

Chapter 6

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Protecting our trees

Introduction

Trees are an important feature of the urban, rural and natural landscapes. For many people, trees are the embodiment of the environment and tree planting is seen as a key environmental tool. Trees perform many vital services, such as preventing soil erosion, providing habitats for wildlife, improving the atmosphere, protecting water catchments or simply providing shade on a hot summer's day. Canberra prides itself as being the 'bush capital' with the tree-covered mountains to the west providing a majestic backdrop to the city. Many of the units of Canberra Nature Park, interspersed among Canberra's suburbs, have trees making up significant components of their ecosystems. Within the suburbs and the city centres, native and exotic tree species form key elements of the 'garden city' aspect of Canberra. To address tree protection issues in the urban environment, the *Tree Protection Act 2005* (ACT) ('*Tree Protection Act*') was introduced and came into force on 29 March 2006.

Tree Protection Act 2005

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

- an [ACT Tree Register](#) for the protection of individual trees of exceptional value (registered trees)
- Tree Management Precincts (for regulated trees) for protection against unnecessary removal of trees in urban forests.

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

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

Applicability

The *Tree Protection Act* is only applicable to territory land that is declared to be in a 'built-up urban area' by the responsible minister (the Minister for Territory and Municipal Services) (s 7). The emphasis of the *Tree Protection Act* is on leased land within the built-up urban area. Trees on unleased land are not subject to the provisions of the *Tree Protection Act* unless they have been entered on the ACT Tree Register. Trees on national land are not covered by the *Tree Protection Act*.

ACT Tree Register

The *Tree Protection Act* protects individual trees through the establishment of a tree register, managed by the Conservator of Flora and Fauna ('the conservator') (s 41). The minister responsible for the *Tree Protection Act* establishes the criteria for the registration (and cancellation of registration) of a tree (s 45). This criteria requires the tree to be exceptional for its natural or cultural heritage value, landscape and aesthetic value or scientific value. The current criteria is listed in the *Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006* (ACT) and can be found on the [ACT legislation register](#) (see Contacts list at the back of this book).

Tree Advisory Panel

Section 68 of the *Tree Protection Act* creates the Tree Advisory Panel ('advisory panel'). The advisory panel is established to provide advice to the conservator. In August 2014, two advisory panel members were appointed for a 2 year term and another member was appointed for a 1 year term. A person appointed to the advisory panel must have extensive experience in one of the following areas (s 69(3)):

- arboriculture
- forestry
- horticulture
- landscape architecture
- natural and cultural heritage (s69(3)).

Protecting trees under the Act

Tree management precincts and regulated trees

The minister is responsible for determining the criteria for declaring an area be a tree management precinct (s 38) and for making the Tree Management Precinct Declaration which is a notifiable instrument (s 39).

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

The first is to provide protection for trees during the establishment of the ACT Tree Register. As a transitional step from the previous legislation, all of the ACT's suburbs were declared to be Tree Management Precincts. Currently, tree management precincts include all built up urban areas, as set out in the *Tree Protection (Built-up Urban Areas) Declaration 2014 (No 2)* (ACT). They comprise of the Canberra Central suburbs (including Oaks Estate, Beard and North Watson), Belconnen suburbs (including Lawson and Charnwood Homestead) Woden Valley suburbs, Tuggeranong suburbs (including Tharwa and Hume), Weston Creek and Molonglo Valley suburbs, Gungahlin suburbs and Hall. As the survey for the identification of

