

**REVIEW OF THE OPERATION
OF SIGNIFICANT TREE
CONTROLS**

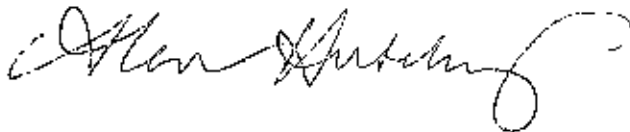
**ALAN HUTCHINGS
NOVEMBER 2002**

The Honorable Jay Weatherill, M.P.
Minister for Urban Development and Planning
ADELAIDE
SOUTH AUSTRALIA 5000

Dear Minister,

On 18 August 2002 you appointed me to conduct a review of the operation of Regulation 6A (Significant Trees) of the *Development Regulations 1993*.

I have pleasure in submitting my report and recommendations.

A handwritten signature in black ink, appearing to read "Alan Hutchings". The signature is fluid and cursive, with a large loop at the end.

Alan Hutchings
Commissioner
Environment, Resources and Development Court

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1. OBJECT OF THE REVIEW

Sub regulations (7), (8) and (9) of Regulation 6A of the *Development Regulations 1993* state that

(7) The Minister must, as soon as practicable after the second anniversary of the commencement of this regulation, appoint a person to review the operation of this regulation (and to report on any other matter that appears to be relevant to the Minister)

(8) The person appointed under sub regulation (7) must present to the Minister a report on the review (and any other relevant matter) within six months after his or her appointment.

(9) The Minister must ensure that copies of the report presented to the Minister under sub regulation (8) are available for inspection by members of the public, without charge and during normal office hours, at the principal office of the Department of the Minister.

On 18 August 2002, I was appointed as the "person to review" with terms of reference thus

To investigate and make recommendations to the Minister for Urban Development and Planning on the following matters related to the significant tree controls under the *Development Act 1993* and *Development Regulations 1993*.

1. The appropriateness of the 2.5 metres trunk circumference threshold for development applications for tree-damaging activities that currently applies pursuant to regulation 6A of the *Development Regulations 1993*.
2. The extent of the designated area that currently applies pursuant to regulation 6A.
3. Whether individual councils should be able to choose to apply a lower trunk circumference and/or height threshold for their area or portion of their area on a permanent basis through an amendment to regulation 6A.
4. The experience of councils and the Development Assessment Commission in administering the significant tree controls since April 2000.
5. The process for the listing of trees as significant in Development plans through the preparation of Plan Amendment Reports by councils.
6. Initiatives that would improve compliance with the significant tree controls.

7. The need for further education of developers, landowners, assessment authorities and the community on the significant tree controls.
8. The relationship between the *Native Vegetation Act 1991* and the significant tree controls.

2. METHOD OF REVIEW

Advertisements seeking submissions were placed in *The Advertiser* and *Messenger* newspapers and a notice was placed in the Planning SA website. Discussions were held with a wide range of professional bodies, government agencies, interested groups and individuals. In particular, meetings were arranged to which elected members (and their professional advisors) of relevant councils were invited. Those councils are the planning authorities who have administered the "significant tree" controls so far. The National Environmental Law Association (SA Division) arranged a well-attended late afternoon seminar.

In total 101 submissions were received from councils, interested parties, citizens and government agencies. These are listed in the appendix. The Honorable Dr Bob Such, M.P., chaired the original "Urban Trees Reference Group" of 2000 and I am grateful for the opportunity that was arranged so that matters could be discussed with him. I am also grateful for and acknowledge the assistance of Mr Chris Welford, Manager and Ms Deanne Smith, Senior Planning Officer, Legislation Unit, Planning SA. Their executive support and professional advice was invaluable.

The report of the Urban Trees Reference Group stated in its introduction that

"trees form an important part of our urban environment, are highly valued by the community and play a major role in maintaining the livable quality of our suburbs."

That this truism is considered important by the community is underscored by the content of the discussion held, and by the reasoning, thoroughness and, at times, passion of the submissions received.

3. SUMMARY OF FINDINGS

I have carried out this review within the context formed by the scheme of the *Development Act 1993* and by the current policies within Development Plans.

A notable feature of the South Australian planning system is the way in which regulatory procedures and planning policy are separated as far as practicable. This lends an admirable clarity to a complex field of endeavor. As I have described in sections 6 to 8 below, there is currently confusion between the role of regulations and policy, and where a planning judgment is required. In particular, there are two classes of 'significant trees'.

To clarify this, I have made recommendations so that there is; first, a "regulated tree" defined as development in the *Development Regulations 1993* (1.5m girth). Second, a "regulated tree" is then assessed against criteria in the relevant Development Plan as to whether it is a "significant tree". If, as a matter of planning judgment, it is considered to be so, it is then assessed against the provisions for the relevant zone or policy area for development consent or refusal.

With regard to planning policy in Development Plans, I have concluded that the strategy for metropolitan Adelaide favors "urban consolidation" and "significant tree" provisions must be read accordingly. With regard to "significant tree" provisions in particular, I have found them to be somewhat inconsistent having regard to the principles of policy drafting. I have, therefore, set out a number of sample provisions as a way to address this and have recommended accordingly.

