



**Appeals Convenor**  
**Environmental Protection Act 1986**

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**REPORT TO THE  
MINISTER FOR ENVIRONMENT**

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**APPEAL IN OBJECTION TO THE REQUIREMENTS OF VEGETATION  
CONSERVATION NOTICE CPS 8557/1**

**CLEARING OF NATIVE VEGETATION AT YAKKA MUNGA STATION  
LOT 266 ON DEPOSITED PLAN 238551, GEEGULLY CREEK**

**NOTICE ISSUED TO: ZENITH AUSTRALIA INVESTMENT HOLDING PTY LTD**

**APPELLANT: ZENITH AUSTRALIA INVESTMENT HOLDING PTY LTD**

Appeal Number 37 of 2019

**August 2019**

## Appeal Summary

This is an appeal against the requirements of a vegetation conservation notice issued in respect to suspected unlawful clearing on a pastoral station south east of Broome.

The notice was issued to the appellant (the owner of the land) by the chief executive officer (CEO) of the Department of Water and Environmental Regulation in June 2019. The notice set out the basis for the CEO's view that suspected unlawful clearing had occurred, and required that no further unlawful clearing be undertaken.

By the appeal, the appellant submitted that the clearing was not unlawful as it was undertaken for an exempt purpose or purposes. The exemptions relied upon by the appellant related to undertaking pastoral activities, including construction of roads and provision of stock water. The appellant also questioned the requirements applied to the notice.

For the reasons stated in this report, it is considered that there was (and is) a reasonable basis upon which to suspect unlawful clearing occurred on the land, and that as a result, the pre-condition for the discretion to issue the notice was (and is) established. It is noted, however, that up to five hectares of the area of clearing may be exempt for establishment of tracks, and it is recommended that this be reflected in the terms of the notice.

Furthermore, to the extent the notice required only that no further unlawful clearing occur on the land, it is considered to be entirely consistent with the formal requirements for a valid notice under the *Environmental Protection Act 1986*.

## Recommendation

Based on the information provided in respect to this appeal, it is recommended that the appeal be allowed to the extent that the notice is amended to account for the construction of vehicular tracks, but is otherwise recommended to be dismissed.

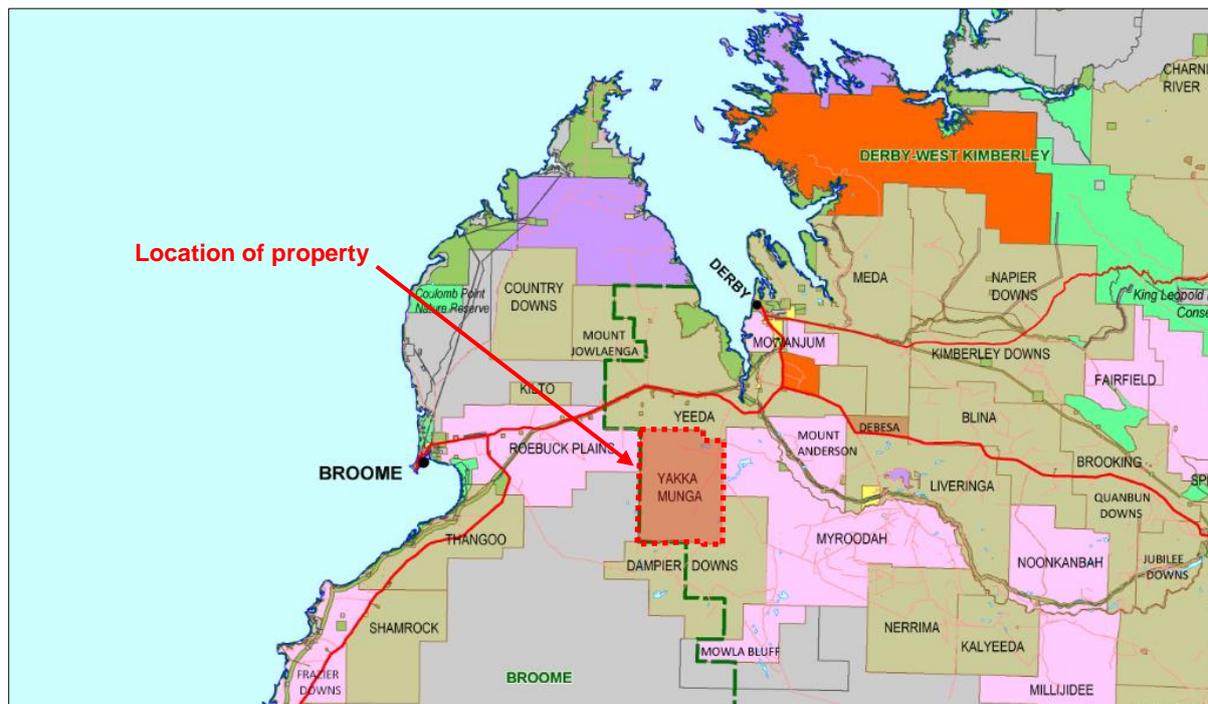
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## INTRODUCTION

This is a report on an appeal by Zenith Australia Investment Holding Pty Ltd (the appellant) against the requirements of a vegetation conservation notice issued to it by the Department of Water and Environmental Regulation (DWER) in respect to the Yakka Munga Station in the Shire of Derby-West Kimberley (see Figure 1).

**Figure 1 – Location of Yakka Munga Station** (Source: Department of Agriculture and Food, 2019)



The appellant has held the pastoral lease under the *Land Administration Act 1997* (the LA Act) for Yakka Munga Station since July 2018.

On 7 June 2019, DWER advised that it received several reports from members of local interest groups alleging the clearing of a large area of native vegetation within Yakka Munga Station. DWER further advised that following discussions with a representative of the appellant, it was confirmed that clearing of native vegetation had been undertaken to form a four kilometre square approximately 50 to 60 metres (m) wide, and which has been divided by two central roads of the same width, forming four equal square paddocks. It is understood that the appellant intends to excavate the outer square to form a water catchment area for all-year-round stock watering.

