

2022

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

URBAN FOREST BILL 2022

EXPLANATORY STATEMENT

and

HUMAN RIGHTS COMPATIBILITY STATEMENT

(Human Rights Act 2004, s37)

Presented by

Chris Steel MLA

Minister for Transport Canberra and City Services

URBAN FOREST BILL 2022

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

This explanatory statement relates to the Urban Forest Bill 2022 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not intended to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, as this is a task for the courts.

This explanatory statement provides information about why the Bill is proposed together with an explanation of the proposed legislative amendments.

The purpose of the Bill is to give effect to actions in the Urban Forest Strategy 2021-2045 (the Strategy) and provide a legislative framework for managing trees on private and public land in line with the objective of enhancing Canberra's tree canopy to reach a target of 30 per cent canopy coverage by 2045. This target was set out in the Strategy, ACT Climate Change Strategy 2019-2045 and the Living Infrastructure Plan. This Bill also seeks to strengthen and improve the management of the ACT's urban forest.

The Bill will replace the *Tree Protection Act 2005* (the TPA). The Bill will protect trees on private and public land in the ACT under a single piece of legislation, recognising the important role they play for the community and in combatting the impacts of climate change.

The Bill includes many elements from the TPA, including:

- the establishment of a register of significant trees with appropriate levels of protection,
- approval requirements for tree damaging activities,
- approval requirements for groundwork activities within the tree protection zone of a protected tree,
- approval requirements for tree management plans,
- ability to make directions with regard to tree protection matters, and
- provide offences and enforcement provisions.

The Bill will also introduce several new elements, including:

- an updated definition of protected trees including new size requirements for protected trees,
- the inclusion of trees on public land,
- the introduction of a canopy contribution framework, and

- tree bonds and an updated compliance framework

The updated definition of protected trees (*Urban Forest Bill*, section 9) will extend legal protections to an increased number of regulated trees (being trees which meet minimum size requirements on leased land) and to registered and remnant trees in future urban areas. This reform will provide greater legislative consistency in urban tree management, extend protections to the most valuable trees in future urban areas, and contribute to reducing the net loss of trees on leased land by enabling large trees to develop and encouraging tree retention.

The Bill will extend legislative protection to all public trees (*Urban Forest Bill*, section 9). These previously received limited protections under the *Public Unleased Land Act 2013*. This reform will provide greater legislative consistency in urban tree management and will provide appropriate protections and administrative processes for managing the protection of public trees.

The introduction of a Canopy Contribution Framework (*Urban Forest Bill*, sections 34-42) will ensure live trees approved for removal are replaced through establishing canopy contribution agreements with applicants as a condition of tree removal. Canopy contribution agreements will be established according to a hierarchy that requires replanting on site where possible, or equivalent financial contribution where replanting is not possible. Importantly, participation in the Canopy Contribution Framework will only apply once approval has been granted for the removal of a tree or trees under the strict criteria outlined in this Bill. The establishment of this framework provides a mechanism for incentivising retention or onsite replanting of trees approved for removal. It does not remove or reduce existing restrictions on tree removal. This reform will contribute to maintaining and increasing urban canopy cover through encouraging tree retention and replanting.

The introduction of Tree Bonds (*Urban Forest Bill*, sections 91-96) along with an appropriate compliance framework will strengthen compliance with tree protection measures. This reform will support existing tree protection plans and requirements, and promote clear understanding and equal application of tree protection requirements across industry and the community in the ACT.

CONSULTATION ON THE PROPOSED APPROACH

Key partners, stakeholders and the Canberra community have been engaged throughout the development of the Bill. The public release of an exposure draft of the full Bill allowed for the detailed provisions and operation of the various amendments to be informed by feedback from a wide range of stakeholders.

External stakeholders

A review of the Tree Protection Act commenced in 2019. To inform the review, Transport Canberra and City Services undertook an eight-week community engagement process from October to December 2019. The engagement process sought feedback from the community through an information paper and an online

and hard copy survey. A total of 272 YourSay submissions were received on the review from a wide cross-section of the community. These consultations were focused on a discussion paper proposing changes to the regulated tree criteria and strengthening tree protection on private land.

Submissions were received via email and in writing from 45 groups and individuals. The submissions were received from community councils and resident associations, local architecture and tree businesses, environment and conservation groups, research and education institutions, general community groups and interested individuals. Surveys were also completed by 227 respondents. Over 58 percent of survey respondents had an interest in trees or tree protection and 21 percent had interacted with the Tree Protection Act.

Key findings from the community engagement process were that people wanted:

- greater flexibility for lessees to manage trees on their property
- recognition of the value of a strong tree canopy
- holistic management of the urban forest
- improvements to the current tree damage application process
- changes to criteria for tree removal
- replanting and a no net loss offset scheme to increase the tree canopy.

The ACT Government subsequently developed an exposure draft of the Urban Forest Bill for public review and consultation in 2022. During this consultation period, 66 YourSay submissions were received on an exposure draft of the bill which had a broader focus than the proposed amendments to the Tree Protection Act. The submissions were received from a similar range of community councils and resident associations, local architecture and tree businesses, environment and conservation groups, general community groups and interested individuals.

Four industry briefings were held during the consultation period focused on arborists, landscape architects, the construction industry and the community sector. Approximately 50 representatives attended the briefings. Several targeted meetings were also held with utility providers, community councils and conservationists.

The views of the participants of the 2019 and 2022 consultation processes have contributed to the development of the objectives of the Bill, the Canopy Contribution Framework, the Tree Fund and Tree Bonds, as well as the criteria for what constitutes a regulated tree.

The Transport Canberra and City Services (TCCS) Directorate engaged with the Human Rights Commission in the development of the Bill to ensure that the provisions of the Bill are human rights compliant.

Aboriginal and Torres Strait Islander groups

Consultation offers were also extended to Aboriginal and Torres Strait Islander Groups through the Aboriginal and Torres Strait Islander Elected Body and the ACT's Registered Aboriginal Organisations. The Elected Body provided input regarding the proposed legislative changes to incorporate Aboriginal cultural trees on the ACT Tree Register.

ACT Heritage Council

TCCS also consulted the ACT Heritage Council. Discussions focused on the proposed legislative reform to the ACT Tree Register and the new proposed elements of tree protection including the canopy contribution framework.

ACT Government agencies

Extensive consultation on the Bill has occurred both internally within the Transport Canberra and City Services Directorate and across other areas of the ACT Government such as Policy and Cabinet within the Chief Minister, Treasury and Economic Development Directorate, Treasury, the Environment, Planning and Sustainable Development Directorate, Community Services Directorate and the Justice and Community Safety Directorate, including the Human Rights Unit and Criminal Law section within the Legislation Policy and Programs branch. Consultation has also been undertaken with the Planning Sub-Committee of Cabinet.

CONSISTENCY WITH HUMAN RIGHTS

During the development of the Bill due regard was given to its compatibility with human rights as set out in the Human Rights Act 2004 (the HR Act).

Rights engaged

The Bill engages the following sections of the Human Rights Act 2004:

- section 9 – Right to Life (promoted)
- section 27 – Cultural and Other Rights of Aboriginal and Torres Strait Islander Peoples and Other Minorities (promoted)
- section 21 – Right to a Fair Trial and Hearing (limited)
- section 12 – Right to Privacy and Reputation (limited)
- section 8 – Right to Recognition and Equality before the Law (limited)
- section 17 – Right Take Part in Public Life (limited)

Rights Promoted

Right to Life

The Bill promotes the right to life. It seeks to address the ACT Government's obligation to protect its citizens through maintaining and enhancing environmental conditions of Canberra society that impact on the right to life. The Government must take reasonable action to protect its citizens where it is aware of a real and immediate risk to life. In May 2019, the ACT Government declared a state of climate emergency and acknowledged the need for urgent action across all levels of government.

The Bill is one action to secure a liveable and healthy future for the Canberra community and ensure people have access to an urban forest to support their health and wellbeing. It supports the ACT Government's obligation to conserve urban forest resources, including its ecosystems and ecological processes, for the benefit of people in the ACT now and in the future. In doing so it ensures conservation is treated as an integral part of the planning and implementation of development activities. It also supports the Government to be able to assess proposed activities which may significantly affect the urban forest, establish adequate tree protection standards and monitor changes in - and publish - relevant data on the urban forest and canopy cover.

In promoting the right to life, the Bill supports the Government's Climate Change Strategy and Urban Forest Strategy.

Cultural and Other Rights of Aboriginal and Torres Strait Islander Peoples

The Bill promotes the cultural and other rights of Aboriginal and Torres Strait Islander peoples. It seeks to strengthen Aboriginal and Torres Strait Islander peoples' enjoyment of their culture and ability to engage in their distinct cultural practices relating to their use and enjoyment of land, natural resources and place. It seeks to do this by ensuring that activities engaged in as part of continuing cultural practices are not regarded as tree damaging activities. It also seeks to recognise and provide protection to cultural trees and ensure that where damage does occur, Aboriginal and Torres Strait Islander peoples' rights to legal action and remedies are not restricted by the operation of the Bill.

