

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

Tree Protection Bill 2004

EXPLANATORY STATEMENT

Circulated with the authority of
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Minister for the Environment

EXPLANATORY STATEMENT

Outline

The *Tree Protection (Interim Scheme) Act 2001* was introduced to control tree damaging activities while a permanent legislative and policy framework for urban tree protection was developed.

In October 2002, a discussion paper, *Tree Protection for the ACT - The Next Steps*, was released for public comment followed by direct briefings for key stakeholders. The paper analysed issues arising from 18 months experience with administration of the interim legislation with general discussion on tree protection and management issues. Possible options were presented for a permanent and workable tree protection regime with a view to establishing an appropriate and practicable balance between the protection needs of urban trees and the private activities of Canberrans within their leases.

This Bill is to replace the *Tree Protection (Interim Scheme) Act* and sets out provisions for the protection of trees in the urban area. This Bill contains provisions for:

- establishment of a register of trees of high importance;
- establishment of comprehensive tree protection measures to be applied in areas where urban forest values are at risk of degradation;
- approval of tree damaging activities;
- approval of groundwork activities within the tree protection zone of a protected tree;
- approval of tree management plans;
- offences relating to damaging trees and undertaking unauthorised groundwork activities; ability for the Conservator of Flora and Fauna (the Conservator) to make directions with regard to tree protection matters;
- enforcement; and
- establishment of an Independent Tree Advisory Panel. (The Conservator is established under the *Nature Conservation Act 1980*).

Revenue/Cost Implications

Current expenditure on interim tree protection measures is between \$450,000 and \$500,000 per annum. This recurrent funding would cover the ongoing administrative costs of the proposed scheme, estimated at \$460,000 per annum. The indicative cost of the proposed establishment of a register of 3,000 trees is estimated at \$250,000. This one-off establishment cost will need to be addressed through existing resources and, if necessary, future budgetary processes.

Formal Clauses

Part 1- Preliminary:

Clauses 1 and 2 are formal requirements. They deal with the short title of the Bill, commencement provisions.

Clause 3 provides the objects of the Act. The primary objects stated in this clause are the protection of individual trees of importance and protection of urban forest values. Definitions of the *urban forest* and *urban forest values* are provided in sub-clause 3(2).

Clause 4 provides for a dictionary of terms used within the Bill and notifies that the dictionary is located at the end of the Bill.

Clause 5 advises that the notes included within the Bill are explanatory and do not form part of the Act.

Clause 6 advises that this Bill is subject to other legislation, including the Criminal Code and Legislation Act.

Clause 7 provides a definition of the built-up urban area as the area of land to which the Bill applies. The built up urban area is to be defined by reference to a map of Canberra and determined as a disallowable instrument.

Part 2 – Important Terms

This Part defines the important terms used in the Bill. Many other definitions are included in the dictionary.

Clause 8 defines “protected trees.” As referring to all trees subject to protection under this Bill.

Clause 9 defines “registered trees” to be trees that are included on the register, including provisionally registered trees.

Clause 10 defines “regulated trees” and “tree management precincts.” A regulated tree is a tree that meets the size criteria and is located on leased land in an area declared as a tree management precinct. A regulated tree is essentially the same as a significant tree under the *Tree Protection (Interim Scheme) Act 2001*.

Clause 11 defines “protection zone for protected trees” as the area of ground extending two metres to the canopy extent of a protected tree and/or for metres from the trunk. A tree management plan for a protected tree, approved by the Conservator under Clause 32, may define the protection zone for a protected tree to be otherwise.

Part 3 – Protection of Trees

The offence provisions in this bill are divided into three categories:

- Damaging a protected tree;
- Undertaking major pruning of a protected tree; and
- Undertaking prohibited groundwork within the protection zone of a protected tree.

Division 3.1 - Definitions for part 3

Clause 12 defines the meaning of *damage* to a protected tree.

