

2009

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

**GOVERNMENT RESPONSE TO THE
STANDING COMMITTEE ON CLIMATE CHANGE, ENVIRONMENT AND
WATER
REPORT NO 1**

REPORT ON ANNUAL AND FINANCIAL REPORTS 2007-2008

**Presented by
Mr Jon Stanhope MLA
Chief Minister**

Government Response

Standing Committee on Climate Change, Environment and Water Report No 1 – Report on Annual and Financial Reports 2007-2008

Introduction

The Annual Reports of All ACT Government agencies are referred to the Standing Committees of the ACT Legislative Assembly for examination and report.

The Standing Committee on Climate Change, Environment and Water reviewed annual reports for:

- Office of the Commissioner for Sustainability and the Environment
- Department of Territory and Municipal Services (including some reporting areas now within the Department of the Environment, Climate Change, Energy and Water)

The Committee made eighteen recommendations.

Response to Committee Recommendations

Recommendation 1

2.6 The Committee recommends that a network of ACT Government officials with responsibility for implementing sustainability initiatives in ACT Government agencies be convened, if one does not yet exist.

Government Response

Agreed.

A number of networks exist. The Chief Minister's Department chairs a Chief Executive's Sustainability Coordination Group. In addition there is an interdepartmental committee on climate change with all agencies represented and a Property Sustainability Working Group.

Recommendation 2

2.7 The Committee recommends that permission be sought from the Commonwealth's Government Agency Environmental Network (GAEN) for an ACT Government official to attend GAEN meetings as an observer.

Government Response

Agreed.

DECCEW will liaise with the Government Agency Environmental Network regarding the benefits to the ACT and potential involvement.

Recommendation 3

2.8 The Committee recommends that the ACT Government consider hosting an initial meeting of a national network of state and territory representatives with responsibility for the sustainability of agency operations, with a view to establishing a virtual state and territory network on an ongoing basis.

Government Response

Noted.

The Government Property Group under the auspices of the Australian Procurement and Construction Council and Australian Procurement and Construction Ministerial Council provides a forum for consideration of sustainability of Government buildings. Also the Australian Procurement and Construction Council considers national approaches to sustainable government procurement.

Recommendation 4

2.25 The Committee recommends that the ACT Government consider whether the Energy Efficiency Fund currently supports the installation of video-conferencing facilities in selected ACT Government agencies as a greenhouse gas emission reduction measure, and if not, whether the program should be broadened to permit such use.

Government Response

Agreed.

The Energy Efficiency Fund is under review and the incorporation of video conferencing facilities will be considered as part of the review.

An application for the installation of videoconferencing facilities has not been made to the Energy Efficiency Fund.

Any applications will be considered within the existing resources of the Energy Efficiency Fund.

Recommendation 5

3.9 The Committee recommends that the Environment Protection Authority monitor air quality in residential areas close to 'burn out' events at the Summernats Car Festival and make that information publicly available.

Government Response

Agreed.

The EPA will engage a consultant to undertake air quality monitoring in residential areas close to 'burn out' events at the Summernats Car Festival and make that information publicly available.

The implementation of this recommendation will be done within existing EPA resources.

Recommendation 6

4.17 The Committee recommends that staff in the Office of the ACT Commissioner for Sustainability and the Environment, and the ACT Planning and Land Authority, undertake training in the operation of the Human Rights Act 2004 (ACT) and in particular, the potential role of the Act in relation to environmental issues, including tree management.

Government Response

Agreed.

The Office of the Commissioner for Sustainability and the Environment (OCSE) is progressing this recommendation with staff undertaking training in Harassment and Bullying, *Human Rights Act 2004*, *Discrimination Act 1991*, and Discrimination in Employment in July and August 2009. Staff are now more aware of the rights and obligations under the legislation and also aware of options available to the OCSE in terms of complaints resolution.

ACTPLA will contact the Human Rights Office to discuss areas where the *Human Rights Act* has implications for the Authority in the exercise of its statutory responsibilities.

Recommendation 7

4.34 The Committee recommends that legal advice provided to the Department in 2008 concerning the operation of the Tree Protection Act be provided to the Committee.

Government Response

Agreed.

Legal advice is attached.