In the light of the foregoing, I have recommended that no lists of "significant trees" be included in future Development Plans, that controls be extended to rural councils after consultation; that an exemption be granted to the Botanic Gardens Board on the fulfillment of certain conditions; that an accreditation system for suitably qualified people be established and that certain education and training programs be undertaken.

Enforcement and penalties remain contentious and complex and I recommend a separate offence be introduced. A key part of this would be that "tree replacement" be introduced as a landholder's duty. The extent of the "subject land" with regard to "significant trees" is an issue that requires considerable further investigation and I recommend accordingly.

With regard to relationships between the *Development Act 1993* and the *Native Vegetations Act 1991* I find no overlap. However, within the Hills Face Zone and rural living areas (if controls are extended to them), procedures should be put in place to ensure that "significant trees" near dwellings and other improvements are not overlooked.

4. SIGNIFICANT TREE DECISIONS TO DATE

Some submissions made assertions about heavy administrative burdens, about barriers being placed in the way of developers and about householders' frustrations: There were also assertions that a refusal was a more likely outcome than an approval. The facts are

NUMBER OF SIGNIFICANT TREES APPROVED FOR REMOVAL OR PRUNING OR DEVELOPMENT APPLICATIONS FOR TREE-DAMAGING ACTIVITIES REFUSED FROM 20/04/00 TO 30/9/02

| Council | Number of significant trees approved for removal | Number of significant trees approved for pruning | Number of significant trees whose removal was refused |
|-----------------------------------|--|--|---|
| Adelaide | n/a | n/a | n/a |
| Adelaide Hills | 364 | 61 | 4 |
| Burnside | 264 | n/a | 71 |
| Campbelltown | 90 | n/a | 12 |
| Charles Sturt | n/a | n/a | n/a |
| Gawler | n/a | n/a | n/a |
| Holdfast Bay | 64 | 13 | 6 |
| Marion | 78 | n/a | 7 |
| Mitcham | 993 | 299 | 43 |
| Norwood | n/a | n/a | n/a |
| Onkaparinga | 149 | 36 | 2 |
| Playford | 10 | 1 | 0 |
| Prospect | 77 | 11 | 2 |
| Port Adelaide | 47 | 6 | 9 |
| Salisbury | 45 | 32 | 9 |
| Tea Tree Gully | 109 | 120 | 1 |
| Unley | 284 | 72 | 18 |
| Walkerville | n/a | n/a | n/a |
| West Torrens | n/a | n/a | n/a |
| Development Assessment Commission | 658 | n/a | 0 |

Notes on table: n/a = not available. Some councils were unable to provide the data for the entire period. To avoid confusion, the information these councils provided [if any] has not been included in the table.

Only general comparisons should be made between councils because some councils could not include data on tree-damaging activities that were part of applications for the construction of buildings. It is important to also be aware that the threshold level for applications varied between councils.

5. ISSUE: METROPOLITAN POLICY CONTEXT

A theme running through the submissions taken as a whole is the apparent contradiction between policies seeking, in the words of Development Plans, a more "compact urban area" on the one hand and the "conservation of significant trees" on the other, in metropolitan Adelaide. In discussions, this was raised repeatedly by the town planners who formulate policy, design developments and administer development control; and also by lawyers specializing in planning and environmental law (the "planning bar").

Given this, I have considered it necessary to set out the relevant policy context as provided by the Development Plans for metropolitan Adelaide. I have focused upon Development Plans rather than the Planning Strategy to which some submissions refer, because Part 3 of the *Development Act 1993* in effect establishes the strategy as a procedural tool whereby planning issues of the day are evaluated for the purposes of preparing Development Plans. I have examined therefore those provisions in council plans which, taken as a whole give, in my view, a metropolitan regional framework or strategy (in its general sense) for the subject of this Review.

The well-known 1962 Metropolitan Development Plan still forms the foundation for Adelaide's development. However, in 1988 significant amendments were made to its provisions. These are commonly known as the "urban consolidation" provisions whereby more closely settled residential areas were promoted (although not those for business and/or community purposes). Under headings such as "Form of Development" and "Residential Development" in the opening parts of each metropolitan council's plan, directions are set for "increasing dwelling density to maintain population levels" for "a compact urban area" and for the "encouragement of designs which use space efficiently and effectively, and the provision of medium-density residential development where appropriate". Although there are provisos (to which I will return) the strategic thrust of these provisions is clear.

Except in the City of Adelaide, these provisions have prevailed as a uniform regional set in all council Development Plans since 1988. However, in recent months some of these plans have been reformatted and reworded so that they need to be read on a council-by-council basis rather than regionally. As far as I can ascertain, this does not compromise the "urban consolidation" strategy for metropolitan Adelaide.

Imprinted upon this strategy now, are the metropolitan wide provisions for the "conservation of significant trees", the public policy importance of which is stressed by the report of the original "Urban Trees Reference Group", the investigations for the "Significant Tree Control" Plan Amendment as well as

submissions to this Review such as that from the Urban Forest Biodiversity Program.

In making decisions about development applications, planning authorities must have regard to the provisions of authorised Development Plans. In this light I have given careful regard to those for "urban consolidation" on the one hand and those for "significant trees" on the other and it is my view that the general thrust of planning for metropolitan Adelaide favors "urban consolidation". It may be there are good reasons to reverse this and some submissions so suggested but official planning policy must be taken as it is now. Recommendations are made in this context.

