

# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

## WICKERSON v CONSERVATOR OF FLORA AND FAUNA (Administrative Review) [2018] ACAT 43

AT 72/2017

**Catchwords:** **ADMINISTRATIVE REVIEW** – tree protection – reconsidered decision by Conservator of Flora and Fauna to refuse approval to remove regulated tree – criteria for tree damaging activity – whether tree represents an unacceptable risk to public or private safety – whether tree is shown to be causing or threatening to cause substantial damage to a substantial building, structure or service – whether location of tree is inappropriate given its potential size and growth habitat – whether tree should be removed to allow others to develop – whether tree is substantially affecting solar access – consideration of each criterion – exceptional circumstances – tree adjacent to building with asbestos roof – whether all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective – whether block is of small size and there are grounds for exercise of discretion to remove regulated tree – approval granted

**Legislation:** *ACT Civil and Administrative Tribunal Act 2008* s 26  
*Tree Protection Act 2005* ss 3, 8, 10, 15, 19, 21, 25, 72, 106, 107 107B, Sch 1, 3

**Subordinate Law:** *Tree Protection (Approval Criteria) Determination 2006 (No2)*  
(Disallowable Instrument DI 12006-60)

**Cases cited:** *Blackshaw & Anor v Campbell* [2016] ACAT 80  
*Blackshaw & Anor v Campbell* [2016] ACAT 108  
*Bowen, Farley, Farthing and Mullinger v National Trust* [2011] EWHC 1992 (QB)  
*Bozin v Conservator of Flora and Fauna* [2010] ACAT 91  
*Caminer v Northern and London Investment Trust Ltd* [1951] AC 88  
*Campbell v Blackshaw & Anor* [2016] ACAT 64  
*Commissioner for ACT Revenue v Butt* [2016] ACAT 109  
*Egan v Conservator of Flora & Fauna* [2016] ACAT 27  
*Legal Practitioner 'S' v Law Society of the ACT* [2018] ACAT 12  
*Kelly v Conservator of Flora and Fauna* [2009] ACAT 24

*Macjiejewski v Conservator of Flora & Fauna* [2013] ACAT 78  
*Maleganeas v Conservator of Flora and Fauna* [2007] ACTAAT 24  
*Moss v Conservator of Flora and Fauna* [2016] ACAT 1  
*Muttukumar & Anor v Conservator of Flora and Fauna* [2008] ACTAAT 13  
*Svensson v Conservator of Flora and Fauna* [2010] ACAT 10

**List of**

**Texts/Papers cited:**

ACT Coroners Court and Maria Doogan, *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003* (ACT Coroners Court, 2006)  
 ACT Government, *Urban trees in the ACT* Access Canberra  
 ACT Government, *Asbestos* Access Canberra  
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 ACT Government, *Design Standards for Urban Infrastructure 23, Plant Species for Urban Landscape Projects*  
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 ACT Government, *Governance Principles - Appointments, Boards and Committees in the ACT*  
 Australian Government, Your Home: Australian's Guide to Environmentally Sustainable Homes website, *Passive Solar Heating* (2013)  
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 Pryor LD and Banks JCG, *Trees and Shrubs in Canberra* (Little Hills Press Crows Nest, 1991)  
 Queensland Government factsheet 'Is it safe? Cracked, damaged or weathered asbestos cement sheeting'  
 Shigo A L, *How Trees Survive, Tree Care Industry Volume VII* (Number 2-February 1996)

**Tribunal:** Presidential Member E Symons

**Date of Orders:** 16 April 2018

**Date of Reasons for Decision:** 16 April 2018

**AUSTRALIAN CAPITAL TERRITORY )  
CIVIL & ADMINISTRATIVE TRIBUNAL ) AT 72/2017**

**BETWEEN: ALEC WICKERSON**  
Applicant

**AND:**

**CONSERVATOR OF FLORA AND FAUNA**  
Respondent

**TRIBUNAL:** Presidential Member E Symons

**DATE:** 16 April 2018

**ORDER**

The Tribunal orders that:

1. The Conservator's decision is set aside and in its place is substituted a decision that the application for approval to remove a regulated tree is approved.
2. This decision takes effect on 14 May 2018.

.....  
Presidential Member E Symons

## REASONS FOR DECISION

### The application

1. This is an application by Alec Wickerson (**applicant**) for review of a reconsidered decision (**reconsidered decision**) made by the Conservator of Flora and Fauna (**respondent**) on 3 November 2017 to refuse approval for the removal of a regulated tree located on Block 8 Section 35 Lyneham (the **property**), under section 107 of the *Tree Protection Act 2005* (**TP Act**). The reconsidered decision upheld a previous decision dated 14 September 2017 under section 25 of the TP Act to refuse a tree damaging activity (**original decision**). The applicant is the lessee of Block 8 Section 35 Lyneham.

### Background

2. On 5 September 2017 a branch from a *Cupressus glabra*, commonly known as an Arizona Cypress (**tree**) growing in the applicant's yard had fallen on to the ground near the front corner of the applicant's house and another broken branch remained hanging in the tree.
3. On 6 September 2017 at 6.57am the applicant applied to the respondent for approval to damage two trees, a *Betula Pendula* and the *Cupressus glabra*, by removing them. The *Betula Pendula* was not listed on the ACT Tree Register and did not require approval for its removal. The tree is located in the eastern side yard of the property between the applicant's property's deck and a timber fence separating the property from a neighbouring property.
4. The respondent had previously granted the applicant approval to remove a *cupressus macrocarpa* in June 2014 on the basis that "the tree is located on a block of less than or equal to 1200m<sup>2</sup> and is a species listed in Schedule 2."<sup>1</sup>
5. On 14 September 2017 a delegate of the respondent refused the application on the ground that it was not established that any of the criteria for removal set out in Schedule 1 of the *Tree Protection (Approval Criteria) Determination 2006 (No2)* (ACT) (Disallowable Instrument DI 12006-60) (**Determination**) had been met.

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<sup>1</sup> Supplementary T documents page 127, respondent's decision 11 June 2014

6. On 20 September 2017 the applicant submitted an application for reconsideration of the decision in relation to the tree under section 106 of the TP Act on grounds of unacceptable risk to public or private safety from dropping branches; threatening to cause substantial damage to a substantial building or structure; the tree's location is inappropriate given its potential size and growth habit; it is substantially affecting solar access to the applicant's lease and to the neighbour's lease and the tree is part of a close planting of a number of trees and its removal will allow the other trees to develop. The application submitted on 20 September 2017 included a letter in support from a neighbour, Ms Anne Cahill Lambert OAM, dated 20 September 2017.
7. Ms Hayley Crossing, a member of the Tree Advisory Panel (**TAP**) inspected the tree on 25 October 2017 and prepared a report dated 31 October 2017 for the TAP. This report concluded that the tree did not meet any of the criteria relied upon in the Determination for removal and it did not meet the fire risk assessment criteria for removal. The report recommended removal of the hanging branch in the tree and some reduction pruning to reduce the weight, especially over the neighbour's boundary.
8. At a TAP meeting on 31 October 2017 the panel considered the application for reconsideration of the original decision and provided advice to the respondent to refuse the application on the basis that no criteria under the TP Act for approval to remove are met. The respondent made a reconsidered decision to uphold the original refusal on 2 November 2017.<sup>2</sup> The applicant received the reconsidered decision on 10 November 2017.
9. On 1 December 2017 the applicant applied to the Tribunal under section 107B of the TP Act for review of the respondent's reconsidered decision.

#### **Preliminary matter**

10. On 28 February 2018 the respondent identified a defect with the reviewable decision, namely that the advice provided by the TAP to the respondent was not

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<sup>2</sup> T documents page 69

provided by a properly constituted TAP as only two members were appointed to the TAP at that time. The circumstances required at least three members.<sup>3</sup>

11. The respondent brought this defect to the Tribunal's and the parties' attention by email on 28 February 2018.
12. On 4 March 2018 a properly constituted TAP reviewed the matter and provided its advice to the respondent. The TAP advised that "the criteria for removal of the subject tree are not satisfied and therefore the application for removal of the tree should be refused."<sup>4</sup> In an undated Expanded Statement of Reasons<sup>5</sup> the Conservator confirmed the original decision to refuse the application for tree damaging activity in relation to the tree.
13. Was jurisdiction properly conferred?
14. The respondent submitted that now that advice from a properly constituted TAP has been provided to the Conservator the Tribunal can be satisfied that it is vested with jurisdiction. The Tribunal agrees.
15. The Tribunal is satisfied that it is vested with jurisdiction to hear this matter under the TP Act.

### **The hearing**

16. The applicant represented himself. He gave evidence and called evidence from his partner, Ms Tara Williams, and a neighbour, Mr David Lambert. Ms Kristy Katavic of Counsel represented the respondent instructed by Ms Deborah Bak from the ACT Government Solicitor. Ms Hayley Crossing gave evidence for the respondent.

### **Site inspection**

17. The hearing on 15 March 2018 commenced with a site inspection of the subject tree and the property. The inspection was conducted in the presence of the parties, the respondent's legal representatives and some of the witnesses who later gave

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<sup>3</sup> Respondent's statement of facts and contentions filed 6 March 2018 at [13]; Section 69(1) of the TP Act

<sup>4</sup> Ibid at [14]

<sup>5</sup> T Documents pages 101 - 107

evidence at the hearing. The Tribunal's attention was drawn to the tree from the street at the front of the block and its lean towards the neighbour's property. The Tribunal's attention was also drawn to the fallen branch which was sitting on the ground to the side of the applicant's property and to where it had landed on the applicant's property on 5 September 2017 and to the location of the cypress tree which had been removed in 2014. From the driveway along the western side of the property the Tribunal's attention was drawn to the hanging branch in the tree.

18. The Tribunal then observed the tree at close range and its attention was drawn to the base of the tree and where it comes out the ground, to the structure and growth pattern of the lower and upper branches, the branch attachments to the tree, the shape of the tree's canopy and its overhang over the house and fence. From the rear of the property the Tribunal's attention was drawn to the shape of the canopy, the lean of the tree, the distances of the tree to the applicant's house and to the boundary fence with the neighbouring property, the location of this tree and other trees on the property and the extent of shading on the applicant's house. The Tribunal then observed the tree from the neighbouring property where its attention was drawn to the distance of the tree from the house on that block and the amount of tree overhang over this property. The Tribunal's attention was also drawn to the tree's shading effect on this property.
19. The hearing continued at the Tribunal's premises later the same morning. At the conclusion of the hearing the Tribunal reserved the decision. This is the Tribunal's decision. In this decision the Tribunal which heard the matter is referred to as the Tribunal and references to tribunal refer to the tribunal generally.

### **Tribunal's jurisdiction**

20. Section 107B of the TP Act provides for review by the Tribunal of a decision of the Conservator under section 107 following reconsideration of a decision originally made pursuant to section 25 of the TP Act.