Clause 13 defines the meaning of *major pruning* as pruning that meets set criteria. The definition of major pruning differs for regulated and registered trees. Major pruning of a regulated tree is defined as pruning that is not in accordance with the Australian Standard for Pruning of Amenity Trees (AS4374). The definition of major pruning for a registered tree is more comprehensive.

Clause 14 defines the meaning of *prohibited groundwork* as a series of activities that involve disturbance of the soil within the protection zone of a protected tree.

Division 3.2 – Prohibited activities

Clause 15 establishes the offence of damaging protected trees. The question of whether a tree is a protected tree is a matter of strict liability. This is to reflect the policy that people should take care to ensure that trees they are working on are not protected, or that they have the relevant approvals to do the work. The maximum penalty for the offence depends on the level of the mental element the person had in relation to causing the damage. Intentional damage carries the most serious penalty, while the strict liability offence carries the lowest.

Clause 16 establishes the offence of undertaking unauthorised groundwork within the tree protection zone of a protected tree. Again, the question of whether a tree is a protected tree is a matter of strict liability. Also, the question of whether the work was in the tree protection zone is a matter of strict liability. The maximum penalty for the offence depends on the level of the mental element the person had in relation to causing the damage. Intentional damage carries the most serious penalty, while the strict liability offence carries the lowest.

Clause 17 provides for exceptions to clauses 15 and 16. Under this section it is not an offence to undertake any of the prohibited activities on a protected tree if:

- approval has been granted by the Conservator;
- the activity is in accordance with a tree management plan approved by the Conservator;
- the activity is in accordance with a direction under the *Plant Diseases Act 2002*; or

Exception is also made for prohibited activities undertaken on a regulated tree if it is in accordance with relevant sections of the *Utilities Act 2000*.

Division 3.3 – Approved activities

Clause 18 empowers the Minister to determine criteria for the Conservator to approve tree damaging activities. The determination is to be a disallowable instrument.

Clause 19 makes provisions for a person to apply to the Conservator for authority to undertake a tree damaging activity.

Clause 20 provides for the Conservator to request further information required in order to reach a decision regarding approval of an application to undertake a tree damaging activity. The Conservator may refuse to consider an application further if the applicant fails to comply with the request.

Clause 21 enables the Conservator to request advice from the Independent Tree Advisory Panel if necessary. A member of the panel who has been delegated by the panel under clause 72 may provide this advice.

Clause 22 provides for the Conservator to make a decision regarding an application to undertake a tree damaging activity and/or groundwork activities and provides for conditions to be imposed with approvals.

Clause 23 requires the Conservator to notify specified interested persons of the decision and their right to request reconsideration within 14 days.

This provision is similar to that of the interim scheme with the exceptions that the definition of an adjoining lessee is limited to those situated within 100m of the tree and that notification may, in addition to the persons specified, be sent to any persons the Conservator consider appropriate.

It also directs the Conservator to notify the relevant land management agency, being the Department of the public service with responsibility for managing the relevant piece of unleased Territory land. This is relevant for the approval of activities regarding registered trees located on unleased Territory land.

Clause 24 defines the operation of the approval, including when the approval takes effect and the period of the approval.

This is similar to the interim scheme except for:

- the additional provision that allows the Conservator to extend the period for which the approval remains in force providing the activity still meets the approval criteria; and

- limiting the time between the date of the decision and the start of the approval period to 14 days, as compared to 28 in the Interim Scheme. This is consistent with the time given for comments in the development application process under the *Land (Planning and Environment) Act 1991*.

Clause 25 empowers the Conservator to cancel an approval if satisfied the activity no longer satisfies the criteria, providing interested persons are notified as per Clause 23.

Clause 26 provides for the approval of tree damaging activities and groundwork activities in urgent circumstances. Circumstances are defined as urgent if the Conservator is satisfied that the activity is:

- required urgently in order to protect the health or safety of people or animals, or public or private property; or
- is considered to be ‘minor works’, i.e. it is unlikely to have an adverse impact upon the tree.