Recommendation 8

4.39 The Committee recommends that the Auditor-General review the Department of Territory and Municipal Service's administration of the Tree Protection Act 2005 (ACT).

Government Response

Noted.

The Auditor-General has advised that this matter will be considered when developing the 2009-10 performance audit program.

Recommendation 9

4.40 The Committee recommends that in future annual and financial reports, the Department of Territory and Municipal Services provide accurate analyses of its performance, including variances and performance shortfalls.

Government Response

Agreed.

Recommendation 10

4.41 The Committee recommends that the Minister for Territory and Municipal Services develop a communications strategy for the Tree Protection Act 2005 (ACT) so that the statutory objectives of the scheme can be better met.

Government Response

Agreed.

A communication strategy will be developed.

Recommendation 11

4.42 The Committee recommends that future declarations and maps showing built up urban areas and tree management precincts under the Tree Protection Act include sufficient information to enable householders to identify the status of their suburb.

Government Response

Noted.

This recommendation refers to the maps defining built-up urban areas. The maps are available on the ACT Legislation Register. It is relatively simple to interpret which areas of the ACT are covered by the *Tree Protection Act 2005*. It is also widely known that, generally speaking, all suburbs of Canberra are contained within a "built-up" urban area.

Recommendation 12

4.49 The Committee is of the view that the use of public transport, and ACTION bus services in particular, should be encouraged, consistent with the Sustainable Transport Plan for the ACT.

Government Response

Agreed.

The initiatives that ACTION has put in place to encourage the use of public transport are significant including the addition of new accessible CNG and Euro 5 diesel buses to improve efficiency and passenger comfort, an enhanced network to improve passenger demand, the introduction of a new ticketing system to improve passenger ticketing options and data, encouragement to passengers to use public transport such as free travel for ACT Seniors and for bike and ride travellers, and improved CCTV at interchanges and in buses for enhanced passenger safety.

Recommendation 13

4.53 The Committee recommends that in future annual reports, the Office of the ACT Commissioner for Sustainability and the Environment comply with the Chief Minister's Annual Report Directions concerning the reporting of Legislative Assembly committee inquiries and reports.

Government Response**Noted.**

The Office of the ACT Commissioner for Sustainability and the Environment (OCSE) would appreciate further information on the particular Legislative Assembly committee inquiries and reports referred to.

Recommendation 14

4.58 The Committee recommends that if the role and functions of the Office of the ACT Commissioner for Sustainability and the Environment are expanded, that adequate resources are provided to enable the Office to perform its functions.

Government Response**Noted.**

The role of the Office of the Commissioner for Sustainability and the Environment is under review. Recommendations will be made to Government on the revised role and any resourcing requirements.

Recommendation 15

4.63 The Committee recommends that if the Minister for the Environment, Water and Climate Change cannot table the Government's response to the ACT Commissioner for Sustainability and the Environment's State of the Environment Report in the March 24-26 sitting, he explain to the Assembly during that sitting why the response has been delayed.

Government Response**Noted.**

The response has been tabled, with the tabling statement addressing the delays.

Recommendation 16

4.69 The Committee is of the view that it would be beneficial, in relation to further consideration of the proposed nomination of the ACT as a UNESCO Biosphere Reserve, for the Office of the Commissioner for Sustainability and the Environment to

hold a stakeholder forum on 5 June 2009 (World Environment Day), to further discuss with a wide range of stakeholders the proposed nomination of the ACT as a UNESCO Biosphere Reserve.

Government Response

Not agreed.

Given time constraints it was not possible for a stakeholder forum to take place on World Environment Day 2009.

Recommendation 17

4.73 The Committee recommends that the Minister for the Environment, Climate Change and Water table in the Legislative Assembly during the May sitting period, the ACT Government's response to the report of the former Standing Committee on Planning and Environment in relation to the proposed nomination of the ACT as a UNESCO Biosphere Reserve (Report 30, Sixth Assembly).

Government Response

Not agreed.

The Minister for Environment, Climate Change and Water tabled the Government Response to the Planning and Environment Standing Committee's (Sixth Assembly) report *The Proposed Nomination of the ACT as a UNESCO Biosphere Reserve* in the Legislative Assembly on 27 August 2009.