In particular, paragraph 14(2)(b) excludes contemporary cultural practices undertaken in relation to a protected tree from the definition of tree damaging activities. In addition, section 57 of the Bill requires that Aboriginal cultural trees must be provisionally registered and therefore protected. Section 59 of the Bill also imposes requirements to consult with Aboriginal representative organisations before decisions are made to register or not to register Aboriginal cultural trees. Section 67 imposes similar consultation requirements before decisions are made to cancel the registration of Aboriginal cultural trees.

The Bill seeks to further support the Cultural and Other Rights of Aboriginal and Torres Strait Islander Peoples through Division 4.6 which seeks to protect

information about the location or nature of an Aboriginal cultural tree, making it an offence to publish such information, except where that information is shared between Aboriginal people.

Rights Limited

Right to a Fair Trial and Presumption of Innocence

Nature of the right and the limitation

The Bill creates a regime of ‘prohibited activities’ in Division 3.2. These prohibited activities include causing ‘damage’ to a tree’ or doing ‘prohibited groundwork’ in a tree’s protection area. Engaging in these prohibited activities is an offence, and the maximum penalties are set relatively high, especially where there is intention. These offences may limit the right to a fair trial, or other rights in criminal proceedings. Key operational definitions such as ‘damage’ and ‘prohibited groundwork’ are cast broadly to capture a wide scope of conduct, and the definition of ‘regulated tree’ is specified in the Bill. The penalty levels reflects the need for adequate deterrence of the conduct. However, laws must contain safeguards against arbitrary application and without these may result in an unreasonable limitation on the right to a fair trial, or other rights in criminal proceedings. The relevant safeguards against arbitrary application of these offence provisions are discussed further below.

Further offences compel adherence to administrative tree protections, including:

- contravening a canopy contribution agreements (section 42),
- contravening a tree protection directions (section 46).

In addition, the strict liability offences in the Bill engage and limit the right to be presumed innocent, as there is no requirement for the defendant to prove a fault element, such as intention or recklessness and the prosecution need only show that the defendant did the prohibited act. These strict liability offences, and elements of offences are:

- the circumstance that the tree is a protected tree, for the offence of damaging protected trees under section 16(1)(2)(3) and (4),
- engaging in conduct that damages, or is likely to damage, a protected tree (section 16(5)),
- doing prohibited groundwork in (a) the protection zone for a protected tree; or (b) a declared site,
- contravening a condition of an application for approval of tree damaging activity (section 33),
- failure to comply with a tree reparation directions (section 49),
- contravening a tree management plans (section 90),
- contravening a tree protection condition of development approval (section 109).

Legitimate purpose

The objective sought to be achieved by the Bill is that all people protect protected trees, contribute towards having a resilient and sustainable urban forest, and maintain and enhance canopy cover. The means proposed to achieve this objective is to introduce offences to discourage prohibited behaviours that cause damage to trees and reduce the canopy coverage, and facilitate enforcement of that prohibition.

Rational connection between the limitation and the purpose

There is a rational connection between introducing an offence and penalty regime that prohibits certain conduct and the objective of the legislation. The offences facilitate enforcement of tree protection and prevent conduct that seriously damages protected trees. The offences also support tree canopy protection by penalising contraventions of plans/directions to protect these trees and/or compensate for their damage/removal.

Proportionality

Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

As discussed above, sections 16 and 17 capture a wide variety of conduct and set relatively high maximum penalties, however these are the least restrictive means possible of achieving the legitimate objective of the Bill. The offence of damaging a protected tree is targeted to prohibit conduct that would kill or cause serious harm to the tree, and has explicit carve outs for minor pruning and cultural heritage practice. Similarly, the definition of prohibited groundwork includes conduct that would harm protected trees.

The limitation on the right to a fair trial can also be considered the least restrictive means possible for protecting trees, because there is a regime that provides for exceptions to the offence provisions. Importantly these apply where conduct is approved under section 28 or 32, or done in accordance with a tree management plan, tree protection directions or a development approval. There are also several exceptions for necessary activities under pruning directions, installation and maintenance under the Utilities Act, or where there is an urgent need to protect life or property under the Emergencies Act.

Although the Bill sets relatively high maximum penalties for tree damaging activities, doing prohibited groundwork and contravening canopy contribution agreements, these are necessary to counteract the large financial incentives that are associated with tree damage, particularly where a person may be contemplating developing a property for financial gain. These penalties are maximum amounts only and there would be discretion for penalties to be set that were proportionate to the seriousness of the conduct engaged in.

The Bill also imposes strict liability in certain offences. These are also considered reasonable and proportionate for the following reasons.

Firstly, where the Act makes it a strict liability offence to contravene a condition of an application for approval of tree damaging activity (section 33), fail to comply with a tree reparation direction (section 49), contravene a tree management plan (section 90), or contravene a tree protection condition of development approval (section 109), certain people who deal regularly with the tree, are on notice of their obligations and is aware that the tree is protected, and of what conduct is prohibited or required in relation to the tree.

There are additional strict liability offences in sections 16(5) and 17(4) for engaging in conduct that damages, or is likely to damage, a protected tree and doing prohibited groundwork in the protection zone for a protected tree or a declared site. The maximum penalty for these offences has been set at 50 penalty units, which is in line with the Guide to Framing Offences.

An inherent safeguard against the limitation on the right to the presumption of innocence is the availability of the defence of mistake of fact. This would allow anyone charged with an offence under sections 16(5) and 17(4) to challenge the assertion that tree damage or prohibited groundwork had occurred. The defence of mistake of fact would also be a safeguard for third parties like tradespeople or visitors who may be lawfully on the property and inadvertently breach offence provisions because they are not aware, for example, that the tree is protected by virtue of it being planted under a Canopy Contribution Agreement.

An additional safeguard is that the offences against sections 46, 49, 90 and 109 do not apply if the person has a reasonable excuse.

The Bill is also scheduled to commence on 1 July 2023. During this time an extensive public education program will be undertaken to alert the community and businesses, such as arborists acting on behalf of people, about the new laws to ensure they are aware their obligations. Appropriate safeguards, such as regular mail-outs to third parties such as new property owners and residential tenants, will be implemented to ensure people likely to have the most regular dealings with protected trees are aware of their status so they do not inadvertently breach provisions of the Bill.

Right to Privacy and Reputation

Nature of the right and the limitation

The Bill limits the Right to Privacy and Reputation. The Bill will impact on private life by providing authorised officers under section 116 with powers of entry to premises but not a part of the premises used only for residential purposes. The authorised officer may inspect a tree registered under the Bill or area near the tree. They may conduct an examination under section 117 or give the lessee or occupier of the premises a tree protection direction under subdivision 3.4.1 which compels and prohibits certain behaviour to protect trees. Such a direction can also authorise persons to do or complete the activity stated in the direction. Under subdivision 3.4.2 an authorised officer may also issue a tree reparation direction which compels the

repair, removal or replacement of a protected tree which is damaged, and similarly authorises the Director-General to fulfil the tree reparation direction where necessary. These actions can be done with the occupier's consent or in accordance with a warrant, limited by the powers set out in the Bill.

The Bill also enables authorised officers to confiscate personal property under section 118 if the authorised officer is satisfied on reasonable grounds that the property is connected with an offence under the Bill in accordance with the powers set out in the Bill. It will enable authorised officers to direct a person to provide personal details under section 119 in circumstances where the officer believes a person to have committed, be committing or about to commit an offence against the Bill, or where they may be able to assist in the investigation of an offence against the Bill.

The Bill will amend laws relating to the urban forest, including those relating to trees on leased (private) land, in such a way as to impact on a person's ability to enjoy their home. It will require occupiers of the land on which regulated and registered trees are located to apply to the ACT government to have these trees removed. Where approval is given to remove the trees, it will require them to enter into a Canopy Contribution Agreement under subdivision 3.3.2 to replant a fixed number of equivalent trees on their property or pay a set amount for their replacement on public land. The Bill will also require occupiers of the land on which regulated trees are located to take reasonable steps to protect them, including entering into a tree bond arrangement under division 5.2 as appropriate.

Legitimate purpose

The objective to be achieved by the Bill is that all people protect regulated and registered trees on their properties and contribute towards having a resilient and sustainable urban forest with a tree canopy covering 30 percent of the Territory's existing and future urban area by 2045 and incorporate the values of trees and their protection into design and development decisions. This objective is particularly important given the current aging of Canberra's urban forest and canopy cover level which is currently around 21 percent. These objectives are pressing concerns during a period of declared climate emergency given the urban forest can assist in mitigating climate change challenges. A strong and resilient urban forest provides a range of climate mitigation benefits, such as protection from heat island effects and reduced damage from storm surges as trees can provide protection to buildings and infrastructure.

