



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON ESTIMATES 2023-2024

Mr Mark Parton MLA (Chair), Ms Jo Clay MLA (Deputy Chair),
Mr Michael Pettersson MLA

ANSWER TO QUESTION TAKEN ON NOTICE DURING PUBLIC HEARINGS

Asked by Mr Michael Pettersson MLA on 25 July 2023: Mrs Gardner took on notice the following question(s):

[Ref: Uncorrected Proof Hansard Transcript 25 July 2023 p 15]

In relation to: Investigation into the complaint received last FY

MR PETTERSSON: Thank you. I was hoping the committee could get an update on some of the complaints that you have received in the past financial year and then the investigations undertaken.

Dr Lewis: Absolutely. I will hand to Miranda to talk through our complaints.

Mrs Gardner: Sure. So, we have only had one complaint in the last financial year that we have taken to an investigation. I am Miranda Gardner by the way. I am Director of Complaints and Investigations. And that was regarding the removal and then replanting of heritage listed trees at Downer.

And the complaint was about limiting solar access from these trees which are exotic non-natives deliberately planted as part of the development in a way that is designed to block the weather. It was a windbreak so they are very heavily shading.

So, we have completed that complaint report and circulated to all stakeholders. We do not publish our complaint reports although we can provide a copy if you wish. The actual findings of that one were quite complicated. It was, like, detailed interplays between different policies and the way that those were replied by officers during the development application.

So, it is not really possible to kind of summarise in this setting but very happy to provide a copy if you would like that.

MR PETTERSSON: That would be wonderful. Thank you.

MR PETTERSSON: That would be wonderful. Thank you.

Dr Sophie Lewis: The answer to the Member's question is as follows: –

Please see attached referred report.

Approved for circulation to the Select Committee on Estimates 2023-2024

Signature: 

Date: 27 July 2023

By the Commissioner for Sustainability and the Environment, Dr Sophie Lewis

FINAL COMPLAINT REPORT:
COMPLAINT 002-2022

Failure of ACT Heritage Council to consider climate change and enviromental sustainability in its decision to re-plant trees at Downer



OFFICE OF THE COMMISSIONER
FOR SUSTAINABILITY AND
THE ENVIRONMENT

Yuma

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Graphic design and typesetting: Paper Monkey

Office of the Commissioner for Sustainability and the Environment, 2023,
Failure of ACT Heritage Council to consider climate change and environmental sustainability
in its decision to re-plant trees at Downer, published by the Office of the Commissioner for
Sustainability and the Environment, Canberra, 2023.

This document is available online at www.envcomm.act.gov.au

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Complaint Report Background and Purpose

Purpose of Report

The purpose of this report is to inform the Complainant, the Principal Officers of relevant directorates, and Ministers responsible for relevant portfolios, of the Commissioner for Sustainability and the Environment's (the Commissioner's) findings in relation to the Complaint outlined below.

Status of Report

This report pertains to the Commissioner's functions under Section 12 of the Commissioner for Sustainability and the Environment Act 1993 (the Act).

This is a non-statutory report. It is not a Special Report as defined under Section 21 of the Act. There is no statutory requirement for this report to be tabled in the Legislative Assembly, or for recommendations to be presented.

Response to Report

As described above, no statutory response is required to this Complaint Report.

ACT Government directorates which have been provided with a copy of the report are encouraged to provide a written response to the Commissioner in relation to those matters which pertain to their portfolio. These will be shared with ministers as appropriate.

The Minister for the Environment may choose to direct the Commissioner to investigate this matter, or related matters raised through this investigation, under Section 21(1)(a) of the Act, which would require the Commissioner to produce a Special Report for the Minister to table in the Legislative Assembly.

Circulation of Report

A copy of this Complaint Report has been provided to:

- Minister for Environment and Heritage
- Minister for Planning
- Minister for City Services
- Director-General of the Environment, Planning and Sustainable Development Directorate
- Director-General of Transport Canberra and City Services
- The Complainant

Notes:

Throughout this report, references to 'heritage' refer strictly to non-Indigenous heritage.

This report uses the terms 'sustainability', 'sustainable development' and 'environment' to refer to broad principles rather than specific matters defined in the Territory Plan and other legislation which makes up the ACT planning system.

1. The Complaint

1.1 Background Information

1.1.1 Information from Complainant

The following information was provided to the Commissioner by the Complainant in support of their submission (note some supplied text not directly related to the substance of the complaint has been omitted from this Report).

I moved into my apartment, a newly built north-facing apartment complex in Bradfield St Downer in June 2021. In late September, I discovered that the empty northern verge awaiting tree planting was to be planted with tall pines. The ACT Heritage Council insists that Canary Island Pines be planted in a windbreak as "like for like" to replace Heritage listed Monterey Pines, planted in the 1940s, and removed as part of the Development approval to make way for medium density housing on site of old Downer Primary School, Bradfield St Downer.

Winter solar loss: *These new evergreen trees, across the north face of apartments and townhouses, will have the impact of reducing winter solar amenity for residents for decades to come, and an eventual adverse impact on rooftop solar. This adverse effect will be extended when similar new pines are planted on the northern aspect of the proposed Goodwin Retirement development.*

This is a different context: *The 'heritage' pertains to the CS&IR Experiment Station. The Station was established in a rural/agricultural landscape in the 1940s, which is now both an inner-city, and a medium density, urban environment. Unlike then, climate action is now a local, national, and global emergency.*

Lack of accountability to ACT climate action goals and design standards: *The Heritage Act does not require the Heritage Council to take cognisance of climate change, and current residents are not defined as 'interested persons' under the provision of the Act, because they were not around at the time of the Heritage Council's decision. As a consequence, current affected residents have no right of appeal. The Heritage Council has picked trees that ACT Government Guidelines say are unsuitable for street tree planting. Amendment from the Heritage Council allowing that the windbreak can be relocated approximately 3 metres north is unsatisfactory – it will not address the issue for future residents in any substantial way.*

It's unnecessary: *There are 400+ metres of original pines along Melba and Bonython Streets. These are around the ovals, which themselves are symbolic of the rural Experiment Station, and this heritage of trees and original CS&IR buildings are still evident – without necessitating planting new pines that will undermine passive-solar design for current and future residents. Existing original pines are poorly maintained. Dead pines have been removed and not replaced and there are a number of distressed trees.*

Contrary to wellbeing: There are also adverse impacts on wellbeing from evergreen pine trees in this context. Goodwin Village will see an increased number of senior citizens in the area, and pine trees drop cones (a trip hazard); winter sunlight to homes that is beneficial for residents' wellbeing will become blocked; other residents have attested to problematic allergenic impacts from cone pollen from the mature Heritage listed conifers surrounding this site.