On 13 June 2019, DWER investigators conducted a site inspection of the property, confirming that vegetation had been cleared as described by the appellant's representative.

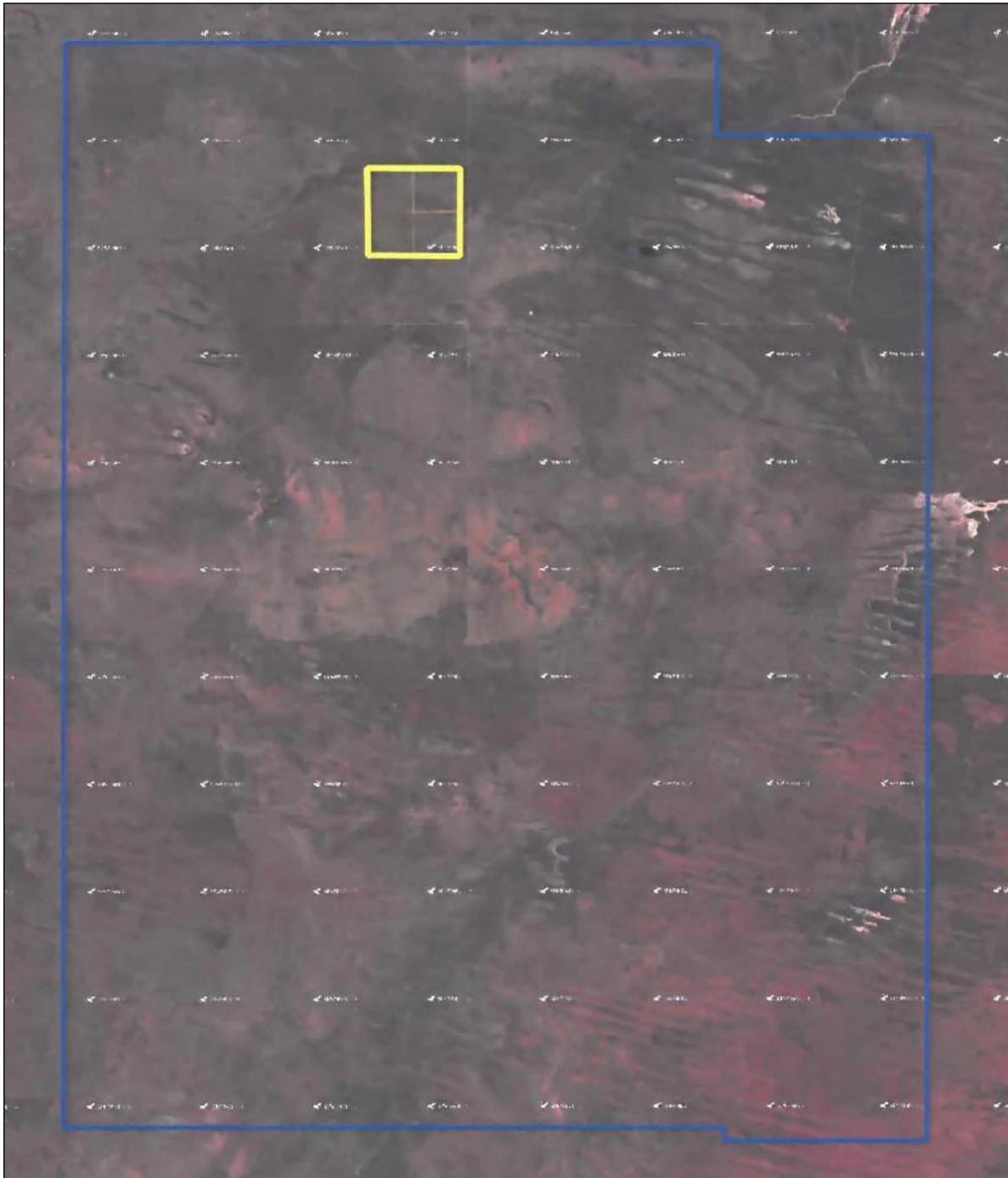
The vegetation conservation notice the subject of this appeal was issued on 20 June 2019. The notice includes details as to the reason for which it was issued, being that the CEO of DWER suspected that unlawful clearing of native vegetation had taken place and was likely to take place on the land. The requirements of the notice are:

The person to whom this vegetation conservation notice is given, and each subsequent owner and or occupier of the land who is bound by this vegetation conservation notice must ensure that no further unlawful clearing of the kind specified above or that is related to the unlawful clearing specified above takes place on the land.

The area subject to the notice is shown in Figure 2.

**Figure 2 – Area subject to notice (in yellow)**

(Source: DWER, 2019)



It was against the requirements of this notice that the appeal was received.

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 the DWER in relation to the issues raised in the appeal.

The appeal investigation included considering the advice of DWER, and a response from the appellant to the issues raised in DWER's response. A site visit with representatives of the appellant was conducted, which included part of the area the subject of the notice.

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

## OUTCOME SOUGHT BY APPELLANT

The appellant sought for the notice to be set aside, such that it can continue with what it regards as lawful clearing.

## STATUTORY CONTEXT

Section 70(2) of the EP Act provides:

- (2) If the CEO suspects on reasonable grounds —
- (a) that unlawful clearing is likely to take place on any land; or
  - (b) that unlawful clearing is taking place or has taken place on any land,
- the CEO may cause a notice (a vegetation conservation notice) to be given requiring a person bound by it to ensure that no unlawful clearing, or no further unlawful clearing, takes place on the land.

'Unlawful clearing' is defined to mean anything constituting a contravention of section 51C or 51J of the EP Act. Relevant to this appeal, section 51C provides that clearing of native vegetation is unlawful unless it is:

- done in accordance with a clearing permit;
- in accordance with an exemption set out in Schedule 6 of the EP Act; or
- in accordance with an exemption set out in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2006* (the Clearing Regulations) and is not done in an environmentally sensitive area.

