

chapter six

Protecting trees

Introduction

Trees are an important feature of the urban, rural and natural landscapes. For many people, trees are the embodiment of the environment and tree planting is seen as a key environmental tool. Trees perform many vital services, such as preventing soil erosion, providing habitats for wildlife, improving the atmosphere, protecting water catchments or simply providing shade on a hot summer's day.

Canberra prides itself as being the 'bush capital' with the tree-covered mountains to the west providing a majestic backdrop to the city. Many of the units of Canberra Nature Park, interspersed among Canberra's suburbs, have trees making up significant components of their ecosystems. Within the suburbs and the city centres, native and exotic tree species form key elements of the 'garden city' aspect of Canberra.

For many years, the ACT lacked a specific piece of legislation dealing with tree protection. This is not to say that there were no legislative avenues of protection for trees but these tended to be limited in their scope. This was particularly notable in urban areas, where protection had to be achieved through indirect means, for example, through the development approval process, or through heritage listing of trees, or through the design and citing codes for multi-dwelling developments. To address tree protection issues in the urban environment, the *Tree Protection (Interim Scheme) Act 2001* (ACT) was introduced. This has since been replaced by the more comprehensive *Tree Protection Act 2005* (ACT) (Tree Protection Act) which came into force on 29 March 2006.

Tree Protection Act 2005

Introduction

The Tree Protection Act introduces the concept of 'protected trees' and seeks to provide tree protection through the establishment of:

by
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- an ACT Tree Register for the protection of individual trees of exceptional value (registered trees)
- Tree Management Precincts (for regulated trees).

So a 'protected tree' may be either a 'registered tree' or a 'regulated tree'.

The objects of the Tree Protection Act also include the promotion of the value of trees and their protection requirements into development design and planning and the promotion of a broad appreciation of the role of trees in the urban environment (s.3).

Applicability

It is important to note that the Tree Protection Act is only applicable to territory land that is declared to be in a 'built-up urban area' by the responsible minister, at the time of writing, the Minister for Territory and Municipal Services. The emphasis of the Tree Protection Act is on leased land within the built-up urban area and trees on unleased land 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.

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 responsible for the Tree Protection Act has established criteria for the registration of a tree (s.45). These require the tree to be exceptional for its natural or cultural heritage value, landscape and aesthetic value or scientific value. The current criteria can be found on the internet as the Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006, disallowable instrument DI 2006-56, listed on the legislation register (see Contacts list at the back of this book).

Tree Advisory Panel

Section 68 of the Tree Protection Act creates the Tree Advisory Panel (the advisory panel). This is established to provide advice to the conservator. In May 2008, three advisory panel members were appointed for a two-year term, through Disallowable Instrument DI2008-123. A person appointed to the advisory panel must have extensive experience in one of the following areas:

- arboriculture
- forestry
- horticulture
- landscape architecture
- natural and cultural heritage.

Protecting trees under the Act

Tree Management Precincts and regulated trees

Tree Management Precincts under the Tree Protection Act have two roles.

The first is to provide protection for trees during the establishment of the ACT Tree Register. As a transitional step from the previous legislation, all of the ACT's suburbs were declared to be Tree Management Precincts. Currently tree management precincts include all built up urban areas, as set out in the Tree Protection (Built-up Urban Areas) Declaration 2009 (No. 1). They are Canberra Central suburbs (including Oaks Estate), Woden Valley suburbs, Tuggeranong suburbs (including Tharwa and Hume), Weston Creek suburbs, Belconnen suburbs and Gungahlin suburbs and Hall. As the survey for the identification of trees for the ACT Tree Register is completed in a suburb, the Tree Management Precinct status of the suburb may be revoked.

The second role is to provide for tree protection in areas of development, in areas of particular heritage significance or in areas of reducing canopy cover.

Trees to be protected in Tree Management Precincts are called regulated trees and these are defined in s.10 of the Tree Protection Act, as being a tree on leased land within a Tree Management Precinct which meets one of the following criteria:

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

These requirements are consistent with the definition of significant trees under the previous legislation.