The urgent circumstances clause differs from the interim scheme in that it requires permission from the Conservator. In order to ensure that such a matter is addressed in an appropriately timely manner and at all hours, a delegate of the Conservator may provide approval orally and without delay. Delegation may be given to Environment Protection Officers who are on call 24 hours a day.

The minor works provision (sub-clause (4)) is necessary given the revised structure of the offence provisions. It is to allow permission to be granted for activities that may technically be prohibited, yet unlikely to have any significant impact on the health of the tree.

Clause 27 establishes the offence of not complying with conditions attached to an approval under Clauses 22 or 26. This is to allow enforcement of conditions on approval where breach of the conditions is not directly a tree damaging activity. An example of such a condition is the common requirement that trees not approved for removal be fenced prior to work commencing.

Part 4 – Tree management plans

This Part of the Bill empowers the Conservator to approve tree management plan. Approval of these plans will operate to give approval for tree damaging activities as set out in plan, in advance, without the need to make a new application for approval.

Clause 28 empowers the Conservator to determine guidelines for the preparation and assessment of tree management plans. The guidelines would be a disallowable instrument.

Clause 29 makes provision for a person to apply to the Conservator for approval of a tree management plan.

Clause 30 provides for the Conservator to request further information required in order to reach a decision regarding approval of a tree management plan. The Conservator may refuse to consider an application further if the applicant fails to comply with the request.

Clause 31 enables the Conservator to request advice on the approval of a tree management plan from the Independent Tree Advisory Panel if necessary. A member of the panel who has been delegated by the panel under clause 72 may provide this advice.

Clause 32 empowers the Conservator to make a decision regarding an application to undertake a tree damaging activity and/or groundwork activities.

Clause 33 requires the Conservator to notify specified interested persons of the decision. The list of persons to whom notices must be sent is the same as Clause 23.

Clause 34 defines the operation of the approval of a tree management plan. This provision is the same as in Clause 24.

Part 5 – Tree management precincts

The part of the Bill provides specified areas of the city with a tree protection regime similar to the interim scheme. The criteria for the declaration of Tree Management Precinct (a Disallowable Instrument) would be designed to enable the Minister to declare an area as a Tree Management Precinct based on the need to protect:

- the values associated with urban forest from possible degradation from high levels of development activity;
- the landscape contribution of trees in heritage areas; and
- provide protection for trees during the construction phase of greenfield and urban infill developments.

Clause 35 empowers the Minister to determine criteria for the declaration of tree management precincts. The criteria would be a disallowable instrument.

Clause 36 empowers the Minister to declare an area as a tree management precinct. The declaration would be a disallowable instrument.

Tree management precincts will be areas where the existing scheme for tree protection will continue to apply (with some refinements, as outlined in part 3: see the provisions relating to protection of regulated trees).

Part 6 –Tree Register

Clause 37 defines the meaning of “registered tree” for the purposes of this part of the Bill as not including a provisionally registered tree.

Clause 38 establishes the Tree Register and the information and records that must be included in the Register.

Clause 39 enables the Conservator to correct errors in the Register.

Clause 40 ensures the Register is made available to the public.

Clause 41 ensures that any information that is determined to be restricted information is not included in the register. See the explanation for Part 8 for more information on this provision.

Part 7 – Registration of trees

Division 7.1 Criteria for registration etc.

Clause 42 empowers the Minister to determine criteria to register or cancel the registration of a tree. The criteria would be a disallowable instrument.

Division 7.2 Registration process

Clause 43 provides the requirements for a tree to be nominated to the register.

Clause 44 empowers the Conservator to provisionally register a tree thereby protecting it whilst it is being considered for registration.

Clause 45 sets out the required information to be recorded for a provisionally registered tree.

Clause 46 requires the Conservator to notify specified interested persons of the decision regarding the provisional registration and proposed inclusion on the register.