A notice made under section 70(2) may be given to the owner, occupier or such other person where the CEO considers it practicable for that person to comply with and give effect to the notice.<sup>1</sup>

Where the notice is issued under section 70(2)(b) (i.e. in respect to clearing that has occurred or is occurring), section 70(4)(b) of the EP Act states that the CEO may require any person bound by the notice to take certain measures to (among other things) repair any damage caused by the clearing or re-establish and maintain vegetation to a condition as near as possible to the condition of the vegetation before the clearing occurred.<sup>2</sup>

Before giving a notice with requirements of the kind set out in section 70(4)(b) is given, the CEO must give that person an opportunity to make submissions in response to the proposed measures.<sup>3</sup>

In the present case, the CEO of DWER did not apply any measures of the kind contemplated by section 70(4)(b).

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<sup>1</sup> EP Act, section 70(3).

<sup>2</sup> EP Act, section 70(4)(b)(i) and (ii).

<sup>3</sup> EP Act, section 70(5).

The right of appeal in this case is provided for in section 103(1) of the EP Act, which states:

... a person who is aggrieved by —

- (a) a requirement contained in a ... vegetation conservation notice ... given to that person ..., may within 21 days of being given that notice lodge with the Minister an appeal in writing setting out the grounds of that appeal.

While the right of appeal is in respect to the requirements of the notice, the Minister is required to turn his mind to whether or not there is a reasonable basis to suspect unlawful clearing has occurred, or is occurring, on the land.

## **GROUND OF APPEAL**

The appeal raises two issues for consideration:

1. whether a reasonable basis to suspect unlawful clearing had occurred is established; and
2. if so, whether the requirements of the notice are reasonable.

## **GROUND 1 – REASONABLE BASIS TO SUSPECT UNLAWFUL CLEARING**

The appellant raised a number of grounds in support of its view that the clearing that has taken place on the land was not unlawful, as it was either authorised under the LA Act or was otherwise exempt for the purposes of the EP Act. In this context, the appellant submitted that there was no basis for the CEO to conclude that the clearing on the land was unlawful, and that as a result, there was no basis upon which the notice could be issued.

In support of this contention, the appellant submitted that the clearing was undertaken in accordance with relevant exemptions, and as such, a clearing permit was not required. These exemptions relate to the use of the land for pastoral purposes (watering and access roads) and prevention of cruelty to animals.

More broadly, the appellant indicated that it has invested significant capital to improve productivity on all its pastoral and farming properties with a view to increasing its capacity to meet growing demand for Western Australia's agricultural products. It stated that it has invested in new methodology to improve output and quality and remain competitive. The appellant submitted that this includes the works the subject of this appeal, and which are directed at more sustainable paddock design and enhanced native pasture growth to reduce erosion and enhance industry strength by providing a volume of quality end-product.<sup>4</sup>

### **Consideration**

By this ground of appeal, the appellant submits that it did not require a clearing permit for the clearing, as the works undertaken were consistent with the requirement to manage the land for 'pastoral purposes' under the LA Act, and were otherwise exempt under Schedule 6 of the EP Act. While not expressly raised by the appellant, possible exemptions applicable to the clearing under the Clearing Regulations are also explored.

#### Clearing authorised under the *Land Administration Act 1997*

By this element of the appeal, the appellant submitted that:

Section 109(1)(a) and (b) of the Land Administration Act provide an exemption from the general prohibition on soil disturbance and land clearance (without a permit) for clearing and

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<sup>4</sup> Zenith, letter to Appeals Convenor, 19 August 2019, page 1.

disturbance 'as permitted under the lease' and 'as necessary for the construction of improvements permitted under the lease'.<sup>5</sup>

The appellant advised that the clearing was undertaken to effect the following improvements:

The clearing ... was limited to the extent necessary to create two improvements to support a 4 km x 4 km area of all-weather holding paddocks as part of Zenith's core business of commercial grazing. These improvements are:

- a nominal 2.5 m-deep water drainage and stock watering channel following the topography on the area boundary (i.e. 16 km in length); and
- two 4 km-long x 1.9 m high above-ground-level fenced roads to provide access to the paddocks and livestock.

The water drainage and stock watering channel is designed to contain and store water for livestock and to allow year-round operation of the station ... This stock water is important as bore water on the property is becoming more variable and brackish, which has a direct impact on livestock welfare.

The purpose of the roads is to provide all-weather access to the paddocks for the purposes of better pastoral management. Fencing of the roads is necessary to maintain animal and human safety.<sup>6</sup>

The appellant submitted that the LA Act permits it to use the land for pastoral purposes, and that 'pastoral purposes' are defined in the LA Act to include the commercial grazing of authorised stock; supplementary uses of land inseparable from, essential to, or normally carried out in conjunction with the grazing of authorised stock; and activities ancillary to those activities.

The appellant further submitted that information published by the Pastoral Lands Board (the 'Pastoral Purposes Framework 2018') sets out the types of activities that 'may be characterised as a pastoral purpose activity that is authorised under the pastoral lease', and therefore do not require any separate approval to be implemented. Relevant to the appeal, the appellant stated that the Framework states that the construction, maintenance, expansion and replacement of 'stock waters' on a pastoral lease falls within the notion of pastoral purposes, as stock waters is essential to operating a pastoral business.

The appellant also noted that:

... the Framework references the requirement in section 108(2) [of the LA Act] for pastoral lessees to use methods of best pastoral and environmental management practice and encourages 'active rehabilitation' (which includes earthworks). The PLB 'considers that no additional approvals are required ... so long as the activities are consistent with the pastoral lessee's requirements under section 108 of the [LA Act]'.<sup>7</sup>

The appellant submitted that there is no express limit on the scale of stock watering improvements that can be undertaken on a pastoral lease, and as such, no limitation applies to the works carried out in this case, as they are for exempt purposes.

The appellant also cited animal welfare laws and specific provisions of the lease about improving the condition of soil and land under the lease in support of its view that the activities were exempt.

