



# ENVIRONMENTAL DEFENDER'S OFFICE (ACT)

## Tree protection law

March 2010 - Fact Sheet 8

*Significant trees in the ACT urban environment are identified and protected through the Tree Protection Act 2005 \*CEV+. The Act creates an ACT Tree Register, a Tree Advisory Panel and measures to control damage to 'protected' trees.*

### Tree Protection Act 2005

The *Tree Protection Act 2005* (ACT) (Tree Protection Act) came into force on 29 March 2006. The objects of the Tree Protection Act include promoting the value of trees, as well as measures to protect trees during development design and planning, and the promotion of a broad appreciation of the role of trees in the urban environment [s.3].

The Tree Protection Act seeks to provide tree protection through the establishment of:

- an ACT Tree Register for the protection of individual trees of exceptional value – 'registered' trees;
- measures to guide management of 'regulated' trees. These are significant trees which are either over 12 metres tall, have a canopy of 12 metres or have a trunk circumference of 1.5 metres.

### What trees are protected?

The Tree Protection Act introduces the concept of 'protected trees' and provides various measures to protect these trees. 'Protected trees' are 'registered trees' or 'regulated trees' [s.8]. 'Registered trees' are those registered on the ACT Tree Register under Part 7 [s.9]. 'Regulated trees' are living (native or non native) trees (other than registered trees or palm trees) of a certain significant size on leased land in a tree management precinct [s.10] (see discussion below).

### How broad is the application of the Tree Protection Act?

The Tree Protection Act is only applicable to leased territory land declared to be a 'built-up urban area' by the Minister [s.7]. Trees on unleased land – such as public parks, reserves, nature strips, forestry plantations and land designated for urban development – are not subject to the provisions of the Tree Protection Act unless they have been entered on the ACT Tree Register. Trees on national land are not covered by the Tree Protection Act.

### What is the ACT Tree Register?

The Tree Protection Act protects individual trees through the establishment of a tree register, managed by the Conservator of Flora and Fauna (the Conservator) [s.41].

The Minister is required to establish criteria for the registration of a tree (s.45) – *Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006 DI 2006-56*. To be registered a tree must be exceptional for its natural or cultural heritage value, landscape and aesthetic value or scientific value.

### What is provisional registration on the Tree Register?

Anyone can nominate a tree in the built-up urban environment for inclusion on the tree register [s.46] using the nomination form available from the Department of the Environment, Climate Change, Energy and Water. Once a registration form is received, the Conservator has six months to decide



whether to provisionally register the tree [s.47].

The Conservator is required to place a notice of the decision to provisionally register the tree in a daily ACT newspaper [s.49]. The notice must identify the tree and call for comments not less than 21 days after the publication of the notice. The Conservator must also seek the input of:

- the Tree Advisory Panel;
- the Heritage Council if the tree has heritage significance;
- the Heritage Council must consult with each representative Aboriginal organisation if the tree is an Aboriginal heritage tree [s.50].

Notice of the Conservator's decision must be given in writing to:

- the person who nominated the tree;
- the Heritage Council, where the Conservator considers the tree to have heritage significance;
- the lessee of, or land management agency (the land manager) for, the land that includes all or part of the protection zone for the tree; and
- anyone else the Conservator considers appropriate [s.49].

Provisional registration ceases if, either the tree is registered, or the Conservator decides not to permanently register the tree [s.60].

### **What is a registered tree?**

A registered tree is a tree that is registered or provisionally registered on the ACT Tree Register under Part 7 of the Act [s.9].

### **How is a tree placed on the Tree Register?**

The Conservator must make a decision on the registration of the tree within one year after the day the tree was provisionally registered [s.52]. In doing so, the Conservator must have regard to the advice of the Tree Advisory Panel, the Heritage Council, and any comments received on the proposed registration received by the stated due date for comments [s.52].

To register a tree the Conservator must believe that the tree meets the criteria for registration. These are found in the *Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006* DI2006-56. To be registered a tree must be exceptional for its natural or cultural heritage value, landscape and aesthetic value or scientific value. The Conservator must provide written notification of the registration decision to affected parties and stakeholders [s.53].