Poor Governance: Minister Vassarotti says she is unable to intervene, and will note it for future legislative change, yet the ACT Government would have been aware of this conflict of heritage planning and sustainability goals for years, as well as knowledge of climate crisis. Replies to our letters to Ministers and Heritage Council have been exceedingly slow, disjointed across portfolios, and not engaging with our concerns. Residents are left with Minister saying that this will be reviewed for possible legislative change in future, and her office advising us that any retrospective change is unlikely.

We are arguing that:

- Deciduous trees can be planted in the heritage windbreak pattern, and are an obvious compromise.
- The Heritage Council must consider the ACT Climate Change Strategy 2019-2025 in its decisions.
- DAs must allow consequent 'interested persons' to have a right of appeal.
- Politicians must be able to effect change, and ACT Government able to intervene to ensure statutory bodies can't undermine key environment and sustainability standards and strategies, developed for current and future citizens.

Actions prior to complaint submission

Before the saplings were planted:

- Other Downer residents were active about tree choices here for years prior. I have an email from a local resident outlining her efforts since 2013, including a survey conducted of Downer residents, "with 80+% opposed to conifers" – this was submitted at Planning phase, to no avail; also, I have copies of correspondence from new townhouse residents in early-mid 2021 to and from Minister Vassarotti requesting change of tree choice.
- Bradfield Apartment residents moved in mid-2021, shortly followed by Covid lockdown. When we became aware of the intended species planting a group of us wrote to Chief Minister/Minister for Climate Change in October 2021. This was immediately redirected to Minister for Environment and Heritage. We spoke briefly to the Minister in a "Zoom drop in" during Covid lockdown, seeking her assistance. She said neither she nor Chief Minister was able to intervene due to legislation, nor is the matter appealable through ACAT; she said we are free to contact Heritage Council. We wrote again to her office to seek to understand the legislative constraints, and the written reply concluded that their office would note this as a future issue but not take further correspondence from us about this.

- 18.10.21 – we wrote to the Heritage Council, outcome was an opportunity to meet with Chair via WebEx. Our purpose: hear their response, to seek to understand their conservation goals, and explore compromise options. We submitted a proposal 15.11.21 with compromise win/win options¹. Their response, due mid-December, was released 11.1.22, a day after 21 new Canary pine trees were planted. This Heritage Council response was for an amendment that the trees be relocated 3 meters north, and pruning of lower branches.

Since 21 saplings were planted in front of Bradfield apartments 10 January 2022.

- We contacted Heritage Council staff on 10.1.22 and were told trees could be transplanted and official reply would be released imminently
- We wrote 14.2.22 to key ministers pointing out this issue crossed numerous portfolios, pleading for an integrated response given that climate action is a nominated top priority for ACT Government; we got belated disjointed replies from Minister Vassarotti's office on 25.3.22 and Minister Gentleman 12.4.22. Min. Gentleman promised follow up by a contact officer. It took our follow up, and numerous pass-ons, to eventually speak with appropriate officer on 7.7.22.
- We met with Downer Community Association in February 2022 – they have since written a letter to Heritage Council noting their support for our concerns, and asking Council to reconsider its decision.
- The pine trees planted in front of Townhouses have been placed in the amended location, so the ones in front of Apartments are not in alignment with these
- We have written again three times since February to the Heritage Council to ask about compliance with their directions of Heritage tree management plan – no reply still.
- Trees official met with us on site on 7.7.22. She said the Heritage Council amendment had been "overlooked" and that the 21 trees in front of the apartments will be relocated as per the amendment. We acknowledged this in a letter on 11.7.22, asking further questions, and have heard nothing further.
- We commenced an E-petition to Legislative Assembly in July; this is open till 31.10.22.

¹ Note: the alternative tree proposed by The Bradfield residents, the conifer *Metasequoia glyptostroboides*, has been grown in Canberra but was removed from the approved list of trees for public plantings by TCCS in 2021 for its intolerance to drought.

1.1.2 Location of The Bradfield development



Figure 1: Downer development site in March 2018 (Source: ACTmap*i*)



Figure 2: Downer development site in December 2021 (Source: ACTmap*i*)

1.1.3 Heritage Registration

The *Trees of The Former Commonwealth Scientific & Industrial Research (CS&IR) Dickson Experiment Station* were entered onto the interim Heritage Places Register in 1998.

The entry notes:

*While Monterey pine is a common species in plantation forestry and farm windbreaks, its presence as a windbreak in a suburb is unusual. In landscape terms the windbreak encloses and protects the playing fields and community facilities and provides a delineation between the suburban housing component and the central open space.*²

The citation includes a number of management recommendations including annual inspection of the trees '*for health and structural integrity*'. ACT Heritage has no record that such inspections have ever been undertaken. The citation includes specific recommendations for staged replacement of declining eucalyptus trees which form part of the heritage place but does not include such recommendations for the Monterey Pines.

1.1.4 The Bradfield Development Background

Development of this site has been a prolonged process with a number of related development applications and a Territory Plan Variation. Two Development Applications (DA) relating to site preparation were approved prior to 2017, and both included conditions to protect and retain the heritage trees *in situ*. DA201731204 was submitted in 2017 and ultimately resulted in the construction of The Bradfield apartments.

DA201731204 was made for: *demolition of the remaining site infrastructure and removal of trees; construction of 160 dwellings with garages or basement car parking, landscaping and associated works. Dwellings to be constructed in two stages and comprise 37 townhouses within four 2-storey buildings and 123 apartments within three 4-storey buildings. Works addressing Deed of Agreement requirements including creation of two multi unit residential blocks with heritage listed objects; off-site works; with portion of site to remain under Holding Lease for future development.*

Public notification of DA201731204 took place on 3–26 April 2017 through notices on the site and letters to nearby residents. Eighteen responses were received raising a range of issues, including both support for and against removing the trees. Replacement of the pines with deciduous trees was also suggested by some respondents.

The DA was approved with conditions, one of which was the removal and replacement of the heritage windbreak of Monterey Pines, *Pinus radiata*, with a similarly spaced planting of Canary Island Pines, *Pinus canariensis*.