There is no distinction between native and exotic species when defining regulated trees. However, if the tree is a pest plant, under the *Pest Plants and Animals Act 2005* (see Chapter 5), it cannot be a regulated tree.

Provisional registration

Anyone can nominate a tree for inclusion in the tree register (s.46) using the nomination form available from the Department of Territory and Municipal Services (TAMS) website (see Contacts list at the back of this book). Only trees in a built-up urban area can be nominated for registration.

Once a registration form is received, the conservator has six months to decide whether to provisionally register the tree (s.47). Notice of the conservator's decision must be given in writing to:

- the person who nominated the tree
- 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
- the heritage council, where the conservator considers the tree to have heritage significance
- anyone else the conservator considers appropriate (s.49).

The conservator is required to place a notice of the decision to provisionally register the tree

in a daily newspaper circulating generally in the ACT (s.49). Currently, only the *Canberra Times* meets this criteria. The notice must identify the tree and call for comments by a closing date not less than 21 days after the publication of the notice.

The conservator must also ask the advice of the advisory panel, set up under the Tree Protection Act, on the proposed registration. The Heritage Council must be consulted if the tree has heritage significance. And, if the tree is an Aboriginal heritage tree, the Heritage Council must, in turn, consult and consider the views of each representative Aboriginal organisation before providing the conservator with its advice (s.50) (See Chapter 9 for more information on heritage listing.) The term ‘representative Aboriginal organisation’ is an organisation declared to be so in accordance with s.14 of the *Heritage Act 2004* (ACT) or as prescribed by regulation under the Tree Protection Act.

Provisional registration can last up to one year from the date of registration. However, a tree is able to be provisionally registered more than once.

Provisional registration ceases if, within the year the tree is registered or the conservator decides not to permanently register the tree. If this is the case, the period for appeal to the ACT Civil and Administrative Tribunal (ACAT) against this decision must have lapsed with no appeal having been made; or any appeal against the decision must have been decided and be unsuccessful (s.51) (see Chapter 12 for a discussion of ACAT).

Registration

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 advisory panel or heritage council and any comments received on the proposed registration received by the stated due date for comments under s.49.

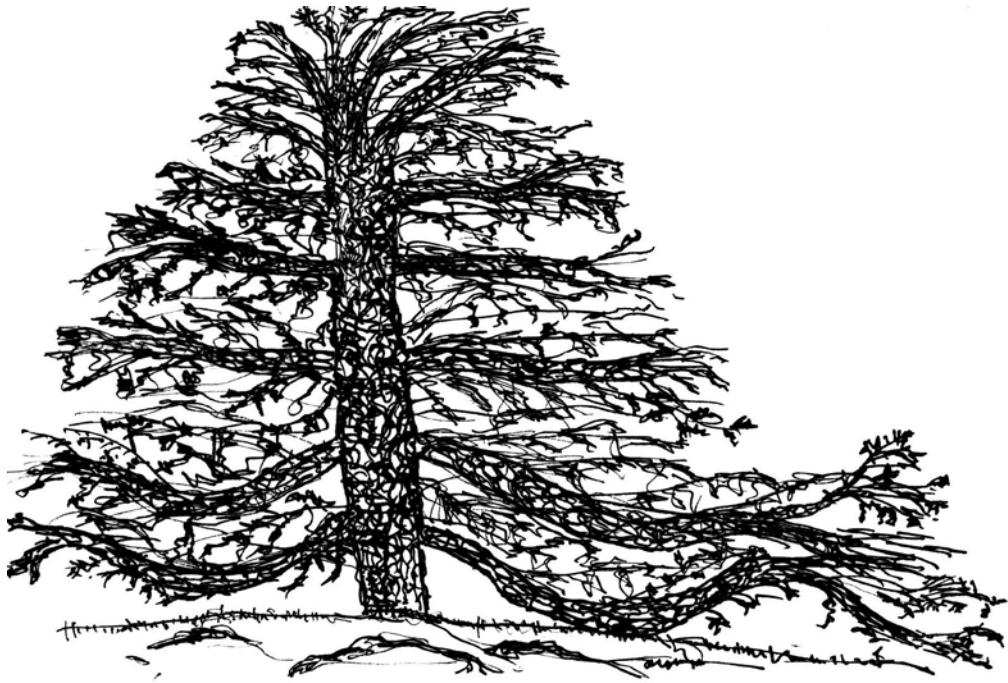
To register a tree the conservator must believe that the tree meets the previously mentioned criteria for registration. Once a decision on the registration is made the conservator must provide written notification of the decision under s.53 to:

