



Appeals Convenor
Environmental Protection Act 1986

**REPORT TO THE
MINISTER FOR ENVIRONMENT**

**APPEAL IN OBJECTION TO THE REQUIREMENTS OF A VEGETATION
CONSERVATION NOTICE**

VCN CPS 8611/1, VARIOUS LOTS, CALINGIRI

APPELLANT: GARY MCGILL

Appeal Number 14 of 2020

July 2020

Appeal Summary

This report relates to an appeal lodged against the requirements of a Vegetation Conservation Notice (VCN) given to Mr Gary McGill (the appellant) by the Department of Water and Environmental Regulation (DWER) in respect to the suspected unlawful clearing of 6.2 hectares of native vegetation on Lot 21 on Plan 22279, Calingiri.

The VCN was applied to the Certificates of Title of 13 lots owned by the appellant and requires the revegetation of an equivalent contiguous area on Lot 2631 on Deposited Plan 139596, Calingiri, a property located north of the cleared area.

The appeal seeks the following amendments to the VCN:

- that the date by which initial revegetation is required to be completed is extended by 12 months to 31 October 2021
- that the VCN only be registered on the Certificate of Title of the lot where revegetation is required

The amendments are sought on the grounds that the original requirements are unreasonable and impose unachievable or unnecessary time and financial burdens on the appellant.

During the appeal investigation an alternative revegetation proposal was put forward by the appellant whereby the revegetation of an equivalent area was proposed for Lot 21, near where the clearing had occurred. The appellant submitted that the alternate area is more conducive to native vegetation establishment and that if approved the VCN should then only apply to Lot 21.

After considering the grounds of appeal, the alternate revegetation proposal presented by the appellant (including observations from a site visit), and DWER's response to the appeal, the appeal investigation found:

- it is reasonable, based on required lead times, to defer the date by which initial revegetation is required by 12 months;
- based on the available information, the alternate revegetation proposal is likely to result in a better revegetation outcome than if undertaken on Lot 2631; and
- if the revegetation is undertaken on Lot 21, it is reasonable to only apply the VCN to the Certificate of Title of that lot.

Recommendation

It is recommended that the appeal be upheld in full, that is:

- the VCN should be amended to require initial revegetation under measure 4(c) to be completed by 31 October 2021;
- the VCN should be amended to require revegetation on Lot 21; and
- the VCN should be removed from the Certificates of Title of the other 12 lots.

INTRODUCTION

This is a report on an appeal lodged by Mr Gary McGill (the appellant) in objection to the requirements of a vegetation conservation notice (VCN) given to him by the Department of Water and Environmental Regulation (DWER) in respect to the suspected unlawful clearing of native vegetation.

The land the subject of the suspected unlawful clearing is Lot 21 on Plan 22279, Calingiri, owned by the appellant. In 2019 DWER identified that 6.2 hectares of native vegetation had been cleared on Lot 21 in February 2018. In February 2020 VCN CPS 8611/1 was given to the appellant requiring the revegetation of an equivalent area.

BACKGROUND

Prior to giving the VCN, DWER took into account submissions received from the appellant. The submissions included a request to move the proposed revegetation requirement from the cleared area to an alternate property. Ultimately DWER gave a VCN requiring the revegetation of an equivalent contiguous area on Lot 2631 on Deposited Plan 139596, Calingiri, a property located north of the cleared area.

The VCN was applied to the Certificates of Title of 13 lots owned by the appellant. The location of the 13 lots, including the location of the suspected unlawful clearing and the lot where the revegetation is required is shown in Figure 1.

Figure 1 – Lots subject to the VCN (blue outline) including the location of suspected unlawful clearing (yellow) and the lot where revegetation is required (green)



(Source: VCN CPS 8611/1)

OVERVIEW OF APPEAL PROCESS

In accordance with the *Environmental Protection Act 1986* (EP Act), two reports relating to the matters raised on appeal are required to inform the Minister for Environment prior to the Minister determining the appeal outcome:

- a report from the Appeals Convenor, as required by section 109(3) of the EP Act
- a report from the decision-making authority of the decision under appeal (i.e. from DWER), as required by section 106(1).

This document is the Appeals Convenor's report to the Minister.

In order to properly advise the Minister, the Appeals Convenor conducted an investigation which included:

- review of and regard for the matters raised in the appeal
- review of and regard for the report from DWER provided under section 106 of the EP Act
- an on site meeting with the appellant in July 2020
- review of and regard for supporting information provided by the appellant
- review of other information, policy and guidance as considered necessary.

The environmental appeals process is a merits-based process. Appeal rights in relation to VCNs are against the requirements of the VCN, that is, whether the requirements are adequate or appropriate.