This element of the appeal is essentially that, because the works were for pastoral purposes (roads and stock watering), they were exempt from the requirement to obtain a permit under section 109(1) of the LA Act. This section relevantly provides:

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<sup>5</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 1.

<sup>6</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 1.

<sup>7</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, pages 2-3.

- (1) A pastoral lessee must not remove trees or otherwise clear land under the lease or disturb or affect its soil except —
  - (a) as permitted under the lease; or
  - (b) as necessary for the construction of improvements permitted under the lease; or
  - (c) in accordance with a permit issued under Division 5.

Penalty: \$10 000.

The implication in this ground of appeal that section 109(1) of the LA Act operates to the exclusion of the operation of the EP Act is not supported. Section 117 of the LA Act provides that the Pastoral Lands Board must not grant a permit (including a permit to clear land) unless it is satisfied that any requirements in relation to the proposal arising from the operation of (among other things) the EP Act have been complied with. Importantly, the reference to a 'permit' in section 109(1) of the LA Act is a permit issued under that Act, and not a clearing permit within the meaning of Division 2 of Part V of the EP Act.

Furthermore, section 5 of the EP Act relevantly states:

**Inconsistent laws**

Whenever a provision of this Act ... is inconsistent with a provision contained in, or ratified or approved by, any other written law, the provision of this Act ... prevails.

In response to this issue, DWER stated its position to be that:

... although native vegetation clearing that is 'permitted under the lease' or 'as necessary for the construction of improvements as permitted under the lease' does not require a permit to clear under Part 7 Division 5 of the LA Act, there is still the requirement to comply with the EP Act.

The appellant was provided with an opportunity to consider DWER's advice. In response, the appellant acknowledged that the exemption in section 109 of the LA Act does not remove the need to meet the requirements of the EP Act, but noted that section 109 is central to the its appeal and the reasons for which the clearing was undertaken:

The purpose of our improvements aligns directly with the definition of 'pastoral purposes' in section 93 of the LA Act, which includes 'the commercial grazing of cattle' (part (a) of the definition) and activities ancillary to that land use (part (c) of the definition). Consistent with this, the [Framework] recognises access roads, fences and stock watering improvements as 'essential' aspects of the use of land for pastoral purposes. Improvements that are innovative or of a certain scale are not excluded by either the definition or the [Framework].

Therefore, to the extent that DWER's arguments imply that Zenith's improvements are not for pastoral purposes, Zenith believes they are incorrect.<sup>8</sup>

On the basis of the information provided in respect to this element of the appeal, it is considered that the existence of an exemption under the LA Act did not replace the operation of section 51C of the EP Act. The following section considers the application of the relevant exemption provisions contemplated under section 51C as cited by the appellant.

Clearing exempt under Schedule 6

By this element of the appeal, the appellant claimed two exemptions in Schedule 6 of the EP Act as being relevant to this appeal, being:

- clearing caused by grazing of stock on land under a pastoral lease in accordance with the LA Act; and
- clearing to give effect to a requirement to clear under another written law.

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<sup>8</sup> Zenith, letter to Appeals Convenor, 19 August 2019, page 2.

The two exemptions sought to be relied on by the appellant are considered in turn.

*Grazing of stock – clause 13, Schedule 6*

Clause 13 relevantly provides that a permit to clear under the EP Act is not required for:

Clearing caused by the grazing of stock on land under a pastoral lease within the meaning of the *Land Administration Act 1997* as long as that grazing is not in breach of —

- (a) that Act; or
- (b) the pastoral lease; or
- (c) any relevant condition set or determination made by the Pastoral Board under Part 7 of that Act.

The appellant submitted that the reference to 'clearing caused by the grazing of stock' is not narrowly confined to what livestock may eat, but includes all activities that fall within the notion of 'pastoral purposes' as defined in section 93 of the LA Act.

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

The reference [in clause 13 of Schedule 6] to 'clearing caused by the grazing of stock on land under a pastoral lease' is a reference to clearing caused by that grazing itself and does not extend to clearing caused by other means, such as managing a pastoral lease for pastoral purposes or carrying out any other activities that are permitted by the lease. This is supported by the definition of clearing under section 51A of the EP Act specifically including reference to "the grazing of stock".<sup>9</sup>

The appellant was provided with an opportunity to respond to this issue, and in response, it reiterated its view that the expression should not be narrowly construed:

There is no justification for limiting the meaning of the wider phrase 'the grazing of stock on land under a pastoral lease' in Clause 13 of Schedule 6 by reference to the definition in 51A when a broader interpretation with reference to the use of the land for the 'grazing of stock' and what that entails is available.<sup>10</sup>

Taking into account the information relevant to this issue, the position of DWER is supported: the intent of the exemption is considered to apply to the grazing of stock alone, so as to remove the requirement that would otherwise apply for the pastoral lessee to obtain a permit to clear under the EP Act for grazing of stock. The construction put forward by the appellant would have the effect of including a range of non-grazing activities such as the construction of tracks and fences: however, given specific exemptions apply to these activities (see below), it is not considered appropriate for clause 13 of Schedule 6 to be extended in the way sought by the appellant.

This conclusion is not to say that clearing for the purposes identified by the appellant cannot be undertaken – rather, it requires the person wishing to undertake the clearing to make an application for an EP Act clearing permit, and furnish such information in support of that application to establish the potential impacts of the clearing.

*Requirement to clear under another law – Schedule 6, clause 1*

Clause 1 of Schedule 6 relevantly provides that a permit to clear under the EP Act is not required for 'clearing that is done in order to give effect to a requirement to clear under a written law'.

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<sup>9</sup> DWER, Response to appeal 037/19, 26 July 2019, page 5.

<sup>10</sup> Zenith, letter to Appeals Convenor, 19 August 2019, page 4.

The appellant submitted that multiple provisions apply to its operations which it asserted amount to a requirement to clear within the meaning of this exemption.

First, the appellant submitted that section 108(1) and (2) of the LA Act require it to undertake certain activities, and that as the clearing undertaken in this case was in furtherance of these requirements, the exemption in clause 1 of Schedule 6 is enlivened.