That said, I note one key "urban consolidation" provision viz, "a compact urban area" – contains the proviso:

"while a compact form of development is generally desirable, recognition must be given to areas of particular character or amenity, or to specific constraint such as environmental or historical (sic) value, water catchment areas and areas of bushfire hazard"

Examining a selection of plans suggests this proviso has enabled zones and/or policy areas to be created the provisions of which recognise "particular character or amenity".

6. ISSUE: SEPARATION OF REGULATION AND POLICY: INTRODUCTION OF "REGULATED TREES"

Some submissions expressed serious concerns about there being confusion over what falls within statutory regulation on the one hand and planning policy on the other. These were well put by the National Environmental Law Association (NELA) the membership of which contains most of the "planning bar".

The position is this. Section 4 of the *Development Act* defines a significant tree as being either:

- One declared so by regulation with the current Regulation 6A in turn defining the significant tree by dimension (girth and/or height) and/or species.
- One declared so within a Development Plan if, as required by section 24 (4a)(a) of the Act, the tree satisfies a number of planning criteria (in turn, based broadly on amenity and environmental criteria) about which a planning judgment must be made.

One definition is statutory and quantitative, the other is of policy and qualitative. In due course, the assessment of any application to remove etc a "significant tree" is made having regard to Development Plan provisions that repeat, for all intents and purposes, the criteria in section 24. A planning judgment based on qualitative criteria must be made on all trees notwithstanding the manner of their declaration.

Legislative and policy skeins are therefore seen to be tangled. Moreover, two classes of significant trees are created; those which are so simply because they have grown to a certain size in the main; or those about which a professional assessment has been made from, for example, urban design, tree management and natural science principles. It is clear that considerable confusion has been created and to clarify the situation NELA suggests the term "regulated trees" be used in the first instance with presumably the term "significant" being applied to those "regulated trees" found worthy after professional assessment.

This suggestion has merit. A practical and simplifying feature of South Australia's planning system is the separation of statutory matters on the one hand and policy on the other. In everyday matters, this means that regulations deal with administration and procedure and Development Plans with policy; the latter being, as the Supreme Court has said many times, "planners' documents". Of course, there is always some overlap and a few statutory definitions require simple arithmetically based judgments. Examples include "horse keeping" which is defined as "one horse kept per three hectares of land used" and "multiple dwelling" defined as "five persons who live independently of one another and share common facilities within that dwelling". That said definitions are considered neutral and are drafted so as to mark the point at which a use or activity becomes development and thus a candidate for assessment by the application of a planning judgment.

As a consequence of this, Sub Regulation 6A(b) and (c) would be deleted because the matters within them would be dealt with by way of Development Plan provisions as set out in Issues 8 and 9 below.

Recommendation: That the term "Regulated Tree(s)" replace "Significant Tree(s)" in Regulation 6(A) and section 4 of the Act and that Sub Regulations 6A(b) and (c) be deleted.

7. ISSUE: THRESHOLD FOR APPLICATION OF CONTROLS

What should be the point at which a tree becomes a candidate for assessment; i.e. a "regulated tree"? This threshold issue was contentious and responses to the relevant terms of reference ranged widely. The following summarises the options put forward.

1. Retain a 2.5m-trunk circumference threshold (possibly with a greater number of exempt species e.g. willows, orchards, pest species and tree species known to cause allergies) and discontinue the interim 1.5m trunk circumference and 4m height controls;
2. Retain a 2.5m trunk circumference threshold, add a 12m height threshold (both to be met) and discontinue the interim trunk circumference/height controls;
3. Retain a 2.5m trunk circumference threshold but allow councils the option of introducing a blanket 1.5m trunk circumference and/or 4m height for native South Australian species threshold through a regulation amendment;
4. As per 3 but allow councils the option of introducing the lower thresholds for portions of their areas only; e.g. by zones or tree management areas shown in Development Plans;
5. Allow councils the option of introducing different thresholds for designated parts of their areas through a regulation amendment (e.g. lower thresholds for coastal areas);
6. Introduce a 2m uniform trunk circumference threshold for all councils within the designated area as a compromise by regulation amendment and discontinue the interim 1.5 trunk circumference and 4m height for native South Australian species thresholds;
7. Introduce both the 1.5m trunk circumference and 4m height for native South Australian species thresholds for all councils in the designated area by regulation amendment and discontinue the 2.5m trunk circumference threshold;
8. Options 3 or 7 combined with optional "tree protection orders" administered by councils for trees with 350mm trunk circumference up to the 1.5m threshold;
9. List species as significant rather than utilizing size criteria.

Additionally, the South Australian Society of Arboriculture submitted that the recognised international technical convention is to use diameter rather than girth at a height of 1.5m above ground level. The professionals who assess vegetation pursuant to the *Native Vegetation Act 1991* argued for 300mm above ground level. Exemptions were also suggested to which I will return.

I have carefully considered the above options each of which has merit. I am mindful of the need for practicality, clarity and brevity and the desirability of uniform application. I am also mindful of the essential systemic separation of statutory and policy matters discussed above and which was forcefully argued in many submissions.