- the person who nominated the tree
- the lessee of, or land manager for, the land on which the tree is located
- if the tree is on leased land, the lessee of, or land manager for, land adjoining the land on which the tree is located and which is within 50 metres of the tree
- anyone who provided comments on the proposed registration and who indicated they wanted to be advised of the conservator’s decision
- the heritage council, if it provided advice on the registration
- anyone else the conservator considers appropriate.

Where the conservator decides to register the tree, a notice of this decision must also be placed in the *Canberra Times*.

Cancellation of registration

The conservator also has the power under Division 7.3 of the Tree Protection Act to cancel the registration of a tree. Proposals for the cancellation of a registration can be made by anyone



Registered tree

and this must be made on the required form. As is also the case for proposals for registration, the conservator may refuse to consider applications deemed frivolous or vexatious.

Before considering proposals for cancellation the conservator must give notice of the proposal to:

- the person proposing the cancellation
- the lessee of, or land manager for, the land on which the tree is located
- if the tree is on leased land, the lessee of, or land manager for, land adjoining the land on which the tree is located and which is within 50 metres of the tree
- the heritage council if the tree register indicates that the tree has heritage significance
- anyone else the conservator considers appropriate.

In addition, the conservator must place a notice of the proposed cancellation in the *Canberra Times*. The notice must identify whether the conservator considers the proposal may meet cancellation criteria; whether there may be grounds for declaring a site declaration (refer below) and call for comments by a closing date not less than 21 days after the publication of the notice.

As with a proposal for registration, the conservator must seek the advice of the advisory panel in relation to the proposal for cancellation and any proposed site declaration. The requirements for involvement of the heritage council and its requirement to consider the view of each representative Aboriginal organisation are the same as for registration.

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. This decision must be made after considering the advice from the advisory panel and where applicable the heritage council as well as any comments on the proposed cancellation received within the period for public comment.

Cancellation of a tree's registration can only occur if the conservator believes the cancellation meets the cancellation criteria. These are currently found in the previously mentioned Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006, disallowable instrument DI2006-56. The criteria include the tree:

- no longer meeting the criteria for registration
- presenting an unacceptable safety risk
- causing substantial damage to a substantial building, structure or service which can't be fixed without ongoing and extensive remediation.

Upon making a decision the conservator must notify in writing the same people as were notified of the cancellation proposal, plus anyone who made written comments and asked to be advised or anyone else the conservator thinks appropriate.

Where the decision made is to cancel the tree's registration, this must be published in the *Canberra Times*. The decision on the tree's cancellation is able to be appealed to the ACT Civil and Administrative Tribunal. Cancellation of the tree's registration can only occur after the period for appeal has lapsed and no appeal has been made or any appeal is unsuccessful.

Site declarations

Site declarations are dealt with under s.61. The inclusion of site declarations provides the conservator with 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 definition of a protection zone is discussed in the Damages section below. The declaration remains in force for five years and the tree's entry in the tree register is not removed but is simply annotated that the registration has been cancelled. Declarations under s.61 are notifiable instruments.

Written notice of site declarations must be given to:

- the lessee of the land on which the tree is located
- the ACT Planning and Land Authority (ACTPLA)
- anyone else the conservator deems appropriate.

