

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

Amendments to the Tree Protection Bill 2005

SUPPLEMENTARY EXPLANATORY STATEMENT

Circulated with the authority of
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Minister for the Environment

EXPLANATORY STATEMENT

Outline

The Tree Protection Bill 2005 (the Bill) was tabled in the Legislative Assembly on 17 March 2005. Since then, the need for some minor technical amendments has been identified to assist with the operation and improve the effectiveness of the legislation. The amendments address three issues that have arisen since its tabling that relate to:

1. The application of strict liability in the offence provisions;
2. The integration of tree protection with the Development Application process; and
3. Transitional arrangements and consequential amendments relating to the *Heritage Act 2004*.

Application of strict liability

It has been identified that the manner in which strict liability offences are applied in the Bill create the potential to impact upon the individual civil liberties of members of the public. The *Criminal Code 2002* provides for the use of strict liability provisions where a person can reasonably be expected, because of his or her professional involvement, to know the requirements of the law. As it stands, the Bill applies strict liability to anyone who damages a protected tree or undertakes prohibited groundwork within the tree protection zone of protected tree.

The amended clauses limit the application of strict liability to persons working in a business that deals with trees on a regular basis and may therefore be expected to be aware of the protection status of a tree and whether the activity is likely to cause it damage.

Tree protection in the Development Application process

The tabled version of the Bill contains consequential amendments to the *Land (Planning and Environment) Act 1991* (the Land Act) that enable the ACT Planning and Land Authority to make decisions regarding tree protection requirements in a DA. As it is drafted, this arrangement creates uncertainty where a Tree Management Plan approved by the Conservator exists prior to the Development Application. In this situation there would be two concurrent and possibly conflicting decisions relating to the same tree.

The amendments will remove this uncertainty and further improve the integration of tree protection concerns in the development assessment process. The amendments require that a Development Application that impacts on protected trees must include a Tree Management Plan that, subject to approval by the Planning Authority, will constitute a valid Tree Management Plan under the Bill.

Tree protection and the Heritage Act 2004

The Bill applies to trees within the ‘built-up area’, as defined by notifiable instrument, and does not provide protection for trees outside this area. The *Heritage Act*, on the other hand, applies to *all* Territory land. The transitional arrangements of the Tree Protection Bill (clause 116) automatically transfer *all* trees included on the Heritage Register to the Tree Register. The amendments ensure that trees outside the built-up area currently on the Heritage Register may remain so, and more may be included in the future.

Revenue/Cost Implications

These amendments will not result in any additional financial implications beyond those relating to the Tree Protection Bill 2005.

Formal Clauses

Amendment 1 (clause 15) substitutes the heading for clause 15 with ‘Damaging protected trees - general’ to distinguish the offence provisions contained in this section with the new clause (15A) pertaining to persons working as part of a business.

Amendment 2 (sub-clauses 15(4) to (6)) removes the sub-clause that provides the strict liability offence for damaging a protected tree for persons who are not working as part of a business.

Amendment 3 (new clause 15A) establishes the new offence provisions for damaging a protected tree that pertain to persons working as part of a business. Sub-clauses 15A(1) and (2) are fault based offences that apply in situations where the offender has acted in a reckless manner. Sub-clause 15A(3) is a fault based offence that applies to situations where the offender has acted negligently. Sub-clauses 15A(1), (2) and (3) apply strict liability to whether the tree is a protected tree. Sub-clause 15(4) is a strict liability offence. The level of penalty reflects the extent of mental element involved.

This amendment includes examples of the relevant work referred to in clause 15A(1)(b) as being businesses engaged in tree surgery, building, plumbing, landscaping, installing irrigation, concreting, earthwork or horticulture.

Amendment 4 (clause 16) substitutes the heading for clause 16 with ‘Doing prohibited groundwork -general’ to distinguish the offence provisions contained in this section with the new clause (16A) pertaining to persons working as part of a business.

Amendment 5 (sub-clause 16(4) and (5)) removes the sub-clause that provides the strict liability offence for doing prohibited groundwork for persons who are not working as part of a business.

Amendment 6 (new clause 16A) as per Amendment 3, establishes the new offence provisions at 16A for doing prohibited groundwork that pertains to persons working as part of a business.

Amendment 7 substitutes a new heading for clause 17 include new sub-clauses 15A and 16A.

Amendment 8 (sub-clause 17(1)) broadens the application of this sub-clause to include new clauses 15A and 16A.

Amendment 9 (new sub-clause 17(1)(c)(11a)) provides an exception from the offence provisions (clauses 15 to 16A) for activities done in accordance with a tree protection condition of an approved Development Application. This replaces the sub clause (17(1)(d) omitted through Amendments 10 and 11 below.

Amendment 10 (sub-clause 17(1)(d)) removes an exception from offence as referred to in Amendment 9.

Amendment 11 (sub-clause 17(2)) removes an exception from offence as referred to in Amendment 9.

Amendment 12 (sub-clause 17(3)) inserts a new definition of *development approval* to mean a development approval under the Land Act.

Amendment 13 (new example relating to clause 18(1)(c)) provides an example of a tree protection condition to include the tree protection requirements of a Tree Management Plan.

Amendment 14 (sub-clause 18(3)) removes the application of strict liability to the general offences under clause 18 and creates a new strict liability offence that applies only to persons who, due to their work, may be reasonably expected to know their obligations with regard to protected trees.