2 Entry to the ACT Heritage Register, *Trees of the Former CS&IR Experiment Station*, https://www.environment.act.gov.au/_data/assets/pdf_file/0009/148338/402.pdf ACT Heritage Council 1998

1.2 Commissioner's Decision to Investigate the Complaint

Key aspects of the complaint as articulated by the Complainant are:

1. **Winter solar loss:** *These new evergreen trees, across the north face of apartments and townhouses, will have the impact of reducing winter solar amenity for residents for decades to come, and an eventual adverse impact on rooftop solar.*
2. **This is a different context:** *The 'heritage' pertains to the CS&IR Experiment Station. The Station was established in a rural/agricultural landscape in the 1940s, which is now both an inner-city, and a medium density, urban environment. Unlike then, climate action is now a local national and global emergency.*
3. **Lack of accountability to ACT climate action goals and design standards:** *The Heritage Act does not require the Heritage Council to take cognisance of climate change. The Heritage Council has picked trees that ACT Government Guidelines say are unsuitable for street tree planting.*
4. **It's unnecessary:** *There are 400+ metres of original pines along Melba and Bonython Streets. These are around the ovals, which themselves are symbolic of the rural Experiment Station, and this heritage of trees and original CS&IR buildings are still evident without necessitating planting new pines that will undermine passive-solar design for current and future residents. Existing original pines are poorly maintained. Dead pines have been removed and not replaced and there are a number of distressed trees.*
5. **Contrary to wellbeing:** *There are also adverse impacts on wellbeing from evergreen pine trees in this context. Goodwin Village will see an increased number of senior citizens in the area, and pine trees drop cones (a trip hazard); winter sunlight to homes that is beneficial for residents' wellbeing will become blocked; other residents have attested to problematic allergenic impacts from cone pollen from the mature Heritage listed conifers surrounding this site.*
6. **Poor governance:** *Minister Vassarotti says she is unable to intervene, and will note it for future legislative change, yet the ACT Government would have been aware of this conflict of heritage planning and sustainability goals for years, as well as knowledge of climate crisis. Replies to letters to Ministers and Heritage Council have been exceedingly slow, disjointed across portfolios, and not engaging with our concerns.*

Consideration of the Commissioner for Sustainability and the Environment Act 1993

The Commissioner has considered the complaint with regard to the Act, both in relation to its relevance to the CSE's statutory functions and the circumstances described below. Under the CSE Act, the Commissioner has the discretion not to investigate complaints subject to statutorily defined circumstances.

Consideration of information provided by the Complainant

1. Based on the information provided, the Commissioner is satisfied that the new Canary Island Pines will grow to a height (25m) and thickness (15m)³ that will block solar access to the north-facing development, impacting the passive solar properties of the development and, in the future, solar panel use. This will reduce the environmental sustainability of the development.

- 2&3. The complaint highlights the apparent subservience of sustainability objectives to heritage objectives inherent in this matter. This appears at odds with the ACT Government's public stance on positive climate action. The primacy of heritage values in the face of a climate emergency appears untested in the ACT.

The species of tree selected for 'like for like' heritage planting, the Canary Island Pine (replacing the original Monterey Pines) is described in City Service's tree guide as 'Not suitable for use as a street tree'⁴.

The Commissioner is satisfied that the apparent conflict between heritage and sustainability in this instance has implications for the environmental management and sustainable development of the city more broadly which merits further investigation.

4. The broader heritage context of the site is outside the scope of the Commissioner's role and is not a basis for this investigation.
5. The indirect wellbeing impacts of the tree species selection is outside the scope of the Commissioner's role and is not a basis for this investigation.

The Commissioner has not pursued an investigation into the dual role of the Minister for Heritage and Minister for Environment. While this dual function resulted in frustrations reported by the Complainant during attempts to resolve the matter, it does not appear to have contributed to the matters raised within the complaint. The conflict of heritage and environment values appears to arise in the Planning domain, as discussed further in this report.

While early discussions with the complainant suggested the substance of the complaint related solely to decisions made by the ACT Heritage Council, the Commissioner's enquiries found that the Planning areas of EPSDD are equally responsible for decisions leading to the situation in Downer which has prompted this complaint being made.

Objects 2B(c) and 2B(e) of the *Commissioner for Sustainability and the Environment Act 1993* are to 'encourage decision-making that facilitates ecologically sustainable development' and 'encourage sound environmental practices and procedures to be adopted by the Territory and territory authorities as a basis for ecologically sustainable development.'

On this basis, the Commissioner determined that the following aspects of the complaint warranted further investigation:

- restricted solar access as a result of the new plantings;
- the unsuitable nature of *Pinus canariensis* for use as street trees; and
- the apparent primacy of non-Indigenous heritage values over environmental and sustainability values.

In line with legislation, the Commissioner's sole focus in investigating this matter is on whether ACT Government decisions and practices supported ecologically sustainable development.

3 Sizes taken from TCCS Municipal Infrastructure Standards 25 https://www.cityservices.act.gov.au/_data/assets/pdf_file/0004/1378543/Municipal-Infrastructure-Standards-25-Plant-Species-for-Urban-Landscape-Projects.pdf.

4 https://www.cityservices.act.gov.au/_data/assets/pdf_file/0005/1502798/Pinus-canariensis.pdf

1.3 Evidence Submitted to this Investigation

Multiple iterations of documents were submitted for DA201731204 by the proponent, Canberra Housing, in response to multiple rounds of entity advice and feedback to the proponent, and amendments to the planning proposal. Documents provided to this investigation include the file for DA201731204, as well as documents and correspondence from ACT Heritage relating to the Statement of Heritage Effect (SHE) and documents and internal correspondence from the TCCS Urban Treescapes unit. Extensive documentation was also provided by the Complainant.

The Commissioner and her staff held meetings with ACT Government officers from the Planning and Sustainable Development Branch, Urban Treescapes and ACT Heritage.

2. Commissioner's Findings

This investigation found limitations in the development approval process which have the potential for perverse outcomes in terms of sustainable development. In keeping with the Objects of the *Commissioner for Sustainability and the Environment Act 1993*, Parts 2B(c) and 2B(e), the Commissioner's investigations focus solely on the implications of:

(c) encourage decision-making that facilitates ecologically sustainable development
and

(e) encourage sound environmental practices and procedures to be adopted by the Territory and territory authorities as a basis for ecologically sustainable development.

The Commissioner notes that the combination of factors leading to this complaint are highly specific, and as a result, findings in relation to this complaint may have limited application elsewhere.

In line with the Commissioner's mission to act as an independent voice for the environment and sustainability in the ACT, this report questions whether the ACT planning system adequately considers environmental and sustainability matters which are not explicitly covered by the statutory process. The Commissioner's understanding is that under current arrangements, heritage values included on the heritage register are protected due to their inclusion in the Territory Plan, while broad sustainability values are not⁵. This means that legally there is no basis for 'weighing up' whether a measure to protect heritage will have adverse environmental impacts⁶, because there is no statutory trigger for such sustainability values to be considered. This is symptomatic of a wider weakness – from a sustainable development perspective – in the planning system, in that it results in environmental matters which are not already deemed to be under threat to be excluded from consideration.