Recommendation 18

4.74 The Committee recommends that the Minister for the Environment, Water and Climate Change table in the Legislative Assembly an ACT Government response to the report entitled Third International Biosphere Conference and Field Trips Report (Spain, Canada, USA), at the same time as it tables its response to the report of the former Standing Committee on Planning and Environment on the proposed nomination of the ACT as a UNESCO Biosphere Reserve (Report 30, Sixth Assembly).

Government Response

Not agreed.

The Government has taken the *Third International Biosphere Conference and Field Trips Report (Spain, Canada, USA)* into account in developing its response to the former Standing Committee on Planning and Environment's report on the proposed nomination of the ACT as a UNESCO Biosphere Reserve. This Government Response is publicly available.

Your Reference

Our Reference

07-2-6148972

Contact

Rebekah Knox

612 6205 3769

rebekah.knox@act.gov.au



**AUSTRALIAN
CAPITAL
TERRITORY
GOVERNMENT
SOLICITOR**

Level 5
12 Moore Street
CANBERRA CITY
PO Box 260
CIVIC SQUARE
ACT 2608
DX 5602 CANBERRA
Tel: 612 6207 0666
Fax: 612 6207 0650
www.act.gov.au

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By email: richard.allen@act.gov.au

Mr Richard Allen

Manager

Tree Protection Unit

Environment Protection & Heritage

Territory and Municipal Services

GPO Box 158

CANBERRA CITY ACT 2601

Dear Mr Allen

**Retrospective application of Notifiable Instrument re Tree Management
Precincts on reconsideration decisions**

Thankyou for your request for advice received by this office on 15 August 2008. My advice is as follows:

A. Background

1. You seek advice about the Conservator's ability to make decisions with respect to a number of applications for reconsideration that have been made pursuant to section 105 of the *Tree Protection Act 2005* ("TPA").
2. In particular, I understand that the applications to which you refer relate to decisions made for the refusal of various activities sought to be carried out in areas that now form part of various "tree management precincts" as declared by way of Notifiable Instrument ("NI"), namely the *Tree Protection (Tree Management Precincts) Determination 2008 (No 1)* which came into force on 6 August 2008.
3. Your concern arises from the fact that these applications for reconsideration were actually made prior to the NI coming into effect on 5 August 2008 but after the date of cessation of the relevant transitional provisions in respect of "interim tree management precincts" set out in Part 15 the former TPA (29 March 2008). In other words, it appears that there were no "tree management

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precincts” in place during the period between 29 March 2008 and 5 August 2008.

4. Accordingly, you have sought advice as to whether or not the Conservator has the power to make decisions in respect of the applications for reconsideration that were made during that period.

B. Applicable Law

1. The legislation that relates to your query is as follows:

- (1) the *Tree Protection Act 2005* (“TPA”);
- (2) the *Nature Conservation Act 1980* (“NCA”); and
- (3) The *Legislation Act 2001*.

2. In addition, the relevant NI is the *Tree Protection (Tree Management Precincts) Determination 2008 (No 1)* which, as noted above, came into effect on 6 August 2008.

3. Section 7 of the TPA provides that the Act applies to “*trees on land in built up urban areas.*”

4. Section 10(1) of the TPA Act provides, in relevant part, that:

“A regulated tree is a living tree (other than a registered tree or a palm tree) that is on leased land within a tree management precinct.”

5. Section 10(3) provides that a “tree management precinct” is an area declared under part 5 to be a tree management precinct.

6. Section 38 of Part 5 of the current TPA provides that the Minister may “*determine criteria for declaring an area of land in a built up area to be a tree management precinct*” and that the Minister may “*declare a stated area to be a tree management precinct.*”

7. Section 39(2) of the TPA provides that:

“The Minister may declare an area of land in a built-up urban area to be a tree management precinct only if satisfied that the area satisfies the criteria determined under section 38”

8. A declaration under Part 5 of the TPA is a Notifiable Instrument.

9. 119 of the former TPA provided that:

“the built up urban area in each district under the Districts Act 2002 is taken to be a tree management precinct on the commencement day.”

