



Environmental Defenders Office

20 December 2019

Business Development Unit
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Dear Community Engagement Team,

Review of the Tree Protection Act 2005: Submission by the Environmental Defenders Office (Canberra)

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

- Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.
- Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.
- Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO Ltd welcomes the review of the *Tree Protection Act 2005* (ACT) (the *TPA*). The *TPA* is almost 15 years old and given greater existential threats as a result of our changing climate and significant biodiversity loss, it is important to review relevant legislation to ensure it is current, and in this instance, continues to protect trees in the ACT.

The review of the *TPA* has been prompted, in part, by the ACT Government's new *Climate Change Strategy and Living Infrastructure Plan*, the tree canopy cover target of 30% by 2045 and meeting these targets in the context of future urban intensification and expansion. In summary, the *Review of the Tree Protection Act 2005 Discussion Paper* ("*Discussion Paper*") raises the following issues

- 1) The *Discussion Paper* fails to acknowledge or address the role of trees as significant habitat for threatened species. Any review of the *TPA*, including a re-focus or re-prioritisation of its objectives must include a strengthening of tree protection for this purpose;

- 2) Offsets for tree removal include replacing trees with “tree canopy equivalent” in order to meet the target of 30% tree canopy cover. Tight guidelines as to what can be appropriately offset will need to be established;
- 3) The proposals set out in the *Discussion Paper* could result in weakening of tree protection in the ACT. It suggests that current criteria used to approve an activity that may damage a protected tree are prescriptive and do not allow for innovation and best practice. Before the criteria is amended (the language in the *Discussion Paper* suggests a lessening of the criteria), greater clarification is needed as to how the current *TPA* isn’t meeting it’s current objectives. Given that the *TPA* was intended to balance the protection of urban trees with the rights of property owners, the statistics provided in the *Discussion Paper* suggest that the criteria is actually working as intended.

These concerns are elaborated on below.

Objective and priorities in the *Tree Protection Act*

The current objects of the *TPA* are set out in section 3:

(1) *The objects of this Act are—*

(a) to protect individual trees in the urban area that have exceptional qualities because of their natural and cultural heritage values or their contribution to the urban landscape; and

(b) to protect urban forest values that may be at risk because of unnecessary loss or degradation; and

(c) to protect urban forest values that contribute to the heritage significance of an area; and

(d) to ensure that trees of value are protected during periods of construction activity; and

(e) to promote the incorporation of the value of trees and their protection requirements into the design and planning of development; and

(f) to promote a broad appreciation of the role of trees in the urban environment and the benefits of good tree management and sound arboricultural practices.

By replacing the *Tree Protection (Interim Scheme) Act 2001* with the current *TPA*, the ACT Government sought to further the objects of the legislation, to provide “strong and effective legislation that strikes the right balance between protecting the cultural and natural heritage of Canberra and not impinging unduly on the expectations and rights of property owners with trees on their property.”¹ The legislation was intended to “significantly improve the protection of outstanding trees throughout the city and will ensure the benefits of the urban forest can be enjoyed long into the future”.²

Fifteen years on, the objects remain the same, though the threats have changed. The *TPA* sought to balance the desire for an urban forest with lease holders’ rights to property. It is appropriate to re-examine the *TPA*’s objectives with a climate lens, although this should not

¹ ACT Legislative Assembly Hansard, 2005 Week 4 (17 March) Page 1131, per Mr Jon Stanhope. Located at <http://www.hansard.act.gov.au/hansard/2005/week04/1131.htm>.

² ACT Legislative Assembly Hansard, 2005 Week 4 (17 March) Page 1131, per Mr Jon Stanhope. Located at <http://www.hansard.act.gov.au/hansard/2005/week04/1131.htm>.

be the only consideration. Habitat loss and loss of habitat connectivity, particularly through land clearing, is a critical issue impacting on biodiversity decline in the ACT. The *Discussion Paper* does not consider this at all. Equally prioritising habitat protection necessarily adds in a nuance to tree protection by increasing the considerations that ought to be taken into account when damaging/removing trees. In addition to achieving a target of 30% of tree canopy or tree canopy equivalent, it is imperative that any changes to the objects seek to achieve the preservation and maintenance of biodiversity habitats, and remnant ecological communities. In this regard, protection of species through consideration of, and where relevant alignment with, the action plans of vulnerable species is critical.

