



10 March 2010

Dr Maxine Cooper  
Commissioner for Sustainability and the Environment  
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Dickson ACT 2602  
By email [envcomm@act.gov.au](mailto:envcomm@act.gov.au)

Dear Dr Cooper

**RE: Investigation into the Government's tree management practices and the renewal of Canberra's urban forest**

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the Commissioner's investigation into tree management practices and the renewal of Canberra's urban forest.

As you will be aware, the EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each State and Territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

**Executive Summary**

Whilst recognising that this review is focused on Canberra's urban forest the EDO has provided some broader comments extending beyond the urban forest. The EDO is of the view that the protection of Canberra's urban forests provided for in the *Tree Protection Act 2005* must be viewed in the broader context of environmental protection in the ACT. The urban forest must be seen as an important part of biodiversity conservation in the Territory. Urban forest and connectivity corridors are vital in protecting native species and it is essential that all the legislative schemes which are aimed at vegetation protection work harmoniously.

The recommendations of the EDO are summarised as follows:

- the ACT Government should act on its stated intention of conducting a review of the *Nature Conservation Act 1980* as soon as possible to provide a consistent, holistic approach to vegetation management and tree protection within the ACT;
- a single legislative scheme should apply for the protection and management of all trees and native vegetation in the ACT, regardless of land tenure or location.

Whilst preferring a single legislative framework for protecting the ACT's trees, in the interim the EDO makes the following recommendations to improve the existing laws which operate to protect the ACT's urban and non urban trees:

- remove the concept of 'built-up urban areas' and 'tree management precincts' and link the operation of the Tree Protection Act to Territory Plan zones and make complementary amendments to the Nature Conservation Act;
- extend the application of the Tree Protection Act to provide greater protection for native species;
- amend the criteria against which the Conservator's decisions in respect of tree removal applications are made under the Tree Protection Act to require greater consideration of the ecological importance of the particular tree and make the criteria the same for decisions made under the Nature Conservation Act;
- amend the Tree Protection Act and the Nature Conservation Act to limit the number of exemptions from approval and licencing requirements;
- provide for community comment on tree damaging applications under both the Tree Protection Act and the Nature Conservation Act, including a requirement for the decision-maker to consider these comments when making their decision;
- require the Conservator to consult and consider the advice of the Tree Advisory Panel prior to determining tree damaging applications relating to native trees;
- require a statements of reasons to accompany all decisions;
- extend standing for merits review to allow public interest matters to be heard;
- expand the objects clause of the Tree Protection Act;
- expand the provisions relating to site declarations to incorporate regulated native trees; and
- amend the *Planning and Development Act 2007* so that the Conservator plays a greater decision-making role in regards to trees subject to development applications.

This submission focuses on terms of reference numbered 3, 9 and 10 and includes proposals for reform of the Tree Protection Act, the Nature Conservation Act and the Planning and Development Act.

More detailed discussion of these recommendations is provided below.

### **Single Legislative Scheme**

As you will be aware the ACT currently provides a level of protection for, and regulation of, the removal and damage to trees in the ACT both in the urban and non-urban environment primarily through the *Tree Protection Act 2005* (ACT) (hereafter 'Tree Protection Act') and the *Nature Conservation Act 1980* (ACT) (hereafter 'Nature Conservation Act').

The Tree Protection Act currently provides some protections to certain trees referred to as

'protected' trees. These are defined as 'registered trees', being trees registered on the ACT tree register, of which there are currently none,<sup>1</sup> and 'regulated trees', being living trees of a certain size on leased land within the 'built-up urban area'.<sup>2</sup> The 'built-up urban area' is an area declared by the Minister for the Environment and is essentially all of Canberra's suburbs, but importantly it does not currently cover future urban areas.<sup>3</sup> The Tree Protection Act protects these trees by prohibiting damage to them without approval by the Conservator for Flora and Fauna (hereafter referred to as the Conservator)<sup>4</sup>. 'Damage' is defined to include killing, felling as well as major pruning.<sup>5</sup> The Act covers both native and non native trees.