Section 108(1) and (2) of the LA Act provide:

**108. Pastoral lessee's duties as to leased land**

- (1) A pastoral lessee must, to the satisfaction of the Board, at all times manage and work the land under the lease to its best advantage as a pastoral property.
- (2) The lessee must use methods of best pastoral and environmental management practice, appropriate to the area where the land is situated, for the management of stock and for the management, conservation and regeneration of pasture for grazing.

In relation to the duty in section 108(1), the appellant stated:

In fulfilment of its duty in section 108(1) to 'manage and work the land under the lease to its best advantage' Zenith is committed to achieving year-round operation in all weathers, to which the all-weather holding paddocks with their water drainage and stock watering channels and all weather access roads is a necessity. In addition, the quality of the station livestock depends on the availability of proper and sufficient water (i.e. stored surface water) in the holding paddocks, given the issues that have arisen with bore water availability and quality.<sup>11</sup>

On section 108(2), the appellant further submitted that:

... performance of its duty in section 108(2) to 'use methods of best pastoral and environmental management practice for the management, conservation and regeneration of pasture for grazing' is also informed by its requirement under condition 4 of the lease 'to maintain ... good and improving soil and plant conditions'. In the context of soils becoming unproductive through waterlogging, best practice and condition 4 in combination require improvements which necessarily entail vegetation clearance to enable channelling and drainage to promote soil improvement and plant survival.<sup>12</sup>

In response to this element of the appeal, DWER noted that the question of what amounts to a 'requirement to clear' was considered by the Supreme Court in 2006 involving a contention by the Water Corporation that it did not require a permit to clear native vegetation as it was required to undertake clearing under statutes administered by the Corporation. In considering this issue, Master Newnes found:

In my view, in the present context the phrase "requirement to clear under a written law" in Item 1 [of Schedule 6] refers to an obligation under a written law to clear; that is, the clearing itself must be an obligation imposed by or under a written law, rather than a need which arises from some other obligation imposed by or under the written law.<sup>13</sup>

Master Newnes additionally found that the characterisation of clause 1 as sought by the Water Corporation would have the effect of providing a broad exemption to the requirement for a clearing permit in section 51C of the EP Act, which he concluded:

... would make very substantial inroads into the scheme of environmental protection that the EP Act, and in particular the protection of native vegetation that Div 2, is designed to achieve.<sup>14</sup>

<sup>11</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 6.

<sup>12</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 6.

<sup>13</sup> *Water Corporation v Chief Executive Officer of the Department of Environment* [2006] WASC 256 at para 57.

<sup>14</sup> *Water Corporation v Chief Executive Officer of the Department of Environment* [2006] WASC 256 at para 61.

DWER advised that, in its view, a requirement to clear should be such that the person the subject of the requirement could be said to be in breach of the written law if they failed to so clear. In the view of DWER, a requirement must therefore be specific in nature.

In relation to section 108(1) and (2) of the LA Act, DWER advised:

Section 108 of the LA Act imposes a number of general duties upon a pastoral lessee in relation to management of the pastoral lease. DWER's position is that the generality of these duties is such that they do not impose a requirement to clear.<sup>15</sup>

Taking into account the information presented in respect to this matter, it is considered that DWER's position is supported, and that absent a legal requirement to clear, clause 1 of Schedule 6 is not enlivened in respect to section 108(1) and (2) of the LA Act.

The appellant also raised a number of other provisions of the LA Act which it asserted qualified as a requirement to clear under clause 1 of Schedule 6, including the prohibition in section 106 to use pastoral land for other than pastoral purposes; the requirement in section 107 to make improvements as directed by the Pastoral Lands Board; or the general description of 'pastoral purposes' in section 93 of the LA Act.

In response to these submissions, DWER advised:

Clearing is not exempt simply because it is done for pastoral purposes as defined in section 93 of the LA Act or because it is for a purpose otherwise authorised by the pastoral lease or LA Act.

Section 106 of the LA Act imposes a prohibition on using the land other than for pastoral purposes, except in accordance with a permit issued under Division 5. A prohibition is not a requirement to clear to which Item 1 Schedule 6 applies.

Section 107 of the LA Act enables the Pastoral Lands Board to require a pastoral lessee to make improvement to the land in accordance with an approved development plan. The Department understand that there was no such development plan that applied to the clearing and so no question arises as to whether there could be any requirement to clear under that development plan.<sup>16</sup>

DWER similarly advised that condition 4 of the lease (which states that the 'Lessee will maintain on the area leased good and improving soil and plant conditions') is general in terms, and not in the nature of a legal requirement to clear.<sup>17</sup>

In addition to the LA Act, the appellant also submitted that:

... the provision of stock water for livestock in enclosed holding paddocks is necessary to give effect to the requirements of the *Animal Welfare Act 2002* under which it is an offence not to provide an animal with proper and sufficient food and water. In recent times insufficient water for livestock has been a matter of concern for the pastoral industry. In the context of this concern and issues with the station bore water, Zenith considers that clearing to enable it to meet this requirement under animal welfare law falls within the scope of Clause 1 of Schedule 6.<sup>18</sup>

In response to this issue, DWER advised that the fact that the *Animal Welfare Act 2002* provides that a person in charge of an animal is cruel to an animal if the animal is not provided with proper and sufficient food or water does not mean that there is any requirement to clear.

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<sup>15</sup> DWER, Response to appeal 037/19, 26 July 2019, page 3.

<sup>16</sup> DWER, Response to appeal 037/19, 26 July 2019, page 3.

<sup>17</sup> DWER, Response to appeal 037/19, 26 July 2019, page 3.

<sup>18</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 6.

Taking into account the information provided in respect to these submissions, it is considered that none of the exemptions sought to be relied on by the appellant were of a type that enlivens the operation of clause 1 of Schedule 6. Specifically, none of the provisions of the LA Act cited by the appellant are considered to be of a character that compelled it to clear land in the manner undertaken in this case. Similarly, obligations relating to ensuring water is available for stock did not compel the appellant to clear in the manner undertaken.