Accordingly, it is strongly asserted that the object of the *TPA* remains the protection of urban trees and forest values, that any reprioritisation aims to strengthen key objectives by acknowledging the important role and function of trees in a changing climate and as habitat, and for habitat connectivity.

Protection for all trees

As in our submission to the Commissioner for Sustainability and the Environment in her investigation into the ACT Government's tree management practices and the renewal of Canberra's urban forest in 2010, we continue to assert that the protection of Canberra's urban forest, provided for in the *TPA*, be viewed in the broader context of environmental protection in the ACT, in that it 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. As such, we continue to assert that a single legislative regime apply for protection and management of all trees and native vegetation in the ACT, regardless of land tenure or location – that is, that the *TPA* applies equally to trees on private and public land. 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 side of a boundary is protected yet on the other side are not.

Whether a tree is given protection under the *TPA* is based solely on the size of the tree. Tree protection based on size alone is insufficient in ensuring adequate protection of trees and the urban forest, as particular attention must be paid to native trees that provide habitat for wildlife and contribute to biodiversity in the ACT. Accordingly, and as noted below, including broader factors into consideration when assessing tree protection, for instance the ecological significance of a tree, must be taken into account by the conservator (or equivalent) when determining whether to approve a tree damaging activity.

Current and future criteria for approval of tree damaging activities

The *Discussion Paper* states on multiple occasions that the existing criteria are overly prescriptive and do not allow for innovation and best practice. The *Discussion Paper* states that the *TPA* as it is currently drafted focusses on trees at an individual level rather than focusing on the urban forest as a whole and total canopy coverage.³ The *Discussion Paper* discusses what is considered a protected (regulated or registered) tree in the legislation,⁴ and states that the protections afforded to regulated or registered trees can result in outcomes that do not align with the goal of enhancing our urban forest, and that for instance, the criteria has

³ Discussion Paper, page 7.

⁴ Discussion Paper, page 8.

been applied against the removal of trees with impacts on urban design outcomes or public safety issues.⁵

Whilst the current *TPA* and the Approval Criteria Determination do not consider total canopy coverage explicitly, the urban forest must be considered a sum of its parts. Through this lens, the *TPA* and the Approval Criteria Determination protect the existing urban forest by disallowing the frivolous removal of trees in the urban landscape unless certain thresholds are met. The thresholds ensure a balance between protection of the urban forest and lease holders' rights to property by helping to determine when a tree can justifiably be removed, and in what circumstances. Despite assertions in the Discussion Paper, the *TPA* does allow for the removal of trees where there is an "unacceptable risk to public or private safety".⁶ The *TPA* appropriately *balances* all interests. Examples provided in the Discussion Paper, such as the trip hazard on page 10, can be remedied in ways other than the removal of a significant tree.

Note that the criteria to approve tree modification in the Approval Criteria Determination is actually quite substantial already. In addition to removing trees for public safety and where trees are shown to cause substantial damage, trees can be damaged or removed where:

- the tree is in decline or life expectancy is short;⁷
- the location of the tree is inappropriate given its potential size and growth habit;⁸
- the tree substantially affects solar access to the lease and pruning is not sufficient to remedy this;⁹
- the tree is causing an allergic reaction to an occupant of the lease, or neighbouring lease (and this is supported by certification for a medical specialist);¹⁰ and
- where the tree is part of a close planting of a number of trees and the removal of the tree will allow other trees to develop;¹¹
- where the tree is located on a block of less than or equal to 1200m² and is a species listed in Schedule 2.¹²

In addition, the Conservator may consider exceptional circumstances raised by the applicant, whilst taking into account advice from the Tree Advisory Panel.¹³

Further, the Discussion Paper notes, in Table 1, a summary of Tree Damaging Activity outcomes in 2018-19. It is noted that the vast majority of applications for tree removal, ground works with conditions and minor pruning were actually approved. Approvals for major pruning and lopping ranged from 63 – 71%. Almost 75% of tree felling/removal applications are approved. With generally high approvals for tree removal and tree damaging activities then, it is difficult to understand the instances where legislation has been overly prescriptive so as to not allow for innovative and best practice. There needs to be some criteria for the protection of trees (and thus, removal), and it appears to be working.