It is my view, therefore, that the entry-level threshold for "regulated trees" should be 1.5 metres trunk circumference measured 1.0 metre above ground level (the multiple trunk measurement would be adjusted accordingly). It follows that this would form the only basis for definition in the regulations; i.e., that the matters now dealt with under Regulation 6A(1)(b)(c) would be inappropriate.

Recommendation: That a tree becomes a "Regulated Tree" at 1.5m trunk circumference measured 1.0m above ground level throughout the designated area.

8. ISSUE: CHARACTERIZATION OF "SIGNIFICANT TREE"

Having separated the statutory threshold requirement from those matters of policy, which would be used to judge whether a "Regulated Tree" is "significant", I turn to the latter. Section 23 (4a)(a) of the Act enables a tree to be declared "significant" in a Development Plan if it fulfills listed criteria. Using this as a basis, all Development Plans could contain a provision thus:

Where a regulated tree

- (i) makes an important contribution to the character or amenity of the local area; or*
- (ii) is indigenous to the local area and its species is listed under the National Parks and Wildlife Act 1972 as a rare or endangered native species; or*
- (iii) represents an important habitat for native fauna; or*
- (iv) is part of a wildlife corridor or a remnant area of native vegetation; or*
- (v) is important to the maintenance of biodiversity in the local environment; or*
- (vi) is a notable visual element to the landscape of a locality; or*
- (vii) has Aboriginal cultural value; or*
- (viii) has historic value as a horticultural or cultural heritage specimen; or*
- (ix) is indigenous to a botanically recognised area and has a minimum height and/or canopy nominated in the provisions of the relevant zones and/or policy areas;*

it is a significant tree.

This would also cover groups of trees. Numbers (vii) & (viii) are added to accommodate submissions drawing attention to the absence of the matters dealt with by these criteria.

Number (ix) places the matters generally dealt with under Regulation 6A(1)(c) within a legitimate policy context. In other words, these matters will need to be justified by research and investigation. In this regard, experts in botany, ecology and the like submitted that the reference to "a species indigenous to South Australia" was too broad, indeed meaningless. The alternative – viz, "a botanically recognised area" – should enable such experts to advise town planners as to relevant zones and/or policy areas when plan amendments are prepared. More generally along these lines, the desirability of recognizing the variety of landscapes within metropolitan Adelaide and country towns and the integral place of trees within them was a strong theme in many submissions. I deal with this further below.

Recommendation: That a "Regulated Tree" be deemed a "Significant Tree" if it fulfills certain amenity, environmental, cultural and heritage criteria set out in Development Plans.

9. ISSUE: DEVELOPMENT PLAN PROVISIONS

As well as submissions that raised the metropolitan policy contradictions discussed in "5" above, it was argued that the term "conservation" in Objective 1 of the Ministerial Plan Amendment (now part of or forming the basis of metropolitan council Development Plans) exacerbated these contradictions and gave undue weight to the conservation of significant trees. Other matters are: that although "development options and design solutions" are mentioned in Principle 3 of the plan amendment, there is no objective stressing the importance of sound urban design from which that phrase can flow; that the reference to "balance" gives no indication of what criteria should be weighed; and that no reference is made to biodiversity in Principle 1. With these matters in mind, I have redrafted the objectives in the Ministerial plan amendment thus.

Objective 1: *Urban landscapes managed to retain significant trees.*

Trees whether occurring singly or in groups are highly valued and integral features of metropolitan Adelaide and country towns. They are important for a number of reasons including aesthetics, amenity, biodiversity, habitat and heritage.

In some situations, they are of equal or greater importance than buildings,

clear open spaces, roads and infrastructure. In others such as where compact residential development is sought or where the efficient layout of business, community and industrial areas is the primary aim, they are of lesser importance.

Objective 2: *Individual developments designed to be enhanced by significant trees situated on the development site and its surrounds.*

Good urban design and site planning integrate built form, open space, circulation and vegetation to produce visually pleasing and efficient developments with low environmental impacts for the benefit of owners, users and the community.

I have also made an addition to the general metropolitan Adelaide Objective 6 under the "Residential Development" heading as shown in italics thus.

Objective 6: *A compact metropolitan area.*

This objective may be achieved through selective development of infill housing, redevelopment and refurbishment of existing housing, and use of vacant and underutilized land, with the aim of reducing the social, environmental and economic costs of urban development, and maximizing use of the community investment in facilities and services in existing housing areas. While a compact form of development is generally desirable, recognition must be given to areas of particular character or amenity, or to specific constraint such as environmental or historical value, water catchment areas and areas of bushfire hazard, or to areas where the particular character derives, in part, from the presence of significant trees.

I referred above to the proviso commencing with the words "While a compact form..." apparently being the basis for the creation of zones of a "particular character" and also to the submissions about the variety of landscapes in urban areas. The City of Mitcham in particular made strong submissions referring, *inter alia*, to the remnant 'grey box' vegetation in the Adelaide Hills. Accordingly, I have used that City's **Residential (Hills) Zone** as an example of how a "significant tree" objective could be added to recognise aspects of "particular character" that result from trees.