### Other exemptions

By implication, the appellant also sought to rely on exemptions under the Clearing Regulations for some or all of the clearing undertaken. These exemptions are:

- clearing along fence lines – item 11 of regulation 5, Clearing Regulations
- clearing for vehicular tracks – item 12 of regulation 5, Clearing Regulations

### *Fence lines*

Although not expressly raised as a ground of appeal, the appellant noted that the clearing was for (among other things) the establishment of four paddocks which would include roads that would be 'fenced ... to provide access to the paddocks and livestock'.<sup>19</sup>

Item 11 of regulation 5 of the Clearing Regulations authorises the clearing of Crown Land along a fence line to provide access to construct or maintain a fence between Crown land and Crown land if the clearing is no more than five metres from the fence line on one side and no more than 1.5 metres from the fence line on the other side.

In providing advice on this matter, DWER stated:

This item applies to a boundary fence between one parcel of Crown land and another parcel of Crown land. The clearing in this case was not for a boundary fence.<sup>20</sup>

In response to DWER's advice, the appellant submitted:

Whilst DWER has discounted this exemption on the basis that it only applies to a fence between different parcels of Crown land and 'the clearing in this case was not for a boundary fence', the exemption applies to a fence 'between Crown Land and Crown Land' (defined simply as 'land other than alienated land'). The land in this appeal, being the subject of a pastoral lease, is Crown land within the meaning of the EP Act. In addition, the term 'fence' is defined in the Clearing Regulations without reference to the boundary of properties. The fences proposed by Zenith are to control the movement of persons and animals within this parcel of Crown land, such that Item 11 applies.<sup>21</sup>

Notwithstanding the appellant's view, the position of DWER is supported: it is apparent that this exemption is intended to be apply at the boundary of different parcels of Crown land and as the fences proposed in this case are not for boundary fencing, the exemption does not apply.

### *Vehicular tracks*

The appellant raised the construction of all-weather roads as part of its substantive claim that the clearing was part of normal pastoral activities under the LA Act, and was therefore exempt. The merit of this claim is considered above.

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<sup>19</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 1.

<sup>20</sup> DWER, Response to appeal 037/19, 26 July 2019, page 4.

<sup>21</sup> Zenith, letter to Appeals Convenor, 19 August 2019, page 3.

While not expressly raised in the appeal, the Clearing Regulations provide an exemption from the requirement to obtain a permit for clearing associated with the construction of vehicular tracks.<sup>22</sup> This is a limited exemption, and provides that the extent of the clearing (and any other limited clearing) does not exceed five hectares (ha) in any financial year. Among other things, the exemption also specifies that the track 'is no wider than necessary'.

In advice on this issue, DWER noted that the entire footprint of clearing undertaken by the appellant was in excess of 120 ha, and as a result, the exemption does not apply to the entirety of the clearing. As to whether any of the clearing was authorised under this exemption, DWER noted:

It is not clear if there are any tracks that meet the requirements of this Item ...

The maximum possible exempt clearing is five ha. Therefore, as DWER's position is that since no other exemption is available, at the very least, approximately 115 ha of clearing required authorisation by a clearing permit issued under the EP Act. However, the clearing for the tracks may not have been necessary had the unlawful clearing not occurred.

In light of the above, it may be possible for the Minister for Environment to conclude that the fourth bullet point of the VCN, under the heading Reasons for which this vegetation conservation notice is given, would be more accurate if it was modified to include words to the following effect:

*the clearing was not for an exempt purpose, except to the extent that the clearing was for a vehicular track that complies with Item 12 of the Table to regulation 5 of the Environmental Protection (Clearing of Native Vegetation) Regulations 2004.*<sup>23</sup>

In response to this issue, the appellant stated that it is grateful that DWER has conceded a possible exemption, and subsequent amendment to the notice, in relation to tracks.<sup>24</sup>

Taking the above into account, in the absence of a valid exemption (save for possibly 5 ha associated with the construction of vehicular tracks), it is considered there is a reasonable basis to suspect unlawful clearing has occurred on the land, and that as a result, the necessary precondition for issuing a vegetation conservation notice is established.

#### Content of published guidelines

While it is considered that the clearing in this case is not exempt in the manner put forward by the appellant, it appears that DWER had published certain material that purported to set out guidance on the application of exemptions in respect to activities associated with the operation of pastoral leases, and in particular, section 108(1) and (2) of the LA Act.

In this regard, the appellant submitted that the guidance material:

... expressly recognises that a pastoral leaseholder's statutory duties under section 108(1) and (2) [of the LA Act] fulfil the description of 'a requirement under a written law' which may entail clearing.<sup>25</sup>

In its response to this element of the appeal, DWER acknowledged that the guidance material provides a basis to conclude that some clearing may be exempt if it is carried out pursuant to the general duties set out in section 108 of the LA Act, however:

This is not the position now held by DWER. The Department's position is as set out above ... which has been reached following a review of the application of the exemption during the course of investigating Zenith's clearing. However, it is noted that DWER's documents also provide that clearing relating to section 108 of the LA Act must be "to the satisfaction of the

<sup>22</sup> Item 12, regulation 5, Clearing Regulations

<sup>23</sup> DWER, Response to appeal 037/19, 26 July 2019, page 4.

<sup>24</sup> Zenith, letter to Appeals Convenor, 19 August 2019, pages 2-3.

<sup>25</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 6.

Pastoral Lands Board". The Guide further provides that "[t]he Pastoral Lands Board is the judge of satisfactory compliance with section 108."

It is understood that Zenith did not seek the views of the Pastoral Lands Board or [DWER's] Native Vegetation Regulation Branch prior to undertaking the clearing.<sup>26</sup>

In addition to DWER's guidance, as noted above, the Pastoral Lands Board also published the Pastoral Purposes Framework 2018 (the Framework) which is identified as a 'guide to activities that can be undertaken on a pastoral lease'.<sup>27</sup> In response to the appeal, DWER advised that while the Framework does refer to written laws other than the LA Act, it is not a detailed guide to other approvals that may be required.