If the *TPA* is to effectively protect trees (and tree canopy cover), the criteria against which decisions are made need a thorough consideration of environmental impacts of the action. It

⁵ Discussion Paper, page 7.

⁶ Approval Criteria Determination, Schedule 1, section (1)(b).

⁷ Approval Criteria Determination, Schedule 1, section (1)(a).

⁸ Approval Criteria Determination, Schedule 1, section (1)(d).

⁹ Approval Criteria Determination, Schedule 1, section (1)(e).

¹⁰ Approval Criteria Determination, Schedule 1, section (1)(f).

¹¹ Approval Criteria Determination, Schedule 1, section (1)(g).

¹² Approval Criteria Determination, Schedule 1, section (2).

¹³ Approval Criteria Determination, Schedule 1, section (5).

is suggested that the *TPA* and Approval Critical Determination be reviewed (and amended) to include consideration of the following:

- native trees and non-native trees are treated similarly in the legislation. However, there must be better prioritisation for protection of native species over non-native species. 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 contributes to natural and cultural heritage. Trees that provide habitat and/or form habitat corridors should also be prioritised for protection. It is important to note that these features are not easily able to be offset.
- Special provisions should be made for trees close to nature parks, reserves and wildlife corridors, noting the greater importance of trees in these areas;
- The conservator (or equivalent) must consider whether trees subject to applications for removal are ecologically significant trees or trees that provide habitat, this consideration be mandatory, and only approve removal in exceptional circumstances.

The Discussion Paper raised the question as to whether criteria should be more outcomes-focused, however it is difficult to have an informed opinion on this aspect without knowing exactly what the purported outcomes are. It is problematic to support an outcome for increased tree canopy cover only, where “tree canopy cover” to which our 30% target relates also encompasses “tree canopy equivalents” such as green roofs, shrub beds, wetland and rain gardens. Living infrastructure is a critical addition to a city such as ours, however it should be in addition to existing tree canopy, rather than instead of it.

Tree canopy equivalents such as green roofs have benefits, for instance, helping to avoid heat island effects and stopping short wave radiation, however they can be fairly unhelpful for shade. Tree canopy equivalents cannot provide the full range of benefits for biodiversity that trees can. Interrogation of the tree canopy target, including replacement of trees through tree canopy equivalents requires interrogation as not all trees are equal, with older trees providing specific benefits that can't be easily replicated. Tree canopy equivalents such as rooftop gardens require consideration of aspects such as stormwater harvesting and re-use of water for landscapes.

Introduction of a Tree Fund, the establishment of a no net loss offset scheme and replacement trees

The Discussion Paper sets out a vision for the future including “a well-designed framework for management of trees on leased land that supports the objective of increasing canopy cover over the long term and protects highly valued/significant trees in our urban forest”.¹⁴ The Discussion Paper then sets out 5 “guiding principles” to achieve this vision and a number of potential solutions to achieve this vision. These include:

- Offsets to compensate for loss of a tree, with replacement tree, trees or other equivalent infrastructure. Offsets would work on a ‘no net loss principle’ and would either result in a replacement tree, trees or similar living infrastructure planted on the same block, or an amount paid in an offset fund which would be used to plant trees on public land. An effective compliance framework would be established to ensure replacement plantings are achieved and retained;
- Streamlined processes and decision making. Consideration of a more streamlined assessment process that provides greater transparency and certainty about outcomes.

¹⁴ Discussion paper, page 12.

- Outcome-focussed criteria. The Discussion paper states that criteria used to assess whether a tree can be removed is prescriptive and does not always allow for innovation and best practice.

There are number of important points to raise here.

Firstly, offset schemes cannot be used to allow for the weakening of tree protections under the *TPA*. It is essential that offsets are only applied in accordance with good practice, including:¹⁵

1. Offsets must only be used as a last resort and clear limits must be placed on the use of offsets, such as the use of 'no-go zones';
2. Offsets must be based on sounds ecological studies and principles;
3. Indirect offsets must be strictly limited;
4. Offsetting must achieve benefits in perpetuity;
5. Offsets must be based on principles of net gain;
6. Offsets must be additional to what has already been required by law;
7. Offset arrangements must be legally enforceable.

Where a tree has to be removed, as a last resort, it must be replaced on a 'like for like' basis. This recognises the value of particular trees (depending on age, species, tree canopy cover and habitat and ecological values provided), and is closer to quantifying the actual cost to the community when trees are removed.