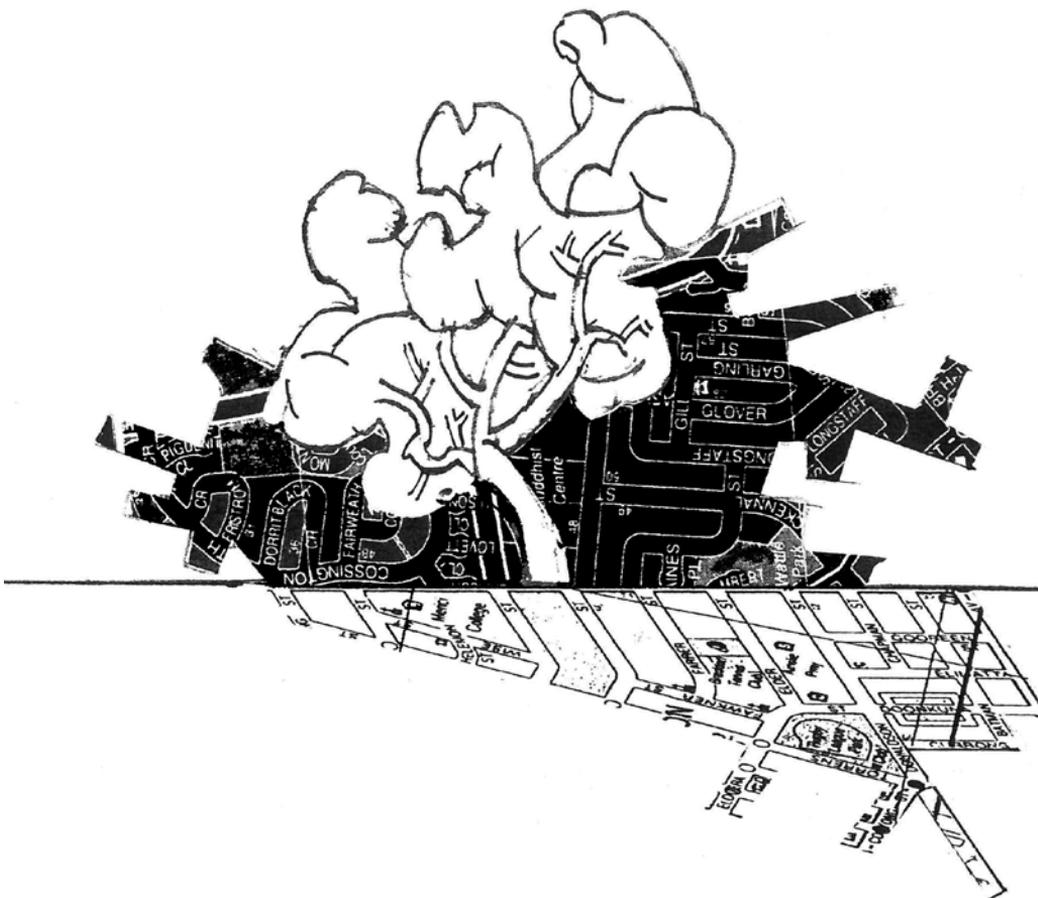
trees for the ACT Tree Register is completed in a suburb, the Tree Management Precinct status of the suburb may be revoked. To date, this has not been done.

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

Trees to be protected in Tree Management Precincts are called *regulated trees* and these are defined in section 10 of the *Tree Protection Act*, as being a tree (other than a registered tree or a palm tree) on leased land within a Tree Management Precinct which meets one of the following criteria:

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

There is no distinction between native and exotic species when defining regulated trees. However, if the tree is a pest plant under the *Pest Plants and Animals Act 2005* (ACT), it cannot be a regulated tree (s10(2)).



Provisional registration

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

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

- the person who nominated the tree
- the lessee of, or land management agency (the land manager) for the land that includes all or part of the protection zone for the tree
- the heritage council, where the conservator considers the tree to have heritage significance
- anyone else the conservator considers appropriate (s 49).

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

The conservator must ask the advisory panel (established in s 68) for advice on the proposed registration. The ACT heritage council must be consulted if the tree has heritage significance. If the tree is an Aboriginal heritage tree, the heritage council must, in turn, consult and consider the views of each representative Aboriginal organisation before providing the conservator with its advice (s 50) (see Chapter 9 in this Handbook for more information on ACT heritage law). The term 'representative Aboriginal organisation' is an organisation declared to be so in accordance with section 14 of the *Heritage Act 2004* (ACT) or as prescribed by regulation under the *Tree Protection Act*.

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

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

Registration

The conservator must make a decision on the registration of the tree within one year after the day the tree was provisionally registered (s 52). In doing so, the

conservator must have regard to the advice of the advisory panel or heritage council and any comments on the proposed registration received by the stated due date for comments (s 49).

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

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

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

Cancellation of registration

The conservator also has the power under Division 7.3 of the *Tree Protection Act* to cancel the registration of a tree. Proposals for the cancellation of a registration can be made by anyone and this must be made in the required form. As is also the case for proposals for registration, the conservator may refuse to consider applications deemed frivolous or vexatious.

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

- the person proposing the cancellation
- the lessee of, or land manager for, the land on which the tree is located
- if the tree is on leased land, the lessee of, or land manager for, land adjoining the land on which the tree is located and which is within 50 metres of the tree
- the heritage council if the tree register indicates that the tree has heritage significance
- anyone else the conservator considers appropriate (s 56).

In addition, the conservator must place a notice of the proposed cancellation in *The Canberra Times* (s 56(4)). The notice must identify whether the conservator considers the proposal may meet the cancellation criteria (s 56(5)(a)); whether there may be grounds for declaring a site declaration (refer below) (s 56(5)(b)); and call for comments by a closing date not less than 21 days after the publication of the notice (s 56(5)(c)).

As with a proposal for registration, the conservator must seek the advice of the advisory panel in relation to the proposal for cancellation and any proposed site declaration (s 57(1)). The requirements for involvement of the heritage council and its requirement to consider the view of each representative Aboriginal organisation are the same as for registration (ss 57(2)-(3)).

The conservator must make a decision on whether to cancel the tree's registration within six months after the date of the public notification of the proposed cancellation. This decision must be made after considering the advice from the advisory panel and where applicable the heritage council, as well as any comments on the proposed cancellation received within the period for public comment (s 58).

