



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL IN OBJECTION TO THE REQUIREMENTS OF VEGETATION
CONSERVATION NOTICE CPS 8153/1**

**CLEARING OF NATIVE VEGETATION ON
LOT 236 ON DEPOSITED PLAN 33373, LAKE CLIFTON**

APPELLANTS: L DE LAAT AND J AMBROSE

Appeal Number 002 of 2019

March 2019

Appeal Summary

This report relates to an appeal against the requirements of a Vegetation Conservation Notice (VCN) issued by the Department of Water and Environmental Regulation (DWER) in regard to the suspected unlawful clearing of native vegetation at a property located in Lake Clifton.

The VCN requires that the appellants undertake a number of specified measures, for a period of ten years from the date of the VCN, to re-establish and maintain vegetation on the area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred.

The appellants acknowledged that the clearing was unlawful and submitted they did not know that a clearing permit was required. The appellants contended that their intent was to clear 'prickle bush' that had regrown after the 2011 Lake Clifton fire, to reduce the fire hazard. In response, DWER advised that the clearing was not of an exempt kind as per the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* or Schedule 6 of the *Environmental Protection Act 1986*, and that the clearing was unlawful.

In regard to the requirements of the VCN, the appellants contended that the specified measures are too stringent and were unreasonable, and sought for the requirements to be amended. In response, DWER advised that the requirements of the VCN were directed towards allowing the area cleared to regenerate to its previous condition.

Having regard to the information presented in relation to this appeal and noting DWER's advice that the requirements of the VCN are necessary to repair the damage caused by the clearing, it is considered that the requirements are reasonable in the circumstances.

Recommendation

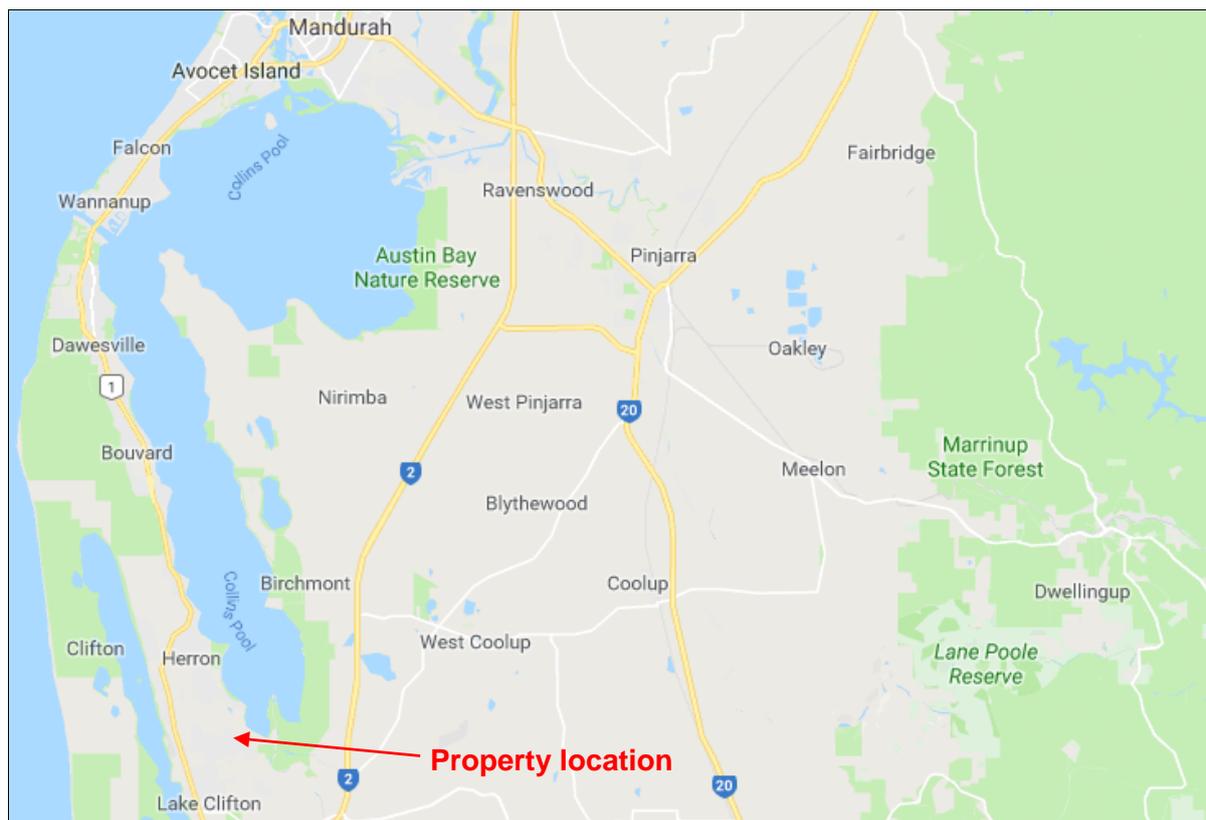
It is recommended that the appeal be dismissed.