Secondly, a tree fund developed to support the further planting of trees needs to be considered carefully, such that any monetary offsets deposited in the tree fund to compensate for the loss of a tree is a sufficient deterrence to tree removal. Any tree fund should not be solely reliant on funding from the general public, as this would mean that funds for tree planting are solely reliant on tree removal. Accordingly any tree fund should also include contributions from the ACT Government.

Thirdly, it is important to note that most urban development in the ACT has an impact on nationally threatened box gum woodlands, native grasslands or threatened species such as the striped legless lizard, particularly on undeveloped rural leases.¹⁶ These are not easy to offset.

Finally, rather than the establishment of a no net loss offset scheme, any new scheme should rather operate on the principles of 'net gain', particularly given the goal is to increase the ACT's canopy cover by 9% over the next 25 years.

Tree Curator

The Discussion Paper proposes the creation of the ACT Tree Curator position. At present, the Conservator of Flora and Fauna is responsible for decision-making under the *TPA*. The new ACT Tree Curator would possess the relevant statutory powers under the *TPA* to assume the responsibilities of the Conservator of Flora and Fauna.

¹⁵ Rachel Walmsley et al 'Fundamental Principles for Best Practice Biodiversity Offsets' (2014) Impact 96; Senate Environment and Communications References Committee (Cth), 'Environmental offsets' (Commonwealth of Australia, 2014), ch 3.

¹⁶ <https://www.smh.com.au/opinion/its-becoming-harder-to-see-the-trees-for-the-revenue-20140128-3112b.html>

It is noted that the creation of this position was first proposed in the 2011 Report on the Investigation into the Government's tree management practices and the renewal of Canberra's urban forest report written by the Commissioner for Sustainability and the Environment. The Commissioner highlighted that the administrative arrangements for the *TPA* separate the Conservator of Flora and Fauna from the government directorate tasked with administering the Act. The 2011 Report highlighted the need to remove this complexity through the creation of a designated Tree Curator role positioned within TCCS. Furthermore, the 2011 Report identified the importance of having an individual trained in horticulture and arboriculture making decisions under the *TPA*. Given the impacts of climate change, and the loss of trees contributing to loss of habitat for vulnerable species, a separate position designed to focus on tree protection and management is welcomed.

Removal Process through the Planning System

Current process for tree damaging activity in development applications

The *TPA* states that if the conservator is satisfied, on reasonable grounds, that a development (i.e. a development subject to development approval under the *Planning and Development Act*) involves or is likely to involve an activity that damages a protected tree, or be prohibited groundwork, the conservator 'may' give written advice about the development.¹⁷

The conservator providing advice on a development must include advice about tree protection requirements for each protected tree with a protection zone on, or partly on, the land subject to the development (s 83(3) *TPA*). Under s 83(3), the conservator may also

- (a) include information about the trees on the land; and
- (b) set out the changes (if any) the conservator considers should be made to any tree management plan or proposed tree management plan that relates to the development application, having regard to—
 - (i) the guidelines approved under section 31; and
 - (ii) the advice (if any) of the advisory panel; and
 - (iii) anything else the conservator considers relevant.

The conservator's advice is then to be considered by the ACT Planning and Land Authority when deciding to approve or refuse an application. For registered trees, a development approval inconsistent with the conservator's advice about those trees must not be given. For regulated trees, development approval inconsistent with the conservator's advice must only be given in the merit track, where the person considering the advice is satisfied that any applicable guidelines and any realistic alternatives to the development have been met, and the decision is consistent with the Territory Plan (s 119(2) *PD Act*).

As it is, consideration of the conservator's advice on the protection of trees through the development application process is limited, in that merit track applications (a large proportion of applications) need not be consistent with the conservator's advice. As in previous submissions, it is suggested that the conservator (or an equivalent role) be given a greater decision-making role in regards to trees subject to development applications. Advice on protections for particular trees could also be provided prior to lodging a development application, so that developers have an understanding of the status of trees and biodiversity on their property and make decisions accordingly, prior to investing in the development application process.

¹⁷ *TPA*, section 82.

Should you have any questions on the above, please do not hesitate to contact Stephanie Booker on (02) 6243 3460 or stephanie.booker@edo.org.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Stephanie', is positioned below the closing text.

Stephanie Booker
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Environmental Defenders Office