### **Applicable law**

21. The objects of the TP Act are set down in section 3 which provides:

*(1) The objects of this Act are—*

- (a) *to protect individual trees in the urban area that have exceptional qualities because of their natural and cultural heritage values or their contribution to the urban landscape; and*
- (b) *to protect urban forest values that may be at risk because of unnecessary loss or degradation; and*
- (c) *to protect urban forest values that contribute to the heritage significance of an area; and*
- (d) *to ensure that trees of value are protected during periods of construction activity; and*
- (e) *to promote the incorporation of the value of trees and their protection requirements into the design and planning of development; and*
- (f) *to promote a broad appreciation of the role of trees in the urban environment and the benefits of good tree management and sound arboricultural practices.*

22. Section 8 defines a ‘protected tree’ to include a ‘regulated tree’ and section 10 defines a ‘regulated tree’ as:

- (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.*

23. Section 15 of the TP Act provides that it is an offence to damage a protected tree unless, pursuant to section 19 of the TP Act, approval has been granted by the Conservator under section 25 of the TP Act.

24. Section 25(3) of the TP Act sets out the matters to which the Conservator, and therefore, this Tribunal, must have regard when making a decision on an application to remove a protected tree, namely:

- (a) *the approval criteria; and*
- (b) *the advice (if any) of the advisory panel; and*
- (c) *...: and*
- (d) *anything else the conservator considers relevant.*

25. Section 21 of the TP Act provides for the Minister to determine the criteria to be applied when considering an application for approval for a tree-damaging activity. On 4 April 2006 the Minister for the Environment made the Determination for the purposes of section 21. The relevant criteria for consideration in this case are:

*(1) The Conservator of Flora and Fauna (the Conservator) may give an approval to damage a regulated tree under section 25 when:*

- ...
- (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*
- ...
- (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*

*all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective.*

*(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; and*
- (b) the importance of the tree in the surrounding landscape; and*

...

26. Section 26 of the ACT Civil and Administrative Tribunal Act 2008 (**ACAT Act**) provides:

**26. Tribunal may inform itself**

*The tribunal may inform itself in any way it considers appropriate in the circumstances.*

### **Issues**

27. The issues for determination are whether approval may be given to remove the tree by reference to the criteria in the Determination, in particular criteria 1(1)(b), (c), (d), (e), and (g) and all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective and considering any exceptional circumstances under criterion 3(a).

### **Agreed facts**

28. The tree is a *Cupressus glabra*, commonly known as an Arizona Cypress and is a regulated tree under the TP Act. It is not disputed that the tree's removal requires approval. It is listed in Schedule 2 of the Determination as a problematic tree for the purposes of criterion 1(2) of the Determination which provides for removal of a Schedule 2 tree located on a block of less than or equal to 1200m<sup>2</sup>. The applicant's property is 1219m<sup>2</sup>. The tree is also listed as an arson risk in the 'Explanatory Notes for Assessing Fire Hazard' under the TP Act.
29. The tree is 17 metres in height. Its canopy overhangs the applicant's house and deck, the side fence and part of the adjoining neighbour's rear property. The trunk of the tree is 2.2m from the nearest fence, 2 metres from the nearest structure (the applicant's deck), 2.8 metres from the nearest structure (the neighbour's garage) and 6.2 metres from the nearest house (the applicant's). It is accepted that the applicant's house and its roof are substantial structures for the purposes of the criteria.
30. The tree is in good health.

### **The applicant's evidence and contentions**

31. The applicant and his partner, Ms Tara Williams, provided evidence for the applicant. Their neighbour, Mr David Lambert, also provided evidence. They had all filed witness statements.
32. The applicant told the Tribunal that he had sought the removal of the tree because its branches had been breaking and falling off. Indeed, he gave evidence that on 5 September 2017 his partner had discovered one broken branch from the tree on the ground adjacent to the corner of his house. The fallen branch was six metres in length with a diameter of 20 centimetres. She had sent him a photo of this

branch. Another branch had also broken and was hanging from the tree. He saw these branches later that day and lodged his application the following morning.

33. The ACT Fire Brigade attended his property on 5 September 2017 after the applicant's partner called SES to review the damage. Their advice was that the tree is dangerous and for the occupants and children not to go outside the house. The applicant said "while it is possible to follow this advice, it seems impractical to tolerate such reduced amenity of the property in the long run."<sup>6</sup> He and his partner have two young children, aged four and one and he is worried about his family's safety as well as the safety of other people visiting his property and of his neighbours.
34. The applicant's partner had arranged for an arborist from Canopy The Tree Experts to attend and provide a quotation for their services to remove the tree. The arborist attended the property on 5 September 2017 and provided quotation Number 3356 of \$1,144.00 to "remove the broken branch in the tree and to prune off dead tips from the Red Wood branches over the house". This quotation included the following words "IMPORTANT HOUSE HAS ASBESTOS". This quotation also included a quotation for the removal of the Cypress Tree, which required a permit, of \$3,718 and a quotation to remove a dead silver birch. The quotation stated if mulching was to be carried out on site the cost was an extra \$44. Stump grinding, if required, would be priced on the day.
35. The applicant's property has a sheeted asbestos roof. A property inspection conducted by Lawrie Paul Building Services on 2 October 2009<sup>7</sup> identified "corrugated asbestos cement sheet roofing installed", "weathering and lichen growth" on the roof and stated "due to the brittle nature of this product, roofing could only be viewed from a ladder placed at several intervals around perimeter;". Licensed asbestos inspectors have also deemed the sheeting 'brittle' and advised the applicant that it is not possible to replace sections of the asbestos sheeting when damaged; advising the whole roof will need replacing.

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<sup>6</sup> Applicant's statement of reasons page 4

<sup>7</sup> Applicant's statement of reasons filed 14 February 2018 at attachment C

36. On 27 November 2017 the applicant obtained advice from an arborist, Mr Alan Mann, of Canopy The Tree Experts, that “the current broken branches in the tree are likely to break off and tumble over so that the butt end hits the roof and the main branch falls on the deck” which is below the tree. If a broken branch causes damage to the asbestos sheeted roof the applicant is concerned about the risk to both private and public health and safety if asbestos fibres are released into the community.
37. As well as Mr Mann’s advice, the applicant highlighted the statements in the TAP report from Ms Hayley Crossing that – “The tree has poor branches attachments with weak unions, and some future branch failure seems likely and the hanging branch is threatening to damage the asbestos roof. This branch should be removed.”<sup>8</sup> as reinforcing the risk that the tree presents.
38. The applicant submitted that the respondent had not given appropriate consideration to the interaction of criterion 1(b) – that the tree represents an unacceptable risk to public and private safety – and paragraph 3(a) of the Determination, namely – any exceptional circumstances that he had raised. While acknowledging that the respondent was required to take into account the advice from the TAP, he submitted that the respondent was not required to singularly follow that advice and decision making should not be solely supported by their advice. He said the advice from the TAP may or may not over rule the matters he has raised.
39. In considering criterion 1(b) the applicant relied on the definition of ‘unacceptable’ in the Oxford Dictionary being “not satisfactory or allowable” and in the Merriam-Webster dictionary being “not pleasing or welcome”.<sup>9</sup>
40. The matters which he submitted should have been taken into consideration when considering the risks under criterion 1(b) – *the tree represents an unacceptable risk to public or private safety* – and the exceptional circumstances are<sup>10</sup>:

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<sup>8</sup> T documents at page 53

<sup>9</sup> Page 3/9 application at [12]

<sup>10</sup> Application at [10]

- (a) The species of the tree has been identified by the Tree Protection Unit as a ‘problematic species’ in Schedule 2 of the Determination.
- (b) The tree is of a very large size and age, as agreed and assessed by all parties.
- (c) As the tree has grown to be of a very large size so, too, have the problematic features of the species and the risk that these features present to infrastructure and citizens – as evidenced by the very large branches that have been breaking off the tree as sighted by the Tree Protection Unit.
- (d) The tree has been planted in a questionable location for its size and species, being along the side of the house and not in the front or back yard area as may be more typical.
- (e) Reduction pruning would be a reasonable response if the tree was of a species that was of such inarguable heritage value so as to offset the ongoing financial burden for a young family, which is not the case here, and if it was in a prominent location of importance to the city and utility to a wide number of residents, which cannot be proven.
- (f) The house that the tree’s falling branches is putting at risk has an asbestos sheeted roof.
- (g) The sheeting has been deemed brittle by licensed asbestos inspectors and cannot be impacted by any objects.
- (h) Advice from asbestos inspectors is that it is not possible to replace sections of the roofing with alternative material when they are broken. The whole roof will require replacing with an estimated cost of \$9,900 from Canberra Asbestos Removal dated 19 January 2018 for removal and disposal of roof and capping incl. GST and \$29,645.00 incl. GST from Petherbridge Roofing dated 13 February 2018 for roof replacement.<sup>11</sup>
- (i) The applicant has been advised by Westpac Insurance, with which the house insurance policy is held, that only the section of the roof that is damaged by the tree will be covered by insurance.<sup>12</sup>

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<sup>11</sup> Applicant’s statement of reasons at Attachment F

<sup>12</sup> Ibid at Attachment G

- (j) Insurance will not cover the additional costs that will be incurred because if any part of the roofing is damaged the whole roof needs to be replaced as it is asbestos.
- (k) For the foreseeable future the applicant holds a right and fair expectation to manage the asbestos in the property and replace the roof as its potential service life expires. This roof replacement should not be hurried and should not be further complicated or made costlier due to the imposition of a well forecasted catastrophe (both the Tree Protection Unit and independent arborists have documented that more branches will fall and may hit the roof) where that could have otherwise been clearly and surely managed more effectively.

41. In relation to the risk from asbestos, the applicant submitted that<sup>13</sup>:

- (a) regulatory settings in place by the ACT Government establish that uncontrolled damage of asbestos sheeting is not allowed. Only licensed asbestos removers may break, damage or remove asbestos;<sup>14</sup>
- (b) he has a fairly held expectation that appropriate management of asbestos in Canberra will be a guiding concern for regulators when taking decisions, and in this matter, for the Tribunal;<sup>15</sup>
- (c) under some circumstances asbestos sheeting may be intentionally damaged and to do so there must be protective measures in place;
- (d) citizens and the ACT Government have changed their understanding of the risks around asbestos over time. Previously deemed safe, the current appreciation of risk is that there is no safe level of exposure to asbestos;
- (e) it would be a typical view from citizens that allowing a tree branch to damage an asbestos roof is unacceptable where there was an alternative management plan, in the same way that any asbestos is not to be carelessly broken;

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<sup>13</sup> Application at [13]

<sup>14</sup> ACT Government, *Asbestos* (6 April 2018) Access Canberra

<sup>15</sup> *ibid*

- (f) when a tree branch weighing several hundred kilos falls on or through the roof it is unclear how the impact of the incident on the occupants and nearby residents can be managed. For example, should a branch fall during a storm then it will be difficult to manage and clean up the windswept broken asbestos sheeting or fibres; and
  - (g) appropriate weight should be given to the exceptional circumstances that the tree is growing above a house with an asbestos sheeted roof and it is unacceptable to attempt to wilfully allow for and to plan for an asbestos sheeted roof to be damaged by a tree branch.
42. In relation to criterion 1(c) – *the tree is causing or threatening to cause substantial to a substantial building, structure or service* – the applicant submitted that the matters in [40] and [41] above should also be taken into consideration, as well as the following:
- (a) Criterion 1(c) and paragraph 3(a) of the Determination are designed to interact such that the risk of substantial damage in 1(c) is to be considered in the context of exceptional circumstances in paragraph 3(a).
  - (b) The applicant contends that the fact that the tree is growing above his house which has an asbestos sheeted roof is an exceptional circumstance in considering this criterion and the previous criterion and should be given appropriate weight in considering this application.
  - (c) His neighbours’ primary concern is the threat of substantial damage to their property from the tree falling or further branches falling.
  - (d) While it is possible to remove the broken branches, it is reasonable to expect that due to the significant height the tree has now reached and as, since the approved removal of the *cupressus macrocarpa* in 2014, the tree is unprotected from strong winds, the remainder of its branches will become increasingly vulnerable to strong winds.
  - (e) If another branch the same size as the branch which has fallen, such as the branches hanging in the tree, hit the asbestos roof it would shatter, and based on his advice, it would entirely need replacing.

