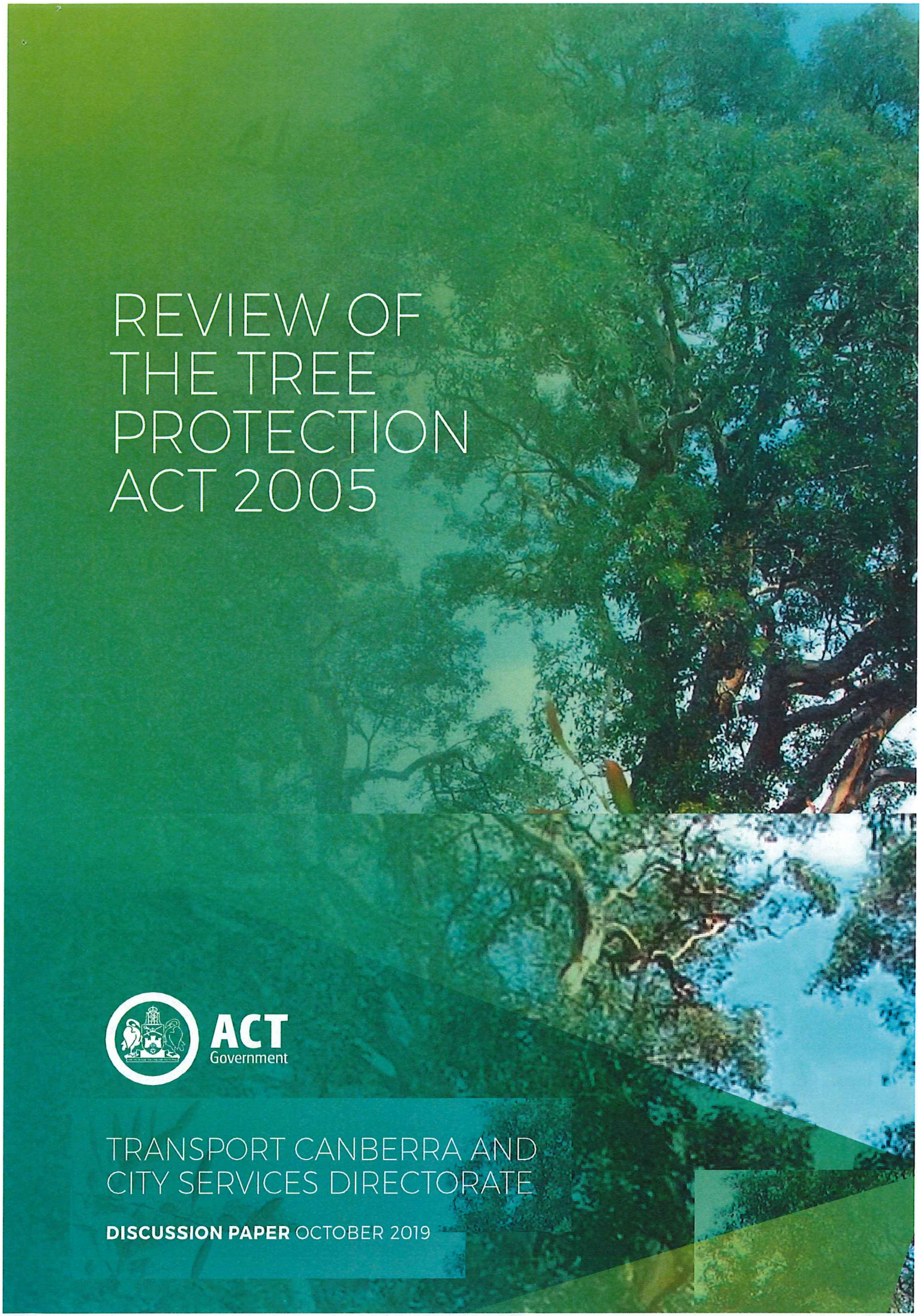

REVIEW OF THE TREE PROTECTION ACT 2005

ACT Government

TRANSPORT CANBERRA AND CITY SERVICES DIRECTORATE

DISCUSSION PAPER OCTOBER 2019

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Message from the Minister

LEGISLATIVE ASSEMBLY
RECORD
24 OCT 2019
MOP No.
Paper No.
Clerk

Our incredible tree canopy in Canberra contributes so much to Canberra's character and what makes our city a great place to live.