Objective 2: *Significant trees conserved.*

Within the zone, significant trees also include vegetation which is four metres or more in height and indigenous to the Western Mount Lofty Ranges.

Additionally, a sentence could be added to the third paragraph under the "Desired Character" for the zone so that it would read:

As a result of the above factors, the area has developed a unique character typified by generally large to very large allotments mainly accommodating detached dwellings, thus resulting in a very high open space to built-form ratio. This has enabled many areas to remain relatively densely vegetated and the area as a whole to maintain a distinctive natural character. *Much of the vegetation in the zone is remnant Eucalyptus macrocarpa and other species indigenous to the Western Mount Lofty Ranges. This vegetation forms a distinctive part of the zone's character and offers opportunities for developments to be "designed with nature".*

The use of "tree management areas" in the City of Burnside's plan amendment is a variation of this approach, which could be modified with relative ease if policy drafting consistency across the metropolitan area was considered desirable.

For the redrafting of the principles in the Ministerial Plan Amendment, I have used the submission of NELA as a basis. In my view this clarifies both format and wording, adds the concept of biodiversity and carries through matters of enhancement of amenity in line with the additional general Objective 2 drafted above.

Principle 1: *Tree damaging activity to a significant tree (or trees) that:*

- (a) *makes an important contribution to the character or amenity of the local area; or*
- (b) *is indigenous to the local area and its species is listed under the National Parks and Wildlife Act 1972 as a rare or endangered native species; or*
- (c) *represents an important habitat for native fauna; or*
- (d) *is part of a wildlife corridor of a remnant area of native vegetation; or*
- (e) *is important to the maintenance of biodiversity in the local environment; or*
- (f) *forms a notable visual element to the landscape of the locality; or*
- (g) *has aboriginal cultural value; or*
- (h) *has historic value as a horticultural or cultural heritage specimen.*

Should not be undertaken unless –

- (a) *in the case of tree removal it is reasonably required because;*

- (1) (i) *the tree is diseased or its life expectancy is short; or*
- (ii) *the tree represents an unacceptable risk to public or private safety; or*
- (iii) *the tree is within 20 metres of a residential, tourist accommodation or habitable building and is a bushfire hazard within a Bushfire Prone area; or*
- (iv) *the tree is causing or threatening to cause substantial damage to a substantial building or structure of value;*
- (v) *to improve or enhance the amenity of the land or locality on or in which the tree stands; and*
- (b) *in the case of other tree damaging activity, it is reasonably required;*
- (i) *to remove dead wood, treat disease, or in the general interests of the health of the tree; or*
- (ii) *to reduce or prevent an unacceptable risk to public or private safety; or*
- (iii) *because the tree is causing, or threatening to cause damage to a substantial building or structure of value; or*
- (iv) *to maintain the aesthetic appearance and structural integrity of the tree; or*
- (v) *to improve the amenity of the land or locality on or in which the tree stands; or*
- (c) *the tree or trees are to be replaced with other vegetation or development that will make a similar or enhanced contribution to the amenity of the locality.*

Recommendation: That objectives and principles for “significant trees” be introduced into Development Plans that more clearly recognise:

- the relationship of “significant tree” conservation to metropolitan regional policy;
- the place of “significant trees” in site planning and design;
- how “significant trees” contribute to the particular character of localities;
- and how principles must carry through policies set out in objectives.

10. ISSUE: LISTS IN DEVELOPMENT PLANS

Section 4 of the *Development Act 1993* enables trees to be declared "significant by a Development Plan". Accordingly, the councils for Adelaide, Burnside, Norwood Payneham and St Peters, Prospect and Unley have done so. Lists setting out property addresses, title, species, location within each property and justification in relation to section 23(4a)(a) of the Act are included.

The lists are lengthy and are the result of protracted and expensive investigation and assessment by relevant professionals. They demonstrate an admirable intention to apply the spirit of the legislation and policy.

However, most of the councils that have prepared lists, as well as others, have raised serious concerns about the cost of this process with regard to: finances, staff and consultant time; and also updating lists and modifying them in line with the procedures under the Act for amending Development Plans in due course. Given the effect that listing has on, for example development potential, modification of lists is not a matter that would appear to fall within the ambit of section 29 of the Act.

It is my view, therefore, that listing is not appropriate. It diverts resources and, in time, could create statutory and policy confusion. This is not to say that lists already prepared should be abandoned. They could remain within plans already authorised.

Recommendation: That the practice of listing individual trees in Development Plans cease.

11. ISSUE: EXTENSION OF CONTROLS TO OTHER AREAS

Most submissions saw the extension of controls to country towns as highly desirable. Indeed this issue is beyond contention given the pleasant and diverse landscapes in many country towns and that they are often oases within land cleared in the 19th century as the frontier of settlement moved further out. However, other than the submissions from the Adelaide Hills and Mount Barker Councils, which have resolved to apply the controls, there were no submissions from country areas.

In my view, it would be inappropriate for controls to be extended without full consultation with rural and regional councils. While such consultation could be seen as part of a general "further education" brief, these councils may have particular needs and viewpoints in relation to their constituencies and thus it would be desirable for consultation programs to be tailored accordingly. Given

the experience of the Development Policy Advisory Committee in assessing and coordinating plan amendments, it may be able to provide an oversight of such a program. I note the broad brief that section 9 of the Act sets out for the Committee in its rendering of advice to you.