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 except for individual trees that have been entered on the ACT Tree Register. Trees on national land are not covered by the Tree Protection Act.<sup>6</sup>

The Nature Conservation Act also provides some protections for trees in the ACT. Under this Act certain protections are provided to native timber on unleased land within the 'built-up area' and to native timber on leased or unleased land outside the built-up area.<sup>7</sup> The 'built-up area' is defined by reference to the definition in the Emergencies Act.<sup>8</sup> Subject to a number of exceptions,<sup>9</sup> felling, damaging or removing native timber which has a diameter of more than 10cm is prohibited without a licence issued by the Conservator.<sup>10</sup>

Clearing of native vegetation (which includes trees)<sup>11</sup> in a reserved area is also prohibited without a licence from the Conservator unless it is done in accordance with a development approval or a fuel management plan or strategic bushfire management plan under the Emergencies Act.<sup>12</sup>

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<sup>1</sup> Note that there are approximately thirty provisionally registered trees.

<sup>2</sup> *Tree Protection Act 2005* (ACT) ss8-10.

<sup>3</sup> See the *Tree Protection (Built-up Urban Areas) Declaration 2009 (No 1)* NI2009—62

<sup>4</sup> See *Tree Protection Act 2005* (ACT) Division 3.2.

<sup>5</sup> *Tree Protection Act 2005* (ACT) s12.

<sup>6</sup> See the *Tree Protection (Built-up Urban Areas) Declaration 2009 (No 1)* NI2009—62 which excludes national land.

<sup>7</sup> *Nature Conservation Act 1980* (ACT) s52(1).

<sup>8</sup> See *Emergencies Act 2004* (ACT) s65 and *Emergencies (Built-up Area) Declaration 2006* NI 2006-225. This includes any area which is, within the terms of the *Territory Plan* as in force from time to time, subject to a planning policy listed below: -Residential land use policies; Commercial land use policies; Industrial land use policies; Community facility land use policies; Restricted access land use policies; Water feature land use policies; Municipal services land use policies; Entertainment, accommodation and leisure land use policies; and Urban open space land use policies.

<sup>9</sup> The *Nature Conservation Act 1980* provides exceptions for felling or damaging trees on leased land outside built-up areas where it is necessary to avert an immediate danger or injury to a person or damage to property (in the opinion of the person who felled the tree); where the timber was planted by the occupier and felled by that occupier or subsequent occupier, or where it is felled with intention of using it on the land (other than for sale or trade).

<sup>10</sup> *Nature Conservation Act 1980* (ACT) s52(4).

<sup>11</sup> Native vegetation is defined to mean trees, understorey plants, groundcover consisting of any kind of grass or herbaceous vegetation, plants occurring in a wetland or stream indigenous to the area. See *Nature Conservation Act 1980* (ACT) s73.

<sup>12</sup> See *Emergencies Act 2004* (ACT) Division 8.2.

The policy justification for applying different protections to trees depending upon where they are located is not clear. The Explanatory Memorandum to the Tree Protection Act does not offer any explanation as to why this position was adopted nor is there any available EM for the Nature Conservation Act.

*Should there be regulation of trees on leased and unleased land?*

The EDO is of the view that the regulation of trees on both leased and unleased land is appropriate.

At times during the debate on tree regulation on private property, individual property rights are used as an argument against such regulations. Assertions of a property owner's right to use the property as they see fit are used as an argument against effective regulation to protect trees and the environment.

The EDO does not agree with this position. Whilst property rights should be respected it is not inconsistent or incongruous to say that certain limitations should be placed on property owner's rights in dealing with the property in order to protect public rights and the environment.

Property rights have been controlled, and regulated by Governments in all common law jurisdictions for centuries and there is an established body of jurisprudence that establishes a government's right to do this without giving rise to compensation.<sup>13</sup>

One line of argument that is often used to explain the position is that property owners share equally in the environmental benefit obtained from the regulation. Individual proprietary rights are exchanged for improved civic rights to environmental welfare. This concept was spelt out by Lord Hoffman:

*'The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest.'*<sup>14</sup>

In this case the public interest of general environmental health and in particular the existence and protection of the urban forest and biodiversity within the ACT must outweigh any loss that individuals may feel in relation to a diminished ability to deal with their property as they choose. The exercise of free dominion over private property is already restricted by a range of controls that exist for the public good. Zoning requirements, easements for sewerage and water, lease purpose clauses all exist to facilitate the well being of the community. Tree protection mechanisms are no different.

Given the strong public policy justification for regulating individual property rights the EDO is of the view that private property rights should not be a justification for providing different protections for trees on leased or unleased land.

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<sup>13</sup> Only in very extreme situations will regulation amount to a taking of property rights sufficient to require compensation. This is far beyond the level of propriety control diminished by the Tree Protection Act.

<sup>14</sup> *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C per Lord Hoffmann.

### *Should there be regulation of trees in urban and non-urban areas?*

The EDO is of the view that the protection of trees should appropriately occur both in urban and non-urban areas.

