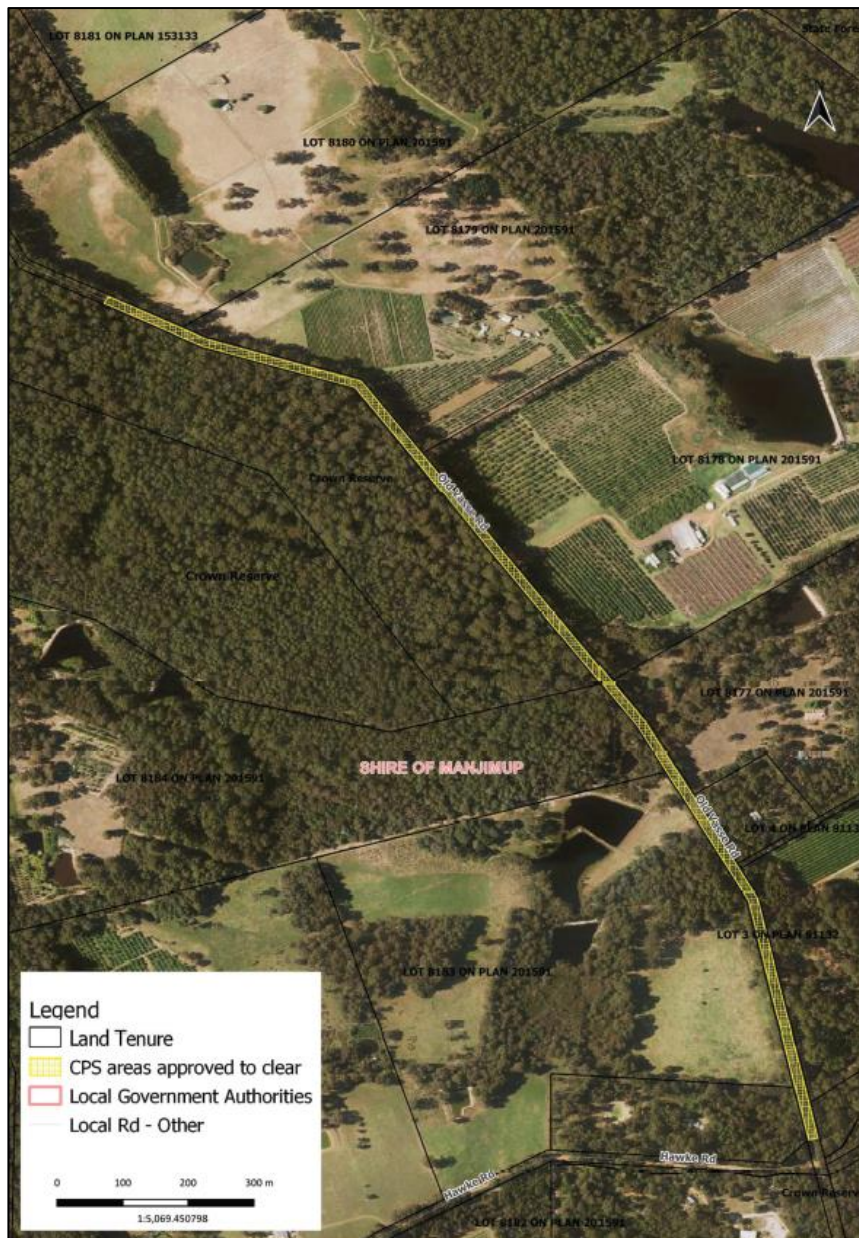


Figure 1 Area authorised to be cleared under the clearing permit (cross-hatched yellow)¹

¹ Department of Water and Environmental Regulation (2022) *Clearing Permit granted under section 51E of the Environmental Protection Act 1986: Purpose Permit Number CPS 9742/1 and Decision Report*. 21 December 2022.

The broader 2.8 ha footprint within which the clearing is proposed is about two (2) kilometres (km) long by about 14 metres (m) wide and includes the existing road formation.

The clearing permit is related to, and is an extension of, a portion of the proposed clearing under Clearing Permit CPS 9333/1 (0.12 ha within the Old Vasse Road/Hawke Road intersection), which was the subject of Appeal 010/22².

1.2 Grounds of appeal and appellant concerns

Mr Julian Sharp (appellant) submitted that the proposed clearing of native vegetation within the Old Vasse Road reserve will impact on several environmental and other values and is not necessary. The appellant is seeking for the clearing permit to be revoked. The grounds of appeal are summarised in Table 1.

Table 1 Grounds of appeal

Ground	Main concerns the appellant submitted
Environmental values	Old Vasse Road is a visually important entry to the Warren National Park, and is a significant Flora Road.
Planning and other matters	It is unclear if the Shire of Manjimup has ensured/published research confirming that no Aboriginal sites of significance will be impacted. The growing catastrophic impacts of climate change dictate that no more native vegetation should be cleared; this is clearly stated in the Intergovernmental Panel on Climate Change (IPCC) reports.
Purpose and necessity	The Shire of Manjimup's claim that 'trees feature prominently as impacted hazards in run-off road crashes and account for a large proportion of fatalities' is spurious, this 'logic' suggests all roadside vegetation should be cleared. The Shire of Manjimup has not provided statistics on the number of run-off road crashes on Old Vasse Road and any associated injuries or fatalities; there have been no vehicle crash fatalities in 46 years.
Conditions	It is unclear if DWER will be monitoring any clearing that does proceed.