INTRODUCTION

This is a report on an appeal lodged by Ms Lisa de Laat and Ms Julie Ambrose (the appellants) in objection to the requirements of the vegetation conservation notice CPS 8153/1 (VCN) given by the Department of Water and Environmental Regulation (DWER) in respect to the suspected unlawful clearing of native vegetation at the appellants' property in Lake Clifton.

The land the subject of this appeal is Lot 236 on Deposited Plan 33373, Lake Clifton in the Shire of Waroona (the property) (see Figure 1).

Figure 1 – Location of the property



(Source: Google Maps 2018)

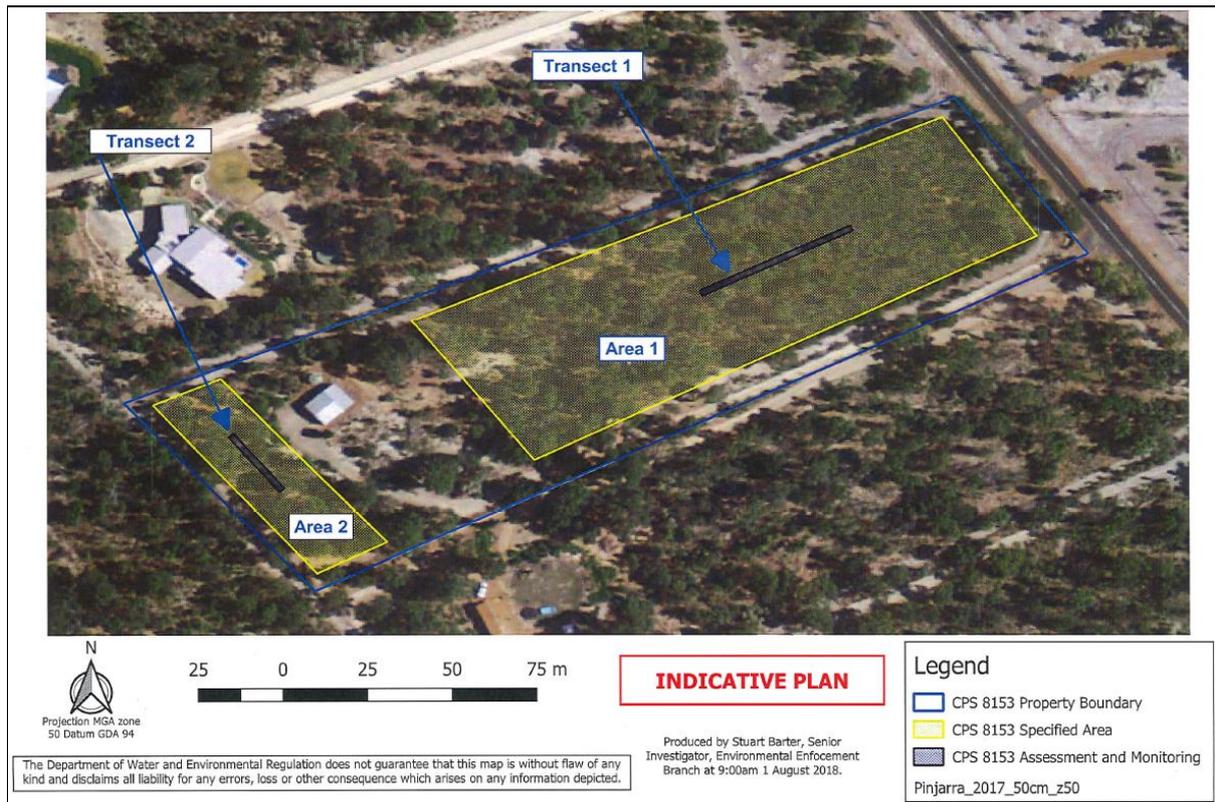
In response to the appeal, DWER provided the following background information¹.

On 24 June 2018, DWER received a complaint from a member of the public alleging that the majority of native vegetation across the property had been cleared.

On 23 July 2018, a DWER investigating officer made contact with one of the owners, Ms de Laat, who stated that in 2011 the property and surrounding properties, were burnt by an intense bush fire, and that since the fire regrowth vegetation had consisted predominately of a 'prickle bush' that was so dense that she was unable to walk into the middle of the property. DWER advised that Ms de Laat was of the belief the dense vegetation created an unacceptably high fire hazard risk, and sought to reduce this risk by organising the clearing of the property through a local contractor. Ms de Laat also advised that her mobility was not very good due to a hip replacement and back surgery and her intention was to improve access throughout the property in the event of another bush fire.

¹ DWER, *Response to the Appeal*, 14 February 2019, pages 1 and 2.