The EDO's view is that the objects behind a legislative scheme designed to protect trees in the ACT should be to:

- protect habitat and promote biodiversity conservation;
- minimise the ecological footprint of human development and promote sustainable living;
- enhance Canberra as the bush capital; and
- recognise the amenity value of trees.

To best achieve these objects the EDO submits that the same protections should apply to all protected trees within the ACT regardless of the land tenure where the tree is located. Consequently the EDO recommends that a single legislative scheme should apply to provide protections for all trees to be covered by the scheme, regardless of where the trees are located. This would create a more efficient and comprehensive means of protecting trees and the environment and remove the artificial boundaries that currently exist in the operation and division of responsibility between the two Acts.

The EDO recommends that this be considered as part of a comprehensive review of the Nature Conservation Act. Until such time as comprehensive review is undertaken it is the view of the EDO that amendments should be made to the existing legislative framework to properly integrate the legislative regimes which currently exist to regulate tree protection in the ACT. These are discussed below.

### **Recommendations for amendments to existing laws**

#### **Amended definition of built-up urban area concept**

As noted above, the protection of trees under the Tree Protection Act, currently relies on a tree being in a 'built-up urban area' (amongst other things). The 'built-up urban area' is an area declared by the Minister and is essentially all of Canberra's suburbs, but importantly it does not currently cover future urban areas.<sup>15</sup>

Under the Nature Conservation Act, as discussed above, certain protections are provided to native timber on unleased land within the 'built-up area' and to native timber on leased or unleased land outside the 'built-up area'.<sup>16</sup> Under the Nature Conservation Act the 'built-up area' is defined by reference to the 'built-up area' definition created under the *Emergencies Act 2004 (ACT)*.<sup>17</sup>

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<sup>15</sup> See *Tree Protection Act 2005 (ACT)* ss7 and 39; *Tree Protection (Built-up Urban Areas) Declaration 2009 (No 1) NI2009—62*; *Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006 DI2006—56 r1*.

<sup>16</sup> *Nature Conservation Act 1980 (ACT)* s52.

<sup>17</sup> Above n8.

The different definitions of the concept of a 'built-up urban area' and 'built-up area' used in the two Acts leaves open the potential for gaps or overlap in applicability and is not an effective legislative scheme. The terms used in the 'built-up area' declaration made under the Emergencies Act, that is land subject to various planning policies, are not consistent with terms in the current Territory Plan. We can assume that corresponding zones can be substituted to give effect to the declaration however this is not clear and difficulties do arise.

An illustration of the current problems is the industrial development of Beard. It is leased land in the Urban Zone 1 (Broadacre Zone) and the Tree Protection Act does not apply as it is not in a built-up urban area within the definition of that Act. This zone appears to be outside the 'built-up area' definition in the Nature Conservation Act and therefore the Nature Conservation Act would apply. However it is being developed into an industrial area – and consequently could be said to be subject to an industrial land use policy so as to come within the definition of the 'built-up area'. If this interpretation were taken it would be outside the scope of both the Tree Protection Act and the Nature Conservation Act and no tree protection measures would apply. Whilst it appears that it would be within the scope of the Nature Conservation Act it is an example of the difficulties brought about by the current system.

Having different rules apply depending upon the location of the tree and the land tenure make it difficult for the public to ascertain exactly which rules apply to which trees. It also leads to situations where a tree on one boundary line for example on the boundary of the Mt Ainslie Nature Reserve are protected yet on the other side are not.

As stated above the EDO recommends a new single comprehensive native vegetation legislative scheme which would apply to all native vegetation in the ACT, regardless of its location. This would remove the need for concepts such as a 'built-up urban area'.

However in the interim, if the Tree Protection Act and the Nature Conservation Act are to continue with a concept of a 'built-up urban area' to determine tree protection, the EDO is of the view that it is preferable that this area should be defined by reference to the Territory Plan zones (being residential, commercial, industrial, community facility, urban parks and recreation, transport and services), rather than being determined by Ministerial determination.

The current concept of a 'built-up area' in the Nature Conservation Act is determined in the context of bushfire response rather than environmental protection. Before making the Built-up area declaration the Emergency Services Commissioner must consult with the chief officer (fire brigade) and the chief officer (rural fire service).<sup>18</sup> The Emergency Services Commissioner is not required to consult the Conservator and therefore there are no environmental considerations built in to the application of the Nature Conservation Act.