The appellant also submitted that the local community is unanimously opposed to the proposed clearing, and that the Shire declined to make publicly available a consulting engineer's report. These matters are considered to be outside the scope of this appeal and are addressed in Section 2.4 ('Other matters').

1.3 Key issues and conclusions

The appeal relates to whether DWER's decision to approve the proposed clearing was justified. To address the concerns, we considered three questions in the context of the issues raised in the appeal: what environmental values are likely to be impacted by the proposed clearing; is the proposed clearing consistent with planning instruments and other relevant matters; and considering the above, should the clearing permit have been granted, and if so, are the conditions appropriate to manage impacts?

We summarise our conclusions for these issues below. Section 2 of this report details our reasoning, and Section 3 contains supporting information.

² Available from: <https://www.appealsconvenor.wa.gov.au/Appeal?id=31792>

What are the environmental values of the application area?

We conclude that DWER had regard for the environmental values of the application area, including flora and vegetation values and their importance to local amenity and tourism, and has assessed the impacts of the proposed clearing (including the contribution to climate change) in accordance with its *A guide to the assessment of applications to clear native vegetation*³ (Guide to Assessment). In summary we generally agree with DWER's findings, however we consider that the proposed clearing 'may be at variance' with clearing principle (c) given the application area contains suitable habitat for threatened flora.

Is the proposed clearing consistent with planning instruments and other relevant matters?

We conclude that DWER had regard for relevant planning instruments and other matters, including Aboriginal sites of significance. We note that the clearing purpose is consistent with the reservation of the land and the regional road network planning framework, and that the Shire has undertaken steps to avoid and minimise the extent of clearing as far as practical. We also accept that the proposed clearing will have a public benefit.

Should the clearing permit have been granted, and if so, are the conditions appropriate to manage impacts?

We conclude that, on the available information, DWER's decision to grant the clearing permit was justified based on the necessity of the works to improve road safety, and that DWER has applied reasonable conditions to manage and counterbalance the identified impacts so that the proposed clearing is 'unlikely to lead to an unacceptable risk to environmental values'⁴.

1.4 Recommendation to the Minister

We recommend that the appeal be dismissed.

³ 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.

⁴ Department of Water and Environmental Regulation (2022), decision report, section 1.4 page 2.

2 Reasons for recommendation

Broadly, the appellant questioned the adequacy of DWER's assessment in relation to flora and vegetation values, consideration of climate change and Aboriginal sites of significance, the need for the proposed clearing, and the need for monitoring to ensure compliance.

The concerns raised by the appeal are similar to those raised on Appeal 010/22. We consider our findings for [Appeal 010/22](#) to be relevant to this appeal, and suggest the reports are read in conjunction with one another for further context and details.

2.1 What are the environmental values of the application area?

The Shire applied measures to avoid and minimise impacts

The Shire's application for a clearing permit states that the 'Road alignment has been designed to minimise vegetation clearing'.⁵ The decision report refers to the Shire's avoidance and mitigation measures to minimise environmental impacts of the proposed clearing, including designing the road alignment to minimise clearing, modification of the road design to avoid 11 trees (from 35 to 24, in response to DWER's request to consider further avoidance/mitigation⁶), and an offset (to counterbalance significant residual impacts). DWER was satisfied that the Shire has made a reasonable effort to avoid and minimise potential impacts of the proposed clearing on environmental values.^{7,8}

By the decision report we understand that the proposed road design comprises (on each side of the road centreline) 3 m wide sealed pavement, 1 m wide hard shoulder, and 1.5 m wide table drain, for an overall road formation of 11 m width.⁹ In relation to the design modification to avoid 11 trees, the Shire advised that 'while the 1.5m to toe of drain is desirable and best practice for infrastructure protection', it now proposes to 'meander the drainage around the trees but outside the edge shoulder'.¹⁰

Application area may include habitat for threatened flora

By the decision report, DWER's assessment found that the proposed clearing 'is at variance' with clearing principles (a), (b), (h) and (f), and 'is not likely to be at variance' with clearing principles (c), (d), (e), (g), (i) and (j). In summary, DWER found that the application area:

- contains vegetation consisting of *Eucalyptus diversicolor* (karri) and *Corymbia calophylla* (marri) trees, with a variable dense midstorey and understorey, consistent with mapped vegetation types for the area, in 'Very Good' to 'Good' condition
- contains suitable habitat for 11 conservation significant fauna, including two 'Critically Endangered' species; the proposed clearing impacts habitat (including trees) for threatened fauna western ringtail possum¹¹, Baudin's cockatoo¹², Carnaby's cockatoo¹³ and forest red-tailed black cockatoo¹⁴, and constitutes a significant residual impact

⁵ Shire of Manjimup application for a clearing permit (18/05/2022). Also from DWER's Clearing Permit System (CPS) online database: <https://cps.dwer.wa.gov.au/main.html>

⁶ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 5.

⁷ Department of Water and Environmental Regulation (2022), decision report, section 3.1 page 4.

⁸ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 3.

⁹ Department of Water and Environmental Regulation (2022), decision report, page 1.

¹⁰ Shire of Manjimup emails dated 13 March 2023: clarification of table drains and tree coordinates.

¹¹ *Pseudocheirus occidentalis*: 'Critically Endangered' under WA *Biodiversity Conservation Act 2016*.

¹² *Calyptorhynchus baudinii*: 'Critically Endangered' under IUCN Red List; 'Endangered' under WA *Biodiversity Conservation Act 2016* and Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

¹³ *Calyptorhynchus latirostris*: 'Endangered' under WA *Biodiversity Conservation Act 2016*.