Cancellation of a tree's registration can only occur if the conservator believes the cancellation meets the cancellation criteria. These are currently found in Schedule 4 of the previously mentioned *Tree Protection (Criteria for Registration and Cancellation of Registration) Determination 2006* (ACT). The criteria includes the tree:

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

Upon making a decision the conservator must notify in writing the same people as were notified of the cancellation proposal, plus anyone who made written comments and asked to be advised or anyone else the conservator thinks appropriate (s 59).

Where the decision made is to cancel the tree's registration, this must be published in *The Canberra Times*. The decision on the tree's cancellation is able to be appealed to ACAT. Cancellation of the tree's registration can only occur after the period for appeal has lapsed and no appeal has been made or any appeal is unsuccessful (s 60) (see below for more information on appealing to ACAT).

Site declarations

Site declarations are dealt with under section 61. Site declarations allow the minister to declare a particular site if he or she thinks a registered tree has been damaged (usually by poisoning or cutting down). Site declarations act as a disincentive for the illegal damaging of a tree because when a site is declared, no construction can occur on that site for 5 years. Site declarations allow the conservator to keep the tree on the tree register despite the prohibited damage which has led to the cancellation of its registration. Where the conservator believes this to be the case, the protection zone for the tree immediately before the cancellation becomes a declared site. The definition of a protection zone is discussed in the Damages section below. The declaration remains in force for five years and the tree's entry in the tree register is not removed, but is simply annotated that the registration has been cancelled. Site declarations under section 61 are notifiable instruments.

Written notice of site declarations must be given to:

- the lessee of the land on which the tree is located
- the ACT Planning and Land Authority (ACTPLA)
- anyone else the conservator deems appropriate (s 61(4)).

If tree damage occurs in an emergency situation, TAMS should be notified on 13 22 81.

Tree management plans

Tree management plans are mechanisms to prescribe the range of activities that may affect a particular tree. Proposals for tree management plans can be made by:

- the conservator for a registered tree
- the land manager of the land on which a registered tree is located
- anyone, for a tree on leased land in a built-up urban area (ss 32(1)-(3)).

Proposals need to be in writing and sent to the conservator. The conservator then has 30 days from the date the proposal is received to make a decision (s 35). During that time the conservator may issue a written notice requiring the applicant to give further information or documentation that the conservator reasonably needs to decide the application (s 33). The conservator may ask the advisory panel for advice (s 34).

If the proposal or application relates to a tree that forms part of a place with heritage significance or it relates to a tree that is an Aboriginal heritage tree, the conservator must give a copy of the proposal or application to the heritage council or representative Aboriginal organisation respectively (*Heritage Act 2004* (ACT) ss 61A-61D). This must be done within three days of the conservator making a proposal or receiving an application (s 34A). Entities referred to must give their advice no later than 10 working days after the day the conservator gives the proposal or application to the entity (s 34B). If the entity does not respond, the entity is taken to have supported the proposal or application (s 34C).

In making a decision to approve a tree management plan, the conservator must have regard to:

- guidelines approved under section 31
- the advisory panel's advice (if any)
- the heritage council or representative Aboriginal organisation's advice (if any)
- anything else the conservator considers relevant (s 35(4)).

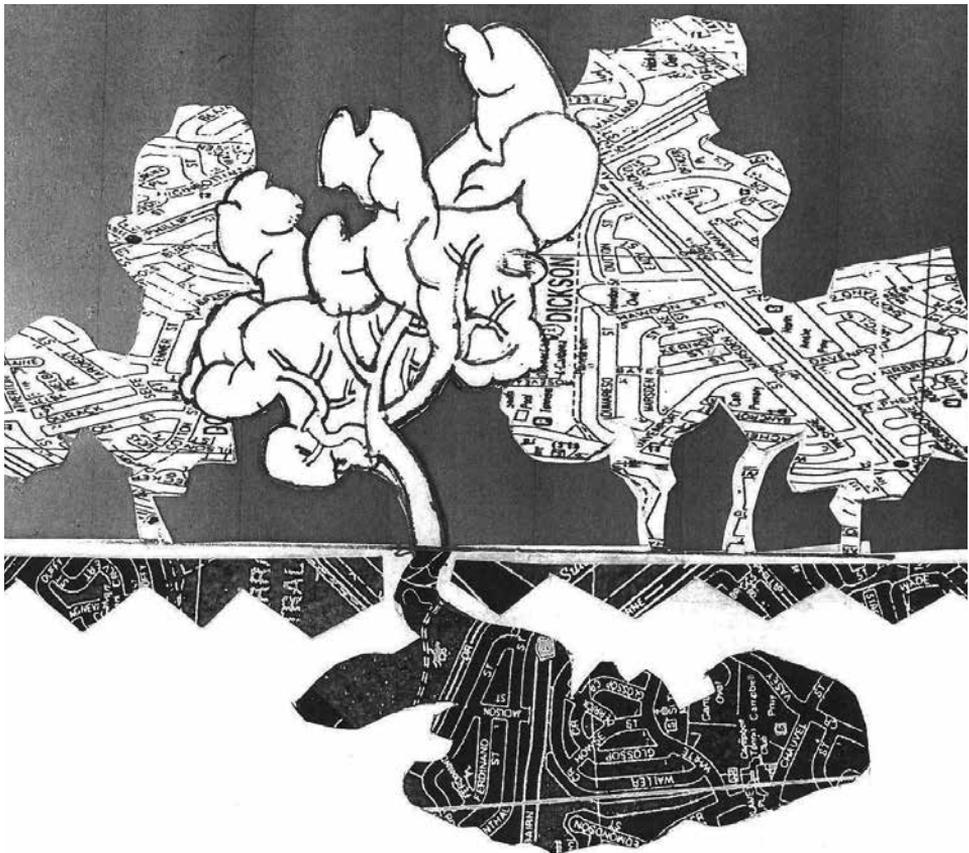
At the time of writing, *Tree Protection (Guidelines for Tree Management Plans) Determination 2010* (ACT) is a guideline approved under section 31.