To remove the possibility of overlap or gaps in applicability the EDO recommends that the Nature Conservation Act should also be amended to provide the inverse of the Tree

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<sup>18</sup> *Emergencies Act 2004* (ACT) s65(2).

Protection Act. That is, everywhere not in the listed zones (residential, commercial, industrial, community facility, urban parks and recreation, transport and services) and therefore not covered by the Tree Protection Act is protected by the Nature Conservation Act. This a sensible and logical way of ensuring compatibility between the two Acts.

The EDO is also of the view that it is desirable that the areas to which the Act applies are appropriately provided for in the primary legislation, rather than in delegated legislation.

### **Criteria for protection**

Currently whether a tree is given protection under the Tree Protection Act as a regulated tree (and not a registered tree which must be assessed against the criteria<sup>19</sup>) is based solely on the size of a tree.

The EDO is of the view that tree protection based solely on the satisfaction of size criteria is not the best way of ensuring adequate protection of trees and the urban forest. Particular attention must be paid to native trees that provide habitat for wildlife and make a greater contribution to biodiversity in the ACT.

The EDO notes, however that a size requirement for qualification for the protection mechanisms is an easily enforceable and publicly communicable concept. Consequently the EDO recommends that this continues to be the criteria under which trees are protected. Recognising the inherent limitation of a size based approach it is recommended that broader environmental factors, such as the ecological significance of a tree, must be taken into account by the Conservator in determining whether an approval (under the Tree Protection Act) or licence (under the Nature Conservation Act) should be granted to damage a protected tree.

This recognises that vegetation other than large trees can be important for habitat protection. Whilst size is easy to apply it is not necessarily the only measure of ecological or environmental values.

### **Protection of Native/Non-Native Species**

Currently the Tree Protection Act applies to both native and non-native trees. It does not prioritise protection for native over exotic species. In fact the Tree Protection Act has been used to protect a recognised weed species,<sup>20</sup> whilst at the same time there is significant community concerns about the removal of native trees that are not protected by the Tree Protection Act.<sup>21</sup>

In contrast, the Nature Conservation Act only applies to native timber and vegetation.

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<sup>19</sup> See *Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006* DI2006—56.

<sup>20</sup> *Maleganeas and Conservator of Flora & Fauna* [2007] ACTAAT 24. This involved the removal of a *Fraxinus oxycarpa*, commonly known as a Desert Ash which has been listed as a weed by Weeds Australia. See <http://www.weeds.org.au/cgi-bin/weedident.cgi?tpl=plant.tpl&state=&s=0&ibra=all&form=tree&card=E15>.

<sup>21</sup> *Residents furious as tall tree falls*, Canberra Times 22/12/09; *Tree-felling on hold: fury wins reprieve*, Canberra Times 08/11/09; *Ainslie residents dispute tree-felling*, Canberra Times 03/10/09. Also see below n37.

The EDO recommends that the Tree Protection Act should emphasise protection of native plants. *The National Framework for the Management and Monitoring of Australia's Native Vegetation*,<sup>22</sup> notes that native vegetation contributes to natural values, resources and processes of biodiversity, soil and water resources, hydrology, land productivity, sustainable land use, and climate change. It also contributes to natural and cultural heritage, and indigenous people's interests. The Canberra Ornithologists Group recommends a careful selection of native plants, and cautions against exotics, as the best way of providing habitat for native bird species in Canberra.<sup>23</sup>

To provide greater protection to native trees the EDO recommends that the definition of a 'regulated tree' in the Tree Protection Act be amended to include native trees with a trunk greater than 10cm in diameter and non-native trees which satisfy the current size criteria in section 10 of the Tree Protection Act.

This ensures consistency by providing the same level of protection for native trees on leased land in the urban environment as are provided for native trees in the non-urban environment and on unleased land in the urban environment under the Nature Conservation Act. That is protections are appropriately based on size and ecological value of the tree irrespective of the land tenure and location of the tree.

### **Criteria for approving tree removal or damage**

Currently the Conservator must take into account specified criteria when deciding whether to approve an application for tree damaging activity (under the Tree Protection Act) or to issue a licence to allow damage to a native tree (under the Nature Conservation Act).<sup>24</sup> These criteria are set out in disallowable instruments.<sup>25</sup>

The EDO is of the view that it is essential that decision-makers are given clear and objective criteria against which to assess and upon which to base their decisions. This leads to better decisions, greater transparency and improves reviewability of those decisions.