- (f) The applicant considers that both such damage and the roof being part of his house<sup>16</sup> meet the definition of substantial as “large weighty, considerable, solid or big, not trivial, minimal or nominal” in an earlier decision of the ACT Administrative Appeals Tribunal of *Maleganeas v Conservator of Flora and Fauna (Maleganeas)*<sup>17</sup>. The applicant contends that replacement of a damaged section of his asbestos roof would not be possible without disturbing asbestos.
- (g) As well as the risks from asbestos the risk of arson is a further problematic feature of this tree. It is listed as an arson risk in the ‘Explanatory Notes for Assessing Fire Hazard’ under the TP Act. The applicant’s property is located in Section 35 Lyneham which is separated from the O’Connor Ridge Nature Reserve by Dryandra Street. The property’s western boundary fence abuts and is adjacent to the prescribed Bushfire Prone Area.<sup>18</sup> The Bushfire Prone Areas have been assessed at being of high risk to life and property due to bushfires.
- (h) In the inquest and inquiry into the Canberra firestorm in January 2003 Dr Peter Ellis of the CSIRO gave expert evidence on fire spread into and in the suburbs and the effect of garden types on fire spread. He gave evidence that the statistical tests carried out on a total of 779 houses and garden types pointed out that cypress trees in general and conifers in particular were a factor in house loss and damage.<sup>19</sup>
- (i) Recommendation 60 in the Findings and Recommendations of the Coronial Report into the 2003 Canberra Firestorm refers to the potential of wooden fences and conifers contributing to fire spread. It states:

*that the Canberra Urban Development Working Group referred to in Mr Peter Dunn’s letter consider the report prepared by Mr Leonard and note particularly that the community awareness information currently available to householders in connection with measures they can take to better protect their homes from bushfires does not refer*

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<sup>16</sup> *Svensson v Conservator of Flora and Fauna* [2010]ACAT 10 at [61]

<sup>17</sup> [2007] ACTAAT 24

<sup>18</sup> Attachment B – applicant’s statement of reasons filed 14 February 2018

<sup>19</sup> ‘The Canberra Firestorm Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003’ at 5.14.21

*to the potential of wooden fences, conifers and outbuildings to contribute greatly to fire spread, particularly in suburban areas...*

- (j) In 10.2.8 the Coronial Report also highlighted that ember attack played a role in the fires. It stated:

*Mr Justin Leonard, who studied the effects of building location, design and construction on fire spread, and Dr Peter Ellis, who studied the effects of garden types on fire spread, found that houses in Duffy were not destroyed or damaged by direct flame contact or by radiant heat from the fire front in the adjacent forest; they were destroyed as a result of ember attack. Dr Ellis also found there was a strong link between house destruction and garden type; houses with more unkempt or fuel heavy gardens were more likely to be destroyed as a result of ember attack.*

43. In relation to criterion 1(d) –*the location of the tree is inappropriate given its potential size and growth habit* – and paragraph 3(a) of the Determination the applicant submits that the tree’s location is inappropriate given its potential size and growth habit. He submits the following matters should be taken into account:<sup>20</sup>

- (a) ACT Urban Services has published ‘Design Standards for Urban Infrastructure 23 Plants for Urban Landscape Projects’. The applicant provided a copy of these Standards to the Tribunal. The applicant acknowledged that the Standards have been developed for public land managed by Canberra Urban Parks and Places for new plantings. However, he submitted that it provides guidance on a range of tree species including *Cupresss Arizonica* at pages 23 to 24 and identifies that the minimum clearance or set back from buildings for this tree is to be 12 metres. This is because it has a tree shape category of ‘4’ or ‘pyramidal’ with low branching structure. It is not considered suitable for road verges. At the applicant’s property, the tree has been planted approximately six metres from the applicant’s house.
- (b) The *Design Standards for Urban Infrastructure 22 Soft Landscaping Design* provides general guidance on planting trees in residential areas including on residential verges. Relevantly, item 22.11.17 provides the

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<sup>20</sup> Applicant’s Statement of Reasons pages 12 - 14

following guidance on location – “Avoid planting trees where their placement imposes significantly on the adjacent leaseholder (that is, trees are too close to the boundary).” In the case of this tree it has been planted 2.2 metres from the boundary fence and its canopy extends over this fence. The adjoining leaseholder, Mr David Lambert, has filed a witness statement noting that the tree has significantly impacted on his and Anne Cahill-Lambert’s lease.

- (c) The applicant has referred to these Design Standards as useful guidance only as a response to the absence of any published advice from the respondent on appropriate locations. The applicant also noted that in the earlier tribunal decision of *Svensson v Conservator of Flora and Fauna*<sup>21</sup> (*Svensson*) the Conservator’s expert witness, Dr Peter Coyne, referred that tribunal to the Design Standard in [43a] above which recommended appropriate distances between trees and houses which should be observed when planting new trees.
- (d) The applicant also referred the Tribunal to item 22.10.7 in the soft landscaping Design Standard where it provides the following guidance on pruning practices “The height of lower branches of a tree should never be no more than 30 per cent of the tree height.” The applicant noted that the respondent had identified that the tree has been under pruned (by a previous owner) to a height of 9 metres. The tree’s height is 17 metres which means that the tree has been under pruned where the height of the lower branches are 54% of the height of the tree, or 24% over the maximum height set out in the Design Standards.
- (e) The respondent has noted that this under pruning has exposed the tree to wind which has contributed to branch failure.<sup>22</sup> As well, this tree has been assessed by Ms Crossing as having weak branch unions, which is a feature of this species of tree. The tree is susceptible to ongoing limb breakage. Its location is inappropriate.

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<sup>21</sup> [2010] ACAT 10 at 42

<sup>22</sup> Respondent’s expanded statement of reasons T-documents pages 101, 102 and 104 at [21]

- (f) The tree is inappropriate as it is a problematic species and an identified fire risk.
  - (g) The applicant submits that the general amenity of his block is already restricted due to the placement of other potentially regulated trees on the block. Removal of the tree will aesthetically enhance the tree scape of the street; it will provide a more aesthetically coherent layout of trees on his block and highlight the trees that are not problematic and have exceptional qualities such as the pin oak located to the north east side of the block. He submits that to do so is consistent with the aims of the TP Act at section 3(1)(f), namely “to promote a broad appreciation of the role of trees in the urban environment and the benefits of good tree management and sound arboricultural practices”, i.e. to highlight exceptional trees on the block and remove those that have been selected, planted and pruned inappropriately. He urges that these matters be taken into consideration when assessing the relative impact of the tree.
44. In relation to criterion 1(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”* – the applicant submitted: <sup>23</sup>
- (a) The tree is evergreen.
  - (b) The applicant’s living areas of kitchen, dining and lounge room are shaded from 9am to approximately midday in winter due to the very large size of the tree and the placement of the tree abutting the house. The neighbour’s patio, laundry and kitchen are shaded from approximately midday through to the end of daylight in winter.
  - (c) He has a young family. His August 2017 heating bill was \$2,137. The tree’s shading prohibits any warming affect that may be gained from having sunlight enter his house.
  - (d) It is not reasonable to expect that solar access is substantially affected and the energy efficiency and utility of the house is compromised in order to preserve a problematic species of tree.

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<sup>23</sup> Applicant’s Statement of Reasons [95] to [106]

- (e) Advice from the Australian Government<sup>24</sup> is that there are five hours or less of solar heat gain available in winter and that “living areas and the kitchen are usually the most important locations for passive heating as they are used day and evening.” Here the tree prohibits winter time solar heat gain to his living areas in the mornings and to his neighbour’s kitchen area in the afternoons.
- (f) The Tribunal does not need to consider ‘the entire lease’ when considering the shading; the criterion does not require ‘absolute shade’ or ‘entire shade’ over the lease.
45. In relation to criterion 1(g) – *where the tree is part of a close planting of a number of trees, the removal of the tree will allow other trees to develop* – the applicant submitted that removal of the tree would enable the Californian Redwood planted approximately three metres away, a rhododendron planted approximately two metres away, and a hakea and a eucalypt each planted approximately four metres away to develop. The applicant has been actively trying to manage and rehabilitate the redwood noting that many of the original redwoods planted in the ACT have now died. He has increased water supply to the redwood in accordance with advice from Canopy, The Tree Experts in 2015. His neighbours want the hedge they have planted against their side of the boundary fence to grow. Its growth has been negatively impacted by the shade from the tree.

#### **Effectiveness of reasonable remedial treatments and risk mitigation measures**

46. The criteria require that the Tribunal be satisfied that the effectiveness of all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective. The respondent proposed removal of the hanging branch, reduction pruning and replacement of the asbestos sheet roof as available reasonable and sufficient risk mitigation measures and treatment.<sup>25</sup>
47. The applicant said<sup>26</sup> he has sought advice from various arborists about reduction pruning and been advised that such pruning would cover trimming of branches

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<sup>24</sup> Ibid at [99]; Australian Government, Your Home: Australian’s Guide to Environmentally Sustainable Homes website, *Passive Solar Heating* (2013)

<sup>25</sup> Respondent’s statement of facts and contentions at [51]

<sup>26</sup> Applicant’s witness statement dated 14 February 2018 at [32]

up to 50mm thick and for removal of no more than 10% of the tree per year. The figure of 10% is in accordance with Australian Standard 4373 'Pruning of Amenity Trees'. He contends<sup>27</sup> that such pruning would not be effective or reasonable.

48. He submitted<sup>28</sup> it would not be effective as following any reduction pruning the tree would remain at the same height; it would be in the same location that has been found to be inconsistent with the minimum required setback for the species (see[43a] above) and given the tree's overhang of the neighbour's property, it is not expected that reduction pruning would be able to reduce the amount of overhang on the neighbouring lease to the satisfaction of all.
49. The applicant submitted<sup>29</sup> reduction pruning would not be reasonable as it is not a one off cost; the tree is a relatively fast growing species and reduction pruning would not provide a static result; it would be a recurring expense as the tree grows back to take up its form and habit. He had obtained a quote for reduction pruning of \$2,750 plus GST from A.C.T. Tree Felling dated 12 February 2018.<sup>30</sup>
50. The applicant submitted<sup>31</sup> that it is not reasonable to expect an individual lessee with the associated finances available to them to absorb such a recurring cost when it is made on the basis to accommodate a tree that has been inappropriately planted.
51. The applicant also submitted, in relation to the respondent's contention that replacement of the asbestos sheet roof as an available, reasonable and sufficient risk mitigation measure and treatment, this did not consider the unreasonable costs to a citizen to protect a tree that has been inappropriately planted. He had provided evidence to the Tribunal that the cost for removal of the asbestos sheet roof and replacing it was almost \$40,000. He referred the Tribunal to *Svensson* where that tribunal stated at [63]:

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<sup>27</sup> Applicant's statement of reasons at [91]

<sup>28</sup> Ibid at [91]

<sup>29</sup> Ibid at [92]

<sup>30</sup> Ibid attachment H at page 41

<sup>31</sup> Ibid at [92]

*Replacing the drains with p.v.c. pipes would be effective in stopping discharge of water from the pipe. However, this would no doubt involve considerable expenses, and in the Tribunal's view could not be regarded as either remedial or reasonable. ...*

52. In *Kelly v Conservator of Flora and Fauna (Kelly)*<sup>32</sup> that tribunal also referred to the cost of remedial measures and stated:

*... Removal of a large tree would of course be an expensive undertaking, and it seems likely that the combined cost of removing the tree and repairing the damaged surfaces would be considerably greater than the cost of remedial measures alone.*

53. The applicant also drew the tribunal's attention to [62] of the respondent's statement of facts and contentions which states:

*The Respondent accepts that the Applicant in this case has provided some evidence to suggest that the replacement of the asbestos roof is a costly exercise ... and would provide a permanent solution to the apprehension of risk.*

54. The applicant submitted that this cost is large and considerable and not trivial, minimal or nominal. To expect him to incur this cost as a reasonable mitigation or remedial measure fails to ensure a practicable balance between the protection needs of the urban trees and the private activities of Canberrans with their leases. He said, in the particular circumstances of this case, there are no other effective or reasonable remedial treatments.