Some submissions suggested controls should be extended to rural living areas outside of the metropolitan area. These submissions have merit. There is almost a ring of rural living areas beyond the outer bounds of urban Adelaide containing many thousands of allotments housing large numbers of people; likewise such areas occur adjoining or near to country towns. While the *Native Vegetation Act 1991* applies generally, its exemptions in relation to distances from buildings, fence lines etc may mean that many "significant trees" are not under a control regime.

Recommendation: That, with the assistance of the Development Policy Advisory Committee, consultation be undertaken with rural and regional councils with a view to extending the controls to country towns and rural living areas.

12. ISSUE: EXEMPTIONS

Submissions sought exemption in four areas.

(i) Designed Gardens:

The Board of the Botanic Gardens of Adelaide is responsible for the Adelaide Botanic Garden and Park, Wittunga Botanic Gardens and Mount Lofty Botanic Gardens. Its brief "is to actively increase knowledge and appreciation of plants, their significance, and the need for their conservation locally and globally". Its staff are experienced in the relevant natural sciences and principles of landscape architecture and provide expert advice to planning authorities and others as well as to the Board on a range of matters including significant trees.

In my view, it would be entirely appropriate for these Botanic Gardens to be exempt from the controls providing garden management plans (and subsequent amendments) are ratified by government. Section 23(5) of the Act (adoption of other plans, policies etc) may provide the formal mechanism. In due course other "designed gardens" managed by other responsible authorities could be considered.

Recommendation: That land under the control of the Board of the Botanic Gardens of Adelaide be exempted upon the ratification of garden management plans by government.

(ii) Commercial Orchards & Forests:

Primary Industries and Resources SA and the Adelaide Hills Council both drew attention to the fact that the "cutting and removal of trees planted for commercial production is normal horticultural practice" and that having to seek approval would be an "unacceptable imposition". Although trees in such areas are unlikely to be "regulated trees" or if so assessed to be "significant" given that orchards and woodlots are planted and managed as crops and are relatively rare in the metropolitan area or country towns, there would appear to be an argument for exemption. However, this assumes all trees within orchard or forest properties have that purpose.

Ornamental trees may grow around a homestead, for example, and may come within the criteria of "significant tree". Thus exemption is not appropriate.

Recommendation: That no exemptions be granted to commercial orchards and forests.

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(ii) "Weed" species etc.

Mr Kym Knight, an arboriculturist, submitted that "there should be a mechanism that allows exemptions for certain weed species". The Department for Environment and Heritage likewise submitted that "trees should not be declared significant if they have weed potential, present a health risk to the community and/or have a negative impact on water quality".

Other submissions from technical experts also pursued this point with examples of particular species in particular situations. I am persuaded by their submissions and I see two ways to deal with the issue. The first would be to list exempted species but this would be too broad. Some species in some instances may be acceptable; in others, not. In essence a judgment has to be made. Therefore, the addition of a further criteria to those proposed for inclusion in Development Plans (Issue 8) would be appropriate; viz

A regulated tree cannot be a significant tree if it is of a species that presents a health risk to the community; or if, within its locality, it has weed potential or is likely to lessen the quality of water in rivers, streams, lakes and ponds.

Recommendation: That trees judged to be public health risks, weeds or threats to water quality not be deemed significant trees.

(iv) Trees on road reserves

The Department of Transport and Urban Planning submitted that there was some duplication with regard to the responsibilities of the Commissioner of Highways with regard to tree management and those of the Development Assessment Commission with regard to "significant trees" on relevant road reserves. The Presiding Member and the Principal Planner of the Commission have advised me that administration in this area is proceeding smoothly. Two statutory authorities are involved; the independent Commissioner and the Commission. It is therefore a matter for them.

13. ISSUE: QUALIFICATIONS

An issue raised almost across the board was that only qualified people should advise planning authorities about "significant trees". These submissions were well argued and have considerable merit; albeit they tended to concentrate on the circumscribed issue of tree management.

The judgment that has to be made about "significant trees" is a planning judgment; in professional terms within that subset of planning known as urban design where a development's worthiness is considered with regard to its site and its surrounds. If a significant tree is a site feature, in turn, its worthiness must be considered with regard to tree management and natural science matters. The professions and disciplines relevant to urban design, tree management and natural science in this context would generally be town planning, landscape architecture, arboriculture, horticulture, ecology, botany, biology and biogeography. At times cultural and heritage matters may also be relevant.

It is clear from the submissions that confidence in the significant tree regime would be strengthened if some form of accreditation of professional advisors was established. The Hon Dr Such, MP appended to his submission a number of legislative instruments from elsewhere, one of which referred to the qualification of a "significant tree" advisor in the Australian Capital Territory. I also note section 101 of the Act concerning "professional advice to be obtained in relation to certain matters".

In my view an accreditation system would be desirable, along the lines of an "authorised officer" for the purposes of assessment of "significant trees" being one who "in the opinion of the Minister has extensive relevant experience in one or more of the following fields: town planning and urban design, landscape architecture, arboriculture, horticulture, natural science and heritage". The details of such a system would require consideration and discussion with relevant professional and technical bodies.