In relation to this Complaint, the Commissioner made the following findings.

2.1 Restricted solar access as a result of the new plantings

As part of this investigation, the Commissioner reviewed shadow modelling diagrams which form part of the DA package submitted by CHC Australia. The purpose of these models is to demonstrate compliance with Rule 58 (relating to solar access) in the Multi Unit Housing Development Code. Rule 58 of the Multi Unit Housing Development Code states that:

The floor or internal wall of a daytime living area of not fewer than 70% of apartments on a site is exposed to not less than 3 hours of direct sunlight between the hours of 9am and 3pm on the winter solstice (21 June).

⁵ Executive Branch Manager, Planning and Sustainable Development Directorate, personal commentary 20/10/2022

⁶ Unless those impacts are on statutorily-defined environmental values.

The matter of solar access and overshadowing was considered by a meeting of the Major Project Review Group (MPRG) in August 2018. The briefing provided for the MPRG states that:

A review of the new shadow diagram information suggests the figures are more like:

- 64, 52% comply with the rule
- 21, 17% have 3 hours of solar access between 8am and 4pm
- 38, 31% do not have 3 hours solar access.

Since only 52% of apartments in the development comply with Rule 58, the applicable Criterion was used instead. This Criterion stipulates that 'Daytime living areas have reasonable access to sunlight.' The meaning of 'reasonable' is subjective and the basis on which it has been applied is not clearly explained in the documents provided to this investigation. The Commissioner has subsequently been advised that this decision was based on 69–70% of apartments achieving at least 3 hours of direct sunlight between 8am and 4pm⁷, and this was deemed to constitute 'reasonable access to sunlight' by the MPRG. The minutes from the meeting state:

MPRG noted 70% of the apartments would not comply with the solar access requirement in accordance with the code. However, considering the site constraints and provision of communal open space within the site that allows for permeability through the site, MPRG accepted the criterion was met.

An objective rationale for decisions about when and why Criteria are used instead of Rules would be helpful, including the provision of public guidance on this. In this example, the development appears to be a long way from meeting the applicable Rule and it is concerning to the Commissioner that such Rules, which were presumably developed to promote sustainable development practices, can be disregarded in favour of the far less rigorous and more subjective Criteria.

The Commissioner notes that there was no basis for the planning and land authority to lawfully consider tree shade when assessing the development application, or to consider shade from trees when assessing solar access⁸. The Commissioner further understands that it is the planning and land authority's consistent practice to not consider overshadowing from vegetation when assessing solar access. This practice resulted from several ACT Civil and Administrative Tribunal (ACAT) decisions, the most recent, to which the Commissioner was referred by Planning during this investigation, being *Hamilton v ACT Planning and Land Authority and Ors*, AT 23/2018 (*Hamilton v ACTPLA*), which found that:

It seems that...whether one considers or does not consider the effect of shade trees, there is the potential to produce an absurd outcome. On the respondent's argument, the decision-maker is asked to ignore the reality of existing trees, which in this case, on any view of the evidence, cast substantial shadows that were not included in the original shadow diagrams, and may not be accurately included in the revised ones. The objectors' position, however, would require that the developers submit shadow

7 A requirement for three hours of sunlight between 8am and 4pm is not mentioned in the Rule or the Criterion.

8 DA201731204 also indicated an internal inconsistency in the way trees are considered in the Multi Unit Housing Development Code. Re-planting of the heritage trees is used as a basis for support of an electricity substation at the front of the apartment building:

Larger substation is proposed within view and relatively close proximity to Bradfield St frontage. It is however somewhat obscured by the row of trees...the proposed substation is not opposed.

Screening of electric substations is a criteria in the Multi Unit Housing Development Code. It seems inconsistent that trees are considered part of the development for this part of the code but not for solar access.

diagrams based on variables that cannot be calculated, prophesise what may or may not happen in the future, and adopt a practice that may result in trees being removed contrary to good public policy.

As part of this ruling ACAT also observed the following:

[the relevant development code rule] does not provide any criteria or guidance as to the extent or area of the direct sunlight that is required – it simply states that “the floor or internal wall” must be “exposed to not less than three hours of direct sunlight between 9am–3pm on the winter solstice”. On a plain reading, this appears to mean the requirement is met by any amount of direct sunlight falling on the floor or internal wall during the relevant period.

The determination for the development in question is that *‘the eucalyptus trees do not provide complete shade cover. Some portion of direct sunlight will penetrate the tree canopy. That is sufficient for code compliance.’*

The Commissioner shares ACAT’s view regarding the potential for ‘an absurd outcome’ in weighing the environmental value of urban trees against the sustainability value of solar access for buildings. Likewise, the ACT Planning and Land Authority state in their response to the case, *‘[to] take into account shadow from trees would produce an absurd outcome. It would necessarily motivate the removal of those trees in order to achieve rule compliance’*. This is obviously not a desirable outcome for the ACT from an environment and sustainability perspective, especially given recent ACT Government commitments to increase tree canopy cover across urban areas.

In the case of this complaint the specifics of the ACAT ruling do not, however, appear directly relevant. While the wording of the Multi Unit Housing Development Code allows for any amount of sunlight reaching the rooms to count towards compliance, it is doubtful that even this small amount of light will penetrate a double row of dense conifers only a few metres away from the apartments. The trees in question for *Hamilton v ACTPLA* are eucalypts, which have a much sparser canopy than conifers and have a crown rather than branches all the way down the trunk. Secondly, the trees in *Hamilton v ACTPLA* are already established at the site and are of varying age and condition, whereas the trees at the Bradfield are to be planted as a condition of the development application. They are not an ‘unknown variable’ to be predicted – they are deliberately planted in a specific pattern as part of the development.



Figure 3: Trees considered by ACAT in *Hamilton v ACTPLA*



Figure 4: Image from Statement of Heritage Effect showing the extent of shading from the windbreak (left) and new plantings in front of The Bradfield (right).



Figure 5: Mature *P canariensis* on a street verge (in California)⁹

Further, *P canariensis* have a life expectancy in Canberra of 60–80 years at least¹⁰, which is comparable with the anticipated lifespan of a new modern building. It is unclear why a tree should therefore be considered a ‘variable that cannot be calculated’, requiring a ‘prophecy’ to predict ‘what may or may not happen’, when buildings which may have a design life of 50 years or less¹¹ are considered to be permanent and predictable elements of the urban landscape.