The ACT Government has set a clear direction for the future of a modern garden city in which trees will be a major focus. The Government's *Climate Change Strategy* and *Living Infrastructure Plan* released in September 2019 set a tree canopy cover target of 30% by 2045. At the moment our coverage is around 21%, and changes to legislation will be required if we are going to achieve our goal.

The ACT Government has also embarked on the largest tree planting program this century to renew and enhance our tree canopy. While the ACT Government works hard to manage the trees in parks, on verges and in other public places, a large part of our canopy cover comes from the trees we have around our homes, on private land.

The *Tree Protection Act 2005* sets out how we manage trees on private land. It has been clear from my conversations with the community that the legislation does not always work for Canberrans and can in fact lead to adverse outcomes for our canopy cover. Under the existing legislation thousands of trees have been removed on leased land and not replaced.

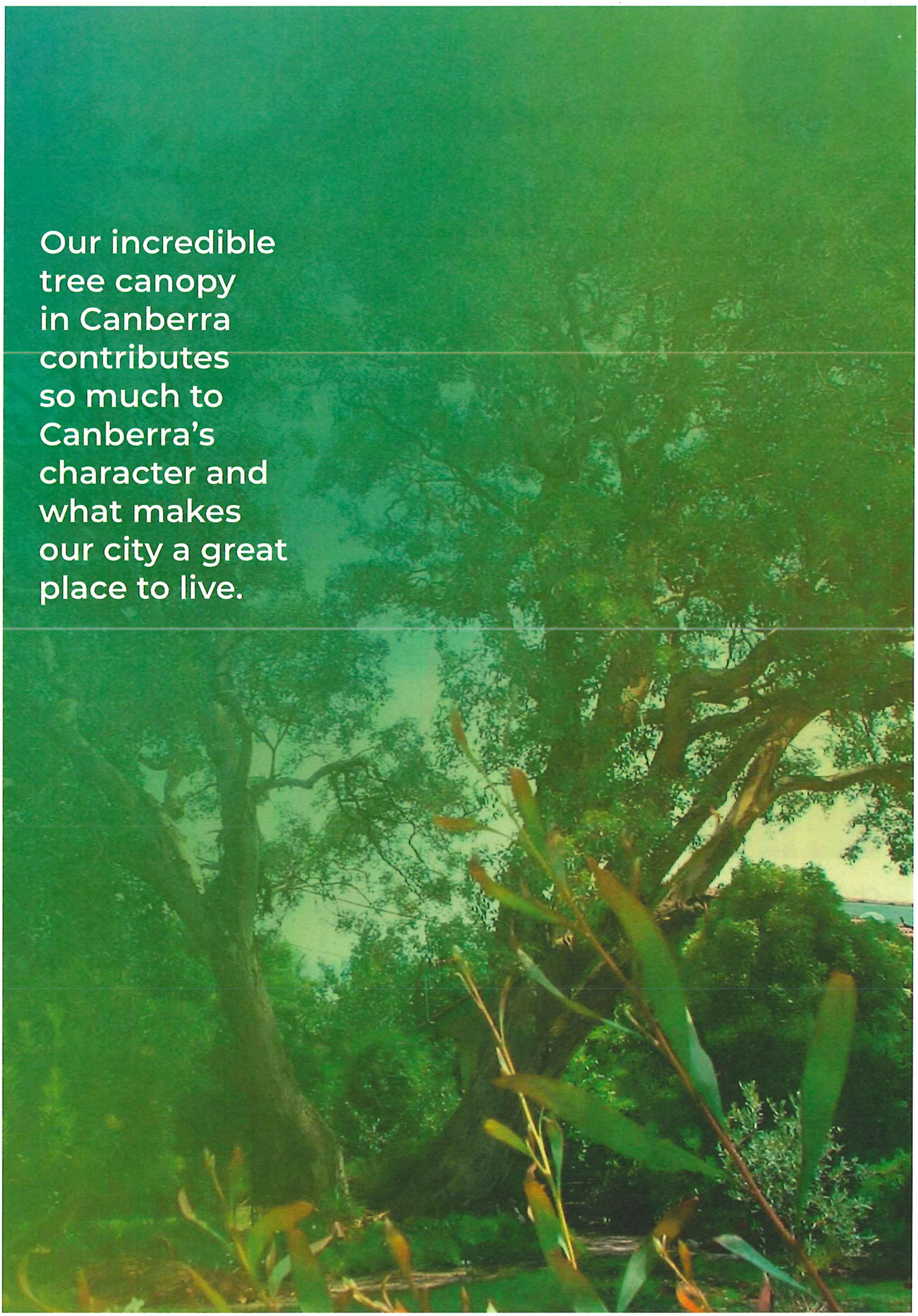
This discussion paper is intended to start a conversation on reforming the *Tree Protection Act* to make the process for managing trees on leased land more streamlined, fairer and focused on the overall outcome of enhancing our tree canopy.