¹⁴ *Calyptorhynchus banksii* subsp. *naso*: 'Vulnerable' under WA *Biodiversity Conservation Act 2016*.

- is within a local area that retains about 69 per cent remnant vegetation cover, and contains mapped vegetation types retaining at least 78 per cent of their original extents, all above the 30 per cent minimum threshold for biodiversity conservation in Australia
- intersects two minor non-perennial watercourses in the Warren River catchment
- contains suitable habitat for threatened flora *Caladenia harringtoniae* ('Vulnerable')
- is adjacent to Warren National Park (northern portion of application area); the proposed clearing could result in spread of weeds and dieback into this conservation area
- is about 0.63 km west of a mapped ecological linkage, and forms part of a local ecological linkage; the proposed clearing is unlikely to compromise these linkages
- was mapped in 2005 as having a roadside conservation value of 'Medium High' to 'High'
- does not contain any threatened or priority ecological communities.

By the available information, there is no question that the application area contains flora, vegetation and habitat values, and in summary we generally agree with DWER's findings.

We consider, however, that the proposed clearing 'may be at variance' with clearing principle (c).

Proposed clearing 'may be at variance' with clearing principle (c)

The decision report sets out that DWER identified that records of two threatened and seven priority flora species occur within 10 km of the application area, and considered the likelihood of these species utilising the native vegetation proposed to be cleared based on habitat preferences.¹⁵ DWER found that the application area contains the same mapped soil and/or vegetation types and/or suitable habitat features for four of these, including the threatened species *Caladenia harringtoniae* (pink spider orchid; 'Vulnerable').

Florabase¹⁶ describes *Caladenia harringtoniae* as a tuberous perennial herb to 0.2-0.4 m high, with pink flowers in October to November, growing in sandy loam associated with winter-wet flats, margins of lakes, creeklines, and granite outcrops. Florabase indicates this species is known from 40 records (some may overlap) from Nannup to Albany.

In its response to the appeal, DWER advised that *Caladenia harringtoniae*:

Usually inhabits paperbark (*Melaleuca* sp.) and flooded gum (*Eucalyptus rudis*) seasonally inundated swamps and flats ... [and] may also be found along creek lines in Jarrah and Karri forest.¹⁷ As no clearing of riparian vegetation is permitted under this Permit, it was considered unlikely that the proposed clearing would impact [it].¹⁸

Clearing principle (c) sets out that native vegetation should not be cleared if it includes, or is necessary for the continued existence of, rare flora. The Guide to Assessment provides the following examples of proposed clearing that is likely to be 'at variance' with this principle:

- clearing of flora declared as rare or listed as threatened
- clearing of buffers or other areas necessary to maintain ecological processes and functions for rare flora.¹⁹

¹⁵ Department of Water and Environmental Regulation (2022), decision report, pages 14 and 16.

¹⁶ Western Australian Herbarium (1998-). *Florabase – the Western Australian Flora*. Department of Biodiversity, Conservation and Attractions.

¹⁷ Hoffman, N. and Brown, A. (1992) *Orchids of South-west Australia*. Revised 2nd edition with supplement. University of Western Australia Press, Nedlands.

¹⁸ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Pages 2-3.

¹⁹ Department of Environment Regulation (2014), page 14.

The decision report states that the application area ‘intersects two minor non-perennial watercourses’, which appears to be consistent with the habitat preferences of this species. Given this, we consider that the proposed clearing ‘may be at variance’ with clearing principle (c) on the basis that the application area traverses areas that may be necessary to maintain ecological process and functions for the threatened flora *Caladenia harringtoniae*.

We consider, however, that this finding does not affect the overall outcome, given DWER has applied a condition on the clearing permit prohibiting the clearing of riparian vegetation (being the preferred habitat of this species). The adequacy of the clearing permit conditions is considered in Section 2.3.

No Flora Roads listed in the Shire of Manjimup

By information and reports published on the Department of Biodiversity, Conservation and Attractions (DBCA) ‘Roadside Conservation Committee’ webpage²⁰, roadside survey and mapping was conducted in the Shire of Manjimup in 1996-2004, and portions of the Old Vasse Road reserve in the vicinity of the proposed clearing were afforded a ‘High (9-12)’ roadside conservation value. The current published list of Flora Roads does not, however, include any road reserves in the Shire of Manjimup.

2.2 Is the proposed clearing consistent with relevant planning instruments and other matters?

EP Act states DWER to consider relevant planning and other matters

Section 51O of the EP Act sets out the principles and instruments that DWER shall have regard to when making decisions about clearing applications, which include: the clearing principles so far as they are relevant to the matter under consideration; and any development approval, planning instrument, or other matter, that the CEO considers relevant.

The Guide to Assessment sets out the considerations for these relevant matters, including consideration of by-laws and policies, local biodiversity guidelines and plans, and regional planning strategies dealing with public infrastructure. ‘Other matters’ are not defined in the EP Act, and are generally environmental issues not directly within the scope of the clearing principles, but within the object and principles of the Act.²¹

Public works exempt from planning approval, but must have regard to intent etc of Planning Scheme

The proposed clearing is for public roadworks by a local government. As public works, the proposal is exempt from the requirement to obtain planning approval. However, while planning approval is not required, the body carrying out the works must have regard to:

- the purpose and intent of any planning scheme that has effect in the locality where, and at the time when, the public works are undertaken
- the orderly and proper planning, and preservation of amenity, of the locality at that time.²²

²⁰ <https://www.dpaw.wa.gov.au/management/off-reserve-conservation/roadside-conservation>

²¹ Department of Environment Regulation (2014), page 39.