### **Can a tree registration be cancelled?**

The Conservator has the power to cancel the registration of a tree [Div 7.3]. Proposals for the cancellation of a registration can be made by anyone on the required form. As is the case for proposals for registration, the Conservator:

- may refuse to consider applications deemed frivolous or vexatious;
- must give notice of the proposal to cancel; and
- must seek the advice of the Tree Advisory Panel and the Heritage Council.

The Conservator must identify whether he/she considers the proposal may meet cancellation criteria or there may be grounds for making a site declaration.

The Conservator must make a decision on whether to cancel the tree's registration within six months after the date of the public notification of the proposed cancellation. The Conservator can only cancel a tree's registration if relevant criteria (set out in DI2006-56) are met such as the tree:

- no longer meets the criteria for registration;
- presents an unacceptable safety risk; or
- is causing substantial damage to a substantial building, structure or service which cannot be fixed without ongoing and extensive remediation.

### **What is a site declaration?**

The Conservator can make site declarations [s.61] which provides the opportunity to keep a tree on the tree register despite damage under a prohibited activity which has led to the cancellation of its registration. Where the Conservator believes this to be the case, the protection zone for the tree immediately before the cancellation becomes a declared site. The declaration remains in force for five years and the tree's entry in the tree register is not removed but is simply annotated to note the registration has been cancelled. Written notice of site declarations must be given to:

- the lessee of the land on which the tree is located;

- the planning and land authority (currently ACTPLA); and
- anyone else the Conservator deems appropriate.

### What is the role of the Tree Advisory Panel?

The Tree Protection Act creates the Tree Advisory Panel [s.68]. Its function is to provide advice to the Conservator, particularly with regard to registration or cancellation of trees on the Tree Register, approvals sought to undertake tree damaging activities under [Div 3.3] or re-consideration of advice provided by the Conservator [s.70]. A person appointed to the advisory panel must have extensive experience in one of the following areas: arboriculture; forestry; horticulture; landscape architecture; or natural and cultural heritage [s.69].

### What is a regulated tree and tree management precinct?

The Tree Protection Act allows for establishment of Tree Management Precincts in which regulated trees [s.10] are to be protected. These are trees that:

- are 12 metres or more high;
- have a trunk with a circumference of 1.5 metres or more, one metre from the ground;
- have two or more trunks and the sum of their individual circumferences, 1 m above the ground, is 1.5 m or more; or
- have a canopy 12 m or more wide.

Both native and exotic trees are protected. However, if the tree is a pest plant, under the *Pest Plants and Animals Act 2005* it cannot be a regulated tree. All of the ACT suburbs are currently declared Tree Management Precincts through the *Tree Protection (Built-Up Areas) Declaration 2010 (No 1)* NI20010-187.

### Tree Management Plans

Tree management plans are mechanisms to prescribe the range of activities that may affect a particular tree. Proposals for tree management plans can be made by:

- the Conservator for a registered tree;
- the land manager of the land on which a registered tree is located; or
- anyone, for a tree on leased land in a built-up urban area [s.32].

Proposals need to be in writing and sent to the Conservator. The Conservator then has 30 days from the date the proposal is received to make a decision [s.35]. During that time the Conservator may seek advice from the Tree Advisory Panel and must have regard to any guidelines established for tree management plans. At the time of writing, the Conservator had not made any such guidelines.

Once a decision is made the applicant, where there is one, must be advised of the decision in writing [s.36].

The ACT Government has undertaken to prepare tree management plans for every registered tree in order to clearly identify what activities can be undertaken in respect to the tree without requiring approval.

### What is the effect of being a 'protected tree'?

The Tree Protection Act prohibits the damaging of a protected tree – either a 'registered tree' or a 'regulated' tree - without approval. The term 'damage' includes killing, destroying, felling, removing, ring barking, lopping, pollarding, poisoning, major pruning, or anything else that causes the tree to die, reduces its expected life span or significantly and adversely affects the tree's health [s.12].