One of the key ideas is introducing a system of offsets to ensure that if a tree has to be removed, then it is replaced by multiple trees to ensure that the canopy is renewed and enhanced.

Thank you in advance for your input on how we can reform our *Tree Protection Act* and ensure Canberra's urban forest is enhanced for generations to come.

Chris Steel MLA

MINISTER FOR CITY SERVICES


Our incredible tree canopy in Canberra contributes so much to Canberra's character and what makes our city a great place to live.

Introduction

Since Canberra's early days trees have been an important element in shaping our city and lives. Trees were a key element of Walter Burley Griffin's original plan, and in many respects, Canberrans are enjoying the legacy of tree planting undertaken in previous generations. The time is right to renew and expand our urban forest in the face of challenges such as urban densification and climate change.

Achieving the target of 30% canopy cover[1] by 2045 as outlined in both the *Climate Change Strategy* and *Living Infrastructure Plan,* will be an ambitious and challenging task, but a necessary one to ensure the city is resilient against climate change.

Meeting this target will involve changes to the way the ACT Government manages our urban forest, including trees both on public land and on leased land.

As part of the ACT Government's commitment to maintaining a healthy and resilient urban forest, TCCS will develop an Urban Forest Strategy in close collaboration with other managers of Canberra's urban forest. This strategy will focus on trees on public land and will outline how the urban forest can be maintained and enhanced to improve amenity in a changing climate and deliver sustainable biodiversity outcomes, as our city form changes through urban intensification and expansion. It will set out a pathway to meet canopy targets, build the resilience of Canberra's green canopy and ensure that Canberra remains a liveable city in the future.

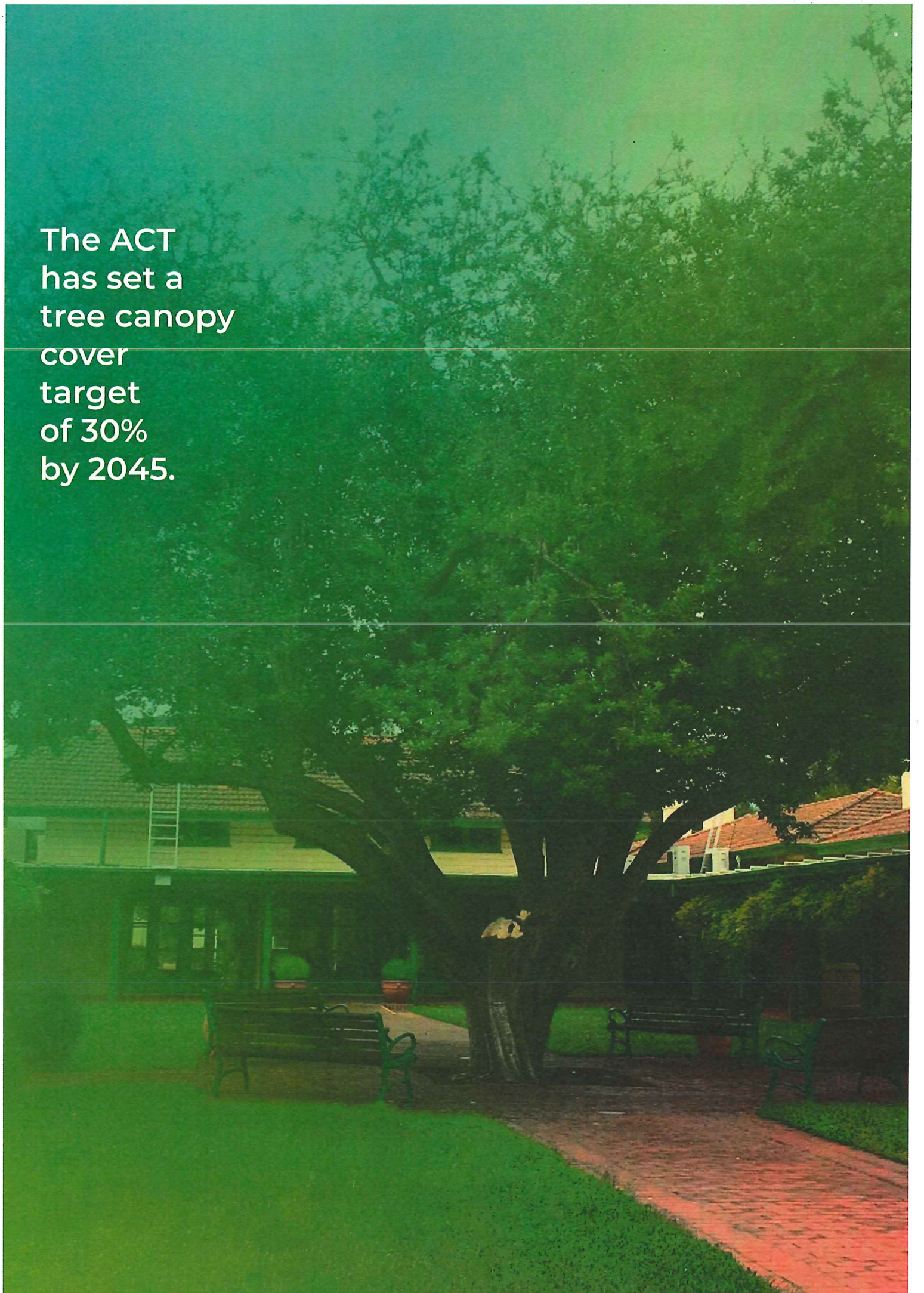
The legislative reform of the *Tree Protection Act 2005* (TP Act) that is the focus of this discussion paper is in addition to developing this Urban Forest Strategy.