²² *Planning and Development Act 2005*, section 6(1) and (2).

This general proposition is reinforced in the *Shire of Manjimup Local Planning Scheme No.4* (Planning Scheme), which provides that public works should be considered in terms of the purposes of the Planning Scheme, the *Shire of Manjimup Local Planning Strategy*²³ (Planning Strategy) and relevant local planning policies.²⁴

On the Planning Scheme and Planning Strategy more generally, the instruments support the finding that native vegetation is important and should be limited. In this regard, two aims set out in the Planning Scheme are to:

- conserve, protect and enhance the biodiversity of the Scheme Area and its environs by ensuring that land use and development is undertaken in a sustainable manner with biodiversity values at the fore-front of decision-making²⁵
- improve the means of access into and around the district and to ensure the safe and convenient movement of people including pedestrians, cyclists and motorists²⁶.

Further, the Shire of Manjimup has published several policies, including *Managing the natural environment*.²⁷ Among other things, this policy provides that the clearing of high conservation value vegetation is not supported unless in exceptional circumstances and where justified, and that the retention and regeneration of native vegetation is encouraged.²⁸

Under the Planning Scheme, the application area is reserved as 'Local Roads'. Noting that the clearing purpose is stated to be for road construction and hazard reduction, we consider that the proposed clearing is consistent with the reservation of the land.

Local amenity and tourism values relate to roadside vegetation

The Planning Strategy recognises the importance of forest vegetation to local amenity and tourism.²⁹ DBCA's brochure *Karri Forest Explorer*³⁰ identifies that Old Vasse Road provides access to several attractions including the Marianne North Tree, the Dave Evans Bicentennial Tree, and the Warren National Park.

DWER had regard for the importance of the vegetation to local amenity and tourism in the context of relevant planning and other matters (and public submissions), and concluded that:

... the clearing of 24 trees along the length of the clearing footprint will not significantly compromise the visual and tourism amenity of the road when considering the remaining vegetation both within the road reserve adjacent properties ...³¹

In its response to the appeal, DWER acknowledged the value of the vegetation to local residents. DWER advised, however, that it:

... [M]ust have regard to a wide range of factors when deciding whether to grant a clearing permit, including the necessity of the clearing. Noting that this application was to improve road safety, ... the Department decided to grant this clearing permit, noting that the [Shire] had employed suitable avoidance and mitigation measures.³²

²³ Western Australian Planning Commission (2003 endorsed) *Shire of Manjimup Local Planning Strategy*. August 2003.

²⁴ Department of Planning, Lands and Heritage (2022) *Shire of Manjimup Local Planning Scheme No. 4*. 22 March 2022 (as amended). Clause 3.5.

²⁵ Department of Planning, Lands and Heritage (2022), clause 1.7(xiii).

²⁶ Department of Planning, Lands and Heritage (2022), clause 1.7(xv).

²⁷ Shire of Manjimup (2016) *Local Planning Policy 6.1.19 Managing the Natural Environment*. 21 December 2016.

²⁸ Shire of Manjimup (2016), page 4.

²⁹ Western Australian Planning Commission (2003 endorsed), paragraph 4.3.5.2.

³⁰ **Error! Hyperlink reference not valid.** Department of Biodiversity, Conservation and Attractions (2019) *Karri Forest Explorer*. Visitor guide, December 2019.

³¹ Department of Water and Environmental Regulation (2022), decision report, pages 8 and 12.

³² Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 3.

By the above, it is apparent that a part of the local amenity and tourism values in this locality relate to the native vegetation, and, further, that DWER had regard for these matters in its assessment of the clearing application.

Old Vasse Road recognised as part of RAV and regional road networks

Old Vasse Road is recognised as part of the Restricted Access Vehicle (RAV) network administered by Main Roads Western Australia (MRWA), and as part of the regional road network described in the *South West Regional Blueprint*³³.

The decision report indicates DWER had regard for these road networks in its assessment:

The applicant advised that Old Vasse Road ... does not currently meet requirements for heavy vehicles, noting that the existing road formation does not allow RAV vehicles to navigate horizontal curves without encroaching onto the opposite side of the road ...

... Old Vasse Road is recognised as part of the regional road network in the South West Regional Blueprint, which sets out several priorities and actions, including that 'Old Vasse Road is sealed' to meet the objectives 'Regional road network supports effective tourism routes through the region' and 'Freight routes from Scott River, Warren Blackwood and other agricultural sectors meet requirements for export of food' ...³⁴

In its appeal response, DWER reiterated that the purpose of the proposed clearing (as advised by the Shire) is to upgrade Old Vasse Road to meet RAV network standards. DWER referred to the *Standard Restricted Access Vehicle Route Assessment Guidelines*³⁵:

... [T]he guideline states that: "when the hauling unit of a RAV travels around a curve or tight bend, the trailing units pull across the curve or tight bend and as such, require additional road width" and "in instances where it is identified the RAV would be required to utilise additional road width when travelling around a curve or tight bend, potentially encroaching into oncoming traffic, the assessor must ensure there is sufficient visibility on the approach to the curve or tight bend to observe oncoming vehicles, and react or stop if necessary". Minimum required sight distances for RAV are provided within the guidelines. [The] *Restricted access vehicle route assessment form* referred to in the guidelines indicates that trees can restrict sight distance.³⁶

Shire obliged to ensure no unlawful impacts to Aboriginal sites of significance

The decision report indicates that DWER had regard for Aboriginal sites of significance:

Several Aboriginal sites of significance have been mapped within the local area. It is the [Shire]'s responsibility to comply with the *Aboriginal Heritage Act 1972 (WA)* and ensure that no Aboriginal Sites of Significance are damaged through the clearing process.³⁷

In response to this element of the appeal, DWER provided the following further advice:

... There are three mapped Aboriginal sites of significance within 10 kilometres of the Application Area, the closest of which (Place ID 4519) is 8.0 kilometres from the Application Area. Noting the distance to these sites, the Department considers it highly unlikely that the clearing would impact upon them ...³⁸

³³ South West Development Commission and Regional Development Australia – South West (2014) *South West Regional Blueprint*. December 2014. Australian Government.

