SUPREME COURT OF WESTERN AUSTRALIA HELD AT PERTH	No: CIV 2445 of 2015 **SUBSTITUTED APPLICATION FOR JUDICIAL REVIEW**
Applicants	**SAVE BEELIAR WETLANDS (INC)** 4 Hope Street White Gum Valley WA 6162 and **CAROLE DE BARRE** 20 Malvolio Road Coolbellup WA 6163
First Respondent	**THE HONOURABLE ALBERT JACOB, MLA** Office: Minister for Environment; Heritage of Western Australia
Second Respondent	**THE ENVIRONMENTAL PROTECTION AUTHORITY OF WESTERN AUSTRALIA**
Third Respondent	**THE COMMISSIONER OF MAIN ROADS WESTERN AUSTRALIA**
Intervener	**THE ATTORNEY GENERAL OF WESTERN AUSTRALIA**
Decisions or conduct to be reviewed	**First Decision** Date: 13 September 2013 Where made or occurring: Perth, Western Australia Written law governing: *Environmental Protection Act* 1986 (WA), section 44 Description: The decision of the Second Respondent pursuant to s.44(1) and (2) of the *Environmental Protection Act* 1986 (WA) (**Act**) to recommend that the proposal to extend the Roe Highway from Kwinana Freeway to Stock Rd (**Proposal**) may be implemented subject to conditions, as contained in Report 1489, dated 13 September 2013 (**Report**). **Second Decision** Date: 2 July 2015 Where made or occurring: Perth, Western Australia Written law governing: *Environmental Protection Act* 1986 (WA), section 45 Description: The decision of the First Respondent pursuant to s.45(1) of the Act to allow the Proposal to be implemented

	subject to conditions, as contained in Statement No. 1008 dated 2 July 2015.
Application [Tick one or more]	The applicant applies for judicial review of the above decisions or ~~con~~duct and ☒ a writ of certiorari; ~~a writ of mandamus;~~ ☒ a writ of prohibition; ~~a writ of *procedendo*;~~ ~~an information of *quo warranto*;~~ ☒ a declaration; ~~an injunction;~~ ~~this remedy (being a remedy which would have the same effect as a remedy that could be provided by means of one or more of the above writs)~~ —
Grounds of application	The grounds for the above application are these — 1. The Second Respondent made a jurisdictional error when it made the First Decision because: (a) it failed to ask itself the correct question in that it found that the Proposal would have significant residual environmental impacts to several "critical [environmental] assets" and it determined that an offsets package was therefore "necessary" or "required" but did not ask itself (when it should have done so) whether, and on what basis, an offsets package was capable of making the Proposal environmentally acceptable; (b) further and in the alternative, it failed to take into account a mandatory relevant consideration, being one or more of the following documents: i) EPA Position Statement No. 9 dated January 2006 titled *Environmental Offsets* (**Position Statement**); ii) the EPA Guidance Statement No. 19 dated September 2008 titled *Guidance for the Assessment of Environmental Factors, Environmental Offsets – Biodiversity*; and iii) Environmental Protection Bulletin No. 1 dated September 2008 titled *Environmental Offsets – Biodiversity*.

Grounds of application (continued)	each of which states that there is a presumption that the Second Respondent will recommend against approval of a proposal that is likely to have significant adverse impacts to "critical assets" (**the Presumption**). PARTICULARS (A) Each of those documents are mandatory relevant considerations, being documents published by the Second Respondent pursuant to its functions under s.16 of the Act and which were intended by it, amongst other things, to guide its decision making; (B) Having found that the Proposal would have significant residual environmental impacts to several "critical [environmental] assets", the Second Respondent should have taken into account one or more of those documents but failed to do so; (C) Had it done so, the Second Respondent would have asked itself (but didn't) whether, and on what basis, it was appropriate to depart from the Presumption in its assessment of the Proposal before determining that an offsets package was "necessary" or "required" as a result of its finding that the Proposal would have significant residual environmental impacts to several "critical [environmental] assets"; (c) in the further alternative, it failed to provide adequate reasons for its decision that an offset package was "necessary" or "required" in that, having found that the Proposal would have significant residual environmental impacts to several "critical [environmental] assets", it should have explained in the Report its departure from the Presumption but failed to do so. 2. The Second Respondent made a jurisdictional error when it made the First Decision because it asked itself the wrong question in that it should have asked itself whether the Proposal is environmentally acceptable but, rather: (a) it asked itself whether the criteria identified in the Position Statement relevant to the approval of a

Grounds of application (continued)	proposal by the Minister under s.45 of the Act had been satisfied, namely whether: i) the proponent had done all it could to avoid and minimise environmental impacts; and ii) an "acceptable, comprehensive offsets package for the significant, residual adverse impacts" of the Proposal could be imposed; and (b) further and in the alternative, it assessed only the Proposal's impact on certain elements of the environment, in isolation of each other. 3. The Second Respondent made a jurisdictional error when it made the First Decision because it failed to exercise, or failed to properly understand, its statutory function under s.44 of the Act in that it failed to determine whether or not the Proposal was, in its opinion, environmentally acceptable when it both: (a) determined that the provision of offsets was necessary to counterbalance the Proposal's residual significant environmental impacts on terrestrial fauna and wetlands; and also (b) recommended that the Minister impose condition 12-2 which empowers the CEO to agree that construction of the Proposal may commence notwithstanding that the proponent has failed to identify the offsets which the Second Respondent determined were necessary to counterbalance the Proposal's residual significant environmental impacts on terrestrial fauna and wetlands. 4. The First Respondent made a jurisdictional error when it made the Second Decision because he relied upon the First Decision when making the Second Decision and the First Decision was invalid for the reasons set out above. 5. On the basis of the above grounds, the Applicants seek: (a) A Writ of Certiorari against the First and Second Respondents to quash the Second Decision and the First Decision respectively; and (b) A Writ of Prohibition against the First and Third Respondents to prevent each of them from giving effect to Second Decision and the First Decision respectively; and

Grounds of application (continued)	(c) In the alternative, declarations that the First and Second Decisions are invalid; and (d) An order that the First and Second Respondent, and if it opposes the relief sought, the Third Respondent, pay the Applicants' costs.	
Late application	Leave to proceed with this application outside the limitation period has been granted by the Court.	
Reasons for decision	☐ The applicant also applies for an order that the maker of the challenged decision give adequate reasons for it.	
Signature of applicant or lawyer	 Castledine Gregory	Date: 12 November 2015