55. More generally, the applicant submitted that the respondent's decision should be aligned with the overall intent of the TP Act. One of the objects of the TP Act<sup>33</sup> is to protect individual trees that have exceptional qualities because of their natural and cultural heritage values or their contribution to the urban landscape. The applicant submitted that, therefore, trees which are considered exceptional are "those that have a value that can be proven, via either [a cultural] or via a demonstrated heritage value to the ACT or contribution to the urban landscape."<sup>34</sup>

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<sup>32</sup> [2009] ACAT 24 at [53]

<sup>33</sup> Section 3(1)(a) of the TP Act

<sup>34</sup> Applicant's statement of reasons 14 February 2018 at [9]

56. The applicant also submitted that while the TP Act does not define the term ‘urban landscape’ the ‘Transport Canberra and City Services Nomination for Tree Registration’ form provides further guidance on the relative value of a particular tree. Item 8 of the nomination form states the object of the landscape and aesthetic value is “to identify trees that are of particular importance to the community due to their substantial contribution to the surrounding landscape.”<sup>35</sup>
57. Therefore, the applicant submitted “the [tree’s] value must be contextualised and of particular importance is the value of the tree as considered by the community or people living in the same place as a tree.”<sup>36</sup>
58. The applicant also referred the Tribunal to website notification at Access Canberra which advises residents that the intent of the TP Act is to be upheld by regulators in the following way:

*At times City Services will provide formal approval to residents to remove trees that are not part of the formal street or parkland plantings or undesirable tree species such as pines, poplars and willow.*<sup>37</sup>

59. The applicant acknowledged that website notification such as that referred to [58] above was not a matter of law but submitted that “residents must have some ability to rely on public statements as vetted by a delegate of the relevant Minister made on ACT Government websites as indicative of the intent of legislators regarding undesirable tree species.”<sup>38</sup>
60. The applicant also referred the Tribunal to the following statement, the parts he highlighted being underlined, in the ‘Outline of the Explanatory Statement’ to the Tree Protection Bill 2005:

*In October 2002, a discussion paper, Tree Protection for the ACT - The Next Steps, was released for public comment followed by direct briefings for key stakeholders. The paper analysed issues arising from 18 months experience with administration of the interim legislation with general discussion on tree protection and management issues. Possible options were presented for a permanent and workable tree protection regime with a view to establishing an appropriate and practicable balance between the*

<sup>35</sup> Document 5 Applicant’s Authorities filed 15 March 2018

<sup>36</sup> Applicant’s Statement of Reasons filed 14 February 2018 at [10]

<sup>37</sup> ACT Government, *Urban Trees in the ACT*, Access Canberra website

<sup>38</sup> Ibid at [12]

*protection needs of urban trees and the private activities of Canberrans within their leases.*<sup>39</sup>

61. The applicant submitted that the above statement can be taken to mean that the Criteria in the TP Determination should not be read so as to preserve a tree exclusively above all other and ordinary and expected uses of the land. It is support for his submission that it is possible to decide that the interests of a particular tree must be subordinate to the interests of the residents.
62. He also submitted<sup>40</sup> that decision makers must not feel compelled to only consider the advice of arborists on the health of a tree. Section 25(3)(d) of the TP Act requires the respondent to have regard to anything else the respondent considers relevant. Decision makers must consider all factors and which ones are relevant to making a decision and then obtain the practicable balance the TP Act requires, with the health of the tree not automatically a factor. The objectives of the TP Act are not to preserve all trees at any cost and no matter the impost on the property owner.
63. The applicant's final submission was that the TP Act operates to protect trees that are unusually good and offer a heritage value and an aesthetic value that is contextualised. In this regard he referred the Tribunal to the decision in *Moss v Conservator of Flora and Fauna (Moss)*<sup>41</sup> where the application for the removal of the tree had been referred to the ACT Heritage Council as the blocks on which the tree was located and the tree were within the Reid Housing Precinct entered into the ACT Housing Register. The ACT Heritage Council had advised the Conservator that removal of the tree would impact on the landscape significance of the precinct and removal of the tree was opposed by the Council. That tribunal said:

*... the Tribunal considers that no persuasive evidence has been provided to show that removal of the tree is preferable to maintaining its contribution to the heritage, landscape and aesthetic values of the precinct, especially*

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<sup>39</sup> Ibid at [13]

<sup>40</sup> Ibid at [18]

<sup>41</sup> [2016] ACAT 1 at [4]

*given the advice from the ACT Heritage Council and the objects of the Tree Protection Act.*<sup>42</sup>

64. The applicant submitted that the present case can be distinguished from *Moss* as the tree the subject of this application is not within a heritage precinct, is planted too close to the applicant's house and the boundary fence between his and the neighbouring property and the TAP has noted that the "tree is generally typical of the species" and "pendulous habit and weak branch attachment are typical."<sup>43</sup> The tree does not offer either heritage value or aesthetic value.

### **Other matters**

65. The applicant raised a number of concerns in relation to the processes that had been followed by the Tree Protection Unit, the Tree Advisory Panel and the Conservator. He questioned the lack of independence observed in the reconsideration of the original decision as the original officer from the Tree Protection Unit who refused the original application to remove the tree was the same officer who attended the follow up site visit with a member of the Tree Advisory Panel in October 2017. He said:<sup>44</sup>

*... At that point, my curiosity and wonder at what processes may be at work has shifted to fair astonishment.*

*21. As could be predicted when a review is conducted and the original decision maker is engaged we find that the original decision is upheld.*

66. In a letter emailed to the applicant's neighbour, Ms Anne Cahill Lambert, on 21 September 2017 in relation to this tree, the original officer stated in considering an application for reconsideration – "The tree is examined by an independent adviser and discussed by the independent advisory panel prior to a new recommendation being made to the Conservator of Flora and Fauna."<sup>45</sup> The applicant expected this process to be observed during the reconsideration of the original decision. Instead, the original officer was also present at the review inspection with the TAP member.

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<sup>42</sup> Ibid at [42]

<sup>43</sup> Applicant's submissions in reply at [17]

<sup>44</sup> Alec Wickerson witness statement at [20], [21]

<sup>45</sup> T Documents at page 52

67. The applicant's partner recounted her experience with the officer from the Tree Protection Unit on 12 September 2017 in her witness statement which she said was patronising and arguing for argument's sake. She said that she observed him accompanying the Tree Advisory Panel member, Ms Crossing, throughout the inspection on 25 October 2017 and this made it difficult for her to talk to the panel member privately. She said while she found that Ms Crossing had listened to, respected and considered her views the process was not aligned with her expectations of what an independent review would entail, given the conduct of the original officer who had been, apparently, engaged as an authoritative voice in the review process. She said her view about what independent reviews would entail had been informed with reference to the Australian Government Administrative Council best practice guides at <https://www.arc.ag.gov.au> .
68. Ms Williams also submitted that her experience through this process is that the decision making has been inconsistent and lacking in transparency. Her experience with the Tree Protection Unit was that there is little public visibility, such as through guides on a website or publishing the assessment forms that are used in their decision making. She stated:
27. *I feel that if there was greater transparency and accountability for their decision making, citizens would be more informed and able to argue their case and could not be as easily dismissed as I found the Tree Protection Unit's initial response to me.*
28. *I also question whether the effort of defending the Conservator's decision is an efficient and effective use of Government resources and have questions as to whether the respondent is acting the way Government should when dealing with private citizens, as a model litigant.*
29. *It is also frustrating that there seem to be two sets of rules operating within the ACT Government – one for citizens who I would counter have limited expertise and resources and one for developers who may likely be in the opposite situation to citizens. I am aware that the operation of the Act has always been somewhat controversial within the ACT but is galling to read that decisions of the Conservator can be over turned by the Planning Directorate to allow a redevelopment to go ahead.*
69. The applicant's concerns continued when he became aware shortly before the hearing that the respondent had identified a defect in the Reviewable Decision in

that the TAP was not properly constituted at the time of their advice to the respondent.

70. Further, the applicant did not become aware until 6 March 2018, when the respondent filed its statement of facts and contentions, that the respondent's expert witness, Ms Hayley Crossing, had been employed by Canopy, The Tree Experts since November 2017. This was the same company that the applicant had been seeking independent advice from in relation to the tree since 5 September 2017.
71. The applicant's partner had made Ms Crossing aware on 25 October 2017 of the applicant's existing relationship with Canopy, The Tree Experts and the applicant subsequently engaged Canopy, The Tree Experts on 27 November 2017 to specifically provide advice in relation to the Tribunal process. Neither the applicant nor his partner then knew that Ms Crossing was working for Canopy,
72. The respondent did not provide formal disclosure of Ms Crossing's employment in relation to any bearing, real or perceived, that this may have on the matter at hand. As stated in [70] above the first time the applicant became aware of this potential conflict of interest was 6 March 2017, before the hearing.
73. The applicant provided the Tribunal with a copy of section 72 of the TP Act which refers to disclosure of interests – advisory panel members, and referred to the 'Governance Principles – Appointments, Boards and Committees in the ACT March 2017' document which provides guidance to government appointees noting that such appointees have significant responsibilities and are invested with a considerable measure of public trust. The applicant submitted:

*...when government is involved in a legal dispute with a citizen they must be held to the highest of standards with regard to adherence to legal obligations, transparency, procedural fairness, the proper use of resources and application of authority under which they are bound.*<sup>46</sup>

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<sup>46</sup> Applicant's submission in reply at [32]

74. While these matters were of real and genuine concern to the applicant and his partner, subject to the Tribunal's comments below, it is not the role of the Tribunal in these proceedings to canvas these matters.
75. The Tribunal was concerned to hear that the original investigating officer from the Tree Protection Unit, who had refused the original application, accompanied the independent adviser who was examining the tree on 25 October 2017 pursuant to the reconsideration request. This obviously caused concern for the applicant and his partner. It negatively impacted and compromised the 'independence' of this examination. Such a practice should not be repeated.
76. The Tribunal also noted, with concern, that there had, apparently been no documented disclosure of Ms Crossing's conflict of interest when she became employed by Canopy, The Tree Experts during the currency of the applicant's review. While Ms Crossing gave evidence at the hearing of a discussion she had had with Mr Alan Mann of Canopy, The Tree Experts during which it was determined that she would not have any involvement with the applicant's business with Canopy, The Tree Experts while she was engaged as the TAP expert, it did not appear that the TAP or Ms Crossing had considered or complied with the mandatory requirement in section 72(2) of the TP Act to disclose the nature of the interest to the Conservator. To not have done so has impacted on the independence and transparency of the process. The respondent should ensure that this does not happen again.