The Commissioner agrees with ACAT’s general findings that consideration of tree shade is not appropriate for most solar access assessments. However, in this specific case, the arguments which persuaded ACAT in *Hamilton v ACTPLA* do not apply. The Commissioner is of the opinion that the unique combination of circumstances at this specific site warranted a ‘common sense’ consideration of tree shadows in solar access assessment for The Bradfield. These circumstances are that:

- The trees are a known part of the development, and indeed their inclusion and retention at the site is a *requirement* of the development approval.
- The trees are large, dense conifers planted in a double row. The original purpose of this planting – which afforded it heritage protection – was to provide a windbreak for an open area of land. By design, the planting allows little light to penetrate the barrier.

⁹ <https://www.public.asu.edu/~camartin/plants/Plant%20html%20files/Pinus%20canariensis%20street%20tree%20LA2.JPG>

¹⁰ Urban Treescapes Director Carma Sweet, personal commentary

¹¹ There is no mandatory design life for a building in the ACT, with different structural components being subject to their own individual standards. However, research for this investigation indicates that modern building in Australia typically have a design life of 30–100 years.

Therefore, even the very small amount of light apparently required for code compliance is unlikely to reach the apartments to the south of the windbreak.

- The Bradfield was *already* non-compliant with Rule 58 of the Multi Unit Development Code, with only 52% of apartments meeting code requirements rather than the stipulated 70%. While there are legislative provisions for the MPRG to overrule code requirements where they see fit, in this case their failure to consider tree shading at The Bradfield will result in compliance with Rule 58 falling well below 52%.
- The heritage listed *P radiata* windbreak had been in situ for around 75 years at the time of its removal. Assuming that the new windbreak survives for a comparable period of time (there are examples of *P canariensis* specimens in Australia which are well over 100 years old), this seems a degree of permanency comparable with a modern built structure. It is therefore unclear why the windbreak should be considered an unknown variable while a building is not.

The Commissioner notes that decisions by ACAT do not need to be self-consistent, so the findings in *Hamilton v ACTPLA* does not preclude a different conclusion being drawn in different circumstances.

For an ecologically sustainable Canberra, a more nuanced approach is needed to weigh up the pros and cons of development impacts where different values are effectively pitted against one another. The Commissioner supports the ACT Government's position of not including tree shade in solar access assessments to avoid unnecessary removal of urban trees. However, in this specific case the unique circumstances regarding the species selection and placement of the trees in keeping with their heritage registration warrant a reconsideration of this approach.

2.2 The unsuitable nature of *Pinus canariensis* for use as street trees

The Complainant raised concerns about the selection of *P canariensis* as a replacement species for *P radiata*, since the ACT Government's own planting guidelines list *P canariensis* as 'not suitable for use as a street tree'.

The Commissioner has received advice from Urban Treescapes officers that while they do not generally agree with planting *P canariensis* in a street setting it is the 'least worst' option in contexts such as this where heritage values must be maintained and has been used elsewhere in Canberra¹² for this purpose. As for the matter above, the heritage matter protected in the Territory Plan overrides more general environmental and public place management issues which are not explicitly statutory matters.

The Commissioner considers that the ACT Heritage Council genuinely considered all alternative species suggested to it by the Complainant, convened special meetings and sought expert opinion regarding other species options. This element of the complaint is however directly related to the third point of this investigation discussed in more detail below.

¹² Such as at Yarramula dog park in the Weston Park Heritage Precinct.

2.3 The apparent primacy of heritage values over environmental and sustainability values

The ACT Government has clear procedures for the provision of entity advice to development assessments, which were followed in relation to DA201731204. The purpose of these procedures is to ensure that any potential impact on existing infrastructure, utilities, registered heritage, or environment matters is identified and, as far as possible, mitigated. However, the system is effectively blind to matters which are not explicitly dealt with in the legislation. There is no opportunity to weigh up how advice from one entity may impact on a different thematic area – in this case, the impact of heritage advice on sustainability outcomes – because within the planning system sustainability is effectively a non-issue when it relates to an area which also has registered heritage values that are recognised in the Territory Plan.

In relation to the substance of this complaint, the assessment and setting of approval conditions for DA201731204 considered advice from the ACT Heritage Council, Transport Canberra and City Services, and the Conservator of Flora and Fauna (the Conservator). A summary of the advice provided by these three entities is provided below.

ACT Heritage Advice

The ACT Heritage Council sought multiple revisions of the SHE Report from CHC Australia until they were satisfied that heritage protection measures were adequate for the development to proceed. The ACT Heritage Council based their decision to agree to the removal and replanting of the windbreak on advice provided by Red Box Design in a report prepared for CHC Australia, which stated that the trees were in poor health and needed to be removed on the grounds of public safety. The ACT Heritage Council were not aware of opinions from Urban Treescapes officers and the Conservator that the analysis of this report was incorrect (see discussion below). Nevertheless, ACT Heritage has subsequently advised the Commissioner in their formal comments on this investigation's findings that even if they had been aware of these opinions they would not have endorsed the removal of only a proportion of the trees (i.e. only those that posed a safety risk) as this 'would have fundamentally altered the character of the heritage windbreak, and diminished its heritage significance'.

ACT Heritage also dismisses the option of using deciduous trees – which would allow for better solar access – on the grounds that they are not compatible with the heritage characteristics of the site.

Transport Canberra and City Services Advice

Formal advice submitted by Transport Canberra and City Services (TCCS) in response to entity referrals for DA201731204 from April 2017 onwards does not include any objection to the removal and replacement of the heritage windbreak trees. This is at odds with internal emails provided to the Commissioner as part of this investigation. These include an email from the then-Manager Urban Treescapes to TCCS executives dated 08/02/2017 which lists extensive reasons why TCCS should not support the proposed approach, including:

- *The 100 radiata pines are in good health and are likely to live for 30 plus years. As such I can't see why there is a proposal to remove the trees. Radiata pine is on the weeds list however we don't actively remove young or mature trees just because they are on the weeds list. The weeds list is a legislative document and as such Radiata pine should not be replanted in breach of the weeds list.*
- *If removal and replacement of the pines goes ahead I'd strongly suggest that an alternative deciduous exotic replacement species is used.*
- *I am surprised the Heritage Council is supporting such a radical proposal and suggest we make contact with the HC.*

Another email to TCCS asset acceptance from CHC Australia (the developer) on 31/01/2017 confirms CHC's intention to remove the heritage trees as part of the development (note this is prior to SHE approval) and states *'As recently as our last meeting prior to Christmas TCCS indicated an unwillingness to receive the replaced trees and maintenance thereof.'*

This email was forwarded to staff in City Services, including the Executive Branch Manager, referencing CHC's desire to *'elevate this further up the chain'* given that acceptance of the trees is not supported by TCCS. The email also states *'It is likely that the issue may still get elevated if we choose to not accept the proposal.'* TCCS' acceptance of the trees appears to have been an important aspect of the approval for DA201731204.