If the legislation is to effectively protect trees the criteria against which decisions are made should require a thorough consideration of the environmental impacts of the action. The EDO recommends that a review of 'tree species of ecological importance' should be undertaken with a view to expanding the current list. The criteria should then require that where the tree is a listed tree the Conservator must take into account its role in the ACT environment and protecting biodiversity. Exceptional circumstances should be required for the removal of these trees. Currently the Conservator may take into account a list of ecologically beneficial species.<sup>26</sup> The EDO is of the view that this should be a mandatory requirement.

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<sup>22</sup> See <http://www.environment.gov.au/land/publications/nvf/index.html>.

<sup>23</sup> See <http://canberrabirds.org.au/AttractingBirdsGarden.htm>.

<sup>24</sup> *Tree Protection Act 2005 (ACT) s25(3)(a); Nature Conservation Act 1980 (ACT) s106(1)*

<sup>25</sup> See *Tree Protection (Approval Criteria) Determination 2006 (No 2) DI2006—60; Nature Conservation (Licensing Criteria) Determination 2001 DI2001-47.*

<sup>26</sup> *Tree Protection (Approval Criteria) Determination 2006 (No 2) DI2006—60 r1(3)(c).*

It is recommended that the current approval criteria made under the Tree Protection Act be amended as follows:

- special provision should be made for trees close to nature parks and wildlife corridors noting the greater importance of trees in these areas;
- the Conservator must consider whether it is a listed ecologically beneficial tree and only approve its removal in exceptional circumstances;
- Insert a specific criterion providing that if the tree is not a native tree it may be removed if the applicants can prove that doing so would facilitate the growth of an indigenous tree.
- Remove native species from the current schedule 2.

The EDO notes that currently the removal criteria apply only to regulated trees and there are no criteria against which to assess the removal of registered trees. Any criteria should make it clear that damage should only be approved in exceptional circumstances. It is noted also that the Nature Conservation Act instruments make incorrect/obsolete reference to their enabling Sections.<sup>27</sup>

### **Application of laws to executive action**

Currently the provisions protecting the damage, felling or removal of native timber under the Nature Conservation Act do not apply to executive actions.<sup>28</sup> They only cover public interference with unleased land (or private actions on leased land in non -urban areas).<sup>29</sup> As the Tree Protection Act does not regulate trees on unleased land,<sup>30</sup> there is no legislated process to ensure accountability for executive actions that damage trees on unleased land.

The Tree Protection Act does not have similar exemptions for executive actions. However it is noted that there are exemptions for certain actions under the Utilities Act.<sup>31</sup>

The EDO is of the view that the executive, such as officers from the Department of Territory and Municipal Services, and utility companies should be subject to the Tree Protection Act and Nature Conservation Act and comply with the same legislative requirements as the rest of the community, including the requirement to obtain approval from the Conservator prior to any tree damaging activity. In all but urgent and emergency situations (for example natural disasters as are currently provided for under the Tree Protection Act s19(1)(e) and (f)) there do not appear to be any compelling public policy reason why the executive should not be bound by the same rules in relation to tree protection as other members of the

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<sup>27</sup> *Nature Conservation (Licensing Criteria) Determination 2001* DI2001-47 and *Nature Conservation Criteria Determination 2001* DI2001-59 make incorrect/obsolete references to the sections under which they operate.

<sup>28</sup> It is noted that the provisions relating to clearing native vegetation under the Nature Conservation Act do apply to executive actions.

<sup>29</sup> *Nature Conservation Act 1980* (ACT) s52(5)(a).

<sup>30</sup> *Tree Protection Act 2005* (ACT) s10.

<sup>31</sup> *Tree Protection Act 2005* (ACT) s19(1)(d)(i).

community. Governments throughout Australia are bound by a range of environmental standards in the case of the Commonwealth to a higher standard than applies elsewhere.<sup>32</sup>

The EDO recommends that the Tree Protection Act and the Nature Conservation Act include a provision that the Act binds the Crown and removes the exemptions in s52(5)(a) of the Nature Conservation Act and 19(1)(d)(i) –(iii) Tree Protection Act.<sup>33</sup>

This will have the effect of requiring utility companies and the executive (public servants) to obtain a licence or approval from the Conservator prior to felling native timber or damaging protected trees. This will mean that the value of the trees and the appropriateness of any tree damaging activity will appropriately be assessed by the Conservator. It will not prevent necessary installation and maintenance work of utility networks being carried out. It simply requires an assessment and approval of any tree damage or removal prior to the work being carried out to ensure that the best environmental outcome is achieved.