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
- anyone, for a tree on leased land in a built-up urban area.

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 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. Where the decision is to approve a tree management plan, the conservator must also advise in writing;

- the lessee or the land manager of the land where the tree is located
- the lessee, or land manager, of land adjoining the land on which the tree is located and which is within 50 m of the tree
- the heritage council, where the tree has heritage significance
- representative Aboriginal organisations where the tree is an Aboriginal heritage tree.

Tree management plans come into effect from the date stated in the approval notice, which in turn, must be at least 14 days after notice of approval has been issued.

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.

Damaging trees

Damage

The Tree Protection Act prohibits the damaging of a protected tree (that is a registered tree or a regulated tree, see Introduction). The term 'damage' includes killing, destroying, felling, removing, ring barking, lopping, pollarding, poisoning, major pruning, 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 (Division 3.2). To be prohibited the groundwork must occur within the tree protection zone for the tree or in a declared site. The tree protection zone is deemed to be under the canopy of the tree, within a 2 m radius out from the canopy, within a 4 m radius surrounding the trunk as measured at 1 m above natural ground level, or the tree protection zone as defined in the a tree management plan for the tree (s.11). The 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 diameter of greater than 50 mm.

For declared sites, prohibited groundwork includes changing the level of the soil except for the preparation of garden beds, the planting of trees and shrubs or other cultivation for horticultural purposes.

The concept of acceptable (minor) pruning of trees differs between registered and regulated trees. For registered trees minor pruning must be conducted in accordance with the Australian

Standard on Pruning, AS 4373 and is limited to:

- deadwood
- limbs with a diameter of 50 mm or less
- 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.

For regulated trees, minor pruning needs to be performed in accordance with AS 4373 and must not affect the general appearance of the tree, or if it is a fruit tree, it must be done for fruit production purposes (s.13).

Exceptions to damage

The Tree Protection Act contains an extensive list of circumstances where damage to a protected tree is permitted (s.19). These are where:

- 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 s.13 of the *Plant Diseases Act 2002*
- damaging activities to a regulated tree were done in compliance with the *Utilities Act 2000*, ss.105 and 106 installation of and maintenance of network facilities respectively and ss.225F and 225G installation of and maintenance of territory network facilities respectively
- there is a network protection notice given under s.125 of the *Utilities Act 2000*
- there is a territory network protection notice given under s.225X of the *Utilities Act 2000*
- there is a notice under s.13 of the *Roads and Public Places Act 1937* dealing with trees overhanging public places
- compliance with ss.106 and 225G of the *Utilities Act 2000* is required for the protection of life and property and it is not possible to obtain an urgent circumstances approval from the conservator (see below)
- the activity was performed honestly by a member of the fire brigade or rural fire service or anyone under the control of the chief officers of these organisations or a police officer while exercising a function under the *Emergencies Act 2004* for the purpose of protecting life or property or preventing or fighting fires.

Approvals

Subject to the exceptions outlined above, it is an offence to damage a protected tree. Similarly, it is an offence to undertake prohibited groundwork in the protection zone for a protected tree or in a declared site (Division 3.2). As noted above, one of the circumstances in which a protected tree can be damaged or prohibited groundwork undertaken is with the conservator's approval. The criteria under which the conservator can grant approval

was most recently set out in Tree Protection (Approval Criteria) Determination 2006 (No 2). This can be found on the ACT legislation register website as disallowable instrument DI2006-60. Approval is obtained by writing to the conservator. The completed form can be posted or submitted electronically (see Contacts list at the back of this book).

The conservator may give approval to damage (which includes removal) a regulated tree if, after all reasonable steps to remedy the problem have proved 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 9 am and 3 pm during winter and pruning would not fix the problem
 - is causing an allergic reaction to someone who lives on the property and the claim is supported by a medical specialist's certificate
- or
- is part of a close planting and its removal would enable the other trees to develop fully.