OUTCOME SOUGHT BY APPELLANT

The appeal as submitted seeks the following amendments to the VCN:

- that the date by which initial revegetation is required to be completed is extended by 12 months to 31 October 2021
- that the VCN only be registered on the Certificate of Title of the lot where revegetation is required (i.e. Lot 2631)

GROUNDINGS OF APPEAL

GROUND 1: REVEGETATION SCHEDULE

The appellant submitted that measure 4(c) of the VCN, which requires initial revegetation to be completed by 31 October 2020, is likely to be difficult if not impossible to comply with. The appellant submitted a number of reasons for this including that time is required to research and source plants and seeds, and that time is also required to engage a consultant to advise/assist.

Consideration

The VCN was given to the appellant on 28 February 2020 and was appealed on 20 March 2020. In April 2020 the appellant provided additional information from a nursery to support the assertion that additional time is required to source seedlings:

Native seedlings take 7-9 months to establish in the nursery to allow for germination, growing and hardening off ready for planting. We start seeding in November with planting taking place in the winter months of June/July the following year.¹

¹ Additional information received from the appellant, 16 April 2020.

In response to this appeal ground, DWER advised that the concerns raised by the appellant are reasonable and applicable. DWER recommended that the VCN be amended to require initial revegetation under measure 4(c) to be completed by 31 October 2021, as requested by the appellant.²

Conclusion

It is accepted that the appellant's concerns are reasonable and it is considered appropriate that the VCN be amended as recommended by DWER.

GROUND 2: LOTS SUBJECT TO THE VCN

By this ground of appeal it was submitted that registration of the VCN on the Certificates of Title of 13 lots rather than just Lot 2631 is disproportionate, unreasonable and unnecessary. The appellant submitted that this is likely to have serious adverse financial and commercial effects including impacts to the ability of the appellant to sell or lease any of the lots.

Consideration

In response to this appeal ground, DWER advised:

Prior to the submission made by the Appellant pursuant to section 70(5) of the EP Act, the draft VCN only related to [Lot 21] as the suspected unlawful clearing occurred within this Lot. The alternative areas of revegetation proposed within the submission were within Lot 2631 on Deposited Plan 139596, approximately two kilometres north-east of the suspected area of unlawful clearing.

The area of suspected unlawful clearing is at the southern extent and the alternative area of revegetation is at the northern extent of the 13 adjoining lots listed in the final VCN. The 13 lots are all owned by the Appellant and are managed as one farming property. The definition of 'property' under the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, means the area of land that is managed as a single property whether or not it is made up of a number of properties held under separate titles.

Based on this definition and the separation between the area of suspected unlawful clearing and the area of revegetation, the inclusion of the entire farming property is considered reasonable and necessary to ensure that no further unlawful clearing takes place on the property.

Under the VCN, the only measure that applies to the whole property (all 13 lots) is measure 1, "Ensure that no unlawful clearing, or further unlawful clearing, takes place on the land". The remaining measures currently only impact the revegetated area within Lot 2631 (the specified area).

Pursuant to section 70(7) of the EP Act, the only impact to the sale or lease of the whole or part of the land subject to measure 1, while it remains registered under section 66 of the EP Act, is that subsequent owners or occupiers of the land are bound by the VCN. Furthermore, pursuant to section 67 of the EP Act, Mr McGill must notify in writing each person who succeeds him in ownership or occupation, advising them that they are bound by the VCN. Future owners or occupiers of any lots, a part from Lot 2631, will only be required to manage native vegetation within the property lawfully. Therefore, the impact on potential lease or sale would be minimal.

In the event that Lot 2631 is sold or leased, the new owner or occupier will be required to comply with all measures within the VCN. These measures are considered to be necessary to repair the damage caused by the suspected unlawful clearing.

² DWER response to Appeal 014/20, 14 April 2020, page 4.

The Appellant has not provided any evidence that the VCN will have any adverse financial and commercial impacts as a result of being registered onto each Certificate of Title.

On 2 April 2020, the Appellant contacted DWER and advised that based on expert opinion, the alternative areas (in Lot 2631) put forward by him in his submission would be unlikely revegetated to a level required by the VCN due to the rocky terrain. Although another site has been recommended (Lot 1635) the 'expert' will need to do a site inspection to confirm the best area for successful revegetation.

It is therefore, submitted that the 'specified area' for the VCN be extended to cover the entire farming property so that revegetation required by the VCN (a 6.2 hectare contiguous area) can be successfully achieved in the most suitable location.³

The appellant requested and was provided a copy of DWER's response. The Appeals Convenor subsequently attended a site visit with the appellant to further discuss the matter and view the relevant areas.

During the site visit, and followed up in writing, the appellant put forward an alternate proposal. The appellant requested that consideration be given to amending the required revegetation location to an area of 6.2 hectares located on Lot 21 near the cleared area (Figure 2).

Figure 2 – Approximate location where revegetation is proposed (green arrow) in relation to the area of suspected unlawful clearing (yellow outline)



³ DWER response to Appeal 014/20, 14 April 2020, pages 3-4.

