

Urban Forest (Remediation of Land) Declaration 2025 (No 1)

Disallowable instrument DI2025—316

made under the

Urban Forest Act 2023, section 137 (Power to apply or disapply legislation to entities or activities).

EXPLANATORY STATEMENT

Subsection 137 (1) (b) of the *Urban Forest Act 2023* (the Act) allows for the Minister to declare that a provision or provisions of the Act does not apply to a stated entity or activity. Section 48 (1) (b) of the *Legislation Act 2001* provides that a power given under an Act to make a statutory instrument includes the power to make an instrument that applies differently by reference to stated exceptions or factors.

Overview

The Territory keeps record of contaminated land where remediation is, or may be, necessary to mitigate the risk of harm to human health, serious environmental harm, or both. If remediation is required and there are protected trees growing on contaminated land, the operation of the Act may hinder the remediation work. It is in the interest of public health and safety, and the right to a healthy environment that remediation work not be unnecessarily hindered.

The purpose of this instrument is to remove administrative and financial barriers to the remediation of contaminated land where there are protected trees on that land. This declaration disapplies elements of the Act in order to facilitate necessary remediation work. In doing this, the declaration disapplies as few provisions as possible, ensuring the objects of the Act continue to be met.

Outline of Provisions

Clause 1

Clause 1 names the instrument the *Urban Forest (Remediation of Land) Declaration 2025 (No 1)*.

Clause 2

Clause 2 states that the instrument commences on the day after its notification.

Clause 3

Under section 21 of the Act, a person may apply to undertake a tree damaging activity. Section 28 of the Act provides the conditions for deciding an application made under section 21. This includes that the decision-maker must decide whether to approve the activity within 35 working days of receiving the application.

Clause 3 disapplies section 28 (1) of the Act to the extent it imposes the 35 working-day timeframe within which a decision must be made. This disapplication has the effect that the decision-maker may take more than 35 working-days to reach a decision. The disapplication only applies for the purpose of allowing the decision-maker to consider whether the activity is necessary to facilitate remediation of the land.

This declaration has been made with the understanding the decision-maker may require time to gather and consider information about the proposed remediation. The 35-working day timeframe did not contemplate the time it might take a decision-maker to satisfy themselves that the activity being applied for is necessary to facilitate remediation. The extension of the timeframe supports evidence-based decision-making and procedural fairness.

This declaration does not affect the operation of section 22 (Approval application—more information), section 24 (Approval application—advisory panel advice) or section 25 (Approval application—referral to other entities) which allow the decision-maker to seek further information. It does however support the decision-maker to ask other relevant entities, such as the environment protection authority, for further information.

Clause 4

Clause 4 disapplies section 28 (4) (a) of the Act. Section 28 (4) sets out matters a decision-maker must consider in deciding an application to undertake an activity that would or may damage a protected tree or be prohibited groundwork. Paragraph (a) requires the decision-maker to consider the criteria made by the Minister under section 20 of the Act. The criteria relate to the health and condition of the tree and would not allow for a healthy tree to be removed for the purpose of remediation work. Given the importance of the criteria to the protection of trees, two pre-conditions have been declared that limit when a decision-maker can make a decision without considering the criteria.

The first pre-condition is that there is evidence that the land requires remediation. This evidence can take two forms. Either the land is notified on the register of contaminated sites, or the environment protection agency is satisfied the land requires remediation.

The second pre-condition is that the decision-maker is satisfied the activity is necessary to facilitate the remediation of the land. This condition puts an onus on the applicant to establish a connection between the tree damaging activity and the remediation. Matters which the decision-maker may consider include:

- the physical proximity of the tree to the remediation work, for example, is the tree growing in the soil that needs to be remediated, or is the tree simply on the same parcel of land as the soil that needs to be remediated;

- the nature of the remediation, for example, is deep or shallow excavation required to remediate soil;
- access to the remediation site, for example, does the tree prevent the machinery required to undertake remediation from accessing the contaminated area.

Clause 5

When a person receives approval to remove a tree under section 28, they must ordinarily enter into a canopy contribution agreement. Section 36 of the Act provides the conditions for a canopy contribution agreement through on-site planting of replacement trees or, if on-site planting is not possible, through a financial contribution. Remediation work may prevent an on-site canopy contribution due to pre-existing site constraints or as a result of the remediation. Imposing a financial agreement may be an unfair burden on a person undertaking remediation work that is required for public health and safety.

Clause 5 disapplies sections 36 (3) (b) and 36 (4) (b), which has the effect that the decision-maker is not required to consider the matters prescribed by regulation for making an on-site or financial canopy contribution agreement. As the regulation sets out the ordinary requirements for an on-site or financial canopy contribution agreement, this disapplication gives the decision-maker discretion to determine the appropriate canopy contribution agreement for the remediated site. The discretion is limited to circumstances where the decision-maker is satisfied the removal of a protected tree was necessary to facilitate the remediation of land.

Although the declaration removes the requirement for a canopy contribution agreement to comply with the regulatory prescriptions, principles of natural justice, and the conduct requirements on the decision-maker as a public servant mean the decision-maker must make a fair and reasonable canopy contribution, having regard to the nature and constraints of the site. For instance, if site constraints—whether pre-existing or arising from remediation—prevent an on-site canopy contribution, the decision-maker may accept a reduced on-site or financial contribution or an off-site alternative. However, if a reticence to enter an on-site contribution relates to a proposed redevelopment of the remediated site rather than in inherent site constraint, the decision-maker may decide a canopy contribution obligation that aligns with the requirements prescribed by regulation is appropriate.

Human Rights

This declaration supports human rights by helping to protect the right to a healthy environment. The instrument removes barriers to the remediation of contaminated sites under the *Environment Protection Act 1997* without compromising the objects of the *Urban Forest Act 2023*.

Climate Change

Retaining the requirement to enter into achievable on-site canopy contributions will have a measurable impact on climate change.