### **Community Consultation**

Currently there are no requirements for public notification or consultation in respect of approval applications for damaging activities under either the Tree Protection Act or the Nature Conservation Act.

The EDO strongly supports community participation in environmental matters. Public participation and consultation in relation to administrative decision-making is a fundamental element of good governance. In addition to fostering an inclusive society, public consultation leads to better decisions by assisting decision-makers in identifying public interest concerns and the views of all stakeholders. Greater community input also helps integrate ecological and social considerations in government decisions which promote the principles of ecologically sustainable development.<sup>34</sup> Moreover, participation enhances the accountability, and thus acceptability, of environmental decisions.

Balancing the need for public participation and administrative efficiency is at times a difficult task and in this case the appropriateness of allowing public comment on all tree damaging applications submitted to the Conservator does raise some issues relating to timing, resourcing and increased bureaucracy. There are however compelling public policy reasons, as discussed above, for allowing comments under both the Tree Protection Act and the Nature Conservation Act.

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<sup>32</sup> See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss26 and 28 which provide that where an action is undertaken by the Commonwealth or on Commonwealth the relevant impacts are on the environment generally and not just listed 'matters of national environmental significance'.

<sup>33</sup> *Tree Protection Act 2005* (ACT) s19(1)(d) provides that the prohibitions on damaging protected trees and doing prohibited groundwork (in ss15 and 18) do not apply for certain actions undertaken under the *Utilities Act 2000* (ACT). For example, electricity companies installing network facilities or maintaining facilities can clear regulated trees without approval under the *Tree Protection Act 2005* (ACT).

<sup>34</sup> Richardson, B. & Razzaque, J. 2006,, 'Public participation in Environmental Decision-Making' In B. Richardson & S. Wood (eds), *Environmental Law for Sustainability*, Hart Publishing, Oxford and Portland, Oregon, 165- 195.

Currently the Conservator has 30 days to make a decision on an application for a tree damaging activity.<sup>35</sup> To provide a short time for public comment within the 30 day period, for example 10 days, would not add an overly onerous requirement. When considered in the context of other assessment processes, such as the development approval process, this does not appear to be a burdensome requirement.<sup>36</sup>

Given the nature and level of community concern over the felling of trees,<sup>37</sup> providing a mechanism for public comment is a reasonable and sensible means of encouraging public participation and ultimately greater acceptance of the decision making process.

The EDO therefore recommends that the Tree Protection Act and the Nature Conservation Act be amended to provide for public consultation, except in exceptional circumstances for example where there are urgent public safety issues.

Prior to public consultation the EDO recommends that where an application relates to a native tree, the Tree Advisory Panel should provide advice to the Conservator and this advice, and any other relevant advice the Conservator has sought, should then be made public for consideration during the public comment period. It would also be worthwhile providing that the Conservator may again consult the Tree Advisory Panel to clarify any issues raised by public comments. Similar provisions should also be included in the Nature Conservation Act.

The EDO also recommends that the legislation should specifically require the Conservator to consider any comments made during the consultation period and the advice of the Tree Advisory Panel in making his/her decision. This would lead to greater transparency and community acceptance of decision making.

Appropriate notification provisions, consistent with allowing for public consultation, would also need to be included. The EDO recommends that where trees are on private land notification should be through the appropriate website and the provision of written notice to neighbours. For trees on public land notice should be placed on the appropriate website and a sign erected on or near the tree or on the roadside nearest the tree if it is unlikely that people will be able to see a sign on or near the tree.

The EDO also recommends the inclusion of a requirement to undertake a post felling analysis of any tree removed because of health concerns. This information should be publicly available. It could help allay public concern about the inappropriate removal of trees and highlight systemic problems, if any, in tree diagnosis.

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<sup>35</sup> *Tree Protection Act 2005* s25; *Nature Conservation Act 1980* (ACT) Part 11 does not set a statutory timeframe for the Conservators decision.

<sup>36</sup> For example, under the Planning and Development Act applications in the merit and impact track require a decision if no representation is made in relation to the proposal in 30 working days. In any other case 45 working days after the day the application is made to the authority (ss122 and 131). The matters to be considered by the Conservator in relation to a tree damaging activity are, more often than not, less complex than a development application in either the merit or impact codes.

<sup>37</sup> Canberra Times above n 21. In addition the EDO is regularly contacted by community members who are concerned about tree removals.

## Statements of Reasons

The EDO also recommends that the TPA and the NCA should require the Conservator, in making a decision in relation to an application for a tree damaging activity, to provide a notice of the decision and a statement of reasons to the applicant as well as to all persons that provided comments.