This clause is similar to Clause 22 with the additional requirement to publish a notice in a daily paper inviting comment from the community regarding the proposed registration.

Clause 47 provides for the Conservator to consult with the Independent Tree Advisory Panel; Heritage Council (if the tree is proposed to be registered on the basis of heritage significance); and comments received from the community. The advice provided by the panel on the cancellation of the registration of a tree must be provided by the entire panel. This is in contrast to Clause 21 (Advisory panel advice on approval application) and Clause 31 (Advisory panel advice on proposed tree management plan) where the function may be delegated to an individual member of the panel under Clause 71.

Clause 48 defines the period for provisional registration and criteria for ending provisional registration.

Clause 49 empowers the Conservator to make a decision regarding the registration of a tree.

Clause 50 requires the Conservator to notify specified interested persons of the decision regarding the registration of a tree as per Clause 44.

Clause 51 provides for the registration of trees and the information required to be maintained on the register.

Division 7.3 – Cancellation of registration

Clause 52 provides the requirements for a proposal to cancel the registration of a tree.

Clause 53 requires the Conservator to notify specified interested persons of the proposed cancellation of the registration of a tree as per Clause 44.

Clause 54 provides for the Conservator to consult with the Independent Tree Advisory Panel; Heritage Council; and comments received from the community as per Clause 45. The advice provided by the panel on the cancellation of the registration of a tree must be provided by the entire panel. This is in contrast to Clause 21 (Advisory panel advice on approval application) and Clause 31 (Advisory panel advice on proposed tree management plan) where the function may be delegated to an individual member of the panel under Clause 71.

Clause 55 empowers the Conservator to make a decision regarding the cancellation of the registration of a tree.

Clause 56 requires the Conservator to notify specified interested persons of the decision to cancel the registration of a tree as per Clause 44.

Clause 57 requires the Conservator, upon deciding to cancel the registration of a tree, to remove the entry pertaining to that tree from the register.

Clause 58 provides for exclusion of development activity for five years following from the area defined as the protection zone of a tree that has been removed from the Register.

This provision is to remove the incentive to poison, or otherwise kill, a registered tree in order to realise a development objective. Approval may not be granted for a development application in this area unless the Conservator agrees to shorten the period that the exclusion persists.

Part 8 – Restricted information

This provision is in place to ensure the protection of the values of certain trees where the release of certain information may compromise those values. Examples of this include trees that have been registered for their Aboriginal cultural significance or trees that represent sensitive habitat for an endangered species.

Clause 59 establishes what kind of protected tree this part applies to.

Clause 60 defines how the Conservator defines restricted non-Aboriginal information and who should be given a copy of the declaration.

Clause 61 defines how the Conservator defines restricted Aboriginal information and who should be given a copy of the declaration. It also provides a definition of what an *Aboriginal heritage* tree is.

Clause 62 establishes the limitations and penalties regarding the publication of restricted information.

Clause 63 empowers the Conservator to give an approval for the publication of restricted information providing there is no adverse impact resulting from the publication.

Clause 64 provides for certain circumstances where specified persons may have access to restricted information.

Part 9 – Independent Tree Advisory Panel

This part of the Bill provides for the establishment of a panel of at least three persons expert in relevant fields. The Independent Tree Advisory Panel will be responsible for providing advice to the Conservator with regard to specific functions of the Conservator as well as other matters pertaining to tree protection in general. The entire panel is required to provide advice on some matters, as specified in Clause 71, whereas a majority to the panel's tasks may be delegated to a suitably qualified member of the panel.

Clause 65 establishes the Independent Tree Advisory Panel.

Clause 66 provides for the appointment of members to the Independent Tree Advisory Panel and sets out the eligibility requirements for its members. The panel members between them must include extensive experience in the fields of either: arboriculture; forestry; landscape architecture; natural and cultural heritage; or horticulture. At least one member must have extensive experience in arboriculture or forestry.