**The respondent's evidence and contentions**

77. The respondent contended that the applicant had not established that any of the criteria had been met, that the TP Act did not authorise removal of a protected tree on the basis of assertion or speculation and the decision under review should be confirmed.
78. The respondent relied on the Witness Statement and oral evidence of Ms Hayley Crossing. Ms Crossing is a current member of the TAP, having been appointed for two years from 21 August 2016. She has a Bachelor of Landscape Architecture (2000, University of Canberra), a Quantified Tree Risk Assessment

Certificate (2015) and a Diploma of Arboriculture (2017). She has been employed as an arborist by Canopy The Tree Experts since November 2017.

79. Ms Crossing had inspected the tree on 25 October 2017. She incorrectly identified in her report, which was annexure “C” to her witness statement, that the tree was located in the front of the block whereas it is located on the eastern side of the block, next to a deck attached to the main living area of the applicant’s house. It is between the house and the neighbouring boundary fence and its canopy overhangs the neighbour’s boundary and the applicant’s house and deck.
80. The report states that another tree in the front yard on the southern side of the subject tree was removed in 2014 pursuant to approval granted under criteria 2. It was a schedule 2 listed problematic tree. Ms Crossing stated that the removal was a mistake as the applicant’s block is larger than 1200m<sup>2</sup> in criterion 2. The applicants block is 1219m<sup>2</sup>. In the respondent’s expanded statement of reasons<sup>47</sup> the respondent states that this decision was made in error however then adds at [35] “The removal of [that] tree may also have been approved under the criterion in s 1(1)(c)” [whether the tree is shown to be causing or threatening to cause substantial damage to a substantial building, structure or service].
81. Ms Crossing then, relevantly, stated in her report:

*8. The removal of the above-mentioned tree has exposed the subject tree to more wind forces.*

*9. The tree is on a lean more than likely because it was once part of a close planting and was more than likely growing away from the tree that has been recently removed.*

*10. The applicants have an asbestos roof and have advised me the day of the inspection, that if part of the roof were damaged, then the whole roof would have to be replaced.*

*11. There was a torn limb hanging from the canopy. This limb was threatening to fall onto the asbestos roof.*

*12. The neighbours had experienced some fallen branches onto their property. I inspected the tree from their property.*

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<sup>47</sup> T documents page 106

20. *The tree has poor branch attachments with weak unions, and some future branch failure seems likely. However, branch sizes are not large and are unlikely to cause “substantial damage”.*

21. *[The] Tree has recently been exposed to more wind forces due to the above mentioned tree removal ... to the south of the subject tree. It appears this may have contributed to previous branch failure and some future branch failure.*

82. In relation to each of the criterion relied upon by the applicant the respondent contended as follows.

**Criterion 1(1)(b) – unacceptable risk to public and private safety**

83. The respondent contends that this criterion is not satisfied having regard to the expanded statement of reasons and the expert opinion of Ms Crossing.
84. The respondent accepted that the tree may pose some risk, but that it does not reach the requisite level of unacceptability as stated by the tribunal in *Egan v Conservator of Flora and Fauna (Egan)*.<sup>48</sup>

*Dr Coyne also made a persuasive case that criterion (b) refers to ‘unacceptable risk’, as distinct from risk in general, and requires consideration of the relative acceptability of the many risks faced in the community, and the relative prevalence of incidents of different types. The Tribunal accepts that criterion (b) requires that the unacceptability of the risk be considered, and that apprehension on its own is not sufficient to satisfy the criterion ...*

85. The respondent contends that the various tree experts have not indicated that the tree poses a risk that is unacceptable or that it is likely to shed more branches in a way that is consistent with posing a risk to public or private safety; and that there is no evidence before the Tribunal of ineffective reasonable remedial treatments or risk mitigation measures being carried out and none are necessary because the tree does not represent an unacceptable risk.
86. The respondent also contended<sup>49</sup> that, following *Muttukumar & Anor v Conservator of Flora and Fauna*<sup>50</sup> it was open to the applicant to arrange for the tree to be inspected by an arborist from time to time to check for any deterioration

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<sup>48</sup> [2016] ACAT 27 at [29]

<sup>49</sup> In [33] Respondent’s statement of facts and contentions

<sup>50</sup> [2008] ACTAAT 13 at [38]

in the tree and following *Maleganeas*<sup>51</sup> it was also open to the applicant to prune the tree should any signs of weakness develop in the future indicating the risk of branch failure.

87. Ms Crossing said that, while criterion 1(b) relates to safety the emphasis is on unacceptable risk. She assessed the safety risk of the tree as low. In relation to ‘unacceptable risk’ she referred to the international threshold for unacceptable risk published by the UK Health and Safety Executive of 1:10,000 and stated that there are roughly 2-3 deaths a year from falling trees in Australia, a risk factor of approximately 1:10 million.
88. Ms Crossing stated that the health risk from a fallen branch onto asbestos sheeting appears low. She referred the Tribunal to Queensland Government factsheet ‘Is it safe? Cracked, damaged or weathered asbestos cement sheeting’ which states - “At the time asbestos cement sheeting is cracked or damaged, some respirable asbestos fibres can be released into the air. However, the number of released fibres is likely to be very low. This is because the material is not 100% asbestos, asbestos fibres in the sheeting are predominantly large and the asbestos is bound into the cement. If you are close to the material when it cracks or is damaged, it poses a very low health risk.” It also stated – “Hailstorms pose a risk to roofing, particularly old asbestos roofs. If your asbestos roof is punctured or cracked, it is best to have your house reroofed.”
89. In her opinion, the tree does not present an unacceptable safety risk and does not meet criterion 1(b) for removal.

**Criterion 1(c) - causing or threatening to cause substantial damage to a substantial building, structure or service.**

90. The respondent contended that the issue in dispute is whether the tree is shown to be causing or is threatening to cause substantial damage to the roof and this assessment is to be conducted at the time and not to the potential of the tree in the future.<sup>52</sup>

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<sup>51</sup> At [37]

<sup>52</sup> Respondent’s statement of facts and contentions at [35]

91. The respondent did not disagree with the applicant's contention that there are risks associated with asbestos and inappropriate handling of it. However, in this matter criterion 1(c) will only permit approval for removal if the tree is causing or threatening to cause damage to the roof that is 'large, weighty, considerable, solid or big and not trivial, minimal or nominal' and all other reasonable remedial treatments or risk mitigation measures have been deemed to be ineffective.
92. The respondent relied on the expert evidence from Ms Crossing and her opinion that the branch sizes are not large and if they fall are unlikely to cause 'substantial damage'. The damage noted to date from fallen medium size branches was to a fence and some 'near misses' to the house and the neighbour's car, none of which constitute 'substantial damage'. The respondent alleged this expert evidence had not been contradicted by the applicant.
93. Ms Crossing acknowledged that the tree has some branches with poor attachments that are pendulous and this could contribute to branch failure. However, she quoted world renowned researcher and authority on trees, Dr Alex Shigo, who wrote "All trees are naturally shredding organisms"<sup>53</sup>. Ms Crossing stated that branch failure is expected from time to time, especially in high winds but she did not expect the size of tree parts to be large or heavy enough to cause substantial damage. She expected that the branch failure is likely to lessen because trees self-optimize or become stronger when they are exposed to new forces such as wind as they grow stronger reaction wood.
94. She also opined that the falling branches, such as the one remaining in the tree and observed at the inspection, are likely to be caught in the canopy due to the spiralling branch attachment of this species. As this branch is still there and it should be removed, she observed that the applicant had not taken all reasonable remedial treatments or risk mitigation measures as required by the TP Act.
95. She stated that the tree was on a lean because it had grown that way and this was likely because it had been once part of a close planting. She saw no indication at inspection that the tree had moved or was heaving out of the ground. She opined that it seemed unlikely that, notwithstanding the neighbour's concerns, that the

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<sup>53</sup> Shigo Dr A, *How Trees Survive*, 1996 February, Tree Care Industry VII Number 2

whole tree would fail or that the tree's lean to the neighbour's house had increased.

96. Ms Crossing said, in relation to reduction pruning, that it would reduce the end weight of the branches and likely be effective in preventing future branch failure, especially for large branches. In her opinion, this would be reasonable remedial treatment for risk mitigation, as required by the TP Act. She acknowledged that it would be necessary for the applicant to hire a cherry picker and use secateurs to carry out this pruning. She estimated the cost at between \$2,500 and \$3,000 and stated that it would only be necessary for this pruning to be carried out once. Although she would only prune it once, she agreed that it could also be pruned every three years and if the pruning was properly carried out it would not have an adverse effect on the tree.
97. In cross examination Ms Crossing agreed that the tree was not of heritage value or in a prominent location. She said that it was included in the species of problematic trees listed in Schedule 2 of the Determination because it was a big tree. She did not recommend to any of her clients that they plant this species of cypress.
98. In relation to the asbestos roofing, Ms Crossing opined that, as the insurer has indicated to the applicant that it would only cover the damaged parts of the roofing and not the whole roof, it would follow that it was reasonable for the TAP to assess the tree similarly – that is on the potential that it may cause damage to only a few sheets of the asbestos roofing. She said-<sup>54</sup>

*47. Removing a tree because it is threatening to cause damage to a small area of an asbestos roof is setting a precedent and undermines the criterion of "Substantial Damage" as set out in the Tree Protection Act.*

99. In Ms Crossing's opinion the tree did not meet this criterion.
100. Ms Crossing observed that the asbestos roof could be damaged by many other causes such as hail storm, flying debris in a high wind event or by other surrounding tree branches.

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<sup>54</sup> Witness statement Hayley Crossing 6 March 2018

**Criterion 1(d) – the location of the tree is inappropriate given its potential size and growth habit.**

101. The respondent accepts that, as a species, this tree has a tendency to grow quickly however, submitted it is now a mature specimen, its growth has slowed and will continue to slow.
102. The respondent submits that the fact that this tree is identified as a problematic species in Schedule 2 of the Determination is not determinative as to whether, as a specimen, it is inappropriately located, given its actual form and structure.
103. The respondent relies on Ms Crossing's evidence and her expert opinion. Ms Crossing opined that this tree does not meet criterion 1(d). She said the *Cupressus* species are a prominent planted tree throughout Canberra. Since the *Cupressus macrocarpa* had been removed from the applicant's block in 2014, there was more room and less competition for the subject tree to grow. She did acknowledge that the tree was exposed to increased wind. The tree is now a mature tree and has reached 17 metres, probably its potential height for Canberra. Its period of rapid growth has finished and while it may grow slightly bigger, Ms Crossing doubted it would ever grow much taller than 20 metres.
104. In response to the applicant's reference to the ACT Urban Services Design Standards for Urban Infrastructure, Ms Crossing stated that this document was developed specifically for use in public land managed by Canberra Urban Parks and Places; it was not intended to be applied to residential blocks. To do so would see a large proportion of suburban trees having to be removed which is not the intention of either the TP Act or the 23 Plant Species for Urban Landscape Projects.
105. Ms Crossing reiterated that this species of tree is listed as a problematic tree only if the block size is less than 1200m<sup>2</sup>. The applicant's block exceeds this size and therefore the tree should not be addressed as a problematic tree.
106. Ms Crossing disputed the applicant's reference in his statement of reasons filed 14 February 2018 at [11] that pine tree is a common name that encompasses a range of cypress trees that are unsuitable for residential properties with *Cupressus*

*Glabra* being one species of ‘conifer’ under the *pineaceae* family of ‘pine’ in the context of pines being undesirable trees. She said her “understanding of the reference to ‘pines’ being undesirable trees refers only to ‘*Pinus radiata*’ and certainly does not apply to all the species commonly known as ‘Pines’ or ‘Cupressus’.