The conservator may also approve the removal of a tree if it is located on a block of less than 1200 m² and is determined to be a problematic tree species listed in Schedule 2 of the above determination.

Major pruning of a regulated tree may be approved when the work:

- is a remedial treatment
 - is in the general interests of the health of the tree
 - reduces an unacceptable risk to public or private safety
- or
- reduces the risk of damage or prevents further damage to a substantial building, structure or service.

Major pruning of regulated trees may also be approved if 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.

For both regulated and registered trees, approval for prohibited groundwork within a tree protection zone may be granted if the groundwork will have minimal impact on the tree should the conditions of the approval be followed.

Within declared sites, prohibited groundwork may be approved if the conservator is satisfied that the prohibited groundwork and any other prohibited groundwork activity within the past 12 months will affect less than 10 per cent of the site. The conservator may also grant approval for prohibited groundwork activity in a declared site if the ACTPLA has advised that the groundwork is necessary to achieve the broader strategic planning objectives for the ACT.

The conservator when deciding to approve damaging activities for a regulated tree may consider the importance of the tree in the surrounding landscape, including whether the tree has ecological importance to the local environment. To be considered for this later condition, the tree must be listed as a local ecologically beneficial species, as per Schedule 3 of the above approval criteria determination DI2006-60.

The conservator must make a decision within 30 days of receiving the application for a prohibited activity (s.25). When the conservator's decision concerns a declared site written notice must be given to:

- the applicant
- the lessee or the land manager of the land where the tree is located
- ACTPLA.

For other approval decisions written advice must be given to:

- the applicant
- the lessee or the land manager of the land where the tree is located or the activity is to be conducted
- the lessee of land adjoining the land on which the tree is located and which is within 50 m of the tree
- the heritage council, where the tree has heritage significance
- representative Aboriginal organisations where the tree is an Aboriginal heritage tree.

An approval takes effect on the date that is stated in the notice of decision and this must be at least 14 days after the day on which notice was given to the applicant. The notice will state the period for which the approval is in force (s.27). An approval to damage a tree may be cancelled if the conservator is of the opinion that the criteria for approval are no longer met (s.28). Notice of the cancellation must be given to certain persons as set out in section 28.

Urgent circumstances

In addition to the various exceptions to prohibited activities, approval may be sought under the urgent circumstances section of the Tree Protection Act (s.29). This allows for an application for approval to be made in writing or orally where the activity is urgently

required to protect the health or safety of people or animals, or public or private property. 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.

Urgent circumstances authorisations can be requested by telephoning Canberra Connect (see Contacts list at the back of this book).

Other protection mechanisms

Tree protection directions

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 examples 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
- prune the tree to correct damage to the tree.

Land development applications

Under the *Planning and Development Act 2007* (Planning Act), the conservator is to receive a copy of any development application (DA) in the impact track or a DA in the merit track if the application relates to any part of a declared site (s.148 and reg.26). See Chapter 3 for a discussion of DAs and the assessment tracks. 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 ACTPLA written advice on the matter (s.82 Tree Protection Act). The advice must include advice about tree protection requirements for each protected tree with a protection zone on the land (s.83 Tree Protection Act). This advice needs to be considered by ACTPLA (or the minister) in making its decision on the DA (ss.120(d) and 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, as outlined in ss.119(2) and 128(2) of the Planning Act.

Restricted information

Certain information about a registered tree or a tree nominated for registration can be deemed to be restricted information. This is done under Part 8 of the Tree Protection Act. Whether information is restricted is determined by the conservator. 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.

Aboriginal heritage trees are trees of particular significance to Aboriginal people because of Aboriginal tradition and/or the history of any Aboriginal people of the area in which the tree is located (see Chapter 9).