The means proposed to achieve this outcome is to provide authorised officers with powers to better protect trees. This includes by being able to enter premises to inspect a tree registered under the Bill or area near the tree, give the lessee or occupier of the premises a tree protection direction and to confiscate personal property if the authorised officer is satisfied on reasonable grounds that the property is connected with an offence under the Bill in accordance with the powers set out in the Bill.

The Bill will also introduce a Canopy Contribution and Tree Bond schemes, which contribute to the achievement of a resilient and sustainable urban forest. The Bill will do this by requiring people who are approved to remove a tree under specific criteria to make a contribution to the Canopy Contribution Fund. This contribution can take the form of onsite replanting or a monetary contribution where this is not possible. It will also require people who want to undertake development around a protected tree to enter into a Tree Bond to encourage the protection of the tree. The bond will be fully refunded after a defined period where the tree has not been damaged, or partially refunded or not refunded where damage has occurred.

Rational connection between the limitation and the purpose

The objective of tree protection is furthered by allowing authorised officers to investigate potential breaches of the legislation.

Canopy Contribution Agreements encourage people to offset the impact of their decisions where these decisions are likely to reduce the urban forest's overall resilience and sustainability and canopy cover. Trees Bonds encourage people to better protect existing protected trees so they do not reduce the resilience and sustainability of the urban forest and Canberra's canopy coverage.

Proportionality

The limitations on the right to privacy are considered proportionate to the legitimate purpose of tree protection and increasing canopy coverage for the following reasons.

While the Bill acknowledges the need to provide authorised officers with powers of entry to premises under Part 7 for the purposes of inspection or to issue tree protection directions, the Bill includes safeguards that they can only do so with the occupier's consent obtained in accordance with the provisions of the Bill or with a warrant. In the case of a warrant, it may only be issued through the courts and a judicial process, which has inherent safeguards. The power to grant a warrant depends on a magistrate being satisfied there are reasonable grounds for suspecting that there is a particular thing or activity connected with an offence under the legislation and that the this is, engaged in at the premises, or may be engaged in at the premises within the next 14 days. Furthermore, authorised officers must announce themselves before entering pursuant to a warrant, and details of the warrant and details about rights and obligations must be given to the occupier or someone representing them.

In instances where consent to enter is sought, there are further protections guiding how this consent must be sought. For example, the authorised person must produce an identity card and explain important details such as the purpose of entry, the resulting powers to seize evidence and that consent may be refused. Another protection is that consent, if given, must be recorded and can be challenged later in court. The authority to enter does not extend to a part of the premises that is used only for residential purposes and the actions the authorised officer can undertake when on a premises is limited to those actions set out in the Bill. Consent can also be withheld, meaning a warrant would need to be sought.

While the Bill also enables authorised officers to seize things, the Bill includes safeguards that limit the exercise of this power. These include that authorised officers only seize things that are consistent with the purpose of entry told to the occupier, when seeking their consent or authorised under the warrant. The power to seize items also requires the authorised officer to be satisfied on reasonable grounds that the ‘thing’ is connected with an offence. Furthermore the power to seize is confined to seizing things consistently with the purpose of the entry told to the occupier when seeking their consent. A receipt relating to things seized under the legislation must also be given. Section 128 provides for the return of seized things.

Furthermore, when authorised officers give directions under section 119 for a person to provide personal details, they are limited to the details and circumstances set out in the Bill.

Authorised officers are also required by section 129 to minimise, as far as is practicable, inconvenience, detriment and damage in the exercise of their functions. Written notice must be given of damage caused and a person may seek compensation under section 130 for loss or expense suffered because of the exercise of functions under Part 7.

Finally, the limitation on privacy is achieved using the least restrictive means possible, in part because these entry powers do not extend to a part of the premises that is used only for residential purposes.

Right to Recognition and Equality before the Law

Nature of the right and the limitation

The Bill may limit the right to recognition and equality before the law, because the imposition of financial settlements in Canopy Contribution agreements and Tree bonds apply irrespective of a person’s ability to pay, and this may disproportionately impact on people on low incomes who may not have capacity to pay

Legitimate purpose

The introduction of the Canopy Contribution and Tree Bond schemes seek to encourage all property owners with protected trees to contribute to the resilience and sustainability of the urban forest and Canberra’s canopy coverage. Canopy Contribution Agreements include the option of a financial settlement to offset the consequences of tree removal.

Trees bonds encourage people to better protect existing protected trees so as to not contribute to the reduction of the resilience and sustainability of the urban forest and Canberra’s canopy coverage.

Rational connection between the limitation and the purpose

Financial settlements in canopy contribution agreements should be an option to compensate for protected tree removal in all instances where replanting is not possible. Tree bonds need to operate as general regulatory measure that prevents tree damaging activities for all people who interact with protected trees. These

monetary pathways therefore need to apply uniformly in the Bill and are an effective and necessary means to achieving the aims of the Bill.

Proportionality

The potential limitation on the right to equality is safeguarded by concession exemptions to canopy contribution agreements will be applied based on social or financial hardship. Section 38 of the Bill provides an option to apply for a payment management plan to pay a financial settlement in instalments. If applications to access these options are refused, the decision to refuse and the amount of the financial settlement is internally and externally reviewable. These safeguards work to ensure that the financial settlements contemplated by the Act do not disproportionately impact vulnerable people and their right to equality and non-discrimination.

It will remain open to people to leave protected trees on their property, in which case there will be no need for a Canopy Contribution Agreement or the payment of a financial settlement. Where circumstances require the removal of a protected tree, such as where the tree may pose a risk to health, safety and property damage, eligibility criteria will apply. These ensure that tree removal may be approved where a tree meets these criteria, and all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective.

Right to Participate in Public Life

Nature of the right and the limitation

The Bill limits the right to participate in public life. Section 99 limits the selection requirements of people who may participate in the Tree Advisory Panel as its participation requires participants to have particular expertise to advise on technical matters raised in the Bill.

Legitimate purpose

The purpose of using participation requirements is to enable the decision maker to receive expert advice from the panel participants on matters raised in applications on which to make an informed decision. The means proposed to achieve this is to require that participants possess one or more of a broad range of relevant expertise and experience in arboriculture, forestry and/or horticulture.

Rational connection between the limitation and the purpose

The inclusion of a participation requirement based on expertise and experience seeks to ensure that the most appropriate decisions are made under the Bill.

Proportionality

The Bill enables applicants to submit documentation that draws on their own expertise and experience that does not have to be drawn from expertise and

experience in arboriculture, forestry and/or horticulture. Consequently, the Bill enables a broader range of information to be considered by the decision-makers.

Urban Forest Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Urban Forest Bill 2022**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

PART 1 PRELIMINARY

Clause 1 Name of Act

This clause states that the name of the Act is the *Urban Forest Act 2022* (the Act).

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on 1 July 2023.

Clause 3 Dictionary

This clause states that the dictionary at the end of the Bill is, once enacted, part of the Act.

Clause 4 Notes

This clause states that a note included in this Act is explanatory and does not form part of the Act.

Clause 5 Offences against Act – application of Criminal Code etc

This clause provides that the Criminal Code chapter 2 applies in relation to all offences against the Act. The *Legislation Act*, s133 applies in relation to the meaning of penalty units expressed in the Act.

Part 2 OBJECTS AND IMPORTANT CONCEPTS

Clause 6 Objects of Act

This clause sets out the objects of the Act.

The objects seek to recognise the role and value of trees in the urban environment and the importance of protecting trees in response to challenges associated with urban densification, loss of biodiversity and climate change. The objects acknowledge the benefits of protecting mature trees and engaging in sustainable tree management on public and leased land.

The objects of the Bill reflect the canopy target set out in the Urban Forest Strategy, the Climate Change Strategy and the Living Infrastructure Plan. These objects recognise the value of trees in the urban environment and their contribution to human health and wellbeing in a changing climate. These foster joint responsibility for the care of our urban forest.

Objects:

- (a) to support a resilient and sustainable urban forest that contributes to community wellbeing in a changing climate;
- (b) to protect and enhance the urban forest by recognising its value, including cultural and heritage value;
- (c) to contribute to biodiversity in urban areas;
- (d) to support a target of 30% tree canopy cover across the of the Territory's urban areas.

Clause 7 Meaning of *urban forest*

This clause defines the term *urban forest* for the Act.

Clause 8 Meaning of *built-up urban area*

This clause defines the term *built-up urban area* for the Act.

Clause 9 Meaning of *protected tree*

This clause defines the term *protected tree* for the Act to include registered trees, regulated trees and public trees within the built-up urban area, as well as registered and remnant trees in future or developing urban areas.

This ensures all trees that comprise the urban forest are protected under the one Act.

The inclusion of public trees (trees on unleased land) allows for these trees to be captured under the canopy contribution and bond framework and compliance measures and speaks to the connectivity between elements of the urban forest ecosystem.

The protection of registered and remnant trees located on land in a future urban area or an area that is the subject of an estate development plan aligns with the recognition of the loss of mature native trees (including hollow-bearing trees) and a lack of recruitment listed as a key threatening process under the Nature Conservation Act 2014 in 2018. This ensures ecologically valuable remnants and otherwise significant trees worthy of registration are afforded the highest level of protection and provides clarity to planners about trees that must be retained and designed around during the development of new urban areas.