The appellant submitted that, on the advice of his consultant, this area contains yellow sandy soils low in the landscape which would be more conducive to a successful revegetation outcome than a rocky ridge on Lot 2631.

A list of species that could be planted in the area was provided by the appellant's consultant. The consultant advised that the list was formulated by reference to species suitable for deep yellow sand and sand over gravel in the Victoria Plains area as published in the book *Trees and Shrubs for the Midlands and Northern Wheatbelt* by Agriculture Western Australia⁴. The list includes:

- *Acacia acuminata*
- *Acacia multispicata*
- *Acacia pulchella*
- *Banksia attenuata*
- *Banksia prionotes*
- *Eucalyptus hypochlamydea* (now *Eucalyptus horistes*)
- *Eucalyptus pyriformis*
- *Allocasuarina acutivalvis*
- *Allocasuarina campestris*
- *Calothamnus quadrifidus*
- *Hakea coriacea* (now *Hakea francisiana*)
- *Hakea scoparia*
- *Melaleuca uncinata*
- *Melaleuca scabra*⁵

The area in question is currently divided by linear stands of tagasaste to assist in preventing wind erosion. The appellant proposed, on the advice of his consultant, these stands be retained to provide a windbreak for the revegetation. A total of 6.2 hectares would still be revegetated but the area might not necessarily be contiguous as a result.

The appellant submitted that if this area was utilised as the revegetation area, a better revegetation outcome would likely be achieved than on Lot 2631 and that the VCN should then only need apply to Lot 21 where the clearing occurred.

In considering the alternate proposal it was noted that the cleared area is a rocky ridge that has been reeafinated (i.e. dug up and crushed by a Reefinator) and sown to crop. The VCN currently requires the revegetation to be similar to the species composition, structure, density and vegetation condition of the cleared area (i.e. in its pre-cleared state). Noting the alternate area comprises sandy soils, and would therefore have supported a different vegetation type, this requirement would need to be amended.

The appellant advised that the remaining areas of remnant vegetation on his landholdings do not include areas of sandy soils. As a result there is unlikely to be any areas owned by the appellant that are available to use as reference sites for the revegetation. Despite this limitation, it is noted that there is published information available, such as that referenced by the nursery, to assist in preparing completion criteria for the revegetation.

After viewing the soils and landforms of the three relevant areas (i.e. the cleared area, the ridge on Lot 2631, and the alternate revegetation area on Lot 21), it is considered that the alternate proposal is likely to result in a better revegetation outcome than revegetation on Lot

⁴ Wilcox, D.G., Lefroy, E.C., Stoneman, T.C., Schoknecht, N.R. and Griffin, E.A. (1996). *Trees and Shrubs for the Midlands and Northern Wheatbelt*, Bulletin (Western Australia). Agriculture Western Australia; 4324.

⁵ Additional information received from the appellant, 16 April 2020.

2631. Based on the soil type and position in the landscape, the alternate site is likely to be more conducive to native vegetation establishment.

It is noted that the alternate proposal is not necessarily 'like for like'. However, the alternate proposal is likely to address one of the key impacts considered to have been caused by the clearing being the loss of vegetation significant as a remnant in an area that has been extensively cleared. Both the cleared area and the alternate area are mapped as Beard vegetation association 7 which retains 10.6 per cent of its pre-European extent within the Avon Wheatbelt bioregion.⁶ The revegetation will ensure that a further decline in the extent of the vegetation association does not result.

Given the revegetation would be located on the same lot as the cleared area it is also considered reasonable that the VCN should only be registered on the Certificate of Title of Lot 21.

Conclusion

It is recommended that this ground of appeal be upheld. The VCN should be amended to require revegetation on Lot 21 and it should be removed from the Certificates of Title of the other 12 lots.

Consequential amendments such as to completion criteria and to the contiguous vegetation requirement are a matter for DWER to consider in implementing this recommendation if supported by the Minister.

CONCLUSION AND RECOMMENDATION

It is recommended that the appeal be upheld in full, that is:

- the VCN should be amended to require initial revegetation under measure 4(c) to be completed by 31 October 2021;
- the VCN should be amended to require revegetation on Lot 21; and
- the VCN should be removed from the Certificates of Title of the other 12 lots.

Should the Minister determine to uphold the appeal in this way the final wording of the VCN measures is a matter for DWER under section 110 of the EP Act.

Emma Gaunt
APPEALS CONVENOR

Investigating Officer:
Simon Weighell, A/Senior Appeals Officer

⁶ Government of Western Australia. (2019). 2018 Statewide Vegetation Statistics incorporating the CAR Reserve Analysis (Full Report). Current as of March 2019. WA Department of Biodiversity, Conservation and Attractions, Perth. <https://catalogue.data.wa.gov.au/dataset/dbca-statewide-vegetation-statistics>