If the conservator makes a declaration about restricted information, under ss.63 and 64, the conservator must try to give a copy of the declaration to:

- the person who nominated the tree
- the lessee of, or land management agency for, the land on which the tree is located
- the lessee of, or land management agency for, land adjoining the land on which the tree is located and which is within 50 m of the tree
- the Heritage Council, where the tree is an Aboriginal heritage tree or if the tree has or may have other heritage significance
- if the tree is an Aboriginal heritage tree, each representative Aboriginal organisation.

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. Requests for publication of restricted information must be in writing and state the information to be disclosed, the reason for disclosure and the nature of the publication (s.66).

Restricted information may also be provided to someone considering buying the land if they request access to the restricted information relevant to the conservation and use of the land. Where such a request occurs the conservator is obliged to provide the information sought with a written explanation about restricted information. Any of the people or organisations to whom the conservator needs to try and provide copies of a restricted information declaration (see above) can also request the information if the land upon which the tree is located is offered for sale.

Review of decisions

The Tree Protection Act provides for the review of some of the conservator's decisions. The conservator is required under s.105 to advise when a decision is available to be reconsidered (by the conservator on the advice of the advisory panel) or reviewed by the ACT Civil and Administrative Tribunal (ACAT) (see Chapter 12 for a further discussion of ACAT which replaces the former AAT).

An application for reconsideration can be made on a form available on the TAMS website for decisions on applications for the approval of damaging activities (s.25), cancellation of the approval of a damaging activity (s.28) or decisions relating to the approval of tree management plans (s.35).

Applications to ACAT for review can be made for the following decisions:

- approval or refusal to approve registration of a tree under s.52
- cancellation or refusal to cancel the registration under s.58
- site declaration under s.61
- the publication of restricted information under s.66
- tree protection orders under s.76
- reconsiderations under s.107.

Trees not protected under the Tree Protection Act

Introduction

As previously noted, the Tree Protection Act only provides protection for trees on land in built-up urban areas (s.7). In particular it provides protection for protected trees, being regulated trees on leased territory land within a tree management precinct, or registered trees. Protection for trees which are not registered trees in areas such as leased rural land or on unleased land, such as public parks, reserves, nature strips, forestry plantations and land designated for urban development, comes from the following three Acts:

- *Nature Conservation Act 1980* (ACT)
- *Trespass on Territory Land Act 1932* (ACT)
- *Heritage Act 2004* (ACT).

In combination with the Tree Protection Act, these Acts provide for some form of tree protection across territory land, with the exception of exotic non-heritage listed trees on leased rural land. It should also be remembered that Commonwealth heritage legislation has the ability to provide some protection for trees.

Nature Conservation Act 1980

Under the Nature Conservation Act, it is an offence to fell or damage standing native timber or remove fallen native timber on unleased land, or leased rural land, without a licence. It is also an offence to damage fallen native timber of a certain size on unleased land without a licence. The conservator is responsible for issuing the licences. There are some exceptions to this general rule, such as where the standing native timber is on leased rural land and:

- the timber was planted by or for an occupier and felled by that or any subsequent occupier
- the person believed that the felling was necessary to avoid injury to a person or damage to property
- or
- the person intended to use the timber on the land where it was growing.

Similarly, a licence is not required in respect to damage to fallen native timber on unleased land if the timber is less than 10 cm in diameter.

Licences are not required for felling trees to prevent or fight fires or to protect life and property under the *Emergencies Act 2004* (ACT) where this is done by someone involved with the fire brigade or bushfire service, or by a police officer (s.5 Nature Conservation Act). Nor are licences required where conservation officers or public servants do the felling in the performance of their duties (s.52(5)).

Trees on rural leased land can also be protected by other provisions of the Nature Conservation Act, for example, those making it an offence to disturb a native animal nest or its environment without a licence (s.43), those that allow the conservator to give directions for the protection or conservation of native timber on private leases (s.60), and those covering declarations of vulnerable and endangered ecological communities and species (Division 3.2). These

declarations result in action plans, which include management actions and protection measures that may involve the retention and maintenance of native trees (Division 3.4). There is more detail on all these matters in Chapter 5.