Clause 10 Meaning of *registered tree*

This clause defines the term *registered tree* for the Bill. A registered tree includes a provisionally registered tree.

Clause 11 Meaning of *regulated tree*

This clause defines the term *regulated tree* for the Act.

Protected trees include private trees (trees on leased land) that meet the specified size requirements of a regulated tree. This is to ensure protection of the next generation of mature trees by providing medium sized trees the opportunity to grow into large trees, and better aligns with other jurisdictions across Australia. The circumference measuring point of 1.4m above natural ground level aligns with diameter at breast height which is the industry standard. This is to create greater consistency across industry.

Dead native trees with a circumference of 1.88m are protected to allow for the retention of significant habitat elements in our urban landscape. These trees have a high likelihood of containing significant habitat elements; their protection will align with the listing of the loss of mature native trees (including hollow-bearing trees) and a lack of recruitment as a key threatening process under the *Nature Conservation Act 2014* in 2018. This allows for the protection and opportunity to educate on the important role of dead trees to the urban forest.

Trees planted through the canopy contribution framework will be protected for 5 years following planting to ensure commitments to replant achieve the objects of the Act. This

protection duration is to allow these trees to become established, so they have a greater likelihood of successfully growing into mature trees that contribute to the canopy cover.

Clause 12 Meaning of *remnant tree*

This clause defines the term *remnant tree* for the Act.

Remnant trees include trees which were part of the original ecological community where the tree is located, and trees which have regenerated from these.

Remnant trees are native trees that are a remnant of, or have regenerated from, the original vegetation that existed on the land prior to the land being developed, where developed includes development of the urban area or development for rural land uses (such as land clearing).

This clause provides examples of species common to the original vegetation of the ACT.

Clause 13 Meaning of *protection zone* for protected tree

This clause defines the term *protection zone* for a protected tree for the Act.

Part 3 PROTECTION OF TREES

Clause 14 Meaning of *damage*

This clause defines the meaning of a *damage* for the Bill.

Damaging activities are defined in two categories to reflect the level of harm to a tree or its ecological value. Damage may be intentional, reckless or negligent.

Damage comprises actions which are inherently harmful to a tree or its ecological value. This includes actions which have a significant adverse effect on the contribution of the tree to its surrounding ecosystem – such as removing a hollow. It also includes any action which is likely to cause the tree to die, significantly reduces its life expectancy or significantly and adversely affects the tree's health, stability or general appearance.

Minor damage comprises actions which have the potential to significantly harm a tree.

Damage does not include any action undertaken in relation to a protected tree as an ongoing practice of Aboriginal cultural heritage, such as scarring or similarly modifying a tree.

Clause 15 Meaning of *prohibited groundwork*

This clause defines the meaning of *prohibited groundwork* for the Act.

Actions done in the protection zone of a protected tree constitute damage where the action is likely to cause the tree to die, significantly reduces its life expectancy or significantly and adversely affects the tree's health, stability or general appearance.

Clause 16 Damage protected trees

This clause establishes the offence of damaging protected trees and maximum penalty units that apply. This is to reflect the policy that people should take care to ensure that trees they

are working on or near are protected, or that they have the relevant approvals to do the work. The maximum penalty for the offence depends on the mental element the person had in relation to causing the damage. Intentional damage carries the most serious penalty followed by recklessness and negligence. Strict liability offence can be applied where appropriate; these carry the lowest penalty.

This offence does not apply to the ongoing practice of Aboriginal cultural heritage such as scarring or modifying a tree. This upholds Aboriginal cultural rights and recognises that these cultural activities are traditionally conducted in such a way as to not adversely impact trees.

Clause 17 Doing prohibited groundwork

This clause establishes the offence for doing prohibited groundwork within the tree protection zone of a tree/s and the maximum penalty units that apply. This is to reflect the impact on tree health and stability as a result of damage to tree roots. 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, followed by recklessness and negligence. Strict liability offence can be applied where appropriate; these carry the lowest.

Clause 18 Exceptions— tree damaging and prohibited groundwork offences

This clause provides for exceptions to clauses 16 and 17. This clause outlines when it is not an offence to undertake any of the prohibited activities on a protected tree.

Tree damaging and prohibited groundwork offences do not apply to activities done to a protected tree, other than a registered or a remnant tree, as part of civil infrastructure works on unleased territory land. Unapproved actions which constitute tree damage or prohibited groundwork in relation to registered and remnant trees on unleased territory land are offences regardless of any other circumstances surrounding the activity.

The intention of the exception for activities done to a regulated tree in accordance with the *Utilities Act 2000* is to ensure that essential services, such as electricity, water and sewerage, are able to be maintained in a safe and reliable condition without unnecessary administrative requirements.

The intention of the exception for activities undertaken by a relevant person under the *Emergencies Act 2004* is to ensure that essential works to protect life and property and respond to emergencies are able to be completed immediately as required.

The intention of the Minister authorising an agency is to allow work on public trees by the ACT Government agencies to allow sound tree management of the public urban forest and bushfire safety responses.

There are also exceptions when a direction or approval is issued under this Act, the *Plant Diseases Act 2002* or the *Public Unleased Land Act 2013*. These exceptions ensure that the specific works outlined in a direction or approval can be completed in a timely manner.

This clause notes that a tree with exemptions under this Act may still be protected under the *Heritage Act 2004* if the tree is a heritage tree.

Clause 19 Authorisation to carry out prohibited activities without approval

This clause permits the Minister to authorise administrative units to carry out activities that would otherwise be prohibited under the Act.

The intention of the clause is to allow for administrative units to maintain the health, safety, amenity, and renewal of the urban forest, including pruning and removal of trees on trees located on unleased land without unnecessary administrative requirements.

Clause 20 Criteria for approval of activities

This clause provides the Minister to determine criteria for approving tree damaging activities. The determination is to be a disallowable instrument.

Clause 21 Application for approval of tree damaging etc activity

This clause permits a person to apply to the decision-maker for authority to undertake a tree damaging activity for a tree on leased land. This clause only requires a person to apply for approval for an activity that is otherwise prohibited. If an activity is not prohibited, then approval is not needed.

This clause notes that a tree may be protected under the *Heritage Act 2004* if the tree is a heritage tree.

Clause 22 Approval application—more information

This clause permits the decision-maker to request further information that is required in order to reach a decision regarding approval of an application to undertake a tree damaging activity. The decision-maker may refuse to consider an application further if the applicant fails to comply with the request.

Clause 23 Approval application—assessment of tree

This clause requires an assessment of the tree be carried out to support a decision under clause 21.

Clause 24 Approval application—advisory panel advice

This clause enables the decision-maker to request advice from the advisory panel, if necessary, when making a decision on an application. The Tree Advisory Panel is established under Clause 97.

Clause 25 Approval application—referral to other entities

This clause requires the decision-maker to refer applications to other entities (as necessary) following an assessment of the tree/s. If the application relates to a tree that forms part of a place or object with heritage significance the application should be provided to the Heritage Council. If the application relates to a tree that is an Aboriginal cultural tree the application should be provided to each representative Aboriginal organisation and the Heritage Council.

Referral is not required where the tree damaging application in question does not relate to an Aboriginal cultural tree or a tree that forms part of a place or object with heritage significance.

Clause 26 Approval application—time for referral entity to give advice

This clause provides the timeframe given to other entities listed under clause 25 to provide advice on an application.

Clause 27 Approval application—effect of no response by referral entity

This clause makes provisions for when advice is not provided by an entity in accordance with clause 26.

Clause 28 Approval application—decision

This clause provides for the decision-maker to decide on an application to undertake a tree damaging activity and/or groundwork activities and provides for timeframes in which decisions are to be made and that conditions may be applied to approvals.

Clause 29 Approval application—notice of decision

This clause requires the decision-maker to notify specified interested persons and entities of the decision and their right to request reconsideration.

Clause 30 Operation of approval

This clause requires the decision-maker to notify of a decision within 14 working days and allow for the decision-maker to issue an extension of the period of approval. The approval remains in force for the period stated in the approval.

Clause 31 Cancellation of approval

This clause empowers the decision-maker to cancel an approval if satisfied that the activity no longer satisfies the criteria, providing interested persons are notified as per clause 31 (2) and 31 (3). Subject to an application for reconsideration, the cancellation takes effect on the date stated in the notice.

Clause 32 Approval in urgent circumstances or for minor works

This clause provides for the approval of tree damaging activities and prohibited groundwork in urgent circumstances or for minor works.

Circumstances are defined as urgent if the decision-maker is satisfied that the activity is:

- considered to be urgent; and
- the activity is necessary to protect the health or safety of people or animals, or public or private property (for example, the tree is actively failing)

In order to ensure that such a matter is addressed in an appropriately timely manner and at all hours, a delegate of the decision-maker may provide approval orally and without delay. If the application is made orally, the applicant must make a written application as soon as practicable after the oral application is made to ensure accurate records are kept.