Once a decision is made the applicant, where there is one, must be advised of the decision in writing. Where the decision is to approve a tree management plan, the conservator must also advise in writing:

- the lessee or the land manager of the land where the tree is located
- the lessee, or land manager, of land adjoining the land on which the tree is located and which is within 50 m of the tree
- the heritage council, where the tree has heritage significance
- representative Aboriginal organisations where the tree is an Aboriginal heritage tree (s 36).

Tree management plans come into effect from the date stated in the approval notice, which in turn, must be at least 14 days after notice of approval has been issued (s 37).

The ACT government has undertaken to prepare tree management plans for every registered tree in order to clearly identify what activities can be undertaken in respect to the tree without requiring approval.



Damaging trees

Damage

The *Tree Protection Act* prohibits the damaging of a protected tree (that is a registered tree or a regulated tree). The term 'damage' includes killing, destroying, felling, removing, ring barking, lopping, pollarding, poisoning, major pruning, anything else that causes the tree to die, reduces its expected life span or significantly and adversely affects the tree's health (s 12).

In addition, certain groundwork is prohibited (div 3.2). To be prohibited the groundwork must occur within the 'tree protection zone' for the tree or in a declared site. The tree protection zone is deemed to be under the canopy of the tree; within a 2m radius out from the canopy; within a 4m radius surrounding the trunk as measured at 1m above natural ground level; or the tree protection zone as defined in the a tree management plan for the tree (s 11). The prohibited activities include changing the soil level (except for the preparation of garden beds, the planting of trees and shrubs or other cultivation for horticultural purposes), contaminating the soil or cutting any roots with diameter of greater than 50 mm (s 14(a)).

For declared sites, prohibited groundwork includes changing the level of the soil except for the preparation of garden beds, the planting of trees and shrubs or other cultivation for horticultural purposes (s 14(b)).

The concept of acceptable (minor) pruning of trees differs between registered and regulated trees. For registered trees minor pruning must be conducted in accordance with the Australian Standard on Pruning, AS 4373 and is limited to:

- deadwood
- limbs with a diameter of 50 mm or less
- the first pruning of the tree in the calendar year, which affects less than 10 per cent of the canopy and does not change the overall shape of the canopy (s 13).

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

Exceptions to damage

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

- the prohibited activity has been granted approval by the conservator
- a registered tree is removed because its registration was cancelled for safety reasons
- the prohibited activity is in accordance with a tree management plan, a tree protection order or a condition of a development approval

- directions for the seizure, disinfection, and destruction, of plants were made under section 13 of the *Plant Diseases Act 2002*
- damaging activities to a regulated tree were done in compliance with the *Utilities Act 2000 (ACT)* ('*Utilities Act*') for example:
 - installation of and maintenance of network facilities (*Utilities Act* ss 105-6)
 - installation of and maintenance of territory network facilities (*Utilities Act* ss 231-2)
- there is a network protection notice given under section 249 of the *Utilities Act*
- there is a territory network protection notice given under section 32 of the *Utilities (Technical Regulation) Act 2014 (ACT)*
- there is a plant pruning direction under section 31 of the *Public Unleased Land Act 2013 (ACT)* ('*Public Unleased Land Act*')
- there is a plant removal direction under section 34 of the *Public Unleased Land Act*
- compliance with sections 231–2 of the *Utilities Act 2000* is required for the protection of life or property and it is not possible to obtain an urgent circumstances approval from the conservator (see below)
- the activity was performed honestly by a relevant person in the exercise or purported exercise of a function under the *Emergencies Act 2004 (ACT)* for the purposes of protecting life or property, or controlling, extinguishing or preventing the spread of fire.