In addition, certain groundwork is prohibited without approval within the tree protection zone [Div 3.2]. The tree protection zone is deemed to be under the canopy of the tree, within a two metre radius out from the canopy, within a four metre radius surrounding the trunk as measured at one metre above natural ground level or as defined in a tree management plan for the tree [s.11].



Prohibited activities include:

- changing the soil level (except for the preparation of garden beds, the planting of trees and shrubs or other cultivation for horticultural purposes);
- contaminating the soil; or
- cutting any roots with a diameter of greater than 50 mm.

## Can protected trees be pruned?

You can undertake 'minor pruning' of a protected tree without approval. The meaning of minor pruning differs for regulated and registered trees. For regulated trees minor pruning means pruning (other than lopping or pollarding) performed in accordance with the Australian Standard on Pruning, AS 4373, that does not affect the general appearance of the tree or if it is a fruit tree, if it is done in accordance with the Standard and is done for fruit production [s.13(2)(b)].

Lopping is cutting branches or stems of the tree between branch unions and amounts to damage of a tree which requires approval [s.12]. Pollarding is removing branches of the tree to a previously pruned or lopped point and also requires approval [s.12].

For registered trees, minor pruning means pruning (other than lopping or pollarding) conducted in accordance with AS 4373 that is limited to:

- removing deadwood;
- removing limbs with of a diameter of 50 mm or less; or
- the first pruning of the tree in the calendar year, which affects less than 10 per cent of the canopy and does not change the overall shape of the canopy.

While minor pruning can be undertaken without approval, major pruning of both regulated and registered trees generally requires the approval of the Conservator. Approval is given in accordance with the criteria set out in the *Tree Protection (Approval Criteria) Determination 2006 (No) 2*.

Major pruning of a regulated tree may be approved if:

- it is a remedial treatment;
- it is in the general interests of the health of the tree;
- it reduces an unacceptable risk to public or private safety;
- it reduces the risk of damage or prevents further damage to a substantial building, structure or service; or
- the tree (excluding remnant eucalypts) is substantially affecting solar access to the lessee's or a neighbour's lease between 9 am and 3 pm during winter and minor pruning would not fix the problem.

Major pruning of registered trees may be approved if the work is required:

- to maintain the health and safety of the tree;
- to maintain clearance from services; or
- as remedial treatment.

Approval for major pruning of a registered tree may only be given if the work is necessary and will not:

- substantially alter the tree's shape or form;
- cause the tree to become unsafe; or
- result in the decline or death of the tree, or necessitate its removal or destruction.

## What is an offence under the Tree Protection Act?

It is an offence to damage a protected tree without approval as well as to undertake groundwork in the protection zone of a protected tree [ss 15-18]. Unless otherwise defined in a tree management plan, the protection zone is measured in relation to the canopy of the tree and a 4m radius area surrounding the trunk [s.11].

## How can a protected tree be lawfully damaged?

The Tree Protection Act contains an extensive list of circumstances where damage to a protected tree is permitted [s.19] including:

- the prohibited activity has been granted approval by the Conservator;
- a registered tree is removed because its registration was cancelled for safety reasons;
- the prohibited activity is in accordance with a tree management plan, a tree protection order or a condition of a development approval;
- directions for the seizure, disinfection, and destruction, of plants were made under the *Plant Diseases Act 2002* [s.13];

- damaging activities to a regulated tree were done in compliance with the *Utilities Act 2000* [s.105-106; s.125; s.225(F, G and X)];
- there is a notice under the *Roads and Public Places Act 1937* [s.13] dealing with trees overhanging public places; or
- the activity was performed honestly by a member of emergency services while exercising a function under the *Emergencies Act 2004* for the purpose of protecting life or property or preventing or fighting fires.

Urgent approvals to do prohibited activities may be granted where the activity is urgently required to protect the health or safety of people or animals, or public or private property [s.29]. An application may be made orally or in writing. The Conservator's approval may be in writing or given orally. In the latter case the Conservator must make a written record as soon as practicable [s.29].