Minor works approval allows for the decision-maker to grant permission for activities that may technically be prohibited yet are unlikely to have any significant impact on the health of the tree.

Clause 33 Offence—contravene condition of approval

This clause establishes the offence of not complying with conditions attached to an approval under clauses 28 or 32. This is to allow enforcement of conditions on an approval where a 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. An offence against this clause is a strict liability offence.

Clause 34 Definitions—sdiv 3.3.2

This clause defines key terms used in Subdivision 3.3.2.

Clause 35 Decision on approval application—canopy contribution agreements

This clause provides for the decision-maker to require a Canopy Contribution Agreement with the applicant following an approval decision under clause 21(1)(a) or an approval decision for the removal of a protected tree under the *Planning and Development Act 2007*.

Entrance into a Canopy Contribution Agreement is contingent on approval for the removal of a tree against the criteria referred to under clause 28. An agreement cannot be entered into without this approval being in place.

This clause sets out categories of activities for which applicants are automatically exempt from the requirement to enter a canopy contribution agreement.

Clause 36 Canopy contribution agreement—conditions

This clause allows the decision-maker to set conditions associated with a Canopy Contribution Agreement established under clause 35(2).

The Canopy Contribution Agreement must state that it is subject to either or both of the following conditions:

1. the applicant must give an undertaking to make a contribution (an ***on-site canopy contribution***) to the tree canopy on the land where the protected tree is located;
2. the applicant must make a monetary contribution (a ***financial settlement***) to the tree replacement fund in the amount stated in the agreement.

Under the Canopy Contribution Framework, the replanting of trees on block or nearby is the preference to ensure future canopy is concentrated in the area where removals occur. Where this is not possible, a financial contribution will be made into a Tree Fund which will be spent on the expansion and renewal of the urban forest. A regulation may prescribe the number of replacement trees required, the size of the replacement trees and/or the amount to be paid when trees cannot be planted on the site.

Clause 37 Canopy contribution agreements—amendment

This clause allows the decision-maker to consider an amendment of an agreement no later than 15 working days after the agreement was entered into. The decision-maker must decide whether to amend the conditions within 15 working days after the day the decision-maker receives the application.

The agreement must remain consistent with any regulation which prescribes the number of replacement trees required, the size of the replacement trees and/or the amount to be paid when trees cannot be planted on the site. The amendment may alter the proportion of contributions which will be completed through an on-site canopy contribution, and the proportion which will be completed through a financial settlement. The intention of this is to provide flexibility for the unique circumstances of applicants whilst ensuring agreements include a total sum of undertakings equal to the identified canopy contribution required.

Clause 38 Canopy contribution agreements—payment management plans

This clause allows the decision-maker to decide if a person entering into a canopy contribution agreement can enter a payment management plan through financial settlements by instalments.

Clause 39 Canopy contribution agreements—exemption

This clause sets out the factors the decision-maker must consider when deciding whether to exempt an applicant from this requirement, where no automatic exemption applies.

Clause 40 Canopy contribution agreements—use of financial settlement amounts

This clause sets out what an amount paid under a financial settlement can be used for. These categories for spending will support the expansion and renewal of the urban forest.

Clause 41 Canopy contribution agreements—annual reporting

This clause sets out the reporting requirements relating to the *Urban Forest Bill* by the director-general under the *Annual Reports (Government Agencies) Act 2004* for a financial year.

Clause 42 Offence—contravene canopy contribution agreement

This clause establishes the offence of engaging in conduct that contravenes, or is likely to contravene, a Canopy Contribution Agreement. The maximum penalty for this offence is 100 penalty units.

Clause 43 Criteria for tree protection directions

This clause permits the Conservator to determine criteria for giving tree protection directions. A determination is a notifiable instrument.

Clause 44 Tree protection directions

This clause provides for the decision-maker to give directions regarding the protection of trees and outlines to whom those directions can be given. A direction must state the period for which it is in force.

Clause 45 Tree protection directions—service

This clause provides for a written tree protection direction to be issued to the lessee or occupier of the land or anyone carrying out an activity that may affect a protected tree by leaving it, secured conspicuously, at the location where the activity is occurring.

Clause 46 Offence—fail to comply with tree protection direction

This clause states that it is an offence to intentionally, recklessly or negligently fail to comply with a tree protection direction. The maximum penalty for this offence is 50 penalty units.

Clause 47 Contravention of tree protection direction—action by authorised person

This clause sets out what an authorised officer may do in response to a situation where a tree protection direction has been contravened. This includes:

- entering the land to fulfil the direction;
- recovering any costs associated with fulfilling the direction; and
- notification of the proposed action to the lessee or any other person the Conservator considers an interested person.

Clause 48 Tree reparation directions

This clause sets out the circumstances under which a tree reparation direction can be issued and what the reparation would require. It states that the direction must be in writing and what information a reparation direction must contain.

Clause 49 Offence—fail to comply with tree reparation direction

This clause states that it is an offence to fail to comply with a tree reparation direction. This applies where compliance was reasonably practicable so as to not impact persons who were not reasonably able to comply. The maximum penalty for this offence is 50 penalty units.

An offence under this clause is a strict liability offence.

Clause 50 Repair of damage etc by Territory

This clause states that in cases where the person issued with a direction fails to comply with it, the Territory may undertake the repair of damage and recover the reasonable cost of doing so.

Part 4 REGISTRATION OF TREES

Clause 51 Definitions—pt 4

This clause defines key terms used in Part 4.

Clause 52 Criteria for registration and cancellation of registration

This clause empowers the Minister to determine criteria for the registration or cancellation of registration of a tree. A determination is a disallowable instrument.

Clause 53 Tree register

This clause establishes the Tree Register and the information and records that must be included in the Register for registered trees, provisionally registered trees and declared sites.

This clause ensures that any information that is determined to be restricted information is not included in the register.

This clause clarifies that in this section a registered tree does not include a provisionally registered tree as there are procedural differences between registered and provisionally registered trees.

Clause 54 Nomination for registration

This clause provides the requirements for a tree to be nominated to the register and in what form the nomination must be received. This clause allows the Conservator to refuse a nomination if satisfied that it is frivolous or vexatious.

Clause 55 Provisional registration—decision

This clause requires the Conservator to make a decision on whether to provisionally register a tree within six months of receiving a nomination for a tree. The six-month period may be extended where the Conservator has requested more information. The Conservator can only provisionally register a tree if they are satisfied the tree meets the registration criteria as determined under clause 52.

Clause 56 Provisional registration—notice of decision

This clause requires the Conservator to notify specified interested persons and entities of a decision regarding provisional registration and proposed inclusion on the register. The Conservator must also give public notice of a decision.

Clause 57 Provisional registration

This clause sets out the required information to be recorded for a provisionally registered tree. This clause also sets out the requirement for the Conservator to notify representative Aboriginal organisations of the provisional registration or Aboriginal cultural trees.

Clause 58 Provisional registration—period

This clause defines the period for provisional registration and criteria for ending provisional registration.

Clause 59 Consultation on proposed registration

This clause provides for the Conservator to consider advice from the Tree Advisory Panel and/or Heritage Council (if the tree is proposed to be registered on the basis of heritage significance) and/or representative Aboriginal organisations and submissions received from the community.

The Conservator may seek advice from any other person who is reasonably able to provide relevant advice, information or document/s.

This clause provides for the Conservator to extend a tree's provisional registration by a stated written period to allow reasonable time for an entity to provide advice, views, information or documents.

Clause 60 Registration—decision

This clause empowers the Conservator to make a decision regarding the registration of a tree. The conservator may only register the tree if the tree satisfies the registration criteria set out in the regulation under Clause 52(1)(a).

This clause provides for the Conservator to extend the period of provisional registration where further information is required from the nominator.

Clause 61 Registration—notice of decision

This clause requires the Conservator to notify specified interested persons of the decision regarding the registration of a tree and their right to request reconsideration.

Clause 62 Registration

This clause provides for the registration of a tree and the information that the Conservator is required to enter on the tree register.

Clause 63 Proposal for cancellation of registration

This clause provides the requirements for a proposal to cancel the registration of a tree.

Clause 64 Notice of proposed cancellation of registration

This clause requires the Conservator to provide written notice of the proposed cancellation of the registration of a tree to specified interested persons and entities. The clause also invites comments from the interested persons or the community regarding the proposed registration by way of a public notice.

Clause 65 Consultation on proposed cancellation of registration

This clause requires the Conservator to seek advice from the advisory panel in relation to the proposed cancellation and any proposed site declaration. Where the Tree Register indicates that the tree has heritage significance the conservator is to seek advice from the Heritage Council. If the tree is an Aboriginal cultural tree, the Conservator must seek advice from each representative Aboriginal organisation and the Heritage Council.