Based on TCCS advice to the entity referral process for DA201731204, it is clear that the proposal to remove the trees was agreed by TCCS at some point prior to the DA submission. It is not clear from the documents provided what the reasons were for this change of position. The Commissioner's requests for clarification on this matter have not resulted in the provision of any further information. Consequently, the Commissioner has concerns about the transparency of this decision-making process given that there is evidence of pressure from CHC Australia regarding the decision.

The position of the TCCS officer stated in the February 2017 email quoted above, including opposition to removal of still-healthy trees and replacement with deciduous species in preference to conifers, would have resulted in better outcomes for ecologically sustainable development in the Commissioner's opinion.

Conservator Advice

On 10 April 2017 the Conservator Liaison notes in feedback to the DA that:

Whilst the Pinus radiata are not regulated trees as defined under the provisions of the [Tree Protection Act 2005], it is important to provide a comment in respect the Red Box Design group "Summary of Findings" as a guide to the Heritage Unit which does not have qualified arborists on its staff, and would in all intents and purposes have to rely on the information lodged with the Development Application to make a decision on the future of these historically relevant trees.

- The Pinus radiata trees are hardly in a state of senility.*
- Several individuals with identifiable defects would meet criteria for removal if the trees were regulated under the Tree Protection Act 2005.*
- The long-term viability of the trees is more likely to be in excess of 30 years.*
- Generally the trees would be considered to be in good – excellent health. Whilst being mature many have good trunk height ratios and show no signs of instability.*
- The trees provide a significant aesthetic landscape contribution which is a character of the suburb.*
- The proposed development fails to provide adequate deep root or canopy development space for the reinstatement of a significant tree scape of the same calibre.*
- The removal of the trees is contrary to the aims and objectives of the Tree Protection Act 2005. It is apparent that incorporation of any existing trees within the block was not considered.*

In relation to this complaint, advice about the health of the heritage listed trees was provided to the DA process by the Conservator which differed from the advice provided by the consultant contracted by the developer. However, since the trees are considered a heritage matter under the Territory Plan and not an environment matter, the DA Team could disregard the Conservator's advice with impunity. Likewise, the Commissioner reviewed emails from within TCCS clearly expressing the opinion that the trees were not in a state of health which would require their removal, but this advice was not shared with ACT Heritage and for unknown reasons was omitted from TCCS's formal submission to the DA process.

3. Summary of Findings

It is difficult to state definitively that removal and replacement of the heritage listed windbreak, which is the subject of this complaint, has resulted in a net negative outcome for sustainability and the environment. However, this investigation has highlighted areas where the Commissioner considers the ACT Government's actions to be contrary to the principles of ecologically sustainable development.

3.1 Solar access

The specific circumstances surrounding this complaint about the planting of a dense evergreen windbreak immediately to the north of a residential development appears at odds with sustainable development objectives. While the Commissioner agrees with the ACT Government's position that trees should not be removed for reasons of improved solar access for housing, in this matter the existing trees were removed on other grounds. The planting and positioning of the new trees were a condition of the development approval. This is not a case of established trees incidentally impinging on solar access; these trees are a designed and planned element of the development. The species and planting pattern specified as part of the heritage approval intentionally creates a dense barrier effect that will block out sunlight as the trees mature. The Commissioner is of the opinion that such circumstances warrant additional interrogation in the DA process on the matter of solar access, especially since the development was already non-compliant with the relevant development code in this regard.

3.2 Development approval and planning system

Within the DA process, entity advice is provided and considered in a narrow fashion which only considers impacts as they relate to statutorily defined matters. From the perspective of a person not familiar with the planning system, it seems obvious that solar access issues would arise from the re-planting of the heritage windbreak, and that this does not represent sound decision-making in support of sustainable development. However, there was no place in the DA process for this to be considered due to the treatment of heritage and non-statutory sustainability issues as entirely discrete and unrelated, with the former automatically superseding the latter due to its inclusion in the Territory Plan.

The legislation which dictates the development approval process does not adequately allow for consideration of sustainability factors in relation to this complaint. In light of the dual climate and biodiversity crises the world is facing, it is essential that sustainability outcomes are prioritised in the planning system. The exclusion of climate change and sustainability from decisions relating to heritage management in the ACT is a systemic issue which is likely to result in adverse outcomes for the environment and sustainability¹³.

¹³ Refer also to the Commissioners submission to the recent Legislative Assembly Inquiry into the ACT's Heritage Arrangements for further detail on the interplay between heritage and climate in a modern ACT context. https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/2184862/Submission-003-ACT-Commissioner-for-Sustainability-and-the-Environment.pdf

In terms of sustainable development, the ACT Heritage Council's position on permitting removal of healthy trees where this is deemed to protect heritage significance¹⁴ raises a broader question about trees in non-Indigenous heritage precincts and their end-of-life replacement. Within the planning system, consideration needs to be given as to whether it is appropriate to remove healthy non-Indigenous heritage-registered trees on the grounds of maintaining the heritage characteristics of a site, as has occurred in this instance. The removal of such trees is not consistent with the ACT Government's strategy to increase canopy cover and reduce the removal of mature trees from Canberra's urban areas. The retention of healthy trees in the windbreak would have meant that residents of The Bradfield would have known they were buying apartments adjacent to tall shade-casting trees, and this complaint would not have arisen.

3.3 Heritage considerations

The ACT Heritage Council has already shown capacity to adopt an approach which is considerate of the changing context for ACT heritage sites. This is evidenced in this matter by their agreement that continued use of *P radiata* for the windbreak planting is inappropriate as this tree is now classified as an environmental weed. This type of flexibility could and should be applied in other areas where heritage decisions have implications for environmental sustainability. The use of deciduous trees to replace the *P radiata* in the windbreak would have minimised the impacts of the trees on winter solar access for The Bradfield and this complaint would not have arisen.