Approval to damage

Subject to the exceptions outlined above, it is an offence to damage a protected tree (s 15). Similarly, it is an offence to undertake groundwork in the protection zone for a protected tree or in a declared site (div 3.2). As noted above, one of the circumstances in which a protected tree can be damaged or groundwork undertaken is with the conservator's approval. Division 3.3 of the *Tree Protection Act* establishes the process for approving an activity that causes damage to a protected tree.

Approval criteria

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

According to the criteria, the conservator may give approval to damage a regulated tree (which includes removal) if, after all reasonable steps to remedy the problem have proved ineffective, where the tree:

- is in decline and its life expectancy is short
- represents an unacceptable risk to public or private safety
- is causing or threatening to cause substantial damage to a substantial building, structure or service
- is an inappropriate tree for its location because of its potential size or growth habit— this does not apply to remnant eucalypts
- is substantially affecting solar access to the lessee's or a neighbour's lease between 9 am and 3 pm during winter and pruning would not fix the problem
- is causing an allergic reaction to someone who lives on the property and the claim is supported by a medical specialist's certificate or
- is part of a close planting and its removal would enable the other trees to develop fully (Sch 1 Item 1(1)).

The conservator may also approve the removal of a regulated tree if it is located on a block of less than 1200 m² and is determined to be a problematic tree species listed in Schedule 2 of the above Determination (Sch 1 Item 1(2)).

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

- is a remedial treatment
- is in the general interests of the health of the tree
- reduces an unacceptable risk to public or private safety
- reduces the risk of damage or prevents further damage to a substantial building, structure or service; or
- if the tree (excluding remnant eucalypts) is substantially affecting solar access to the lessee's or a neighbour's lease between 9 am and 3 pm during winter and minor pruning would not fix the problem (Sch 1 Item 1(5)).

Major pruning of registered trees may be approved if the work is required:

- to maintain the health and safety of the tree
- to maintain clearance from services; or
- as remedial treatment (Sch 1 Item 3(1)).

Approval for major pruning of a registered tree may only be given if the work is necessary and will not:

- substantially alter the tree's shape or form
- cause the tree to become unsafe; or
- result in the decline or death of the tree or necessitate its removal or destruction (Sch 1 Item 3(2)).

For both regulated and registered trees, approval for prohibited groundwork within a tree protection zone may be granted if the groundwork will have minimal impact on the tree should the conditions of the approval be followed (Sch 1 Item 4).

Within declared sites, prohibited groundwork may be approved if the conservator is satisfied that the prohibited groundwork and any other prohibited groundwork activity within the past 12 months will affect less than 10 per cent of the site.

The conservator may also grant approval for prohibited groundwork activity in a declared site if ACTPLA has advised that the groundwork is necessary to achieve the broader strategic planning objectives for the ACT (Sch 1 Item 5).

When deciding to approve damaging activities for a regulated tree, the conservator may consider:

- any exceptional circumstances raised by the applicant
- advice from the Tree Advisory Panel
- the importance of the tree in the surrounding landscape
- whether the tree has ecological importance to the local environment (Sch 1 item 3).

To be considered for this later condition, the tree must be listed as a local ecologically beneficial species, as per Schedule 3 of the *Tree Protection (Approval Criteria) Determination 2006 (No 2)* (ACT).

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

- the applicant
- the lessee or the land manager of the land where the tree is located
- ACTPLA (s 26(1)).

For other approval decisions written advice must be given to:

- the applicant
- the lessee or the land manager of the land where the tree is located or the activity is to be conducted
- the lessee of land adjoining the land on which the tree is located and which is within 50 m of the tree
- the heritage council, where the tree has heritage significance
- representative Aboriginal organisations where the tree is an Aboriginal heritage tree (s 26(2)).

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

Urgent circumstances

In addition to the various exceptions to prohibited activities, approval to damage a protected tree may be sought under urgent circumstances (s 29). This allows for an application for approval to be made in writing or orally where the activity is urgently required to protect the health or safety of people or animals, or public or private property. The conservator's approval may be in writing or given orally. In the latter case the conservator must make a written record as soon as practicable.

Urgent circumstances authorisations can be requested by contacting the conservator's office via Canberra Connect (see Contacts list at the back of this book).

Other protection mechanisms

Tree protection directions

The conservator has the power to issue directions in respect to a protected tree (s 76). A direction is given to the owner or occupier of the land on which the tree is located or to someone undertaking an activity that may affect a protected tree. The direction must be in writing and examples may include a requirement to:

- stop the damaging work
- erect a fence around the tree to protect it
- drain the area around the tree where it has become flooded
- prune the tree to correct damage to the tree.