Clause 66 Cancellation of registration etc—decision

This clause requires the Conservator to decide on the cancellation of the registration of a tree within six months after the day the Conservator publishes the notice of proposed cancellation of registration under clause 64. The Conservator must consider any advice given by the advisory panel or heritage council, any public comments received within the notice period and, for an Aboriginal cultural tree, any advice from representative Aboriginal organisations.

Clause 67 Cancellation of registration—notice of decision

This clause requires the Conservator to notify specified interested persons of the decision to cancel the registration of a tree as per clause 66.

Clause 68 Cancellation of registration

This clause requires the Conservator, upon deciding to cancel the registration of a tree, to remove the entry pertaining to that tree from the register. The Conservator must retain the listing on the register if the site is made a Declared Site under clause 69 if the registration of the tree has been cancelled this Declared Site listing must include a statement to this effect.

Clause 69 Site declarations

This clause allows the Conservator to make an area a Declared Site if a Registered Tree is damaged due to unauthorised human activity that is not subject to exemption under section 18. Such a declaration would prevent development or other activity that, if the tree had remained, would be prohibited within the site for at least five years, unless a longer period is stated in the declaration. Site declaration is intended to remove the incentive to poison, or otherwise kill, a registered tree in order to realise a development objective.

This clause requires the Conservator to notify specified interested persons of the decision to declare a site. A site declaration is a notifiable instrument.

The decision to declare a site may be appealed to the Administrative Appeals Tribunal. As mentioned in schedule 1, part 1.2, column 4 a site declaration is a reviewable decision which the lessee of the land to which the declaration relates can appeal. The lessee of land to which the declaration relates may apply to the ACT Civil and Administrative Tribunal for a review.

Clause 70 Cancellation of registration of dead tree

This clause permits the Conservator to cancel the registration of a tree if satisfied, on reasonable grounds, that the tree has died of natural causes, without the need to satisfy Division 4.4.

Clause 71 Cancellation of registration of dead tree—notice

This clause requires the Conservator to provide written notice of the decision to cancel the registration of a tree to specified interested persons. The Conservator must also give public notice of a decision.

Clause 72 Cancellation of registration of dead tree – tree register

This clause requires the Conservator, upon deciding to cancel the registration of a tree under clause 70, to remove the entry about the tree from the tree register.

Clause 73 Application—div 4.6

This clause defines that the meaning of an Aboriginal cultural tree for the purposes of Division 4.6.

Clause 74 Restricted information—Aboriginal cultural trees

This clause sets out the circumstances in which information regarding an Aboriginal cultural tree is restricted and who shall receive a copy of the declaration to restrict information.

Clause 75 Offence—publish restricted information without approval

This clause establishes the offence of publishing restricted information without approval. The maximum penalty for this offence is 50 penalty units

Clause 76 Approval to publish restricted information

This clause permits a person to apply, in writing, to the Conservator for approval to publish restricted information about an Aboriginal cultural tree. The Conservator may give approval for the publication of restricted information providing there is no substantial adverse effect on the values for which the tree is or may be registered resulting from the publication. The Conservator is required to request advice from the Heritage Council and to consult and consider the views of each representative Aboriginal organisation about the information prior to approving its publication.

Clause 77 Limited access to restricted information—land for sale

This clause provides for certain circumstances where specified interested persons may have access to restricted information.

Part 5 MANAGEMENT OF TREES

Clause 78 Tree management plans—proposal or application

This clause allows the Conservator to propose or accept a tree management plan for a protected tree on leased land or a registered tree on unleased land. In deciding on a tree management plan, the Conservator may set conditions for the protection of a protected tree/s.

Clause 79 Tree management plans—more information for application

This clause allows the Conservator to request further information for an application in deciding on a tree management plan.

Clause 80 Tree management plans—assessment of tree

This clause requires an assessment of a tree to be carried out to support a decision under clause 85.

Clause 81 Tree management plans—advisory panel advice on proposal or application

This clause allows the Conservator to request advice from the Tree Advisory Panel when deciding on a proposal or application for a tree management plan.

Clause 82 Tree management plans—referral of proposal or application to other entities

This clause requires the conservator to refer applications for a tree management plan to other entities (as necessary) following an assessment of the tree/s. If the application relates to a tree that forms part of a place or object with heritage significance, this entity is the Heritage Council. If the application relates to a tree that is an Aboriginal heritage tree, these entities are each Aboriginal organisation and the Heritage Council.

Referral is not required where the proposed tree management plan in question does not relate to an Aboriginal cultural tree or a tree that forms part of a place or object with heritage significance.

Clause 83 Tree management plans—time for referral entity to give advice

This clause provides the timeframe given to other entities listed under clause 82 to provide advice on an application for a tree management plan.

Clause 84 Tree management plans—effect of no response by referral entity

This clause makes provisions for when advice on a tree management plan is not provided by an entity in accordance with clause 83.

Clause 85 Tree management plans—decision

This clause allows the Conservator to decide on an application for a tree management plan and provides the basis and timeframes by which decisions are to be made.

Clause 86 Tree management plans—notice of decision

This clause requires the Conservator to notify specified interested persons of the decision. Where an application relates to a tree that forms part of a place or object with heritage significance, this includes, but is not limited to, the Heritage Council. Where an application relates to a tree that is an Aboriginal heritage tree, this includes, but is not limited to, each Aboriginal organisation and the Heritage Council.

Clause 87 Tree management plans—operation

This clause allows for a tree management plan to take effect on the date the Conservator approved the tree management plan.

Clause 88 Tree management plans—guidelines

This clause allows the Conservator to set guidelines for a tree management plan in a regulation. A guideline under this clause is a notifiable instrument.

Clause 89 Tree management plans – doing groundwork in protection zone

This clause requires a utility service to provide a tree management plan before undertaking groundwork within the tree protection zone of a protected tree.

Clause 90 Offence—contravening tree management plans

This clause outlines the offence for a person who does something that contravenes or is likely to contravene an approved tree management plan. An offence against this section is a strict liability offence. This offence does not apply where the person had a reasonable excuse for contravening the tree management plan.

Clause 91 Definitions – div 5.2

This clause defines the terms *Tree Bond Agreement* and *public unleased land permit* for this division.

Clause 92 Tree bonds and tree bond agreements

This clause provides the circumstances under which a Tree Bond Agreement is required, and the documents required to establish an agreement.

Clause 93 Tree bond agreements—form and period

This clause makes provisions for the establishment of a Tree Bond Agreement.

Clause 94 Tree bond agreements—guidelines

This clause allows for the Minister to approve guidelines in relation to Tree Bond Agreements. Guidelines will be in a notifiable instrument.

Clause 95 Tree bonds—release

This clause provides the circumstances under which a bond will be released.

Clause 96 Tree bonds—refusal to release

This clause defines the circumstances under which the Conservator can refuse to release a bond and what allows for the Conservator to ask the person to do something to restore the tree or refuse to refund the amount of the tree bond to the person.

Clause 97 Advisory panel - establishment

This clause establishes the Tree Advisory Panel.

Clause 98 Advisory panel – appointment of members

This clause requires the Minister to appoint members of the advisory panel and establishes the duration of appointment.

Clause 99 Advisory panel—membership

This clause provides for the appointment of members to the 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; or horticulture. At

least one member must have extensive experience in arboriculture or forestry to ensure the panel has sufficient knowledge of issues relating to tree safety and growth habits.

Clause 100 Advisory panel—functions

This clause establishes the functions of the Tree Advisory Panel. This clause sets out specific circumstances for which the panel may provide advice and provides for the provision of advice on any matters pertaining to tree protection matters.

Clause 101 Advisory panel—ending appointment

This clause empowers the Minister to end the appointment of a member of the panel in accordance with provision of this section.

Clause 102 Advisory panel—disclosure of members interests

This clause requires members of the panel to disclose any 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 103 Advisory panel—procedures

This clause provides for the making of regulations regarding the procedures for decision making by the panel and provides specific examples. These examples are not exhaustive and do not limit the meaning and provision of the related clause.

Clause 104 Advisory panel—delegation

This clause empowers the panel to delegate certain functions to individual members of the panel in accordance with provisions of any requirement prescribed by regulation and the disclosure provision in Clause 102. 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.

PART 6 DEVELOPMENT APPLICATIONS – CONSERVATOR’S ADVICE

Clause 105 Meaning of development—Pt 6

This clause defines *development* for this part.

Clause 106 Simplified outline—pt 6

This clause provides a simplified explanation of this part and the *Planning and Development Act 2007* to assist interpretation.

Clause 107 Land subject to development—conservator may give advice about tree protection

This clause indicates that the Conservator can provide written advice to the planning and land authority in relation to a development that involves, or is likely to involve, an activity that would or may damage a protected tree, or is prohibited groundwork in the protection zone of a protected tree or a declared site.

Clause 108 Conservator’s advice about tree protection

This clause sets out the information that must be included in the advice from the Conservator to the planning and land authority under section 108 of the Act or under section 149 of the *Planning and Development Act 2007*. This clause includes a list of additional information the Conservator may also provide as part of the advice provided to the planning and land authority.