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10. The commencement day for the former Act was 29 March 2006. Section 123 of that Act specifically provided that Part 15 (“Transitional”) was to expire two years from that date (29 March 2008).
11. Chapter 8 of the Legislation Act deals with the commencement of Acts and statutory instruments. Section 73(4) of the Act deals with the commencement of statutory instruments and provides that such instruments ordinarily commence to operate on the day after they are made.
12. Section 73 of the Legislation Act is subject to Section 76 which provides that a statutory instrument may provide that a *non-prejudicial* provision of the instrument commences retrospectively.
13. “Prejudicial provision” is defined as “a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by –
 - (a) *adversely affecting the person’s rights; or*
 - (b) *imposing liabilities on the person.*”

C. Advice

1. The TPA deals with the approval of activities that may be undertaken in relation to trees generally, but in particular, deals with the approval of (or refusal to approve of -as the case may be) activities that may be undertaken with respect to “protected trees”. Protected trees under the TPA include both “registered” and “regulated trees.”
2. Section 10 of the TPA defines a “regulated tree” as a “living tree” of certain stated proportions that is on “leased land” within a “*tree management precinct.*”
3. A “tree management precinct” is in turn defined in section 10(3) of the TPA as “*an area declared under part 5 to be a tree management precinct.*”
4. I note that under the former TPA the transitional provisions in Part 15 provided for the creation of interim “tree management precincts” until the stated expiry of those provisions two years after commencement (29 March 2008.)
5. Section 39 of the current TPA provides that the Minister “*may, in writing, declare a stated area of land in a built up urban area to be a tree management precinct.*” However, while the current Act commenced on 31 March 2008, such a declaration was not in fact made until 5 August 2008, coming into force on 6 August 2008 by way of NI, as set out above.
6. Accordingly, it appears that during the period starting from the expiration of the transitional provisions under the former TPA on 29 March 2008 and the

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commencement of the NI on 6 August 2008, there were technically no “tree management precincts” in place.

7. It follows that during that period there were no trees that could have been regarded as “regulated trees” for the purposes of the definition contained in section 10 of the TPA.
8. This anomaly may arguably be overcome by the making of a further declaration under Part 5 of the TPA that is expressed to apply retrospectively from 29 March 2008. However, the potential effect of the retrospective operation of such an instrument in the present context is likely to be problematic for the reasons set out below.
9. The Legislation Act permits the inclusion of provisions in Acts and statutory instruments that have retrospective operation provided that those provisions do not adversely affect a person’s rights or impose liabilities on a person *and* provided the retrospectivity of the provision is clearly expressed.
10. In the present case, the inclusion of a provision in a newly created NI providing that the instrument is to be taken to have commenced on 29 March 2008 would have the effect of rendering the trees that are the subject of the various applications currently under consideration “regulated” trees under the TPA for the relevant period. The applicants’ would be thereby deprived of a right that they would otherwise have had to deal with their trees in any way they saw fit with no legislative constraints.
11. Accordingly, if the Conservator places reliance upon the retrospective application of a NI in making reconsidered decisions on applications made during the relevant period it is likely that the application of that instrument will be considered to have adversely affected someone’s rights or to have imposed liabilities upon them. It follows then that those decisions could potentially be successfully challenged by the persons affected on the basis that the retrospective operation of the NI was prejudicial to them.
12. In view of the above, the preferable course may be to invite the subject applicants to make fresh applications to the Conservator thereby avoiding the potential for decisions to be challenged.

D. Conclusion

1. The decision making power of the Conservator under the TPA is not, of itself, affected by the existence or otherwise of a notifiable instrument in respect of tree management precincts. However, it is clear that if there were no such precincts in place for the period between 29 March 2008 and 6 August 2008, then for that period, strictly speaking, there were no “regulated trees” in relation to which a decision on an application for an activity involving such trees could validly be made.

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2. To rectify this anomaly, a further declaration with retrospective application could be made by the Minister under section 39 of the TPA. However, for the reasons expressed above, this course is not recommended.
3. In the circumstances, the preferable course would be to invite the subject applicants to submit fresh applications for the proposed tree damaging activities.

Please contact me on 6205 3769 should you wish to discuss this matter further.

Yours sincerely

ACT Government Solicitor

A handwritten signature in black ink, appearing to be 'Rebekah Knox', with a stylized flourish extending to the right.

Rebekah Knox
Acting Senior Solicitor