**Criterion 1(e) – the tree is substantially affecting solar access to the lessee’s lease, or neighbouring lease, during winter between the hours of 9am to 3 and pruning is not sufficient to remedy this.**

107. The respondent contends that the Tribunal is required to consider whether the tree is affecting solar access to the lessee’s lease, not limited to that part of the lease or block on which the residence is built.<sup>55</sup> It relies on Ms Crossing’s evidence that the intent of this criterion is to establish whether the tree is substantially affecting solar access to the whole lease, not just a part of the building on the lease. Here the tree shades the living area of the applicant’s house in the morning. It does not substantially shade the whole lease. It does not meet this criterion.

108. In relation to the applicant’s claims that ‘fair consideration needs to be given to the needs for solar access to the house to allow sunlight during winter’ and his heating bill for the August 2017 quarter of \$2,137 the respondent referred the Tribunal to the earlier decision in *Sharma v Conservator of Flora and Fauna*<sup>56</sup> where that tribunal said “[i]t is clear from reading the criteria, that financial hardship is not an allowable criterion” and added that the heating bill in the present matter is not evidence of any fact in issue.

109. The respondent contended not only that this criterion is not met, but that there was no evidence of any remedial treatments or risk mitigation having been carried out.

**Criterion 1(g) – the tree is part of a close planting of a number of trees, the removal of the tree will allow other trees to develop.**

110. Ms Crossing stated that the subject tree does not meet this criterion as only regulated trees are considered under this criterion. The only regulated tree in the applicant’s block that could develop as part of a close planting if the subject tree

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<sup>55</sup> *Maciejewski v Conservator of Flora and Fauna* [2013] ACAT 78

<sup>56</sup> [2014] ACAT 20 at [79]

is removed is the Californian Redwood – *Sequoia sempervirens*. She described the Redwood tree on the applicant’s block as a poor specimen with deadwood/dieback in the top of the canopy adding that “... it is not well suitable to Canberra as summers are too dry”<sup>57</sup>.

111. Further, she said the hedge plants which the neighbour wishes to encourage along the boundary are unregulated trees and not considered over a regulated tree.

**Criterion 2 – approval to remove a tree if located on a block of less than or equal to 1200m<sup>2</sup> and is a species listed in Schedule 2**

112. Ms Crossing stated that the subject tree is not a Schedule 2 listed species as the applicant’s block exceeds 1200m<sup>2</sup>. Although approval had been granted earlier for removal of the *Cupressus macrocarpa* at the front of the applicant’s house this approval was in error as the block exceeds 1200m<sup>2</sup>. Each application should be considered independently from each other.

**Remedial Treatments and Risk Mitigation**

113. The respondent contends<sup>58</sup> that reasonable and sufficient mitigation measures and treatments include:

- (a) removal of the hanging branch;
- (b) pruning; and
- (c) replacement of the asbestos roof,

and that none of these had been determined unreasonable or ineffective.

114. In this matter, the respondent noted that removal of the hanging branch and selective pruning had been recommended by the respondent in the original decision and that the hanging branch had not been removed, notwithstanding that the Canopy, The Tree Experts had also inspected the tree in November 2017 and stated that “current broken branches are likely to break off and tumble over so that the butt end hits the roof and the main branch falls on the deck”. The

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<sup>57</sup> Pryor LD, Banks JCG, *Trees and Shrubs in Canberra* (1991, Little Hills Press, Crows Nest) page 158

<sup>58</sup> Respondent’s statement of facts and contentions at [51]

respondent contends that any risk of damage to the roof from the hanging branch could be effectively remedied by removal of that branch.

115. The respondent further contends that pruning, as part of normal tree maintenance, would be effective to mitigate the applicant's perceived risk of unacceptable risk to public or private safety and substantial damage.
116. Ms Crossing opined that reduction pruning would be considered a reasonable risk mitigation measure to reduce the likelihood of future branch failure. Although the applicant has been provided with quotes for arboricultural work, she noted that this work had not proceeded.
117. In relation to respondent's contention that replacement of the asbestos roof is an effective remedial treatment that goes to addressing the applicant's main concern about the effects of damage to the roof, the respondent referred the Tribunal to the decision in *Kelly v Conservator of Flora and Fauna*<sup>59</sup> where that tribunal considered criterion 1(b) where the subject tree was causing uplifting to the driveway and the carport floor. That tribunal noted that there were a number of available remedial measures including repairs to the driveway, resurfacing affected areas and removal of the tree's roots which had not been undertaken or been determined to be ineffective.
118. While the respondent noted that the available evidence suggested roof replacement was a costly exercise, it submitted such replacement would provide a permanent solution to the apprehension of risk.

**Criterion 1(3)(a) – exceptional circumstances**

119. The respondent disputes the applicant's claim that having an asbestos sheet roof constitutes an 'exceptional circumstance.'
120. The respondent contends that for this criterion to be satisfied the applicant is required to show that having a healthy tree located on a property with a house that has an asbestos roof is uncommon, special or unusual in the context of the TP Act

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<sup>59</sup> [2009] ACAT 24 at [51], [52]

which includes the protection of urban forest values and the incorporation of the value of trees in the urban environment.

121. The respondent contends that this criterion cannot be met.

### **Other Discretionary matters**

122. Ms Crossing submitted<sup>60</sup> that the applicant is cherry picking the TP Act when stating<sup>61</sup> in his statement of reasons that the object of the TP Act is to protect ‘exceptional trees’. The objects in the TP Act have five other parts<sup>62</sup> that generally cover urban forest as a whole, not just ‘exceptional trees’.

123. An object of section 1(b) of the TP Act is to protect urban forest values that may be at risk because of unnecessary loss or degradation. The subject tree is, by definition, part of the urban forest and removal of the tree would be inconsistent with the objects of the TP Act. Ms Crossing considered the loss of this tree as unnecessary.

124. While accepting that the tree is on the arson list, Ms Crossing alleged that the applicant did not understand how the ‘Fire Risk Analysis Form for Regulated Trees’ works and said that the tree did not meet the criterion for removal as it did not meet point 4 – “there was not an accumulation of fuels that could transfer into the canopy” because the tree has had its canopy lifted and did not have low branches to create a ladder effect.

125. Ms Crossing further stated that, in her opinion, the conifers referred to in the 2003 Canberra firestorm inquiry referred to by the applicant were more than likely a reference to the *Pinus radiata* forests that surround Canberra.

### **Consideration of issues**

126. The applicant has sought review of the decision on criteria (b), (c), (d), (e) and (g) of paragraph 1 of the Determination with respect to:

- Criterion (b) - public and private safety (in the form of risk from falling branches onto people and onto his asbestos sheeted roof and fire hazard),

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<sup>60</sup> Hayley Crossing Witness Statement at [76]

<sup>61</sup> At [8]

<sup>62</sup> s.3(1) (b), (c), (d), (e) and (f) of the TP Act

- Criterion (c) - threat to cause substantial damage to substantial structures, in particular the asbestos sheeted roof on his property,
- Criterion (d) - it's inappropriate location being 2 m from the nearest structure (his deck) 2.8 m from the nearest structure (neighbour's garage) and 6.2m from the nearest house (applicant's house),
- Criterion (e) - its impact on his and his neighbour's solar access, and
- Criterion (g) - that the tree is part of a close planting of a number of trees.

127. In *Bozin v Conservator of Flora and Fauna*<sup>63</sup> (**Bozin**) the tribunal set out the task of the Tribunal in hearings such as the present matter. It said:

*The Tribunal's task, standing in the shoes of the Conservator, is to undertake a fresh consideration of the application to remove the subject tree, having regard to the evidence currently available and to the criteria for removal in the Criteria Determination.*

128. In *Egan*<sup>64</sup> the tribunal adopted the respondent's contentions that:

*The legislation in this case requires the applicant to demonstrate that the criteria are met, and to provide the data, analysis and persuasive arguments to satisfy the relevant criteria.*

129. In considering the applicant's application afresh the Tribunal must not only consider each of the criteria relied upon, including criterion 1(3)(a) – exceptional circumstances; it must also consider whether the applicant has shown that all other reasonable treatments or risk mitigation measures have been determined to be ineffective to address the issue.

130. The Tribunal now turns to a consideration of the evidence in relation to each of the criteria. In doing so the Tribunal will also consider whether all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective and any exceptional circumstances that have been raised by the applicant taking into account advice from the TAP and the importance of the tree in the surrounding landscape.

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<sup>63</sup> [2010] ACAT 91 at [27]

<sup>64</sup> at [25]

131. Conscious of the statement in *Egan* (in [128] above) the Tribunal has set out above in considerable detail the parties' evidence, analyses, arguments and the data they have relied upon and which the Tribunal has taken into consideration in reaching its decision.

**Criterion 1(1)(b) – the tree represents an unacceptable risk to public or private safety**

132. The applicant lodged his application the morning following a branch from the tree breaking and falling to the ground and a second broken branch hanging in the tree. He submits that the tree represents an unacceptable risk to the safety of his family, visitors to his property and to his neighbours as the tree leans towards his neighbours' property and its branches overhang all structures. One of these branches which was six metres in length and 20cm in diameter fell to the ground at the front corner of his house. The tree is now 17 metres in height and, according to Ms Crossing, may grow to 20 metres which adds weight to the applicant's concerns that given this greater height from which branches will fall, the greater will be the resulting damage.
133. He has two main concerns under this criterion – (i) that the tree represents an unacceptable risk to private safety in that a person or persons may be injured or killed by a falling branch or branches from the tree and cars, fences and buildings may be damaged or destroyed; and (ii) the tree represents an unacceptable risk to both private and public safety in that an arborist, Mr Alan Mann, he engaged and the respondent's expert witness, Ms Hayley Crossing, have stated a falling branch or branches may fall on his asbestos roof.
134. The applicant has obtained advice from an asbestos assessor that the asbestos sheet roofing is not to be walked upon and it is brittle. The 2009 Lawrie Paul Building Services report said of the asbestos sheet roof – "the material is considered safe if undisturbed and unweathered, some thought should be given to replacement with 'colorbond' metal or similar." The sheets overlap and disturbing one sheet impacts on the next one and so on. The applicant was unable to install a skylight as it was not possible to remove and replace one sheet of asbestos. Given the advice that a branch may fall on the brittle asbestos roof he is concerned that the resulting damage will release asbestos fibres in to the air.

Unsurprisingly, the applicant said that he was not prepared to test the brittleness of the asbestos or the release of asbestos fibres by damaging it for the sake of his application. He is acting on the advice he has received that the asbestos sheets are to be undisturbed.