Planning and land development applications

Under the *Planning and Development Act 2007* (ACT) ('*Planning Act*') the conservator is to receive a copy of any development application (DA) in the merit track or the impact track if the application relates to any part of a declared site (ss 148-9, as per the *Planning and Development Regulation 2008* (ACT) reg 26) (see Chapter 3 in this Handbook for more information on DAs and the assessment tracks). If the conservator believes that a development is likely to result in damage to a protected tree or affect a tree protection zone or declared site, the conservator can give ACTPLA written advice on the matter (*Tree Protection Act*, s 82). The advice must include advice about tree protection requirements for each protected tree with a protection zone on the land subject to development (*Tree Protection Act*, s 83). This advice needs to be considered by ACTPLA (or the minister) in making its decision on a DA (*Planning Act*, ss 120(e), 129(e)).

Approval inconsistent with the conservator's advice in relation to regulated trees can be issued only in certain circumstances as prescribed in the *Planning Act*. Approvals that are inconsistent with the conservator's advice about regulated trees may include situations where the approval is consistent with the objects of the territory plan and

realistic design solutions, alternatives or applicable guidelines have been considered (ss 119(2), 128 (3)).

Development approvals which are inconsistent with the conservator's advice in relation to a registered tree or a declared site cannot be issued (*Planning Act*, ss 119(3), 128(4)) unless expressly allowed under the Act. Such an express allowance is currently in place for any DA, through the merit or impact track, relating to light rail development.

Generally, development approval must not be given for a proposal in the merit track if the approval would be inconsistent with the advice of the conservator where the development concerns a registered tree or a declared site (s 119(3)). An exception to this rule applies if the development is related to a light rail development proposal, and if the proposal does not affect a protected matter. A 'protected matter' is defined under section 111A of the *Planning Act* as a matter protected by the Commonwealth or a protected matter as declared by the minister. The *Planning and Development (Protected Matters) Declarations 2015 (No. 1)* contains a Schedule of species declared as a protected matter for the purposes of the *Planning Act*. There are currently no species of trees listed in this Schedule.

If no protected matter is involved and the decision maker (usually ACTPLA) is satisfied that an entity's advice, including the conservators, will risk significant delay, increase the cost or be a significant impediment to the development, the entity's advice may be disregarded (s 119A). Section 119A(2) expressly excludes the above described protection for registered trees pursuant to section 119(3), thus allowing the conservator's advice relating to a registered tree to also be disregarded.

Likewise, generally development approval must not be given for a proposal in the impact track if approval would be inconsistent with the advice of the conservator where the development concerns a registered tree or a declared site (s 128 (4)). Similar to the merit track, the *Planning Act* provides for a light rail exception. Where the development proposal is related to light rail and does not involve a protected matter, the decision maker may grant approval regardless of any inconsistent entity advice, including the conservators, where it is satisfied that the entity's advice will risk significant delay, will increase the cost or be a significant impediment to the development to which the proposal relates (s 128A). Section 128A(2) excludes the requirement that a light rail proposal be consistent with the advice of the conservator in relation registered trees or declared sites. However, unlike its merit track equivalent, this section does not specifically exclude section 128(4) which otherwise provides specific protection for registered trees or declared sites. This part of the legislation creates an ambiguity as to the issuing of a DA where the proposal is in the impact track, relates to light rail and is inconsistent with the conservator's advice relating to a registered tree or declared site.

Restricted information

Certain information about a registered tree or a tree nominated for registration can be deemed to be restricted information. This is done under Part 8 of the *Tree Protection Act*. Whether information is restricted is determined by the conservator. A declaration of restricted information can only be made if either:

- public disclosure of the information is likely to have a substantial adverse effect on the values for which the tree is or may be registered; or
- the tree is an Aboriginal heritage tree.

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

If the conservator makes a declaration about restricted information, under sections 63-4, the conservator must try to give a copy of the declaration to:

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

The conservator may approve the publication of restricted information where satisfied it will not lead to a substantial effect on the tree's registration values. Requests for publication of restricted information must be in writing; state the information to be disclosed, the reason for disclosure and the nature of the publication (s 66).