The benefit of requiring a statement of reasons is succinctly stated by Justice Allsop in *Minister for Immigration & Multicultural Affairs v W157/00A* as:

*“...the requirement to give reasons helps to encourage a careful attention to the proper legal framework of the decision and to the relevant issues to consider in making the decision, and, thus, to foster good decision making.”*<sup>38</sup>

It is noted that in addition to these persons any person who is affected by the decision or has a right to seek review is entitled to request a statement of reasons under the ADJR Act or the ACAT Act.<sup>39</sup>

The reasons must be sufficient to ensure that even if individuals disagree with the decision they can at least understand why the decision maker decided the way they did and how they reached the decision. The current requirements for statements of reasons are set out in the *Legislation Act 2001*.<sup>40</sup>

## Review of Decision

Currently the right to seek merits review of a decision relating to an application to damage a tree made under the Tree Protection Act extends only to applicants.<sup>41</sup> Under the Nature Conservation Act an ‘entity that has interests affected by the licence’ is entitled to seek merits review of a Conservator’s decision to grant a licence to remove, fell or kill a native tree.<sup>42</sup> This would include an applicant and may extend more broadly.

The EDO recommends that the rights to seek merits review of decisions made under the Tree Protection Act and the Nature Conservation Act be extended to include not only applicants, but any person who has made a submission (assuming amendments are made as recommended above to include public consultation of decisions), and any person whose interests are affected by the decision.

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<sup>38</sup> *Minister for Immigration & Multicultural Affairs v W157/00A* [2002] FCAFC 281 at [92].

<sup>39</sup> See *Act Civil and Administrative Tribunal Act 2008* (ACT) s22B and *Administrative Decisions (Judicial Review) Act 1989* (ACT) s13.

<sup>40</sup> Section 179 states that ‘the document giving the reasons must set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based.’

<sup>41</sup> *Tree Protection Act 2005* Schedule 1.

<sup>42</sup> *Nature Conservation Act*, s104, Schedule 1, item 7

The EDO notes that the Scrutiny of Bills Committee report on the Tree Protection Bill noted that the Assembly may wish to consider the appropriateness of the now current Act's review provisions.<sup>43</sup>

The EDO has consistently argued for expanded standing for public interest environmental matters. The inability to satisfy standing requirements has often served to deny potential public interest litigants access to the court system. Traditionally, an argument has been put that standing and appeal rights should be restricted to prevent a situation where the 'floodgates' are opened and courts are faced with a multitude of actions being filed by 'meddlesome' third parties. Further concerns usually revolve about the ability to abuse the process or the ability to cause mischief. However, using the experience of nearly twenty years of the open standing provisions under s 123 of the *Environmental Planning and Assessment Act 1979* (NSW), it shows that there has not been such a barrage of vexatious litigation. The former Chief Judge of the NSW Land and Environment Court, Justice Jerrold Cripps has noted that:

*"It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited."*<sup>44</sup>

Moreover, the Senate Standing Committee on Environment, Communication and the Arts noted in their first report on the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), that the statistics of the Department of Environment, Water, Heritage and the Arts suggested that:

*"there is little litigation initiated under the Act – either by third parties, proponents of actions, or permit applications. In approximately eight years since the Act commenced, there have been just eight applications to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits review of decisions. When it is considered that this is Australia's main national environmental legislation... this appears to be an extremely low level of litigation."*<sup>45</sup>

Given that the floodgates argument has been effectively discredited, there is no compelling policy basis for restricting standing.

The EDO submits that open standing provisions should apply to all environment legislation. However as a minimum the EDO recommends including a merits review right to a broader range of people as recommended above.

It is noted that judicial review of the Conservator's decision in relation to tree damaging activities under the Tree Protection Act or the Nature Conservation Act, is available to an

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<sup>43</sup> *Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)* Scrutiny Report 6 - 4 April 2005 p16.

<sup>44</sup> Cripps J "People v The Offenders", Dispute Resolution Seminar, Brisbane 6 July 1990.

<sup>45</sup> "The operation of the *Environment Protection and Biodiversity Conservation Act 1999*" First Report by The Senate Standing Committee on Environment, Communications and the Arts, 18 March 2009, para 6.43.

aggrieved person. An aggrieved person is defined as a person whose interests are adversely affected.<sup>46</sup> Judicial review is a review of the legality of the decision.