The TP Act sets out how we protect individual trees on leased land in Canberra. The TP Act is now almost 15 years old and needs to be reviewed to ensure it is consistent with achieving the targets set out in both the *Climate Change Strategy* and *Living Infrastructure Plan* and with community expectations.

In reviewing the TP Act we want to create a framework that ensures we can enhance the urban forest through a well-designed approach to respond to the threat of climate change and underpin the health, liveability and wellbeing of Canberrans. We also want to ensure trees can contribute to the health and livelihood of Canberrans for generations to come. To do this we need to look at concepts like offsets, streamlining our processes and provide greater transparency.

You can find information on how to have your say at **www.yoursay.act.gov.au**.

1 This figure refers to the canopy coverage for urban areas and includes residential, commercial, urban open space and road reserves plus hills, ridges and buffers, parkland etc.


The ACT
has set a
tree canopy
cover
target
of 30%
by 2045.

Why effective tree management is important

The trees that make up the urban forest are essential to making the city resilient against climate change. There are estimated to be 770,000 trees on leased land (i.e. private land) in Canberra, approximately equal to the number of trees on public land. This estimate includes regulated trees (those of sufficient size to fall within the Act) as well as smaller trees that are not regulated. Without a framework to protect and enhance canopy cover between one quarter and half of these trees could be lost over the next 20 years, due to the ageing forest and the need to remove trees for urban intensification.

In addition to the important role trees play in mitigating climate change, we also know that trees are important to Canberrans and contribute significantly to the City's liveability. In developing the *Better Suburbs Statement* a 2018 citizen's forum ranked street and park trees as their second highest priority among 14 municipal service delivery themes. Trees contribute to creating a sense of identity for the City, make it easier to use active travel methods and can contribute to overall wellbeing.

The TP Act currently has a focus on protecting trees at an individual level, rather than focusing on the urban forest as a whole and total canopy coverage. Any tree in Canberra that meets set criteria, like being over 12m tall or with a canopy of over 12m (see the full criteria in **Appendix A**) is automatically protected and can only be pruned or removed if it meets a strict set of criteria.

This can result in outcomes that do not align with the goal of enhancing our urban forest. In some cases it means trees cannot be removed, with impacts on urban design outcomes or public safety issues. Anecdotal evidence also suggests that the strict rules about when a tree can be removed results in removals without approval, or in tree poisonings. These actions have adverse effects on our urban forest and our ability to reach our canopy coverage targets.

Tree canopy target

In 2015, Canberra's urban area, the private and public lands including the reserves in our inner hills, ridges, buffer spaces (woodlands, waterways and grasslands), was estimated as having an average 21% tree canopy cover. A key goal of the recently released *Living Infrastructure Plan* is to adopt and progress towards a target of 30% of Canberra's urban environment covered by a tree canopy or a tree canopy equivalent (such as green roofs, shrub beds, wetlands and rain gardens etc). Implementation of this plan is a key action in the recently released *Climate Change Strategy*.