On the specific issues raised on the appeal in respect to the Framework, DWER advised:

There is an assumption in certain sections of the Pastoral Purposes Framework 2018 that activities that are for pastoral purposes may not, or may be less likely to, require other approvals. However, the Pastoral Purposes Framework 2018 varies in how it deals with this issue. In many cases, it is silent on whether additional approvals might be required for activities that are for pastoral purposes and could involve clearing. In other cases, the Pastoral Purposes Framework 2018 provides that activities that may be for pastoral purposes may also require an EP Act clearing permit.

If Zenith had consulted DWER, the scale, extent and type of the works are such that the Department would have examined the issue specifically and carefully, as it has once it received notice of the works. Whether or not the works might be argued to be related to activities carried out for pastoral purposes (such as vehicular access, stock watering or drainage), there may come a point at which the scale and type of works are such that they cease to be works for pastoral purposes.

Although the guidance statements and Pastoral Purposes Framework 2018 were published and publicly available at the time of the clearing, this does not provide a defence to the unauthorised clearing of native vegetation and does not make the clearing lawful. At best, these publications might contribute to a mistake at law that the clearing was exempt, not a mistake of fact.<sup>28</sup>

It is understood that the DWER guidelines have been amended to reflect the its current position with respect to the application of exemptions.

In response to DWER's advice, the appellant stated:

It is contrary to rules of fairness that government authorities should change their stated position while a matter is under adjudication. At the very least, those who have referred to a position taken by a government authority should not have to bear the consequences of a change in that position.

...

If, by DWER's own admission, and despite disclaimers relating to legal reliance, DWER's guidance materials and the [Framework] promote a misunderstanding of the law, it is only fair that this Appeal be upheld.<sup>29</sup>

The appellant also made the following response in respect to DWER's comments on the scale of the clearing in this case:

While DWER has sought to introduce the concept of scale as a qualification to the application of the exemptions, this is not supported in any way by the terms of Clause 1 or Clause 13 [of Schedule 6]. In addition, the definition of 'pastoral purposes' in section 93 of the LA Act makes no reference to scale.<sup>30</sup>

<sup>26</sup> DWER, Response to appeal 037/19, 26 July 2019, page 6.

<sup>27</sup> Pastoral Lands Board, October 2018: <https://www.dplh.wa.gov.au/getmedia/fd2cd973-39e3-4e59-bcda-be5ef23c98e3/PL-Pastoral-purposes-framework-oct-2018>

<sup>28</sup> DWER, Response to appeal 037/19, 26 July 2019, page 6.

<sup>29</sup> Zenith, letter to Appeals Convenor, 19 August 2019, page 3.

<sup>30</sup> Zenith, letter to Appeals Convenor, 19 August 2019, page 4.

While it is unfortunate that DWER published guidance erroneously indicating that certain pastoral activities were exempt from the requirement to obtain a clearing permit, this does not mean the clearing was lawful. On the basis of the information provided in respect to this appeal, it is considered that the activities undertaken in this instance (irrespective of scale) were not for an exempt purpose or purposes, and as a result, the pre-condition for the discretion to issue the notice was established.

## **Conclusion**

For the reasons stated above, it is considered that the CEO of DWER was justified in suspecting on reasonable grounds that unlawful clearing had occurred on the land, and specifically that the clearing was undertaken without a clearing permit or outside any identified exemption (save for the possibility that up to five hectares of the 120 ha of clearing was exempt as a vehicular track).

It is concluded therefore that the pre-condition for the discretion to issue a vegetation conservation notice was established.

It is noted that guidelines published by DWER that suggested activities of the kind reflected in section 108 of the LA Act are 'exempt' from the requirement to obtain a clearing permit have been removed to reflect DWER's current view. On the assumption that the Framework may have been informed (in part) by the former view of DWER on the scope of the exemptions, it is expected that the Pastoral Lands Board will review the content of that document accordingly.

It follows from the above that it is recommended that this ground of appeal be dismissed, subject to the notice being amended in the manner recommended by DWER in respect to Item 12 of regulation 5 of the Clearing Regulations.

## **GROUND 2 – REQUIREMENTS OF THE NOTICE**

By this ground of appeal, the appellant submitted that the requirements of the notice in this case is simply restatement of the generic purpose of a vegetation conservation notice, and is therefore invalid on multiple grounds, primarily in relation to 'uncertainty' associated with:

- use of the concept of 'unlawfulness'
- loose wording
- indefinite duration
- description of the parties bound.

These issues will be addressed in turn.

### **Consideration**

#### *Unlawfulness*

By this element of the appeal, the appellant submitted that embedding the concept of unlawfulness into the notice is problematic and unfair for a number of reasons:

First, the prohibition of unlawful behaviour is accomplished by statute law in all its detail and whether an action has been unlawful can only ultimately be determined by a court. A requirement not to behave 'unlawfully' is, on one view, superfluous and, on another, oppressive to the recipient through uncertainty because, in the absence of a court determination, the recipient can never know conclusively whether his or her activities are lawful ...

Second, the reference to 'further unlawful clearing' inappropriately pre-judges the legal standing of what has occurred, when the notice is based on no more than a 'suspicion' that unlawful clearing has taken place. Indeed, the grounds advanced for the 'suspicion' are themselves

based on nothing more than evidence that clearing has occurred (satellite imagery and site inspection), the fact that no permit was obtained and contentious and unsubstantiated assertions that exemptions do not apply.