³⁴ Department of Water and Environmental Regulation (2022), decision report, pages 1 and 4.

³⁵ Main Roads Western Australia (2022) *Standard Restricted Access Vehicle Route Assessment Guidelines*. May 2022. Government of Western Australia.

³⁶ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 5.

³⁷ Department of Water and Environmental Regulation (2022), decision report, section 3.3 page 8.

³⁸ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 4.

The Shire advised that:

The Shire has investigated the existence of any registered cultural, state or heritage significant sites for this section of road, of which there is none. This has not been published as it is a desktop study carried out by through the various online tools available to LGA's and the general public.³⁹

During a meeting with this Office, the Shire advised it has not consulted with Traditional Owners in relation to the proposed clearing on the basis that no registered Aboriginal sites of significance are present within the broader 2.8 ha footprint. In any event, it is the Shire's responsibility to ensure that no such sites are damaged during proposed clearing activities; consent is required to disturb a site under section 18 of the *Aboriginal Heritage Act 1972*.

None of the 24 trees proposed to be cleared are listed in the independent *National Register of Big Trees*⁴⁰, the National Trust of Australia's *Significant Tree Register*⁴¹, or the Department of Planning, Lands and Heritage's *State Register of Heritage Places*⁴².

Climate change

The decision report indicates that DWER had regard to climate change:

While the Department acknowledges that the clearing of native vegetation contributes to climate change, it is not considered reasonable to attribute a particular climate change impact to this particular proposal. The Department encourages permit holders to seek opportunities to avoid and minimise the impacts of clearing where possible ...⁴³

In response to this element of the appeal, DWER advised that:

The State Government published the Western Australian Climate Policy in November 2020, which considers the impacts of clearing on climate change and opportunities to sequester carbon. In May 2022 the State Government also published the *Native vegetation policy for Western Australia*. The policy guides State Government agencies to work together to explore how to define, measure and achieve net gain in native vegetation at the landscape-scale, and to set up the right policy settings to encourage stakeholders to conserve and restore native vegetation (for example, through a mix of regulation, funding and economic incentives, services or information). Importantly, the policy does not introduce net gain as a required outcome of individual proposals, but rather as a goal at the landscape-scale.⁴⁴

While we note that climate change is not expressly identified in the Guide to Assessment, we consider that climate change is a key consideration for decision-making under the EP Act, and as such, it is within the scope of an 'other matter' (by section 51O of the EP Act).

This is supported by the *Native vegetation policy for Western Australia* (Native Vegetation Policy) which identifies the risk posed by climate change:

In some areas, [remaining native vegetation] is rare, significant and fragmented, and under threat from climate change, bushfires and invasive species. Cumulative impacts are leading to increasingly protracted regulatory assessments.⁴⁵

³⁹ Shire of Manjimup response to Appeal 045/22 (16/01/23), page 1.

⁴⁰ McIntosh, D. (undated); <http://nationalregisterofbigtrees.com.au/pages/home-page>

⁴¹ <https://www.nationaltrust.org.au/services/significant-tree-register/>

⁴² <https://www.wa.gov.au/government/document-collections/the-state-register-and-other-heritage-listings>

⁴³ Department of Water and Environmental Regulation (2022), decision report, section 3.3 page 8.

⁴⁴ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 3.

⁴⁵ Government of Western Australia (2022) *Native vegetation policy for Western Australia*. Department of Water and Environmental Regulation, May 2022. Page 10.

The Native Vegetation Policy also provides that regional planning processes should consider climate change as a primary consideration in developing regionally tailored objectives and priorities, including:

... managing threats to improve the condition and resilience of remnant vegetation (e.g. climate change, invasive species, inappropriate fire regimes, inappropriate water regimes and quality, unsustainable use)⁴⁶

We are therefore of the view that there may be cases where climate change predictions/risks are relevant to decisions on clearing applications. For example, if proposed clearing involves removal of habitat of a species of fauna that is seen as more susceptible to climate change impacts, that information may be relevant to whether or not the permit should be granted.

We note that in this case the application area contains karri and marri vegetation in 'Very Good' to 'Good' condition, is within a local area that retains about 69 per cent remnant vegetation cover, and is, in part, adjacent to a conservation area. While the vegetation contains suitable habitat for conservation significant fauna and flora, it is not of a type in itself that is identified as being rare or under particular threat from climate related impacts.