In acknowledgement of this commitment, over 17,000 new trees will be planted on public unleased land across the city between 2019 and 2023 to ensure Canberra's beautiful urban forest is renewed and enhanced for future generations. This is the largest program of tree planting this century, to renew and enhance Canberra's tree canopy.

It is intended that the tree canopy coverage target will be measured at the city-wide scale and be delineated by Canberra's urban footprint boundary. Both public and private land will be included in the measurement.

Where 30% canopy cover cannot be achieved through tree and vegetation plantings, alternative locality-specific solutions will be used based on assessment of microclimate and built environment conditions. In assessing the most effective and appropriate living infrastructure options, the focus will be on achieving the suite of benefits, city cooling plus environmental services, equivalent to the 30% target.

Alternative treatments to meet the equivalence of the tree canopy cover and permeable surfaces targets may include green roofs and walls, wetlands and rain gardens, water features and fountains, watered grass, shrub beds, and climbers on structures. In higher density areas, roof and podium gardens are effective in retaining and/or slowing the flow of water, and also provide opportunities for city cooling, wildlife habitat, community gardens and high value open spaces.

As the Plan's targets are to be achieved on both public and private land, the Government, community and business will need to work collaboratively to realise the desired outcome. The *ACT Planning Strategy 2018* commits to reviewing planning and development codes, guidelines and standards to incorporate living infrastructure objectives. Implementation of the canopy cover target will be supported through the review of planning policy and mechanisms to maintain and enhance the urban forest in precinct, estate and district level planning processes, and review of relevant development and design guidelines.

Trees in Canberra now

Updated data on the changes to urban canopy cover in the past five years will be available in 2020.

Under the TP Act there are two ways that trees can be protected on leased land – either by registration (registered trees) or by meeting a set of criteria (regulated trees).

Registered trees are trees (or groups of trees) that have been registered on the basis of their natural or cultural heritage, landscape and aesthetic or scientific value. The full detailed criteria can be found in **Appendix B**. Applications for registration of trees are considered by the Conservator of Flora and Fauna and may include consultation with relevant sections of government before deciding whether or not the tree should be registered. Registration is the highest form of protection offered under the TP Act and any tree within the built-up urban area, whether on public or private land, can be nominated for registration. Registered trees cannot be removed for development and registration can only be cancelled in very limited circumstances. There are currently 176 single tree registrations and 35 group registrations in the ACT.

Regulated trees are trees in a tree management precinct that are either 12 metres high or taller; have a trunk with a circumference of 1.5 metres or more (at 1 metre above natural ground level); have 2 or more trunks with the total circumference of all trunks being 1.5 metres or more (also at 1 metre above natural ground level); or have a canopy spread of 12 metres or more. Trees that are defined as a pest plant under the *Pest Plants and Animals Act 2005* and trees on public land are not regulated trees. Currently all leased Territory land in the ACT is under a tree management precinct.

Under the TP Act a person can apply to the Conservator of Flora and Fauna, through the Tree Protection Unit, to impact on or remove a regulated tree on their block, but applications can only be approved in some circumstances. A copy of the criteria that is used to assess applications is at **Appendix B**.

Tree protection criteria in other Australian jurisdictions typically cover trees that are of a smaller size than is specified in the TP Act. Changing the size criteria for regulated trees would have a significant impact on the coverage of the Act. For example, capturing smaller trees would enable increased protection of younger trees (rather than only protecting mature trees) and would assist in reaching the 30% tree canopy cover target and ensure recruitment of the urban forest as older trees meet the end of their useful life. However, it would increase the number of trees that require approval for removal.

In the 2018-19 financial year 1,837 Tree Damaging Activity applications to remove or damage trees were lodged and the Conservator provided advice on a further 420 Development Applications.

Approvals for Tree Damaging Activity activities are received for a very small proportion of the overall urban forest on private land. In 2018-19, a total of 2,974 individual regulated trees were assessed in relation to a proposed damaging activity as outlined in the Act, through the 1,837 Tree Damaging Activity applications (some covering multiple trees). This represents less than half of one percent of the total estimated number of trees. Of the trees subject to an application to undertake a potentially damaging activity, approval rates varied from 63.5% for major pruning to 96.1% for ground works within tree protection zones, where conditions to limit damage to trees can be put in place as part of the approval.