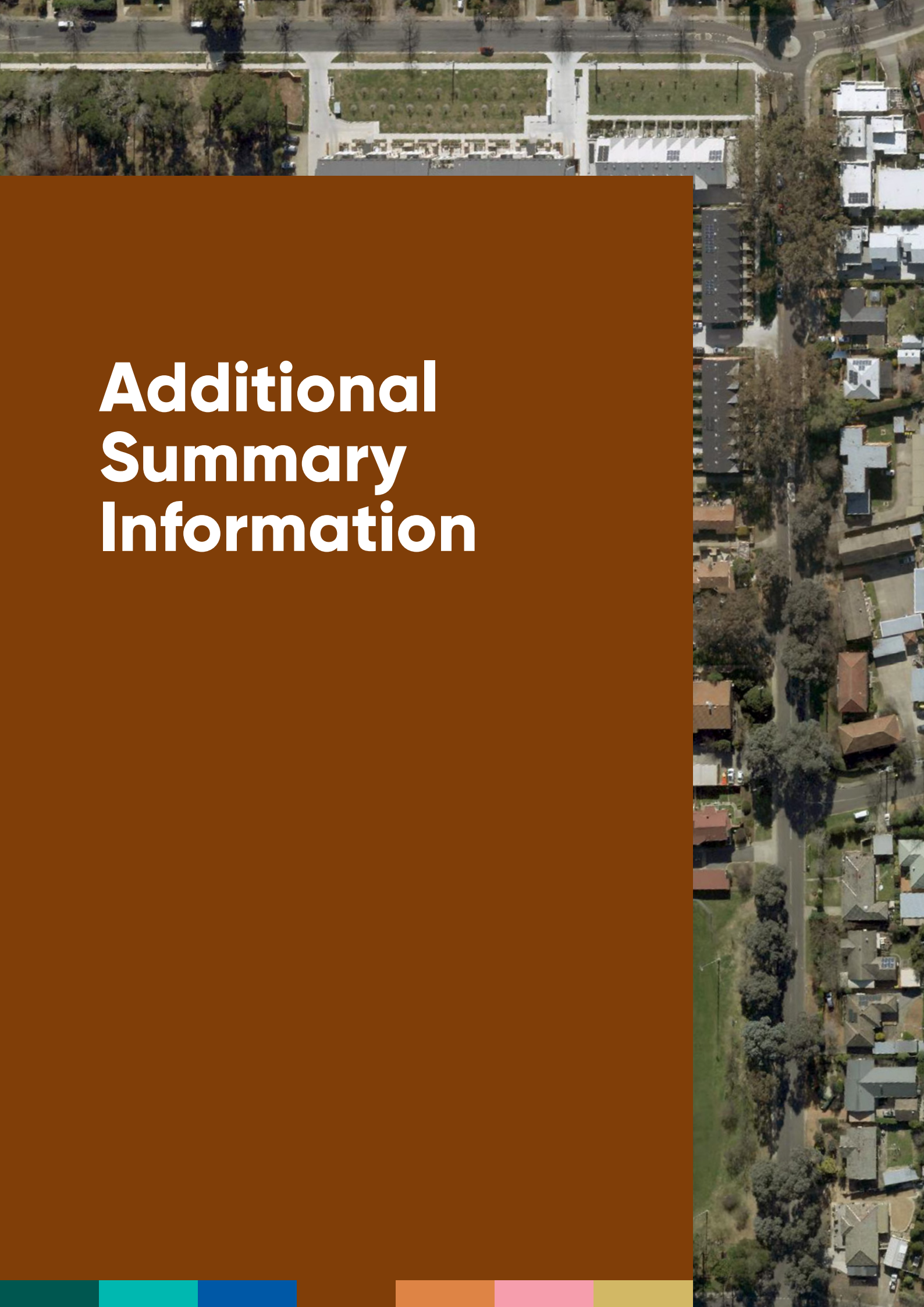
¹⁴ Only a few of the trees in the windbreak were assessed in the Red Box report as being in poor condition, and it is only these that warranted removal on the grounds of public safety. ACT Heritage permitted the removal of all the trees, including healthy ones, to ensure all trees in the windbreak are the same age. This protects heritage values but is a less environmentally sound approach.

4. Commissioner's Recommendations

It is unlikely that the exact circumstances which led to this complaint will arise again, but the issues identified in this investigation also have implications for other 'one-off' developments. Lessons can be learned from this matter and should be considered in the assessment of future DAs where heritage and sustainability elements are at odds.

Recommendations:

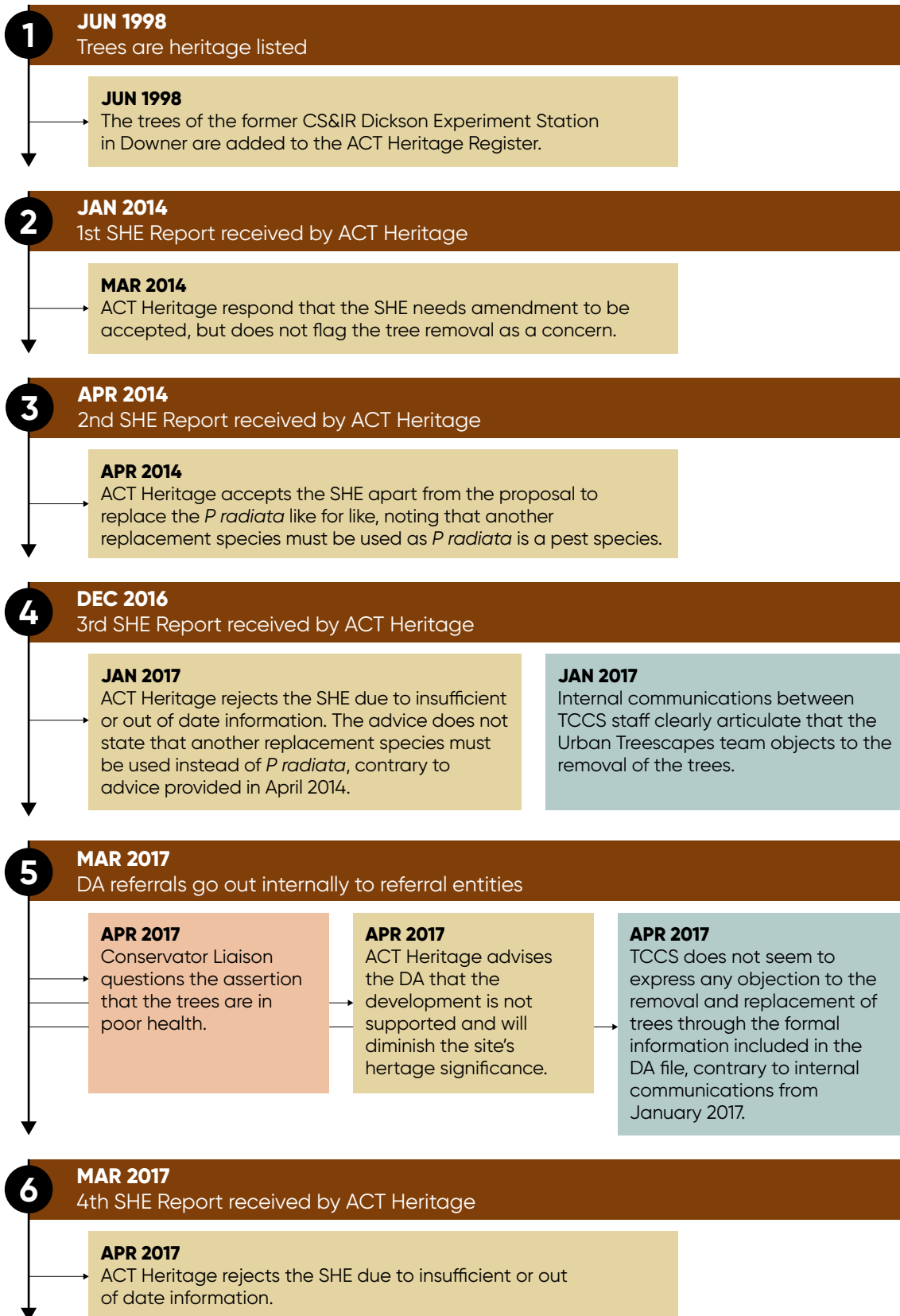
1. Where tree planting is mandated as part of development conditions (e.g., for heritage protection), amendments to the relevant planning codes should be made to enable the consideration of these trees in solar access assessments to ensure the best possible outcome for both tree canopy cover and solar access.
2. As part of the heritage arrangements review and the planning system review and reform, the ACT Government should consider whether it continues to be appropriate for statutory non-Indigenous heritage values to be considered more important than sustainable development where these values are at odds.
3. As part of the ACT Planning System Review climate change mitigation should be introduced into the Territory Plan in such a way that it is referred for entity advice and can be considered on an equal footing with other statutory matters. The referral entity could be the Office for Climate Action.