The provision of this advice to the planning and land authority is to support capacity to make decisions regarding tree protection matters relating to protected trees that are subject to proposed Development Applications. This capacity is limited to approving a Development Application contrary the Conservator’s advice only when, considering broader planning objectives of the Territory Plan, all reasonable design options have been considered to avoid the need to undertake the proposed prohibited activity.

Clause 109 Offence—contravene tree protection condition of development approval

This clause establishes the offence of contravening a tree protection condition. This offence does not apply where the person had a reasonable excuse for contravening the tree protection condition.

This clause also establishes the offence of the person responsible for the development failing to reasonably notify site workers of tree protection conditions.

The maximum penalty for these offences is 50 penalty units. An offence against this section is a strict liability offence.

PART 7 ENFORCEMENT

Clause 110 Definitions—pt 7

This clause defines *connected*, *occupier*, *offence* and *warrant* for this part.

Clause 111 Appointment of authorised people

This clause provides that a public servant may be appointed as an authorised person for the Act.

Clause 112 Identity cards

This clause provides for the identification of authorised persons, by way of an identity card. This clause lists the requirements of the information this card must contain to ensure accurate identification and validity.

The clause establishes an offence of failing to return the identity card within seven days after the person stops being an authorised person. This offence does not apply if the authorised person’s identity card is lost, stolen or destroyed by someone else. The maximum penalty for this offence is 1 penalty unit. An offence against this section is a strict liability offence.

Clause 113 Authorised person must show identity card on exercising power of entry

This clause provides that if an authorised person exercises a power that affects an individual, the authorised person must first show an identity card to that individual.

Clause 114 Power to enter premises

This clause establishes that an authorised person may enter premises and the conditions under which this may occur.

An authorised person may enter premises without consent in order to effectively inspect a registered tree or tree proposed for registration, or to issue a tree protection direction in a timely manner.

An authorised person may enter public places, premises with the occupier's consent or with a search warrant, or adjacent land to seek the occupier's consent in order to effectively conduct their duties. Entry is to be without payment of an entry fee or other charge. An authorised person may not enter parts of the premises that are being used only for residential purposes.

Clause 115 Production of identity card

This clause provides that an authorised person, and any other person accompanying the authorised person who is not a police officer, may not remain at the premises entered if the authorised person does not produce their identity card when asked by the occupier.

Clause 116 Consent to entry

This clause provides that when seeking consent to enter the premises, an authorised person must produce their identity card and inform the occupier of the purpose of the entry; that anything found and seized under this part may be used in evidence in court; and that consent may be refused.

The authorised person must ask the occupier to sign a written acknowledgement of their informed consent to enter and must provide a copy to the occupier as soon as practicable. This ensures informed consent. If consent is questioned a court must find that the occupier did not consent to entry under this part.

Clause 117 General powers on entry to premises

This clause outlines the actions that an authorised person who enters a premises can do in relation to the premises or anything at the premises.

This clause establishes an offence for failing to take reasonable steps to comply with a requirement to provide reasonable help to facilitate one or more of these actions. The maximum penalty for this offence is 20 penalty units.

Clause 118 Power to seize things

This clause outlines the conditions under which an authorised person may seize anything at the premises if satisfied on reasonable grounds that is connected with an offence against this Bill or if seizure has been authorised under a warrant.

An authorised person may remove the seized thing from the premises or restrict access to it to prevent the concealment, misplacement or destruction of the thing, or the use of the thing to continue or repeat the offence.

The clause establishes an offence for unapproved interference with a seized thing to which access has been restricted. The maximum penalty for this offence is 20 penalty units. An offence against this subsection is a strict liability offence.

Clause 119 Direction to give personal details

This clause establishes the personal details that a person may be directed to provide if the authorised person has a reasonable belief that a person has committed, is committing or is about to commit an offence against the Act, or may be able to assist in the investigation of an offence against this Act.

This clause outlines the manner and information that must be provided upon issuing a direction to ensure that the recipient understands the direction and its legal effect.

The authorised person may direct the person to immediately provide evidential proof where the validity of the personal details provided is in reasonable doubt. While clause 120 establishes an offence for non-compliance, a person may remedy this by providing evidential proof within three days. Where this occurs, the non-compliance offence would not be applied.

Clause 120 Offence – fail to comply with direction to personal details

This clause establishes an offence for failure to comply with a direction to give personal details under clause 119.

The maximum penalty for this offence is 5 penalty units. An offence against this subsection is a strict liability offence.

Clause 121 Warrants generally

This clause provides that an authorised person may apply to a magistrate for a warrant to enter premises.

This outlines the application requirements, the conditions under which a magistrate may issue a warrant and that a decision may not be made until all the required information is provided.

The clause establishes that the warrant must contain details of powers of entry, the relevant offence, the things that may be seized, the hours of permitted entry and the date of expiry to ensure full legality and clarity of understanding.

Clause 122 Warrants—announcement before entry

This clause establishes that before anyone enters the premises under a search warrant, an authorised person must announce their authorised entry, give anyone at the premises an opportunity to allow entry, and identify themselves.

This clause provides that the authorised person does not need to comply with these provisions if they believe on reasonable grounds that immediate entry is required to ensure the safety of anyone, or the effective execution of the warrant.

Clause 123 Details of search warrant to be given to occupier etc

This clause provides that the authorised person must make a copy of the warrant and a document outlining the rights and obligations of the person available to the occupier or their representative if they are present at the premises while a search warrant is being executed.

Clause 124 Occupier entitled to be present during search etc

This clause provides the conditions under which the occupier of the premises or their representative is entitled to observe a warranted search of their premises if they are present. The person is not entitled to observe the search if to do so would impede the search or interfere with its objectives.

This entitlement does not prevent two or more areas of the premises being searched at the same time.

Clause 125 Receipt for things seized

This clause provides that once something is seized by an authorised person, as soon as reasonably practicable, that person must issue a receipt for it to the person from whom it was seized, or if it is not practicable to do this, leave a receipt secured conspicuously at the place of seizure.

This receipt must outline the contents seized, the grounds for seizure, the location of storage and details of the authorised officer to provide a clear and accurate record.

Clause 126 Moving things to another place for examination or processing under warrant

This clause outlines the conditions and timeframes under which a thing found at premises entered under a search warrant may be moved to another place for examination or processing.

Relocation for examination or processing is permitted with the occupier's written consent or on reasonable grounds where it is significantly more practicable to do so due to timeframes, cost and the availability of expert assistance.

The authorised person must, if practicable, tell the occupier the location and time when the examination or processing will be carried out to allow the occupier or the occupier's representative to be present during the examination or processing.

Clause 127 Access to things seized

This clause provides that a person who would, apart from the seizure, be entitled to inspect a seized thing, may access it to inspect, photograph, take extracts or make copies of it.

Clause 128 Return of things seized

This clause outlines the conditions and timeframes under which a seized thing must be returned to its owner or reasonable compensation must be paid by the Territory to the owner for the loss of the thing.

Anything seized that is forfeited to the Territory is not required to be returned or compensated for and may be sold, destroyed or disposed of as the Director-General directs.

Clause 129 Damage etc to be minimised

This clause provides that an authorised person must take all reasonable steps to ensure that they, and any person assisting the authorised person, causes as little inconvenience, detriment and damage as it practicable.

This clause outlines the necessity and accepted means of issuing notification to the believed owner of any damage caused by an authorised person or their assistant in the exercise or the purported exercise of a function under this part of the Act.

Clause 130 Compensation for exercise of enforcement powers

This clause permits a person to claim compensation from the Territory if the person suffers loss or expense because of the exercise, or purported exercise, of a function under this part by an authorised person, or a person assisting an authorised person.

This outlines the process for compensation claims to be made and assessed by a court to ensure compensation is justified and reasonable.

The clause further provides that a regulation may prescribe matters that may, must, or must not be taken into account by the court in considering whether it is just to make the order.

PART 8 NOTIFICATION AND REVIEW OF DECISIONS

Clause 131 Definitions—pt 8

This clause defines *internally reviewable decision*, *internal review notice* and *reviewable decision* for this part.

Clause 132 Internal review notices

This clause provides that if a decision-maker makes an internally reviewable decision, the decision-maker must give a reviewable decision notice to each entity mentioned in schedule 1, part 1.1, column 4 in relation to the decision.

Clause 133 Applications for internal review

This clause provides for entities listed in schedule 1, part 1.1, column 4 to apply for reconsideration of a decision and the timeframe for making an application and formalities required.

Clause 134 Internal review

This clause empowers the decision-maker to reconsider a decision and sets out the process for making such a reconsideration including requesting advice from the Advisory Panel. The Conservator is the decision-maker in relation to a protected tree that is a registered or regulated tree, or a remnant tree outside of the built-up urban area tree. The director-general of the directorate responsible for the management of urban trees is the decision-maker in relation to a protected tree that is a public tree.