135. Ms Crossing has assessed the tree as having poor branch attachments with weak unions and that some future branch failure seems likely. She stated that the torn limb hanging from the canopy “was threatening to fall on the asbestos roof.”<sup>65</sup> The arborist engaged by the applicant, Mr Alan Mann of Canopy, The Tree Experts, stated:<sup>66</sup>

- *The broken branch appears to be broken through (excessive) twisting, which is explicable in that it was long and pendulous and side on the storm winds so that it would have blown to the SE twisting the branch at the point at which it has split*
- *The current broken branches are likely to break off and tumble over so that the butt end hits the roof and the main branch falls on the deck*
- ...

136. This advice gives credibility to the applicant’s concerns, especially in relation to damage to his asbestos roof. This is not a case of the applicant only having an apprehension of risk. Damage to his asbestos roof also represents a risk to both private and public health and safety if asbestos fibres are released into the community. The applicant has obtained expert advice that such damage would be substantial because he would need to replace the whole roof. The Tribunal will consider this further under criterion 1(b).

137. The question for the Tribunal is – is this risk unacceptable? For the applicant the answer is unquestionably ‘yes’. He relies on the Oxford Dictionary definition of unacceptable of “not satisfactory or allowable” and the Merriam-Webster dictionary definition of “not pleasing or welcome”. Ms Williams said

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<sup>65</sup> Hayley Crossing witness statement at [18]

<sup>66</sup> Email to Alec [Wickerson] and Tara [Williams] 27 November 2017 from Alan Mann

*One of the key reasons we believe our application should be approved is because of the risk posed, both in terms of cost and safety, of a tree branch falling on our roof which is made of bonded asbestos sheeting.<sup>67</sup>*

138. The respondent however, rejects such a finding and submits that an apprehension of risk is not sufficient to satisfy this criterion. Ms Crossing provided some 2012 statistical evidence from the Australian Bureau of Statistics on causes of death and stated that one is 40 times more likely to die from a bed related accident than from a falling tree and 1,000 times more likely to die from a fall. In an attachment to her witness statement she referred to the statement by Michael Henderson in the 1987 British Medical Association report ‘Living with Risk’ – “the purpose of life is not simply to avoid death. We live with and accept risk in our daily lives.” She stated that the death rate from falling trees or branches in Australia is approximately two per year, which is about one in 10 million per year; the ACT Government is responsible for more than 750,000 street and park trees, which to the best of Ms Crossing’s knowledge, have never caused a fatality. She assessed the safety risk was low.
139. The Tribunal noted that she did not provide evidence, statistical or otherwise, of injury, life changing or otherwise, to a person or persons from falling tree branches or trees in Australia. She did provide evidence that the torn limb hanging from the tree was threatening to fall on the roof adding that the tree’s branch sizes are not large and are unlikely to cause substantial damage.
140. Ms Crossing also referred the Tribunal to the report by Kathryn E. Kelly<sup>68</sup> which stated:

*Much has been written about determining the acceptability of risk. The general consensus in the literature is that “acceptability” of a risk is a judgment decision properly made by those exposed to the hazard or their designated health officials. It is not a scientifically derived value or a decision made by outsiders to the process. Acceptability is based on many factors, such as the number of people exposed, the consequences of the risk, the degree of control over exposure, and 40 or so other factors.*

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<sup>67</sup> Tara Williams witness statement at [21]

<sup>68</sup> Kathryn E Kelly and NC Cardon, *The Myth of 10-6 as a Definition of Acceptable Risk* (June 1991)

141. The Tribunal notes the statement in relation to ‘risk assessment’ by Mr Justice Mackay in 2011 in the English High Court of Justice, Queens Bench Division in *Bowen, Farley, Farthing and Mullinger v National Trust*<sup>69</sup> where a group of children were sheltering under the canopy of a beech tree when, without warning, a large branch fell and killed one child and seriously injured three others -

*In the event, their judgment was wrong and disastrous consequences followed, because of the cruellest coincidence of the failure occurring at the very moment this small group was standing under the branch when it did so. But risk assessment in any context is, by its very nature, liable to be proved wrong by events, especially when as here the process of judging the integrity of a tree is an art not a science, as all agree.*

142. The Tribunal also notes the statement by Lord Radcliffe in a 1951 decision of the House of Lords in *Caminer v Northern and London Investment Trust Ltd.*<sup>70</sup>

*... for a tree or its branch only falls once; and it must be poor consolation to an injured passer-by in the country lane to be assured that the chances were all against his being at the place of the accident at the moment when it occurred.*

143. The TAP has found that the tree has weak branch unions and concluded some future branch failure is likely. It appears to the Tribunal that the respondent has not given proper weight to this finding and conclusion in its risk assessment. The two English cases referred to above arose in instances where risk assessments were proved wrong. It is a sobering truth that a tree or its branch only falls once.

144. For the applicant and his partner, who clearly fit the description by Kathryn E. Kelly (above) of “those exposed to the hazard” and who are living in the property with their two young children the risk is very real – it is unacceptable. They have not come to their position uninformed. They provided detailed evidence of their research into asbestos to the Tribunal. It was compelling. The applicant said in his Witness Statement

*34. My overall feeling at this point is fear. I fear that the roof of my house will be broken, that it is not covered by insurance and it will be complicated and expensive to remedy.*

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<sup>69</sup> [2011] EWHC 1992 (QB) at [43]

<sup>70</sup> [1951] AC 88

35. *I fear that the right solution can't be reached as the decision maker to date, and now respondent, is acting unreasonably and is able to rely on assertion whereas I don't have this fall-back.*

145. The applicant provided his detailed analysis of the respondent's risk assessment matrix – 'Risk Assessment for Applications for Tree Damaging Activities'<sup>71</sup> in which he concluded that this matrix could also be applied to give a different result to that of the respondent, namely that the risk assessment matrix for personal safety and for structural damage returns a result of 'high'. Personal safety and structural damage risks of 'high' or 'higher' in the risk assessment make approval (for removal of the tree) mandatory. The applicant's analysis was not credibly challenged.

146. For these reasons the Tribunal finds that, in this matter, the risk is unacceptable.

147. The term 'exceptional circumstance' is not defined under the criteria or under the TP Act and it has not been scrutinised by the tribunal in the context of the TP Act.

148. The respondent referred the Tribunal to two other merits review decisions of the tribunal for general guidance on the meaning of 'exceptional'. In *Commissioner for ACT Revenue v Butt*<sup>72</sup> that tribunal said:

*'Exceptional' means 'forming an exception or unusual instance; unusual; extraordinary'. 'Exception' means relevantly 'something excepted; an instance or case not conforming to the general rule.'*

*The phrase 'exceptional circumstances' is used in many legislative contexts, but must be construed and understood according to the context.*

149. In *Legal Practitioner 'S' v Law Society of the ACT*<sup>73</sup> that tribunal referred to the statement by Lord Bingham in *R v Kelly (Edward)*<sup>74</sup> that:

*We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or*

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<sup>71</sup> In [41] – [53] of Applicant's Statement of Reasons lodged 14 February 2018

<sup>72</sup> [2016] ACAT 109, at [40]-[41]

<sup>73</sup> [2018] ACAT 12

<sup>74</sup> [2000] 1 QB 198 at 208

*special or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.*

150. In assessing exceptional circumstances in the context of whether the tree represents an unacceptable risk to public or private safety the Tribunal adopts the statement by the appeal tribunal in *Campbell v Blackshaw & Evans*:<sup>75</sup>

*Section 28<sup>76</sup> of the ACAT Act provides that the Tribunal may inform itself in any manner in which it sees fit. This includes, where appropriate, relying upon its own expertise and applying a healthy dose of common sense.*

151. The Tribunal notes that this decision by the appeal tribunal was also the subject of an unsuccessful appeal by Ms Campbell to the Supreme Court of the ACT<sup>77</sup> in that her applications for an extension of time to appeal and leave to appeal were dismissed.
152. Having carefully considered all of the evidence and the parties' contentions the Tribunal is satisfied, in the present matter, that the fact that the tree is adjacent to the applicant's house which has an asbestos roof is an exceptional circumstance in criterion in 1(3)(a) of the Determination.
153. The applicant challenged the respondent's suggested reasonable remedial treatments and risk mitigation measures. While the applicant acknowledged he could have paid to remove the hanging branch remaining in the tree he told the Tribunal that he was reluctant to incur that cost when his application to the Tribunal to review the Conservator's decision was pending. He disputed that reduction pruning was a reasonable remedial treatment or risk mitigation measure and he vehemently disputed that replacing the asbestos sheeted roof was a reasonable risk mitigation measure.
154. The Tribunal agrees with the applicant. The example of reasonable remedial treatments set out in [6](1) of Schedule 1 of the Determination – reduction pruning to lessen wind resistance and reduce weight of limbs undertaken every

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<sup>75</sup> [2017] ACAT 64 at [43]

<sup>76</sup> Now section 26

<sup>77</sup> *Campbell v Blackshaw* [2018] ACTSC 39

three years and the expensive risk mitigation measure of replacing the asbestos sheeted roof are, the Tribunal determines, in the particular circumstances of this tree and the applicant's house, neither reasonable nor remedial. They are ineffective.

155. There is compelling evidence from both Ms Crossing and Mr Mann that the hanging branch and other branches, are likely to break off and hit the asbestos sheeted roof of the applicant's house.

156. The Tribunal is satisfied, having considered all of the evidence, that this risk and the associated damage causing release of asbestos fibres is unacceptable. This criterion is met.

**Criterion 1(c) – the tree is causing or threatening to cause substantial damage to a substantial building, structure or service.**

157. The Tribunal has considered in relation to criterion 1(b) the risk from branches falling from the tree and found that in this matter, the risk is unacceptable. Applying that healthy dose of common sense referred to by the appeal tribunal in *Campbell v Blackshaw & Evans* (see [150] above) it follows that falling branches from the tree are threatening to cause damage to the applicant's roof. It is not in dispute that the roof to the applicant's house is a substantial structure<sup>78</sup>.

158. In *Muttukumar & Skillicorn and Conservator of Flora and Fauna*<sup>79</sup> the tribunal set out the following comments from the respondent's expert witness, Dr Peter Coyne, who was then the Chair of TAP:

*38 ... We also note Dr Coyne's comments that if a branch were to break away from the tree it would tend to fall away from the house and the roof itself would provide protection to the occupants. ...*

159. In the present matter, the same cannot be said about the protection the roof would provide to the applicant and his family. The fact that the roof is asbestos sheeting and the tree is planted adjacent to it is at the heart of this matter. The Tribunal

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<sup>78</sup> Respondent's statement of facts and contentions at [35]

<sup>79</sup> [2008]ACTAAT 13

also adopts its consideration and assessment of criterion 3(a) - 'exceptional circumstances' in [147] – [150] above in relation to this criterion.

160. The question is – whether such roof damage is substantial. The applicant contends that any damage to the asbestos sheeted roof constitutes 'substantial damage' due to the risks associated with asbestos. The respondent does not disagree that there are certain risks associated with asbestos and inappropriate handling of it.<sup>80</sup> It submitted that the health risks are low to very low. The respondent referred to the Guide for Householders and the General Public.<sup>81</sup> This Guide states that this publication was developed in response to the high volume of individual householders' enquiries received by state and territory environmental health units in relation to asbestos identification and management.