Recommendation: That an accreditation system for suitably qualified people to advise on "significant trees" be established.

14. ISSUE: EXTENT OF "SUBJECT LAND"

No other issue demonstrates the challenges of a development assessment system attempting to control a living entity than this. The juxtaposition of property boundaries and tree root zones raises complex management and legal challenges. While many submissions underlined these, in contrast to the other issues suggested solutions were absent. It is an area that requires further investigation.

Recommendation: That a working party be established to advise on the legal and management issues pertaining to property boundaries and the physical extent of "significant trees".

15. ISSUE: COMPLIANCE

Poor compliance with laws and policies results from overly complex and contradictory drafting more often than not. The recommendations above with regard to a single entry threshold, "regulated trees" becoming "significant trees" only after assessment against Development Plan provisions and, generally, the separation of regulatory procedures and planning policy in line with the scheme of the *Development Act 1993* are put forward to clarify and remove overlap and contradiction as far as possible.

16. ISSUE: ENFORCEMENT AND PENALTIES

The difficulty of identifying parties responsible for felling or damaging "significant trees" is an issue. Some submissions suggested the drastic step of reversing the onus of proof, others suggested expiation notices while others suggested the "strict liability" principle be applied whereby land owners are always responsible unless they can demonstrate otherwise; a situation analogous to speed camera notices. It seems to me that none of these approaches can be considered in isolation from the general body of enforcement law and practice.

To date six enforcement matters have been brought to the Environment, Resources and Development Court or the Magistrates Court and at this early stage the Courts are feeling their way. Penalties in the Act are substantial but fines imposed have been comparatively slight. Consequently some submissions

were critical, commenting that landowners and developers are "thumbing their noses" at the system. There is no information available to support this assertion nor that the removal of significant trees without consent is widespread but concerns are pervasive.

This issue is complex and one that even the "planning bar" is finding a considerable challenge. Nevertheless there are directions that could be pursued. The illegal removal of a "regulated tree" would pre-empt the crucial process of judging its amenity, ecological and heritage values to the community as listed in Issue 8 above. This is of serious concern. One option would be to increase the already substantial fines and introduce draconian procedures of the type referred to above. However, some might still think "it is worth their while" to fell a tree without consent and adjust their financial and other affairs accordingly. In any event, the basic offence of removing the tree as a living entity would not be corrected.

Dr David Jones, Director of the Landscape Architecture program at the University of Adelaide supplied "A Guide to the Law and Good Practice" for tree preservation prepared by the United Kingdom's Department of the Environment as an addendum to his submission. This included the duties of landowners to replace relevant trees removed without permission; viz,

- (1) to plant another tree,
- (2) of an appropriate size and species,
- (3) at the same place,
- (4) as soon as he or she reasonably can."

In practical terms, "at the same place" could be taken to mean within the root zone of the removed tree or elsewhere on the subject land that the planning authority considers as near as reasonably practicable to the original position of the removed tree. People who clear a development site to maximize, for example, its unit yield and absorb a fine as a cost to be passed on would find this course of action pre-empted by having to replace trees. Indeed, in some circumstances the position of replacement trees could lead to greater site planning constraints.

As I see it, a separate offence of removal and damage to "regulated" and "significant" trees should be introduced. In relation to fines, guidelines for the Courts relating to amenity, ecological, tree management and heritage matters should desirably be included. A tree replacement penalty would be crucial with guidelines similar to those quoted above.

Recommendation: That a separate offence for the removal and damage of "regulated" and "significant" trees be introduced and that "tree replacement" be introduced as a duty for landowners.

17. ISSUE: EDUCATION AND TRAINING

On the basis of the submissions, it can be said that most citizens understand the basis of the "significant tree" controls and are sympathetic to their aims. A few are hesitant seeing them as a "further intrusion" upon their householder "rights". The production of general educational material such as bulletins, brochures and the like should continue.

An important submission was from the "SA Urban Forest Biodiversity Program". Until its receipt, I had no knowledge of this worthy initiative. Its publications contain information of interest not only to the general public but also to planning authorities. Section 3 of the *Development Act 1993* enables Development Plans to be created, *inter alia*, "to facilitate sustainable development and the protection of the environment". Close cooperation between those administering the Program and planning authorities could assist in the drafting of "urban forest" provisions for Development Plans which would complement those for land use and infrastructure and provide a spatial context for "significant tree" initiatives. It may be appropriate to seek the involvement of the Development Policy Advisory Committee in this matter as well.

I referred under Issue 13 to the involvement of qualified people. Following the receipt of submissions and discussions, it is clear to me that the professionals involved in "significant tree" assessments are still groping towards a coordinated approach. Perhaps by way of organisations such as the Planning Education Foundation and relevant professional institutes training programs could be established that bring these professionals together.

Recommendation: That with the assistance of relevant professional bodies and the "SA Forest Biodiversity Program", training programs be organised that, *inter alia*, bring together the professionals involved in "significant tree" assessment.