Figure 2 – Property layout and Specified Area under VCN CPS 8153/1



(Source: DWER VCN CPS 8153/1 2018)

On 24 July 2018, DWER inspected the property and confirmed that the front third of the property had been predominately cleared and the remainder of the property was parkland cleared. DWER noted the area to the west of the building at the back of the property was impacted but remaining trees provided denser coverage, and there were at least 11 large piles of cleared vegetation across the property. DWER advised that the piles consisted predominately of: banksia, eucalyptus, allocasuarina and acacia species and contained larger vegetation types (banksia and eucalyptus trees), which was not consistent with the owners' explanation that the vegetation cleared was predominately a prickly bush that took over the property after the 2011 fire.

DWER advised that the matter was followed up with Ms de Laat at the time of the site inspection, and she stated that the larger cleared trees had come from the area within the building envelope. Ms de Laat also confirmed that no development approval had been obtained for building within the building envelope. Given this, DWER advised that an exemption for 'Clearing to construct a building' in accordance with regulation 5 item 1 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations) did not apply in this instance.

On 18 December 2018, DWER served Vegetation Conservation Notice CPS 8153/1 (the VCN) on the appellants, on the basis that a delegate of the CEO of DWER suspected that clearing of native vegetation had taken place on the property, and that the clearing was not authorised.

In summary, the VCN requires that the appellants undertake a number of specified measures, for a period of ten years from the date of the VCN, to re-establish and maintain vegetation on the area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred.

The specified measures include:

- no unlawful clearing;
- assessment of the success of natural regeneration in September or October 2019;
- if within three months of this assessment evidence is not submitted to the satisfaction of the CEO of DWER that natural regeneration has occurred, revegetation measures will need to be complied with;
- no unauthorised cultivation;
- exclusion of livestock;
- weed control;
- biennial monitoring by an environmental specialist; and
- record keeping and reporting requirements.

It is against these requirements of the VCN that the appeal was lodged.

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 matters raised in the appeal.

During the appeal investigation, the Office of the Appeals Convenor undertook a site visit with the appellants and DWER officers, and then met separately with the appellants to discuss the appeal process and the issues raised in the appeal.

The environmental appeals process is a merits based process. Appeal rights in relation to a VCN are against the requirements of the VCN, that is, whether the requirements of the VCN are adequate or appropriate. In determining the relevance of an appeal lodged in objection to the requirements of a VCN, the Appeals Convenor normally considers whether the Minister is able to form a reasonable suspicion that unlawful clearing has taken place, and if so whether the requirements of the VCN are appropriate, having regard to the matters raised in the appeal, the objects of the EP Act and the operation of section 70 specifically.

OUTCOME SOUGHT BY APPELLANTS

The appellants sought for the VCN to be removed, and in the alternative, for the requirements to be amended.

GROUNDINGS OF APPEAL

The appeal raises a number of issues in objection to DWER's decision to issue the VCN and the requirements of the VCN, which have been summarised under the following grounds:

1. clearing of regrowth after 2011 bush fire; and
2. the requirements of the VCN are unreasonable.

GROUND 1: CLEARING OF REGROWTH AFTER 2011 BUSH FIRE

The appellants advised that the property was burnt out during the 2011 Lake Clifton fire, with the loss of a water tank and fences. The appellants acknowledged that the clearing was unlawful and submitted they did not know that a clearing permit was required. The appellants contended that their intent was to clear 'prickle bush' that had regrown after the fire to reduce the fire hazard. The appellants asserted that regrowth was prolific after the fire and was encroaching firebreaks, the building envelope and existing infrastructure on the property, and that it was impossible to walk through Areas 1 and 2 specified in the VCN (see Figure 2).

One of the appellants also submitted that she had undergone major surgery and experienced poor health, which rendered her unable to manage weeds and regrowth on the property after the fire.

Consideration

This ground of appeal broadly relates to whether or not a valid exemption applied to the clearing.

In its response to the appeal, DWER advised that at the site visit with the appellants and representatives of the Office of the Appeals Convenor, the appellants pointed out a shrub that they identified as the 'prickle bush' that had taken over the property following the 2011 bush fire. DWER also advised that a photograph of this plant was taken and later reviewed by a qualified botanist from DWER, who advised that the plant was likely to be *Daviesia divaricate*, which is native to the area, however examination of a plant specimen would be required for confirmation. DWER further advised that the plant did not resemble any introduced flora and was therefore native vegetation as defined under the EP Act.

DWER noted that aerial imagery from 2011 confirmed that the property was impacted severely by fire as described by the appellants. DWER advised that pioneer flora species often return quickly and dominate an area after fire, and therefore, it is possible that the property had been dominated by the prickle bush. DWER noted however, that evidence obtained during the site inspection indicated that larger native vegetation had also been cleared, including banksia, allocasuarina, eucalyptus and corymbia species.