### How do I get permission to damage protected trees?

The Conservator can grant approval to damage protected trees using established criteria set out in *Tree Protection (Approval Criteria) Determination 2006 (No2)* – DI 2006-60. In summary the criteria cover, if after all remedial steps have been ineffective, the tree:

- is in decline and its life expectancy is short;
- represents an unacceptable risk to public or private safety;
- is causing or threatening to cause substantial damage to a substantial building, structure or service;
- is an inappropriate tree for its location because of its potential size or growth habit – this does not apply to remnant eucalypts;
- is substantially affecting solar access to the lessee's or a neighbour's lease between 9am and 3pm during winter and pruning would not fix the problem - this does not apply to remnant eucalypts;
- is causing an allergic reaction to someone who lives on the property and the claim is supported by a medical specialist's certificate;
- is part of a close planting and its removal would enable the other trees to develop fully;
- is located on a block of less than 1200m<sup>2</sup> and is determined to be a problematic tree species listed in Schedule 2 of DI2006-60; or alternatively
- if the groundwork proposed will have minimal impact on the tree should the conditions of the approval be followed.

When deciding to approve damaging activities for a regulated tree the Conservator may consider the importance of the tree in the surrounding landscape and any exceptional circumstances. For trees listed as a locally beneficial species in Schedule 3 of DI2006-60, the Conservator may also consider whether the tree has ecological importance to the local environment.

The Conservator must make a decision within 30 days of receiving an application to undertake a prohibited activity [s.25].

### What if a protected tree is being damaged?

The Conservator has the power to issue directions in respect to a protected tree [s.76]. A direction is given to the owner or occupier of the land on which the tree is located or to someone undertaking an activity that may affect a protected tree. The direction must be in writing and may include a requirement to:

- stop the damaging work;
- erect a fence around the tree to protect it;
- drain the area around the tree where it has become flooded; or
- prune the tree to correct damage to the tree.

### What if a protected tree will be affected by a proposed development?

The *Planning and Development Act 2007* (Planning Act) requires that the Conservator receive a copy of any development application in the impact track or in the merit track if the application

relates to any part of a declared site [s.148; reg.26]. In addition, if the Conservator believes that the development is likely to result in damage to a protected tree or affect a tree protection zone or declared site, the Conservator can give written advice on the matter [s.82].

The advice must include the tree protection requirements for each protected tree with a protection zone on the land [s.83]. This advice needs to be considered by the ACT Planning and Land Authority, ACTPLA, (or the Minister) in making its decision on the development application [s.120(d); 129(e) Planning Act]. Development approvals which are inconsistent with the Conservator's advice in relation to a registered tree or a declared site cannot be given [ss.119(3) and 128(3) Planning Act].

In other cases, such as where the advice relates to regulated trees, approval inconsistent with that advice can only be given in certain situations [ss.119(2) and 128(2) Planning Act].

### Can information be restricted?

The Conservator can determine that certain information about a registered tree or a tree nominated for registration can be deemed to be restricted information [Part 8]. A declaration of restricted information can only be made if either:

- public disclosure of the information is likely to have a substantial adverse effect on the values for which the tree is or may be registered; or
- the tree is an Aboriginal heritage tree.

The Conservator may approve the publication of restricted information where satisfied it will not lead to a substantial effect on the tree's registration values.

### How are decisions reviewed?

The Conservator is required to advise an applicant (or approval holder) when a decision is available to be reconsidered [s.105]. These include decisions on:

- applications for the approval of damaging activities [s.25];
- cancellation of the approval of a damaging activity [s.28]; or
- the approval of tree management plans [s.35].

The ACT Civil and Administrative Tribunal (ACAT) can review specified decisions made by the Conservator including:

- approvals or refusal to approve registration of a tree [s.52];
- cancellation or refusal to cancel the registration [s.58];
- site declarations [s.61];
- the publication of restricted information [s.66];
- tree protection orders [s.76]; or
- reconsiderations [s.107].

Part 13 and Schedule 1 set out who may seek merits review of these decisions. Generally it is the applicant (for registration or approval) or relevant lessee or occupier of land.

## EDO (ACT)

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