2.3 Should the clearing permit have been granted, and if so, are the conditions appropriate to manage impacts?

Purpose of clearing is necessary and is for a public benefit

In relation to its claim that 'trees feature prominently as impacted hazards in run-off road crashes and account for a large proportion of fatalities', the Shire advised that:

[There were] 167 recorded crashes on Shire maintained roads for the current 5-year period ending 2019. Run Off Road crashes are the most common crash, making up 47% of all crashes in the Shire of Manjimup. In the South West, 42% of all vehicle crashes resulting in 'Killed or Seriously Injured' were Run Off Road crash types. This data is provided ... by the States RoadWise Program. Since 2017, no crashes were recorded for Old Vasse Rd.⁴⁷

DWER advised that the purpose of the proposed clearing (to upgrade Old Vasse Road as part of the RAV network) was a relevant matter in determining the application. DWER acknowledged the appellant's view that there have been no recent vehicle crash fatalities on Old Vasse Road, however advised that:

Nonetheless, Old Vasse Road is a component of the RAV network, and the [Shire] has submitted that the road in its current form does not allow RAV vehicles to navigate horizontal curves without encroaching onto the opposite side of the road, which is a safety concern. The Department considers it is the responsibility of the road manager (the [Shire]) to ensure conformance with all relevant aspects of road construction and maintenance guidance and standards within its jurisdiction.⁴⁸

DWER also acknowledged that despite the Shire's claim, the 'clearing of all roadside vegetation is not required', and that the modified the road design avoids 11 trees.⁴⁹

The Guide to Assessment prioritises clearing for public use:

In determining the necessity of the clearing higher priority will be given to clearing for public use than private benefit or commercial gain.⁵⁰

⁴⁶ Government of Western Australia (2022), page 15.

⁴⁷ Shire of Manjimup response to Appeal 045/22 (16/01/23), page 1.

⁴⁸ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Pages 4 and 5.

⁴⁹ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 5.

⁵⁰ Department of Environment Regulation (2014), page 40.

On the available information, we accept that the proposed clearing will have a public benefit through improved road safety, and consider that DWER’s decision to grant the clearing permit was justified based on the necessity of the works in this regard. We also note that the extent of clearing allowed (including the 24 trees) is limited by the clearing permit.

Impacts of proposed clearing can be managed by permit conditions

DWER applied conditions on the clearing permit to address the identified impacts likely to result from the proposed clearing (Table 2).

Table 2 Management of identified impacts

Identified impact	Clearing permit condition
Clearing activities generally.	Condition 5 ‘Avoid, minimise, and reduce impacts and extent of clearing’.
Clearing principle (b): proposed clearing will impact on suitable habitat for black cockatoos and western ringtail possums, and constitutes a significant residual impact in this regard.	Condition 4 ‘Clearing not authorised’: clearing of trees limited to 24 specified trees. Condition 7 ‘Directional clearing’: for fauna. Condition 9 ‘Offset – Lot 13916 on Deposited Plan 38045’: counterbalance loss of habitat.
Clearing principle (f): application area traverses two minor non-perennial watercourses and associated vegetation, which may include suitable habitat for threatened flora.	Condition 8 ‘Vegetation management – watercourse or wetland’: clearing of riparian vegetation not allowed.
Clearing principle (h): proposed clearing presents a risk to an adjacent conservation area from spread of weeds and dieback.	Condition 6 ‘Weed and dieback management’.

As noted earlier, the decision report states that DWER ‘encourages permit holders to seek opportunities to avoid and minimise the impacts of clearing where possible’.⁵¹ This is reflected in condition 5; we consider this sends a clear message that, while the clearing permit authorises the clearing of up to 0.45 ha of native vegetation, further opportunities to avoid, minimise and reduce the impacts of the proposed clearing must be considered.

Further, condition 10 (‘Records that must be kept’) on the clearing permit requires the Shire to maintain records for specified activities conducted in accordance with the clearing permit. Condition 11 (‘Reporting’) on the clearing permit requires the Shire to provide these records to DWER on request. The records that must be kept include:

- the species composition, structure, and density of the vegetation within cleared area
- the location, date, size and direction of clearing
- actions taken to avoid, minimise, and reduce the impacts and extent of clearing
- actions taken to minimise the risk of the introduction and spread of weeds and dieback
- actions taken to avoid clearing riparian vegetation
- actions taken to give effect to the offset requirement.

We consider that through proper implementation of the clearing permit conditions, the impacts of the proposed clearing can be minimised, managed and counterbalanced so that clearing activities do not lead to unacceptable risks to identified environmental values.

⁵¹ Department of Water and Environmental Regulation (2022), decision report, section 3.3 page 8.

DWER responsible for determining compliance with clearing permit

We acknowledge the appellant's concern about the Shire's compliance with the clearing permit, and in particular the monitoring of clearing activities by DWER.

'Clearing' is defined to mean the killing or destruction of, the removal of, the severing or ringbarking of trunks of stems of, or the doing of any other substantial damage to, some or all of the native vegetation in an area, and includes draining or flooding of land, or grazing of stock, or other any act or activity that causes this.⁵²

'Unlawful clearing' is defined to mean anything constituting a contravention of section 51C or 51J of the EP Act.⁵³ Relevant to this:

- section 51C provides that a person who causes or allows clearing commits an offence unless the clearing: is done in accordance with a clearing permit; is of a kind set out in Schedule 6 of the EP Act; is of a kind prescribed in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations) and is not done in an environmentally sensitive area; or is done following receipt of a written notice from the Chief Executive Officer of DWER (CEO) advising that a clearing permit is not required
- section 51J provides that a permit holder who contravenes a condition (including an environmental undertaking) to which the clearing permit is subject commits an offence.