TABLE 1 Summary of Tree Damaging Activity outcomes (individual trees) in 2018-19

Tree Damaging Activity	Not granted	Granted	Percentage of trees with activity granted (%)
Tree felling/removal	589	1,731	74.6%
Major pruning	99	172	63.5%
Lopping	16	40	71.4%
Ground works with conditions	12	299	96.1%
Minor pruning	2	14	87.5%
Total number of trees:	**718**	**2,256**	**68.2%**

Under the TP Act decisions on applications to remove trees are made by the Conservator of Flora and Fauna (the Conservator). This is a role that is established under the *Nature Conservation Act 2014* to develop and oversee policies, programs and plans for the effective management of nature conservation and to monitor the state of nature conservation. The TP Act sets out a number of responsibilities for this role including determining applications for tree damaging activities and tree removals. This role sits within the Environment, Planning and Sustainable Development Directorate. The operational unit responsible for the day to day administration of this Act, including undertaking activities as a delegate of the Conservator, sits within the Transport Canberra and City Services Directorate within the City Presentation business unit.

CASE STUDY

Limitations of the current Act in relation to criteria for removal

Under the current TP Act a tree can be removed if the roots are causing 'substantial damage to a substantial building, structure or service'. Because this criteria requires the damage being done to be substantial, and the affected building or structure to also be substantial this is a high test. This can mean that cases of medium but not substantial damage are not captured and trees in these cases cannot be removed.

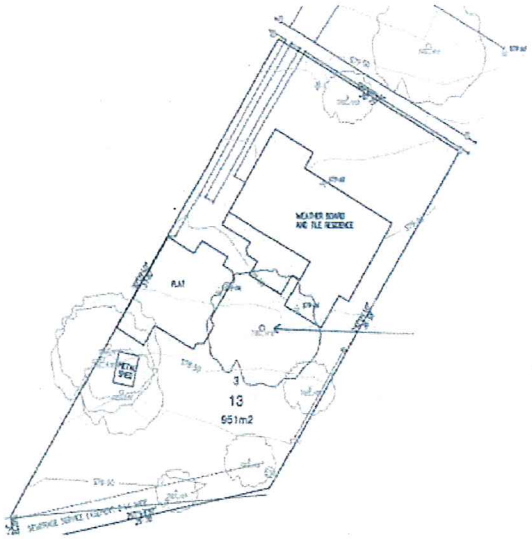
In this example tree roots are causing the driveway to lift, creating a trip hazard. Because the tree causing this damage is healthy and neither the damage itself or the structure that was damage is considered 'substantial', the tree cannot be removed.

CASE STUDY

Limitations of the current Act in relation to Tree Damaging Activity approvals

Under the current TP Act the criteria that dictates when a tree can be removed is focused on the health and structure of the tree. This can present challenges for house owners. In the example below a regulated tree is located in the centre of the block, preventing any development. As the tree is healthy and of sound structure the tree cannot be removed under the TP Act.

In this example it is possible for the owners to apply for a Development Approval to remove the tree on design grounds. This could allow the ACT Planning Authority to permit removal of a tree, even if it would not be permitted under the TP Act, after consideration of a range of broader issues. In these cases the Conservator can suggest conditions related to trees on the site be included on the Development Approval. The process for seeking Development Approval usually takes several months and can be costly, with no guarantee that the tree can be removed until the DA is determined. This increases time and cost for both the applicant and the Government.



What about trees on public land?

The current TP Act does not regulate trees on urban public land, unless they have been registered on the basis of their special significance. The *Public Unleased Land Act 2013* does provide for some protection measures for trees as public assets on public land, however this is limited. The *Nature Conservation Act 2014* provides protection for trees outside of the urban area, for example, in nature reserves. The future development of the Urban Forest Strategy will consider all trees in the urban forest.

A vision for the future

This review will aim to create a well-designed framework for management of trees on leased land that supports the objective of increasing canopy cover over the long term and protects highly valued/significant trees in our urban forest.

We will achieve this vision by following these guiding principles throughout the review:

- some trees in Canberra are exceptional and should continue to have a very high degree of protection (for example remnant eucalypts or trees registered for cultural significance including scar trees)
- trees on leased land make a vital contribution to overall canopy cover and the community should be encouraged to retain and care for trees on leased land
- when a regulated tree is removed it should be replaced with an equivalent tree/s or other living infrastructure
- processes for approval to remove a tree should be streamlined and transparent
- an effective compliance framework that is enforceable must support the goals of the legislation.

How we could get there?

To achieve this vision there are a number of solutions that can be considered. These are discussed further below.