Amendment 15 (new sub-clause 24(2)(f)) places a requirement upon the Conservator to notify the Representative Aboriginal Organisations of a decision on an approval under clause 23 relating to an Aboriginal heritage tree.

Amendment 16 omits sub-clause 28(1) as it has been moved to clause 18 (see Amendment 16 above).

Amendment 17 (sub-clause 28(2)) limits the offence to the person to whom the development approval was given (see Amendment 16 above).

Amendment 18 replaces sub-clauses 34(2)(a) and (b) to ensure that the notification requirements include reference to the land management agency of the land where the relevant protected tree, or part of the tree protection zone of the relevant protected tree, is located.

Amendment 19 (new sub-clause 34(2)(d)) places a requirement upon the Conservator to notify the Representative Aboriginal Organisations of a decision on an approval of a Tree Management Plan under clause 33 relating to an Aboriginal heritage tree.

Amendment 20 replaces reference in sub-clause 47(1)(b) to *tree protection zone* with *protection zone* for sake of drafting consistency.

Amendment 21 (new sub-clause 48(3)) requires the Heritage Council to consult with the Representative Aboriginal Organisations when providing the Conservator with advice on the registration of a tree for its Aboriginal heritage significance.

Amendment 22 (new sub-clause 55(3)) requires the Heritage Council to consult with the Representative Aboriginal Organisations when providing the Conservator with advice on the cancellation of the registration of a tree for its Aboriginal heritage significance.

Amendment 23 (sub-clause 62(3)(e)) adds reference to the representative Aboriginal organisations to the list of persons to whom the Conservator must provide a copy of a declaration of restricted Aboriginal information.

Amendment 24 (sub-clause 62(4)) omits the definition of a *heritage registered tree* as it is being added to the dictionary section of the Bill (see Amendment 41 below).

Amendment 25 (sub-clause 65(3)) adds reference to the representative Aboriginal organisations to the list of interested persons who may seek restricted Aboriginal information from the Conservator.

Amendment 26 (sub-clause 79, note 1) amends the note describing the requirement for the ACT Planning and Land Authority (Planning Authority) to refer Development Applications that relate to protected trees to the Conservator. This reflects the amendments relating to Tree Management Plans subject to a Development Application (see Amendments 28 and 29 below).

Amendment 27 (sub-clause 79, note 4) clarifies the provision enabling the Planning Authority to make a decision inconsistent with the Conservator's advice.

Amendment 28 (sub-clause 80(2)) amends reference to the decision to refer to the development as this is the more appropriate term.

Amendment 29 (sub-clause 80(3)(a)) expands, for sake of clarity, the list of what the Conservator is required to consider, within the given timeframe, with regard to a Development Application referred by the Planning Authority.

Amendment 30 (clause 81) provides greater explanation what should be included in the advice provided by the Conservator to the Planning Authority with regard to a referred Development Application.

Amendment 31 (sub-clause 106(1)(a)(i) to (iii)) adds the offences in clauses 15 to 16A to the list of relevant offences to which criminal liability of executive officers apply in the light of Amendments 1 to 8 above.

Amendment 32 (sub-clause 115(2)) amends the list of legislation to be repealed in the transition phase to reflect the recent replacement of disallowable instruments relating the appointment of tree advisors under the *Tree Protection (Interim Scheme) Act 2001*.

Amendment 33 amends sub-clause 116(1) to limit the trees transferred from the Heritage Register to the Tree Register, to only those located within the built-up area.

Amendment 34 amends clause 117 to limit the application of Tree Management Precincts to districts within the built-up area.

Consequential Amendments

Amendment 35 (Schedule 1 amendment 1.3) enables the Heritage Council to only include individual trees on the Heritage Register that are located outside the built-up area.

Amendment 36 (Schedule 1 amendment 1.4) provides new definitions of protected trees in the *Land Act*.

Amendment 37 (Schedule 1 amendment 1.7) expands the proposed new section in the Land Act (section 229(4)(b)(i) and (ii)) to require the Planning Authority to refer to the Conservator any Development Applications that relate to protected trees as well as any Tree Management Plans (approved, proposed or amended). This reflects the amendments intended to further integrate tree protection considerations into the Development Application process via Tree Management Plans.

Amendment 38 (Schedule 1 amendment 1.14) provides a rewording of the consequential amendment in the Bill to place greater emphasis on the limitation upon the Planning Authority to make a decision inconsistent with advice from the Conservator with regard to Registered Trees. This amendment also enables the Planning Authority to approve Tree Management Plans considered as part of a Development Application.

Amendment 39 (Schedule 1 new amendment 1.15A) requires the Planning Authority to provide the Conservator with a notice of any decision regarding Development Applications that relate to protected trees.

Amendment 40 (Schedule 1 new amendments 1.19A) provides definitions in the Land Act for the terms *damage*, *declared site*, *prohibited groundwork*, *protected tree*, *protection zone*, *regulated tree* and *registered tree*.

Dictionary

Amendments 41, 42 and 43 provide new definitions for *Aboriginal heritage tree*, *representative Aboriginal organisation* and *Tree Management Plan*. The definition of a Tree Management Plan is expanded to include one approved by the Planning Authority as part of a Development Application.