Clause 135 Reviewable decision notices

This clause provides that if a decision-maker makes a reviewable decision, the decision-maker must give a reviewable decision notice to each entity mentioned in schedule 1, part 1.2, column 4 in relation to the decision.

Clause 136 Applications for review

This clause provides that a person mentioned in schedule 1, part 1.2, column 4 in relation to a reviewable decision and any other person whose interests are affected by the reviewable decision, may apply to the ACT Civil and Administrative Tribunal for a review.

PART 9 MISCELLANEOUS

Clause 137 Power to apply or disapply Act to entities or activities

This clause provides that the Minister may declare that the Bill or certain provisions of the Bill, apply or do not apply to a stated entity or a stated activity. A declaration under this clause is a disallowable instrument.

Clause 138 Power to extend or suspend time periods in extraordinary circumstances

This clause indicates the Minister can declare the Bill applies to a stated entity or a stated activity as defined in a disallowable instrument. This clause provides for the impact of extraordinary circumstances on the effective administration of the legislation, for example natural disasters such as bushfires or a pandemic.

Clause 139 Codes of practice—protected tree disputes

This clause allows for the Minister to make a code of practice outlining how to deal with neighbourhood disputes about trees whose tree protection zone crosses lease boundaries. A code of practice is a disallowable instrument.

Clause 140 Criminal liability of executive officers

This clause provides that an executive officer of a corporation commits an offence where the corporation contravenes Clauses 16, 17, 33, 42, 46, 49, 109 of the Bill and, to broadly summarise, the officer could be said to be responsible for the breach. Sub-clause 140 (3) sets out the factors that a Court must have regard to in deciding whether the executive officer took or failed to take reasonable steps to prevent the corporation breaching the Act. It also provides a definition of an executive officer and relevant officer.

Clause 141 Delegation of decision-maker's functions

This clause provides for the delegation of the functions of the decision-maker in relation to a protected tree under the Bill to:

- a public employee;
- an authorised person; or
- a person prescribed under regulations.

This clause provides that the decision-maker may not delegate certain functions under the Act. Functions that cannot be delegated include the registration of a tree under section 60, the cancellation of registration under section 66 and reconsideration of a decision under section 134.

Clause 142 Incorporation of documents

This clause provides that statutory instruments under this Bill may apply, adopt or incorporate an instrument as in force from time to time.

Clause 143 Determination of fees

This clause provides that the Minister may determine fees for the Bill and that a determination is a disallowable instrument.

Clause 144 Regulation-making power

This clause provides that the Executive to make regulations for this Act, including to create offences and fix penalties of no more than 10 penalty units.

Clause 145 Review of Act

This clause provides that the operation of the Act is reviewed two years after the date of commencement.

PART 10 REPEALS

Clause 146 Legislation repealed

This clause lists the legislation that is repealed by this Act. The clause notes that all legislation instruments made under the *Tree Protection Act 2005* are also repealed.

PART 20 TRANSITIONAL

The repeal or amendment of a law does not affect the previous operation of the law or anything done, begun or suffered under the law. It also does not affect an existing right, privilege or liability acquired, accrued or incurred under the law. An investigation, proceeding or remedy in relation to an existing right, privilege or liability under a repealed law may be started, exercised, continued or completed, and the right, privilege or liability may be enforced and any penalty imposed, as if the repeal had not happened (see Legislation Act, s 84).

Clause 300 Definitions—pt 20

This clause defines *commencement day* and *repealed Act* for the purposes of this part.

Clause 301 Applications for approval made before commencement day

This clause provides that an application for approval of tree damaging activity which is submitted and has not received a decision prior to the commencement day of this Act is to be assessed under the repealed Act. Such an application will be assessed according to the *Tree Protection Act 2005* and its instruments. Any approval issued will be an approval under the *Tree Protection Act 2005*.

Clause 302 Approvals in force before commencement

This clause provides that any approval received before the commencement day under the *Tree Protection Act 2005* will continue in force until such time as it would have ended under the repealed Act. This clause also outlines the timeframe and processes under which an approval under the repealed Act can be extended.

Clause 303 Approvals in force with uncommenced extension

This clause provides for an extension of an approval which has been granted under the *Tree Protection Act 2005* prior to the commencement day to continue in force under the repealed Act until such time as it would have ended under the repealed Act.

Clause 304 Applications for tree management plans made before commencement day

This clause provides that an application or an approval of a tree management plan submitted or issued under the *Tree Protection Act 2005* prior to commencement day will be taken to be an application or approval under this new Act from commencement day onwards.

Clause 305 Nominations for tree registration before commencement day

This clause provides that a Tree Register nomination submitted under the *Tree Protection Act 2005* which has not been decided prior to commencement day will be taken to be a tree register nomination under this new Act from commencement day onwards.

Clause 306 Provisional registration of trees before commencement day

This clause provides that any tree that is provisionally registered under the *Tree Protection Act 2005* immediately before commencement day is to be taken to be provisionally registered under this new Act from commencement day onwards.

Clause 307 Registration of trees before commencement day

This clause provides that any tree registered under the *Tree Protection Act 2005* before commencement day is to be taken to be registered under this new Act. Any tree registered under the repealed Act will be taken to be registered under the new Act from commencement day onwards.

Clause 308 Proposal to cancel tree registration made before commencement day

This clause provides that any proposed to cancel tree registration made under the *Tree Protection Act 2005* before commencement day which has not received a decision is to be taken to be a proposal under this new Act from commencement day onwards.

Clause 309 Aboriginal cultural trees under repealed Act

This clause provides that any tree that is provisionally or fully registered as an Aboriginal cultural tree under the *Tree Protection Act 2005* before commencement day is to be taken to be provisionally or fully registered respectively as an Aboriginal cultural tree under this new Act from commencement day onwards.

Clause 310 Site declaration made before commencement day

This clause provides that any site declaration made under the *Tree Protection Act 2005* that is in force before or on the commencement day is to be taken to be a declaration under this new Act from commencement day onwards.

Clause 311 Declarations under repealed Act, s 64

This clause provides that any declaration made under the *Tree Protection Act 2005* that is in force before or on the commencement day is to be taken to be a declaration under this new Act from commencement day onwards.

Clause 312 Approvals under repealed Act, s 66

This clause provides that any approval of the publication of restricted information made under the *Tree Protection Act 2005* that is in force before or on the commencement day is to be taken to be an approval to disclose restriction information under this new Act from commencement day onwards.

Clause 313 Tree protection directions in force before commencement

This clause provides that any tree protection direction made under the *Tree Protection Act 2005* that is in force before the commencement day is to be continued under the repealed Act despite its repeal. This direction will continue in force until such time as it would have ended under the repealed Act.

Clause 314 Authorised people

This clause provides that the appointment of authorised people under the *Tree Protection Act 2005* before the commencement day is to be taken to be an appointment of authorised people under this new Act from commencement day onwards.

Clause 315 Instruments under repealed Act

This clause provides for the treatment of specific determinations and appointments made under the *Tree Protection Act 2005* that were in force immediately before the commencement day. This outlines which determinations under the repealed Act are to be

taken to be determinations, guidelines and appointments under this new Act from commencement day onwards.

Clause 316 Transitional regulations

This clause allows for regulations to be made for transitional matters that are necessary because of the enactment of this Act.

The section contains two different regulation-making powers.

Section 361 (1) enables the making of a regulation to deal with any transitional matters that arise as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the Act, be strictly ancillary to the operation of the Act and not widen the Act's purpose.

Section 361 (2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify part 11 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Section 361 (3) gives a regulation under s361 (2) full effect according to its terms. A provision of part 11 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section is not expressed, and does not intend, to authorise the making of a regulation limiting *future* enactments of the Legislative Assembly. Also, any modification by regulation of part 11 of the Act has no ongoing effect under the expiry of that part.

Clause 317 Expiry—pt 20

This clause provides that Part 20 expires 2 years after the day it commences.

SCHEDULE 1 REVIEWABLE DECISIONS

Reviewable decisions relate to Part 8 notification and review decisions.

Part 1.1 Internally reviewable decisions

This schedule provides a list of internally reviewable decisions. Internally reviewable decisions outlined in the schedule relate to:

- the approval or cancelation of approval of activities
- Canopy Contribution Agreement conditions (including on-site canopy contributions and/or financial settlements, amendments and exemptions)
- payment plan applications
- tree management plans
- bond agreements (time period, amount & forfeit of bond amount in full or part)

Column 4 of this schedule provides the entity who can apply for the review of each item listed in Column 2.

Part 1.2 Reviewable decisions

This schedule provides a list of reviewable decisions.

Reviewable decisions outlined in the schedule relate to:

- Tree protection directions
- Tree registration – including provisional registration
- Site declarations
- Publication of restricted information
- Confirming, varying or setting aside a first decision on a reconsideration application for the approval or cancelation of approval of activities, for a tree management plan, for Canopy Contribution Agreement conditions or for payment plan applications.

Column 4 of this schedule provides the entity who can apply for the review of each item listed in Column 2.

DICTIONARY

The dictionary defines terms used in the Act.