### **Expanded Objects**

The EDO submits that the objects of the TPA be amended to include the following objectives:

- to protect biodiversity; and
- to protect significant native trees.

This clarifies that the aim of protecting individual trees must be considered in the greater environmental context and comes within the broader goal of biodiversity conservation.

### **Extension of Site Declarations**

Under section 61 of the TPA the Conservator may declare a protection zone for a tree where a tree has been unlawfully damaged and as a result of this damage the tree is removed from the ACT Tree Register. The effect of a site declaration is that only prescribed activities, such as planting trees, can be undertaken on the site.

This measure was created as a means of ensuring that people could not profit from damage to registered trees. It was enacted to ensure that people did not choose to illegally remove trees and choose to factor in the costs of the fines rather than go through the administrative process of seeking approval.

The EDO is of the view that these provisions provide a useful deterrent over and above fines to stop illegal damage to registered trees. The EDO recommends that this provision should be extended to all native trees. It is a useful deterrent to have available to the Conservator and provides another mechanism to ensure environmental conservation.

### **Additional Resources**

In recognition of the expanded role of the Conservator the EDO recommends that additional resources be allocated to the Conservator's office to ensure that the consultation and decision-making role can be undertaken thoroughly.

### **Review Provisions**

The EDO also recommends that a review provision be included to allow for a review of the new scheme to take place after the first two years of operation.

### **Interaction with the *Planning and Development Act 2007***

Much of the tree clearance in the ACT occurs as part of urban development. Consequently to ensure an effective regulatory framework for tree protection in the ACT it is necessary

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<sup>46</sup> *Administrative Decision (Judicial Review) Act 1989 (ACT)* s3B.

that both the Tree Protection Act and the Nature Conservation Act effectively interact with the Planning and Development Act.

Currently any development proposal in the impact track must be referred to the Conservator for advice.<sup>47</sup> In making a decision whether to approve the development the ACT Planning and Land Authority (ACTPLA) must consider the Conservator's advice. However they are only required to follow the advice of the Conservator where the development affects registered trees. Where the development affects 'regulated trees' or trees covered by the Nature Conservation Act, ACTPLA is only required to consider the Conservator's advice but may act contrary to this advice where ACTPLA has considered any applicable guidelines; all reasonable development options and design solutions; and any realistic alternative to the proposed development; and the decision is consistent with the objects of the territory plan.<sup>48</sup>

Whilst there is no readily available data on the number of times this has occurred,<sup>49</sup> examples are readily available. A recent ACTPLA decision approved the removal of 68 regulated trees contrary to the advice of the Conservator.<sup>50</sup> The reasons given were that road alignments required the trees to be removed, and that it facilitated the retention of higher quality trees. Without any further detail the decision then asserts that all reasonable design solutions had been considered.

The problem with the argument that higher quality trees were retained is that there will almost always be higher quality trees. To argue that because it is not the worst possible scenario somehow makes it acceptable is inherently flawed. The trees that are being removed now will become the trees of higher value in the future, this is not sustainable development. Not cutting down some trees is not effective protection of others, the option to keep both does exist.

The EDO is of the view that the process must necessarily involve obtaining the advice of the Conservator. However the process should not allow this advice of the Conservator to be overruled.

The EDO recommends that if a development application involves damage to a protected tree under either the Tree Protection Act or the Nature Conservation Act approval should be sought from the Conservator prior to a development application being lodged. If the proponent is unable to get approval from the Conservator the Development Application should not be accepted by ACTPLA.

Requiring approval from the Conservator and the Tree Protection Act or the Nature Conservation Act process to take place prior to the development application would make

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<sup>47</sup> Merit track applications which involve a declared site must also be referred to the Conservator but there are currently no site declarations - *Planning and Development Act 2007 (ACT)* s148 and *Planning and Development Regulation 2008 (ACT)* r26(2)(a).

<sup>48</sup> *Planning and Development Act 2007 (ACT)* ss119(2) and 148(2).

<sup>49</sup> The Standing Committee on Climate Change, Environment and Water; *Report on Annual and Financial Reports 2008-2009* February 2010 p25.

<sup>50</sup> DA No. 200916253.

the process much more efficient and ensures that sound ecological consideration (made under the proposed amended decision making process and criteria) of the issues, unhindered by external development pressures, takes place.

Development can be sustainable and an appropriate balance must be found to ensure that the environment is protected.

Please do not hesitate to contact me if you wish to discuss this submission further.

Yours sincerely

**Environmental Defender's Office Ltd**

Kirsten Miller  
Principal Solicitor