Clause 67 establishes the functions of the Independent Tree Advisory Panel. This clause sets out specific circumstance for which the panel may provide advice and provides for the provision of advice on any matters pertaining to tree protection matters. These functions are to provide advice to the Conservator on:

- (a) application for approval of activities under clause 21;
- (b) application for approval of Tree Management Plans under clause 31;
- (c) proposed registration of a tree under clause 48(1);
- (d) proposed cancellation of registration of a tree under clause 55(1);
- (e) reconsideration of a decision by the Conservator under clause 94(1); and
- (f) other tree protection matters.

The panel may delegate above functions (a), (b) and (f) to an individual member of the panel under clause 72. It is envisaged that these functions would constitute the majority of the functions exercised by the panel. This would be especially so during the transition from the interim scheme to permanent tree protection legislation.

Clause 68 empowers the Minister to end the appointment of a member of the panel in accordance with provision of this section and the disclosure provisions in Clause 66.

Clause 69 requires members of the panel to disclose and financial or personal interest they may have in any matter being considered by the panel and for the Conservator to report the stated interests to the Minister.

Clause 70 provides for the making of regulations regarding the procedures for decision making by the panel and provides specific examples.

Clause 71 Empowers the panel to delegate certain functions to individual members of the panel. This is to enable the efficient administration of the more routine decisions whilst ensuring that the entire panel is involved in providing advice on more important matters.

The panel may not delegate the provision of advice to the Conservator on the following matters:

- (a) registration (Clause 47);
- (b) cancellation of registration (Clause 54); or
- (c) reconsideration of a decision under Clause 96.

It also specifies that the panel may only delegate advice of a technical nature to suitably qualified members of the panel. The panel may, for example, include members who have expertise in the field of cultural heritage but not in arboriculture or forestry.

Part 10 Tree protection directions

The following sections provide for the Conservator to make directions with regard to the protection of trees.

Clause 72 permits the Conservator to determine criteria for giving directions.

Clause 73 empowers the Conservator to give directions with regard to the protection of trees and provides for an offence to defy a direction.

Part 11 – Enforcement

Division 11.1 – General

Clause 74 defines the terms *connected*, *occupier* and *offence* for the purpose of the Bill.

Division 11.2 – Authorised people

Clause 75 empowers the chief executive to appoint authorised people for the Act.

Clause 76 requires authorised persons to have identity cards.

Division 11.3 – Powers of authorised persons

Clause 77 empowers an authorised officer to enter premises with consent, with a warrant, or in regard the registration or inspection of a tree on the register.

It is necessary for authorised officers to be able to enter premises without consent or a warrant to access a tree for consideration for inclusion on the register or for inspection of a tree that is already on the register. A thorough assessment of the tree, required in order to consider the tree for registration, may not be possible without access to the lease. If the lessee is adverse to the registration of the tree, there exists the potential for the tree to be irrevocably damaged or killed before a warrant is obtained.

Clause 78 provides that an authorised person may only remain on premises if they produce an identity card when asked to do so.

Clause 79 establishes the procedure required for an authorised person to obtain consent to entry, and the requirement for giving acknowledgement of that consent.

Clause 80 empowers an authorised officer to collect evidence and seize things upon entering a premises.

Clause 81 empowers an authorised officer to seize anything that is connected to an offence and defines the offence of interfering with a seized thing.

Clause 82 empowers an authorised person to require a person to state their name and address in relation to on suspicion of the committing of an offence under this Bill.

Division 11.4 – Search warrants

Clause 83 empowers an authorised person to apply to a magistrate for a search warrant with regard to an offence under this Bill and establishes the process and requirements for the provision of a warrant.

Clause 84 empowers an authorised person to apply by phone, fax, radio etc to a magistrate for a search warrant in urgent or otherwise special circumstances.

Clause 85 requires the authorised person to announce that they are entering the premises under a search warrant.