The clearing permit in this case contains conditions requiring the Shire to maintain records on clearing activities conducted under the permit, and to provide these records to DWER on request. In its appeal response, DWER noted that in addition to these requirements:

... [U]nder section 89 of the EP Act, the Department may inspect the clearing site at any given time to ensure compliance with the Permit conditions. Should the [Shire] contravene these conditions, in accordance with section 51J of the EP Act, the Chief Executive Officer has the power to revoke or suspend the clearing permit and/or take other appropriate compliance actions as provided for by the EP Act.

Compliance with clearing permits is managed through the Department's *Compliance and Enforcement Policy*. Such measures allow the Department to determine compliance with the permit conditions and take appropriate action should non-compliance be identified.⁵⁴

The Shire advised that in its experience:

... DWER do carefully monitor vegetation clearing works and the permit conditions usually require stringent reporting of the works be kept and or presented to [DWER's] CEO.⁵⁵

By the above, any clearing conducted that is contrary to the provisions in section 51C of the EP Act, or in contravention of any clearing permit conditions, would likely be unlawful. DWER is responsible for determining compliance with, and enforcing the provisions of, the EP Act and instruments authorising activities under it (including the clearing permit under appeal).⁵⁶

⁵² EP Act, section 51A.

⁵³ EP Act, section 70(1). Also: 'anything constituting a contravention of an environmental protection covenant'.

⁵⁴ Department of Water and Environmental Regulation response to Appeal 045-22 (09/02/23). Page 6.

⁵⁵ Shire of Manjimup response to Appeal 045/22 (16/01/23), page 1.

⁵⁶ Suspected unlawful clearing can be reported to DWER for investigation via this link:

<https://www.wa.gov.au/service/environment/environment-information-services/unlawful-clearing-of-native-vegetation>

2.4 Other matters

Local community opposed to clearing

The appellant submitted that the local community values the intact roadside vegetation along this road, and has been unanimously opposed to any proposed clearing for over 20 years.

The decision report notes that this matter was also raised in public submissions received by DWER in relation to the application, and sets out DWER's response as follows:

We acknowledge the submitter's comments, however this is beyond the scope of this assessment. It is encouraged to continue to liaise with the applicant on this matter.

The department continues to liaise with applicants to ensure appropriate avoidance and mitigation measures are undertaken by applicants to minimise the clearing of roadside trees.⁵⁷

Consulting engineer's report

The appellant questioned why the Shire has not made publicly available a taxpayer-funded consulting engineer's report relating to the clearing and construction methodology for the proposed road upgrades to Old Vasse Road.

In response to this matter, the Shire advised:

The report referred to ... is a technical document that the Shire used in order to apply for funding from MRWA for the road upgrade project. The report does not detail any construction methods or vegetation clearing requirements. The report does identify a number of intersection and road geometry issues that must be upgraded in order to make the road compliant with the mixed vehicle types that are authorised to use the road. The Shire does [not] intend to release this document to any particular community member or group as it has no direct relation to how works are carried out other than the type of upgrade work required and the location. The findings of this report have been determined from site and desktop investigations. The scope of the report includes:

- Providing background information on Old Vasse Road, including:
 - Traffic Data from 2020; and
 - Crash History Data from last 5 years.
- Road Safety Inspection at the following intersections (provided as an attachment):
 - Old Vasse Road / Vasse Highway;
 - Old Vasse Road / Hawke Road; and
 - Old Vasse Road / Pemberton Northcliffe Road.
- Evaluate the road design and connecting intersections;
- Evaluate the waterways and drainage;
- Identify potential roadside obstructions;
- Provide a signage review; and
- Provide key recommendations for improvement and a priority works list.⁵⁸

⁵⁷ Department of Water and Environmental Regulation (2022), decision report, Appendix B, page 12.

⁵⁸ Shire of Manjimup response to Appeal 045/22 (16/01/23), page 1.

3 Supporting information

3.1 DWER's assessment of the clearing application

In May 2022, the Shire applied to DWER for a 'purpose' permit under section 51E of the EP Act to clear 0.45 ha of native vegetation within a broader 2.8 ha footprint within the Old Vasse Road reserve for the purpose of road construction and hazard reduction.⁵⁹

The application was advertised for public comment for 21 days on 26 May 2022. Four public submissions were received, raising concerns around the validity of the application, the road design, the necessity and extent of the proposed clearing, impacts on environmental values (fauna, Warren National Park, potential erosion, 'Flora Road' status), climate change, impacts on tourism, visual amenity and social value, appeals against Clearing Permit CPS 9333/1, and consultation between the Shire of Manjimup and the local community (discussed in Appendix B of the decision report).

DWER assessed the clearing application against the 10 clearing principles set out in Schedule 5 of the EP Act. DWER's assessment found the proposed clearing 'is at variance' with clearing principles (a), (b), (h) and (f), and 'is not likely to be at variance' with clearing principles (c), (d), (e), (g), (i) and (j).

DWER also had regard for the site characteristics, relevant datasets, representative photographs of native vegetation within the application area, a Habitat Tree Assessment⁶⁰, relevant planning and other matters, and the purpose of the proposed clearing to improve public safety by upgrading a public road.

After consideration of the application and the avoidance and mitigation measures proposed by the Shire, DWER determined that the impacts of the proposed clearing can be managed so that it is unlikely to lead to an unacceptable risk to environmental values.

Clearing Permit CPS 9742/1 was granted on 21 December 2022, authorising the clearing of up to 0.45 ha of native vegetation within the broader 2.8 ha footprint applied for, subject to conditions. These requirements include a limit on the number of trees cleared, avoiding and minimising extent and impacts of clearing, weed and dieback management, directional clearing for the benefit of fauna, prohibition on clearing of riparian vegetation, an offset, and keeping records of clearing activities and providing these to DWER on request.