Offsets – offsets are used to compensate for loss and would mean that when a tree (that meets a certain set of criteria) is removed, it needs to be replaced with another tree or trees, or other equivalent living infrastructure. Offsets work on a 'no net loss principle' and can be implemented in a variety of ways. The ACT could consider a system whereby when a tree is removed, a replacement tree, trees, or similar living infrastructure is planted on the same block, or instead an amount could be paid into an offset fund which would be used to plant trees on public land. A combination of approaches may be necessary to ensure offsets achieve a no net loss result in the short to medium term. It is important to take into account the time it will take for offset plantings to grow and predicted mortality rates of new trees. An effective compliance framework would also be required to ensure replacement plantings are achieved and retained.

CASE STUDY

Offset systems in Brisbane and Melbourne

Brisbane City Council

Brisbane City Council protects vegetation, both native and exotic, on private property that is generally mature and/or prominent in the landscape, or has specific historical or cultural value in Brisbane. The significant landscape tree overlay identifies areas with trees that make a significant contribution to landscape character value and provides for the assessment of the suitability of development in terms of the potential impacts on vegetation identified in the overlay. Where this overlay applies, development must facilitate the retention of significant landscape trees or outline how replacement trees are to be provided in the exceptional instance where a significant landscape tree cannot be retained.

The purpose of Brisbane's Significant landscape tree overlay code is to ensure that if in the exceptional circumstance where an individual significant landscape tree cannot be retained, it is replaced with a number of trees so there is no net loss in the tree canopy area, and the replacement tree species replaces the landscape character values of the significant landscape tree to be lost.

For example — an original tree of 6m canopy diameter has a canopy area of 28m² (3m x 3 x 3.147) and would require 2 x advanced replacement trees. Each tree would typically be expected to grow from a 2m canopy diameter to a 4m–4.5m canopy diameter within three years. This would provide a minimum 25m²–30m² total canopy area to achieve the no net canopy loss requirement.

City of Melbourne

City of Melbourne has developed a process to acquire compensation for trees removed on public land due to development. Where a public tree removal is approved by Council's arborist in relation to a development, the associated cost of the tree and its removal is paid by the property owner or representative prior to the removal.

The costs associated with removal of a public tree include:

A – Removal costs	Amounting to the fees incurred by Council for physically removing the tree.
B – Amenity value	Calculated in accordance with Council's Amenity Formula.
C – Ecological services value	Calculated in accordance with the i-Tree valuation tool.
D – Reinstatement costs	Calculated in accordance with the greening required to replace the loss to the landscape incurred by the removal.

The Amenity Value formula has been prepared to assist with calculating the monetary amenity value of a City of Melbourne tree. When young trees with a 6cm trunk diameter or less will be replaced by another tree, there will be no amenity value charge.

The basic monetary value of a tree is determined by matching the trunk diameter at breast height (DBH) with its corresponding base value. The additional components of the formula are determined by the corresponding total score of the assessment criteria.

Value (V) = Basic Value ($) x Species (S) x Aesthetics (A) x Locality (L) x Condition (C)

Streamlined processes and decision making – the current processes for applying to remove a tree is relatively straightforward but lacks flexibility where trees do not meet removal criteria (Refer to case study for an example). The process can become complicated when the planning system is used to allow for more flexible decision making. The ACT could consider a more streamlined assessment process that provides greater transparency and certainty about outcomes. Consideration could also be given to creating a new role that would be the decision maker on individual applications and work in conjunction with the Conservator. This suggestion has been raised before and is often described as being a 'tree curator'. The Commissioner for Sustainability and the Environment recommended the creation of an ACT Tree Curator (to replace the existing Conservator in the *Tree Protection Act 2005*) in the 2011 Report on the Investigation into the Government's tree management practices and the renewal of Canberra's urban forest.

Outcome focused criteria – the criteria that is used to assess whether a tree can be removed (**Appendix B**) is currently relatively prescriptive and does not always allow for innovation and best practice. These criteria could be changed to be more outcome-focussed with a view to maintaining protections while allowing for urban development and densification. The criteria could work alongside an offset system.

Community engagement

The Tree Protection Act is one important mechanism to protect trees. However, the ACT Government is also pursuing a range of other actions to enhance the urban forest, through the Climate Change Strategy and the Living Infrastructure Plan. These strategic documents commit the Government to a 30% urban canopy cover target by 2045. These strategies importantly acknowledge the critical role that the community plays in meeting the targets, including through hands-on action and fostering attitudinal changes through promoting the benefits of urban trees.

While such community-centred actions are not specifically provided for in the Act, they are nonetheless important considerations in a wholistic approach to managing the urban forest.