Clause 86 requires the authorised person to provide the occupier, or someone else representing the occupier, with details of the search warrant.

Clause 87 entitles the occupier to be present and observe whilst a search is being conducted.

Division 11.5 – Return and forfeiture of things seized

Clause 88 requires that an authorised person provide a receipt for any things seized.

Clause 89 empowers an authorised person to move a thing found under a search warrant to another place for examination.

Clause 90 entitles who would otherwise be able to inspect a thing seized, to inspect or copy (if a document) the thing seized.

Clause 91 requires that things seized be returned to its owner if it is shown to be irrelevant to the offence or the offence is not proven.

Division 11.6 – Miscellaneous

Clause 92 requires that damage or inconvenience incurred by an authorised person in their duties under this Bill be minimised and duly rectified.

Clause 93 provides for a person to claim compensation for any loss or expense suffered due to the exercise of a function under this Bill.

Part 12 – Review of decisions

This part of the Bill sets out the provisions for the formal reconsideration of decisions made by the Conservator. The reconsideration process involves an initial ‘in-house’ process involving the Independent Tree Advisory Panel and the Conservator. It should be noted that neither roles may be delegated when exercising this function.

Clause 94 requires the Conservator to include information about the reconsideration process when notifying persons of decision that are subject to provisions contained in this part of the Bill.

Clause 95 provides for persons to be able to apply for reconsideration of a decision and sets out which decisions for which an application may be made.

Clause 96 empowers the Conservator to reconsider a decision and sets out the process for making such a reconsideration including requesting advice from the Advisory Panel.

Clause 97 allows reconsidered decisions to be reviewed by the Administrative Appeals Tribunal.

Any person notified (under Clauses 23, 25, 33, 46, 50, or 56) may request a reconsideration of a decision within 14 days of the date on the notice. If they, or any other notified person, are dissatisfied with the outcome of the reconsideration they are able to take the matter to the Administrative Appeals Tribunal within 21 days of the reconsideration.

Part 13 – Miscellaneous

Clause 98 is a standard provision providing the power to determine fees.

Clause 99 is a standard provision empowering the Minister to approve forms for the Act. The approval is to be a Notifiable Instrument.

Clause 100 provides for the delegation of the functions of the Conservator to a public employee, an authorised person or a person prescribed under regulations.

The Conservator’s functions regarding the registration, cancellation of registration and reconsideration of a decision can not be delegated.

Clause 101 empowers the Executive to make regulations for this Bill.

Part 14 – Transitional

Clause 102 defines the term *commencement day* as the day the Act commences and *old Act* as being the *Tree Protection (Interim Scheme) Act 2001*.

Clause 103 repeals the *Tree Protection (Interim Scheme) Act 2001*.

Clause 104 provides for the transfer of trees currently included in the heritage places register or the interim heritage places register to the Tree Register.

Clause 105 provides for the establishment of interim Tree Management Precincts for each suburb (district) across the urban area whilst the tree register is being established.

Clause 106 provides for the continuation, extension or cancellation of any approval made under the interim scheme that are still active.

Clause 107 empowers the Executive to make regulations with regard to the transition from the Interim Scheme to the new Act.

Clause 108 provides for regulations made under Clause 107 to be made for any unseen transitional measures.

Clause 109 provides for amendments to be made to the Acts mentioned in the consequential amendments schedule.

Clause 110 provides the expiration of the transitional arrangements.

Schedule 1 – Consequential amendments

Part 1.1 sets out the necessary amendments to the *Administrative Appeals Tribunal Act 1989*.

Part 1.2 sets out the necessary amendments to the *Land (Planning and Environment) Act 1991*.

Part 1.3 sets out the necessary amendments to the *Roads and Public Places Act 1937*.

Part 1.4 sets out the necessary amendments to the *Utilities Act 2000*.

The Dictionary sets out the definitions for the Bill.