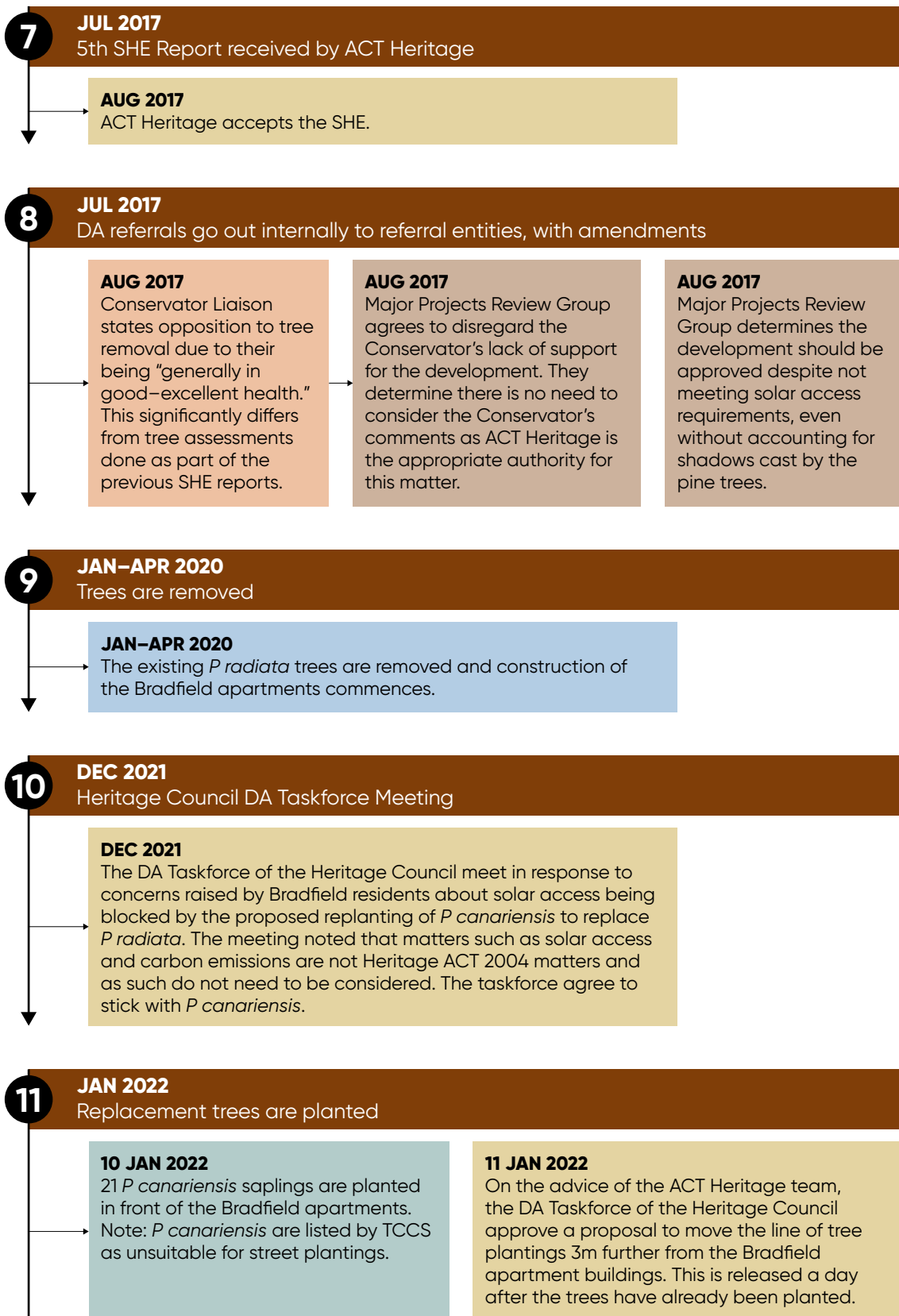
An aerial photograph of a suburban neighborhood. In the foreground, there's a large brown rectangular overlay containing the title text. Below the overlay, the image shows a residential street with several houses, some with solar panels on their roofs. There are green lawns, trees, and a road with a few cars. The background shows more houses and a larger building with a flat roof.

Additional Summary Information

Heritage Tree Timeline

Milestones Developer ACT Heritage ACT Planning TCCS Conservator





Development Application and Heritage Approval Processes