How to have your say

You can have your say in a number of different ways including:

- Engage with us on **yoursay.act.gov.au**
- Complete the survey at **yoursay.act.gov.au**
- Writing to us at **communityengagement@act.gov.au**
  or Attention: Business Development Unit, TCCS, GPO Box 158 Canberra ACT 2601.

This consultation period runs from 22 October to 8 December 2019.

You can stay informed and updated on the YourSay website. We will provide updates on progress, including with a summary of this consultation process.

Questions to get you thinking

1. In light of the ACT's new 30% canopy target, do you think we should amend the focus or priority of the Tree Protection Act?
2. Should the criteria for tree removal at Appendix B be changed?
3. What criteria, if any, do you think should apply in addition to the current criteria at Appendix B? (For example, providing greater solar access)
4. Should these criteria be more outcomes focused?
5. Would you support more outcome focused criteria in exceptional circumstances?
6. Do you support the establishment of a tree fund which would be used to fund more trees being planted in Canberra?
7. Would you support the establishment of a no net loss offset scheme? (Whereby when a tree has to be removed, it is replaced by another tree/s or funds are provided into a tree fund).
8. Would you support replacement trees planted on (a) the same block? (b) public land in the area? (c) any area in Canberra?
9. Would you support more flexible criteria for removing a tree on leased land, if it had to be replaced with new tree/s with no net loss to the urban canopy?
10. Do you support the establishment of an ACT tree curator? What role could they play in enhancing the canopy on leased land?
11. How could the overall process of applying to manage trees on leased land be improved?
12. Are there opportunities to reduce regulatory burden on leaseholders whilst maintaining the tree canopy?
13. Should the removal process be allowed through the planning system?

Appendices

Appendix A – regulated tree criteria

1. 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 and
   a. is 12m or more high; or
   b. has a trunk with a circumference of 1.5m or more, 1m above natural ground level; or
   c. has 2 or more trunks and the total circumference of all the trunks, 1m above natural ground level, is 1.5m or more; or
   d. has a canopy 12m or more wide.

2. However, a tree is not a regulated tree if it is a pest plant under the *Pest Plants and Animals Act 2005*

3. A tree management precinct is an area declared under part 5 to be a tree management precinct.

Appendix B – criteria for removal

Approval to damage a regulated tree

1. The Conservator of Flora and Fauna (the Conservator) may give an approval to damage a regulated tree under section 25 when:
   a. the tree is in decline and its life expectancy is short; or
   b. the tree represents an unacceptable risk to public or private safety; or
   c. the tree is shown to be causing or threatening to cause substantial damage to a substantial building, structure or service; or
   d. the location of the tree is inappropriate given its potential size and growth habit (excluding remnant eucalypts); or
   e. the tree is substantially affecting solar access to the lessees lease, or neighbouring lease, during winter between the hours of 9am to 3pm and pruning is not sufficient to remedy this (excluding remnant eucalypts); or
   f. the tree is causing an allergic reaction to an occupant of the lease, or neighbouring lease, and the claim can be supported by certification from a relevant medical specialist; or
   g. where the tree is part of a close planting of a number of trees, the removal of the tree will allow the other trees to develop; and
   h. all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective.

2. The Conservator may also give an approval under section 25 of the Tree Protection Act 2005 to remove a tree if the tree is located on a block of less than or equal to 1200m and is a species listed in Schedule 2.

3. When deciding whether the criteria in paragraph 1 are met, the Conservator may consider:
   a. any exceptional circumstances that have been raised by the applicant, taking into account advice from the Tree Advisory Panel;
   b. the importance of the tree in the surrounding landscape; and
   c. if the tree is a species listed on schedule 3, whether the tree has ecological importance to the local environment.

4. In considering whether criteria 1(1)(b) and (c) are met the Conservator must assess whether the removal of the tree is urgently required in accordance with section 29 of the Act.

5. The Conservator may give an approval under section 25 of the Act to undertake major pruning on a regulated tree when:
   a. the work is required:
      i. as a remedial treatment; or
      in the general interests of the health of the tree; or
      i. to reduce an unacceptable risk to public or private safety; or
      ii. to reduce the risk of damage or prevent further damage to a substantial building, structure or service.
   b. the tree is substantially affecting solar access to the lessees lease, or neighbouring lease, during winter between the hours of 9am to 3pm and minor pruning is not sufficient to remedy this (excluding remnant eucalypts).

6. The approval of lopping should only be considered when the criteria in clause 1 are met and the retention of the tree is considered necessary. Example, where the retention of the tree is necessary to maintain habitat or heritage values.