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

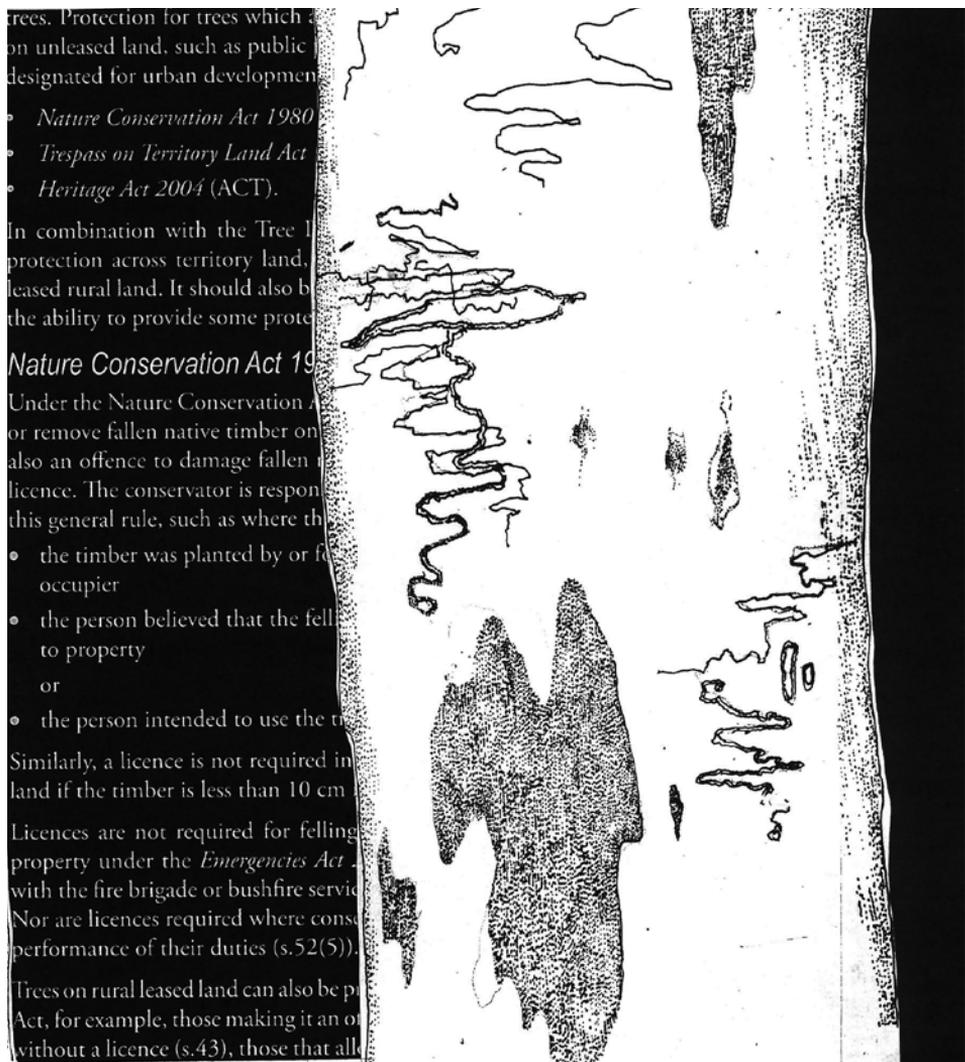
Review of decisions

The *Tree Protection Act* provides for the review of some of the conservator's decisions. Decisions may be internally reviewed (s 105) or reviewed by ACAT (s 107B) (see also Chapter 12 in this Handbook for further information about ACAT).

For internally reviewable decisions, an application must be made in writing within 14 days after the day the notice of the decision is given to the entity. The application must set out the grounds upon which reconsideration is sought (s 106). Upon receiving an application, the conservator must seek the advisory panel's advice on the application. The advisory panel must give their advice to the conservator within 30 days. After receiving the advisory panel's advice, the conservator must make a decision considering the advisory panel's advice (s 107).

Internally reviewable decisions, as listed in Schedule, 1 Part 1.1 of the Act, are decisions to:

- approve, or refuse to approve, activity (s 25)
- cancel approval of activity (s 28)
- approve, or refuse to approve, a tree management plan (s 35).



Reviewable decisions (by ACAT), as listed in Schedule 1, Part 1.2 of the Act, are decisions to:

- approve or refuse to approve registration of a provisionally registered tree (s 52)
- cancel or refuse to cancel registration of a tree (s 58)
- site declarations (s 61)
- approve, or refuse to approve, the publication of restricted information (s 66)
- tree protection directions (s 76)
- decisions that have been internally reviewed (s 107).

There is no provision in the *Tree Protection Act* for third party appeals to ACAT.

Trees not protected under the *Tree Protection Act*

Introduction

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

- *Nature Conservation Act 2014* (ACT)
- *Trespass on Territory Land Act 1932* (ACT)
- *Heritage Act 2004* (ACT)
- *Public Unleased Lands Act 2013* (ACT).

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

Nature Conservation Act 2014

References in this section relate to the *Nature Conservation Act 2014* (ACT) ('*Nature Conservation Act*').

The objects of the *Nature Conservation Act* are to protect, conserve and enhance the biodiversity of the ACT (s 6(1)) through supporting the management and maintenance of biodiversity (s 6(2)(b)) and promoting community involvement (ss 6(2)(c)-(g)).

Under the *Nature Conservation Act*, it is an offence to fell or damage standing native timber, damage or remove fallen native timber (with a diameter greater than 10 cm) on unleased land or leased rural land, without a licence (div 6.1.3). The conservator is responsible for issuing the licences. There are some exceptions to this general rule. For example, damage to native trees on leased rural land does not occur when:

- the tree was planted by an occupier of the land and damaged by an occupier of the land
- the tree was damaged by an occupier of the land with the intention of using it on the land (not for sale)
- the person has a reasonable excuse
- the person is authorised under a development approval under the *Planning Act* (s 145).