Theoretically, a recipient who is convinced of the legality of its actions could legitimately consider itself unconstrained by the requirement. Conversely, such a recipient may be improperly constrained on an on-going basis by the designation of an exempt activity as 'unlawful'. The fact is that the recipient is left indefinitely in a limbo which nothing short of court proceedings could resolve.<sup>31</sup>

### *Loose wording*

The appellant contended that:

The ambiguities introduced by the 'lawfulness' aspect of the requirement are exacerbated by the reference to 'further unlawful clearing of the kind specified above or that is related to the unlawful clearing specified above'. Since what is specified 'above' is expressed as 'clearing of native vegetation on the surface of the land and by excavation of parts of the land' (as disclosed by satellite and site inspection), the kind of clearing captured by the notice is exceptionally general, broad and hence uncertain. This breadth and uncertainty is further expanded by the additional prohibition on clearing that is 'related to' that kind of clearing.<sup>32</sup>

### *Indefinite duration*

The appellant contended that it is customary for requirements of this kind to include a specified timeframe to allow the affected party can satisfy, and then terminate, the effect of the notice:

Given that the notice has been issued on 'suspicion', not proof, of unlawfulness, and given the considerable uncertainty surrounding that issue, it is inappropriate for the notice to have indefinite operation. Even without limiting the notice to a particular occurrence, fairness suggests that a time limit should have been placed on the notice to enable the issue of lawfulness to be discussed and resolved within a specified timeframe.<sup>33</sup>

### *Parties bound*

The final issue raised by this element of the appeal is the appellant's assertion that the notice inappropriately seeks to apply to each future owner or occupier of the land:

It is submitted that it is not within the CEO's power to include such a reference in the 'requirement', given that the [notice] has been issued solely to Zenith Australia Investment Holding Pty Ltd and subsequent owners and occupiers are not within the classes of persons who may be given a [notice], as set out in section 70(3) of the Environmental Protection Act. Any impact on subsequent owners or occupiers arises solely by operation of section 70(7)(b) of the Act, following the notice being registered on title. It is further submitted that registration on title is unreasonable in the circumstances of this notice, given the notice's generality, uncertainty and unsubstantiated imputation of unlawfulness.<sup>34</sup>

### DWER advice

In response to this ground of appeal, DWER noted that section 70(2) of the EP Act sets out the statutory context of the decision to issue the notice, which relevantly includes a requirement for the 'person bound by [the notice] to ensure that no unlawful clearing, or no further unlawful clearing, takes place on the land'. DWER specifically advised:

The wording of this requirement is not a presumption of guilt as it is linked to a suspicion on reasonable grounds that unlawful clearing is likely to take place on the land. Particularly *since*

<sup>31</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 7.

<sup>32</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, pages 7-8.

<sup>33</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 8.

<sup>34</sup> Zenith, Supporting document for appeal against VCN CPS 8557/1, 11 July 2019, page 8.

*works were still being undertaken* at the site during DWER's inspection and the Department was aware that Zenith intended to continue excavation until the water catchment area had been completed around the entire external perimeter of the works.<sup>35</sup>

DWER also advised that there:

... is no need to specify a duration as the clearing will remain unlawful unless a clearing permit is obtained. In that event, the VCN may be revoked or amended under section 65(4) of the EP Act as necessary. The VCN requires that persons bound by the notice ensure that no further unlawful clearing takes place. It will not apply if the clearing is not unlawful.

The requirement applies to the kind of unlawful clearing that has occurred within the dates indicated within the area indicated ... This sufficiently identifies the clearing of concern. Unlawful clearing of the same kind or that is related to the unlawful clearing (further unlawful clearing to further implement the project) describes the clearing by reference to purpose and type.

The reference to subsequent owners and occupiers is a reference to the operation of section 70(7)(b) of the EP Act. It is correct that the notice only binds such persons once it is registered on the title. This is included in the notice by way of information.<sup>36</sup>

## Conclusion

On the basis of the information provided in respect to this ground of appeal, it is considered that the requirement of the notice – i.e. that no further unlawful clearing occurs – is consistent with section 70(2) of the EP Act. Given the notice does nothing more than require that unlawful clearing does not continue, the requirement is not considered to be unreasonable.

As noted by DWER, should a permit to clear be granted in respect to the area the subject of the notice, DWER has the capacity to revoke the instrument accordingly.

It follows that this ground of appeal is recommended to be dismissed.

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<sup>35</sup> DWER, Response to appeal 037/19, 26 July 2019, page 7.

<sup>36</sup> DWER, Response to appeal 037/19, 26 July 2019, pages 7-8.

## CONCLUSION AND RECOMMENDATION

For the reasons stated in this report, it is considered that there was (and is) a reasonable basis upon which to suspect unlawful clearing has occurred on the land, and that as a result, the pre-condition for the discretion to issue a vegetation conservation notice was (and is) established. It is noted, however, that up to five hectares of the area of clearing may be exempt under Item 12 of regulation 5 of the Clearing Regulations, and it is recommended that this be reflected in the terms of the notice consistent with DWER's advice.

Furthermore, to the extent the notice required only that no further unlawful clearing occur on the land, it is considered to be entirely consistent with the formal requirements of section 70(2) of the EP Act.

The appellant has nonetheless requested that the notice be revoked on the basis of DWER's admission that incorrect information was published as to the application of exemptions in this case. While it is accepted that information was published by DWER that stated that clearing for certain 'pastoral purposes' was exempt under Schedule 6 of the EP Act, that information is now acknowledged by DWER as being incorrect, and is understood to have been withdrawn from publication.

As noted earlier in this report, an appeal in respect to a vegetation conservation notice is directed at the requirements of the notice, and for the reasons stated above, the requirements are considered to be reasonable, noting that they do nothing more than to require that no further unlawful clearing occurs.

Taking into account all the information relevant to this appeal, it is recommended that the appeal be allowed to the extent that the notice is amended to include reference that up to five hectares of the area of clearing may be exempt under Item 12 of regulation 5 of the Clearing Regulations. It is otherwise recommended that the appeal be dismissed on the basis that there is a reasonable basis to suspect unlawful clearing, and that the requirements of the notice simply reflect the content of section 70(2) of the EP Act.

It is understood from the appellant that it has commenced discussions with DWER in respect to applying for a clearing permit to enable further work to be done. It is anticipated that, if through that process, DWER determines to grant a permit in relation to some or all of the area applied for, it will review the need for the continued application of the notice at that time.

Emma Gaunt  
APPEALS CONVENOR

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