The decision to grant the clearing permit was published on DWER's website.

⁵⁹ Shire of Manjimup application for a clearing permit (18/05/2022). Also from DWER's Clearing Permit System (CPS) online database: <https://cps.dwer.wa.gov.au/main.html>

⁶⁰ Harewood, G. (2022).

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 clearing permits, the Minister can overturn the original decision to grant the clearing permit if this was the basis of the original appeal submission. Alternatively, if the appeal submission was against the conditions of the clearing permit, the Minister may modify the conditions only.

The appeal investigation will consider the extent to which conditions can address the issues raised, as well as any new information that may not have been available at the time of the original decision.

While process issues can be raised in an appeal, the focus of investigations will be on the substantive environmental matters relevant to DWER's conditions.

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 106(1)).

To properly advise the Minister in our report, our investigation included:

- reviewing DWER's decision report and response to the appeal
- meetings with the appellant (24 February 2023) and the Shire (8 March 2023)
- reviewing other information, policy and guidance as needed (Table 3).

Table 3 Documents we reviewed in the appeals investigation

Document	Date
Shire of Manjimup emails dated 13 March 2023: clarification of table drains and tree coordinates	13 March 2023
Department of Water and Environmental Regulation response to Appeal 045/22 (09/02/23).	9 February 2023
Shire of Manjimup response to Appeal 045/22 (16/01/23).	16 January 2023
Western Australian Herbarium (1998-). <i>Florabase – the Western Australian Flora</i> . Department of Biodiversity, Conservation and Attractions. Available from: https://florabase.dpaw.wa.gov.au/	Accessed January 2023
Appeal submission (24/12/22)	24 December 2022
Department of Water and Environmental Regulation (2022) <i>Clearing Permit granted under section 51E of the Environmental Protection Act 1986: Purpose Permit Number CPS 9742/1 and Decision Report</i> . 21 December 2022. Available from: https://ftp.dwer.wa.gov.au/permit/9742/	21 December 2022
Harewood, G. (2022) <i>Habitat Tree Assessment, Old Vasse Road, CPS 9742/1, Shire of Manjimup</i> . Version 1, October 2022. Report prepared for the Shire of Manjimup. Available from: https://ftp.dwer.wa.gov.au/permit/9742/	October 2022

Document	Date
<i>Biodiversity Conservation (Listing of Native Species) (Fauna)/(Flora) Order 2022</i> . Made under the <i>Biodiversity Conservation Act 2016</i> . Government Gazette 144 of 2022, 30 September 2022. Available from: https://www.legislation.wa.gov.au/legislation/statutes.nsf/gazettes2022.html	30 September 2022
Government of Western Australia (2022) <i>Native vegetation policy for Western Australia</i> . Department of Water and Environmental Regulation, May 2022. Available from: https://www.wa.gov.au/service/environment/environment-information-services/native-vegetation-policy-western-australia	May 2022
Main Roads Western Australia (2022) <i>Standard Restricted Access Vehicle Route Assessment Guidelines</i> . May 2022. Government of Western Australia. Available from: https://www.mainroads.wa.gov.au/heavy-vehicles/access-requirements-in-wa	May 2022 (as revised)
Shire of Manjimup application for a clearing permit (18/05/2022).	18 May 2022
Department of Planning, Lands and Heritage (2022) <i>Shire of Manjimup Local Planning Scheme No. 4</i> . 22 March 2022 (as amended). Available from: https://www.wa.gov.au/government/document-collections/shire-of-manjimup-planning-information	22 March 2022
IUCN Red List – Baudin’s cockatoo listing (last assessed 16 November 2021). Available from: https://www.iucnredlist.org/species/22684727/210840935	16 November 2021
Government of Western Australia (2020) <i>Western Australian Climate Policy</i> . Department of Water and Environmental Regulation, November 2020. Available from: https://www.wa.gov.au/service/environment/environment-information-services/western-australian-climate-change-policy	November 2020
Department of Biodiversity, Conservation and Attractions (2019) <i>Karri Forest Explorer</i> . Visitor guide, December 2019. Available from: https://exploreparks.dbca.wa.gov.au/site/karri-forest-explorer	December 2019
Shire of Manjimup (2016) <i>Local Planning Policy 6.1.19 Managing the Natural Environment</i> . 21 December 2016. Available from: https://www.manjimup.wa.gov.au/our-documents/policies/planning	December 2016
South West Development Commission and Regional Development Australia – South West (2014) <i>South West Regional Blueprint</i> . December 2014. Australian Government. Available from: https://www.busselton.wa.gov.au/documents/1717/south-west-regional-blueprint-2014	December 2014
Department of Environment Regulation (2014) <i>A guide to the assessment of applications to clear native vegetation under Part V Division 2 of the Environmental Protection Act 1986</i> . December 2014. Available from: https://www.der.wa.gov.au/our-work/clearing-permits/48-guidelines-clearing-permits	December 2014
Western Australian Planning Commission (2003) <i>Shire of Manjimup Local Planning Strategy</i> . August 2003. Available from: https://www.wa.gov.au/government/document-collections/shire-of-manjimup-planning-information	August 2003
Hoffman, N. and Brown, A. (1992) <i>Orchids of South-west Australia</i> . Revised 2nd edition with supplement. University of Western Australia Press, Nedlands	1992