161. The relevant pages were last updated on 6 March 2013. The Tribunal noted the following statements in this publication-

- *The human health effects from exposure to asbestos are well documented. In this guide, the likelihood of developing an asbestos-related disease from breathing in asbestos fibres is called the 'risk'. The risk of developing asbestos-related disease, like lung cancer, from asbestos exposure is associated with the level and duration of exposure, length of time since first exposure, the fibre type, and concurrent exposure to tobacco smoke and other carcinogens. Not all factors are well understood, and we do not yet know why some people develop an asbestos-related disease and others do not; however, the risk increases with the exposure to asbestos fibres.*
- *Asbestos fibres are not visible to the naked eye but, they are very light, remain airborne for a long time, and can be carried by wind and air currents over large distances.*
- *When in good condition, bonded asbestos products do not normally release any asbestos fibres into the air and are considered a very low risk for people who are in contact with them, as long as appropriate safety precautions are used when they are disturbed.*
- *However, when bonded asbestos products are damaged or badly weathered (including hail damage), areas may become friable.*

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<sup>80</sup> Ibid at [36]

<sup>81</sup> Department of Health, Australian Government, *Asbestos - A guide for householders and the general public*

- *Friable asbestos products are dangerous because the asbestos fibres can get into the air very easily, and may be inhaled by people living or working in the vicinity.*
- **Remember :** *asbestos cement materials can become friable when they are sufficiently damaged, badly weathered or otherwise deteriorated.*

162. The respondent contends that any resultant damage to the roof would not be ‘large, weighty, considerable, solid or big or not trivial, minimal or nominal.’

163. Ms Crossing assessed that the pendulous branches of the tree are small; will be cushioned by other branches if they fall and the potential damage caused by such branches is more likely to constitute nominal or minimal. However, as set out in [135] above, she also assessed the tree as having poor branch attachments with weak unions and that some future branch failure seems likely. The branch which fell from the tree in September 2017 was six metres in length and 20cm in diameter. The Tribunal observed this branch at the site inspection on the morning of the hearing.

164. The Tribunal had the opportunity to see the applicant and his partner giving evidence. It has taken into consideration the very detailed documentation they have prepared and the thorough research they have carried out. The applicant has acted immediately when he became aware that the tree has shed two broken branches. He has two young children. For the applicant, any damage to his asbestos roof from falling branches amounts to substantial damage as required by this criterion. The applicant has raised the very real concern for him as a leaseholder of damage to his asbestos sheeted roof from falling branches and the resultant airborne asbestos fibres. The Tribunal finds that the damage includes the risk of airborne asbestos fibres and that such damage meets the description of substantial.

165. The applicant’s evidence that any damage to his asbestos roof meant that all of the roofing had to be replaced because individual panels were unable to be replaced was not seriously challenged. In [88] above the Tribunal has set out statements from the Queensland Government factsheet ‘Is it safe? Cracked, damaged or weathered asbestos cement sheeting’ which the respondent provided to the Tribunal and which clearly state “if your asbestos roof is punctured or

cracked, it is best to have your house reroofed.” The total cost to remove and replace the asbestos sheeted roof was approximately \$40,000. The Tribunal accepts this evidence.

166. The Tribunal finds that all other reasonable remedial treatments and risk mitigation measures proposed by the respondent are ineffective in considering this criterion for the same reasons it found in considering criterion 1(b).

167. The Tribunal finds that criterion 1(c) has been met.

**Criterion 1(d) – the location of the tree is inappropriate given its potential size and growth habit**

168. The applicant submitted that the tree is positioned between two houses and set back a few metres from both houses’ curb side building lines. The applicant relied in part on the fact that the species of the tree, *Cupressus Arizonia*, was included in the list of problematic trees in Schedule 2 of the Determination. He told the Tribunal that he was not requesting removal of the tree under Schedule 2; rather he is contending that the existence of Schedule 2 recognises that some trees have problematic features and this contributes to the rationale to approve removal under one of the specified criteria.

169. The applicant contended that the tribunal decision in *Blackshaw & Evans v Campbell (No.2)*<sup>82</sup>(**Blackshaw No. 2**), which, although a nuisance application, provided useful guidance to this Tribunal in regard to the tree being in the group of problematic trees in Schedule 2 and in relation to the appropriateness of planting a cypress tree along a boundary fence. That tribunal said:

81. *First, the cypress trees should never have been planted along the boundary between the applicants’ and respondent’s land. They have become very large trees and will continue to grow to a height of approximately 20m. They have been planted in a sewer easement on the respondent’s land, and close to a stormwater easement on the applicants’ land.*

82. *Second, the trees are unsuited for the applicants’ and respondent’s comparatively small blocks, both of which are little more than 500m<sup>2</sup>. In his decision dated 24 December 2014, the delegate of the*

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<sup>82</sup> [2016] ACAT 108 at [81]

*Conservator gave approval for removal of tree 4 on the basis that “the location of the tree is inappropriate given its potential size and growth habit.” The delegate also refused approval for major pruning or lopping because the criteria for that approval had not been satisfied. In other words, the only option is removal.*

83. *Third, trees 5- 9 are listed in Schedule 2 to the Tree Protection (Approval Criteria) Determination 2006 (No 2) as ‘problematic tree species for the purposes of criterion 1(2) of the Determination. Criterion 1(2) of the Determination permits the Conservator to give approval for removal of a tree listed in Schedule 2, including a regulated tree, ‘if the tree is located on a block of less than or equal to 1200m<sup>2</sup>’. The applicants’ and respondent’s blocks are less than half that size. In an email sent on 9 May 2016, the delegate of the Conservator explained that trees listed in Schedule 2 ‘are generally approved for removal as they have detrimental effects on energy, building structural integrity, solar access and services interference.’*

170. The Tribunal noted that in *Blackshaw No. 2*, each of the adjoining blocks were less than 1200m<sup>2</sup> and, therefore, the cypress trees qualified as problematic trees in accordance with Schedule 2 of the Determination. This was why the Conservator had given approval to the removal of the cypress trees in that matter.

171. The respondent submitted that the fact that the tree is identified as a problematic species in Schedule 2 is not determinative as to whether it is a specimen that is inappropriately located, given its actual form and structure.<sup>83</sup> The respondent contends that the tree is not in an inappropriate location for its size; it is now a mature specimen and its growth has slowed and will continue to slow. The respondent also disagreed with reliance on the Design Standards for Urban Infrastructure as guidance for setback of the tree from the house as the prescribed use of the Design Standards is for use by professionals involved in the planning, design and construction of Urban Infrastructure in the ACT.<sup>84</sup> The respondent contended that this prescribed use is distinct from regulation of trees on private land.

172. The Tribunal, however, found it compelling that Dr Peter Coyne, also a member of the TAP, referred the tribunal in *Svensson* to the recommended appropriate

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<sup>83</sup> *Moss v Conservator of Flora and Fauna* [2016] ACAT 1 at [39]

<sup>84</sup> Design Standards 1

distances between trees and houses in the Design Standards which should be observed when planting new trees. The Design Standards provided guidance on a range of trees which included *Cupressus Arizonica* and identified the minimum clearance or set back from buildings for this tree to be 12 metres. The distance between the tree and the applicant's house is approximately half of this distance. The Tribunal also noted that Ms Crossing said she did not recommend to her clients that they plant this species of tree on private land.

173. The Tribunal finds that all other reasonable remedial treatments and risk mitigation measures proposed by the respondent are ineffective in considering this criterion for the same reasons it found in considering criterion 1(b) and 1(c).
174. For these reasons the Tribunal is satisfied, after considering all of the evidence, that the location of the tree is inappropriate given its potential size and growth habit. Criterion 1(1)(d) is met.

**Criterion 1(e) – the tree is substantially affecting solar access to the lessee's lease, or neighbouring lease, during winter between the hours of 9am to 3 pm and pruning is not sufficient to remedy this.**

175. As the tribunal stated in *Maciejewski v Conservator of Flora and Fauna*:<sup>85</sup>

*111. In order for the applicant to satisfy this criterion the Tribunal needs to be able to find from the evidence that the tree is **substantially** affecting the solar access to the applicant's **lease**, not just to the applicant's house or part of his house. This requires the Tribunal to consider the evidence of solar access to the whole of the perimeter of that lease during winter between the hours of 9 am and 3 pm as well as considering whether pruning could remedy any substantial lack of solar access. The Tribunal is also required to consider whether all other reasonable remedial treatments and risk measurements have been demonstrated to be ineffective.*

*If the Tribunal is not satisfied as to any of these elements, it cannot find that the criterion is met and that it is appropriate to remove the tree.*

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<sup>85</sup> [2013] ACAT 78 at [111]

176. The applicant relied on an aerial photograph<sup>86</sup> on which he had marked the shading to his house and the applicant's neighbour's house in winter 2017. He submitted that his house is substantially shaded between 9am and midday and the neighbour's house from approximately midday to the end of daylight in winter; that these hours fall between 9am and 3pm in winter and meet the criterion. He further submitted that given the proximity of the tree to both of the houses, reduction pruning would not sufficiently reduce its size to remedy the shading problems and removal of the tree was the reasonable option.
177. The applicant disputed that the criterion required shading of the entire lease submitting that such an interpretation may be so devoid of practical application that it may make that particular criterion redundant or of no likely use.
178. The respondent contends that the interpretation advanced by the applicant is inconsistent with the criteria and with precedent. Criterion 1(1)(e) requires substantial shading to the whole of the perimeter of the lease. The partial shading complained of by the applicant is insufficient to satisfy this criterion. The Tribunal agrees.
179. As the applicant has not demonstrated that the tree has a substantial effect on solar access it is not necessary to consider whether all other reasonable remedial treatments of risk mitigation measures have been determined to be ineffective.
180. Criterion 1(1)(e) is not met.

**Criterion 1(g) – where the tree is part of a close planting of a number of trees, the removal of the tree will allow other trees to develop.**

181. The applicant submits that removal of the tree will allow the other trees, particularly the Redwood which is a regulated tree and the Hakea which is not a regulated tree, to develop.
182. The respondent described the tree as the dominant species amongst a close planting of a number of trees. The other trees, apart from the Redwood, are not regulated trees and not of sufficient significance to take advantage of space which

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<sup>86</sup> T documents at page 20 and attachment 3 to application for review of decision

would result from removal of the tree. Further, Ms Crossing opined that the Redwood was not a good specimen and has dieback to the top of the canopy.

183. The Tribunal is not satisfied that this criterion has been met.

**Conclusion**

184. The Tribunal has found that three of the criteria for approval to damage a regulated tree, 1(1)(b), 1(1)(c,) and 1(1)(d) have been met, and therefore it is appropriate to approve the application to remove the tree.

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Presidential Member E Symons

## HEARING DETAILS

<b>FILE NUMBER:</b>	AT 72/2017
<b>PARTIES, APPLICANT:</b>	Alec Wickerson
<b>PARTIES, RESPONDENT:</b>	Conservator of Flora and Fauna
<b>COUNSEL APPEARING, APPLICANT</b>	N/A
<b>COUNSEL APPEARING, RESPONDENT</b>	Ms K. Katavic
<b>SOLICITORS FOR APPLICANT</b>	N/A
<b>SOLICITORS FOR RESPONDENT</b>	ACT Government Solicitor
<b>TRIBUNAL MEMBERS:</b>	Presidential Member E Symons
<b>DATES OF HEARING:</b>	15 March 2018