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

Licences are not required for felling trees to prevent or fight fires or to protect life and property where this is done by someone involved with the fire brigade or bushfire service, or by a police officer in the exercise of a function under the *Emergencies Act 2004* (ACT) (*Tree Protection Act 2005* (ACT), s 19(1)(f)). Where public servants are carrying out their duties, no licence is required for activities such as:

- taking native plants on unleased land (s 140(2)(a))
- taking a protected native plant (s 142(2)(a))
- taking a native plant with special protection status (s 143(2)(a))
- damaging native trees on unleased land (s 144(2)(a))
- damaging or taking fallen native timber (s 146(3)(a)).

Under the *Nature Conservation Act* it is an offence to clear native vegetation in a native vegetation area, being a reserve, where the clearing causes serious harm to the reserve (s 236(1)). Similarly, it is an offence to disturb a native animal nest or its environment without a licence (s 128).

The Act allows for the conservator to make specific directions for the protection or conservation of native trees on occupied land (s 331(1)). Under the Act the minister may declare an ecological community critically endangered, endangered, vulnerable or provisional (s 70), and a native species critically endangered, endangered, vulnerable, conservation dependant or provisional (ss 64(3)-(7)). The conservator is required to produce a draft action plan once an ecological community or native animal is declared critically endangered, endangered or vulnerable (ss 100-1, see also s 98). The draft action plan sets out proposals to ensure, as far as practicable, the identification, protection and survival of the community (s 100(a)(ii)) (see Chapter 5 in this Handbook for more detail on all these matters).

The *Nature Conservation Act* also creates an offence of clearing native vegetation in a reserved area, with higher penalties if the clearing causes harm to the area (Part 9.4 Division 8.2). Offences under Chapter 9 do not apply to a person if:

- conduct constituting an offence is a restricted activity and the person is complying with the directions and requirements of an activities declaration, management agreement or controlled native species management plan (s 252(2)(a))
- the person is authorised under a nature conservation licence, a strategic bushfire management plan under the *Emergencies Act 2004*, a development approval under the *Planning and Development Act 2007* or a public unleased land permit (s 252(2)(b))
- that person is a conservation officer exercising his/her duties under the *Nature Conservation Act* (s 252(2)(c)).

Under Part 14.2, conservation officers may enter premises for the purposes of inspection or examination, taking measurements or conducting tests or taking samples (s 341). Conservation officers may also seize things if an officer is satisfied on reasonable grounds that the thing is connected with an offence against the *Nature Conservation Act 2014* (s 342).

Trespass on Territory Land Act 1932

References in this section relate to the *Trespass on Territory Land Act 1932* ('*Trespass on Territory Land Act*').

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

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

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

Heritage Act 2004

References in this section relate to the *Heritage Act 2004* (ACT) ('*Heritage Act*').

Trees can be listed on the heritage register, created under the *Heritage Act*. Urban trees can be registered if that tree forms part of a place and the heritage council

decides to register the place (s 3B). Places can be registered if it is important to the ACT's cultural or natural history, including representing rare, uncommon or endangered aspects of the ACT's history (s 10). A place can also be listed for its natural heritage significance where it has scientific value for its biodiversity, landform or other naturally occurring elements (s 10A).

Part 10A specifies the heritage council and representative Aboriginal organisation's role in advising about tree protection notices about damaging tree activity or tree management plans. Listing on the heritage register opens a number of avenues of protection, such as offences for diminishing heritage significance of place or object (s 74; see Part 13 generally) (see Chapter 9 in this Handbook for more information on ACT heritage law).

Public Unleased Lands Act 2013

The *Public Unleased Lands Act* provides some protection to registered trees overhanging, causing obstruction, or otherwise endangering the safety of anyone using public unleased land (s 31). It states that if the tree is registered then a tree protection approval for the pruning or removal (issued pursuant to the *Tree Protection Act*) must be in force before the director-general may issue a plant pruning direction or a plant removal direction (issued pursuant to the *Public Unleased Lands Act*). A tree protection approval is not needed for the pruning or removal of regulated trees (see Chapter 7 in this Handbook for more information on the law relating to public land).

Trees on national land and designated areas

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

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

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

Listing on the Commonwealth Heritage List also provides some protection for listed trees (see Chapter 9 in this Handbook for more information on Commonwealth heritage law).

Neighbours' trees

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

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

These common law remedies can be difficult to pursue because of the cost of court proceedings. Therefore, negotiations between neighbours are often a better option. Mediation services which specialise in neighbourhood disputes can often assist if initial negotiations with your neighbour are unsuccessful, for example the [Conflict Resolution Service](#). It is also beneficial to get professional advice from a tree surgeon about the cause of the problem and the most effective way to remedy it. The neighbours could share the cost of such advice.

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