18. ISSUE: NEXUS WITH THE NATIVE VEGETATION ACT

Currently, there is little or no overlap between the controls exercised by the *Development Act 1993* and the *Native Vegetation Act 1991*. Officials concerned work closely together on policy matters and in the drafting of regulations and subsequent administration. In the Hills Face Zone with regard to significant trees, the *Native Vegetation Act 1991* has primacy. The "significant tree" controls in the *Development Act 1993* only apply in the Hills Face Zone to exotic trees and native trees (above the thresholds set out in the *Development Regulations 1993*)

exempted by the *Native Vegetation Regulations 1991* from the need to obtain clearance consent.

That said, there appears to be some confusion within councils' administrations as to their responsibility for naturally occurring "significant trees" in areas around dwellings etc that are exempted by way of the *Native Vegetation Regulations 1991*.

Recommendation: That a bulletin be issued to relevant councils explaining their responsibilities for "significant trees" under the *Development Act 1993* within the Hills Face Zone.

19. MISCELLANEOUS

Submissions brought forward a raft of issues many of which are outside the terms of reference or touch them but peripherally.

Palms are seen as trees by the average citizen. I am informed there is legal debate about whether or not they are. Having regard to urban landscapes, it is clear palms should be included within the "significant tree" controls.

It was submitted that landowners should be able to themselves list a tree as significant regardless of its girth, height or other measurements. This seems worthy as long as the trees conform to criteria as set out above.

There are lists of trees compiled by various organisations; eg, The National Trust. These lists are compiled under a variety of criteria, which do not necessarily align with those for "significant trees". If these lists were made readily available to planning authorities, they could be referred to when a tree was being assessed as to its significance.

A thoughtful submission was made by the City of West Torrens about the adverse effect that maintaining significant trees could have on low income households. This matter is outside my terms of reference but is noted as an example of how issues intertwine within town planning a fact recognised, *inter alia*, by section 3(c)(iii) of the Act.

APPENDIX ONE: LIST OF SUBMISSIONS

A) COUNCIL

1. District Council of Mount Barker
2. Mayor, District Council of Mt Barker
3. City of Marion
4. City of Port Adelaide Enfield
5. City of Unley
6. City of Charles Sturt (staff)
7. City of Burnside
8. City of Holdfast Bay
9. City of Norwood Payneham and St Peters (staff)
10. Town of Gawler (staff)
11. City of Onkaparinga
12. City of Adelaide
13. City of Burnside
14. City of West Torrens
15. City of Mitcham
16. City of Tea Tree Gully
17. Town of Gawler
18. City of Prospect
19. City of Salisbury
20. City of Campbelltown
21. City of Norwood, Payneham and St Peters
22. City of Charles Sturt
23. Adelaide Hills Council (staff)

B) INTERESTED PARTIES

1. Dr David Jones, Director Landscape Architecture Program, University of Adelaide (documents of interest)
2. Urban Development Institute of Australia (SA division)
3. Onkaparinga Catchment Water Management Board
4. F Ugody – Horticultural Consultant –
5. Master Builders Association South Australia
6. Mark Parnell – Environmental Defenders Office
7. Andel Holdings
8. Natural History Society of South Australia
9. Aboriginal Cultural Development Foundation
10. South Australian Society of Arboriculture
11. Conservation Council of South Australia
12. Local Government Association of South Australia
13. Housing Industry Association (SA division)
14. National Trust South Australia
15. Australian Institute of Landscape Architects (draft)
16. National Environmental Law Association (SA division)
17. Planning Institute Australia (SA division)
18. The Royal Australian Institute of Architects (SA chapter)

C) CITIZENS

1. Henry Polec
2. Clarice H
3. D Smith –
4. Maria and Douglas Tidd
5. K V Moffett
6. David H
7. Daryl L
8. Paul Casey
9. Stephen Lawson
10. Lyndon Snelgrove
11. David Hew
12. Dr Ian Napier
13. Daisy Bachmann
14. C Tripodi –
15. A Hsu
16. Trevor Nottle
17. Margaret Sewell
18. Jane Stevanovic
19. Sue Baldwin
20. Simon Frank
21. V G De Barro
22. Norwood Residents' Association
23. Mr Vivian Samuel
24. Derek and Margot Marley
25. Michael Heath
26. Leni Palk
27. David Ness
28. Leni Palk
29. Suzanne Hudson – Tree Watch Group
30. David Bailey – Planner
31. Andrew Grear – Planner
32. Merinda Hyland
33. Eric Richardson
34. Colin Schumacher
35. Sandra Brown – Councillor
36. Andrew Hillier – Councillor
37. Burnside Residents' Association
38. Sue Beauchamp
39. Kym Knight – Arborist
40. Graham Bills – Councillor
41. Blackwood/Belair and District Community Association
42. Allan Ward – Councillor
43. Andrew Murray
44. Bev Gilbert
45. Jan Arnold
46. St Peters Residents Association Inc
47. Colin Miller
48. Barbara Biggins
49. Garry Lopatta
50. Lolo Houbein

D) GOVERNMENT AGENCIES

1. Office of Local Government
2. Office of Economic Development-
3. Primary Industries and Resources SA -
4. Department of Education Training and Employment
5. Department of Human Services
6. Botanic Gardens - DEH
7. Department of Environment and Heritage
8. Department for Administrative and Information Services
9. Department for Transport and Urban Planning

E) POLITICIANS

1. Dr Bob Such (including postscript)