Section 51C of the EP Act provides that it is an offence to clear native vegetation unless the clearing was undertaken in accordance with a clearing permit or was of an exempt kind as per the Clearing Regulations or Schedule 6 of the EP Act.

DWER advised that exemption for the purpose of fire hazard reduction under regulation 5 item 3 'Clearing for fire hazard reduction' of the Clearing Regulations does not authorise clearing through mechanical means.

Regulation 5, item 3 provides that the owner of the land is exempted for:

Clearing that is fire hazard reduction burning if the clearing is —

- (a) to occur outside the prohibited or restricted burning times declared under the *Bush Fires Act 1954* for the zone in which the clearing is to take place; and
- (b) done in such a way as to minimise long term damage to the environmental values of the vegetation.

As to whether any other exemptions apply to the clearing, DWER advised that it reviewed the exemptions under Schedule 6 of the EP Act and regulation 5 of the Clearing Regulations and determined that the clearing observed was not authorised by any exemption.

Conclusion

Having regard to the above, it is considered that the clearing of native vegetation on the appellants' property was not of an exempt kind, and that there was a reasonable basis to suspect that unlawful clearing had taken place.

GROUND 2: REQUIREMENTS OF THE VCN UNREASONABLE

In summary, the appellants submitted that the requirements of the VCN are too stringent and were unreasonable, and sought for the requirements to be amended.

The appellants contended that the native vegetation that was cleared had started to regenerate and as a result, the native vegetation would return to a natural condition in three to four years. The appellants advised that they intended to replant native plants to facilitate bush regeneration, including banksia which had not regenerated after the fire.

Consideration

This ground of appeal concerns the reasonableness of the requirements applied to the VCN by DWER.

Section 70(4)(b) of the EP Act provides that a VCN can require specified measures that the CEO considers necessary for purposes which include repairing damage caused by the clearing, and re-establishing and maintaining vegetation, to a condition existing before the clearing occurred.

Consistent with the above, DWER advised that the purpose of the VCN is to re-establish and maintain vegetation on the area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred.

In its advice, DWER acknowledged that this may occur through 'natural regeneration' and that this had been factored into the requirements of the VCN: for example, requirement 2 (Assessment of natural regeneration) requires the assessment of the success of natural regeneration in September or October 2019, and that if within three months of the assessment, evidence is not submitted to the satisfaction of DWER that natural regeneration has occurred then specified revegetation measures will have to be complied with.

The VCN provides the following definitions (among others):

natural regeneration means that *revegetation* has or will be achieved by or within 10 years from the giving of this vegetation conservation notice without human intervention other than weed control.

revegetate, revegetated and revegetation means the re-establishment of a cover of native vegetation in an area such that the species composition, structure, density and *vegetation condition* is similar to pre-clearing vegetation in that area, and can involve natural regeneration, direct seeding and/or planting.

DWER advised that requirements 2 and 3 (Revegetation) provide sufficient time (over 12 months since the initial clearing) to determine the success (or not) of natural regeneration within the specified area, and therefore, whether the purpose of the VCN can be achieved through natural regeneration. DWER noted that if this is the case, then the revegetation measures will not have to be undertaken. However, if natural regeneration within the specified area is not successful, as determined through the monitoring required under requirement 2, then the revegetation measures will apply.

DWER advised that under requirement 4 (Success of revegetation), replanting etc of vegetation is only required until, in the opinion of the CEO, revegetation has been achieved.

During the site visit, representatives from DWER indicated that the requirements of the VCN would be maintained until satisfactory regeneration of the native vegetation is achieved, and if it is, then continued operation of the VCN could be reviewed.

DWER also advised that the requirements to prohibit cultivation (requirement 5), exclude livestock (requirement 6), and control weeds (requirement 7) will provide a higher likelihood of natural regeneration occurring.

It is noted that requirement 9 (Records must be kept) and requirement 10 (Reporting) require the owner to keep records and report to DWER on whether the requirements of the VCN have or have not been completed appropriately.

Having regard to the foregoing, it is considered that the current ten year period on the VCN is adequate to ensure the objective of the VCN is met and is therefore appropriate. It is noted that should the appellants be able to demonstrate that the objective of the VCN has been achieved prior to the end of the ten year period, they may apply to DWER to have the VCN revoked or requirements amended under sections 65(4) and 70(8) of the EP Act.

Conclusion

Taking the above information into account, it is considered that the requirements of the VCN are reasonable and appropriate.

RECOMMENDATION

For the reasons stated in this report, it is considered that there is a reasonable basis to suspect unlawful clearing had occurred on the property and that the clearing was not of an exempt kind. It is also considered that the requirements of the VCN are reasonable, and it is therefore recommended that the appeal be dismissed.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Michael Power, Senior Appeals Officer