The Nature Conservation Act also creates an offence of clearing native vegetation in a reserved area, with higher penalties if the clearing causes harm to the area (Division 8.2). Exceptions to this relate to actions taken in accordance with:

- a licence
- an approval for a development under Chapter 7 of the Planning Act
- a fuel management plan under Part 6, Bushfire-prone government land, of the *Bushfire Act 1936* (this Act has been repealed and fuel management plans have since been replaced by strategic bushfire management plans under the *Emergencies Act 2004*)
- a strategic bushfire management plan under the Emergencies Act.

Trespass on Territory Land Act 1932

The Trespass on Territory Land Act provides some protection to trees on unleased territory land and land occupied by the territory. It states that a person shall not damage or destroy trees in these areas without a reasonable excuse (s.7). Both native and exotic trees are covered under this section.

Trees on nature strips are an example of trees on unleased territory land covered by the Trespass on Territory Land Act. The Parks, Conservation and Lands (PCL) agency within TAMS manages nature strips as well as other unleased urban land.

All plantings on nature strips, even those planted by residents, are the property of the ACT government. It has responsibility for managing trees on nature strips, including performing tree surgery, pest control and tree removal. Before a householder can remove a tree from a nature strip, or landscape the nature strip, permission must be obtained from PCL. More information, including PCL's tree policy, can be obtained from the TAMS website (see Contacts list at the back of this book).

Heritage Act 2004

Trees can be listed on the heritage register, created under the Heritage Act, with the exception of individual trees in a built up urban area (s.3A Heritage Act). Listing on the heritage register opens a number of avenues of protection. See Chapter 9 for more details on heritage listing.

Trees on national land and designated areas

The complex, dual system of land management and control in the ACT is outlined in Chapter 2. Basically, land in the ACT is divided into national land and territory land. The Commonwealth, through the National Capital Authority (NCA), controls development in those bits of national land that are categorised as designated areas. The ACT, through ACTPLA, controls development in all other areas, but with reference to the NCA in those areas with special requirements because of their importance to Canberra as the national capital.

As noted in Chapter 3, for land within a designated area NCA approval is required prior to the carrying out of any 'works'. This expression includes landscaping, tree felling and excavation. The planning and design principles set out in the National Capital Plan can provide indirect protection for trees where the removal of the trees would be contrary to these principles.

For national land not part of a designated area, the special requirements of the National Capital Plan may provide some indirect protection.

Listing on the Commonwealth Heritage List also provides some protection for listed trees (see Chapter 9).

Neighbours' trees

Trees commonly cause problems between neighbours in residential areas because of the spread of branches or roots from one property to another. The common law of nuisance or negligence may apply to such problems (see Chapter 12). A legal nuisance, in general terms, arises where a use of one property causes damage to the neighbouring property or interferes with the neighbour's enjoyment of the property. Legal nuisance can be difficult to establish in other than very obvious cases, for example, where a neighbour's trees shaded a commercial orchard to the extent that the size of the crop was affected.

Negligence arises where a person can establish that he or she is owed a 'duty of care' by the neighbour and the neighbour has breached that duty and damage has resulted. An example would be where a neighbour knows that one of his or her trees is dangerous but does nothing to prevent the tree falling and damaging the property or person of the neighbour.

These common law remedies can be difficult to pursue because of the cost of court proceedings. Therefore, negotiations between neighbours are often a better option. Mediation services can assist if initial negotiations are unsuccessful. It is often beneficial to get professional advice from a tree surgeon about the cause of the problem and the most effective way to remedy it. The neighbours could share the cost of such advice.

It is possible to remove branches or roots spreading from a neighbour's property under the common law right of 'self-help' or 'abatement'. However, if this action is likely to cause irreparable damage to the offending tree, it is not advised as the owner of the tree could then take action for such damage. Where the tree involved is a protected tree under the Tree Protection Act, approval from the conservator would be required if the action taken was likely to damage the tree.

